

# PRIVATE LAW AND THE EMBEDDED PERSON

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## I. INTRODUCTION

Private law is the law that governs our horizontal interactions in a variety of social settings – the market, the workplace, the neighbourhood, the road – where we encounter other persons in our capacity as persons rather than as citizens or co-citizens. Identifying the conception of the person that underlies or should underlie its prescriptions, therefore, is key to any viable account – explanatory, justificatory, or reformist – of private law. The conveners of our conference remind us that this is a challenging task for several reasons and, in what follows, we focus on the three that seem to us fundamental. The first and the one they most emphasize is the emergence of two robust bodies of law, one dealing with employment/labour contracts and the other with consumer contracts. The significance of these legal corpora, so they claim, is that the subject or the image of the person presumed in them differs from the canonical subject of private law. The two other reasons reflect the increasing impact of human rights law – notably, the idea that human dignity sets private law's "red lines" as well as the prescription of non-discrimination – and the growth of private law interactions across borders, which purportedly put pressure on private law's "unity of the person" idea.

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Our conveners have apparently chosen to address these developments as a series of disparate challenges increasingly fragmenting the person of private law. Thus, in this view, the worker, the consumer, or the “global citizen person” are the offspring of the traditional person of private law and our task in this conference is to anticipate further variations likely to be added to this increasingly split and disharmonious field. And yet, against this trajectory of fragmentation that we consider briefly in Part II, our conveners also hint – or at least this is how we read their synopsis – at an alternate way of facing these challenges, resting on the “philosophical foundations of private law” as “a self-standing discipline,” which imply a “revised concept of the person” from within and offer a solid premise for “interpersonal justice.”

According to the latter approach, the new developments may highlight previously discerned flaws in what conventional wisdom regards as the image of the person in private law, which triggered its rethinking. But although the role of these flaws in prompting the reexamination of private law may be causally important, this view argues it was normatively – and maybe also descriptively – required in any event, since the accepted view was neither conceptually/descriptively necessary nor normatively defensible. This is the approach we take in this Essay. Private law, we argue, is the law governing (and at times, indeed more often than usually appreciated, constructing) our horizontal, personal interactions in a variety of social settings. This means that private law is the law of the embedded person.<sup>1</sup>

This claim, which we present in Part IV, needs to be contrasted first with three competing – and more familiar – views that identify “private” with, respectively, the *dissociated person*, the *executive agent*, and the *civic person*. The first view, which probably reflects the traditional account of private law’s subjects, is associated with the strict (Kantian) division of institutional and moral labor between private law and public law. The second, antithetical view, underlies the – otherwise very

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<sup>1</sup> As we hint above and elaborate below, the embeddedness of the embedded person is by no means natural, inescapable, or deterministic. *Contra* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008). Quite the contrary: it takes people’s agency seriously and, at its best, enhances their autonomy and equal standing in relation to others.

different – positions of the economic analysis of law and the left-leaning critics of liberalism and legalism. Finally, the third approach to private law smooths the rough edges of the first view by insisting that, in a democracy, citizens cannot relinquish their civic duties even when interacting in their private capacity and, therefore, they must respect the human rights of others.

The critical examination of these three prevalent approaches in Part III creates the normative space needed for elucidating our own competing understanding. Private law governs people who are embedded in their various interaction settings, implying they must not be approached as dissociated individuals. Moreover, private law neither reduces individuals to the role of executive agents of the state nor derives their mutual obligations from any civic duties they might (or not) owe to their compatriots.

The consumer and the worker may be the heroes of momentous developments in recent decades but they are not particularly special; they are no different, for example, from the neighbor or the pedestrian. The market, the workplace, the neighbourhood, the road – like many other social loci – are all partly constituted by the law governing our horizontal interactions, namely, private law. Private law is the law of the embedded person because it necessarily addresses the human condition of interdependence and the fact of personal differences that, as they should, affect the basic rules of human interaction. Moreover, many private law conceptions and doctrines not only respond to the social settings that their subject is embedded in but proactively participate in the constitution of these settings. In the many settings where private law's doctrines are (at least partly) power-conferring rather than merely duty-imposing, the function of private law is both constructive and prospective.

Subjects of private law, then, act in a legally structured universe that turns them into embedded persons. The implication, we argue, is that a legitimate – let alone an appealing – private law should proactively seek to empower people's self-determination. Furthermore, it should construct these settings in compliance with the rule fitting the embedded person: reciprocal respect for self-determination and substantive equality, which we have termed relational justice.<sup>2</sup>

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<sup>2</sup> See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

## II. A FRAGMENTED PERSON?

But now we are getting ahead of ourselves, so let us retract and start with the possibility of a private law's fragmented person. This trajectory, writes Hans Micklitz, emerges from the legislation of "status-related rights," which "introduces the distinction between the normal person and persons with particular rights" who, as noted, are the employee and the consumer: "Labour law and consumer law are linked to the status of the employee and the status of the consumer and both legal fields put great emphasis on state interventions."<sup>3</sup>

The employee is the beneficiary of the legal course followed in the first half of the twentieth century, when "the social question" was confronted by legislating "special private law rules and regulations" that were "'outsourced' from the grand codifications" of Germany and France. They thus left intact the "theoretical and ideological structure of the two civil codes," so that "[c]ontract not status continued to govern private law relations." A similar development took place in Europe regarding consumers after World War II when, "[b]ased on the experience in the shaping of labour law, urgent problems were delegated to special consumer protection legislation" typified by "reversal of rule and exception [and] a rediscovery of the political in civil law." Initially, consumer law remained "an autonomous subject" that exists "independently of the civil code," so that "[t]he basic structure of private law, based on contract instead of status, remained untouched." But gradually, and in some cases (notably Germany's) quite grudgingly, consumer law was integrated into private law. To be sure, "the concretization of the consumer as a legal subject [still] faces conceptual and theoretical difficulties," but "[w]hat was at the time a rather revolutionary trisection of a status-based private law has become to a large extent reality."<sup>4</sup>

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<sup>3</sup> Hans-W. Micklitz, *Person, Civil Status and Private Law*, in *NEW PRIVATE LAW THEORY: A PLURALIST APPROACH* 341, 341, 354 (Stefan Grundmann, Hans-W. Micklitz, and Moritz Renner eds. 2021).

<sup>4</sup> *Id.* at 345-46, 355-57.

Although this description is probably commonplace, we find it problematic. Consider first its implicit conceptions of status and contract. If this dichotomy rests on Henry Maine's famous discussion re the "uniform" movement of "progressive societies" towards contract, status is strictly understood as innate, comprehensive, and inalienable,<sup>5</sup> a definition fitting neither employees nor consumers.<sup>6</sup> Even more significant for our purposes is the understanding of contract that is implicit in this familiar account – a wholly open-ended, empty framework, indifferent to substantive inequality between the parties as well as to the identitarian nature of their relationships. This understanding may fit conceptions of contract grounded in the corrective justice view of private law as the bastion of reciprocal respect for independence (or negative liberty) and formal equality. Historically, it is associated with the will theory of contract and, in current scholarship, with the transfer theory of contract,<sup>7</sup> but as we show elsewhere in some detail, it hardly fits contemporary contract law.

Briefly, for contract to be an empty framework, *all* contractual obligations must be strictly grounded in explicit or implicit undertakings by the parties, but this picture is incompatible with the extensive default rules apparatus that typifies modern contract law. Similarly, strict adherence to corrective justice casts doubt on a significant subset of the canon of contract's justice-oriented rules, which go well beyond the demands of reciprocal respect for independence and formal equality. Consider, for example, law's deviations from the laissez-faire mode of regulating the parties' bargaining process, as in the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include affirmative duties of disclosure. Or modern rules dealing with unilateral mistakes,

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<sup>5</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 99-100 (J.M. Dent & Sons Ltd. 1917) (1861). *See also* Carleton Kemp Allen, *Status and Capacity*, 46 L. Q. REV. 277, 286 (1930).

<sup>6</sup> *See* Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY* 51, 52-60 (Paul B. Miller & Andrew S. Gold, eds., 2016); Katharina Isabel Schmidt, *Henry Maine's 'Modern Law': From Status to Contract and Back Again?*, 65 AM. J. COMP. L. 145, 166-67 (2017).

<sup>7</sup> *See respectively, e.g.,* DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* ch12 (2001); PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* (2019).

duress, anti-price-gouging, and unconscionability. Or key rules in the life of a contract epitomized by the duty of good faith and fair dealing, which shield the parties from the heightened interpersonal vulnerability engendered by contract performance and solidify a conception of contract as a cooperative venture.<sup>8</sup>

Therefore, the conventional description of work law or consumer law as exercises of “state intervention” is deeply misleading. True, these doctrines set up the rules of the game in a specific social setting. But so do the specific rules that govern, for example, the tort responsibilities incumbent on owners of lands or cars, on sellers of goods, or providers of services. Both contract law and tort law prescribe, together with the residual rules applicable outside our familiar social categories, more particularized sets of rules that apply, and indeed regulate, these categories. Especially in liberal polities, these residual rules are critical as means for law to develop new categories and also as freestanding and thus not necessarily conventional interaction frameworks. But *both* the socially familiar and the more idiosyncratic settings do rely on a robust legal infrastructure<sup>9</sup> and, in both, law prescribes rules that do not merely abide by the parties’ will or preserve their independence.

This continuity between work law and consumer law on the one hand and residual (more typically called “general”) contract law<sup>10</sup> on the other implies not only that the story of gradual fragmentation misrepresents the role of law. It also suggests that this narrative relies on an inadequate image of the person – the “normal person” – who is the main character of private law. This image, we suspect, is that of the “dissociated” person at the focus of private law’s traditional account. That traditional account is the particularly dominant view of private law,

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<sup>8</sup> See Hanoch Dagan, *Two Visions of Contract*, 119 MICH. L. REV. 1247 (2021); Hanoch Dagan, *The Liberal Promise of Contract*, in PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER’S PRIVATE LAW THEORY 315 (Haris Psarras & Sandy Steel eds., 2022); Hanoch Dagan & Avihay Dorfman, *Justice in Contract*, 67 AM. J. JURISP. 1 (2022); Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89 (2022).

<sup>9</sup> See Hanoch Dagan et al., *The Law of the Market*, 83 L. & CONTEMP. PROBS. i (2020).

<sup>10</sup> On work law, see Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 23 THEORETICAL INQ. L. (2022); on consumer law, see Dagan & Dorfman, *Precontractual*, *supra* note 8.

which resists the fragmentation of the image of the person at its center although, as noted, it is not the only one. In Part III, we discuss three views of private law that reflect different conceptions of the person. While each one captures a major truth about private law, all are deeply problematic. Studying both the insights and pitfalls of these accounts of private law is intrinsically valuable and consequential for developing our own – the law of the embedded person.

### III. THREE DISAPPOINTING ALTERNATIVES

#### *A. Private Law and Dissociated Persons*

The traditional account of private law, which Micklitz's narrative about the fragmentation of the person of private law presupposes, is most forcefully elaborated by the Kantian (and corrective justice) theories of the Toronto school of private law. This school deserves great credit for resisting the tendency of previous theorists to perceive private law as the continuation of public law by other means, an aim that was attained by highlighting the normative significance of private law's relational form. On this front, we join forces. What matters to us at this stage, however, is the substantive aspect of the Toronto school, which offers a clear articulation of the dissociated person as private law's main character. On that front, we part ways.

For Kantians, the interpersonal respect we owe one another as free and equal persons means respecting each other's *abstract* personalities. The "particular features – desires, endowments, circumstances, and so on – that might distinguish one agent from another" are, as Ernest Weinrib claims, "irrelevan[t]."<sup>11</sup> By virtue of their capacity to set and pursue ends, private individuals are free to deploy their person and property without subordination to the choices of others. Private individuals, moreover, are equal by virtue of having this capacity. They are thus "purposive beings who are not under duties to act for any purposes in particular,

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<sup>11</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 82 (1995).



no matter how meritorious"; as such, they are subject to "a system of negative duties of non-interference with the rights of others" – namely, private law.<sup>12</sup>

Indeed, Kant's theory of private law builds exclusively on one underlying ideal: freedom cast in terms of "independence from being constrained by another's choice."<sup>13</sup> As Arthur Ripstein clarifies, independence implies that "each person is entitled to be his or her own master . . . in the contrastive sense of not being subordinated to the choice of any other particular person." Accordingly, independence requires that no one gets to tell you what purposes to pursue and, therefore, is "not compromised if others decline to accommodate you."<sup>14</sup> Quite the contrary: "Because the fair terms of a bilateral interaction cannot be set on a unilateral basis, considerations whose justificatory force extends only to one party are inadmissible."<sup>15</sup>

The principle of independence and, accordingly, the requirement that the terms of people's interactions manifest the formal equal independence of each interacting party, underlie modern Kantian accounts of private law's three building blocks: property, contracts, and torts.<sup>16</sup> Yet, it is not solely Kantian. Alan Brudner, a modern Hegelian, refers to private law as the "law for persons regarded as ends outside of human association – as morally self-sufficient atoms."<sup>17</sup>

Similarly, a recent major book on private law by a Toronto school scholar – Peter Benson's contract theory – celebrates a conception of "juridical autonomy," which "presupposes particular notions of freedom and equality specified in terms of the innate mutual independence of all persons in relation to others." This

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<sup>12</sup> ERNEST J. WEINRIB, CORRECTIVE JUSTICE 11 (2012).

<sup>13</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS 63 (Mary Gregor trans., 1991). *See also* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL THEORY 35 (2009).

<sup>14</sup> RIPSTEIN, *supra* note 13, at 4, 14–45.

<sup>15</sup> WEINRIB, *supra* note 12, at 36.

<sup>16</sup> *See* Dagan & Dorfman, *supra* note 2, at 1404–05.

<sup>17</sup> ALAN BRUDNER, THE UNITY OF THE COMMON LAW 353 (2d ed. 2013). *Cf.* RONALD DWORKIN, LAW'S EMPIRE 296, 299 (1986) (claiming that, insofar as the conduct of private individuals is concerned, the liberal-egalitarian and libertarian conceptions of equality are similar).

conception emphatically excludes any reference to the parties' self-determination, namely, their "forming and rationally pursuing a conception of their substantive good." It likewise rejects any consideration of substantive equality, subscribing instead to a formal equality wherein "the claims parties make in relation to each other must be absolutely the same." In this view, then, contractual fairness has no business protecting particular categories of individuals, be they "the economically or cognitively disadvantaged, the commercially inexperienced or the emotionally vulnerable," nor should it "aim to redress differences in bargaining power per se or unfair and unequal starting points" or "ensure the satisfaction of needs, however urgent."<sup>18</sup>

This view of private law and its person is to be rejected on three types of grounds: descriptive, jurisprudential, and normative. Descriptively, as we hope to have shown across a wide range of private law doctrines, *pace* the Toronto school, private law is committed to enhancing a capacious vision of autonomy rather than merely safeguarding independence. Indeed, it is not content with formal equality but aims at positively establishing substantive equality. Numerous doctrines of private law – including long-established common law rules that require potential tortfeasors to accommodate the relevant constitutive features of their victims, help solve collective action problems, or oblige recipients of mistaken payments to reverse mistakes they are not responsible for – follow directly from the injunction of reciprocal respect for self-determination and substantive equality.<sup>19</sup> Excluding these rules from private law and renaming them as public law or regulatory interventions entails a vast excision, leaving little of what usually passes for private law as deserving this title.

But the problems with the traditional view are even deeper. Not only does modern private law have little in common with its imaginary counterpart and with

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<sup>18</sup> BENSON, *supra* note 7, at 188, 373, 388, 468-69. *See also Id.*, at 8, 24, 26-27, 186, 188, 352, 364, 367-69, 371-72, 377-78, 385, 387-88, 393-94, 396, 470.

<sup>19</sup> *See* Dagan & Dorfman, *supra* note 2, at 1430-59. For contract, torts, property, and restitution, see respectively note 8 and accompanying text; Avihay Dorfman, *Relational Justice and Torts*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 321 (Hanoch Dagan & Benjamin Zipursky eds. 2020); HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 131-46 (2021); Hanoch Dagan, *Autonomy, Relational Justice, And Restitution*, in RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION 219 (Elise Bant et al. eds., 2020).

the dissociated self at its centre. One profound difficulty relates to the role of law, which the Toronto school marginalizes and indeed obscures. This jurisprudential point is crucial for our account of the embedded person and is discussed in Part IV below. As for the normative pitfall of private law's traditional view, we deal with it here because of its embrace of the dissociated person.

A law of dissociated persons may be well-fitted to a world of (to use Brudner's words) morally self-sufficient atoms but this only means it is ill-fitted to the social world as we know it. Consider two facts about our human condition – our interdependence and our differences. Both these facts indicate that the law governing our interpersonal relationships has profound implications for our ability to lead a successful life. They suggest that a law that authorizes people to ignore others' right to self-determination and substantive equality dramatically – and indeed tragically – undervalues the significance of interpersonal relationships to our conceptions of the good life. They thus explain and indeed justify, the expulsion of the dissociated person from modern private law.

Our practical affairs are deeply interdependent. They are replete with interactions with others that range from fairly trivial transactions to the most crucial relationships in our lives related to family, friends, work, and positions we occupy in society. These interactions can be voluntary or involuntary. Thus, we invite others or are invited by others to join projects, be it because social interaction is critical to the project or because enlisting others is instrumentally helpful. Our projects could also affect the legitimate interests of others, including those beyond the privity of such joint endeavours. Indeed, the ability to lead one's life, and certainly to do so successfully, is influenced at almost every turn by both of these forms of interaction. Our conception of private law cannot renounce the responsibility of private law to facilitate these interactions lest it compromises the significance of interpersonal relationships in people's lives.

The significance of our standing vis-à-vis others also implies that the terms of interactions arising under conditions of interdependence should be assessed as just or unjust. Given that we all constitute our distinctive personhoods against the background of our peculiar circumstances, public law cannot be charged with sole responsibility for addressing our personal differences since private law cannot contend with the requirement that people respect each other as independent and

formally equal individuals. Indeed, quite the contrary. Given personal differences and the significance of interdependence, private law must not specify the terms of interpersonal interactions in complete disregard of people's circumstances and their constitutive choices. As opposed to brute preferences, these choices pertain to their ground projects insofar as they are crucial for the interacting parties' ability to act as self-determining agents.

Therefore, any polity that pays heed to the commitment to individual self-determination and substantive equality cannot approach these values as irrelevant to our interpersonal relationships. These values are crucial to both our horizontal and our vertical interactions, although they entail different implications for each of them. Since a just interpersonal relationship must entail reciprocal respect for each party's claim to self-determination, a credible conception of interpersonal justice cannot be exhausted by the duty of non-interference. At times it may require law to proactively facilitate people's cooperative efforts and furthermore, it may impose certain affirmative duties of accommodation founded on such a robust notion of interpersonal respect.

### *B. Private Law and the State's Executive Agents*

If the dissociated person is expected to see others merely as sources of normative constraints over her freedom to set and pursue ends, the executive agent is required to incorporate others' needs, preferences, and interests into her ends as if they were her own. The executive agent is the hero of those who see private law as simply one possible form of public allocation and regulation – "public law in disguise."<sup>20</sup> The person of private law in this view is thus no different from the duty-bearer in public law. Like the public official, the executive agent should act to further the public interest writ large.

Typically, the executive agent is implicit in views that perceive the division of labor between private and public law as purely conventional. Many of these views are espoused by critics of the traditional conception of private law, who perceive it as a sheer delegation of public power, a legitimating device that only serves to

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<sup>20</sup> Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1-2 (1959).

obscure law's many injustices.<sup>21</sup> But a similar – and in a sense clearer – approach characterizes the economic analysis of law that, in many other contexts, is viewed as the nemesis of critical theory. As Alon Harel notes, law and economics theorists tend to be indifferent toward – if not impatient with – any effort to differentiate between private and public law. Their basic approach is that “[t]here is work to be done and it ought to be done in the best possible way,” with the choice between private or public agents a “pragmatic” one that “depends on a comparison between the expected efficacy” of these possible agents “in performing the job.”<sup>22</sup>

On its face, presenting *homo economicus* as an executive agent seems confusing, if not ironic. Rather than pursuing everyone's interests, *homo economicus* is said to choose and behave *without* regard for anyone else's interests. But the *reason* for sanctioning (at times even valorizing) this attitude, as Adam Smith and other of its supporters tell us, is that people's rational pursuit of their subjective self-interest, narrowly defined, would yield the greatest good for the greatest number. The invisible hand is understood as a superior *social* mechanism of allocation given the expected failings of central planning, which faces unsurmountable difficulties in obtaining and processing pertinent information. The implication, however, is that all private law rights are necessarily contingent on a comparative institutional analysis. For lawyer economists, a market failure is often a valid reason for eliminating such rights. Similarly, new technologies that might eventually solve the epistemological and computational difficulties the market is supposed to overcome, could justify obliterating both property rights and freedom of contract.<sup>23</sup>

The resulting despotic world is reminiscent of familiar liberal lessons. Lawyer economists are right when joining critical thinkers who repudiate the dissociated

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<sup>21</sup> Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987).

<sup>22</sup> Alon Harel, *Public and Private Law*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 1045, 1050-51 (Markus Dubber & Tatjana Hörnle eds., 2014).

<sup>23</sup> See Hanoch Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. 1289, 1295-97 (2019).

person of traditional private law theory. But the idea that society should “maximize the net balance of satisfaction taken over all of its members” conflates, as John Rawls famously argued, “all persons into one through the imaginative acts of the impartial sympathetic spectator,” and thus fails to “take seriously the distinction between persons.”<sup>24</sup> People are not passive consumers or carriers of well-being, and their choices and interactions matter because they are part of their individual lives. Bundling people’s property rights and their freedom of contract into one collective welfare package could lead to the nullification of their autonomy and dignity. The subjects of the canonical economic analysis of law are definitely executives, but not so definitely individual persons.<sup>25</sup>

This may explain why some versions of the economic analyses of private law can be read as grounded in a commitment to people’s self-determination (although in most of them, this commitment is at best implicit<sup>26</sup>). A similar concern about effacing individuals while promoting the common good may likewise explain why some critics of the traditional conception of private law (at least those opposed to its sharp disjunction between the fundamental normative principles that apply to people and those that apply to institutions) do not dispute the distinction between our private and our collective responsibilities.<sup>27</sup>

### *C. Private Law and the Good Citizen*

This last observation brings us to the good citizens of private law who take these collective responsibilities seriously, as indeed they should according to Elizabeth Anderson, whose influential work on “democratic equality” is often

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<sup>24</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 23-24 (rev. ed. 1999).

<sup>25</sup> As the text implies, more modest versions of the economic analysis are not vulnerable to this critique and can, and indeed should, play an important role in legal theory. See Hanoch Dagan & Roy Kreitner, *Economic Analysis in Law*, 38 YALE J. REG. 566 (2021).

<sup>26</sup> For an example where this commitment is explicit, see Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 19, at 22.

<sup>27</sup> See Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251 (1998); G. A. COHEN, *RESCUING JUSTICE & EQUALITY* 10, 375 (2008).

referred to as relational egalitarianism.<sup>28</sup> Egalitarianism, argues Anderson, requires private individuals to bear direct responsibility for realizing the demands of justice given that they are citizens of a polity, and the democratic ideal covers not only political engagement (such as voting and protesting against the government) but also requires social relations of equality in and around the institutions of civil society (such as public accommodation and the workplace).<sup>29</sup> Thus, in her thorough analysis of racial segregation (including in the housing context), Anderson articulates a vision of social integration comprising the citizens of a democratic state, including its permanent residents.<sup>30</sup>

This shift, from the dissociated person of traditional private law to the civic person required to take responsibility for the justness of the polity she belongs to, closely aligns with the “materialization” path of European (especially German) private law, famously theorized by Jürgen Habermas. While traditional private law sought to guarantee the negative freedom of legal subjects, its application, according to Habermas, requires a more fundamental right – “equal treatment according to norms that guarantee substantive legal equality.” It thus introduces “a new category of basic rights grounding claims to a more just distribution of social wealth (and a more effective protection from socially produced dangers).” But these basic rights also have a “radiating effect” or “third-party effect”: they prompt changes “in the classical areas of property law and contract law.” Thus, materialization represents a “paradigm shift,” from a facilitative “framework for private activity” that is “limited only by the contingencies of the quasi-natural social situation” to “the paternalistic provisions of a superior political will that, attempting to influence and shape these social contingencies, intervenes with the intention of enhancing the opportunities for an equal use of legal freedoms.”<sup>31</sup>

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<sup>28</sup> Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999). Another seminal piece is Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003). See also KASPER LIPPERT-RASMUSSEN, RELATIONAL EGALITARIANISM: LIVING AS EQUALS (2018).

<sup>29</sup> Anderson, *supra* note 28, at 317.

<sup>30</sup> See ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 89, 94-95 (2010).

<sup>31</sup> JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 391, 396-97, 400-03, 405-06 (1996). Habermas, to be sure,

Like the two other approaches surveyed above, this civic understanding of the person of private law offers a noteworthy insight. Because all citizens, as John Rawls argued, are duty-bound to support just institutions,<sup>32</sup> they may not always be exempted from this obligation even in their capacity as individuals.<sup>33</sup> This plausibly means that our vertical rights – the fundamental rights we hold vis-à-vis the state – may, legitimately, be slightly somewhat extended to the private sphere and invoked against private actors as well. But the civic person, though certainly to be welcomed into the drama of private law, cannot be its central figure.

One reason is that, although all citizens are subject to civic duties, introducing material justice into private law seems to impose the *disproportionate* burden of a *social* problem on a private actor whose negative (or republican) liberty is now constrained. The post-materialization of private law, therefore, even if democratically prescribed,<sup>34</sup> directly confronts the core justificatory query of the law of our interpersonal relations: “Why me?” Why should *I* incur a significantly higher burden than all others in the name of *social* justice?<sup>35</sup> The familiar answers are not always adequate since – barring a few exceptions – the duty-ower is not a

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is critical of materialization per se and suggests democracy as a redeeming approach. ID., at 398, 407-09, 426-28. But as we hint below (*supra* text accompanying note 34) we do not think that democracy alone can be the solution.

<sup>32</sup> See RAWLS, *supra* note 24, at 293-94.

<sup>33</sup> The republican ideal of law further demands from all members of the political community a measure of “civic virtue” or “good citizenship.” The republican tradition, according to Pettit, is “primarily distinguished, not by its distinctive conception of liberty, and not by its image of the form that constitutionalism and democracy and regulation should take, but by its insistence on the need for civic virtue.” PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 245 (1997).

<sup>34</sup> The text should not be interpreted as degrading democratic prescriptions. Quite the contrary: it follows a happy conception of democracy that addresses people’s right to justification – Cf. RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* 188-228 (Jeffrey Flynn trans., 2011) – and thus refines its specific content in the pertinent (private law) context.

<sup>35</sup> See Hugh Collins, *The Challenge Presented by Fundamental Rights to Private Law*, in *PRIVATE LAW IN THE 21ST CENTURY* 213, 223, 234-35 (Kit Barker et al. eds., 2017).



public (or even a “quasi” public) official and, in many cases, does not enjoy disproportionate market power or provide some essential good.<sup>36</sup>

Moreover, something is fundamentally troubling in the grounding of private law responsibilities in our civic capacity. A citizen-based duty owed to one's fellow citizens creates the false impression that the wrong done by private discrimination, for example, is fundamentally that of disrespecting another's privileged status of national citizenship. But the thought that this wrong is mediated by people's affiliation with a given polity or nation-state is counterintuitive. The persons of private law do not interact as citizens in (or permanent residents of) the state but as private individuals *simpliciter*.<sup>37</sup> A worker is not necessarily a member of the same polity as her employer nor do consumer and producer/service-provider or, for that matter, pedestrian and driver, share membership in the same political community. These observations are not merely statistical or empirical but make a normative point: private-law rights and duties are not grounded in citizenship or membership in a political community.

The difference between the civic person and the executive agent implies that supporters of the former do acknowledge that the rights and obligations of private law are neither dependent nor founded on the common good of the pertinent collective as such. Rather than rethinking the persons of private law from the exogenous perspective of the constitutional order to which they belong then, we need to reimagine them within the most charitable interpretation of private law as a domain of interpersonal justice. This brings us – finally – to the embedded person: the hero of a liberal (properly understood) private law, grounded in the relational justice maxim of reciprocal respect for self-determination and substantive equality.

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<sup>36</sup> Compare TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 201 (2015). For a more promising route, see JEAN THOMAS, PUBLIC RIGHTS, PRIVATE RELATIONS (2015). But the crucial step of Thomas's analysis implies that she ends up reinventing the embedded person of private law. See Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361, 267-68 & n29 (2018).

<sup>37</sup> See Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171, 185-86 (2018).

#### IV. PRIVATE LAW'S EMBEDDED PERSON

We hope we have established that the three conceptions of the person of private law considered so far – the dissociated person, the executive agent, and the civic person – are all unacceptable. Our critical analysis of these alternatives, however, yields important lessons. The major pitfall in viewing the person of private law as an executive agent or a citizen is that both these views discard a core insight of the traditional approach – private law deals with quotidian interpersonal interactions that neither need to implicate nor are tied to our capacities as citizens or to the normative (or other) well-being of the polity as a whole. The reverse side, of course, is that these approaches are correct in rejecting the indefensible account of private law's normative foundations endorsed by the traditional view. The moderate voices supporting the executive agent approach sensibly look for a middle ground between the unappealing ideal of formal freedom and equality and the despotic vision of full collectivization. The civic person approach correctly insists that it is not enough for the state to respect its constituents as genuinely free and equal persons. A properly liberal polity must not abdicate its responsibility for ensuring people's substantive freedom and equality in civil society as well.

Is there a way out from this tragic choice between the traditional Scylla of a normatively objectionable private law and the Charybdis unacceptable alternative of fully subordinating the justice of private law to domestic constitutions or the public good? We think that the focus of private law on social (not civic) interactions can be preserved while discarding the disappointing normative commitments of the traditionalists' dissociated person. The key to the elucidation of this happy alternative lies in refining the continuity between the jurisprudential underpinnings of private law before and after the development of work law and consumer law as robust legal fields.

This continuity thesis, as noted, is by no means conventional. Indeed, quite the contrary. Recall, for example, Habermas' discussion of the materialization process. Private law pre-materialization, in his narrative, was a "quasi-natural" bastion of negative liberty inhabited – exactly as imagined by traditionalists – by dissociated persons. Its normative rehabilitation, so the argument goes, was a "paradigm shift," effectuated only thanks to the intervention of the state

superimposing its paternalistic provisions.<sup>38</sup> Similar views on the workings of private law are widely shared among theorists. Thus, John Gardner claims that, like all law, private law's "main point" is to help "people to do what they ought to be doing anyway, quite apart from the law." Tort law in this view is about enforcing such *preexisting* norms of appropriate behavior, even though law can improve things "by rendering [them] more determinate." Gardner argues the same applies to contracts, which "exist apart from the law and are merely recognised and upheld (under limited circumstances) by the law."<sup>39</sup>

But the radical understatement of private law's role in people's practical affairs advocated by Habermas, Gardner, and like-minded theorists clashes with its particularly conspicuous role in its power-conferring sections. A good starting point when considering this issue, then, is H.L.A. Hart's famous definition of power-conferring rules and institutions. As Hart notes, beside laws that "impose duties or obligations" requiring "persons to act in certain ways whether they wish to or not," other laws – Hart discussed contracts, wills, and marriages – "provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."<sup>40</sup>

Thus, instantiating contract as a legal institution empowers people to solicit the commitments of other people, including total strangers, and insist on their performance even absent any detrimental reliance. Promisees enjoy this authority over promisors because once law renders certain types of promises enforceable, promisors are legally obligated to respect their contractual obligations and are subject to the coercive power of the law if they do not. As Hart implies, law's function here is both constructive and prospective. Contract law constructs promisees' authority: it prospectively sets up the rules of the contractual game

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<sup>38</sup> See *supra* text accompanying note 31.

<sup>39</sup> John Gardner, *Dagan and Dorfman on the Value of Private Law*, 117 COLUM. L. REV. ONLINE 179, 193-94, 197-98 (2017). The exceptional case for Gardner is trust law, for it is a genuine creature of law (equity included).

<sup>40</sup> H.L.A. HART, THE CONCEPT OF LAW 27-28 (1961).

wherein this authority is created and applied and prescribes its proper scope as well as the limits of its power. This authority is not – at least should not be – obvious (recall that it applies even absent detrimental reliance). Rather, as one of us argues elsewhere, it is premised upon, and thus circumscribed by, contract's service to people's self-determination.<sup>41</sup> Property and trust roughly share, we think, the same conceptual structure.<sup>42</sup>

An essential part of law's task in constituting these power-conferring institutions is prescribing their constitutive *terms of interaction*. These terms are not limited to the ex-post response of private law to what parties in a particular interaction have done independently of it nor do they replicate some "quasi-natural" analogue. While people in both contract and property are vested with private normative powers, law not only prescribes what types of promises and what categories of resources are, respectively, proper objects of contracts and property. It also – and necessarily – sets up the rules that circumscribe the scope of promisees' and owners' authority and thus its limitations and qualifications.

The ambition of private law's terms of interaction, then, is both constructive and prospective. Terms of interaction construct edifices of human relationships and are not merely ad hoc encounters between, for example, this or that employer and employee or seller and buyer. A constructive ambition of this sort entails a prospective one as well: private law's terms of interaction function as stage-setters, establishing preconditions for interpersonal transactions by dismantling certain entry and exit barriers, outlawing some forms of impermissible behavior, and

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<sup>41</sup> See Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 L. & PHIL. 213 (2021); Hanoch Dagan & Michael Heller, Choice Theory: A Restatement, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 19, at 112.

<sup>42</sup> On property, see Hanoch Dagan, *Liberal Property and the Power of Law*, \* CAN. J.L. & JURISP. \* (2022); Avihay Dorfman, *When, and How, Does Property Matter?*, 72 U. TORONTO L.J. 81 (2022). On trusts, see Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Private Ownership*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 339 (Andrew S. Gold & Paul B. Miller eds., 2014); Hanoch Dagan & Irit Samet, *Express Trust: The Dark Horse of the Liberal Property Regime*, in PHILOSOPHICAL FOUNDATIONS OF TRUST LAW (Simone Degeling et al. eds., 2022).

empowering parties to design their social and economic arrangements by forming rights and obligations.

In the vast areas of private law that, above all, are empowering, law *structures* our interpersonal interactions. Insisting that these structures should be just cannot plausibly be termed “intervention” (as traditionalists and their critics often call it). If tax is law’s primary *locus* of distribution, private law is its main scene of *predistribution*.<sup>43</sup>

What about the duty-imposing sections of private law? Are not at least these sections shaped by “the contingencies of the quasi-natural social situation” as Habermas and Gardner suggest? Some sections of tort law obviously are not since the aim of their duty-imposing rules is to vindicate people’s contract and property rights, which means that they either piggyback on or participate in the construction of the pertinent terms of interaction.<sup>44</sup> But even the other (core) sections of tort law, which vindicate people’s innate rights – say to their bodily integrity and good name – do not simply follow morality’s preexisting norms of appropriate behavior. One key role of any tort duty is to delineate an arena of permissibility so that even risk-creators, who owe a duty of care, are *entitled* to place others in harm’s way insofar as they are discharging the duty. More importantly, tort duties are often used to facilitate valuable activities, including by encouraging risky behavior (say in the case of investigative journalism or the case of the business judgment rule).<sup>45</sup>

We all certainly share Gardner’s intuition that what he calls “raw morality” and “raw moral rights and duties”<sup>46</sup> often provides a secure starting point. A critical contribution of law to morality, then, is to render an “already-constitutive

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<sup>43</sup> Cf. Elisabeth Jacobs, *Everywhere and Nowhere: Politics in Capital in the Twenty-First Century*, in AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY 512, 515-18, 24-31 (Heather Boushey et al. eds., 2017).

<sup>44</sup> Cf. Avihay Dorfman, Conflict between Equals: A Vindication of Tort Law (unpublished manuscript).

<sup>45</sup> *Id.* at ch. 5.

<sup>46</sup> John Gardner, *What Is Tort Law For? Part II: The Place of Distributive Justice*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 335, 338-39 (John Oberdiek ed., 2014).

(set of) norms" more determinate.<sup>47</sup> Given that all private persons have basic rights to a good name and bodily integrity, core aspects of the rights protected by such torts as battery, defamation, or negligence can be identified quite apart from the law, and yet they often require legal specification. But even regarding these rules, Gardner understates law's significance by eliding a vital distinction touching on the epistemic role of law in giving effect to moral duties. To say that law's added value applies only at the margins as if tort law were merely reporting what counts as wrongdoing is quite different from saying that law turns crude moral prescriptions into fully fleshed norms of respectful interactions. The distance between the moral requirement to refrain from punching someone's nose and the mature tort of battery, with all its doctrinal complexities, comes closer to the latter pole. And so does much of tort law. Tort law is often needed to decide what behavior counts as appropriate interpersonal respect as well as whether victims have legal rights (and injurers correlated duties) to begin with.

Notice where we end up: private law, even in its most conventional rendition, is in the business of structuring our interpersonal interactions in the various settings where we encounter one another as private individuals. It sets the rules of the various games that constitute our social life. Although these rules can, they certainly need not follow the traditionalist-cum-Kantian mold of noninterference and, as noted, many of them do not. Indeed, given that the person of private law is embedded in *legally* structured frameworks, it seems incumbent upon the law to structure these frameworks by reference to a more normatively appealing lodestar.

As we hope to have clarified by now, we think that the maxim of relational justice, meaning reciprocal respect for self-determination and substantive equality, is the proper lodestar, and existing private law already responds to its prescriptions to a significant degree. We will not rehearse our normative defense of this maxim or elaborate on its interpretive credentials and reformist implications here. Three propositions, however, are central to our current attempt to elucidate private law's conception of the person and its significance.

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<sup>47</sup> Gardner, *supra* note 39, at 183.

First, the relational justice theory of private law offers a coherent framework that seamlessly integrates employment law, consumer law, and the like (e.g., products liability law) into the fabric of private law, beside their long-established correlates. As we have recurrently emphasized, there is no principled distinction between the rules that prescribe the floor of legitimate interaction in these contexts and those that apply regarding car accidents or the sale of goods and services. In all these contexts, modern private law follows – and should where it does not – the implications of the maxim of relational justice for the typical interpersonal interaction in the social category at hand. Thus, to return to a challenge noted at the outset, the prohibition of private discrimination in the housing or employment markets relies on the very same normative infrastructure that guides the disclosure doctrine typical of modern private law.<sup>48</sup>

Second, this coherence of normative foundations of private law and of the image of the person it anticipates emerges from a proper appreciation of the role of law across these various subfields of private law. The person of private law is the embedded person because private law plays a significant role in structuring our horizontal interactions. This role implies that private law must not abdicate its responsibility for shaping the terms of these interactions in compliance with the most fundamental humanist commitment: to respect everyone's self-determination and substantive equality. Hence, before private law reaches out to public law for normative guidance based on some parties' civic obligations (or, in Habermas' words, before relying on the "radiating effect" of the constitution and of human rights law) private law can, and should, rely on its indigenous normative resources: the normative commitments underlying private law as the law of the embedded person.

Therefore – and this is our final proposition – anti-discrimination rules and similar affirmative duties and burdens typical of the new chapters of modern private law can now be seen for what they are. Rather than external impositions or interventions, they are necessary developments of private law that bring it closer to its (implicit) normative DNA. These, then, are manifestations of the

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<sup>48</sup> See respectively Dagan & Dorfman, *supra* note 2, at 1438-42; Dagan & Dorfman, *Precontractual*, *supra* note 8, at \*-\*.

obligation of reasonable accommodation *integral* to the terms of interaction between, say, owners and promisees (e.g., employers) and nonowners and promisors (e.g., employees) simply as *private* individuals.<sup>49</sup> While the specific content of this obligation may depend on the background (public law) regime surrounding the parties' interactions, its normative underpinning is freestanding. These duties derive from the type of interaction at hand and, consequently, the identification of duty-owners is not arbitrary. In other words, our theory dismisses the difficulty posed by the "Why me?" question in the civic-person account. Moreover, because duty-owners do not act as executive agents of the state or as its good citizens, their interpersonal responsibilities remain intact even if the parties do not belong to the same political community.

## V. THE ROAD AHEAD

We conclude by alluding to two challenges confronting a private law determined to serve the embedded person. One challenge is institutional. Conventional approaches to private law – especially in common law jurisdictions – perceive adjudication as its essential home and, at times this is a duly hospitable setting for the complex task of fashioning the legal infrastructure of interpersonal relationships. In increasingly complex and interconnected social environments, however, adjudication often encounters significant limitations when handling private law's relational task of developing and enforcing a juridical infrastructure for the embedded person. The courts' *modus operandi* is reactive and their perspective and information on key categories of relationships involving employers, landlords, banks, and the like are framed by the specific disputes they encounter. In this light, expecting them to face these challenges on their own becomes an increasingly difficult task that may require private law to recruit an administrative apparatus, supplementing or even supplanting courts. Regulatory underpinning may be necessary to ensure the generality of legal prescription, maintain the required technological expertise for legal decision-making, and target systemic market failures. It may also be necessary to establish effective tools for

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<sup>49</sup> As the text implies, relational justice also offers an internal guide as to the scope of private responsibility: it must be consistent with the self-determination and equal standing of the person responsible. See Dagan & Dorfman, *supra* note 2, at 1445.



proactive (as opposed to reactive) *ex-ante* guarantees of just interpersonal relationships in various social settings and to ensure that they are sufficiently predictable to effectively guide people's behavior as required by the rule of law. It is thus not surprising that significant parts of private law (properly understood) are already administered through regulatory agencies, which only emphasizes the need for private law theory to follow suit.<sup>50</sup>

The second challenge also relates to the gap between law-in-action and legal theory. While most private law theories envision an actual person as their hero – the embedded person in this respect is no different from its dissociated, executive, and civic counterparts – many parties to private law interactions are artificial persons, notably corporations. At times, this reality need not lead to many changes. For example, our relational justice theory of private law captures corporations inasmuch as they are duty-bound to interact respectfully with natural persons (e.g., as sellers or employers). But cases involving corporations on both sides of the interaction as well as those involving duties of natural persons to corporations are more complicated. Indeed, a theory of incorporated persons that transcend their economic function is urgently required in private law theory. This truly awesome task, however, will wait for another day.

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<sup>50</sup> See Hanoch Dagan & Roy Kreitner, 52 *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605 (2020). Needless to say, the institutional challenge is significantly magnified in transnational contexts. See Dagan & Dorfman, *supra* note 36, at 382.