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The Challenges of Private Law: A Research Agenda for an Autonomy-Based Private Law

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I. The Task

What are the most important challenges private law faces? Part of the answer to this question likely depends on upcoming changes in the empirical external reality in which private law operates. But this question—my task in this chapter—goes deeper than that. Private law, like law more generally, is a justificatory practice: because law claims to have the legitimate authority over monopolised power in society, its carriers must always justify its prescriptions and should moreover seek to further improve the law so that it lives up to its implicit and often imperfectly executed promises. This means that an important source of law's challenges comes *from within*; that at least a subset of the challenges of private law is dependent upon the value of private law. My efforts in this chapter will follow this path: I will offer a normatively attractive conception of private law, and will seek to identify the challenges this conception presents to the various legal actors who participate in the evolution of private law or affect its development.

My interpretation of private law, which builds on prior work I have done both as a single author and in collaboration with Avihay Dorfman as well as with Michael Heller,¹ begins with some dissatisfaction with the prevailing approaches to private law. Indeed, much of private law theory seems to be dominated by deadlock between apologies of its traditional, normatively disappointing conception as the 'law for persons regarded as ... morally self-sufficient atoms',² on the one hand, and its radical deconstruction as a garden-variety mode of regulation, on the other. This predicament is both surprising and disappointing. It is surprising because private law theory has become a thriving industry in legal academe

¹ See H Dagan, *Property: Values and Institutions* (New York, Oxford University Press, 2011); H Dagan and MA Heller, *The Choice Theory of Contracts* (New York, Cambridge University Press, 2017) forthcoming; H Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 *Columbia Law Review* 1409; H Dagan and A Dorfman, 'Just Relationships' (2016) 116 *Columbia Law Review* forthcoming.

² A Brudner with JM Nadler, *The Unity of the Common Law*, 2nd edn (New York, Oxford University Press, 2013) 353.

in the past few years. It is disappointing because the fact of our interdependence renders private law an indispensable part of the fabric of our social life. This means that discarding the intrinsic value of private law unacceptably collapses the social to the public; it renders our interpersonal relationships subordinate and subservient to our vertical relationships as co-citizens. It also means that conceptualising the value of these horizontal relationships in libertarian terms cannot possibly comply with the most fundamental commitments of any liberal polity to individual self-authorship (or self-determination) and to substantive equality. These pitfalls of the existing approaches to private law become particularly unfortunate in an era of globalisation, in which our legal environment is increasingly shaped by private law beyond the state.³

Private law theory can do better. At its best, I will argue, private law—either common law or equity; judge-made law or statutory⁴—establishes ideal frameworks for respectful interaction between self-determining individuals, which are indispensable for a society where all recognise one another as genuinely free and equal agents. Only private law—the law of our interpersonal (horizontal) relationships—can form and sustain the variety of frameworks necessary for our ability to lead our chosen conception of life. And only private law can cast them as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice—hence the two animating principles of a liberal (that is, autonomy-based) private law: structural pluralism and interpersonal accommodation.

Building on this account of private law, I offer a preliminary survey of three important challenges to private law in a liberal society. One challenge, prompted by the injunction of structural pluralism, is that of identifying missing frameworks: detecting spheres of life in which private law fails to supply a sufficiently diverse set of alternative property institutions or contract types and is thus insufficiently autonomy-enhancing. Another type of challenge emerges whenever the constitutive good(s) of the social practice that the parties engage in are in tension with the injunction of interpersonal accommodation. These cases require private law to either allow these goods to override the injunction of interpersonal accommodation or else discard or reform the pertinent legal (and social) practice. Finally, because the intrinsic value of private law does not require private law and public law to be treated as mutually exclusive categories, private law can consider utilising public law (vertical) mechanisms that can help secure its horizontal mission and furthermore, must be careful not to undermine the liberal state's commitments to distributive justice, democratic citizenship, and aggregate welfare. This chapter thus concludes with a consideration of the ways in which private law can coordinate with public law, namely: either supplement its doctrinal framework with a regulatory infrastructure or adapt it in order to address pertinent public commitments while still meeting the demands of relational justice.

³ See N Jansen and R Michaels, 'Beyond the State? Rethinking Private Law: Introduction to the Issue' (2008) 56 *American Journal of Comparative Law* 527.

⁴ Indeed, as the text implies, the distinction between public and private law cannot plausibly turn on the question of whether the legal doctrine at hand is legislative or judge-made. While the choice of institutional design is not necessarily indifferent to this distinction, it seems indisputable—at least if we accept the European codes as respectable manifestations of private law—that legislatures, and not only judges, are authorised to promulgate private law doctrines and, moreover, that they can do so just as well as their peers from the court.

II. Autonomy-Based Private Law

A. Theoretical Deadlock

The traditional view of private law—shared by libertarians, modern Kantians (and Hegelians) and many liberal egalitarians—considers private law to be that part of our law that is resistant to demanding interpersonal claims. Per this view, even if commitment to people’s self-determination and thus to their substantive equality has any bearing on the law, it should not affect private law. Some argue that such values are irrelevant in this context because private law precedes our social contract;⁵ others invoke the traditional private-public distinction regarding a division of labour between the responsibility of the state to provide a fair starting point for all and the responsibility of the individual to pursue her ends using her fair share.⁶ Either way, these accounts agree that private law should be guided by a commitment to individual independence and thus subscribe to a private law libertarian position. This position is manifested in the prevailing conceptualisation of property around the owner’s right to exclude and of contract as solely the product of the parties’ will.⁷

This traditional understanding of private law has been harshly criticised. Critics oppose the traditional private-public distinction by highlighting private law’s distributive effects and emphasising the public nature of the choices on which it relies. They further condemn the discursive effects of this distinction that obscures regressive features of private law and improperly shields it from critical scrutiny.⁸ Some critics conclude that private law is merely one form of regulation and insist that the distinction between private and public law derives solely from the instrumental characteristics of these regulatory devices.⁹ One implication of this view is that the only live question in examining proposals for the collectivisation of a traditionally private law doctrine—for example, tort law—is one of comparative performance.

The traditional accounts of private law as the law of independence deserve both conceptual and normative disapproval. Private law relies on public choices, and critics are thus correct to resist the attempt to immunise any of its current components from critical scrutiny. A private law libertarian regime is also normatively disappointing because even a public law that is committed, as the traditional view prescribes, to redress its pitfalls would fail given two facts about our human condition—our interdependence and our personal difference—that account for the profound implications of the law governing our

⁵ See R Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974).

⁶ See R Dworkin, *Law’s Empire* (Cambridge MA, Harvard University Press, 1986); J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993); A Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge MA, Harvard University Press, 2009); E Weinrib, *Corrective Justice* (Oxford, Oxford University Press, 2012); Brudner with Nadler (n 2).

⁷ See respectively T Merrill and H Smith, ‘The Morality of Property’ (2007) 48 *William & Mary Law Review* 1849; C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge MA, Harvard University Press, 1981).

⁸ See, eg, R Gordon, ‘Unfreezing Legal Reality: Critical Approaches to Law’ (1987) 15 *Florida State University Law Review* 195.

⁹ See, eg, M Horwitz, ‘The History of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1423.

interpersonal relationships on our ability to lead our life.¹⁰ And yet, the critics' reductionist account of private law that ignores its unique nature is no more acceptable. By confusing their justified criticism of private law libertarianism with a wholesale critique of the possibility of a private law, these critics threaten to efface private law's value and eradicate its potentially virtuous role.

B. Self-Authorship and Interpersonal Relationships

So why is the traditional conception of private law problematic and how can we envision private law differently? Private law's traditional conception relies on an ideal of just terms of interactions featuring a conception of the person as formally free and equal. In this conception, people are equal in their interpersonal relationships if none is the superior or subordinate of another; and each person is free as against all of the others, because entitled to set and pursue his or her own conception of the good, rather than depending upon the conceptions of others.¹¹ While die-hard libertarians subscribe to this position because, for them, independence and formal equality are the only legitimate commitments of law *tout court*, the liberal conventional position takes seriously individual self-determination—and thus also substantive equality—but nonetheless excludes these values (at least in principle) from private law. Division-of-labour liberals insist that the polity's responsibility to these values is purely vertical, that it does not—indeed should not—affect our horizontal relationships, and that as long as we respect each other's independence and formal equality we bear no responsibility to each other's autonomy and need not be concerned with claims for substantive equality. They argue that assuming that the state complies with its vertical obligations, all that free individuals need in order to form, pursue, and succeed in realising the conception of their life—including their preferred interpersonal arrangements—is properly provided by the conventional conceptions of property as 'sole and despotic dominion' and contract as a means for delineating boundaries of protected domains.¹²

But this understanding of private law, which renders the canonical liberal commitments to individual self-determination (and not merely independence) and to substantive (and not merely formal) equality irrelevant to our interpersonal relationship, is profoundly unsatisfying. Discarding liberalism's most important commitments from the realm of private law is troubling due to two facts of our human condition: human interdependence and personal difference.

Our practical affairs are deeply interdependent. They are replete with interactions with others, ranging from fairly trivial transactions to the most crucial relationships in our lives, such as those related to family, friends, work, and other significant positions we come to occupy in society. These interactions can take either voluntary or involuntary forms of being with others. We invite, and are invited by others, to join projects, occasionally because social interaction is critical to the project, and on other occasions for more instrumental reasons, whereby enlisting others makes our projects possible or practical. Our projects also

¹⁰ See Dagan, *Property* (n 1) ch 3; H Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (New York, Oxford University Press, 2013) chs 5 and 8.

¹¹ See, eg, A Ripstein, *Private Wrongs* (Cambridge MA, Harvard University Press, 2016) ch 10.

¹² See, eg, T Merrill, 'Property as Modularity' (2012) 125 *Harvard Law Review Forum* 151, 157–58.

might render vulnerable the legitimate interests of other people, including those who stand beyond the privacy of such a joint project. Indeed, the ability to lead one's life in general, and certainly successfully so, is influenced at almost every turn by both of these forms of interaction. The traditional conception of private law renounces the responsibility of private law to facilitate such interactions; thus, it compromises the significance of our interpersonal relationships to our conceptions of the good life.

Moreover, the significance of our standing in relation to others also implies that the terms of the interactions that arise under conditions of interdependence should be assessed as just or unjust. In this context, the traditional conception is, once again, disappointing, especially given the fact of personal difference, namely, the fact that we all constitute our own distinctive personhoods against the background of our peculiar circumstances. The traditional conception of private law replaces a concern for what it is for *real* people to relate to one another as free and equal agents, with a concern for what it is for equal abstract beings to relate to one another. By assigning the sole responsibility to address our personal differences to public law, this conception implicitly rejects any claims private individuals may place on one another as a matter of *relational justice*.

Taking seriously the facts of interdependence and of personal difference implies that the liberal commitments to individual self-determination and to substantive equality are just as crucial to our horizontal relationships as they are to our vertical ones, although they may entail different implications in these different dimensions. An individual person is free not merely in the formal sense of not being subordinated to the choice of another, but rather in the more demanding sense of being able to make meaningful choices about how his or her own life should go. Indeed, as John Rawls writes, free individuals act on their capacity 'to have, to revise, and rationally to pursue a conception of the good.'¹³ A person can be 'free' in the former sense just because no one else gets to be in a position of domination over her, but nothing beyond this point speaks for this person's ability to form, pursue, and succeed in realising a conception of the good. A fully human life entitles people, as HLA Hart remarked, to self-determination, which requires a measure of independence but 'is not something automatically guaranteed by a structure of negative rights'.¹⁴ And if a just relationship stands for reciprocal respect of each party's claim for self-determination, relational 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 impose certain affirmative duties of accommodation founded on such a robust notion of interpersonal respect.¹⁵

C. Self-Authorship and Private Law Theory

Indeed, a genuinely liberal theory of private law must take seriously law's commitment to autonomy as self-authorship or self-determination. Therefore, it must adhere to the unique responsibility of private law to offer a repertoire of institutions for interpersonal relationships that responds to various forms of valuable human interaction, and should thus be

¹³ J Rawls, *Justice as Fairness: A Restatement* (Cambridge MA, Harvard University Press, 2001) 19.

¹⁴ H Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 828, 836.

¹⁵ See H Dagan and A Dorfman, 'Justice in Private' (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537.

sufficiently distinct from one another so as to offer people meaningful choice for any given sphere of social activity and interaction. A liberal private law should construct these institutions in line with the injunction of interpersonal respect for self-determination, namely: require parties to meaningfully recognise each other as free and equal persons and thus respect each other not only as mere bearers of a generic human capacity for choice, but rather as the persons they actually are.

As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence but also ‘an adequate range of options’. While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy ‘cannot be obtained within societies which support social forms which do not leave enough room for individual choice’. For choice to be effective, and for autonomy to be meaningful, there must be (other things being equal) ‘more valuable options than can be chosen, and they must be significantly different’, so that choices involve ‘tradeoffs, which require relinquishing one good for the sake of another’.¹⁶ Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose, and the distinct constitutive value of these goods, the state must recognise a sufficiently diverse set of robust frameworks for people to organise their lives.

Autonomy’s prescription of pluralism is relevant to law because many of these frameworks cannot be actualised without active support of viable legal institutions (or law-like social conventions). The insights of both lawyer economists and critical scholars are instrumental in establishing this point: the former demonstrate how many of our existing practices rely on legal (or law-like) devices that help overcome numerous types of transaction costs, such as information costs, cognitive biases, and heightened risks of opportunistic behaviour;¹⁷ the latter remind us how many of these options become available to us only due to cultural conventions that are often, especially in modern times, legally constructed.¹⁸ Therefore, a commitment to personal autonomy by fostering diversity and multiplicity cannot be properly accomplished through a hands-off policy and a hospitable attitude to freedom of contract. Rather, the liberal state should ‘enable individuals to pursue valid conceptions of the good’ by proactively *providing* ‘a multiplicity of valuable options’.¹⁹ Accordingly, a structurally pluralist private law includes diverse types of private law institutions, each incorporating a different value or different balance of values. The boundaries between these institutions should be open, enabling people to freely choose their own ends, principles, forms of life, and associations by navigating their way among various institutions. While at a certain point the marginal value created by adding another distinct institution is likely to be nominal in terms of autonomy, pluralism implies that private law’s supply of these multiple institutions should be guided not only by demand. Although demand for certain institutions generally justifies their legal facilitation, the absence of demand should not necessarily foreclose it insofar as these institutions add valuable options of human flourishing that significantly broaden people’s choices. Only in this way can private law recognise and promote the autonomy-enhancing role of multiplicity.²⁰

¹⁶ J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986) 372, 395, 398.

¹⁷ See R Korobkin and T Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *California Law Review* 1051.

¹⁸ See Dagan, *Property* (n 1) chs 1 and 4.

¹⁹ Raz (n 16) 133, 162, 265.

²⁰ See Dagan, ‘Pluralism and Perfectionism in Private Law’ (n 1).

A satisfying conception of private law should not only appreciate its indispensable role in forming and sustaining the variety of frameworks for our interpersonal interactions which are necessary to our ability to form and lead the conception of our life. It should also affirm and vindicate our claims from one another to relational justice, which derives from a robust notion of interpersonal respect to each other's right of self-determination. In other words, it should conceptualise these frameworks as interactions between free and equal individuals who respect each other given the persons they actually are. Indeed, given personal differences and the significance of our interdependence to our self-determination, relational justice—the dimension of justice that focuses on the terms of our interactions as private individuals, rather than as patients of state institutions or as citizens—cannot contend with the requirement, endorsed by both modern Kantians and division-of-labour liberal egalitarians, that people respect each other as independent and formally equal individuals. Rather, if private law is to rely on a normatively defensible conception of justice, it must cast our interpersonal interactions in terms of relationships between self-determining individuals who respect each other given the persons they actually are. Thus, for persons to relate as equals, private law must structure the terms of their interaction so that it consists of the conception of the person as a substantively, rather than formally, free and equal agent. *Pace* the traditional commitment to formal freedom and equality, these terms of interaction must not be specified in complete disregard of circumstances as well as constitutive choices—choices which pertain to people's ground projects (as opposed to their brute preferences)—insofar as they are crucial for the interacting parties' ability to act as self-determining agents. An autonomy-enhancing private law thus requires exactly the kind of accommodative structure that the traditional conception of private law denies.²¹

D. From Theory to Law

Both the prescription of structural pluralism and the injunction of relational justice challenge mainstream private law theories. But they are by no means strangers to private law itself. Quite the contrary, the conception of private law summarised above renders the theory of private law *more* loyal to its practice, because private law as we know it is quite different from its conventional (libertarian) theoretical portrayal. Properly interpreted, private law is committed to enhancing our autonomy, rather than merely to safeguarding our independence. Accordingly, it is by and large structurally pluralist, rather than monist; and it does not content itself with formal equality, but rather increasingly aims at vindicating our substantive equality.

Thus, as I have demonstrated elsewhere, the renewed orthodoxy of property as exclusion²² fails to properly account for property because it marginalises constitutive characteristics of property—notably, governance and inclusion, reflecting the two implications of an autonomy-enhancing understanding of property regarding structural pluralism and interpersonal accommodation respectively. A structurally pluralist conception of property, by contrast, remedies both failures. While appreciating the importance of law's support of the fee simple absolute, given its indispensable role for people's independence,

²¹ See Dagan and Dorfman (n 1).

²² See, eg, J Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, 1997); Merrill and Smith (n 7).

it resists the way exclusion theory privileges this institution and suppresses others as variations or exceptions. This understanding of property takes the heterogeneity of our existing property law seriously. It also highlights how property's internal life is structured by a wide range of sophisticated governance regimes aimed at facilitating various forms of interpersonal relationships.²³

Similar observations apply to contract. Notwithstanding the great, unifying force of the so-called classical contract theory, contract law is not the shapeless, 'general' law taught to generations of first-year students. Diverse family, work, home, and consumer contract types are at least as central to our shared contracting experience as are widget sales. Furthermore, it should be no surprise that the values plausibly animating marriage, employment, and consumer transactions differ from each other and from those driving commercial sales, and moreover that the contract types within each of these contractual spheres offer individuals choices among divergent values. Indeed, contract's core role in a liberal polity is to serve autonomy: contract enhances self-authorship by enabling people legitimately to enlist others in advancing their own projects, goals, and purposes. But in order to properly comply with this important mission contract law must follow, as it by and large does, the structurally pluralist prescription and ensure the availability of distinct, normatively attractive types within each contractual sphere.²⁴

The prescription of interpersonal accommodation also typifies private law. Thus, my critique of the exclusion theory of property demonstrated that in line with this prescription, inclusion is sometimes inherent in property; for example, this is demonstrated by the law of fair housing, which prohibits discrimination in the sale or rental of residential dwellings. Refusing to consider a would-be buyer of a dwelling merely because of her skin colour (for example) fails to respect the individual on her own terms, in violation of the autonomy-based private law injunction of relational justice. Buying and renting a dwelling (a major decision of self-determination) exposes people to discriminatory practices at the hands of some home owners and landlords. Thus, regardless of whether the state takes care of its obligations—in terms of supplying sufficient housing options to all and sustaining integrative residential communities—private law must not, and does not, authorise social relationships that proceed in defiance of the equal standing and the autonomy of the person subject to discrimination.²⁵

The law of fair housing is by no means the only example for private law's compliance with the injunction of just relationships. There are quite a few other manifestations of this underlying commitment, both within property law (such as the law of public accommodations or the fair use doctrine in copyright)²⁶ and outside property law (think about the law of workplace accommodation).²⁷ A particularly revealing example comes from the way

²³ See Dagan, *Property* (n 1) pt III; H Dagan, 'Property's Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership' (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 27.

²⁴ See Dagan and Heller (n 1).

²⁵ See Dagan, *Property* (n 1) ch 2.

²⁶ *ibid* 48–52.

²⁷ See Dagan and Dorfman (n 1). See also below text accompanying nn 78–79. There are numerous other doctrines of private law—including the veteran common law rules that help solve collective action problems or oblige recipients of mistaken payments to reverse mistakes for which they have no responsibility—which cannot plausibly be accounted for by the libertarian conception of private law, and seem straightforward implications of the injunction of reciprocal respect to self-determination and substantive equality.

accident law addresses people's differing competencies to constrain risky conduct in cases of negligent infliction of loss to life and limb. Overlooking the victim's special makeup in prescribing our interpersonal duties—as the traditional conception of private law implies²⁸—is incompatible with an ideal of relating as genuine equals and with respecting one of freedom's most basic ingredients: the interest in staying alive and physically well in the face of the risky conduct. Fortunately, current law by and large rejects this approach and reflects, instead, the injunction of relational justice that the duty of care owed by the injurer to the victim should be partially measured by the latter's sensibility. The injurer must be (and is) responsible to take extra care to protect the disabled person from her dangerous activity.²⁹

III. Internal Challenges

Private law does not always—let alone fully—comply with the prescriptions of structural pluralism and interpersonal accommodation. But rather than undermining the autonomy-based theory of private law outlined above, such blemishes highlight its significance as a source of internal critique that can help push private law to better conform to its normative promise. These blemishes highlight, in other words, the challenges of private law to which we can now (finally) turn.³⁰

A. Missing Frameworks

Ensuring sufficient diversity of valuable contract types and property institutions is a core feature, benefit, and indeed *obligation* of a private law regime committed to individual autonomy. Autonomy theories of private law—even of contract (including Raz's)—have missed the crucial role of this obligation, maybe because they constricted their view of contract down to the symmetrical and discrete arm's-length exchange.³¹ If one takes the contribution of contract and property to autonomy seriously, then private law theory must celebrate the multiplicity of contract types and property institutions, rather than suppress them (as variations on a common theme) or marginalise them (as peripheral exceptions to a robust core).

Multiplicity per se is not enough. What is particularly significant to choice, and thus to autonomy, is the multiplicity of alternatives *within* any given sphere of interpersonal activity. A liberal private law must include sufficiently distinct contract types and property

²⁸ See J Coleman and A Ripstein, 'Mischief and Misfortune' (1995) 41 *McGill Law Journal* 91.

²⁹ See Dagan and Dorfman (n 1); A Dorfman, 'Negligence and Accommodation' (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543262.

³⁰ I do not address the question of which legal institution should discharge of these challenges. The institutional issue is distinct from the substantive one—see above n 4—and it requires a necessarily contextual analysis of the comparative advantages, in terms of both competence and accountability, of courts, legislatures, and other potential legal actors for each of the tasks at hand. Cf H Dagan, 'Judges and Property' in S Balganesch (ed), *Intellectual Property and the Common Law* (New York, Cambridge University Press, 2013) 17.

³¹ See H Dagan, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76 *Law and Contemporary Problems* 19.

institutions for the diverse social settings and economic functions in which law facilitates interpersonal interactions. Only such a rich repertoire can enable people to freely choose their own ends, principles, forms of life, and associations.

(i) *Innovative Contract Types*

Contract law nicely demonstrates the reformist potential of this liberal obligation to provide *intra*-sphere diversity. By and large, modern contract law complies with this prescription in the commercial sphere. In this sphere, powerful economic forces catalyse demand—legal entrepreneurs see value from one-off creation of new forms that are then standardised, replicated, and sometimes codified as discrete types—so the task of contract law can be mostly reactive.³² But as people's ends move away from strict maximisation of economic surplus—that is, for most contracting—there is less reason to believe that market-driven contract types offer us what we need as free individuals. Thus, an autonomy-based contract law should prioritise settings where law's enabling role can best support autonomy through new contracting practices.³³

It is difficult to expect that legal systems would routinely invent new contract types. Indeed, carrying out the state's obligation to enhance choice in such a top-down fashion is not necessarily desirable, given the comparative disadvantage of state institutions vis-à-vis contractual parties in coming up with appropriate innovations. For this reason, at least in typical cases, the carriers of contract law need not (maybe even should not) engage in innovative design. They should, however, proactively look out for innovations—such as those based on minority views and utopian theories—that have some traction but would fail if left to people's own devices due to predictable market failures of various kinds. The state should be favourably predisposed to such innovations even absent significant apparent demand insofar as these outliers have the potential to add valuable options for human flourishing that significantly broaden people's choices.

Take the sphere of employment. The prevailing structure of employment contracts offers a binaric choice between employee and independent contractor status. But emerging new forms on the ground—such as on-demand workers who find job assignments via apps (like Uber) or workers seeking the creation of specifically designated worker co-ops—may call for additional categories and thus additional choice. There are also other possibilities that diverge even further from the existing employment landscape. For example, law can be instrumental in facilitating job-sharing arrangements that stabilise defaults regarding responsibility, attribution, decision-making mechanisms, time division, sharing space and equipment, and availability on off days. By the same token, an autonomy-based approach to employment contracts would suggest that instead of choosing between the 'at will' and the 'for cause' regimes as defaults, states would be advised to promulgate two parallel employment types, so that employers would need to opt in to one or the other.

Pursuing this prescription of securing such intra-sphere multiplicity is important not only in the employment sphere. It can also be invaluable in other spheres, such as home ownership. (Consider, for example, the benefits of providing 'off-the-rack' contractual

³² See R Gilson, C Sabel and R Scott, 'Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms' (2013) 88 *New York University Law Review* 170.

³³ See Dagan and Heller (n 1), on which the remainder of this subsection draws heavily.

arrangements for the emerging insurance and financial products that allow home owners to share or offload the risk that the value of their home will decrease due to changes in the character of the neighbourhood or in the overall housing market.)³⁴ But the structural pluralist agenda cannot contend with the intuitive appeal of these (or similar) suggestions. It requires a more systemic analysis.

Such an inquiry raises—as Ori Aronson indicates—two interrelated questions: (1) ‘what is the “pluralistically optimal” *amount* of alternatives a state is required to (strive to) provide?’, and (2) ‘what is the “optimal” degree of *variance* the state should seek to maintain among the given alternatives?’³⁵ Addressing these questions—which Aronson terms ‘the N question’ and ‘the Δ question’—in the various spheres of contracting raises complex issues. To be sure, some initial propositions, on which the intuitive appeal of the above suggestions may lie, are possible. Thus, N should probably not get too big, lest people’s effective choice be curtailed by too many distinct alternatives;³⁶ and Δ should not be too small, for an insignificant Δ implies that there is no meaningful intra-sphere multiplicity. But these propositions are quite minimal. A robust autonomy-enhancing research agenda requires a refocus of behavioural and institutional economics studies of contract law so as to more precisely explore the actual determinants of these variables in order to identify the optimal N and Δ for any sphere of contracting. Further research should also carefully consider other factors—such as market structure and political economy—that may require actively limiting multiplicity or at least guarding against its potential pitfalls.³⁷ These (and similar) inquiries may also help reformers to decide *which* innovative contract types law should facilitate. A particularly complex challenge of such a process is to assess the meaning of long-term convergence notwithstanding the availability of multiple options: does it derive from the designers’ failure to create the appropriate contract types or to communicate properly their potential virtues to contracting parties? Or perhaps this suggests that choice is less important than they thought it to be in this sphere?³⁸

(ii) *A Residual (Well-Publicised) Category of Privately Tailored Property?*

An autonomy-based private law requires more than a rich variety of state-sponsored frameworks. Alongside this menu, it must offer a residual category of freestanding forms of interaction.³⁹ Such a category allows autonomous individuals to reject the state’s favoured frameworks and decide for themselves how to arrange their interpersonal relationships; to ‘invent’ their own private forms of interaction.⁴⁰

³⁴ See, generally, L Fennell, ‘Homeownership 2.0’ (2008) 102 *Northwestern University Law Review* 1047.

³⁵ O Aronson, ‘The How Many Question: An Institutional Guide to Pluralism’ in L Batnitzky and H Dagan (eds), *Institutionalizing Rights and Religion: Competing Supremacies* (New York, Cambridge University Press, 2017) forthcoming.

³⁶ See, generally, B Schwartz, *The Paradox of Choice: Why More is Less* (New York, HarperCollins Publishers, 2004).

³⁷ See Dagan and Heller (n 1).

³⁸ See Aronson (n 35).

³⁹ Even Roman law (eventually) recognised not only ‘nominated’ but also ‘innominate’ contracts. See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civil Tradition* (Oxford, Clarendon Press, 1990) 534–35.

⁴⁰ See M Hesselink, ‘Private Law Principles, Pluralism and Perfectionism’ in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (The Hague, Kluwer Law International, 2013) 21.

On its face, contract law already complies with this prescription. But it is unclear whether what is currently termed ‘general’ contract law is properly tailored for the task. A residual law of freestanding contracting should be shaped around the obligation to take idiosyncrasy seriously, rather than piggybacking on the arm’s-length commercial contract that the Willistonian project imagined as the default. A residual contract law that can serve as such a liberating device should be as open as possible to idiosyncratic choices, and thus arguably ‘emptier’. This probably means that rather than setting up majoritarian defaults, it should be guided by an effort to set aside such conventional preconceptions and offer as many checklists as possible, thus allowing people to check an option or enter their own.⁴¹

This possible modification to contract law is not insignificant. But the challenge an autonomy-based understanding of private law poses to property is even more demanding, because property law typically offers *only* standardised forms of property. Indeed, although the *numerus clausus* principle is not universal, it is a typical feature of many post-feudal property systems,⁴² and its prevailing understanding stands in sharp contrast to the prescription of offering a sufficiently salient and vibrant residual category of private arrangement.

To be sure, an autonomy-based understanding of private law fully justifies the *numerus clausus* principle insofar as it is understood as a means of facilitating stable categories of state-supported property institutions and standardising their incidents. In line with the notion of structural pluralism, such standardised property institutions consolidate people’s expectations so that they know what they are getting into when entering, for example, a joint tenancy, a common interest community, or, for that matter, a marriage and furthermore express the law’s normative ideals for these core types of human relationships. Both roles—consolidating expectations and expressing ideal forms of relationships—require some measure of stability; and to form effective frameworks of social interaction and cooperation, property law can recognise a necessarily limited number of categories of relationships and resources. A set of fairly precise rules and informed (rather than open-ended) standards must govern each property institution to enable people to predict the consequences of various future contingencies and to plan and structure their lives accordingly.⁴³

The conventional understanding of the *numerus clausus* principle, however, goes further than that—it stands for the proposition that ‘property rights exist [only] in a fixed number of forms,’⁴⁴ so that private arrangements can enjoy the status of property only if they are pigeonholed into the menu of state-recognised property forms. But even the most sophisticated attempts to justify this further dimension of the *numerus clausus*

⁴¹ See Dagan and Heller (n 1).

⁴² See T Merrill and H Smith, ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’ (2000) 110 *Yale Law Journal* 1, 59, who present the *numerus clausus* principle as ‘universal’, and D Lewinsohn-Zamir, ‘The Objectivity of Well-Being and the Objectives of Property Law’ (2003) 78 *New York University Law Review* 1669, 1733, who indicates that some modern legal systems ‘have opted for an “open-list” principle of property rights.’ For a recent account of how one such jurisdiction provides certainty and how another, in which *numerus clausus* does apply, struggles for flexibility, see H Mostrett and L Verstappen, ‘Practical Approaches to the *Numerus Clausus* of Land Rights: How Legal Professionals in South Africa and the Netherlands deal with Certainty and Flexibility in Property Law’ in W Barr (ed) *Modern Studies in Property Law*, vol 8 (Oxford, Hart Publishing, 2015) 353.

⁴³ See Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (n 10) ch 9.

⁴⁴ See Merrill and Smith (n 42) 3.

principle fail. Thus, although ostensibly it seems to be an anti-fragmentation device, needed for addressing anticommons difficulties,⁴⁵ there are ‘much more direct and cost-effective methods of preventing excess fragmentation of property rights’, and in any event ‘the size of parcels or the number of co-owners generate’ much more pressing fragmentation problems.⁴⁶ Similarly unconvincing is the notion that the *numerus clausus* principle serves to reduce the communication costs of third parties who need to determine the attributes of property rights in order to avoid violating them or to acquire them from present owners.⁴⁷ The relevant legitimate concern of such third parties is the verification of ownership of rights; this means that—unlike contract—property law must provide mechanisms for giving effective notice about the partitioning of property rights in a given asset among several people;⁴⁸ but while the way information is structured affects the costs of processing it,⁴⁹ this marginal effect cannot plausibly justify the onerous *numerus clausus* principle.

Whereas an autonomy-based theory of private law celebrates law’s traditional facilitation of property institutions along the lines of the structural pluralist injunction, it must rethink the traditional hostility towards tailor-made property rights. To be sure, an autonomy-based law is perfectly justified in proscribing arrangements insofar as they entail negative external effects—both social (eg segregation) and economic (eg fragmentation)—or impinge upon individual rights (either those of the parties themselves or of third parties). But these are concerns that are, as they should be, addressed even respecting state-sponsored property institutions.⁵⁰ They can, and should, similarly limit the ability of people to tailor their property arrangements in accordance with the way they prefer to shape their interpersonal relationships. But they do not establish an a priori obstacle to such private orderings.

Indeed, people may legitimately want to accommodate their property arrangements to their particular needs and circumstances. In a liberal society, citizens should be free to reject many of law’s messages and to repudiate at least some of the values recommended by the state. An autonomy-based conception of private law must facilitate, rather than block, this option. This means that to fully justify the *numerus clausus* principle, property law should also include (as contract law does) a residual category of private arrangement in addition to the state-sponsored property institutions. Designing such a category and making it sufficiently salient and vibrant is not a trivial task, but two guidelines seem straightforward: (1) the significance to people’s autonomy of opening up this option justifies investing some technological effort in developing effective means to provide notice to third parties as to the content of such an arrangement; and (2) the risks and costs of possible misunderstandings due to its idiosyncrasy or ambiguity should be allocated to the parties of such an arrangement, rather than to these third parties.

⁴⁵ See M Heller, ‘The Boundaries of Private Property’ (1999) 108 *Yale Law Journal* 1163, 1165–66.

⁴⁶ See Merrill and Smith (n 42) 52–53.

⁴⁷ *ibid* 26–34.

⁴⁸ H Hansmann and R Kraakman, ‘Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights’ (2002) 31 *Journal of Legal Studies* 373, 374–75, 380–84, 416–17, 419. See also, eg G Robinson, ‘Personal Property Servitudes’ (2004) 71 *University of Chicago Law Review* 1449, 1484–88.

⁴⁹ See Merrill and Smith (n 42) 33, 43–45.

⁵⁰ See, eg, *Restatement (Third) of Servitudes* §3 (ALI, 2000).

B. Just Practices

The main challenge posed to private law by the prescription of structural pluralism is indeed that of looking for missing frameworks, both specific alternatives for any given sphere of interaction and the residual category of private arrangement just mentioned. It is time to turn to the other prescription of an autonomy-based private law theory, that of interpersonal accommodation. As noted, significant parts of private law already comply with this obligation of reciprocal interpersonal recognition. But taking it seriously requires a critical investigation of doctrines and rules that do not.

The existence of some gaps between current private law and the demands of just relationships should not be surprising. It reflects not only the usual feature of legal theories, like the one articulated in these pages, which seek to flesh out *implicit* normative underpinnings of a set of legal doctrines. Rather, these gaps also derive from the fact that the obligation of interpersonal accommodation is rarely, if ever, the sole value at hand. Indeed, people's robust interdependence, which gives rise to this obligation, typically manifests itself in social practices, that is forms of orderly human activity. Each of these practices is composed of events, actions, and attitudes that are understood to either exemplify, embody, or constitute a substantive good or goods.

Because every practice is supposed to be rationally conducive to the pursuit of its underlying good(s), each such practice is typically informative regarding the contents of the terms of interaction in the particular context. To be sure, in many cases—the easy cases, which fully conform to the interpersonal accommodation obligation—these considerations simply fine-tune this abstract injunction by specifying, for example, the personal qualities that should be determinative in setting the terms of the particular interaction and how decisive they should be.⁵¹ The more challenging cases—my focus here—arise where the particular practice does not comply with the demands of relational justice. In these cases we must consider the existence, and ultimate strength, of countervailing values. Where the legal infrastructure of a particular social practice is inconsistent with relational justice, private law needs to decide whether the values underlying that practice defy the demands of interpersonal accommodation. It can abolish the practice as relationally unjust, or reinstate it notwithstanding this deficiency; at times, it may also reform it by making it congruent with relational justice.

Some relationally unjust practices seem beyond rehabilitation; their repressive nature leaves no moral choice but to discard them altogether. Slavery is an obvious example of a practice indisputably undeserving of a charitable transformation. But in small-scale instances of flatly illiberal social practices, the option of transformation is quite attractive—a successful reconciliation of a social practice with the demands of relational justice can dissolve the difficulty of conflict of values.

Consider the history of the traditional ideal of a marital community as a locus of sharing and trust. Marriage law, including marital property law, has a long, persistent, and shameful tradition in which this ideal has been abused to shield subordinating patriarchal structures. Patriarchal marriages allow men to capture a disproportionately high share of the

⁵¹ See Dagan and Dorfman (n 1). Thus, for example, our transportation practices imply the significance of qualities associated with both the ability to decide where and when to cross the street and the competency to respond to the surrounding environment, as well as the irrelevance of potential victims' political sensibilities.

benefits of marriage and to bear a disproportionately low share of its costs: ‘When we look seriously at the distribution between husbands and wives of such critical social goods as work (paid and unpaid), power, prestige, self-esteem, opportunities for self-development, and both physical and economic security, we find socially constructed inequalities between them, right down the list.’⁵² People may, of course, engage in many joint enterprises where equality is not necessary. Joint owners in a business, for instance, may divide the ownership interest 70-30 without raising any alarm. But it would be perverse to conceive of a marriage of this sort, where one spouse has a recognised controlling interest in the property that partially constitutes the marriage, and, correspondingly, in marital decisions. One reason for this difference is that marriage is a more pervasive engagement than any other enterprise. Disparity in the control of marital property moves beyond simple inequality—which an individual may rightly choose as a means to other ends—to subordination, which systematically denies the importance of whatever ends that individual chooses.⁵³

Some commentators have proposed a radical solution—giving up on marriage altogether.⁵⁴ There are valid pragmatic reasons to resist this option. Because of the intense long-term fusion of marriage, it is one of the few relationships that can produce the communal goods of interpersonal trust, caring, and commitment. For this reason, attempts to erase marriage are likely to be futile: people will continue to partner despite the lack of legal marriage, but will do so without the protections against subordination that the law can provide.⁵⁵ There are also principled reasons for the option of transforming, rather than eradicating marriage; these reasons are more important for our purposes. The principled reasons challenge the purported conflict between non-subordination—which is an obvious component of the maxim of relational justice—and the communal goods of marriage. The explanation for this is quite straightforward: an oppressive marriage is not only unjust in that it deprives the subordinated spouse of both a voice and a viable option of exit, and thus becomes a threat to a spouse’s basic personhood; it also precludes realisation of intimacy, caring, commitment, emotional attachment and self-identification. Because ‘[o]ne committed and loving partner cannot unequivocally rejoice in his life with his partner if he knows that the other finds the relationship oppressive in some way’,⁵⁶ an inegalitarian marriage deprives *both* spouses of the unique collective goods of marriage; it renders marriage an anathema to genuine community. Reforming marriage law so that it complies with the obligations of relational justice would thus also facilitate its compliance with its communitarian DNA. To do so, marriage must be reconstructed such that the marital community is bound by a commitment to equality as non-subordination and the various doctrines governing marriage be adjusted to this revitalised understanding. Pursuing this is a complex task, which I have attempted to undertake elsewhere.⁵⁷ For our purposes it is enough

⁵² See S Okin, *Justice, Gender, and the Family* (New York, Basic Books, 1989) 136.

⁵³ See Dagan, *Property* (n 1) 206.

⁵⁴ See M Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York, Routledge, 1995) 228–30.

⁵⁵ See A Wax, ‘Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?’ (1998) 84 *Virginia Law Review* 509, 636–37.

⁵⁶ See E Anderson, *Value in Ethics and Economics* (Cambridge MA, Harvard University Press, 1993) 151.

⁵⁷ See Dagan, *Property* (n 1) ch 9 (reconceptualising marriage as an egalitarian liberal community and discussing in some detail the implications on marital property law).

to point to the vivid illustration it provides for a (relatively) happy reconciliation between a nonconforming social practice and the demands of relational justice.⁵⁸

There are also really difficult cases. In these cases there is a genuine conflict between the demands of relational justice and the substantive good a particular social practice is understood to embody that is typified by a principled insensitivity to interpersonal accommodation, which may, nonetheless, be grounded on perfectly valid liberal foundations. Thus, a robust practice of freedom of expression can explain granting citizens the privilege to ridicule and even harm others, including an almost complete disregard of the latter's personal qualities, which is to say their judgments, character traits, and personal circumstances (such as race).⁵⁹ Arguably, a structurally similar observation can be made with respect to some of the economic harms generated by moderately regulated economic competition amongst market participants.⁶⁰ To be sure, these observations do not imply that the value of free speech, or of economic competition, warrants absolute dominion over the demands of relational justice. After all, the tort of defamation and other criminal prohibitions (eg on hate speech) may certainly be justified on the basis of relational justice, and certain forms of intentional interference with one's economic interests can likewise give rise to tort liability on account of the demands of relational justice (among other accounts). But these examples illustrate that there can be *liberal* practices whose animating good brings pressure to bear against the normative commitments that generally inform relationally just terms of interaction. These and similar hard cases⁶¹ raise difficult normative questions that can be properly determined only by reference to an overall theory of justice, rather than relational justice alone.

C. Private-Public Hybridity

I turn now to the third challenge of private law: coordinating its efforts of securing and facilitating interpersonal relationships premised on reciprocal respect to self-authorship with *public* law. This challenge may seem misplaced, maybe even objectionable, to private law theorists who perceive the impetus of this enterprise in ascertaining the necessary and sufficient features that *separate* private law from public law. The most ambitious position along these lines is taken by Kantian authors who insist that these are dichotomous and mutually exclusive categories, due to both their normative contents and the distinctive legal forms in which they are instantiated.⁶² Civil recourse theory joins forces to the separation

⁵⁸ For a similar exercise in another, particularly timely, context, see J Singer, 'We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom' (2015) 95 *Boston University Law Review* 929.

⁵⁹ See, for example, *Snyder v Phelps* 131 S Ct 1207 (2011), where the Supreme Court revoked damages for intentional infliction of emotional distress caused by an undeniably harsh and harmful speech.

⁶⁰ See S Perry, 'Protected Interests and Undertakings in the Law of Negligence' (1992) 42 *University of Toronto Law Journal* 247, 265.

⁶¹ Another example relates to the scope of accommodation in social practices that are organised as part of the infrastructure which sustains meaningful (say, religious or cultural) communities, since a community requires some demarcation from broader society and, thus, some measure of practical and symbolic exclusionism. The duty to accommodate protected classes whose personal qualities are the outcome of chance cannot be qualified by such concerns; yet intricate questions may arise regarding qualities that are subject to personal choice, such as religion and familial status.

⁶² See Weinrib (n 6); Ripstein (n 6).

endeavour, but since it finds this position overly ambitious, it seeks to isolate thinner, form-based characteristics of private law around the private entitlement to redress.⁶³

In sharp contrast to these and similar positions, the autonomy-based theory of private law sees no intrinsic value in the sheer separation of private law from public law. Rather, its point is to distil the potential irreplaceable value of private law, which is worth retaining. This value lies, of course, in conceptualising our horizontal relationships as ones between substantively free and equal persons; private law is intrinsically valuable when its doctrines construct ideal frameworks of respectful interaction among self-determining individuals. This means, as I have argued in this chapter, that redeeming the intrinsic value of private law requires to embrace the *same* commitments—to individual self-determination and substantive equality—that inform a liberal public law. Indeed, critics of the public/private distinction are not wrong in disavowing the traditional (that is: private law libertarian) conception of private law. Rather, they are misguided in erasing the *idea* of a private law, and thus subordinating the social to the public.

So the mission of an autonomy-based account of private law is *not* to eliminate all public concerns from private law but, rather, to refine the interpersonal concerns standing at the moral centre of private law. This means that private law need not shy from recruiting public law to provide it with a regulatory infrastructure that may be required in order for it to better fulfil its horizontal tasks. It also implies that rather than resisting the influence of our public commitments (that is: of values such as distributive justice, democratic citizenship, or aggregate welfare), the challenge of a genuinely liberal private law is to respond to the maxim of just relationships, while being sensitive to these important public concerns. Both lessons suggest that what makes private law importantly distinctive is the ideal of horizontal relationships structured around reciprocal respect to self-determination, rather than the exclusion of any other normative commitments or the specific legal mechanisms for addressing deviations from this ideal, be they the familiar one-to-one litigation or otherwise.⁶⁴

(i) *Contract Types and Regulation*

Modern contract law provides an important example for the potential significance of a supporting public law infrastructure. To be sure, by constructing a rich variety of types contract law already performs an indispensable autonomy-enhancing role of facilitating our ability legitimately to enlist others to various projects, both instrumental and communitarian. But traditional contract law cannot always, or even typically, do this work on its own. Indeed, in order to flourish, many contract types require some regulatory support.

⁶³ See J Goldberg and B Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 *Indiana Law Journal* 569, 573. See also B Zipursky, 'The Philosophy of Private Law' in J Coleman, K Himma, and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York, Oxford University Press, 2002) 623.

⁶⁴ Both lessons imply, in other words, that these legal hybrids are *not* 'merely temporary creatures, awaiting their extinctions through novel ways of legal conceptualizing and mapping of our legal universe.' *Contra* K Tuori, 'On Legal Hybrids' in H-W Micklitz and Y Svetiev (eds), *A Self-Sufficient European Private Law—A viable Concept?* (Fiesole, European University Institute Working Papers, 2012) 67. In this they nicely fit the legal realist programme of functional taxonomy that allows some degree of overlap between categories. See Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (n 10) ch 6.

Consider consumer transactions, the type of contract into which most of us enter on a daily basis in running our ordinary way of life. Consumer contract law—comprised of a specific set of rules dealing with issues like disclosure, cancellation, and warranty, which all go far beyond the protective measures anticipated by ‘classical’ contract law⁶⁵—plays a crucial role in making these contracts viable. But consumer protection law includes not only contract rules that apply to the interacting parties. It also contains a thick layer of measures administered at both state and federal levels.

States’ Unfair and Deceptive Practices Acts or similar legislation regulate, among others, various types of misleading statements and representations as well as other deceptive acts and practices.⁶⁶ In addition to establishing a private right of action, these laws entrust government officials—typically the state Attorney-General’s office; in some cases also municipal consumer protection offices at the city and county level—with the authority to administer and enforce these rules.⁶⁷ Likewise, the Federal Trade Commission is quite active in regulating consumer transactions, taking actions in areas like misleading advertising, coercive or deceptive sales techniques, and marketing campaigns that prey on the credulity of the young, the elderly, or the infirm.⁶⁸ And there are of course additional agencies, such as the Food and Drug Administration, or the newly formed Consumer Financial Protection Bureau,⁶⁹ which similarly regulate specific industries in ways that are also crucial for the customers of these particular industries.

These and many other administrative apparatuses—think antitrust, securities regulation, or regulation of credit and debt collection⁷⁰—seek to target systemic market failures that can hardly be addressed on the transactional level.⁷¹ They also provide (when they work well) the infrastructure for a secure marketplace within which effective choices can be made.⁷² In this way, these public law devices comply with the public responsibility of facilitating our private interactions. Significant as they are, they supplement, rather than supplant, the contract rules of consumer transactions (or other contract types).⁷³

⁶⁵ See, respectively, O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford, Oxford University Press, 2012); O Ben-Shahar and E Posner, ‘The Right to Withdraw in Contract Law’ (2011) 40 *Journal of Legal Studies* 115; A Schwartz and L Wilde, ‘Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests’ (1983) 69 *Virginia Law Review* 1387.

⁶⁶ See D Pridgen and R Alderman, *Consumer Protection and the Law* (New York, Clark Boardman Callaghan, 2014) §§ 3:1, 3:15.

⁶⁷ See *ibid* §§ 7:1 (role of state Attorney-Generals), 7:28 (municipal enforcement).

⁶⁸ See *ibid* 11:1 (misleading advertising), 9:10 (coercive sales techniques), 10:1 (deceptive trade practices), 9:11 (commercial exploitation of children, elderly, and infirm). For an overview of the FTC’s efforts to regulate advertising to children, see generally J Beales III, ‘Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present’ (2004) 12 *George Mason Law Review* 873.

⁶⁹ See ‘What does FDA do?’ (Food and Drug Administration), www.fda.gov/AboutFDA/Transparency/Basics/default.htm; ‘About Us’, Consumer Finance Protection Bureau, www.consumerfinance.gov/the-bureau/.

⁷⁰ See 15 USC §§ 1-38 (2013) (antitrust regulation); 15 USC §§ 77a-78lll (2013) (securities regulation); 15 USC §§ 1601-1693(r) (2013) (consumer credit protection).

⁷¹ See, eg, S Breyer, *Regulation and its Reform* (Cambridge MA, Harvard University Press, 1982) 7–8.

⁷² See J Singer, *No Freedom without Regulation: The Hidden Lesson of the Subprime Crisis* (New Haven CT, Yale University Press, 2015) 64.

⁷³ A somewhat similar example comes from the context of child support, where the primary responsibility should be private and relational, but fulfilling the parallel public responsibility requires that the state assist in enforcing the relational responsibilities or even provide some insurance against non-compliance with them. See generally J Millar and A Warman, *Family Obligations in Europe* (London, Family Policy Studies Centre, 1996) 24; R Lerman and E Sorensen, ‘Child Support: Interactions between Private and Public Transfers’ in R Moffitt (ed), *Means-Tested Transfer Programs in the United States* (Chicago IL, University of Chicago Press, 2003) 587.

(ii) Addressing Important Public Concerns

Hybrid arrangements of this sort not only represent public law's support of private law's horizontal mission; at times, they represent private law's accommodation of important public law concerns. Indeed, although the distinctive intrinsic value of private law lies in its pursuit of relational justice, private law should not be oblivious to the responsibilities of the liberal state to secure distributive justice, democratic citizenship, and aggregate welfare.⁷⁴ Quite the contrary, it should contend with possible tensions between the essentially interpersonal focus of private law and the requirements of fair distribution, equal citizenship, or efficiency and try to adapt its doctrinal framework accordingly.⁷⁵ Such an adjustment is often possible because a duty of accommodation grounded in relational justice is a range property:⁷⁶ it need not entail an either/or trade-off, but rather allow a restriction of individuals' responsibility by shifting some of the burden onto public law.⁷⁷

Consider employers' duties of accommodation. Relational justice requires that an employer would not be entitled to turn down a job candidate due to personal qualities such as disability, familial status, and religious affiliation. This obligation can impose non-trivial costs, such as the construction of an accessible workplace, or the obligation to accommodate dietary requirements, holy days, or dress codes. Considerations of both distributive justice and democratic citizenship imply that some of these costs are society's to bear.⁷⁸ The law governing work-related accommodation nicely responds to this challenge. It exempts employers from making accommodation arrangements that exceed a determined reasonable level and, thus, impose undue hardship which would have placed them under a threat of self-effacement (which self-defeats relational justice); in other cases—those which are more important for our purposes—it takes the form of a hybrid that both insists upon a relational duty of accommodation (as opposed to, say, a sheer incentive to those who accommodate) and offers ameliorative arrangements like tax incentives or other publicly funded benefits that address these public concerns.⁷⁹

A similar analysis can justify regulatory frameworks—such as workers' compensation schemes, or the New Zealand public insurance scheme—that collectivise some parts of

⁷⁴ By the same token, in some contexts a private law framework can be legitimately enlisted to serve irreducibly public values, whereby the state commandeers the support of private individuals to enhance collective goals. The incentives set by copyright law and patent law, for example, can (arguably) be understood in terms of delegating our collective interest in fostering research and development to private individuals and firms. When private bodies and private roles are thus publicly enlisted, privatisation-or-collectivisation debates can properly revolve around considerations of comparative institutional competence. But as long as these public values are promoted through private law doctrines, it is still important to evaluate them not only in terms of their performance as regulatory devices, but also in terms of the intrinsic ideals of private law, namely: sustaining, facilitating, and upholding the liberal state's commitments to relational justice.

⁷⁵ Moreover, because there may be some overlap between the public responsibilities to ensure self-determination and substantive equality and the private obligations that relational justice entails, private law should beware of diluting the *public* responsibilities.

⁷⁶ The notion of range property is borrowed from J Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971) 508.

⁷⁷ See Dagan and Dorfman (n 1), on which the remainder of this section heavily draws.

⁷⁸ See S Shiffrin, 'Egalitarianism, Choice-Sensitivity, and Accommodation' in R Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford, Clarendon Press, 2004) 270, 297, 302. It is less important to specify here the metric by which the burden should be redistributed across members of society.

⁷⁹ See, eg, Americans with Disabilities Act of 1990 42 USC § 12112(b)(5)A (2012). Another, perhaps even better solution (available in other jurisdictions) is to use direct subsidies. See E Zamir and B Medina, *Law, Economics, and Morality* (New York, Oxford University Press, 2010) 255.

traditional tort law which turn out to be suboptimal in terms of some public value, such as distributive justice, social welfare, or access to the private law institutions of justice, for that matter. Tort theorists who are guided by the separation thesis tend to treat such schemes as exemplifying a radical transition from a legal order grounded in private law to one premised exclusively in public law.⁸⁰ But this is an overstatement. Whereas the law of negligence is a powerful vehicle for sustaining relationally just terms of interaction in the context of accidental harm to life and limb, it is not essential for this task. What is essential from the perspective of relational justice is that the injurer be subject to an obligatory reason to accommodate, within limits, the person who the victim actually is. Therefore, relational justice need not object to these alternative schemes as long as they include legal doctrines—such as injunctive relief and punitive damages for intentional misconduct—that ensure compliance with the reason for discharging the accommodative duty of care.⁸¹

IV. Concluding Remarks

For too long, most approaches to the study of private law have been divided into two conflicting, but similarly disappointing, positions. Both traditionalists and their critics share the same understanding of private law as structured around a commitment to individual independence and formal equality. But the facts of interdependence and personal difference as well as the crucial role of law in sustaining our private law institutions imply that this conception betrays the most fundamental commitments of a liberal polity to individual self-determination (not merely independence) and thus to substantive (not just formal) equality. Fortunately, this traditional (libertarian) conception of private law is also quite removed from the actual manifestations of private law in contemporary liberal society.

A genuinely liberal conception of private law understands its doctrines as ideal frameworks for respectful interaction between self-determining individuals, which are indispensable for a society where all recognise one another as genuinely free and equal agents. This understanding accepts the primary responsibility of public law to collective values like distributive justice, democratic equality, or aggregate welfare. But it insists that the traditional division of labour between public and private law in which the sole responsibility of individuals is to pursue their ends using their fair share is deeply misguided. Private law—the law of our interpersonal relationships as individuals, rather than citizens or patients of the welfare state—is responsible for ensuring that in these horizontal interactions we respect each other's right to self-determination and thus to substantive equality. This responsibility becomes particularly acute in a transnational era which is increasingly typified by interaction between individuals who are not compatriots and may thus not enjoy the same starting point.

I believe that the autonomy-based understanding of private law discussed in these pages can helpfully inform the substantive law governing interpersonal interactions across

⁸⁰ See Brudner with Nadler (n 2) 270; R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 324; J Goldberg and B Zipursky, *The Oxford Introductions to US Law: Torts* (Oxford, Oxford University Press, 2010) 267, 394–95.

⁸¹ See Dagan and Dorfman (n 1).

national borders. This significant endeavour of devising the tenets of what can be called international private law cannot be addressed here.⁸² But even if we set it—and further challenges⁸³—aside, the research agenda for an autonomy-based private law is rich and exciting. In order for private law to better conform to its normative promise, its carriers must proactively seek to enrich the repertoire of sufficiently distinctive contract types and property forms it offers and furthermore design sufficiently salient and vibrant residual categories for both contract and property. They should also carefully scrutinise the prevailing law in order to examine doctrines that deviate from the obligation of interpersonal accommodation and decide whether to abolish, reform, or reinstate these doctrines given the normative weight of their underlying commitments. Finally, a reinvigorated private law needs to carefully explore the ways it can recruit public law to better secure its horizontal tasks as well as the means by which it can properly respond to public concerns while upholding its intrinsic virtue as the guardian of relational justice.

⁸² For a preliminary attempt, see H Dagan and A Dorfman, 'The Human Right to Private Property' (2017) 18 *Theoretical Inquiries in Law* forthcoming.

⁸³ One important challenge to any private law theory is to consider if and how it should be refined in contexts in which corporate or governmental bodies, rather than natural persons, are involved in horizontal dealings. Cases involving corporations are particularly intriguing, because at bottom a corporation is a private law device that facilitates, in line with the prescription of structural pluralism, a specific set of autonomy-enhancing horizontal interactions. Figuring out the implications of this rudimentary understanding of the corporate form—and considering how it can be reconciled with a collectivist conceptualisation of corporations as means for commanding private resources for the efficient production of public goods—is a major task, which requires a full-blown theory of corporation.

