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Against Relational Justice

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Critical Notice:
Relational Justice: A Theory of Private Law
By Hanoch Dagan and Avihay Dorfman*

Abstract

In *Relational Justice*, Hanoch Dagan and Avihay Dorfman defend a longstanding intuition of bilateral normativity. They argue that private law, for the most part, should structure legal relationships so that parties show reciprocal respect for each other's self-determination and substantive equality. In this critical notice, I argue against the plausibility of their account. My main claim is that a commitment to individual self-determination and substantive equality should be societal and not bilateral. Rather than reciprocal respect for each other's self-determination and equality within bilateral relationships, those who care about these values should require that private law help secure them on a societal scale.

Keywords: *Relational Justice; bipolar obligation; bilateral normativity; self-determination; private law*

1. Introduction

The intuition that there is a special kind of justice that underpins private law relations is prevalent in private law theory and practice. Tort and contract in particular—but also property and restitution—are often thought of as dealing with relationships between two parties, and it seems sensible to many that the regulation of such relationships should be based on some notion of bilateral justice internal to them. The intuition is that there is a distinct sense of bilateral normativity—some bilateral fairness, justice, or decency—that rightly underpins our private law rights and duties.

The intuition of bilateral normativity can be easily defended on libertarian grounds. For those who believe in a natural right to private property, natural duties not to interfere with the property of others, and a natural power to voluntarily alienate one's property, there is a normative universe of bilateral "rules of

*Hanoch Dagan & Avihay Dorfman, *Relational Justice: A Theory of Private Law* (Oxford University Press, 2024) pp 317, ISBN 9780198876229. All parenthetical numbers are page references to this book.

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just conduct"[1] and bilateral "justice in transfer"[2] which can and should inform positive private law rules. Outside the libertarian camp, however, explaining bilateral normativity becomes more difficult. For egalitarian liberals in particular, private rights and duties are not encoded into the moral fabric of the universe.[3] For those who follow John Rawls' work on this, justice is primarily a social concern relating to social, political, and economic institutions, not a bilateral one.[4] These two notions of justice are often seen as inimical to each other, or at least in a challenging tension. Is justice primarily bilateral or social? Is it concerned with the narrow bilateral unit, asking how any person should deal with another, or is it about the broad social unit, seeking distributive fairness and social equality? For many egalitarian liberals, the bilateral normative focus of private law seems immediately suspicious and in need of theoretical justification.

In *Relational Justice*, Hanoch Dagan and Avihay Dorfman offer an important addition to the scholarship that defends the intuition of bilateral normativity. The most distinctive feature of their book is its commitment to defend bilateral normativity in terms palatable to egalitarian liberals. They reject accounts of private law based on *libertarian* freedom, *corrective* justice, or *formal* equality—accounts that are often accused of being less accommodating of widespread concerns for meaningful equality and social justice. Instead, they insist that the "distinctive core of private law" (24) is a normative commitment to see "reciprocal respect for self-determination and substantive equality" (21) between individuals. Perhaps more than any other theory of private law, *Relational Justice* offers an account of bilateral normativity using a vocabulary attuned and fine-tuned to the moral and political sensibilities of the day, at least among its authors' readership and interlocutors (roughly: less John Locke and more John Rawls). This makes for an exceptional contribution to private law theory, marrying the most important pre-theoretical intuition in the field to the most prevalent normative vocabularies and arguments.

For reasons I will lay out in detail, however, I believe that the marriage does not work. In what follows, my main aim is to show that one cannot ground a bilateral normative account of private law in the values of self-determination and substantive equality, as understood in the tradition of egalitarian liberalism. The perimeters of the argument should be clear from the outset. First, I do not hope to provide an argument here against the intuition of bilateral normativity as such—an intuition that may be defended on various theoretical grounds besides Dagan and Dorfman's relational justice theory. Nor will I argue that private law cannot be premised on any notion of reciprocity internal to bilateral relationships. My argument is only against the claim that private law should require reciprocal

1. FA Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, ed by Jeremy Shearmur (University of Chicago Press, 2021) at 217ff.
2. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) at 150.
3. See e.g. Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002).
4. See e.g. John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 1999).

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respect for substantive equality and individual self-determination within bilateral relationships. Second, I intend to say very little about other parts of Dagan and Dorfman's argument in their book. Most importantly, I will not evaluate the many interpretive claims that they make regarding substantive private law rules—in property, contracts, torts, restitution, employment law, and other subfields. My focus is not on the 'fit' dimension of their interpretive theory but on the justification that they purport to provide for private law.

I start by explaining what bilateral normativity is and why relational justice is best read as a theory of bilateral normativity. I then address the *relationality* and *privateness* of private law and explain why neither of these traits in itself supports the idea of bilateral normativity. Beginning in Section 4, I turn to the two values at the centre of relational justice theory: self-determination and substantive equality. I first argue that there is no easy argument from a general concern for self-determination to a concern for the *reciprocal, bilateral respect* for self-determination within particular relationships. This difficulty is exacerbated by the fact that the main obstacles to self-determination are societal and should be considered on a societal scale. I then turn to substantive equality. My suggestion there is, first, that the concern for *social equality*—which animates egalitarian liberalism—invites considerations from outside the bilateral unit, thereby addressing social structures of oppression and hierarchy. Second, drawing on familiar liberal arguments, I explain why the concern for interpersonal, bilateral moral equality, although important, should not in itself be enforced by law.

2. Relational justice as a theory of bilateral normativity

What I call 'bilateral normativity' is often assumed by private law theory but is only rarely articulated clearly as a category of normative thinking in law. To avoid confusion in the identification of this category, it may be helpful to explain first what bilateral normativity is *not*. Bilateral normativity, in the sense of the term here, is not a claim about the form of private law or the bipolarity of plaintiff and defendant that is emblematic of this branch of the law. Instead, it refers to a special type of underlying normativity that can be used to justify and guide the development of such legal relationships.

It is clear that *after* rights are allocated between parties—that is, after private law rules are in place—people can and do act unjustly towards others in a bilateral way. If you trespassed on my property or person, breached your contract with me, or illicitly enjoyed the fruit of my property, then you acted unjustly towards me; you failed to discharge your legal duty towards me and encroached on my right. The observance of legal rights clearly has a reciprocal, bilateral dimension: I must observe your rights, and you must observe mine, and if either of us fails to do so, some correction would be in order.

Legal rights and duties, however, are the creation of law, and their content can vary depending on the rules that create them. When private law creates rights and duties, it presumably does so in an attempt to achieve or reflect some underlying

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normative considerations. One possible aim is to reflect or trace an underlying *bilateral normativity*—an underlying "bipolar obligation," as Stephen Darwall puts it—that pertains between the parties to the legal relationship.[5] Private law theories that subscribe to bilateral normativity claim that such normative considerations should underpin the allocation and definition of private law rights. They claim that, in addition to the bipolar *form* of private rights and duties, these rights and duties are best explained by an underlying *substantive* bilateral normativity.[6]

Relational justice theory offers an account of private law based on bilateral normativity. It argues that the allocation and definition of private rights should be such that it ensures parties show reciprocal respect for each other's self-determination and substantive equality within the bilateral relationship. This is the primary sense in which relational justice is *relational*—that is, *bilateral*. The normative considerations it invokes are internal to the bilateral interaction between two parties. The unit it evaluates is the bilateral pair (property owner/trespasser, promisor/promisee, employer/employee, landlord/tenant), and the measure of justice it employs is how this relationship fares in terms of the reciprocal respect parties show each other's self-determination and equality. According to relational justice, the normative considerations underlying private law relationships emerge from how two parties ought to relate to each other as autonomous equals.

The intuition of bilateral normativity can be contrasted with another normative concern, which we can label 'societal' or 'expanded'. The expanded normative sensibility takes the unit appropriate for evaluation to be broader than the bilateral relationship, encompassing a particular society or scheme of cooperation. The main question raised by this expanded focus is not whether parties show adequate reciprocal respect to each other within the relationship. Rather, the concern is whether society as a whole is just: Is there a just distribution of resources and opportunities, burdens and costs? Are some groups oppressed by others? Are societal structures hierarchical rather than egalitarian?

The distinction is not pedantic. It may seem that if we ensure people treat each other in ways that respect each other's self-determination and equality within relationships, we will thereby be promoting self-determination and equality in

5. Stephen Darwall, "Bipolar Obligation" in *Morality, Authority, and Law: Essays in Second-Person Ethics I* (Oxford University Press, 2013) ch 2.

6. Charles Fried's *Contract as Promise* can serve as an example of a theory that attributes an underlying bilateral normativity to contract law, theorising it as tracing the underlying bipolar moral obligation to keep promises. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed (Oxford University Press, 2015) at 15. The Kantian notion that private law traces 'provisional', bipolar natural duties, owed between abstract free choosers interacting as independent equals under a common rule, is another example of a theory that explains private law in terms of an underlying bilateral normativity. This can be distinguished from the formalist elaboration of the correlative form of rights and duties. See Ernest J Weinrib, *The Idea of Private Law*, revised ed (Oxford University Press, 2012) at 85; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 165. As noted, in this notice, I do not intend to mount a general critique of these and other theories that attribute bilateral normativity to private law. I only mention these two theories here to clarify my use of the term.

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society more generally. This will cast the insistence on bilateral reciprocal respect for these values as an instrumental demand emanating from a deeper societal concern. This is not relational justice's claim—and if it were, it would have been empirically unsubstantiated. Relational justice does not put instrumental value on reciprocal respect within bilateral relationships. Rather, it sees such reciprocity as valuable independently from its service to a broader societal project. Were it to assign such an instrumental role to bilateral normativity, it would (a) cease to be a theory of justice different from social justice, and (b) be required to show that reciprocal respect for self-determination and substantive equality within relationships does, in fact, serve the promotion of self-determination and substantive equality overall. This would not be easy to do. As F.A. Hayek has shown, adhering to bilateral "rules of just conduct" between persons is in tension with ensuring any particular distributive pattern across society.[7] This analytical observation is independent of the particular theory of bilateral justice that is used and exactly what such rules of just conduct are understood to demand. In any case, such instrumental claims would have to be based on empirical evidence, not purely value-based or conceptual arguments.

Sometimes, it is not obvious from the vocabulary theorists use whether a particular concern is bilateral or societal.[8] In particular, the focus on a particular legal relationship, such as that of an employer-employee or landlord-tenant, often involves societal normative considerations despite using a bilateral vocabulary. Many people are worried, for example, about the autonomy of employees in the workplace or the effect of tenancy arrangements on the autonomy of tenants. Are these bilateral considerations or societal considerations? Well, it depends. If the ultimate concern is for reciprocal decency, fairness, and justice within the relationship, then it is a genuinely bilateral normative concern. However, if at its root the concern is about shaping the workplace or creating security in housing through the regulation of bilateral relationships, then it is ultimately a societal normative concern.

More generally, the distinction between the bilateral and the societal normative sensibilities may be obscured at times by the terminology of 'relationality'. In some philosophical contexts, the terms 'relational' and 'societal', rather than being antithetical, are used interchangeably, particularly when contrasted with individualistic views.[9] I will discuss one example of this later, and explain how it features in Dagan and Dorfman's work.[10] Although the two terms can

7. Hayek, *supra* note 1 at 217ff.

8. See e.g. Guy Davidov, "The Goals of Regulating Work: Between Universalism and Selectivity" (2014) 64:1 UTLJ 1.

9. Explaining the notion of 'the relational self', for example, Jennifer Nedelsky writes: "each individual is in basic ways constituted by networks of relationships of which they are a part—networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming." Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012) at 19.

10. See the text accompanying note 27.

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be seen as close in their rejection of individualist conceptualisations of personhood and autonomy, in the context of relational justice theory, they differ considerably in the sort of normative concerns to which they give rise, as noted above.

Another way in which bilateral and societal normative sensibilities may be conflated is the following. One may claim, as relational justice theory does, that one attribute of a just society is that relationships within it are just. (73) This is a perfectly legitimate claim, but it does not destabilise the distinction between bilateral and expanded/societal normativity. Ultimately, relational justice holds that the justice of any society is premised, in part, on bilateral relationships being just. Although it invokes the justice of social structures, its core concern is that of bilateral normativity, that is, justice internal to the bilateral relationship. As Dagan and Dorfman explain:

> [R]elational justice approaches the question of whether private persons participating in an interaction relate to one another as free and equal as, in and of itself, a source of value and concern. . . . Rather than addressing the concern for equality in the *overall scheme* of any given polity, relational justice takes up the question of whether the interacting parties (e.g., in a contract) relate to one another as free and equal. (42-43, emphasis in original)

It is not that the question of bilateral relationships cannot be considered social or political under any classification. Rather, my point is that the ultimate normative sensibility in the authors' account concerns the terms internal to the bilateral relationship, not the terms of cooperation in society as a whole.

The reason for belabouring this classificatory point is that my principal criticism of relational justice theory will be that it takes values and concepts that make sense in the context of expanded or societal normativity—namely, self-determination and substantive equality—and transplants them into the evaluation of the terms of particular bilateral units. Relational justice demands *reciprocal* respect for these values within relationships—rather than social arrangements that promote these values on a societal scale. However, before elaborating this claim, I want to make one additional point about bilateral normativity and explain why not every theory of private law must subscribe to this particular way of seeing the normative stakes of private law rules.

3. Horizontality, privateness, and bilateral normativity

Must private law relationships be justified in reference to bilateral normativity? Consider the following definition of private law, found at the very start of Dagan and Dorfman's book:

> Private law is the law of interpersonal relationships. It structures (a significant subset of) the horizontal interactions of people in their personal capacity, as opposed to their capacity as citizens, as members of a given political community, or as holders of political authority. (3)

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It may seem that if the subject matter of private law is horizontal relationships, and if there is some distinct privateness to the regulation of these relationships, this should mean something for the sort of normative considerations that should animate this law. Particularly, the privateness of these relationships is often seen as steering away from weighing civic, collectivist considerations when regulating them, thus making bilateral normativity—some sense of justice or fairness between the parties—the proper normative grounds upon which to draw.

It is important to see clearly that there is no necessary connection between (1) the horizontality of private law relationships, (2) the privateness of private law, and (3) the justification of this field in bilateral normative terms. The first point to note is that the fact that what is being regulated is a horizontal relationship between two persons does not entail that the values that underpin its regulation must stem from some bilateral justice between these two parties.[11]

For the most part, Dagan and Dorfman do not claim otherwise. They acknowledge the conceptual possibility that bilateral rights and duties—including those of private law—may be imposed in the service of a particular social or economic ordering, which would suggest a different set of values that could underpin private right. At times, however, the book does seem to make a deduction from legal form to normative substance. In their analysis of employment relations under the American *Occupational Safety and Health Act* of 1970,[12] for example, the authors argue that the correlative form of employer-employee responsibilities and the privacy of their interaction support a relational-justice interpretation of this regime—one that roots it in bilateral normative concerns rather than societal or distributive ones. (173-74) It is important to remember that the bilateral form of legal relationships does not entail a commitment to an underlying, substantive bilateral normativity.

Take, for example, the prohibition on dismissal of a pregnant employee due to her pregnancy. This prohibition can be interpreted as enforcing a norm of interpersonal decency and reciprocal respect between employer and employee. It can also be seen as a measure underpinned by a societal normative sensibility, aimed at promoting equality between groups in society, encouraging women's participation in the workforce, and so on. The point is that the mere fact that the subject matter of regulation is a bilateral legal relationship (e.g., between employer and employee) does not mean that the legally prescribed terms of this bilateral relationship are or should be inherently based on relational or bilateral normative concerns.

The second part of Dagan and Dorfman's definition of private law may seem like a more plausible hook on which to hang a commitment to bilateral normativity. This part concerns the special capacity in which people interact with others under private law. The authors elaborate:

11. The literature on the horizontal application of constitutional protections demonstrates this point well. See e.g. Gautam Bhatia, *Horizontal Rights: An Institutional Approach* (Hart, 2023).
12. 29 USC §§ 651-678 (1970).

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> Private law is the law that governs our horizontal interactions in a variety of settings where we encounter other persons *in our capacity as persons rather than as citizens or, more generally, as members of a political community*. It thus participates in constructing the economic and social, as opposed to the political, spheres of our lives. (21, emphasis added)

The reference to people's "capacity as persons" in this quote aims to bridge the gap between the descriptive (i.e., private law dealing with horizontal relationships) and the normative. The final destination of this argument would be to show that private law should principally be based on a certain kind of normative consideration—the kind that applies to interactions between concrete, private persons understood as such—rather than on other considerations that are rooted in expanded or societal normativity.[13] If private law rules are not to be based on considerations of a societal scale, it makes it easier to accept that they should be based on narrow bilateral considerations of fairness and justice between the parties involved. This is an interesting negative argument in favour of adopting bilateral normative foundations for private law, but one that should be rejected.

Relational justice theory distinguishes the private capacity in which people interact under private law from other possible roles that may be assigned to the subjects of law. One such role is that of "executive agents" (30) tasked with maximising overall welfare or preference satisfaction. This is the role, Dagan and Dorfman claim, assigned to legal subjects under the economic analysis of law. Dagan and Dorfman reject this view on the grounds that it does not account for people being "agents with projects who are entitled to govern their lives, and their choices and interactions matter because they are part of their life plans." (31) Another approach that is rejected is attributed to social egalitarians, who ask that people should be seen primarily as "civic persons," (31-32) tasked with supporting just institutions in the making of a just society. Treating people in this way in their private interactions, Dagan and Dorfman claim, is sometimes warranted but only in the margins of private law. (32) If it were to be the primary normative consideration underpinning private law, it would "impose the *disproportionate* burden of a *public* problem on a private actor whose negative (or republican) liberty is now constrained" (32, emphasis in original) (say, by prohibiting the employer from dismissing a pregnant employee in an effort to serve some general societal goal, which places a significant burden on that employer in service to the community as a whole).

Now, I do not mean to defend here the economic analysis of law or any particular conception of civic duty as the basis of private law. However, there is something revealing in these arguments, in which Dagan and Dorfman frame the normative question in terms of the "capacity" (3, 21, 27, 32) in which private law addresses its subjects (i.e., as executive agents, as citizens, or as private

13. Dagan and Dorfman postulate an "embedded person" (26) as the idealised subject of private law. Unlike the abstract chooser of Kantian theory or the citizen of political theory, the embedded person is considered concretely with their special features and in their actual circumstances but treated as an individual rather than as a member of a political community.

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individuals). Framing things this way conflates two distinct normative questions. The first question is what the grounds for making private law rules should be and what purposes a system of private rights should serve. The second is what is distinct about private law and the private relationships it creates.

Arguably, what makes private law private is the space this particular branch of the law creates for people to act on their own judgment, pursue the projects to which they are partial, care for those close to them, or otherwise live a private life. This is the liberty people have while using their rights: making decisions about the means at their disposal in pursuit of individual ends *within their rights*. This does not mean that the system of rights as a whole cannot be designed to serve other normative desiderata alongside the creation of this moral space for private life. It is perfectly sensible to say that (a) the overall system of private law rights and duties should be determined, in part, in a way that serves social justice (including distributive justice), AND that (b) these rights should leave enough space for people to be individual part-authors of their own lives, make choices about their projects and attachments, and meaningfully lead a private life. At times these considerations may pull in different directions, but this does not make them mutually exclusive or conceptually incompatible.

Indeed, the ordinary liberal way of thinking about the determination and allocation of rights (in private law and elsewhere) is alive to this distinction.[14] Part of what a liberal system of legal rights does is unburden the subjects of law from the need to worry about societal and political considerations of justice in every aspect of their private lives. Individuals exercise their liberty, pursue their projects, form their relationships, and create attachments and commitments for themselves—all while playing their part within a just system of cooperation as they comply with their legal duties towards others.[15] Legal rights, in this liberal framework, both protect a space of action in which people can act as individuals on their own decisions *and* create a system of cooperation that aims at attaining social justice.

Regulating the interaction between people in their "private capacity" (27) does not mean, as Dagan and Dorfman suggest, "addressing" (22) them solely as private, non-political individuals. Private law—like all law—addresses people as subjects of legal and political authority. It can legitimately impose duties on actors in the service of justice and fairness on a societal scale.[16] Naturally, the

14. *Cf* John Rawls, "Two Concepts of Rules" (1955) 64:1 Philosophical Rev 3; Thomas Nagel, *Equality and Partiality* (Oxford University Press, 1991).

15. See HLA Hart, "Legal Rights" in *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press, 1982) ch VII.

16. Dagan and Dorfman offer an additional argument for their view to the contrary, based on the fact that parties to private law relationships are sometimes of different citizenships or members of different political communities. They take this undisputed fact to show that private law cannot be said to address its subjects as citizens or executive agents of the state and, therefore, that it cannot be based on societal or political considerations (and must be explained on bilateral normative grounds) (32-33). This argument is premised on a misconception of the grounds on which political authority is exercised and how all law (including private law) addresses its subjects. Although parties to private law relationships may not be citizens of the same polity or full members of the same political community, they are still participants in the same scheme of cooperation, collaborating under a common, accepted and enforced rule. See Arie Rosen,

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space allotted to people to make individual decisions can be broader or narrower—which would determine how private their interactions can be. But this has little to do with the *purpose* in the service of which rights are delineated and determined. Conceptually, nothing stands in the way of private law being based, in part, on broad societal considerations, while at the same time creating space for people to make their own choices over a range of meaningful decisions. Within this space—acting within their rights—people are free to act in ways that are potentially contrary to the promotion of social and distributive justice. Unlike public officials or actual executive agents of the state, the subjects of private law are free to pursue their own projects within their legal powers, prefer their private relationships, and make decisions in which they are not legally answerable to others. There is no sense in which, either under relational justice or any other theory, private law addresses us as private persons. Private law creates spheres of privacy and limits them, and—like all law—it can do so in the service of social and distributive justice (no less than it can do so in the service of relational justice).

This analysis should help allay Dagan and Dorfman's worry that a private law system aiming at social justice would "disproportionally" burden some people with the weight of societal problems. (32) Unless we already assume a standard of bilateral justice that tells us what people owe each other, how can we say that a different standard is disproportionate? Is it disproportionate to design employment law so that the employee is burdened with duties that would improve the circumstances of workers in society in general (e.g., by not working below a minimum wage)? Is it disproportionate to design tenancy law so that a landlord is burdened with duties that would improve the general health of the population? Egalitarian liberals know to answer these questions in the negative.[17] It is part of the role of the system of rights to create a just scheme of cooperation, allocating roles, burdens, and responsibilities in a way that can be justifiable as a whole to each person. It should also, arguably, not be too demanding of individuals and avoid excessively constraining the space they have to lead a private life.

* * *

Note that nothing I have said in this section criticises the idea of relational justice itself. My targets so far were (1) the sense that there is a natural fit between the bilateral intuition at the heart of relational justice and the subject matter of its regulation: private law relationships; and (2) the negative argument developed by Dagan and Dorfman, suggesting that private law must address its subjects in some other capacity than the rest of the law. My point has been that there is no clear argument from the descriptive identification of the phenomenon of private, horizontal relationships to the normative claim about a bilateral normativity

"Political Reasons and the Limits of Political Authority" (2023) 29:1 Leg Theory 63. All law, including private law, can fairly, justly, and without contradiction, promote social and distributive justice in its prescriptions for such participants.

17. See e.g. Robert L Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38:3 Political Science Q 470; Murphy & Nagel, *supra* note 3 at 8-9.

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that must underpin the rules governing these relationships. Neither the fact that these are *relationships* nor the fact that we are dealing with *private* law justifies a narrow bilateral normative focus, which would trace back our private law duties to notions of bilateral, relational justice.

4. Reciprocal respect for self-determination

We have seen that there is no compelling argument to show that relational justice should be the primary value underpinning private law rules. But is it yet a valid consideration, one that should inform the regulation of private law relationships alongside others? The principle of relational justice demands reciprocal respect by parties for each other's self-determination and substantive equality. Are these legitimate grounds for shaping (and interpreting) private law rules?

Let us consider first self-determination and self-authorship—two terms Dagan and Dorfman use interchangeably. Relational justice theory emphasises the fact that private law rights, and particularly property and contract, empower individuals to be self-authors of their life stories. From this, they argue for the importance of reciprocal respect for autonomy as a core value in private law:

> [T]he special standing conferred by the institution of property and the reliability of others' promises ensured by contract are best justified by reference to their service to people's self-determination. In other words, the justified claims of both owners and promisees are premised on their right to others' respect for their self-determination. Reciprocal respect for self-determination ... is private law's most normatively defensible foundation.... Attempts to enlist property or contract in the service of arrangements that undermine relational justice must be treated (at least prima facie) as *ultra vires*. They abuse the idea of property/contract by invoking it in defiance of its own legitimacy. (46-47, footnote omitted; see also 126, 144)

This position is different from the traditional Kantian view, in which private law rights serve to secure the equal independence of parties from each other so that neither becomes subservient to the other.[18] According to the traditional view, private right does not make parties reciprocally responsible for respecting each other's self-determination (as it does in the relational justice account). The suggestion from Dagan and Dorfman is that such reciprocal respect is demanded by the very same values that make private right legitimate. If what legitimises property and contract is their contribution to individual self-determination, people should not be allowed to use them in a way that undermines self-determination. According to relational justice theory, people who use these legal rights contrary to their underpinning values are using them *ultra vires*.

It is not clear that the framework of *ultra vires* action is appropriate for describing relational justice's claims. Traditional accounts of equity are sometimes based on something akin to an *ultra vires* logic concerning how people

18. See Ripstein, *supra* note 6 at 42-50.

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may not use their rights. Alan Brudner, for example, argues that equitable doctrine prevents the enforcement of private rights when they are *used* as an instrument for subverting people's autonomy.[19] But this is not relational justice's claim. The question Dagan and Dorfman address is not how private rights may be used but what the normative grounds for determining private rights should be. This is a more ambitious position than that of Brudner, who, in his own work, argues against what he calls the "tyranny of equity"—that is, accounts that see equitable considerations as appropriate for determining the content of formal right in the way that relational justice does.[20]

Relational justice's actual argument is not about the limits imposed on the *use* of private rights. Rather, it is a purposive interpretation of private law rights centred on the facilitation of self-authorship. The claim is that private law must provide rules of reciprocal respect for self-authorship within private law relationships because self-authorship provides the ultimate justification for the very existence of private law rights. This argument, however, involves a non-sequitur.

For the most part, one can accept the argument's initial premise. Property and contract do empower people to make choices about their lives, and one important value that is served by this is the increased capacity for self-authorship. One may even accept that this empowerment is a core function of private law in a liberal society. A liberal polity cares about individual self-determination, and it is plausible to claim that it should ensure that individuals have a moral space in which to be meaningful part-authors of their lives as individuals.[21] Property and contract serve this purpose. However, acknowledging the importance of self-determination in itself—and even accepting it as the purpose of property and contract—is not the same as insisting on *reciprocal respect* for self-determination within bilateral relationships.

Consider the example of an employee who chooses to contract for employment at a low wage and under poor working conditions. Such a choice may be seen as falling short of an exercise of meaningful self-determination—that is, meaningful part-authorship of one's life story. This is so because the options available to the employee when making their choice were not adequate for self-determination to be possible. They may have been hounded by need or suffering from a scarcity of meaningful options—or both. But these obstacles to autonomy do not represent a failure of reciprocal respect internal to the relationship between the employer and employee. They are the result of societal circumstances in which resources and opportunities are not distributed in a way that provides a sufficient degree of self-authorship to all.

In these instances, the employer is neither the primary cause for the reduced self-determination of the employee nor are they the only (or primary) person

19. See Alan Brudner, *The Unity of the Common Law*, 2nd ed (Oxford University Press, 2013) at 139-40, 170-74.
20. *Ibid* at 228.
21. See Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at ch 14.

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benefitting from their cheap labour. The employee, on the other hand, is not the person whose self-determination is directly harmed by the employer's infringement. Minimum wage laws, for example, primarily help alleviate disparities in wealth and income from which groups of workers suffer.[22] They aim to address an injustice—but not a bilateral one. It is not clear at all that employing someone—who is forced by their circumstances to seek employment below the standards set by employment law—involves disrespect by an employer for anyone's self-determination. To insist that it does obscures the real injustice that the law seeks to address, and encourages the neglect of the institutional threats to autonomy found in the workplace.[23]

Dagan and Dorfman suggest that taking advantage of an employee's lack of options by contracting with them below a certain standard of protection means showing disregard or lack of reciprocal respect for their self-determination. But this is far from obvious. Rules concerning minimum wage and health and safety at the workplace are sensitive to the problems relating to the social significance of work and economic disparities noted above. Breaching them shows disregard for the duty of parties to support institutions that aim to address such social injustices. The infringement's impact on the self-determination of an actual employee (or would-be employee, who may remain unemployed if the minimal standard is met) is hard to predict in a general way. Not every employment below the standards of employment law harms or disadvantages the person the employer contracts with, and not every such contract amounts to disregard for the employee or their self-determination.

It is true that, sometimes, private actors *use* their private rights to diminish another person's self-determination directly—as in instances of undue influence, duress or other abuses of right that are addressed, under traditional accounts, by equitable doctrine.[24] However, Dagan and Dorfman would agree that these instances are not the main causes of concern for those who are worried about the impact of private law rights on individual self-determination. (ch 14) These concerns are overwhelmingly systemic. The capacity for self-authorship is a positive dimension of freedom, which ultimately depends on the distribution of opportunities and resources that create meaningful options to choose from. A particular power disparity within any concrete private law relationship—that is, between two actual parties—is not the primary cause of the unjust distribution of opportunities and resources; it is its manifestation and symptom. It is the product of conditions and problems that subsist at the societal level, not the bilateral.

It may be intuitive to think that if we are concerned about self-determination in general, it can do us no harm to insist on its reciprocal respect within relationships. However, this intuition may be misleading if the obstacles to

22. See Guy Davidov, "Distributive Justice and Labour Law" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 141 at 150.
23. *Cf* Bhatia, *supra* note 11 at ch 6.
24. See the text accompanying notes 19-20.

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self-determination are primarily societal rather than bilateral. First, it is not at all clear that the overall promotion of self-determination is served by insisting on reciprocal respect for self-determination *within* relationships. A system based on such "rules of just conduct" is still likely to lead to distributive patterns that put some in circumstances of need and scarcity of meaningful options.[25] Second, if the obstacles to self-determination are primarily societal, then what is called for is a system of legal rights and duties that removes these obstacles and alleviates social and distributive injustice. The only way a person can show respect for another's equal self-determination is by complying with such a system of rights.

And this is the point. What people truly owe each other in terms of reciprocal respect for self-determination is compliance with a just scheme of cooperation, in which every individual has the resources and opportunities to be self-determining to a sufficient degree and in which they are free from oppression, hierarchy, and other social injustices. Such compliance should not be confused with a *sui generis* bilateral normative concern internal to their relationship.

There is another familiar set of societal obstacles to individual self-determination. Oppressive socialisation can undermine people's perceptions of themselves as self-directing, worthy agents, adversely affecting their capacity for self-determination. This worry is sometimes expressed in the language of "relational autonomy," on which Dagan and Dorfman draw. (46, 253 n 40) However, 'relational' in this context is used as the opposite of 'individual'—not as the counterpoint to 'societal'.[26] The claim of relational autonomy is that we cannot make sense of autonomy in purely individualistic terms. Again, this points to the assumption of societal outlook on moral, social, and economic matters. As Catriona Mackenzie and Natalie Stoljar explain:

> Relational approaches [to autonomy] are particularly concerned with analyzing the role that social norms and institutions, cultural practices, and social relationships play in shaping the beliefs, desires, and attitudes of agents in oppressive social contexts. The second level is that of the development of the competencies and capacities necessary for autonomy, including capacities for self-reflection, self-direction, and self-knowledge. . . . The third level is that of an agent's ability to act on autonomous desires or to make autonomous choices. Autonomy can be impeded at this level not just by overt restrictions on agents' freedom but also by social norms, institutions, practices, and relationships that effectively limit the range of *significant* options available to them.[27]

This sort of concern is relevant to many private law relationships. Consider the example of residential tenancies. Perhaps it is possible to think of tenancy relations as a site of interpersonal respect for self-determination between a landlord

25. See the text accompanying note 7.
26. See discussion in Section 2, above.
27. Catriona Mackenzie & Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000) 3 at 22 [emphasis in original].

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and a tenant. But is it plausible? The self-determination problems associated with residential tenancy are, again, primarily societal. The problem is one of adequate housing not being secured for all, which forces tenants to exercise choice in a way that falls short of genuine self-authorship, and perhaps undermines notions of self-worth as well. If we are interested in the self-determination at stake in tenancy relations, we should look at the social need to secure adequate housing in a way that would allow people to exercise self-determination both in their tenancy contracts and elsewhere in their lives—in their workplace and in their other relationships, free from the hounding fear of street-dwelling and unhealthy accommodation, as well as from the internalised stigmas that come with homelessness and their impact on self-worth and self-directedness.[28] These are not bilateral considerations but societal ones.

The competition in most of the examples cited by Dagan and Dorfman—in employment law, tenancy law, consumer credit law, and so on—is not between the self-determination of one concrete party and that of another. Nor is it a problem of any single person undermining another's perception of self-worth and self-direction. These are all paradigmatic societal problems whose solutions happen to take the form of the regulation of certain relationships. As I noted in Section 2, it is easy to miss this by inadvertently switching gears from the bilateral to the societal in the context of particular legal relationships. Relational justice theory cannot merely co-opt arguments about the societal importance of structuring relations that promote tenants' or workers' autonomy—arguments that ultimately divulge the familiar normative sensibilities of social and distributive justice. For relational justice to add to these existing frameworks, it must show a bilateral dimension of justice whose logic is relevant to these relationships.

The analysis above leaves question-begging relational justice's insistence on *reciprocal, bilateral* respect for self-determination within relationships as the normative basis of private law. What is it that makes *reciprocal* respect for self-determination (rather than the promotion of self-determination *tout court*) a principal normative concern in this context? We can assume, *arguendo*, that the grounds of the legitimacy of private law are its contribution to individual self-determination, and that therefore a concern for self-determination should inform the definition and allocation of private right. But if that is the case, then the conclusions that follow are different from those of relational justice. A concern for self-determination as such entails a delineation of private rights and duties that would promote self-determination overall (and ensure its equitable distribution). Since the principal obstacles to individual self-determination are societal, a concern for self-determination requires a societal normative sensibility—not a bilateral one. Societal considerations aimed at removing these obstacles can be used to determine the rights and duties of property holders and parties to contracts in their bilateral relationships. They can determine the

28. *Cf* Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Public Affairs 266; Christopher Essert, *Property Law in the Society of Equals* (Oxford University Press, 2024) at chs 3, 7.

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terms of the bilateral relationships between employers and employees, landlords and tenants, and ordinary parties under general contract law. However, the normative grounds for such justice-oriented regulation would not be found in the innovative requirements of relational justice; they would be found in the ordinary, familiar societal concerns for social justice and the fair distribution of the resources and opportunities required for meaningful self-authorship.

5. Relating to each other as equals

A concern for the exercise of self-determination through private right, which ultimately depends on the distribution of resources and opportunities in society, defies the narrow bilateral normativity suggested by relational justice theory. But what about the other leg of relational justice: requiring reciprocal respect for each other's substantive equality? A duty to "relate to one another as substantively equal" (12) seems a more plausible starting point for a normative framework centred on values inherent in bilateral units. For one thing, it has the word 'relate' right there in the title. Can it serve as a bilateral normative basis for private law rules?

Let us return to the sophisticated argument offered by Dagan and Dorfman to explore their understanding of substantive equality. To respect another as substantively equal, explain Dagan and Dorfman, means respecting them in their particularity. This is different from the sort of equality demanded by traditional Kantian theory—the formal equality between two free choosers, considered in abstraction from their identities and differentiating features. The shift to *substantive* equality means seeing people as they are and, particularly, as bearers of constitutive features and choices that make them who they are. Not all traits or choices are constitutive in this sense:

> [Constitutive features are those that] are important in one's life story—religious, ethical, professional, and familial choices can plausibly be described in these terms. People's relationships with their loved ones or other constitutive features and choices, such as their vocation, are not on par with their preferences on mundane goods or daily services. (49)

There is an intimate connection between what the authors consider 'constitutive' choices and the value of individual self-determination. (50) Denying people the ability to live and pursue their "ground projects" (49) means compromising their ability to be meaningful self-authors of their life stories.[29] From this notion of substantive equality, relational justice theory draws two prescriptions. The first is a need to accommodate, within relationships, the constitutive features and choices of the other. Dagan and Dorfman offer the following illustration:

29. As Dagan and Dorfman note themselves, their notion of 'ground projects' is broader than the one originally suggested by Bernard Williams (48-49). *Cf* Bernard Williams, "Persons, character and morality" in *Moral Luck* (Cambridge University Press, 1981) 1 at 12. It is not clear what justifies their expansive definition.

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> [J]ust terms of interaction between an employer and an employee could entail that, to relate to one another as substantively equal, the employer should reasonably accommodate the employee's absence from work due to essential family or religious commitments. Yet, this rationale does not apply to an employee who, for example, is unavailable for work on certain days because of her *casual* interest in watching migratory birds passing through. These kinds of leisure activities are not ground-project choices, and, as such, the employer bears no responsibility for accommodating them. (51, emphasis in original)

The second prescription inferred from the commitment to substantive equality is for the rules of private law to compensate for power imbalances:

> For contractual parties to relate as equals, the terms of their interaction must reflect their relatively equal power to set such terms or (in many cases) to have reasonable expectations of safety, privacy, and relevant information to influence their setting. Identifying substantive equality with just terms in either of these ways is closely tied to self-determination, which again defines what it means to treat contractual parties as equals. (51)

For Dagan and Dorfman, then, relating to each other as equals means relating to each other as *equal, self-determining individuals* in their concrete circumstances. By respecting each other's constitutive features and choices, and by having relatively equal power to set the terms of their relationships, people can respect each other as equals in this way.

The repeated reference to self-determination in the explanation of substantive equality obscures the possible distinction between the two limbs that make up the normative core of the relational justice account. This may raise the suspicion that, in the context of relational justice theory, substantive equality is subservient to the value of self-determination and does not do much normative work in itself. This may not be the most charitable interpretation of relational justice theory—which explicitly introduced substantive equality as a separate, equal limb in its account. Nevertheless, it seems necessary to explain briefly why this interpretation—emphasising the primacy of self-determination—cannot ground a relational, bilateral notion of justice.

It is possible to understand the requirement of relating to each other as equal, self-determining individuals in the following sense: Respecting each other as equals *means* respecting people's self-determination—an important capacity that people (let us say) share equally.[30] If that is the sense of 'relating as equals', then the focus on the bilateral relationship and a notion of justice special to it seems, again, inappropriate. As we have seen, obstacles to people acting as self-determining individuals within their bilateral relationships are not primarily problems internal to these relationships. They are overwhelmingly societal, rather than bilateral.[31] Power imbalances in any

30. Assuming a common property as the basis for moral equality is notoriously hazardous. *Cf* A Silvers, "Moral status: what a bad idea!" (2012) 56:11 J Intellectual Disability Research 1014.

31. I say "overwhelmingly" since, as noted, there may also be direct ways in which people can undermine the equal self-determination of others. Under traditional accounts, these are ordinarily addressed by equitable doctrine. See the text accompanying note 24.

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concrete private law relationship are the symptom of social injustice. They are neither the fault nor the natural bilateral responsibility of any single person towards another—not even of the powerful party in a transaction towards the weaker party.

Something similar can be said about the accommodation of constitutive features and whose responsibility it is to bear their costs. We may well agree with relational justice theory that the costs of a person's constitutive features—say, their religious or familial commitment—should not be borne by that person alone. The question is whether this is a bilateral problem—between employer and employee, landlord and tenant, and so on—or a societal one. Consider the need to allow parents to spend time with their newborn. The need to accommodate such "ground projects" is broadly recognised. However, the costs associated with having children are not ordinarily caused by the employer, nor are they naturally part of their responsibility. If these had truly been duties rooted in bilateral justice, the employer might have rightly asked why it falls on them, of all people, to share the costs of their employee's ground projects and not, for example, on the employee's family or neighbours. For the reasons mentioned above, it seems much more sensible to see the cost of these accommodations as a societal problem. When it comes to the accommodation of parental leave, this is also evident in the prevalent solution: having the government shoulder the cost of accommodation.[32]

The language of 'relating to one another as equals' is naturally suggestive of a bilateral, relational demand. However, if the point of substantive equality is merely 'respecting others as self-determining individuals just like me', then given the social nature of the obstacles to self-determination, the demand is, in fact, to support societal-distributive schemes that would remove these obstacles. Despite its use of the language of relationality, 'relating to one another as equals' in this sense indicates a societal-expansive normative sensibility, not a bilateral one.

6. Social and moral ideals of equality

A more charitable reading of the requirement to relate to each other as equals would interpret the reference to self-determination more casually, in a way that leaves open what exactly is required by substantive equality. The focus, then, shifts to substantive equality as a self-standing value, relatively independent from self-determination.

What does it mean to treat each other as substantively equal? Samuel Scheffler distinguishes between different ideals emerging from a commitment to substantive equality between persons:

32. As of 2016, in all OECD member states but one—the United States—maternal leave is paid for by the government. Of the 38 OECD member states, only 9 do not pay for parental leave for fathers. See Willem Adema, Chris Clarke & Valerie Frey, "Paid parental leave and other supports for parents with young children: The United States in international comparison" (2016) 69:2 Intl Social Security Rev 29.

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> As a moral ideal, it asserts that all people are of equal worth and that there are some claims that people are entitled to make on one another simply by virtue of their status as persons. As a social ideal, it holds that a human society must be conceived of as a cooperative arrangement among equals, each of whom enjoys the same social standing. As a political ideal, it highlights the claims that citizens are entitled to make on one another by virtue of their status *as* citizens, without any need for a moralized accounting of the details of their particular circumstances.[33]

The distinction between the moral and social ideals of equality is central to the present inquiry.[34] Social egalitarianism focuses on equality in the social sense. It offers prescriptions for society that aim to rid it of the antithesis of social equality—namely, social hierarchy. Elizabeth Anderson explains:

> To be an egalitarian is to commend and promote a society in which its members interact as equals. This vague idea gets its shape by contrast with social hierarchy, the object of egalitarian critique. Consider three types or dimensions of social hierarchy: of authority, esteem, and standing. In a hierarchy of authority, occupants of higher rank get to order subordinates around. . . . In a hierarchy of esteem, occupants of higher rank despise those of inferior rank and extract tokens of deferential honor from them, such as bowing, scraping, and other rituals of self-abasement that inferiors display in recognition of the other's superiority. In a hierarchy of standing, the interests of those of higher rank *count* in the eyes of others, whereas the interests of inferiors do not: others are free to neglect them, and, in extreme cases, to trample upon them with impunity. Usually, these three hierarchies are joined.[35]

In this vision, relating to each other as equals becomes dependent, again, on societal structures. When our relationships with others are dominated by social hierarchy, we do not relate to each other as equals. The objective is, therefore, to avert these social circumstances.

Dagan and Dorfman acknowledge that their account of relational justice cannot be based on social egalitarianism. (42) For those who find the normative basis for private law rules in social egalitarianism, private right should be harnessed for the removal of hierarchies in society or, in a more positive rendering, for the creation of non-hierarchical social structures. That is not a vision rooted in relational, bilateral justice.

This insight, though, suggests a classificatory problem for the ideal of equality that relational justice theory invokes. If the equality of relational justice is not that of social egalitarianism nor an ideal of equal citizenship, then what kind of an ideal of equality does it embody? The worry is that relational justice might depend on what Scheffler's classification refers to as a "moral ideal" of equality. If that is the case, then at the heart of relational justice theory lies a moralising attitude that would conflict with its claims to offer a liberal theory of private law.

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33. Samuel Scheffler, "What Is Egalitarianism?" (2003) 31:1 Philosophy & Public Affairs 5 at 22 [emphasis in original].

34. On the political ideal of citizenship and its limited relevance to the question at hand, see *supra* note 16.

35. Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017) at 3 [emphasis in original].

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The term 'moral' in the context of the classification above is used to convey a particular meaning. The demands of social justice are also, in a sense, moral demands. What 'moral' means in the context of this typology of ideals of equality is that of bilateral, everyday morality. This is the morality that governs many of our small-scale interactions with those around us and which we ordinarily understand as rooted in equal moral worth. The structure of this moral ideal is familiar: Since we are moral equals, we can only make of others the same demands that they can make of us, demands that are rooted in whatever we take to be meaningful enough in our shared moral worth to justify limiting another's freedom.

There is an affinity between relational justice and the rules of ordinary, everyday morality that are rooted in a moral ideal of equality.[36] Consider the following example, drawn from Dagan and Dorfman's discussion of the tort law doctrine of imperilment. (93-94) According to this doctrine, after a person innocently causes harm or creates a risk to another, they may be under a positive legal duty to rescue the other or reduce the risk they have caused. Dagan and Dorfman note that American courts have explained this doctrine by invoking "the type of basic decency and human thoughtfulness which is generally characteristic of our people."[37] The authors argue that the words of the Court can be seen as reflecting relational justice intuitions—that is, a commitment to reciprocal respect for self-determination and substantive equality.

Now, something like the rule of imperilment does sound like a decent rule of action to adopt, with or without legal rights. It is the sort of thing we may teach our children to do when they innocently cause risk or harm to another. We may say: "I know it was not your fault, but once you created this hazard—however innocently—you cannot simply walk away from it." We may explain this by invoking the sort of equality and reversibility characteristic of everyday interpersonal morality. We can encourage our child to put herself in the other party's shoes and tell her that she should do unto others as she would have them do unto her. In short, we can explain it as an (ordinary, everyday) moral rule.

There is nothing wrong, of course, with following a moral rule in our private interactions. We often draw on the moral code and mores of the societies in which we live to guide us in this way. This is, perhaps, what the Supreme Court of North Dakota meant when referring to the common decency "generally characteristic of our people." Moreover, the fact that an everyday moral duty seems to overlap with a legal duty is not in itself a reason for concern. The legal duty to rescue may be justifiable on multiple grounds relating to social ordering and distribution of responsibilities in society—not necessarily to the enforcement of morals. The familiar liberal worry begins when the law is seen as a vehicle for enforcing everyday bilateral moral duties as such.

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36. Apart from the example discussed here, consider also *Relational Justice*'s account of the "standards of decency, fairness, and reasonableness" associated with the duty of performing contracts in good faith (154, adapting *Restatement (Second) of Contracts* § 205 (1981) [*Restatement*] cited in *Brunswick Hills Racquet Club, Inc v Route 18 Shopping Ctr Assocs*, 864 A 2d 387 (NJ 2005)).

37. *South v National RR Passenger Corp*, 290 NW 2d 819 at 837 (ND 1980).

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The traditional liberal view is that law—including private law—should not be in the business of enforcing ordinary moral duties.[38] For one thing, if we were to understand relational justice as an interpretation of ordinary morality, then we can expect it to serve as a fountain for interpersonal legal duties stemming from the moral ideal of equality. Allowing such a new set of legal duties into private law would mean tasking state institutions—legislatures, courts, and administrative agencies—with controlling the moral dimension of people's private interactions. It would instruct the subjects of law to expect these institutions not only to tell them what their legal rights are but also to arbitrate what is good, desirable, and decent in their relationships with others.

We might all wish to be treated by our service providers, employers, partners, and collaborators in a way that shows actual concern for us as moral equals. However, those who wish to make that into a legal requirement must remember that this means entrusting state institutions and officials with determining what that means, as well as allowing them to enforce their prescriptions. Even if we were to believe, counterfactually, that our institutions are well designed to carry out these tasks, such a radical shift in people's understanding of the authority of political institutions would be undesirable and destructive to individual moral agency as we have come to know it in liberal societies.

Dagan and Dorfman reject the idea that their theory aims to enforce ordinary moral duties. (148) They insist, for example, that relational justice—unlike everyday morality—is not concerned with people's internal motivations, only with their actions. (10, 53) However, if the source of the duties that relational justice seeks to impose through private law is the everyday moral ideal of equality, then the theory is assigning to private law a morality-enforcing role, regardless of what label is put on it. In that case, relational justice emerges not as a special dimension of justice evident in private law but as the familiar, ordinary impulse to shape private law categories to further interpersonal morality.

Other liberal theorists of private law, with similar sensibilities to those of relational justice theory, have been cautious in delineating the realms of law and morality. Joseph Raz, for example, argued that it is permissible for law to *protect* an existing moral practice—and those that rely on it—without enforcing moral rules as such.[39] Seana Shiffrin argued that private law rules should *accommodate* moral agents but not enforce moral duties proper.[40] Going further than that would mean establishing the enforcement of interpersonal moral duties as a core function of private law. To the extent that such a move is inadvertently implied by Dagan and Dorfman's account, this might be a step too far and, in any case, a step beyond the boundaries of the liberal camp.

38. For a classic discussion, see HLA Hart, *Law, Liberty and Morality* (Stanford University Press, 1963).
39. See Joseph Raz, "Promises in Morality and Law" (1982) 95:4 Harvard L Rev 916.
40. See Seana Valentine Shiffrin, "The Divergence of Contract and Promise" (2007) 120:3 Harvard L Rev 708.

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7. Conclusion

Relational justice sets out to defend an account of bilateral normativity underpinning private law, referring to the values of self-determination and substantive equality—two values traditionally rooted in accounts of societal rather than bilateral justice. Although such a transplant might be conceptually possible, its normative foundations are suspicious. For one thing, it seems to be detached from a genuinely *societal* account of justice—one which assumes society as a whole as the unit for evaluation and demands that the system of cooperation set among people be justifiable to each participant. Instead, relational justice assumes a narrow, bilateral normative focus, based on reciprocal respect for self-determination and substantive equality within each relationship. Large parts of my argument were dedicated to showing why this is an implausible vision. It may be possible for us to insist that private law should demand such local, bilateral reciprocity in respecting self-determination and equality—but why should we? Wherever this requirement of internal, bilateral reciprocity comes from, it is not from the values of self-determination and substantive social equality themselves. If we truly care about self-determination and substantive equality, we should have a system of private law that promotes these values *tout court* and on a societal scale.

My critique was tailored to the specific claims of relational justice theory and is not meant to apply more generally to the bilateral normative sensibility that is sometimes evident in private law rule-making and adjudication. My argument focused only on the egalitarian values at the heart of relational justice—self-determination and substantive equality. I argued that a concern for *these values* invites societal and political considerations of justice, not bilateral ones. If, indeed, there is a commitment to bilateral normativity underpinning private law, then it must be rooted in other values or considerations. The questions for Dagan and Dorfman, in this respect, are the same questions we must ask of every account defending bilateral normativity in private law: Where do the demands of reciprocity and bilateralism in respect for self-determination come from? What kind of substantive equality between individuals can be secured by law, apart from social and political equality?

But there is another lesson. *Relational Justice* makes a compelling case for having private law rules that promote individual self-determination and substantive equality. The fact that this sensibility cannot explain the bilateral normative focus evident in parts of private law does not diminish the force of this normative insight; it is only that for private law to serve these values, it must be made more sensitive to societal considerations of justice. There are good reasons to think that parts of private law are already being shaped by such social justice considerations, introduced mainly by democratic processes that increasingly shape this part of modern law.[41] This development, however, may well be antithetical to the

41. See e.g. Arie Rosen, "The Role of Democracy in Private Law" in Paul B Miller & John Oberdiek, eds, *Oxford Studies in Private Law Theory: Volume II* (Oxford University Press, 2023) 211.

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theory of relational justice and to the intuition of bilateral normativity, which it expresses and defends.

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