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## The New Legal Criticism

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## THE NEW LEGAL CRITICISM

*Robin West\**

## INTRODUCTION

Professors Hanoch Dagan and Avihay Dorfman's article *Just Relationships*<sup>1</sup> is a fundamental reinterpretation of the moral ideals of large swaths of private law. Its significance, however, may go beyond even that broad ambition. In this Response, I suggest that *Just Relationships* is also an exemplar—perhaps par excellence—of an emergent form of critical discourse, which may itself foreshadow a paradigm shift in contemporary critical legal scholarship. That new form of scholarship might usefully be dubbed “the new legal criticism.” The label serves partly as an echo of the “New Criticism” movement that emerged in literary criticism in the middle of the twentieth-century, which, in methodological ways, the new legal criticism very much resembles.<sup>2</sup> But primarily, the label “new legal criticism” suggests that this ascendant group of legal scholars articulates a different point of departure for critical thinking about law—particularly for critical thinking about private law—from that which most immediately preceded it in twentieth century legal thought: the critical legal studies movement.<sup>3</sup>

Part I describes new legal criticism and compares it with the critical legal scholarship movements of the 1970s, 1980s, and 1990s. Part II further expands my claim that *Just Relationships* is a good exemplar of the new legal criticism by looking at the roles played by relational justice in Dagan and Dorfman's explication of their jurisprudential claims. Part III looks at the limits of new legal criticism, again as exemplified by *Just Relationships*. I will explore whether the reliance of the new legal criticism on law itself in the development of the idea of justice limits

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1. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395 (2016).

2. For a classic introduction and critique of the New Critics, see Terry Eagleton, *Literary Theory: An Introduction* 40–42 (2008).

3. See generally Mark Kelman, *A Guide to Critical Legal Studies* (1987) [hereinafter Kelman, *Critical Legal Studies*] (interpreting the major contributions of the critical legal studies movement, including legitimation, indeterminacy, and hegemony); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1983) (asserting and defending a radical role for lawyers and legal scholars in reforming law toward social change); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *The Politics of Law: A Progressive Critique* 641 (David Kairys ed., 1998) [hereinafter Gordon, *Some Critical Theories of Law*] (exploring the role of legitimation critiques that centers them from Marxist and radical instrumentalist interpretations of law and capitalism).

its potency as a form of criticism by comparing the authors' discussion of discrimination in housing with a subject they do not address, at-will employment. Finally, the conclusion explores possible avenues of further exploration within the authors' chosen field—private law, largely understood—and within the parameters set by the new legal criticism's premises.

#### I. NEW LEGAL CRITICISM AND THE CRITICAL LEGAL STUDIES MOVEMENT: ONE CONTRAST

The political valence of the new legal criticism is largely shared with its critical precursor. The new legal critics, therefore, much like the critical legal studies scholars of the late-twentieth century, resist the traditional and quasi-libertarian legalist claims that contemporary Western law—or at least U.S. private law—rests and should rest on a firm commitment to formal equality and an anti-state-interventionist and pro-market form of individualism. These conventional claims are twofold: that contract, tort, and property law collectively constitute a legal structure within which (1) norms of equality are exhausted by a shallow commitment to the formally equal treatment of all regardless of identity or context, and (2) our ideals of liberty are likewise exhausted by a conviction that the state should fundamentally stay out of the way of our private interactions and private life, beyond minimal night-watchman-like norms of tort and criminal law.<sup>4</sup> Both critical groups, in short, have a lot of shared ground—they share a resistance to the dominant libertarian interpretations of our inherited private law texts.

Beyond those shared political impulses, however, the new legal critics' departure from critical legal scholars' premises are both deep and broad, spanning method, substance, and a range of distinctively jurisprudential commitments. Starting with method and substance, on the most obvious level, the new legal critics have *no* commitment to—indeed, seemingly no interest in—the various versions of the indeterminacy thesis, deconstructionist methodology, Marxist or neo-Marxist “rights critiques,” or Gramscian-styled worries over legitimation costs, hegemony, or demystification that so dramatically colored critical thinking about liberal legalism from the late 1970s to approximately the mid-aughts of this century.<sup>5</sup> Thus, the new critics' various arguments

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4. For a clear articulation and defense of this libertarian conception of private law, see generally Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998) (defending a libertarian understanding of contract, property, and the role of courts in enforcing the rule of law).

5. On critical legal scholars' interest in deconstructionist methods, see generally Pierre Schlag, *A Brief Survey of Deconstruction*, 27 *Cardozo L. Rev.* 741 (2005). For exemplary and near-iconic examples of the power of the deconstruction method in exposing law's indeterminacy, see, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997, 1002–03 (1985); Mark G. Kelman, *Trashing*, 36 *Stan. L. Rev.* 293, 299 (1984) [hereinafter Kelman, *Trashing*]; Duncan Kennedy, *The Structure*

against libertarian interpretations of our legalist commitments are decidedly *not* that those interpretations—or the legal commitments that are their subject—are incoherent because they are indeterminate,<sup>6</sup> or that they vacillate between various polarities that stand in need of deconstruction,<sup>7</sup> or that the rights at their center serve to legitimate an unjust maldistribution of material resources, or that they create a false hegemony between classes of contractors, citizens, or neighbors under the obfuscating claims of a universalist conception of free actors.<sup>8</sup> And, most importantly in Dagan and Dorfman's article, the new legal critics, unlike the critical legal scholars, harbor no objection to the traditional liberal understanding of the so-called "private-public" distinction.<sup>9</sup> New legal critics particularly reject the quintessential critical legal scholars' claim that "private law" is a kind of malign illusion: the claim that, at best, "private law" is a branch of public regulatory law disingenuously committed to the assertion that it is distinctively different from the public law regimes of which it is a part; or that, at worst, "private law" rests on a destructive denial of the regressive consequences of the false belief that a private sphere of individual liberty and freedom, created by a legal regime of law and rights, justifies the maldistribution of political power that it then disingenuously protects from public critique or political change.<sup>10</sup> New legal critics resist, in other words, the claims—common to most and possibly all of the critical legal scholars' theoretical contributions in the last part of the twentieth century—that the "private sphere" regulated by "private law" in order to protect individual liberty and privacy within that sphere, either does not exist or necessarily serves pernicious ends.<sup>11</sup>

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of Blackstone's Commentaries, 28 *Buff. L. Rev.* 209, 211 (1979); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 793 (1983). The new legal critics, by contrast, have to date evidenced no commitment to the existence of fundamental contradictions or pervasive indeterminacy in law, or the potency of deconstructivist methodology in criticism.

6. See, e.g., Kelman, *Trashing*, *supra* note 5, at 293–94.

7. See, e.g., Dalton, *supra* note 5, at 1002–03.

8. See, e.g., Gordon, *Some Critical Theories of Law*, *supra* note 3, at 646.

9. See Dagan & Dorfman, *supra* note 1, at 1424.

10. *Id.* On the critical legal scholars' view of the public-private distinction, see generally Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349 (1982) [hereinafter Kennedy, *Stages of Decline*]; Louis Michael Seidman, *Critical Constitutionalism Now*, 75 *Fordham L. Rev.* 575, 578 (2006).

11. The critique of the public-private distinction as either illusory or pernicious dates from the legal realist era. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 *Harv. L. Rev.* 553, 564 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 10 (1927); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 816–17 (1935); Leon Green, *Tort Law: Public Law in Disguise*, 38 *Tex. L. Rev.* 257, 262 (1960); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 474 (1923).

As Dagan and Dorfman correctly note, the critique of the public-private distinction has become a defining staple of the critical legal scholarship from the early

There is, however, a more significant, and possibly more lasting, jurisprudential divide between the critical legal scholarship of the twentieth century and the new legal criticism of the twenty-first that overshadows even these methodological and substantive divides. It concerns, broadly, the relationships assumed by the two groups between law, politics, and morality. Put briefly, the new legal critics embrace various *moral principles*, which are themselves imperfectly articulated in positive law, as the basis of their legal criticism or as constituting the baseline against which their criticisms are mounted.<sup>12</sup> Therefore, according to the new legal critics, law is to be criticized on the basis of moral principles and ethical ideals that emanate from law itself.<sup>13</sup> The twentieth-century critical legal scholars, by contrast, aggressively eschewed moral criticism of law of any sort, but particularly when the

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1980s to the present. See, e.g., Kelman, *Critical Legal Studies*, supra note 3, at 198–99 (discussing the role of the critique of the private–public distinction in critical legal studies); Dalton, supra note 5, at 1010–11 (deconstructing this distinction between private and public in contract law); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *Buff. L. Rev.* 237, 247–50 (1987) (critiquing this distinction in various doctrinal areas of law); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *Stan. L. Rev.* 1, 10–42 (1992) (discussing feminist critiques of this distinction); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1423, 1426–27 (1982) (tracing the history of the purported distinction); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 *U. Pa. L. Rev.* 1358, 1361–62 (1982) (discussing the role of this distinction in labor law); Fran Olson, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983) (attacking the distinction between intimate and private spheres and the distinction between both with the public sphere); Gary Peller, *The Metaphysics of American Law*, 73 *Cal. L. Rev.* 1151 (1985) (tracing and critiquing the history of the claim that law is political).

12. The idea that moral criticism of law should be grounded in premises themselves drawn from law can be traced to natural law theoretical approaches to law's criticisms and to some strands of liberal legalism as well. For natural law antecedents, see generally Ronald Dworkin, *Taking Rights Seriously* (1978) (drawing moral principles from the body of existing law and looking to advance law on the basis of those principles); John Finnis, *Natural Law and Natural Rights* 18–19 (2011) (arguing for a moral basis of legal criticism). For more contemporary examples of this sort of overtly moralistic approach to legal criticism, see, e.g., Paul Gowder, *The Rule of Law in the Real World* 7–27 (2016) (arguing for a dignitarian basis for the rule of law); Jeremy Waldron, *Dignity, Rank, and Rights* 14 (2014) (arguing that dignity is both a principle of morality and law); Robin West, *Caring for Justice* (1999) (arguing for a normative approach to law that blends an ethic of care with an ethic of justice); Robin West, *Normative Jurisprudence* (2011) (making the argument for a normative approach to legal criticism); Michelle Madden Dempsey, *Why We Are All Jurisprudes (or, at Least, Should Be)*, 66 *J. Legal Educ.* 29, 35 (2016) (arguing that law provides general moral obligations on people regardless of whether general moral normative forces actually exist); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *Emory L.J.* 815, 817 (2007) (arguing that traditional morality governing sexual expression promotes inequality amongst men and women and unrightfully influences law); Benjamin C. Zipursky & John C.P. Goldberg, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917, 919 (2010) (arguing that tort law should be understood as a body of law providing remedies for wrongs).

13. See, e.g., Dagan & Dorfman, supra note 1, at 1399 (defining morality in private law dealing with interpersonal concerns).

moral principles grounding the criticism were purportedly articulated in the law itself.<sup>14</sup> Moral principles and whatever can be said of them, according to the critical legal scholars, simply cannot be the basis for the criticism of law mainly because they can and should be subjected to the same critiques as law itself: Moral principles are incoherent, contradictory, expressed often in terms of moral or human rights that are then captured by dominant economic interests, and are basically overly protective of property, wealth and entitlement.<sup>15</sup> The critical legal scholars' *critique* of law proceeded, then, not on the basis of law's relation to its own ideals, or to any other set of moral principles, but rather on the basis of law's various relations to *power*.<sup>16</sup> Thus, for the critical legal scholars, law could and should be unmasked, deconstructed, and criticized, not because it falls short of a moral ideal, but rather because it embodies, legitimates, renders invisible, or promotes various forms of social, economic, or legal power.<sup>17</sup> It should be noted that law could also, at least on occasion, be applauded. But again, this would be along the same axis: When law is good, it is not because it is morally "good," but rather because it can be deployed in such a way as to either empower generally subordinated groups, to explode constellations of pre-existing power, or to renegotiate power along surprising and generative axes. The mode of either criticism or praise, however, was (or is) for critical legal scholars, relentlessly *political*, not moral: Law stands fundamentally in some intimate relation to power, and it is toward the end of better understanding, or unmasking, or upending that relation of law to power that critique should be aimed.<sup>18</sup> The moral criticism of law—and particularly moral criticism of law on the grounds that it ill-serves laudatory ideals that are themselves imperfectly expressed and embodied

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14. See, e.g., Kelman, *Critical Legal Studies*, supra note 3, at 42 (noting the different critical views on the theory of law); Kennedy, *Stages of Decline*, supra note 10, at 1352 (noting the washing away of the public-private distinction).

15. See, e.g., Unger, supra note 3, at 107 (suggesting a basic reformulation of the social theory).

16. In this, the critical legal scholars echoed Foucault. See generally Michel Foucault, *The Subject and Power*, 8 *Critical Inquiry* 777 (1982) (arguing that human beings are made subjects by exercises of power, and for the need for a new study of the economy of power relations). For a full discussion, see Robin West, *Critical Legal Studies—The Missing Years*, in *Normative Jurisprudence: An Introduction* 177 (2011).

17. See, e.g., Mark Kelman, *Choice and Utility*, 1979 *Wis. L. Rev.* 769, 769–72 (noting the shortcomings of utility arguments in traditional law and economic opinions); Duncan Kennedy, *The Critique of Rights in Critical Studies*, in *Left Legalism/Left Critique* 178 (Wendy Brown & Janet Halley eds., Duke Univ. Press 2002) [hereinafter Kennedy, *Critique of Rights*] (abandoning the Marxist critique of rights and shifting the argument for the critique of rights from a claim that rights are contrary to the interests of the party of humanity to a political critique that rights freeze political contestation); Catherine A. MacKinnon, *Not a Moral Issue*, 2 *Yale L. & Pol'y Rev.* 321, 323 (1984) (providing a feminist critique on the politics of pornography law).

18. For two powerful examples, see Kennedy, *Critique of Rights*, supra note 17, at 178; MacKinnon, supra note 17, at 323.

in law itself—is at best a distraction and at worst complicit in law’s legitimating and obfuscating projects. The moral calculus required to get such criticism off the ground is itself a part of the intellectual and cultural apparatus in need of critique. The new legal critics, by contrast, harbor no such global moral skepticism.

Thus, the shared premises of the growing number of new legal critics suggests a departure from *both* traditionally liberal and libertarian understandings of large swaths of our law *and* from the critiques of that liberal understanding that have emanated from the various critical legal studies movements of the eighties and nineties. The new legal critics, unlike their critical predecessors, put forward unabashedly moral criticisms of law and of traditionally liberal and libertarian justifications of it, and then offer reinterpretations that are grounded neither in judicial biography, nor in indeterminacy, nor in reader-centered politics, but rather in ideals drawn from their faithful reading of the law itself.<sup>19</sup> We can see this “new” (in some ways of course very old) overall approach to the moral criticism of law emerging across an array of doctrinal areas. To take just a few salient examples: Fourteenth Amendment law, from a new critical perspective, according to Professors Reva Siegel and Robert Post, is committed to a substantive (rather than formal) conception of equality that is in turn informed by the mandate to treat all citizens with dignity and mutual respect—a demand that requires much more state intervention than the simplistic or shallow mandate to treat likes alike or simply get out of our private or commercial affairs.<sup>20</sup> Tort law, according to Professors Benjamin Zipursky and John Goldberg, is not committed to the goal of efficiently allocating the costs of accidents, as argued by now countless liberal, libertarian, and economics-minded torts theorists.<sup>21</sup> Rather, our “law of wrongs” is and should be committed to the mandate that the state must provide legal recourse for those who are wronged by co-citizens in injurious ways that could and should have been prevented. Tort law itself serves this noble, not ignoble, end when properly construed.<sup>22</sup> A third example: Our contracts—or at least our contracts that are enforceable in courts of law and properly enforced—must be *conscionable*, and not just efficient, according to Professors Seana Shiffrin and Hila Keren, and

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19. See Dworkin, *supra* note 12, at 46 (noting that moral principles are drawn from the body of law itself); Gowder, *supra* note 12, at 7–27 (suggesting a dignitarian understanding of rule of law drawn from law); Dagan & Dorfman, *supra* note 1, at 1398 (noting that moral principles for private law are drawn from law itself); Zipursky & Goldberg, *supra* note 11 (arguing for a conception of torts that conceives of torts as wrongs and one in which the concept of wrongs is taken from tort law itself).

20. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 425 (2007) (criticizing the Court’s use of a minimalist approach to reproductive rights rather than democratic constitutionalism, which embraces those rights).

21. Zipursky & Goldberg, *supra* note 12, at 917–30.

22. *Id.* at 931.

when they are not, contract law and the judges who enforce it should stand ready to strike them.<sup>23</sup> A final example: The rule of law itself, according to Professor Paul Gowder, commits the state that abides by it to the substantive equality and equal dignity of all citizens, including most profoundly the poor.<sup>24</sup> The rule of law is neither reducible to a call for formal equality, as held by liberal theorists, nor is it a handmaiden of capitalist exploitation, as contended by Professor Morton Horwitz (following Marx) and scores of like-minded neo-Marxist critical theorists.<sup>25</sup>

All of the aforementioned new legal critics, and again a growing number of others, are finding explicitly moral and for-the-most-part progressive ideals in all of these old legalistic wine bottles: the Fourteenth Amendment, the cases and statutes that constitute contract and tort law, and most vividly perhaps, the liberal philosophical and political canon that comprises our understanding of the rule of law itself. All of these legal scholars—Professors Siegel, Post, Keren, Shiffrin, Zipursky, Goldberg, and Gowder—are finding in law a source, rather than an object, of politically progressive and morally informed critique.

*Just Relationships* is exemplary of this new movement for two related reasons. First, it is much more explicit than most participants in this genre in detailing the “new critical” moral and philosophical premises on which its critique rests. Second, and relatedly, it is simply more jurisprudentially ambitious than most of the examples cited above.<sup>26</sup> Dagan and Dorfman seek no less than a reorientation of private law in its entirety, from top to bottom, rather than any particular field or doctrine within it. And their central positive claim is powerful: All of private law exists, they argue, so as to promote a particular kind of justice—what

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23. Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 *BYU L. Rev.* 427, 438–39 (discussing the centrality of the unconscionability doctrine in a court’s enforcement of a contract); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *Phil. & Pub. Aff.* 205, 249–50 (2000) (arguing that the unconscionability doctrine can coexist with a non-paternalistic interpretation of the law).

24. See Gowder, *supra* note 12, at 6, 143–57 (“When a state achieves the rule of law, it achieves a commitment to equality among its citizens.”).

25. *Id.*

26. Dagan and Dorfman situate their approach to private law by contrasting it with the critique of the public–private divide and the liberal and libertarian understanding of private law as serving the ends of individual freedom. Thus, it is an understanding of the point of private law in its entirety as serving ideally the ends of just relationships. In this way, the work compares with Dworkin’s ambition. See Dworkin, *supra* note 12, at 46 (arguing that strong legal interpretations must fit both precedent and a strong theory of justice). The other new legal critics have not, for the most part, embarked on this jurisprudential analysis, but they are more typically focused on particular areas of doctrine. Cf. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *Harv. L. Rev.* 708, 709–13 (2007) (focusing on the unconscionability doctrine, not just private law in general); Zipursky & Goldberg, *supra* note 12, at 918 (arguing that the study of tort law, rather than private law in general, has gone astray).



they call relational justice—in private relationships.<sup>27</sup> Against the traditionalists, which for Dagan and Dorfman include both liberal-egalitarians and liberal, efficiency-minded libertarians, their distinctive claim is that relational justice requires two moral goals the traditionalists sleight, ignore, or deny: first, a form of *substantive*, rather than solely formal, equality that is in turn sensitive to the contingency, the context, and the vulnerabilities of individual contractors and tortfeasors;<sup>28</sup> and second, a robust autonomy that accords individuals the material wherewithal to truly guide their own lives on the basis of their chosen conception of the good, rather than a shallow libertarian conception of individual independence from the state.<sup>29</sup> Their *evidence* for this broad-based reinterpretation of our existing law of contract, tort, and property, away from the liberal understandings shared by liberal egalitarians and libertarians both, comes not from judicial biography or history, nor from a frank recital of their own political beliefs, but rather, from private law itself: the common law cases and the statutory schemes that form the bulk of modern contract, tort, and property doctrine.<sup>30</sup>

And against critical legal scholars, Dagan and Dorfman put forward two claims: first, that private law most decidedly exists, as does the private sphere it protects and regulates; and second, that private law's existence is a good thing. Private law has distinctive positive value that merits attention and care—it promotes relational justice.<sup>31</sup> If we lose it, we will lose the guardian protector of justice in our relational lives.<sup>32</sup> The claims that private law exists and that it does so in order to promote relational justice in our private lives are not simply the result of either mistaken understanding or a more malign masking of private power.<sup>33</sup> We need to understand private law for what it is, as well as for what it could and should be, *because of* the distinctive values it protects and the forms of private justice it promotes.<sup>34</sup>

## II. RELATIONAL JUSTICE AND THE OBLIGATIONS OF CONTRACT

In *The Great Gatsby*, Tom Buchanan says to Wilson: “I won’t sell you the car at all . . . I’m under no obligations to you at all.”<sup>35</sup> Dagan and Dorfman do not discuss *The Great Gatsby*. Nevertheless, their central intuition can be applied to this quintessential American novel: Tom

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27. Dagan & Dorfman, *supra* note 1, at 1424.

28. See *id.* at 1399–1400.

29. See *id.*

30. See *id.* at 1430–59.

31. See *id.* at 1409–10, 1428.

32. See *id.* at 1410.

33. See *id.* at 1408.

34. See *id.* at 1403–05.

35. F. Scott Fitzgerald, *The Great Gatsby* 90 (Matthew J. Bruccoli ed., Cambridge Univ. Press 1991) (1922).

Buchanan was wrong in the novel's pivotal conversation to disavow *all* obligations to Wilson on the grounds of a lack of contractual privity between the two of them. Our private relationships, Dagan and Dorfman argue, and particularly those that arise from our commercial lives, impose upon us a duty of "relational justice." Relational justice should inform, guide, and restrain our relationships with each other.<sup>36</sup> Relational justice, in turn, requires of us that we respect the substantive equality and the capacity for individual self-determination in our dealings with each other.<sup>37</sup> That, in turn, sometimes (though admittedly not always) requires a sensitivity to the context and the particular vulnerabilities of the others with whom we deal.<sup>38</sup> A respect for the formal equality of all contractors, or for all potential tort victims, and an equally formal commitment to state detachment, are woefully inadequate to those ends.<sup>39</sup>

Private law, in turn, reflects and enforces these obligations, albeit imperfectly, and provides remedies for their most egregious breach. Contract law imposes upon us a wide array of obligations to treat justly those with whom we contract, as well as those with whom we may contract.<sup>40</sup> Tort law imposes an obligation to treat justly those strangers or others with whom we come into incidental contact, including primarily an obligation to avoid accidental harm.<sup>41</sup> Often that obligation is fulfilled through respecting the formal equality of each contractor or individual tort victim: I need not consider the individual circumstances of the buyer of my home or car when setting my asking price, and I need not consider the individual limitations or capacities of every stranger when fulfilling my obligation to proceed nonnegligently down my neighborhood streets in my automobile.<sup>42</sup> Thus, formal equality toward my contractual partners and a formal commitment to liberty that is unburdened by attention to the individuating circumstances of those I might accidentally harm is typically sufficient to ensure that I am behaving justly in my relational life.<sup>43</sup> Consensual contracts, after all, do for the most part leave both parties better off, and obligations of due care defined generally, rather than individually, do for the most part keep all of us out of harm's way while allowing us to pursue our own projects.<sup>44</sup>

But formal equality and a formal commitment to liberty that pays no attention to individuating circumstances is not always enough to ensure

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36. See Dagan & Dorfman, *supra* note 1, at 1421–22.

37. See *id.* at 1423.

38. See *id.* at 1433–34.

39. See *id.* at 1435.

40. See *id.* at 1430.

41. See *id.* at 1431.

42. See *id.* at 1421–22.

43. See *id.* at 1438.

44. See *id.* at 1404.

relational justice. Our private law, to its credit, reflects this limitation. To treat our co-contractors as the substantive equals they are, we must also sometimes take account of the possibility that, for individuating reasons, they are acting under duress and unable to adequately assess their own self-interest, or that the terms we have formally agreed upon are nevertheless operating unconscionably upon them, or that they may lack the maturity to best determine sensible contract terms.<sup>45</sup> To treat all of our co-citizens as worthy of self-determination, we must sometimes adjust upward the amount of due care we owe to account for their particularizing vulnerabilities when those vulnerabilities are obvious and debilitating. Relational justice requires us to abide by these legal constraints.<sup>46</sup> Our law, for the most part, reflects these demands. It is private law's ability to do so, Dagan and Dorfman argue, that is its normative point and moral value—not private law's contributions to efficiency or societal wealth. Of course it creates wealth, and of course it allows us to create wealth through our dealings.<sup>47</sup> To the extent that it does so consistently with the demands of justice—that we respect the substantive equality and capacity for self-determination of others in our dealings with them—those wealth-maximizing dealings and the law regulating them are also just. When justice requires more, though, the law should, and for the most part does, follow, even at substantial cost to wealth and liberty.<sup>48</sup>

The law does not, however, perfectly reflect the demands of relational justice, and when it falls short, it should be faulted.<sup>49</sup> Therein lies the foundation of legal critique, both generally and in private law. One of Dagan and Dorfman's examples perfectly illustrates both the strengths and the limits of not only their own argument but of new legal criticism quite generally.

Dagan and Dorfman argue in an extended portion of their article that, contrary to the claims of virtually all contract scholars, both egalitarian and libertarian, relational justice imposes constraints upon us *in our choice of contracting partners* and that those constraints are only very imperfectly—if at all—reflected in contract law.<sup>50</sup> For this fact, contract law should be criticized.<sup>51</sup> Contract law, to the contrary, rests quite fundamentally on a norm of absolute contractual discretion, in our decisions over who we wish to contract with or wish to avoid. This is

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45. See *id.*

46. See *id.*

47. See *id.* at 1396 (“Private law—the law of our horizontal interventions—offers many instrumental benefits to society: Property and contract law help us assign and reassign entitlements, while tort law helps allocate responsibilities regarding those entitlements.”).

48. See *id.* at 1397–98.

49. See *id.* at 1424 (noting the extent of the compliance of the doctrine with relational justice is contingent and complex).

50. See *id.* at 1419–20.

51. See *id.*

wrong, Dagan and Dorfman argue. Our choices are not at all free, either morally or legally. They are constrained, first, by the contingent yet powerful antidiscrimination norm, which is itself grounded in public law.<sup>52</sup> By virtue of various familiar civil rights laws, we may not decline to sell our home, or refuse to hire someone, on the basis of that potential co-contractor's race, ethnicity, or sex.<sup>53</sup> We cannot opt to *not* deal with Black or Latino or female buyers of our homes or potential employees of our businesses. We do not in fact have that unfettered contractual freedom. We do not have it, of course, by virtue of the existence of antidiscrimination law.<sup>54</sup>

That legal restraint on our contractual freedom, however, as Dagan and Dorfman insist, is "contingent," and by contingent, they mean something quite specific (and contingent might not be the best word for this): The existence of the duty not to discriminate in choosing contractual partners is contingent *not* on contract law itself but rather on federal civil rights laws.<sup>55</sup> But it should not be. Dagan and Dorfman's main point, in brief, in this section of their article, is that we cannot discriminatorily refuse to deal with members of these groups, not *only* by virtue of contingent, could-be-otherwise, public-law-based antidiscrimination law, but *also* by virtue of the demands of relational justice itself.<sup>56</sup> Were we to discriminate against potential homebuyers on the basis of race or other impermissible bases, they argue, we would violate not just public-law-imposed antidiscrimination law but we would also violate our obligations of just dealings. To refuse to contract on these grounds would be to refuse to treat those with whom we would not contract as substantively equal persons who possess rights to self-determination that are the equal of our own. It is thus not only federal antidiscrimination law but *also* relational justice that constrain us from discriminating against potential contracting partners. To discriminate in the sale of our house or to discriminate in our employment practices is a violation of our obligations to treat others justly in our private dealings with them—not just a violation of the civil rights of members of minority groups to nondiscrimination.<sup>57</sup>

However, this account of the violation of the duty of relational justice that is occasioned by discriminatory conduct in our decision to contract or not contract with someone is nowhere reflected in our contract law.<sup>58</sup> It is not in any sense a violation of contract law—or indeed

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52. See *id.*

53. See *id.* at 1460.

54. See *id.* at 1442–45 (arguing traditionalists' understanding ascribes the duty of nondiscrimination in the sale of a home to the contingent existence of antidiscrimination law, whereas the theory of just relationships grounds it in contract and property law itself).

55. See *id.* at 1414.

56. See *id.* at 1399.

57. See *id.*

58. See *id.* at 1401–02.

of private law—to refuse to hire someone, or sell to someone, on the basis of race, gender, or the existence of a disability. To reiterate, while it is most assuredly a violation of our public law of civil rights, it is in no way a violation of *contract law*. Such an act does not give rise to a cause of action in contract. It is not understood in those terms. Our contract law—both in doctrine and even more powerfully in theory—does not include *any* understanding that our choices to contract or not contract are in any way constrained, whether by the race of our potential co-contractor or by any other factor.<sup>59</sup>

But as Dagan and Dorfman argue, it should.<sup>60</sup> The point of contract law, writ large, is to promote relational justice in our dealings with each other.<sup>61</sup> We may be inclined to treat each other justly in the private realm for the most part. But we do not always, and when we do not, contract law itself should act as a corrective. Contract law exists, or should exist, to complete the circle of virtue: Because of various rules of contract law, our contracts will reinforce what is required of us by our obligation of relational justice. When we breach that obligation, contract law should step in to provide the remedy.<sup>62</sup>

There are four steps to Dagan and Dorfman’s quite complex argument on this score, and each is important. The first step may be the least obvious but really should not be: to wit, that the duty not to discriminate is not a part of contract law.<sup>63</sup> We do of course have a duty not to discriminate—this is why their point may be hard to see—but that duty owes its origins to federal antidiscrimination law, not to contract law itself. Again, contract law itself, traditionally understood, teaches something that is very much the opposite: Contract law rests, after all, on a firm foundational claim that we can undoubtedly refuse to contract with anyone we would rather not deal with and agree to contract only with those with whom we wish to deal. Contract law, in other words, follows Tom Buchanan: “I won’t sell you the car at all . . . I’m under no obligations to you at all.”<sup>64</sup> Consider your favorite contract law casebook. Is there a housing discrimination case in there? Is *Lochner*<sup>65</sup> in there? Is the *repudiation* of *Lochner* included? From a doctrinal, as well as, theoretical contract law perspective, contract is understood, taught, studied, and theorized as though these duties simply do not exist. And, within contract law, they do not. They are part of our obligations toward the State, and therefore, toward our co-citizens. In other words, they are then imposed upon our contract choices from the outside; they stem

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59. See *id.* at 1402–03.

60. See *id.*

61. *Id.* at 1420.

62. *Id.*

63. See *id.* at 1399, 1439.

64. Fitzgerald, *supra* note 35, at 90.

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

from our civil rights society, not from our contract law. They are not part of our relational obligations as conceived by contract law itself.

The second step is what Dagan and Dorfman argue in the bulk of their article: Discriminatorily refusing to contract with someone on the basis of race is a refusal to treat those who we refuse to see as substantive equals, possessed of rights and capabilities of individual self-determination, and is therefore a violation of relational justice.<sup>66</sup> It is not only then a violation of the respect and dignity we owe co-citizens by virtue of the great civil rights gains of midcentury. It is part of the respect and dignity we owe those with whom we deal, by virtue of the dictates of relational justice. It is part of the justice that is owed—but it is distinctive in that it is neither distributive justice nor social justice. It is the justice that should inform the relationships we are in, or the relationships we refuse to be in, through our commercial dealings.<sup>67</sup> Again, this is a novel claim. It has not been made, or criticized. It has, to date, simply *not had a hearing*: We do not even approach it in our teaching and scholarship on contract law itself, and we do not approach it in our public law classes or scholarship likewise. It slips through the cracks of our traditional division of labor. Let me just underscore how doubly novel it is: We do not, in law schools, either in our teaching or scholarship, and for reasons which I have discussed at length elsewhere, discuss justice *of any form* as a constraint or as an ideal of our law. So the introduction of justice as a constraint on relationships and as an ideal for private law is itself novel. The conception of “relational justice”—a set of ideals and practices distinct from distributive and social justice, and very distinct from legal or horizontal justice<sup>68</sup>—is all the more so. Relational justice, as Dagan and Dorfman understand it, is the justice owed within our private dealings: It should constrain our behavior and guide our law.<sup>69</sup>

The third claim Dagan and Dorfman make is that because the discriminatory refusal to deal with people of color when, for example, selling a home is a violation of relational justice, this refusal should therefore be cognized as a harm by contract law.<sup>70</sup> Thus, the duty not to discriminate *should be* understood to be a duty that follows directly from contract law itself. The duty not to discriminate should not constrain contract behavior “from the outside”; it should not constrain contract because of an external obligation imposed by a different branch of law.

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66. See Dagan & Dorfman, *supra* note 1, at 1440.

67. See *id.* at 1398–99.

68. Horizontal justice refers to the Aristotelean claim that justice requires the like treatment of likes or fair application of rules. The Politics of Aristotle paras. 1280a7–1282a16, 1282b18–1282b23 (Peter L. Phillips Simpson trans., Univ. of N.C. Press 1997).

69. See Dagan & Dorfman, *supra* note 1, at 1410 (“Private law addresses our interpersonal interactions by marshaling rights and obligations that take a relational form.”).

70. See *id.* at 1425 (describing traditional contract law doctrines that exclude persons unable to contract equally or fairly).

Rather, the duty should constrain contract behavior because it is a part of the core normative content of contract law itself: the construction of just private relations. Contract law exists, fundamentally, to ensure that our relations with each other are just. It does not exist fundamentally to further along the production of wealth, or to resolve prisoners' dilemmas thus facilitating complex deals, or to maximize efficiency and minimize waste—although, no doubt, these are altogether desirable side benefits. It exists to further and promote justice—as does any body of law, although the form of justice is different in different branches of our liberal legal regime.

The fourth and final step, then, is that the duty not to discriminate is not, but should be, understood as a basic rule of contract law and not just of the civil rights society.<sup>71</sup> It should be as much a part of that body of law as the consideration doctrine, or the rules governing the offer and acceptance of deals, or the rules dictating damage awards. It should be understood as a part of our relational duties to co-citizens. Contract law exists fundamentally to ensure that our dealings are just. The duty not to discriminate is required by relational justice. The rule, then, not to discriminate in housing transactions should be, though it is presently not conceived to be, a basic tenet of contract law itself. Because it is not, contract law should be faulted.<sup>72</sup>

Each step of this argument, and certainly the argument's conclusion, distinguishes Dagan and Dorfman's understanding of contract law and its ideals from both traditional *and* critical conceptions, and each underscores its stature as exemplary of new criticism. Moving quickly through these claims: first, that the duty not to discriminate is a function of public civil rights law and not of contract law itself.<sup>73</sup> No one denies this, but only Dagan and Dorfman find it problematic. Traditionalists (both egalitarians and libertarians) locate the duty in public law; critics fault contract law and private law generally for obfuscating the subordination of vulnerable peoples,<sup>74</sup> but they do not specifically fault private law for failing to recognize such a duty on the grounds eventually invoked by Dagan and Dorfman. Public law imposes duties and hence limits on contractual power, but no one—neither liberal egalitarians, nor libertarians, nor critics—aside from Dagan and Dorfman have even

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71. See *id.* at 1460.

72. See *id.* at 1439–40 (showing while traditionalists may concede that contractual freedom to discriminate may justifiably be imposed by outside constraints and critics may insist upon the necessity of doing so, neither group charges the seller with such a duty).

73. See *id.* at 1414–15.

74. See, e.g., Dalton, *supra* note 5, at 999 (“Can we, in other words, expose the way law shapes all stories into particular patterns of telling, favors certain stories and disfavors others, or even makes it impossible to tell certain kinds of stories?”); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563, 577–78 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*] (describing the failure of freedom of contract in traditional contract law to consider inequalities that exist).

stopped to point out that those limits should themselves be understood as a part of contract law or faulted contract law for not including them. Second, the Dagan and Dorfman claim that those limits not only are a function of what might be called a civil-rights morality, but also should be understood as implied by relational justice, is likewise made by neither camp.<sup>75</sup>

The mandate that we should not discriminate is a function of the ethics of our interpersonal dealing, no less than is our obligation to keep our promises, once met. Nondiscrimination is a piece of interpersonal justice.<sup>76</sup> Third, neither traditionalists nor critics come anywhere close to the assertion that interpersonal justice is the heart and purpose of contract law or that contract law is all about the enforcement of duties implied by relational justice. Contract law is not, if this is right, about either maximization of individual liberty or wealth or efficiency, as held by traditionalists,<sup>77</sup> but nor is it about the mystification of financial or political or social power, as held by critics.<sup>78</sup> It is about the pursuit of interpersonal justice. Thus, their final step: When contract law fails to include a foundational obligation of justice, it should be faulted.<sup>79</sup> Neither traditionalists nor critics have seen need to criticize private law on this ground.

Dagan and Dorfman's argument is truly as novel as they claim it to be. But I would go further: The power, centrality, and function of their general, affirmative claim—that contract law in particular, and private law generally, exists so as to further relational justice—put Dagan and Dorfman squarely in the center of the new legal critical movement. Like new legal critics generally, Dagan and Dorfman find the content of those ethical commitments that should guide our law, and hence our behavior, at the heart of law *itself*. This they share with other prominent new critics briefly named above: Professors Post and Siegel find dignitary ideals at the heart of the Fourteenth Amendment, which they then use to criticize particular doctrinal developments they think have strayed too far from that path;<sup>80</sup> Professors Zipursky and Goldberg (criticized by Dagan and Dorfman<sup>81</sup>) find the ethics of recourse in traditional tort law, which they then use as the foundation of their criticism of contemporary efficiency-grounded understandings of tort.<sup>82</sup> What distinguishes Dagan and

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75. See Dagan & Dorfman, *supra* note 1, at 1440.

76. See *id.* at 1439.

77. See, e.g., Randy E. Barnett, A Consent Theory of Contract, 86 *Colum. L. Rev.* 269, 271–91 (1986).

78. See, e.g., Robert W. Gordon, Unfreezing Legal Reality: Critical Approaches to Law, 15 *Fla. St. U. L. Rev.* 195, 198–200 (1987); Kennedy, *Distributive and Paternalist Motives*, *supra* note 74, at 577–78.

79. See Dagan & Dorfman, *supra* note 1, at 1460.

80. Post & Siegel, *supra* note 20, at 377.

81. See Dagan and Dorfman, *supra* note 1 at 1413 n.88.

82. Zipursky & Goldberg, *supra* note 12, at 918–19.



Dorfman from the others is what makes their work jurisprudentially significant: their insistence that those ethical commitments are best captured by a theory of *justice*, which is in turn informed by and produced by a particular body of law. In this claim they, like the other new legal critics in other areas of law, are on a fundamentally different path from both traditional understandings of private law and that of critical legal scholars. Unlike the former, Dagan and Dorfman find interpersonal justice, not efficiency or individual liberty, to be private law's guiding norm. This is indeed, as they argue, utterly at odds with the traditionalist's "division of labor" by which private law exists to promote the values of efficiency and wealth while concerns of social, and to a limited degree, distributive justice are relegated to the public sphere. And, it is even more clearly at odds with the assumptions of critical legal scholars: They find interpersonal justice, not mystification or hegemonic legitimation or obfuscation of private or capitalist power, to be private law's overriding point. They find interpersonal justice, and not witting or unwitting collaboration with political constellations of economic power, to be that body of law's *raison d'être*. Lastly, in some contrast with other new critics, although largely in step, Dagan and Dorfman articulate a deeper jurisprudence; they purport to find, and they then articulate, a theory of justice, obligating us in our quite personal as well as commercial relations. They find, in contract law, and in private law writ large, an *imperative*, backed by law, to treat each other justly—not just a value we might choose to abide. Justice, after all, is a command. When we shirk its obligations, we should be faulted, and perhaps legally sanctioned—thus the role of law. When law abandons that imperative, it should be criticized—thus the role of criticism.

### III. THE LIMITS OF NEW LEGAL CRITICISM

The limits of new legal criticism stem from the same premise as the source of its strength and distinctiveness: the foundational claim—echoing Dworkin—that the discovery, or articulation, of law's ideals come and should come from the substance of law itself. When the ideals are well grounded and admirable, but substantive law sometimes veers off track, that critique will work, as *Just Relationships* shows quite powerfully. Private law itself expresses an ideal of just relations, but it does not always honor that commitment (as in the case of its failure to enforce a duty not to discriminate), thus, the critique. But if the ideals are themselves flawed, so will be the critique. If the law from which the ideals emerge is immoral or amoral, so will be the critique. If the ideals are partial and stunted, so will be the critique. In the context of these authors' concerns, if the concept of relational justice is limited, even at its most capacious, then so will be the critique. The critique will go beyond the law itself, and it will urge the law to go in new directions, but it will not stray far.

Sometimes, perhaps, more is called for. Sometimes, critique should cut deeper.

The limits of new criticism is more than a logical or academic worry; it is inherent in the enterprise. It is, for example, what limits the ability of the common law to “self correct,” so to speak, to move in a more just direction. When the common law “works itself pure,” it does not always work itself more just, but sometimes to the contrary. A Herculean or Dworkinian judge who reaches across generations for a principled interpretation of law nevertheless has one foot firmly grounded in the past.<sup>83</sup> That hobbles his legal mobility, to continue the Dworkinian metaphor. If common law is criticized—or if it simply evolves over time—on the basis of ideals drawn from the common law, it will not move far from those possibly stunted or compromised or, at best, dated ideals. Dagan and Dorfman do insist—and rightly so—on viewing law broadly, as encompassing far more than its common law ancestry.<sup>84</sup> This lessens the problem somewhat: The private law from which the ideals emerge is not the hoary principled law of tort and contract, but the complex world of the Uniform Commercial Code and consumer protective federal legislation for financial and household products both, minimum wage and maximum hours laws, and Occupational Safety and Health Administration regulations. If we understand contract law broadly, then the body of law to which we turn to discern its guiding ideals, whether of relational justice or something else, is considerably broader and possibly more just than were we to limit it to principles of individual liberty, laissez faire, and the creation of wealth, as they were articulated in a handful of mid-nineteenth century cases from two or three countries.

But construing law broadly by no means eliminates the problem. The example Dagan and Dorfman give of the strengths of their new critical method also well illustrates the method’s limits. Again, Dagan and Dorfman want to reinterpret contract law (and private law more generally) so that the antidiscrimination norm is clearly implied *by* it, rather than a limit *upon* it. They do so by reading contract law as resting on a commitment to relational justice and then view the antidiscrimination norm as following directly from that commitment to justice—rather than as following solely from a commitment to, briefly, the civil rights society.<sup>85</sup> This is an exciting and fecund insight. But one reason for its fecundity is that it reveals a tension between contract ideology and the civil rights society—a tension that domesticating the antidiscrimination principle, by bringing it within the umbrella of contract, does not resolve. If relational justice requires nondiscrimination, which I believe it does, does it not require much more besides that, not so cleanly implied by any principle

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83. See Dworkin, *supra* note 12, at 174–75 (explaining how difficult it is to change the law towards a new goal when people have learned a different theory of law).

84. See Dagan & Dorfman, *supra* note 1, at 1397.

85. See *id.* at 1398, 1440–44.

of either public or private law? Relational justice requires nondiscrimination, Dagan and Dorfman argue, because relational justice requires that we treat those with whom we deal (or may deal) as substantive equals entitled to pursue their autonomously chosen, self-determined ends.<sup>86</sup> This seems compelling and important. But if it is compelling and important, does it not imply more than the antidiscrimination norm?

The antidiscrimination norm, if we understand it conventionally as a constraint on contract law imposed by virtue of the civil rights society, civil rights movement, and civil rights commitments, restrains our contractual freedom and choices by disallowing choices made on grounds of race, so as to go some distance toward the elimination of racism in our societal dealings. It makes sense, then, to extend it, by way of reasoned elaboration either through statute or court decision, to other areas well understood as implicated by civil rights: gender discrimination, disability discrimination, and so on. *But*, if we want to understand it as a requirement of relational justice, rather than solely a requirement of the civil rights society, it has a quite different trajectory, and it should extend in very different ways. If we should not discriminate in our private commercial dealings because of our duty to regard others as substantive equals, then there are further constraints we should recognize as likewise implicated by this norm of justice. Do we not also violate the substantive equality of others when we fire them at will, for other irrational or indeed malicious reasons? Is it not a violation of the substantive equality of others when we refuse to hire for irrational or malicious reasons? In other words, if the antidiscrimination norm constrains contractual choice *because* it constitutes a failure to respect the substantive equality of others, and therefore violates our duty of relational justice (rather than constraining choice because it violates norms imposed upon contractual freedom by virtue of the civil rights society), then doesn't the "at will" employment regime likewise constitute a failure to respect the substantive equality of others, and therefore violate our duty of relational justice as well? Transporting, so to speak, the antidiscrimination norm from its civil rights foundation and then importing it into contract law itself, by way of the norm of relational justice, surely has penumbral effects. Its gravitational pull shifts. What it pulls into the ambit is not other groups who have likewise borne the weight of various societal pathologies (women, immigrants, religious minorities), but rather other relational practices that reveal the same failure of regard for substantive equality. At-will employment seems to violate relational justice in precisely the way discriminatory practices violate relational justice if the latter is understood as infringing the victim's substantive equality and self-determination.

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86. *Id.* at 1440–45.

This possibility is by no means a *reductio ad absurdum* complaint against Dagan and Dorfman's argument. Quite the contrary: It seems to me a highly desirable and sensible extension of their argument. It resolves a tension that now exists between contractual norms of freedom and antidiscrimination norms of racial and sexual equality, felt both in theory and very much in practice in workplaces and perhaps in housing or rental markets as well: While employers cannot hire or fire or fail to promote on grounds of race or sex, they can do all of that and more on grounds of irrational and justified general animus. Dagan and Dorfman are right to say that we should indeed rethink private law so that these nondiscriminatory moral constraints upon contractual choice are understood as emanating from a relational, or private, conception of justice. That is a huge advance. Once we do so, we should see that other constraints also emanate from that relational conception and should be therefore understood as derived from contract law, rather than from constraints upon it.<sup>87</sup> And if so, then other contractual practices, not just those that reflect racial bias, come into focus as profoundly unjust, as violations of the norm of relational justice and as, therefore, within the limits of contractual freedom by virtue of the ideology of contract itself rather than, again, by virtue of a constraint imposed upon it from another source of law or principle.

The problem with that extension within the terms of Dagan and Dorfman's project is that while it might be sound as a matter of *moral* principle, it is not at all clear that it is sound as a matter of *legal* principle. The new critical method commits us, after all, to locating the ideals that should guide legal critique and evolution from the text of law itself.<sup>88</sup> It is imminently sensible to view that "law" from which the ideal should be derived as including constraints upon contract that emanate from civil rights laws. Then, the new legal critical method, and the authors' substantive rewriting of private law to which it leads, can soundly locate the antidiscrimination principle in relational justice, which yields their result: Antidiscrimination is a foundational principle of contract law, not just a principle of public law imposed upon it. But—and this is the crux of my critical observation—it is not at all clear that there is any positive legal pronouncement that could similarly ground even skepticism of at-will employment regimes. Yet, that regime seems as violative of relational justice as discriminatory contractual choices themselves, if the violation of relational justice occasioned by discrimination stems from our duty to treat others as substantive equals (rather than from our societal commitment to rid our lives of racism). So, while relational justice as Dagan and Dorfman

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87. If Dagan and Dorfman are right that the constraint against racism in house sales should be understood as emanating from contract law itself and not solely from nondiscrimination law, then presumably the same argument should attach to Title VII constraints against discrimination in employment, to minimum wage laws, and so on.

88. See Dagan & Dorfman, *supra* note 1, at 1430–59 (providing the new legal contract doctrine that evolves out of their theory of just relationships).

understand it seems to squarely target at-will market and employment practices, as well as discriminatory practices, it is not clear that their new legal critical method will generate enough positive law to justify the extension. The long and short of it: In *The Great Gatsby*, Tom gets away with his cruel and abusive mistreatment of Wilson after all.<sup>89</sup> Lack of privity trumps the demands of relational justice, so long as they both are white.

That, in a nutshell, seems wrong. It seems wrong both logically and normatively to conclude that the recognition of relational justice as the core of private law has the powerful effect of “pulling in,” so to speak, the antidiscrimination norm into the heart of contract, rather than placing a limit upon it, but then not insisting that the same concept of justice seemingly casts a shadow on other practices that seem similarly, if not equally, repugnant. To be clear, that Dagan and Dorfman’s conception of relational justice and private law reveals this striking paradox is a strength of their argument. From a civil rights perspective, it even seems terrible—an American tragedy, of sorts—to not extend our understanding of the antidiscrimination norm to include employment at will. We should indeed regard employment at will as an unrecognized civil rights violation. Dagan and Dorfman imply an argument with a similar conclusion regarding private law itself: It is an American tragedy, of sorts, to impose upon contractual freedom a nondiscrimination norm that does not extend to a demand that employers treat all employees and potential employees as substantive equals with rights to self-determination. Their method, however, limits the power of the transmigration. There is no positive law supporting the proposition that the relational justice that is the point of private law renders employment at-will regimes suspect. And that is a pity.

#### CONCLUSION

*Just Relationships* is an exciting work we should applaud. It opens the doors of moral imagination as well as the doors of legal perception. Its basic thesis—that private law exists to further the goals of relational justice—invites us to think about the justice we owe those with whom we transact business and to reflect on how, if at all, that justice forms the contours of our substantive law. It also raises many questions well beyond

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89. One of the most famous and damning lines in American literature recapitulates Fitzgerald’s stance: “They were careless people, Tom and Daisy—they smashed up things and creatures and then retreated back into their money or their vast carelessness, or whatever it was that kept them together, and let other people clean up the mess they had made . . .” Fitzgerald, *supra* note 34, at 139–40. The mess they made, through the course of the novel, included several automobile accidents, Wilson’s suicide, and Gatsby’s murder. Fitzgerald, *supra* note 35, at 139–40. See generally, Robin West, *Gatsby and Tort*, in *American Guy: Masculinity in American Law and Literature* 86 (Saul Levmore & Martha C. Nussbaum eds., 2014).

those posed above. What of mandatory arbitration? Does the recognition of relational justice as the point of private law cast light on the limits we should impose, *as a matter of contract law itself*, on this contractual practice? Does mandatory arbitration in effect have the consequence of prioritizing formal over substantive equality, and therefore of stripping contract of its moral grounding? Does a recognition of relational justice suggest a firm foundation for the much battered unconscionability doctrine that goes well beyond, and much deeper than, the various arguments recently raised on its behalf, grounded in a handful of cognitive biases discovered by behavioral psychologists and economists? Does relational justice have implications for family law, or should we try to articulate a different justice—perhaps, “intimate justice”—for that realm of life? Is there a distinctive form of justice—a sphere of justice, to borrow a now-familiar phrase—that animates other areas of law? Should we distinguish the relational justice we owe strangers, as reflected in tort law, from the relational justice we owe co-contractors or would-be co-contractors, as reflected in contract law? Dagan and Dorfman blur contract and tort for these purposes, but perhaps we might better distinguish them ever more sharply. Perhaps tort rests on a related, but nevertheless different, understanding of justice than contract.

Dagan and Dorfman uncover the lie in Tom Buchanan’s unequivocal declaration in *The Great Gatsby* that he owes Wilson nothing at all by virtue of a lack of privity. Tom Buchanan and Wilson were in a pattern of dealing that formed the foundation for duties they each had toward the other. They owed each other relational justice. Privity of contract, it turns out, does not limit the scope of relational justice even in private life. Much follows from that very straightforward observation not only for our law, and perhaps not even primarily for our law. Much follows for our private transactions, for our sense of the duties we have toward each other, for our conceptions of ourselves, and most importantly, for our understanding of community. Dagan and Dorfman have given us a place to start, and a way to proceed, in making much better sense of all of these obligations.