1. Introduction: the distinction between private law and public law

Hanoch Dagan and Benjamin C. Zipursky

INTRODUCTION

Is there a tenable theoretical distinction between private law and public law? Of course, one could list subjects such as contracts, tort, and property as exemplars of private law and subjects such as constitutional law, administrative law, and immigration as exemplars of public law, and of course it might sometimes be convenient to use the labels to refer to one group or another of subjects. But is there any truth to the claim that they are fundamentally different kinds of law?

For much of the first half of the twentieth century, one's answer to this question was a litmus test among American legal theorists for ideology, and for much of the next fifty years a litmus test for sophistication. In the early parts of the century, progressives would have said "no difference" and laissez-faire conservatives would have said "yes." By mid-century and into the late twentieth century, everyone said "no real distinction" unless they were embarrassingly naïve.¹ Even—sometimes especially—the laissez-faire conservatives came to abandon the very core of the distinction they had once relied upon. Still utilizing the label "private law" to denote the same subjects (i.e., largely contract, tort, and property), they candidly admitted that the state was pursuing its own goal—efficiency—through these forms of law.

In the late 1980s and early 1990s, however, contrarian views began to attract followers. In his provocative and controversial book, *The Idea of Private Law*, Ernest Weinrib asserted that private law is a whole different kind of thing than public law,² and more particularly, that the belief that all law is an instrument for the achievement of public purposes is fundamentally mistaken. Private law is a system recognizing the equality of private individuals and ensuring that justice between them is maintained. Also in the last decades of the twentieth century, American legal theorists such as Jules Coleman, Charles Fried, and Ronald Dworkin challenged the pervasive instrumentalism that lay behind many of those views which had obliterated the public/private distinction.³ In an entirely different way, Peter Birks reinvigorated historical private law scholarship, giving rise to renewed interest in the law of restitution as an academic field.⁴

¹ See, e.g., Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982).

² See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

³ See CHARLES FRIED, *CONTRACT AS PROMISE* (1981); JULES COLEMAN, *RISKS AND WRONGS* (1992); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁴ See PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* (1989).

Due in part to the work of those just mentioned, the question of whether there is a basic distinction between public law and private law has re-emerged as one worth asking. With it are many other questions: not only what the distinction is or should be and which fields should be classified in which category, but why it is even a distinction worth the trouble of trying to make.

Section 1 of this chapter begins by setting forth briefly what we understand the public/private distinction once to have been, and the nature of the arguments that led to its widespread abandonment through much of the twentieth century. American legal realism played a large role in persuading scholars to abandon the distinction. Carrying the mantle of legal realism, the law-and-economics movement took charge as the central paradigm of private law theorizing. While rejecting the public/private distinction, it nonetheless depicted private law areas as distinctive in their pursuit of one value: efficiency. Section 1 then suggests that various private law theorists of the late twentieth century can fruitfully be seen as defining themselves against the ruling law-and-economics paradigm. Many have stayed broadly within the fold of legal realism, so we call these “neo-realists.” But another group appears to have categorically rejected not only law and economics but also everything associated with legal realism, and in so doing self-consciously sought to reinvigorate the public/private distinction. We call the latter group—typified by corrective justice theorists—“neo-conceptualists,” and we contrast these two paradigms.

In sections 2 and 3, Dagan and Zipursky set forth their own approaches, which each developed in conjunction with co-authors (Avihay Dorfman and John C.P. Goldberg, respectively).⁵ Dagan’s relational justice theory of private law can be understood as a form of neo-realism that takes the best from the group of scholars we have categorized as neo-conceptualists. Holding on to the main tenets of the realist legacy (properly interpreted), the relational justice theory nonetheless offers—just like neo-conceptualist approaches—an affirmative theory of the distinction between private law and public law. Its principal claim is that private law subjects pertain to the legal norms governing the relations between private parties, and public law subjects pertain to the legal norms governing the relations between the state and private parties; private law’s objects are horizontal relations, whereas public law’s are vertical. In this schema, private law facilitates the relationships of private parties in their individual capacities while securing interpersonal justice, whereas public law aims at justice, rights maintenance, and equal respect and dignity of citizens (or co-citizens) against the power and authority of the state. Section 2 suggests that the relational justice theory escapes the twentieth-century criticisms that spurred legal realists to abandon the public/private distinction altogether, and provides valuable insights for legal thinkers in our current times.

In section 3, Zipursky similarly combines a jurisprudential view (pragmatic conceptualism) with a tort theoretic view (civil recourse theory) to explain his affirmative account of the distinction between public law and private law. His can be understood as a form of neo-conceptualism that nonetheless accepts various aspects of the realist critique of the public/private distinction. Zipursky ultimately accepts a version of that distinction, however, that stands in the way of using private law to achieve various public goals. In

⁵ See, e.g., Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

this respect, it harks back to the public/private distinction that realists believed they had killed off for good.

We conclude by briefly comparing and contrasting our views of the public/private distinction, and asking how far apart they really are.

1. REVISITING THE PUBLIC/PRIVATE DISTINCTION

1.1 Three Dichotomies

It will be helpful to begin by noting three overlapping dichotomies, each of which is sometimes taken to be what the “public/private” distinction stands for in legal theory. One is between different subject areas within the overall domain of law. Contract, tort, and property are considered prototypical *private law* subjects, whereas constitutional law, administrative law, and criminal law are considered prototypical *public law* subjects. Those who care about the distinction do so for reasons related to the labels “public” and “private”; they connote features of the members of the group in light of which they resemble one another, rather than the subject areas in the other group. Private law subjects relate to the transactions and rights of private parties with respect to one another; public law subjects relate more closely to the relationship between states and individuals, including the rights of individuals against states. Courts and legislatures in the late nineteenth and early twentieth centuries tended to see private law subjects as relating to the stability of transactions and the protection of private rights, including property rights. By contrast, public law related to the justice and welfare of the polity as a whole, quite plainly matters of public welfare and public policy.

A second distinction has been especially important in the area of constitutional law in general and civil rights law in particular. This is a distinction between *private action* and *public action*, involving a private party deciding to exclude individuals of a certain race from a private enterprise (e.g., university, club) and a state deciding to exclude individuals of a certain race from a public entity of a similar kind (e.g., university). The former was private action and the latter public action, more typically denoted by the phrase “state action.”⁶ American constitutional law was and continues to be interpreted in such a manner that, with odd and apparently ad hoc exceptions, only state action will count as a constitutional violation. Indeed, because a state’s or government’s knowing and even deliberate failure to address private discrimination does not typically count as an action, plenty of private discrimination has flown under the radar of equal protection law and other important constitutional norms. Moreover, in many settings, facially neutral state law is used to enforce the legal rights of private actors who act in a discriminatory manner because such cases are held to involve *private* action, not state action. The private action/state action distinction is not unrelated to the distinction between private law and public law, but it is not identical to it.

⁶ See, e.g., Joan Williams, *The Development of the Public/Private Law Distinction in American Law*, 64 TEX. L. REV. 225, 226 (1985).

A third distinction is between the private sphere and the public sphere.⁷ Whether parents permit their children to eat dinner with adults would have been viewed as a prototypical matter belonging to the private sphere. How fast one could drive on a state road or what one must do to sell stocks on the stock market would be viewed as part of the public sphere. The distinction relates to whether or not—for a certain category of conduct or decisions—there is a legitimate basis for the law to regulate that conduct, or, to the contrary, it is a domain of unregulated individual choice in which the law does not belong. In the United States, choices about whether to provide one's children with religious instruction are prototypical examples of matters in the private sphere. What standards must be met by those running airlines open to the public is a matter in the public sphere.

One cannot overstate the importance of these public/private distinctions in the United States over the past century or more. Consider for a moment the private sphere versus public sphere distinction. For the left, reproductive rights and sexual orientation are crucially matters in the private sphere; for the right, decisions about whether to buy or provide health insurance, whether to smoke cigarettes, how to school one's children, and whom to associate with are prototypically deemed private. The private action/state action distinction has been equally consequential in the United States; the state action doctrine led to the need for a civil rights act in the 1960s, and it continues to constrain the pursuit of civil rights and antidiscrimination campaigns to this day. The distinction between private law and public law, traditionally conceived, partially overlaps with each of the foregoing connections. Whom one contracted with, for what, and whether damages are owed are matters of private law and were seen as falling within the private sphere rather than the public sphere—and contract law is prototypical of private law. The payment or nonpayment of a defendant would be deemed private action, not state action; conversely, punishment under the criminal law would be deemed a matter of state action, and criminal law is within the world of public law.

The twentieth century saw an onslaught of critiques of such distinctions, especially from the left.⁸ Progressives in the *Lochner*⁹ era interpreted that case as involving an overreliance on the distinction between public law and private law and as a protection of private actors against invasion of the private sphere by the state.¹⁰ It was one thing to protect workers from industries or employers by criminal law or regulation, but quite another actually to regulate what kinds of contracts private individuals can enter into with one another. Progressives in the era of dismantling Jim Crow were deeply critical of the need to use legislation (rather the U.S. Constitution's explicit Equal Protection Clause) to combat discrimination by private parties, a requirement fed by insistence on the distinction between private action and state action.¹¹ Feminists attacked protections

⁷ Cf. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

⁸ For a related account of the unfolding narrative of European law, see Jürgen Habermas, *Paradigms of Law*, in BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 388 (William Rehg trans., 1996).

⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁰ See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

¹¹ See, e.g., Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

of the traditional family against regulatory reform; such protections were generally defended by reference to a distinction between the private sphere and the public sphere. “The personal is political” was meant to take down that distinction.¹²

We shall be focusing almost entirely on the distinction between “private law” and “public law,” rather than either of the other two distinctions. Nonetheless, as indicated, many of those inclined to problematize the distinction took that position for some of the reasons indicated earlier. In particular, the problem lies not so much in the choice to designate certain areas of the law group A (public law) and others group B (private law). The problem has been in assumptions about what follows in regard to what that area of the law should be used for, how it should be evaluated, who should apply it, and—maybe especially—what sorts of considerations should be brought to bear in applying it.

1.2 The Traditional Approach and Its Critics

The decision to apply a piece of law one way rather than another because that way would increase social welfare or better achieve shared community values (such as equality) has sometimes been regarded as ill-suited to private law, no matter how significant such potential improvement might be. That is because (as some critics point out) those favoring use of the language of “private law as opposed to public law” tended to assume that it was only within the mission of the latter, not the former, to make things better socially for the community. Public betterment as well as the vindication of shared values such as equality, is—on this view of the public law/private law distinction—for areas of public law, not private law. Relatedly, both legislative and judicial decisions regarding private law areas (e.g., property) should be made in a manner that protects the security of private entitlements and the capacity for a robust commercial life with justifiable individual reliance on private entitlements. Various reforms to rules of property and contract, for example, were opposed not just on the substantive ground that their underlying normative vision was unjustifiable, but also on the jurisprudential ground that there was a kind of boundary crossing involved in utilizing considerations of public welfare or shared social values to assess matters pertaining to private law.

The early twentieth-century critique of the distinction between private law and public law was, above all, a critique of the view that *membership* in the private law category disqualified that type of law as a vehicle for the realization of certain kinds of shared values and public goals. There were two ways to mount such a critique. One way was to argue that the categories themselves fall apart; we term these *no-difference critiques*.¹³ Another way to argue it was to identify the reasons that membership in the category of private law was thought to undermine these normative orientations to shared values or public goals, and then to show those reasons did not hold up: that the putative association of private law with private sphere (that need not be accountable to such values and goals) was a mere pretense. We call the second *pretense-based critiques*, and we regard them as the central critiques driving the rejection of the distinction between private law and public law.

¹² See, e.g., Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

¹³ See, e.g., Duncan Kennedy, *The Stages of Decline of the Private/Public Distinction*, 130 U. PA. L. REV. 1349 (1982).

Three different pretense-based critiques can be identified, each corresponding to a different pretense: (a) an anti-formalist critique; (b) an anti-natural rights critique; (c) a judicial-dependency critique.

The anti-formalist critique posited that the principal reasons for thinking private law was apolitical was a belief that certain common law subject areas—contract and property, most famously—could be grasped in doctrinal terms that had a kind of scientific rationality. No doubt those who offered this critique exaggerated their adversaries, which included most famously Christopher Columbus Langdell. Nonetheless, there is more than a grain of truth in the assertion that Langdellian formalism purported to have structure and content that could be grasped in a purely rationalistic fashion. For that reason, application of the law from these areas—and, moreover, finding the right answers to important legal questions in these areas—was supposed to be possible without drawing on (political or other) values. In a variety of public law areas largely in the legislative domain, law was made via the enactment of political choices into statutory form. Public law was not the unfolding of a rational system of principles, but private law was.

Anti-formalists understandably bridled at the idealization of the common law that formalism demanded. Private law cannot be apolitical in the sense imagined by formalism because the doctrine (namely, law's pedigreed sources as such), standing alone, underdetermines the range of legal answers that could, with equal justifiability, be called correct. Although many legal realists saw this insight as a reason to study history or sociology or judicial psychology, and many drew political lessons from it, one analytical point was common: It was simply untenable to pretend that social and political goals did or even could remain outside of the process of fashioning and applying legal doctrine in private law.¹⁴

An anti-natural rights critique posited that a political ideology of laissez-faire lay at the core of the idea that private law principles were apolitical. Natural rights thinking stemming from Locke and ascendant through the nineteenth century blended neatly with a kind of social Darwinism and burgeoning market economy. Vested property interests were understood by many to have evolved over time, rather than being direct assignments by the state. In this sense, they struck some judges as natural rights rather than politically created ones. The law of transactions between private parties facilitated spontaneous development in this way.

Early twentieth-century scholars increasingly rejected the ideological naiveté of this version of natural rights thinking.¹⁵ The reasons for doing so involved recognition that the state was choosing through the law its rules for wealth, investment, taxation, enforcement, and so on. Progressives might have been willing to recognize a systematicity in the common law of contracts and property, and might have been willing to concede that natural rights thinkers were not formalists. But they were not willing to say that private law rules were apolitical. The very idea that traditional private law norms were there to protect “natural” rights was itself a pretense aimed at trying to preserve certain areas of law from evaluation and adumbration that had a leftward political valence.

A third critique relates to a third putative basis for the distinctiveness of private law, seen most easily through contract law. One conception of private law is that the rights and

¹⁴ See HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* 18–24 (2013).

¹⁵ See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 107–11 (1995).

duties in certain areas are actually created by private individuals, not by public entities, legislative bodies, or administrative agencies. The point can even be extended to property. Social practices of claiming, marking, preserving, and using turn out to constitute much of what is meant by *property*. The rights and duties are in this way not fabrications by political actors pouring political will into a system.

The judicial dependency critique undermines this argument by pointing out that legal rights and duties do not exist except against the backdrop of institutions that are authorized to recognize claims as enforceable rights and are thus responsible for the particular shape of all legal rights and duties.¹⁶ These institutions are, overwhelmingly, courts. Private law exists as law only because of the institutions that sustain it, and indeed make it. In choosing to supply rights and remedies for plaintiffs in some cases but not others, courts are making normative choices, whether they like it or not.

1.3 From Legal Realism to Law-and-Economics

Together, these arguments did not so much undermine the distinction between public law and private law as undermine any reason to think that private law should be understood as abstracting away from—rather than embedding—social values and public goals in a manner that rendered it politically neutral. In the latter respect, they were remarkably successful ... at least for a period of time. Beginning with the *West Coast Hotel* abandonment of *Lochner*¹⁷ and through *Shelley v. Kraemer*,¹⁸ the Supreme Court moved away from important aspects of the public/private distinction. In contract law, disclosure duties, the doctrines of unconscionability and of good faith in performance, as well as the critique of exculpatory clauses, gained currency. Tort law developed express warranty, causation, and strict liability. Property law saw the transformation of landlord-tenant relationships through a series of developments epitomized by the implied warranty of habitability.¹⁹

Changes in legal theory were even more dramatic, with a somewhat paradoxical relationship between the emerging new dogmas regarding private and public law. On the private law side, scholars of various stripes increasingly treated torts, contract, and property as sheer means of public policy, indistinguishable from other tools of the body politic at large. For some members of the critical legal studies school, this meant that private law theory should focus on exposing the hidden distributive choices embedded in property, contract, and tort and spotlighting law's elusive legitimating devices that misrepresent publicly sanctioned oppression as an innocuous private sphere.²⁰ Other private law scholars shared the reductionist view of private law, but not its critical edge. They denigrated the significance of the distinction between different branches

¹⁶ See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

¹⁷ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); Goldberg & Zipursky, *supra* note 10.

¹⁸ 334 U.S. 1 (1948).

¹⁹ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

²⁰ See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

of private law (as with Grant Gilmore's announcement of the death of contract),²¹ and increasingly analyzed doctrines and concepts as stand-ins for a publicly oriented goal (as with Prosser and Fleming James and compensation-based instrumentalism).²² Bruce Ackerman's scientific policymaker seems to epitomize this reductionist approach. Because property law parcels out rights to use things among competing users, the real question property law faces, in this view, is allocative. A serious scientific policymaker should thus resort to a comprehensive view of the just society (Ackerman turned to either a utilitarian or Rawlsian view) for deciding in whose bundle one or another right may best be put.²³

Though initially diverse, this line of private law theory has become increasingly dominated by law and economics, which became the leading theoretical approach to core private law areas. Ironically, many of its proponents shared some of the commitments of those who once advanced an agenda of separation between private and public law. In particular, a variety of scholars from the law-and-economics school contend that the rules of private law should be designed so as to achieve an efficient allocation of resources.²⁴ They regard this as a public-welfare-oriented goal and in this sense reject the formalism of some of those who championed the public/private distinction a century ago. Yet they continue to deem it inappropriate for distributional concerns and any other nonefficiency-based shared values or public goals to figure into the selection of the optimal set of private law rules. This they share with many of their laissez-faire, formalistic antagonists of the late nineteenth and early twentieth centuries.

Public law theory, in turn, was also transformed during the twentieth century. For a range of reasons relating to politics, economics, and intellectual history, there were wide shifts in thinking about judicial competence and methodology. In the first part of the twentieth century, progressives complained that when courts used rights-based notions in interpreting the American Constitution, such notions helped them to strike down progressive efforts of legislatures and politically accountable bodies. The alleged distinctiveness between judicial legal reasoning and legislative efforts to reflect shared values and improve social welfare was seen by progressives as an obstacle to progressive reform.²⁵ This perception led some progressives to deny the distinctiveness of judicial reasoning. Decades later, however, many American academics and judges in the 1950s, 60s and 70s sought to defend muscular judicial review by appealing to the judiciary's special competence in protecting rights against majoritarian impulses. Ronald Dworkin and others accepted the imperative of courts to think through matters of political value as part and parcel of their judicial reasoning, but nevertheless regarded judicial decision making as distinct in kind from legislating.²⁶

²¹ See GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

²² See Christopher J. Robinette, *Professor William Lloyd Prosser (1898–1972)*, in SCHOLARS OF TORT LAW 229 (James Goudkamp & Donal Nolan eds., 2019); Guido Calabresi, *Professor Fleming James Jr (1904–1981)*, in SCHOLARS OF TORT LAW, at 259.

²³ See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

²⁴ See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

²⁵ See Goldberg & Zipursky, *supra* note 10.

²⁶ See, e.g., DWORKIN, *supra* note 3.

Thus, by 1990, the American legal academy was at a remarkable place. The pervasive reductionism that had in many ways eviscerated a public/private distinction had generated its own downfall in public law, where the suspiciousness of judicial policy making pushed either toward the natural law tendencies of some constitutional scholars²⁷ or the positivistic originalism or textualism of others.²⁸ Yet in private law theory, both reductionism and the judicial pursuit of public welfare goals of a sort were greatly invigorated with the increasing dominance of law-and-economics scholarship. The public/private distinction—conceived as a doctrine that insists on non-welfarist rationales in the justification and explanation of areas such as property, contract, and tort—was comfortably defeated. Nevertheless, a different kind of dichotomy existed between theorists in the two domains. One particular rationale—efficiency—was held to be of exclusive concern in the private law areas, and reductionism remained the coin of the realm.²⁹ Neither was true in public law theory.

1.4 Neo-Realism and Neo-Conceptualism

There were numerous different responses to this state of affairs and virtually all of them are represented in this book. It is helpful to divide these responses into two broad families. One such family of responses seeks to reinstate the legal realism that spurred the law-and-economics movement. Two clusters of private law scholarship belong to this neo-realist response. One cluster continues the realist invitation to harness theories and methodologies of disciplines outside the law for the purposes of explaining, predicting, and designing legal structures. Classical microeconomic models of human behavior are but one domain of social science, and those whom we are calling “neo-realists” insist that other, potentially competing, intellectual resources of legal scholarship, such as behavioral law and economics, political science, sociology, critical theory, psychology, and so on, should also be available to those serious about making private law the best it can be.³⁰

Whereas the prior genre of neo-realism scholarship seeks to reinvigorate the realist call of *methodological* pluralism, the second (at times overlapping) genre reinstates its *normative* pluralism. Whether in property, contract, or tort, common law legal doctrine is far more complex than any one dimension of value could explain. More particularly, each domain of law contains innumerable doctrines and doctrinal features that on their face aim at specifiable values or goals, and these are quite different from efficiency. The law-and-economics camp, in this approach, is correct in grounding private law on public values, and its reductive instrumentalism should be embraced. But its normative monism is descriptively hopeless and normatively dubious. Private law is much more plausibly

²⁷ See *id.*

²⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

²⁹ See, e.g., LANDES & POSNER, *supra* note 24.

³⁰ See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998).

interpreted with other kinds of public-seeking goals in mind, and it is a good thing, too, given the freestanding pluralism that should guide our normative world.³¹

These neo-realists—in which we would include, broadly speaking, feminist theories of private law, critical race studies, and critical legal studies, among others—push back against the law-and-economics hegemony by resisting its deviation from its realist underpinnings in terms of both method and value. In doing so, they also seek to reverse the law-and-economics revisionist view that revives the public/private distinction while insulating private law from any nonefficiency value.

Corrective justice theorists and other neo-conceptualists also repudiate the law-and-economics canon, but they perceive the legal realist tenets as the problem rather than the solution. Thus, neo-conceptualism rejects each of the realist claims mentioned earlier and offers an alternative account of the nature of private law. Tort, contract, and property are understood not as governmentally created devices to serve compensatory, regulatory, or allocative goals, but as normative frameworks articulating people's rights and duties as against one another. As such, these frameworks embody rich concepts and principles that offer *internal* answers to troubling legal questions that do not require resort to insights of law's neighboring disciplines. Courts have expertise in this distinctly legal language, and their resolution of difficult questions is fundamentally adjudicative in a manner that is distinctive from legislative decisions.

In the elegance and boldness with which this body of ideas is presented, none surpasses the work of Ernest Weinrib. In *The Idea of Private Law*, devoted largely to the law of torts, Weinrib self-confidently supplied a conception of rights derived from Kant and a conception of justice derived from Aristotle. Private law, in Weinrib's view, concerns the nature of the relation between private parties. In particular, private law preserves just relations between private parties. In requiring tortfeasors to compensate their victims, it restores a relationship that had been disrupted by the injustice of the defendant's tortious invasion of the plaintiff's right. In requiring obligors to perform for obligees or to carry through on a secondary duty of paying damages, it sees to it that the right that was ruptured is returned intact. Private law does have an important end or *telos*, but it is not about protection of assets to which there is a natural right; it is not about increasing social wealth; it is not about redistribution of wealth; it is about corrective justice and just relations.³²

Since Weinrib's entrance onto the scene of private law theory in the 1980s, a range of scholars in tort, contract, property, restitution, and equity has confidently embraced some or all of the features of his view of private law. In so doing, they have re-embraced a distinction between public and private law that many had thought the twentieth century had killed off.³³

1.5 Three Differences

As should be clear by now, the position one takes on the distinction between private law and public law is both theoretically and practically important. There are various species

³¹ See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003).

³² See WEINRIB, *supra* note 2.

³³ See, e.g., PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* (2019); JULES L. COLEMAN, *RISKS AND WRONGS* (1992); JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* (2018); ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016).

of both neo-realists and neo-conceptualists, so one must be cautious here (as elsewhere) about overly broad generalization. Nevertheless, it is safe to say that neo-realist and neo-conceptualist approaches to the public/private distinction differ in the ways they perceive the normative underpinnings of private law, their respective views of the role of the social sciences in private law, and their accounts of private law adjudication.

Whereas (some) realists were famously skeptical about concepts of right and duty, neo-realists are more capacious in their view. Still, delineating private rights, like anything else in the law, requires a careful normative evaluation of alternatives. Private law may serve many different goals, and a variety of legal structures can be used to pursue them in different ways. The architects of private law should be thinking broadly about both the normative commitments that these competing structures instantiate and their likely consequences.

The neo-conceptualists, by contrast, insist that while courts are involved in incremental development of the law, understanding private law means understanding how its framework of right and duty should unfold and recognizing that grafting new structures onto it risks interfering with individuals' rights and duties. Neo-conceptualists are not (necessarily) absolutists, but like Dworkinian constitutional theorists, they are profoundly opposed to weighing rights against interests. The upshot is that balancing and policy arguments in private law cases are typically regarded as impermissible and off the table.

This normative difference carries over to a methodological one. Neo-realists tend to reach out to the humanities (notably political philosophy and critical theory) to provide moral evaluations of private law doctrines, and to the social sciences to provide better accounts of private law's impact and consequences. Conversely, neo-conceptualist theorists typically observe that there is an internal structure to legal doctrine that resists explanation or evaluation through such external resources. These different attitudes necessarily project onto differing views as to significance—or lack thereof—of insights from neighboring disciplines for making progress in designing private law.

Finally, neo-conceptualists who emphasize private law's bilateral focus and its internal resources of rights and duties see judges as the carriers of private law. Adjudication, in this view, is not just one venue, contingent to the common law tradition, for the instantiation of private law, but rather its natural forum. Neo-realists repudiate the association of private law with adjudication. While there may be reasons (beyond history) that typically make courts an appropriate institution for shaping the rules of private law, these reasons do not derive from the nature of private law as such, and are therefore necessarily contingent. In certain contexts, legislatures or administrative actors can and should supplement, and possibly even supplant, courts in crafting these rules.

The debates between the two schools are echoed in our (Dagan's and Zipursky's) ongoing discussions and disagreements because we represent these opposing responses, at least to some extent. What brings us together is that we both offer compromise positions. Dagan is a justice-and-rights-oriented neo-realist, and Zipursky a material and pragmatic neo-conceptualist. In the next two sections we each try to explain why our respective approaches to private law capture the best of both worlds.³⁴

³⁴ Section 2 was authored by Dagan and section 3 by Zipursky; the introduction, section 1, and the conclusion were co-authored.

2. THE RELATIONAL JUSTICE THEORY OF PRIVATE LAW

The relational justice theory of private law accepts—indeed, builds on—the pretense-based critique of the traditional distinction between private law and public law. Nonetheless, it insists that private law has a distinctive mission that both the law-and-economics and the neo-realist reductionist movements may undermine. It thus embraces the important neo-conceptualist insight as to the irreducibly *interpersonal* focus of private law.

Reductionistic approaches to private law have no difficulty in analyzing all our interpersonal interactions—in settings like the workplace, the marketplace, the neighborhood, or the road—through the lens of the public purposes of the polity as a whole. However, such radical collectivism threatens to efface the *intrinsic* significance of these social frameworks. Neo-conceptualists, who justifiably criticize this flaw, typically fend it off by imagining private law as the law for morally self-sufficient persons. Yet this vision, which epitomizes the neo-conceptualist dominant (corrective-justice-cum-Kantian) version, is no less troublesome, and not only because of the numerous contemporary private law doctrines that repudiate it.

Private law should, and to a considerable degree already does, replace the Kantian *grundnorms* of individual independence and formal equality with the most fundamental liberal commitments to autonomy (or self-determination) and substantive equality. Whereas there is good reason to ensure that our public, collectivist goals will not take over the domain of private law, these shared social values—the commitments to individual self-determination and substantive equality—can and should confidently occupy private law's core normative DNA. Or so claim Dagan and Dorfman in the relational justice theory of private law, which the following paragraphs summarize.³⁵

* * *

The relational justice theory conceptualizes the public/private distinction by zooming in on those capacities of law's subjects (persons) to which the pertinent legal prescription focuses: as co-citizens who are subjects of a state *or* as individuals. The premise of this view is that law's orientation toward us is qualitatively salient: It makes a difference whether we are addressed as parts of a comprehensive unit of joint responsibility or as persons with projects. Public law and private law are meaningful legal categories because the types of considerations that supply the justifications of their substantive norms are distinctive.

Public law deals with our interactions as subjects of the state or as co-citizens. It constructs our form of government—our collective institutions and their interrelationships—and it regulates the various interactions we have with our fellow citizens, as well as with the public authorities which are supposed to act on our behalf as a collectivity. As such, public law (at its best) both vindicates the rights we each have as against the collectivity and is further guided by our collective goals, such as distributive justice

³⁵ See, e.g., Dagan & Dorfman, *Just Relationships*, *supra* note 5; Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171 (2018); Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, U. TORONTO L.J. (2020). See also HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2020); HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACT (2017).

(which focuses on justice in holdings), democratic citizenship (which seeks to eradicate hierarchies in our relationships *qua* citizens), and efficiency (which is concerned with the size of our welfarist pie).

Private law is an important legal category because it is significant to have a body of law that specifically governs our interpersonal, horizontal relationships, rather than the vertical relationships between the individual and the state. Accordingly, private law theory focuses its attention on the proper legal construction of those interpersonal relationships. Studying the distinctive features of private law must not be confused with an exercise of separation, which looks for necessary and sufficient differences between private and public law that would make them mutually exclusive. There is not, and there should not be, a strict division of labor between public and private law: Because public law also affects our horizontal interactions, it should not ignore its interpersonal implications; likewise, private law takes note, as it should, of its collectivist effects. But while public purposes like distributive justice, democratic citizenship, and efficiency are always potentially relevant, they should not exhaust private law's normative concerns. Private law's distinctive DNA lies elsewhere.

Private law is the body of law that specifically governs our interpersonal, horizontal relationships. Its importance relies on the intrinsic significance of the social, a realm always in interaction with, but not reducible to, the public. Private law both protects us from others' encroachments and empowers us in our more cooperative endeavors. It sets the conditions of legitimate interaction among individuals and delineates what people owe each other in the framework of social interaction.

Private law rules have a range of sources; more specifically, the entitlements relevant to interpersonal relations comprise norms with different institutional pedigrees. Some are doctrines familiar from casebooks in first-year private law courses: trespass, nuisance, the duty to pay damages upon breach, and the limitation of that duty by doctrines of foreseeability and mitigation, the requirement of returning mistaken payments, and so on. Many others are the products of regulatory agencies: Zoning ordinances, for example, define the reciprocal rights and duties of members of a local community; rules of the Occupational Safety and Health Administration define the duties of employers to provide safe workplaces; and those set by the Consumer Financial Protection Bureau determine which lending practices are unfair, deceptive, or abusive.

* * *

Private law entitlements such as these delineate the terms of our interpersonal transactions as individual persons, forming the infrastructure for our dealings with other people. Its building blocks define the legally protected expectations we have in our daily interactions, both voluntary and involuntary, with others. Private law theory elucidates both the value and the potential threat of our horizontal interactions in the array of social spheres governed by private law, such as family, work, home, community, and commerce. It supplies a set of considerations that focus precisely on such social contact, and the dominance of those considerations is private law's distinguishing feature.

As noted, resisting private law's reductionist understanding as exhausted by public considerations does not imply that it ought to be analyzed solely as a stronghold of individual independence and formal equality. This understanding of private law, which leaves the task of realizing the commitments to individual self-determination and substantive equality to public law, may seem conventional. But the division of labor on which it relies

cannot withstand critical scrutiny. Any polity that takes seriously the commitment to individual self-determination (and not merely independence) and to substantive (rather than merely formal) equality cannot make these values irrelevant to our interpersonal relationships. Quite the contrary: These shared values are just as crucial to our horizontal interactions as they are to our vertical ones, although they entail different implications in these different dimensions.

Indeed, because our practical affairs are deeply interdependent, the ability to lead one's life is heavily influenced by one's interpersonal interactions, and given personal differences, formal equality must not serve as the normative yardstick of their justness. Instead, a just interpersonal relationship should stand for reciprocal respect of each party's claim for self-determination and substantive equality. Private law at its best proactively promotes this happy social vision. Therefore, its architects must be careful to ensure the normative acceptability of the legal relationships it authorizes and to verify their actual sustainability given their likely consequences. These missions typically imply the neo-realist methodological openness to insights from the humanities and social sciences.³⁶

* * *

Private law is actually committed to enhancing a capacious vision of autonomy, rather than merely to safeguarding independence. It does not content itself with formal equality, but rather aims at positively establishing our substantive equality. Numerous doctrines of private law are straightforward implications of the injunction of reciprocal respect for self-determination and substantive equality, or—to use Dagan and Dorfman's term—*relational justice*. Relational justice is not exhausted by the favorite neo-conceptualist duty of noninterference. Quite the contrary: Often it requires law to proactively facilitate people's cooperative efforts and, furthermore, to impose certain affirmative duties of accommodation founded on such a robust notion of interpersonal respect.

Elsewhere in this *Handbook* both Dagan and Dorfman analyze numerous examples of property, tort, and contract doctrines that are best understood as manifestations of relational justice.³⁷ Two further examples may help to complete the picture. The first example—the core rule of the law of restitution—exhibits private law's adherence to self-determination. The second example—one of the main doctrines of employment law—demonstrates its commitment to substantive equality.³⁸

Consider the basic rule dealing with mistaken payments, which prescribes that, in principle, the recipient of a mistaken payment is liable in restitution. This rule, which refers to what is typically perceived as the law of restitution's "core case," seems troubling, if not outright unjustified, for a strictly independence-based private law, because it enlists

³⁶ See also Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671 (2011).

³⁷ See Hanoch Dagan, *Autonomy and Property*, ch. 11; Avihay Dorfman, *Relational Justice and Torts*, ch. 19; Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, ch. 7.

³⁸ These examples rely on Hanoch Dagan, *Autonomy, Relational Justice, and Restitution*, in RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION 219 (Elise Bant et al. eds., 2020); Dagan & Dorfman, *Just Relationships*, *supra* note 5, at 1442–45. For yet another area of private law, which relational justice elucidates, see Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. (2020).

a passive recipient for remedying the transferor's mistake for which the recipient bears no responsibility. But our private law, which does *not* rule out all affirmative duties to aid others, finds a restitutionary obligation in the case under consideration (that is, before any detrimental reliance by the transferee) unobjectionable, indeed laudable. The affirmative duty it imposes on the recipient is a modest one—a trivial burden that neither jeopardizes her self-determination nor seriously undermines her independence. At the same time, it seems justified if mutual respect for the parties' self-determination governs the terms of the interaction between the mistaken transferor and the recipient, from which it follows that the recipient should not be oblivious to the mistaken party's circumstances.

Rules of anti-discrimination in the workplace offer a vivid illustration of private law's commitment to substantive equality. These rules are typically justified by reference to our public commitments to equal opportunity and social integration, and are thus (implicitly) perceived by private law theories as external impositions, a price exacted in the name of exogenous, worthy public causes. This construction implies that anti-discrimination rules are contingent on the availability of other state-driven means for securing equal opportunity and social integration, so that when these public ends are, or can be, secured otherwise, they may not be needed, and may even become unjustified. The relational justice theory, by contrast, perceives nondiscrimination rules as entailments of private law's innermost commitments, which are necessary for *perfecting* the realization of its own *raison d'être*. Regardless of whether the state supplies sufficient work opportunities and sustains integrative fora, private law must not leave intact—and thereby authorize—social relationships that violate the substantive equality of the person subjected to discrimination. The shared social values that properly inform our law of interpersonal interactions—that is, private law—imply that there is no way around the imperative to establish relationally just terms of interaction among persons in the workplace.

* * *

These and many other examples support the interpretation of private law as the realm of relational justice. They further vividly demonstrate three important features of the relational theory of private law. First, this account transcends the state: Whereas domestic state law plays an important role in the elaboration and implementation of its fundamental injunctions, private law's core normative DNA is cosmopolitan, pertaining to people's interpersonal relationships as individuals whatever their other affiliations may be.

Second, this sketch may hint at the way relational justice offers an *internal* critique of private law. This account of private law demarginalizes the many doctrines and rules that deviate from the conventional (neo-conceptualist) depiction of private law as disturbingly resistant to other-regarding concerns; in so doing, it also highlights the disappointing pockets of private law that fail to comply with its implicit normative promise.

Finally—and again in sharp contrast to some misleading accounts of private law—relational justice theory, which highlights the role law plays in actively enabling people's relationships by shaping the legal frameworks through which they interact, shows that private law may be threatened not only by having too much law. The absence of law—the failure of private law to proactively support a sufficiently diverse range of such frameworks within a given sphere of interpersonal activity—may similarly betray its mission.

3. PRAGMATIC CONCEPTUALISM AND PRIVATE POWERS

The relational justice theory of private law rejects key aspects of the law-and-economics framework, but retains some of its features. Like the economists, Dagan thinks that private law must be analyzed in terms of the values that it instantiates and the consequences it brings about, and in this sense is not so distinct from public law. Also like the economists, he nevertheless recognizes a kind of division of labor within law broadly, so that some parts of the law have different kinds of aims than others. Private law is distinguished by the kinds of normative goals it serves. For the economists, private law aims to structure individual choices so as to maximize overall efficiency; for Dagan, it aims to structure interpersonal interactions in a manner that exhibits relational justice and facilitates self-determination.

Zipursky shares Dagan's dissatisfaction with the idea that efficiency is the animating value of torts, contracts, and property law. Also like relational justice theory, his view takes private law to be focused upon rights and relationships. But the differences are equally deep. A discussion of private law theory in torts can explain why.

In Zipursky's view (and that of his long-time collaborator, John Goldberg), the common law of torts is rooted in part in the principle that a person who has been legally wronged is entitled to an avenue of civil recourse against the wrongdoer.³⁹ This "principle of civil recourse" is realized in a legal system in which courts provide rights of action to those who were legally wronged against the wrongdoer. It simultaneously provides norms and principles, entrenched in the common law, regarding how one must and must not treat others. When a plaintiff brings a tort suit, the court's task is to make real the demand of the plaintiff, if indeed the allegations are true and the structure of the tort is as required in our system; if not, the courts must not make real this demand. The entry of a judgment is, in effect, the authentication of the demand. Tort law is a system of empowering plaintiffs to make these demands, setting forth the conceptions of wrongs that govern conduct and expectations, and determining whether such a wrong was committed by the object of the plaintiff's demand—the defendant.

The substantive theoretical view of torts is complemented by a jurisprudential view of the content of the common law called *pragmatic conceptualism*.⁴⁰ According to this view, tort law is constituted by the rules and principles described in the preceding paragraph. The rules and principles are not identical to the verbal formulations of them; they exist in the practice of the participants (here, especially that of officials) of the legal community. To apply the law is to follow the practices; the rules and principles are in part what is inherent in the practices. To a large (although not unlimited) extent, legislators may change these rules. And because the rules and principles and practices are not necessarily precise—like language, for example, they have vagueness and gaps—courts' and juries' use of them has some leeway. Too great a deviation, however, will count not as applying the law, but as changing it. This does not mean that doing so is impermissible, but it does mean that permissibility depends on the answer to larger questions about when and why the normal judicial obligation to apply the law gives way.

³⁹ See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998); GOLDBERG & ZIPURSKY, *supra* note 5.

⁴⁰ See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

Pragmatic conceptualism is pragmatic in at least three ways. First, where Weinrib turns to forms of interaction and the place of forms of interaction in an account of justice, pragmatic conceptualism turns to human *practices*. Rather than depicting the operations of courts as the implementation of forms of justice in institutional form—the formalist’s picture—the pragmatic conceptualist looks at the operations of courts as the continuation of (and fidelity to) practices of empowerment and disempowerment through the legal system based on what we do with the words and deeds of the law.

Second, and relatedly, pragmatic conceptualism shares the philosophical pragmatist’s commitment to a sort of *holism* in understanding the operations of argumentation and what is apparently speculative reason utilizing conceptual connections. This aspect of pragmatic conceptualism is not so much contrary to Weinribian formalism as it is to the reductionism of the instrumentalist and the foundationalism of certain natural rights thinkers. Here we have perhaps greater commonality with neo-realists who are deeply suspicious of both reductionists and foundationalists. The pragmatic conceptualist wants to take legal argumentation as it occurs in context, and wants to admit that the pursuit of a right answer in legal reasoning is an ongoing project that is, in the end, answerable only to more argument and greater demands for justification.

Thirdly, pragmatic conceptualism is pragmatic in its sensitivity to levels of particularization and abstraction in the framing of questions. Its proclivity is to address questions that must be answered and to address them in a manner that the situation warrants. In legal theory, that means that the question of what a court should decide in a case or set of cases is typically not the same as the question of what the law should be. That is not principally because of the diverse array of litigants and the variety of their factual circumstances. It is more because litigants arrive at court with a justifiable demand that their cases be decided under the law, and because the challenges faced are framed in a context of precedents, evidentiary rules, procedural hurdles, statutory restrictions, and facts.

Let’s return now to the question of what difference to thinking about private law it makes if one accepts the pragmatic conceptualist framework. Consider a medical malpractice plaintiff who is able to provide evidence that his doctor failed to live up to the standard of care, able to provide evidence that he was injured (e.g., lost a leg to gangrene), but unable to adduce sufficient evidence to support the claim that the malpractice caused the injury. Suppose here that a jury did in fact conclude that the malpractice caused the injury, notwithstanding the evidence being clearly inadequate to support the factual conclusion (assume that no reasonable factfinder could find that the proper treatment would have averted the injury). A classic instrumentalist might well favor the decision that the plaintiff should recover because a liability rule with a relaxed standard would generate a superior compensation/deterrence framework in the jurisdiction. By Zipursky’s account, the court should not reach that conclusion. The judge’s job is to carry through on the inferences that constitute the law. To enter a judgment against the defendant and for the plaintiff in this case would not be applying the law, something that both parties have a right to receive and the court itself has an obligation to provide.⁴¹

⁴¹ Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411 (1999).

The reverse scenario might make the point more strikingly. Suppose that there is a strong case that the doctor was negligent and that the negligence caused the plaintiff to lose her leg to gangrene, and suppose that a jury did in fact conclude both of these and found for the plaintiff. Renewing prior trial motions and cleverly patching together suggestive precedents, the defendant's lawyer argues for reversal of the verdict at trial on the basis of a novel "last doctor" argument: It is likely that the rise in liability insurance rates for the physician will lead him to give up his practice in this town, where there will thus be no physicians remaining. Let us suppose further that the trial judge rejects this and the case is now before an appellate court. Should the appellate court recognize the "last doctor" argument?

A neo-conceptualist will contend in the latter instance that the likelihood of an overall better healthcare system for the community cannot drive the decision in the particular case, just as the tendency toward a more effective deterrence system cannot in the former. To do so would be to fail to respect the plaintiff's right of redress in this case, just as doing so in the first case would fail to respect the defendant's right to be free of liability. Zipursky describes this by saying that courts who failed to respect the litigants' rights in such cases would be treating tort law as if it were public law, not private law.

Pragmatic conceptualism alone does not explain what is meant by this distinction; however, it does so in combination with basic features of civil recourse theory. Recall that one feature of the realist critique of the distinction between private law and public law relates to the fantasy that private law is self-executing. Legal realists rightly argued that rights in contract, property, and tort only operated as enforceable legal rights against the backdrop of state institutions—courts—willing to take active steps to enforce the law. The judicial dependency thesis was thought to wipe out this critical aspect of the public/private distinction. Although a great deal of private law was not legislated through an act of representative government, it was nonetheless enforced, applied, and made real and binding through public acts by state institutions: courts. Because judges are purposive actors, like legislators, the distinction between common law domains and legislative domains was fallacious. It is understandable why a robust natural rights foundation might be able to resist this conclusion—the rights and duties, if natural, were simply being applied by courts, not willed by them. But once this view is unmasked, either a replacement political theoretic normative structure must be generated, or the fallacy of the public/private distinction must be admitted.

Civil recourse theory rejects this supposed dilemma. It accepts that courts are needed for common law to exist as a form of law and it accepts that judges are purposive actors whose judgments are partially constitutive of the common law. A court's entering judgment for a plaintiff in a tort case need not, however, be understood as a choice by a judge that the defendant compensating the plaintiff in this case (or cases like it) is a better state of affairs than the defendant not being required to compensate the plaintiff. It should rather be seen as a choice that this plaintiff is entitled to have the judge enter a judgment on the plaintiff's behalf against the defendant. The plaintiff is so entitled because the defendant treated him in a way the law obligates her not to do, and the state is committed to empowering those who have been legally wronged to obtain redress. Conversely, a court's decision to enter judgment for a defendant is not rooted in a belief that, all told, it would be better if the defendant did not have to pay and the plaintiff did not receive compensation. It is rooted in the idea that people are entitled to be free from the state's coercive power used on behalf of others if they have not breached a duty to the other.

In the law of torts, these two principles—where there's a right there's a remedy, and no liability without a rights violation—are integral.⁴² Acting on these principles is still acting purposively, but it is doing something quite different from trying to achieve a more just or efficient world, from legislating, or (for that matter) from doing equity.

The preceding examples have all been in torts, but there are strong grounds for thinking the position carries over to contracts and property. Courts enforcing contracts are making purposive decisions, but they are not necessarily choosing which of two worlds is better: the one where the plaintiff wins or the one where the defendant wins. They are deciding whether a plaintiff really is entitled to demand damages or to demand enforcement. In doing so, they are in part deciding whether they owe it to the plaintiff to force the obligor to perform or to pay. Similarly, with property, the question is whether the state is obligated to stand behind the force of property owners *qua* property owners.

The preceding paragraph suggests that torts, contracts, and property are all areas in which the state empowers private parties to alter their legal relations with others and alter others' legal rights and duties, too. As H. L. A. Hart famously explained, legal systems centrally involve not only rules imposing duties on private and public entities, but also rules that confer powers upon them to change the rights and duties of others.⁴³ Part of what the state does in applying private law is to comply with its obligation to follow these power-conferring rules.

A focus on the power-conferring rules of private law also yields an elegant taxonomic principle.⁴⁴ Contract law does not simply empower litigants to demand remedies for breach of contract. As Dagan himself describes it, contract law empowers parties to create various forms of relationships, and to create for themselves various rights and duties. Similarly, property law not only empowers parties to use courts to demand remedies. It empowers individuals to own and to alienate land, chattels, and so on; it empowers them to co-own and combine and also to exclude, develop, and so on. Private law domains, as conventionally organized, turn out to be those in which the central power-conferring rules confer powers upon private entities. Public law domains, by contrast, involve empowerment of public entities. In constitutional law, it is branches of government that are empowered (or whose power is limited); in administrative law in general and in particular areas of administrative law (e.g., environmental law, securities regulation), the power-conferring rules confer powers on government agencies and limit their actions.

Taxonomy does not drive the public/private distinction offered here, but rather falls out of it. The central point is that insofar as courts doing private law are purposive, their orientation lies in living up to the ambit and limits of the private empowerment to which the state is committed.

4. CONCLUDING REMARKS

Private law theory over the past half century has seen a robust expansion. To many outside the field, the expansion seems to come from two very different places. We have

⁴² See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

⁴³ H.L.A. Hart, *THE CONCEPT OF LAW* (1962).

⁴⁴ See Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 623 (Jules Coleman & Scott Shapiro eds., 2002).

labeled these “neo-realism” and “neo-conceptualism.” The first, expanding out from a dominant American paradigm of law and economics, has admirably integrated both a pluralistic conception of the purposes of private law and an increasing sophistication in social scientific methodologies. The second has utilized a great expansion in moral and political thinking cut free from the laissez-faire conception of rights that drove private law thinking in its pre-realist days. Very broadly speaking, however, the first retains its roots in instrumentalism and is widely believed to integrate broad strands of pragmatism. The second retains a strong focus on private law as a domain of rights and duties between private parties.

Each of us—Dagan and Zipursky—has tried out a middle ground in this ongoing showdown between conceptions of private law. Coming from the neo-realist side, Dagan has suggested that although the teleological orientation of the neo-realist is well-founded, the substance of private law itself concerns the domain of rights and duties between private parties, which are not informed by collectivist goals such as efficiency. Rather, the rights and duties of private law are grounded in the most fundamental maxim of interpersonal justice in a liberal polity, properly called, of reciprocal respect for self-determination and substantive equality. Indeed, it is central to what private law is that it aspires to create structures that comply with relational justice while empowering people’s self-determination.

By contrast, Zipursky comes from the neo-conceptualist side. Understanding the content of the common law requires grasping the concepts integral to its operation. Indeed, applying the common law means following through on the underlying commitments of the state to empower plaintiffs and protect defendants. And yet the common law is not the working-out of fundamental principles of right. It is a set of practices in which participants in the legal system are entrenched, and its elaboration moving forward must be carried out with great sensitivities to the features of institutions and litigation reality.

Although presented as alternatives, there is much in common between the two views. Both view the relations between private parties as a central focus of private law, and both see the law as aspiring to achieve just relations. Both accept substantial divergence between courts and legislatures, and see special role-based duties for courts and great possibility for legislatures. Both see, in areas like tort, contract, and property, the need for changes that will take seriously equal entitlement of individuals to flourish. Whether in public or in private law, open-minded dialogue can only move us forward.