

# Justice, Politics, and Interpersonal Human Rights

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## I. Interpersonal Human Rights

*Interpersonal Human Rights* develops a theory of the *jus gentium privatum*: the normative DNA of private law, which transcends its domestic instantiations and is thus key to the legal treatment of transnational wrongs.<sup>1</sup>

The concept of interpersonal human rights builds on an account of relational justice which we have developed at some length elsewhere.<sup>2</sup> Private law, in this account, governs our interpersonal relationships as private individuals, rather than our interactions as patients of state institutions or as citizens. More specifically, unlike its conventional portrayals, private law is *not* a bastion of personal independence and formal equality. Rather, charitably interpreted, private law prescribes a set of egalitarian frameworks of respectful interpersonal interaction conducive to self-determining individuals. It is premised, in other words, on reciprocal respect for self-determination and substantive equality, namely: on relational justice.

Relational justice is an aspirational idea. In domestic settings, it serves as a guiding principle for developing just law and as a critical perspective that helps identify blemishes that virtually any legal system inevitably possesses. This is the way we have used it in analyzing contemporary private law in liberal legal systems. These systems, we have demonstrated, include numerous doctrines that nicely comply with relational justice. But the fit is imperfect, so that—to take one example—appreciating the divorce between contemporary private law and its conventional (but misguided) conception as a stronghold of interpersonal independence and formal equality calls for some reform in the overly hesitant approach of private law (at least in the common law tradition) toward affirmative interpersonal duties. By highlighting gaps in which private law does not live up to its implicit promise, our theory of relational justice provides indigenous resources for reformers for pressing law's carriers to make amends.

Whereas relational justice is aspirational in nature, the concept of

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1. Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361 (2018).

2. See e.g., Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Postscript to Just Relationships: Reply to Gardner, West, and Zipursky*, 117 COLUM. L. REV. ONLINE 261 (2017); Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018).

51 CORNELL INT'L L.J. ONLINE 139 (2018)

interpersonal human rights is substantively more modest and jurisprudentially more demanding. It aims to capture the *minimal* requirements of relational justice with which a system of private law *must* comply if it is to be legitimate. *Interpersonal Human Rights* does not attempt to define that minimum, but rather to point to the way in which it can be refined. The idea of interpersonal human rights, we claim, should capture the normative common denominator that underlies the private laws of divergent legal systems. Rights that belong to this category, in other words, should be distilled from a normatively charitable reading of the diverse systems of private law that govern (and have governed) people's interpersonal interactions in different places and different times; they should reflect our *ius gentium privatum*. This broad positive acceptability of these principles, we argue, further affirms that a rule which infringes an interpersonal human right is one that must be expunged from the system.

This prescription of an interpersonal human right represents a *direct* interpersonal obligation, rather than one that we owe as subcontractors who act on behalf of the polity as a whole. It thus provides a foundation of aggrieved parties' standing *vis-à-vis* those who wronged them. This foundation, we contend, is "the missing link of privity" needed in order to support contemporary efforts to address grave transnational wrongs either by references to public policy or by extending vertical human rights to non-state actors.

We are indebted to Roxana Banu, Evan Fox-Decent, Mitchel Lasser, Ralf Michaels, and Horatia Muir Watt for their rigorous engagement with our work and for their penetrating insights.<sup>3</sup> We cannot address in this short Response all their points nor do justice to all their thoughtful and generous discussions, so we have confined ourselves to the three main challenges they raise, dealing with the conception of the state implicit in our theory, the proper role of politics, and the way in which our theory may actually make a difference.<sup>4</sup>

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3. See Roxana Banu, *From The Law of Nations to the private law of mankind*, 51 CORNELL INT'L L.J. ONLINE 101 (2018); Evan Fox-Decent, *Dagan and Dorfman's Jus Gentium Privatum*, 51 CORNELL INT'L L.J. ONLINE 112 (2018); Mitchel Lasser, *Purging Private Law of the State*, 51 CORNELL INT'L L.J. ONLINE 119 (2018); Ralf Michaels, *The New, Old, Ius Gentium Privatum*, 51 CORNELL INT'L L.J. ONLINE 125 (2018); Horatia Muir Watt, *On the Moral Commitments of Private Law and the Curbing of Global Corporate Power*, 51 CORNELL INT'L L.J. ONLINE 133 (2018).

4. At least one of the concerns that we do not discuss here, we've addressed in some detail elsewhere, namely: Lasser's suspicion that our account of private law is an exercise of "wishful thinking," which can be reversed as will by "imaginative and clever" scholars. See Lasser, *supra* note 3, at 123–24. See also Muir Watt, *supra* note 3, at 135–37 (questioning our "findings as to the values that constitute such a core," and suggesting that private law is a "theater" of "dialectic" with no such normative essence). We address the interpretive validity of the relational justice theory of private law in both Dagan & Dorfman, *Just Relationships*, *supra* note 2, at 1430–59, and Dagan & Dorfman, *Postscript*, *supra* note 2, at 269–72.

## II. States

In *Interpersonal Human Rights* we explain that because “the core demands of relational justice” are “fundamentally non-statist” they should be treated as interpersonal *human rights*.<sup>5</sup> We recognized, of course, states’ comparative advantages—in terms of both legitimacy and competence—in enacting interpersonal rights and obligations and their legitimate interest in adding onto their universalist core. But we insist that the significance of the minimal requirements enshrined in private law does not hang on its current positivist manifestations; that *any* humanist polity *must* acknowledge and vindicate our interpersonal human rights.<sup>6</sup> The Commentaries we now address helpfully implies that we need to make two important clarifications regarding the relationship between states and interpersonal human rights.

The first clarification relates to the legacy of the notion of interpersonal human rights. It is, of course, encouraging for a *legal* theory to have some historical pedigree. We thus happily acknowledge the affinities between our theory and the work of “relational internationalist” scholars of private international law—notably Josephus Jitta—which were obscured for many years and recently revitalized by Banu.<sup>7</sup> We are also happy to situate the concept of interpersonal human rights, as Michaels suggests, “in the long Western history of *ius gentium*.”<sup>8</sup>

Michaels, however, goes further than that. He claims that this legacy, which has its origins in Roman law, implies that this concept simply rehearses old ideas. Insofar as the foundations of contemporary human rights law can indeed be traced to the Roman jurist Ulpian, he argues, “human rights were, for a long time, thought as part of private law,” so that “much of the history of private law . . . [is] as a history of private human rights,” and “the idea of human rights as rights (only) against the state . . . is the historical anomaly.”<sup>9</sup>

Michaels acknowledges that historicizing human rights may be an anachronistic exercise,<sup>10</sup> and we are not sure whether, despite the talk of long history and tradition, the content of interpersonal human rights on which we focus is reducible to its Roman counterpart. But even if (for the sake of the argument) our concept of interpersonal human right would have been identical to the historical one Michaels highlights, this idea is by now overlooked. Human rights in contemporary discourse are understood, analyzed, and elaborated as rights against the state, and neither private law nor its foundational commitment to relational justice is frequently invoked as a source for universal claims.

Moreover, our account does not simply contribute to the revival of this long tradition. Moving too quickly between then and now might leave unaddressed dramatic transformations in the human condition and, as a result,

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5. Dagan & Dorfman, *supra* note 1, at 373.

6. *Id.* at 380–82.

7. Banu, *supra* note 3, at 105.

8. Michaels, *supra* note 3, at 125.

9. *Id.* at 130.

10. *See id.*

in what the concept of interpersonal human rights might mean. The private law that was discussed by the Roman jurists and their predecessors was one that preceded the idea of the modern state. Medieval states, to be sure, had raised armies, imposed taxes, and offered patronage; but the modern apparatus of the state was nonexistent. Furthermore, the modern idea of citizenship, including the unmediated political authority it purports to establish between the ruler and the individual person, was largely absent from medieval states.<sup>11</sup>

Unsurprisingly, the rise of the modern state and its distinctive claim for unmediated authority makes the idea of vertical rights particularly prominent for political and legal theory.<sup>12</sup> As Fox-Decent writes, under “conventional accounts of international human rights law,” the state, which is “the chief party that ratifies international human rights treaties and is subject to customary international law,” is “the primary duty-bearer.”<sup>13</sup> And as we move toward the last several decades, the commitment to people’s self-determination and their substantive equality—which are, we take it, the “moral entitlements individuals possess simply in virtue of their shared humanity”<sup>14</sup>—are the legitimating conditions of state authority and operation.<sup>15</sup> But the relative inattention to these same commitments in the horizontal, interpersonal dimension implies that rather than supplementing the old *ius gentium privatum*, contemporary human rights are widely understood as *supplanting* it. This is exactly why, as Fox-Decent reaffirms, “the mainstream public and private international law strategies” cannot establish the privity which is needed in order to “make progress in the field of private transnational wrongs.”<sup>16</sup>

Our account of interpersonal human rights seeks to reverse this crucial wrong turn by insisting that a true commitment to the rights of humans must focus on *both* the vertical and the horizontal dimensions. This means that transplanting ideas of “human rights as between individuals,” as they were understood before the rise of the modern state is unlikely to be the proper cure; our idea, in other words, is *not* that the “venerable history of Western law,” which “was only interrupted with the rise of the state,” should now be continued.<sup>17</sup> The state is here to stay and we are by no means (as we presently

11. See e.g., DAVID NIRENBERG, COMMUNITIES OF VIOLENCE: PERSECUTION OF MINORITIES IN THE MIDDLE AGES (1996) (providing a rich historical analysis of a Medieval state and its religiously-mediated claim for political authority over its diverse body of constituents).

12. This is evident, for example, in John Locke’s emphasis on the consent of the governed to *the government* and on the natural-law constraints imposed *on the government*. On the latter (perhaps less famous than the former) point, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 376 (Peter Laslett ed., 2nd ed. 1967) (“the Law of Nature stands as an Eternal Rule to . . . Legislators”).

13. Fox-Decent, *supra* note 3, at 116–17.

14. *Id.* at 116.

15. This is, arguably, the animating spirit behind some of the arguments developed in JOHN RAWLS, A THEORY OF JUSTICE (1971).

16. Fox-Decent, *supra* note 3, at 118.

17. Michaels, *supra* note 3, at 130.

clarify) its enemies. So our contemporary challenge is to develop an idea of interpersonal human rights that does not aim to replicate the past, but rather to imagine a road not taken. We must affirm the minimal requirements of relational justice without undermining neither the significance of our vertical human rights nor the responsibility and the authority of the modern state.

Indeed, and this is the second clarification as per the relationship between states and interpersonal human rights, our theory of private law has no whiff—strong or weak—of libertarianism, and it need not “strike fear into the hearts of U.S. progressives.”<sup>18</sup> In other words, Lasser’s concerns that ours is a “state-purging project,” which seeks to “remove the state from interpersonal affairs,”<sup>19</sup> is unwarranted. As we hope to have clarified both in *Interpersonal Human Rights* and elsewhere, neither the freestanding significance of relational justice nor the privileged status of interpersonal human rights implies a vision of a minimal, let alone dispensable, state.

We do admittedly (indeed, proudly) hope to reconstruct private law as a “freedom-loving realm”—as long as “freedom” stands (as it should) for self-determination, rather than independence, and is thus married to substantive, rather than formal, equality; but we are far from being “determined” to “keep the state out” of the private law.<sup>20</sup> It would have been incoherent of us to adopt this attitude given the important role of states in ensuring that people’s interpersonal relationships comply with the maxim of reciprocal respect for self-determination and substantive equality. In fact, as we argue elsewhere, this task of vindicating relational justice requires a significant legal apparatus: at times it is best performed by common law judges; and often—increasingly so in our complex and interconnected environment—it implicates legislators and regulators.<sup>21</sup> Moreover, being an aspirational ideal, both relational justice and each of its two pillars of self-determination and substantive equality standing on its own invite domestic laws (and thus the state) to go beyond the threshold of interpersonal human rights.<sup>22</sup>

All this implies that—in sharp contrast to Lasser’s association of our concept of private law with libertarianism—a state which endorses our account of private law may betray its mission not only by having bad law or too much law; law’s absence may undermine it just as well.<sup>23</sup> Furthermore, as we argue in *Interpersonal Human Rights*, “states can legitimately set up their own private law scheme to serve distributive justice, democratic citizenship, and aggregate welfare in addition to [private law’s] core concern

18. Lasser, *supra* note 3, at 123.

19. *Id.*, at 119, 122.

20. *Id.*, at 123.

21. See Dagan & Dorfman, *Just Relationships*, *supra* note 2, at 1435–37; Hanoch Dagan & Roy Kreitner, *Relational Regulators: Private Law Thinking for Administrative Agencies*, available at <http://papers.ssrn.com/abstract=3031886>.

22. See Dagan & Dorfman, *supra* note 1, at 380–82. For the proactive function of the state in properly promoting an autonomy-enhancing private law, see HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017); HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* ch.4 (forthcoming 2020).

23. Cf. ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 201–03 (2011) (emphasizing “the pathologies that follow from law’s absence”).

of securing minimal interpersonal justice,” which implies that relational justice should *not* claim exclusivity in any legal system.<sup>24</sup> In fact, both self-determination and substantive equality necessarily require a background regime, which secures distributive justice, democratic citizenship, and sufficient overall welfare. So by highlighting the significance of relational justice we do not dispute the importance of these public values, but rather insist that the interpersonal dimension of justice should not be easily dismissed under their hegemony.

This means that we do *not* seek to preserve “the independence of private law” or cleanse it “of the state and its communitarian claims,” and we certainly do *not* aim at precluding the common good from affecting domestic private laws.<sup>25</sup> The commitments to individual self-determination and substantive equality that inform our theory emphatically reject these positions. But Lasser is correct to observe that we are (unashamedly) concerned not only “with scenarios in which the state is insufficiently present,” but also with “instances when it is all too present.”<sup>26</sup> Whereas the lesson of *Lochner*, to which Lasser refers, may justify the caution with which U.S. progressives observe limitations on state power, progressives—and humanists, more generally—must not be blind to the risks states may pose to our most fundamental commitments, which they (we are confident) also share, to the self-determination of all people and to their substantive equality. Neither celebrating an unconstrained state authority to regulate our interpersonal affairs nor subordinating these most fundamental rights of each and every person to the public good (however it is defined) can plausibly offer an appropriate response to *Lochner*.

Thus, if by reading *Interpersonal Human Rights* as “Targeting the State”<sup>27</sup> Lasser suggests that we think that state legitimacy must be premised on the same humanist infrastructure on which our theory of private law is founded, we plead guilty as charged. The right of collective self-determination on which states’ sovereignty relies is premised on the right of self-determination of each member of these collectivities, and both the powers and the obligations of states must serve people’s self-determination and substantive equality. In this respect, we agree with Fox-Decent, who claims that vertical human rights are also interpersonal: the state, as he claims, is an artificial legal person, which is duty-bound by these rights due to its relationship to its subjects.<sup>28</sup>

Insisting on people’s rights and on states’ obligations should not be confused with states’ denigration. States are here to stay, and it may be a good thing too given the vital role they can play in upholding and indeed enhancing people’s self-determination and substantive equality. Moreover, we do not claim that citizenship is only instrumental; nor do we suggest that

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24. See Dagan & Dorfman, *supra* note 1, at 380, 388–89.

25. *Contra* Lasser, *supra* note 3, at 122, 126.

26. *Id.*, at 119.

27. *Id.*, at 121.

28. Fox-Decent, *supra* note 3, at 116–18.

the public and the political dimensions of our existence are normatively inferior to the private and horizontal dimensions. Indeed, citizenship may be intrinsically valuable and so does the pursuit of public and political roles. The robustness of citizenship is exactly why, although vertical human rights aim in their spirit to enhance and sustain the interpersonal and civic dimensions, their *form and substance* are quite different from what we call, simply, interpersonal human rights.<sup>29</sup>

But even in their non-instrumental senses, citizenship and the public dimension of persons' lives should not be understood as competing against our entitlements to self-determination and substantive equality. This is why state legitimacy depends on its compliance with our vertical human rights,<sup>30</sup> and it is also why—given the significance of our interpersonal interactions to our self-determination and substantive equality—state legitimacy also depends on its compliance with our interpersonal human rights.

### III. Politics

Muir Watt and Michaels are highly skeptical of this direction. Muir Watt reads our theory as echoing a “legal-naturalistic idea of a universal private law”; and she reminds the readers of this Symposium that “there is potentially much . . . to be said (or resaid) on a jurisprudential plane about [this] idea,” notably as per “what these liberal values mean [and] what they hide,” as well as whether “different cultural understandings” of private law “would lead to very different conceptions of the values involved.” Muir Watt thus concludes that “rather than searching for elusive universal moral commitments of private law, a political economy analysis of the legal institutions that constitute our global economic system offers a (more?) promising strategy for regulating corporate power *ex ante*.”<sup>31</sup>

Michaels is no less critical. He argues that our reliance on a broadly defined humanist framework “beg[s] the question,” and finds our theory to be objectionably “apolitical.” This is a problem, since—unlike the way private law was traditionally perceived—questions of human rights are internationalized not because they are of “low political salience,” but rather exactly because they are viewed as “so political that the state must be barred from its temptation to [violate them].” Thus, our reliance on *ius gentium privatum*, which Michaels reads as a “depoliticized transnational law” that leaves no adequate “space for contestation,” is, at best, “of limited use in the immensely political area of grave human rights violations.” The divergences

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29. This difference also explains why although Fox-Decent is correct to claim that fiduciary private law can serve “as a major source of *inspiration*” for re-stating states’ obligations to their subjects—Fox-Decent, *supra* note 3, at 117—the relationship between the private and the public sides is one of cross-fertilization rather than of mining the former as a source for concrete decisions, results, or reforms. See Hanoch Dagan, *Fiduciary Law and Pluralism*, in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle et. al eds., forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3010681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010681).

30. See *supra* text accompanying note 15.

31. Muir Watt, *supra* note 3, at 135, 137 (emphasis around “more” added)

amongst systems—as in the highly contested question of whether female circumcision is a violation of bodily integrity or the exercise of a religious practice—reflect a “reality of irresolvable conflict,” which should not and cannot “be swept away with a reference to a perceived common core.” Rather, “they must be taken on what are ultimately political grounds.”<sup>32</sup>

Like our critics, we are acutely aware of the risks of relying on pseudo-universalist claims that render essential culturally-specific choices. We are thus happy to (explicitly) embrace the requirement of space-for-contestation into the architecture of interpersonal human rights. However, neither the risks of disguised parochialism, nor the entailed need for a careful process of specifying our interpersonal human rights (that we discussed in *Interpersonal Human Rights* and revisit below) justify our critics’ skepticism. Let us explain.

Our starting point is similar to that of Muir Watt and Michaels. Lawyers and scholars should treat universalist claims with some suspicion both due to the risks of actual abuse of misrepresenting a claim as universalist (which are indeed real, as the post-colonial scholarships demonstrates), and due to the risk of mistakenly perceiving culturally obvious maxims as if they reflect moral injunctions. The latter (more prevalent?) cases may well be innocent; but they also reify contingent hegemonic choices as if they are natural or necessary truths. So invoking hermeneutic of suspicion is justified.

But this suspicion should *not* leave us in a helpless relativism. As Isaiah Berlin famously wrote, “Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon.”<sup>33</sup> We thus emphatically reject the claim that our conflictual reality suggests that we must give up on the “elusive” quest of distilling a common humanist core of universal interpersonal values and, indeed, truths. We do not deny, to be sure, the potential contributions of political economy analyses or—more broadly—the actual effects of political struggles on these hotly contested topics. But we insist that they do not and should not preclude the kind of political discourse our theory anticipates, which is unapologetically normative and reason-based.

In other words, we believe that it is important not to substitute sociological suspicion with an ontological skepticism about reason and normativity. We reject, in other words, the way some critical legal scholars characterize reason as a disciplinary technology and normative analysis as arbitrary power.<sup>34</sup> These claims not only imply the dubious meta-ethical positions of either relativism, skepticism, or nihilism. By equating normative reasoning with parochial interests and idiosyncratic perspectives, they also undermine any possibility of moral justification, and thus also of moral

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32. Michaels, *supra* note 3, at 131–32.

33. ISAIAH BERLIN, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* I, 11 (Henry Hardy ed., 1991).

34. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 109–13, 147–48, 155 (1997); Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 *TIKKUN* 28, 92 (1987); Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151, 1152, 1155 (1985).



evaluation and moral criticism.<sup>35</sup>

Humanists can, and should, be suspicious, but they must resist the relativist trap, which paradoxically ends up reaffirming the status quo.<sup>36</sup> The sheer fact that claims of universalism are not always true and are open to possible abuses should not undermine our responsibility or our commitment to work on behalf of what we believe to be universal rights.<sup>37</sup> Banu's observation that "the ability of individuals to make claims of justice to each other" is *informed* by these individuals' social, cultural, and maybe even "political affiliations"<sup>38</sup> may well be correct. This, however, is exactly why it is important to use the *ius gentium privatum* in order to *name* the idea of international human rights, so as to transcend these domestic inhibitions.<sup>39</sup>

This attitude of bracketing out skeptical doubts in order to allow both justification and criticism also explains why we opt for a *charitable* moral reading of the private laws of divergent legal systems. Like Banu, we do not deny the many normative pitfalls of *all* legal systems, which surely implies that if *ius gentium privatum* stands for "solid comparative [law]," as Jitta seems to have understood it, it would be difficult, if not impossible, to distill from this exercise "a floor of interpersonal morality."<sup>40</sup> But as is oftentimes the case, the idealism of our social world, even if partial and stunted, is an important source of critical engagement.<sup>41</sup> Because, following Jeremy Waldron, we understand *ius gentium* as a body of *principles* that can be extracted from the "overlap between the positive laws of particular states" using "a legal sensibility that is both lawyerly and moralized,"<sup>42</sup> we are more hopeful than Banu and Jitta.

A morally charitable reading of private law enlists the *idealized* picture on which these divergent systems rely for the task of refining the minimal requirements of relational justice with which all legitimate legal systems should comply. Thus, rather than engaging in an apologetic exercise that hides prejudice and entrenches parochial practices, as Muir Watt implies, it marginalizes them and uses their underlying respectable façade, which may be hypocritical, as a fertile source of critical engagement.

*International Human Rights* is careful not to overstate the robustness of

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35. See, e.g., ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* 269–77 (1995).

36. We think, in other words, that critics, like Muir Watt, who seek to pursue "unabashedly normative" projects that can protect against "human rights violations universally understood"—Muir Watt, *supra* note 3, at 135—must join us in resisting the excessive reluctance to engaging in a reason-based analysis of universal moral truths.

37. See Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism: Comment on Arthur Ripstein*, *Private Wrongs*, 14 *JERUSALEM REV. LEGAL STUD.* 37, 47–48 (2016); HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* 39–43 (2013).

38. Banu, *supra* note 3, at 102.

39. Dagan & Dorfman, *supra* note 1, at 379.

40. Banu, *supra* note 3, at 105, 107.

41. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 46–48 (1993).

42. JEREMY WALDRON, "PARTLY COMMON TO ALL MANKIND": *FOREIGN LAW IN AMERICAN COURTS* 28, 35–36 (2012).

these global mandatory minimum standards. It claims, to be sure, that “torturing, raping, abusing, and other harsh deprivations of bodily integrity” are clear examples for a violation of these standards. But it also suggests that drawing “the precise fault line” requires “a gradual process of respectful dialogue among national courts seeking to distill the universal core of interpersonal human rights from their diverse, but not chaotic, sets of domestic private law.”<sup>43</sup> The reason why we think that this path (to which we return below) is not a second-best solution goes back to the hermeneutic of suspicion and to the challenge of embracing suspicion while rejecting relativism.

Consider Michaels’ claim that we “swept away” the dramatic collision of views on female circumcision which “go to the core of fundamental political and/or cultural/religious convictions.” Female circumcision is indeed a case that human rights activists perceive as a clear violation, a claim that is, in turn, criticized as culturally colonialist. This critique, Michaels notes, has various parts: “human rights activists are accused of denying agency to women who may actually choose the circumcision (for whatever reason). They are also criticized for their emphasis on issues of bodily integrity over issues of economic justice, borne from a very Western obsession with the body. Finally, they are criticized for claiming universality for values that are, in origin and focus, Western.”<sup>44</sup>

The modest humanism advanced in *International Human Rights* requires, as Banu puts it, to “reconcile” the dichotomy of “raising and lowering a post-colonial red flag.”<sup>45</sup> It thus suggests that the Western (Christian<sup>46</sup>) origins of our contemporary understanding of human rights should give us a reason to pause and reflect before taking a firm stand for or against the arguments from the Western obsession with physical integrity and consent. However, this alone cannot deal a fatal blow to these rights’ universal status. Concerning physical integrity, it is not clear how or why the significance of economic justice threatens the critique of female circumcision and whether the accusation of *Western obsession* with the body can be valid given that neither Michaels nor the postcolonial critics on whom he relies deny the *ius gentium privatum* status of the other forms of violating people’s bodily integrity, noted above.

Concerning consent and the resulting denial of women’s agency, our basic normative resources—self-determination and substantive equality—are readily equipped to tackle this form of argumentation. After all, moving from the mere fact of consent to the normative conclusion of *damnum absque injuria* is not unique to non-Western practices such as female circumcision. Some infamous doctrines of private law in the West had rested on somewhat similar grounds, namely, that a factory employee performing manual labor in an unusually risky environment “actually choose” to assume the risk to his

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43. Dagan & Dorfman, *supra* note 1, at 387–88.

44. Michaels, *supra* note 3, at 131–32.

45. Banu, *supra* note 3, at 105–06.

46. Cf. SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* (2015).

life and limb. However, reducing the situation to the fact of making a choice without taking into account the circumstances under which a choice is, or could be, made overlooks crucial considerations (such as viable employment alternatives) that ought to bear on whether or not the person's predicament counts as wrongful.<sup>47</sup>

Misrepresenting structural subordination as a choice is not unique to the employment context. Practices that subordinate women are also too often presented as authentically consensual while being maintained by power structures in which women are hardly represented.<sup>48</sup> This means that a responsible evaluation of these practices requires to apply our sociological suspicion in both—indeed, all—directions.<sup>49</sup>

We are accordingly quite skeptical as to whether female circumcision is indeed a happy practice in which the vulnerable participants choose to participate. Having said that, respecting the requirement of space-for-contestation may nonetheless suggest that the strong presumption against female circumcision should be open to reconsideration in fora which are both professionally committed to a normative discourse that requires reasons and expects justification in humanist terms and is at the same time open to critical perspectives and cross-cultural challenges that can help expose self-serving portrayals of contingent preferences as universal truths.

#### IV. Impact

We are finally in a position to examine the various challenges included in this Commentary as per the ability of our theory of interpersonal human rights to deliver on its promise in the context of the grave transnational wrongs for which it was developed. As we read their claims on this front, our critics push us to address three main questions: Who?, What?, and How?

Michaels complains that our theory “responds to a question of minor practical relevance” because it is silent on the question of enforcement.<sup>50</sup> Lasser, in turn, reads *Interpersonal Human Rights* to assign to “judges, who may or may not seek the assistance of enlightened private law scholars” the role of performing “the crucial, delicate—and dare I say, creative—task of generating, elaborating and, of course, applying such a *jus gentium privatum* of interpersonal human rights.” But then, he asks, what might be “the structural and substantive political ramifications of shifting primary regulatory responsibility from the political to the judicial branches of

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47. See Avihay Dorfman, *Assumption of Risk, After All*, 15 THEORETICAL INQUIRIES L. 293, 313–17 (2014).

48. For a powerful example, see Sindiso Mnisi Weeks, *Women Seeking Justice at the Intersection between Vernacular and State Laws and Courts in Rural KwaZulu-Natal, South Africa*, in THE NEW REGAL REALISM: STUDYING LAW GLOBALLY 113 (Heinz Klug & Sally Engle Merry eds., 2016).

49. This conclusion also applies to questions that arise regarding children's right to “physical and mental well-being” in the context of “authoritarian parenting styles,” which is addressed by Banu, *supra* note 3, at 111.

50. Michaels, *supra* note 3, at 126, 130, 132.

government?”<sup>51</sup>

Banu focuses on the substance of our approach, worrying that our reliance on the *minimal* core of private law cannot be “truly transformative.” More precisely, she insists that “a choice must be made” between the truly thin interpretation of this core, shared by Kantian private law theory, and the more robust alternative, which relies on our (more demanding) theory of relational justice. If the concept of interpersonal human rights opts for the former, Banu claims, it might end up merely reaffirming rights (such as the right against battery) which are “already recognized” as “the universal core of interpersonal responsibility.” Thus, if we aspire to do more than that, we need to be able to “address the issues most heavily litigated,” such as “whether a multinational corporation headquartered in the US, like Chevron, would need to pay punitive damages to Ecuadorian plaintiffs for torts committed in Ecuador even if Ecuador does not recognize punitive damages at all or to a lesser extent.”<sup>52</sup>

Finally, Fox-Decent targets our ability to resort to our own “specification of private law’s mission” in terms of relational justice in the service of “the transnational private law project” as we ourselves understands it. To see why, recall that the problem *Interpersonal Human Rights* sets out to address is “the missing link of privity” that haunts both the private international law use of the public policy exception and the public international law attempts to extend vertical human rights to non-state actors. Fox-Decent claims that this requirement of privity—the need to justify to the defendant its recruitment to the task of addressing the plaintiff’s predicament—necessarily relies on “formal, deontological grounds,” namely: that if private law is to be “a justificatory practice that claims legitimate authority,” it must make “no reference to the circumstances or personal differences of the defendant or plaintiff.”<sup>53</sup> But if this is indeed the case, then relational justice—that requires to take seriously the commitment to self-determination and to substantive equality, and thus to attend to both the parties’ circumstances and their personal differences—is, by definition, ineligible for the task.

Thus, according to Fox-Decent, if we adhere to the requirement of privity, we must subscribe to the (thin) Kantian view of our interpersonal rights (notwithstanding Banu’s disappointment). Alternatively, if we hold on to our view that “urgent need and ease of rescue can supply privity in the typical severely-distressed-stranger case,” we thereby imply that there is no “missing link of privity” after all, because “this would open the door to claims by the severely distressed poor against highly profitable multinational corporations operating in the global south.” Either way, we cannot “have [our] transnational private law cake and eat it too.”<sup>54</sup>

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51. Lasser, *supra* note 3, at 124.

52. Banu, *supra* note 3, at 108–10. Banu also raises questions regarding corporate value chains. *Id.* at 108. We briefly address this challenge in Dagan & Dorfman, *supra* note 1, at 386–87 n.114.

53. Fox-Decent, *supra* note 3, at 114–15.

54. Fox-Decent, *supra* note 3, at 114, 116.

These are all important concerns and we are (again) grateful for the opportunity to clarify and refine our position, beginning with the institutional question. *International Human Rights* indeed emphasizes the *substantive* core of transnational private law as the law that governs the basic terms of interactions between substantively free and equal private persons. This is not a coincidence, however. These primary norms—horizontal rights, duties, and powers—are conceptually and normatively prior to the institutions and procedures that aim at enforcing them. This point is true in the domestic context—tort law, for instance, is not reducible to the contemporary law of tort remedy, litigation, or civil recourse more generally; rather, it is primarily a scheme of mandatory reasons that come in the form of primary duties of interpersonal respect for basic rights to bodily integrity, dignity, property, et alia.<sup>55</sup> The same point is widely familiar in the context of international law, including, in particular, the body of law pertaining to vertical human rights.

We do not deny that in many contexts it seems apt to begin theorizing about law with institutions and procedures and only then discuss substance. But this sequence is not one of necessity or pure logic and, so, can be reversed.<sup>56</sup> Substance may precede institutions when a growing awareness of a substantive body of law pushes towards increasingly robust institutional venues and procedural paths. We need not belabor the point, well familiar to international lawyers, that extra-legal institutions, not to mention resort to hard and soft laws, may sometimes prove consequential to preventing and rectifying flagrant human rights violations. Naming transnational wrongs as interpersonal human rights violations is not an inconsequential academic maneuver.

Nothing in these observations suggests that some enforcement mechanisms are not important. Indeed, they are required as law's *fallback plan*—a derivative mechanism—in case these primary duties of respect prescribed by transnational private law have been compromised or neglected by their addressees.<sup>57</sup> We acknowledge, of course, that it is farfetched to imagine international mechanisms—either by extending the jurisdiction of existing fora or by forming new ones—through which interpersonal human rights can be best instantiated. But other, maybe less ambitious, instantiations of the idea behind such mechanisms are not necessarily utopian.<sup>58</sup>

As our discussion of female circumcision demonstrated, translating the abstract imperatives of our interpersonal human rights into concrete cases

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55. For more on this point, see Avihay Dorfman, *The Necessity of Egalitarian Tort Law* (unpublished manuscript).

56. Even H.L.A. Hart, whose celebrated account—in H.L.A. HART, *THE CONCEPT OF LAW* (1961)—of what law is pays particular attention to secondary rules, makes ample conceptual space for primary rules (especially in his critique of both Holmes and Austin and in connection with the discussion of international law as law).

57. *See Id.* We refine the claim as per the role of remedies elsewhere. *See* Hanoch Dagan & Avihay Dorfman, *Substantive Remedies* (unpublished manuscript).

58. Indeed, our account could also be helpfully used in the pursuit of solutions for the jurisdiction difficulty through, for example, the initiatives of requiring states “to provide a ‘natural’ forum for human rights violations understood as such.” Muir Watt, *supra* note 3, at 135.

requires a forum that is professionally committed to a normative discourse based on humanist justifications and is open to the kind of multicultural dialogue that is needed in order to address legitimate concerns of parochialism. Herein lies our response to Lasser and Michaels: if the quest for conceptualizing transnational wrongs as interpersonal human right violations would succeed—and if it would instigate a “respectful dialogue among national courts” that both inculcates humanist aspirations and preserves the hermeneutic of suspicion—then shifting responsibility to the judicial branches of government may indeed help to “cultivate *horizontal-rights-consciousness*” in both participants of transnational interactions and the political branches of government that currently fails them.<sup>59</sup>

All this effort, however, would be redundant if Banu’s skepticism about the transformative effects of interpersonal human rights turns out to be justified. But as Lasser observes, our “turn to interpersonal human rights is by no means limited to interstitial interventions in outlier cases.”<sup>60</sup> Indeed.

One transformative effect coming out of our account concerns the “heavily litigated” question of punitive damages.<sup>61</sup> The substantive challenge to punitive damages emerges from the civilian resistance to awarding super-compensatory damages in a private-law proceeding.<sup>62</sup> For instance, both the German and the Japanese highest courts balked at recognizing and enforcing punitive damages judgments given by U.S. courts against German and Japanese corporations involved in egregious misconduct.<sup>63</sup> As commentators have observed, the source of their reluctance lies in adopting a criminal-law conception of punitive damages—that is, awarding punitive damages represents both an intrusion of criminal law on the domain of private law and an illegitimate privatization of criminal law.<sup>64</sup> Our theory of relational justice provides the normative resources to re-characterize this remedy not only as a legitimate *private-law* response to some human rights violations, but rather also as a necessary one.

As we argue elsewhere,<sup>65</sup> a stand-alone remedy of compensatory damages for human rights violations might not do (relational) justice to the

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59. See Dagan & Dorfman, *supra* note 1, at 388.

60. Lasser, *supra* note 3, at 121.

61. Banu, *supra* note 3, at 108–110.

62. There are other challenges that arise in connection with incorporating punitive damages into a universal floor of interpersonal human rights protection, such as procedural and jurisdictional ones. However, the substantive challenge—can punitive damages serve as a legitimate private-law remedy at all—presents a foundational concern. These other challenges come to life only if the substantive one can be solved.

63. See Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 742 (2008); Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT’L & COMP. L. 285, 294 (1999), respectively. Cf. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II’), EC L 199/40 of 31.07.2007, para. 32 (courts of member states may refuse to enforce excessive judgments of punitive damages on account of being contrary to the public policy (*ordre public*) of the forum).

64. *Id.* and sources cited therein.

65. See Dagan & Dorfman, *supra* note 57.

victim insofar as it would merely *reinforce* the injurer's strategy of reducing—and, indeed, commodifying—the basic rights of the victim to “a mere cost of doing business.”<sup>66</sup> Accordingly, super-compensatory damages can provide the anti-commodification measure against the conversion of the private-law duty to respect vulnerable others as substantively free and equal persons into a standard of pay-as-you-go liability. Awarding it in such circumstances, therefore, makes no appeal to criminal punishment or to a vertical interaction between a state and a criminal, more generally. Instead, the remedy is the functional equivalent of injunctive relief and, in particular, an injunctive relief granted *ex post*.<sup>67</sup> Just as it commands *ex ante* intervention in the form of injunctive relief, so does the idea of relational justice in private law requires *ex post* intervention to *reinstate* just terms of interactions among substantively free and equal persons.

Evidence for the necessity of punitive damages, properly conceived, is not entirely unfamiliar to civilians, to be sure. For example, it does surface under the elusive concept of “effective sanction” in the context of workplace discrimination. In a notable decision, the European Court of Justice interpreted an EU Directive on gender equality in employment settings as requiring member nation states, almost all of which are hostile to the criminal-law conception of punitive damages, to provide victims with a remedy “of such a nature as to constitute appropriate compensation for the candidate discriminated against.” It further maintained, marshaling the private-law perspective we have emphasized above, that “A national measure which provides for compensation only for losses actually incurred through reliance on an expectation (“Vertrauensschaden”) is not sufficient.”<sup>68</sup> On our account, it is insufficient precisely because, and insofar as, a measure of compensatory damages creates the opening for employers to adopt a strategy of reducing the interpersonal rights of work candidates into a mere cost of recruiting employees.

Against the backdrop of this brief discussion, our response to Banu shows that *Interpersonal Human Rights* holds the potential of bringing about transformative effects by working out the implications of the *theory*—relational justice—for the bottom-line *practice* of remedying human right violations at the horizontal dimension. The same commitment to properly defend and develop a universal floor of interpersonal human rights is also likely, we think, to generate other transformative effects as well, which also illustrate its practical payoff. Two such takeaways, which we have defended

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66. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1430 (1993).

67. See Dagan & Dorfman, *supra* note 62. For an earlier development of this theme, see Avihay Dorfman, *What is the Point of the Tort Remedy*, 55 AM. J. JURIS. 105, 153-62 (2010).

68. Case 14/83 Sabine von Colson & Elisabeth Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891, 1906. The EU directive is Council Directive 76/207/EEC of February 9, 1976 on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions (1976 O.J. (L 039) 1-2) amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (2002 O.J. (L 269) 15).

in some detail elsewhere, are particularly important.

The first example involves the land grab scenario, which is one of the three case studies which prompt the analysis of *Interpersonal Human Rights*.<sup>69</sup> In this context we have argued that taking this concept seriously implies that the displaced members of rural communities in developing countries deserve to have direct standing against the buyers (multinational enterprises and foreign states) of the land they previously possessed. We furthermore maintained that there may well be cases—such as, possibly, those of the rural communities affected by the land rush—where although land users lack formal title, their human right to private property may have been violated by these buyers if the failure of their state system of property to recognize their claims to the land is flatly inconsistent with its normative foundations of self-determination and substantive equality.<sup>70</sup> This implication of the concept of interpersonal human rights is yet to be recognized. But the emerging international soft law on these issues happily provides it some support.<sup>71</sup>

This example nicely introduces our second takeaway. Appreciating these premises as the interpretive framework of *ius gentium privatum* implies, as we have just noted, that the human right to private property can also be violated by *omission*, namely, by a failure to recognize such a right even where both self-determination and substantive equality mandate such recognition. This means that, as both Banu and Fox-Decent anticipated, we indeed think that taking our theory of interpersonal human rights seriously requires to reject the Kantian conception of private law, which is founded on relational independence and formal equality, and thus limits private law to duties of abstention. This is, in fact, not the only reason for this divorce. As we note in *Interpersonal Human Rights*, endorsing this concept, or at least its derivation from the *ius gentium privatum*, is likely to be particularly challenging to Kantians given their commitment to the view that the legitimacy of private law is wholly dependent upon the state.<sup>72</sup>

As we mentioned at the outset, we think that the existing range of affirmative interpersonal duties in Western private law is probably inadequate, certainly in comparison to non-Western systems of private law, which are much more hospitable to such duties.<sup>73</sup> As we argued elsewhere, the approach of Western (especially Anglo-American) law “to the legitimate imposition of affirmative interpersonal duties” is overly cautious and at least

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69. See Dagan & Dorfman, *supra* note 1, at 362.

70. See Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQ. L. 391, 403 (2017); Hanoch Dagan, *Property Theory, Essential Resources, and the Global Land Rush*, in GOVERNING ACCESS TO ESSENTIAL RESOURCES 81 (Katharina Pistor & Oliver De Schutter eds., 2015).

71. See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* §§ 7.1, 7.3, 10.1, 16.1, 16.2, 16.8, 16.9 (2012).

72. See Dagan & Dorfman, *supra* note 1, at 373 n.62.

73. See, e.g., Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8 J. REL. ETHICS 204 (1980).



in some cases “the common law’s traditional reluctance to impose affirmative duties of easy rescue” is both “groundless” and “alarming.”<sup>74</sup> Here we suspect that the notion of interpersonal human rights can, and probably should, challenge Western law’s putative invocation of any cultural defense. Outright infringements of relational justice in any domestic system of private law—in both the contexts of female circumcision and the validation of failure to save a drowning child<sup>75</sup>—should be presented as what they are: violations of people’s interpersonal human rights, which require censure and demand making amends.

These three practical payoffs help, we hope, to address Banu’s concerns as per the limited transformative force of interpersonal human rights. But they also forcefully highlight the urgency of Fox-Decent’s challenge, because if we are indeed entitled to refer to interpersonal human rights as a solution to the problem of privity only if we subscribe to the Kantian school, none of these comforting conclusions can be properly established. Fortunately, this is not the case.

To see why, consider the structure of Fox-Decent’s critique. Like us, he understands privity to be the requirement that delineates the scope of our interpersonal duties, separating it from our strictly moral duties of virtues. “It is not enough,” to use Robert Stevens’ formulation of this familiar point, “to justify imposing legal duties to act (or not act) that good people behave in such a way,” because the sheer fact “[t]hat another person is present in the reasons for my duty of virtue cannot, alone, turn it into a duty of right or entitlement, in the sense that the positive law is then justified in enforcing it.”<sup>76</sup>

So far so good. But then, when he turns to consider the implications of this requirement, Fox-Decent implicitly subscribes to a specific, and specifically Kantian, delineation of this important distinction. Stevens makes this presupposition explicit: “duties of right,” he writes, “are based upon our entitlement to independence from the choices of others.” This is why the “most obvious illustration of the difference between duties of right and duties of virtue is the case of easy rescue.” Good people “pick up drowning babies when they could easily do so,” but this does not imply, Stevens insists, that “the baby ha[s] a right . . . to be saved.” To recognize the baby’s “*right* that I saved it,” he thus concludes, “would be to use me as a means to an end, and be inconsistent with *my* independence.”<sup>77</sup>

Like Fox-Decent and Stevens, we believe that private law should not

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74. See Dagan & Dorfman, *Just Relationships*, *supra* note 2, at 1456.

75. See *Handiboe v. McCarthy*, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966), in which the court found that a property owner owes no affirmative duty of easy rescue to save a drowning four-year-old licensee, asserting that “[t]he mere fact that such child is an infant of tender years and unable to appreciate the danger of a particular situation [e.g., a swimming pool with a “slippery and slimy” bottom on the defendant’s yard] as readily as would an adult does not alter the relation of the parties.” *Id.* at 906.

76. See Robert Stevens, *Contract, Rights and the Morality of Promising*, LAW & PHIL. (forthcoming 2018).

77. *Id.*

enact duties of virtue (such as duties of friendship and of benevolence). But we deny what they simply assume, namely: that duties of right are *only* duties of abstention. More generally, we deny that concerns for independence and formal equality exhaust the considerations that ought to determine what legal rights do we have and, as a result, what duties of right we owe to each other. Indeed, relational justice rejects the underlying Kantian conception of rights and articulates another in its stead. After all, the significance of relational justice springs from the conviction that the facts of interdependence and personal difference—and thus the vulnerability and the valuable options to which the human condition as we know it gives rise—imply that the liberal commitment to individual self-determination and substantive equality *cannot* be excluded from the law governing horizontal relationships.

Of course, private law should resist *excessive* imposition of affirmative duties. This is because respect for self-determination and substantive equality goes in both directions—the self-determination and substantive equality of the duty-bearer is no mere external constraint, but rather integral to grounding affirmative duties in a commitment to relational justice. But there exists ample normative space between excessive imposition and a blanket rejection of affirmative duties in private law.<sup>78</sup> As H.L.A. Hart argued, not every infringement of independence ignores “the moral importance of the division of humanity into separate individuals and threaten[s] the proper inviolability of persons.”<sup>79</sup> Therefore, with Hart, our theory of relational justice accepts the significance of distinguishing “between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life.”<sup>80</sup>

In order to translate this lesson into private law the theory of relational justice develops and applies guidelines derived from the ideal of reciprocal respect for self-determination and substantive equality, the nature of legal prescriptions, and rule-of-law concerns. There is no need for us to belabor the details (or the contours) of this aspect of our theory here. For our purposes it is enough to conclude that private law’s *grundnorm* of reciprocal respect for self-determination and substantive equality implies that there is neither a way nor a reason to strictly limit the duties that derive from our interpersonal interactions to duties of abstention, which is why the privity of the transnational interactions with which we are concerned can and should, *pace* Fox-Decent challenge, also be the premise of some (properly delimited) affirmative duties.

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78. See Dagan & Avihay Dorfman, *Just Relationships*, *supra* note 2, at 1413–20, 1451–59; Dagan & Dorfman, *Justice in Private*, *supra* note 2; Dagan & Dorfman, *Against Private Law Escapism*, *supra* note 37, at 43–44, 50–51.

79. H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 834–35 (1979).

80. *Id.* Hart laments this “indispensable chore,” deeming it “unexciting.” *Id.*