Holding On

JOHN GARDNER*

This issue of the *Jerusalem Review of Legal Studies* differs from most in that its focus is not on a published book but on part of a book manuscript – several chapters, in advanced draft, of my forthcoming book *From Personal Life to Private Law*. As I write this response, the book is finally with its publisher.[1] The material on the basis of which Yiffat Bitton, Greg Keating, and Arthur Ripstein wrote their comments remains substantially unchanged in the final cut. I resisted the temptation to create a never-ending feedback loop by attending to their criticisms of the book in the book itself. Yet the temptation was certainly there. I found what they said about my work uniformly perceptive, scrupulous, and testing. They made me see how many further books, and how many better books, could yet be written on the same topics.

They have also given me a nice opportunity, right now, to illustrate two major themes of the book. The first is apology. I'm really sorry for putting Yiffat, Greg, and Arthur to the trouble of responding so carefully and efficiently to my draft chapters, only to hold up publication of the resulting symposium while I (fussily) finished writing the rest of the book. The second theme is what, in the book, I call 'holding on'. We all find it hard to let go of what we have made our own. We attach more value to whatever we are close to, and less to what we might equally have been close to but never were. No doubt I am, in the same way, inordinately attached to my own ideas. As I try to explain in the book, we should not ultimately want it to be otherwise.

* Senior Research Fellow, All Souls College, Oxford.

[1] It is due to be published by Oxford University Press at the end of 2017.

1. Bitton on 'systemic victims'

Yiffat Bitton's remarks are pushing at an open door. For the most part I am happy to endorse them. I did not intend *From Personal Life to Private Law* to give any pride of place to what she calls the 'random victim' of wrongdoing.[2] Indeed the book leans the other way. In chapter 1, to which many of Bitton's comments relate, my topic is wrongdoing within relationships. I distinguish two types of relationships. On the one hand there are (defeasibly) valuable relationships, such as those between friends and between team-mates. On the other hand there are relationships of vulnerability, which may hold between strangers (e.g. between motorists and cyclists) or between familiars (e.g. between lenders and borrowers). The last example shows that the two types of relationship are not mutually exclusive. One may think that the lender-borrower relationship is (defeasibly) valuable *and* marked by vulnerability of the one to the other. In such a case the value in the relationship, if any, holds in spite of the element of vulnerability that the relationship involves, not because of it. If the vulnerability is exploited, that is one of the ways in which the defeasible value in the relationship can be defeated.

This shows where some of Bitton's 'systemic victims', such as victims of domestic abuse, could fit into my narrative. They are in relationships of defeasibly valuable kinds that impose duties of mutual love and support and protection on the parties to them. Those duties are breached by the abuser. Worse than that: the abusive actions of the abuser are the very opposite of those that he has a duty to perform. His *modus operandi* is not mere breach but *inversion* of his duty.[3] He substitutes undermining actions for

[2] Bitton, 'Strictly Relational Duties for Strictly Random Victims and the Need to Let Go When You Have Nothing to Hold On To', this issue.

[3] For further discussion of such inversion, see my 'Citizens in Uniform' in R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, and Victor Tadros (eds), *The Constitution of the Criminal Law* (Oxford 2013).

supportive ones; he replaces acts of love with acts of enmity; he endangers the very person whom he is bound most stringently to protect from danger. If such abuse is a common experience for people in relationships of the relevant kind – if, for example, married women are commonly abused by their husbands – then it becomes tempting to say that this kind of relationship, marriage, is not after all defeasibly valuable. It is an evil. It is 'slavery for women'[4] or 'an institution developed from rape'[5] or 'prostitution to one man instead of many'[6] or such like. But writing marriage off like this is surely letting the abusive spouse off the hook too easily. Only if the abuser has the special duties of a spouse – especially exacting duties of love and support and protection – is his abusive behaviour the special wrongdoing that we all take it to be. For only then do we have the dramatic opposition between what the abuser does and what he is bound to do. To call him a pathetic excuse for a husband hits the wrong note. He is something more like an anti-husband.

Here we have the beginnings of an explanation of how victims of domestic abuse might qualify as 'systemic victims' in Bitton's sense: people who are 'systematically more vulnerable to hurt than others.'[7] There is something about marriage itself that puts them in that position. In a culture of monogamy, those who get married make themselves vulnerable by entrusting so much of their future to just one person. They trust that their spouse will love, support, and protect them – for those are the duties of a spouse. The domestic abuser exploits that trust. He turns it against his victim. By ratcheting up the measure of hostility, disempowerment, and danger that she faces, he also ratchets up

[4] Sheila Cronan, 'Marriage' in Anne Koedt, Ellen Levine, and Anita Rapone (eds), *Radical Feminism* (New York 1973), 213 at 219.
[5] Andrea Dworkin, *Pornography: Men Possessing Women* (New York 1981), 19.
[6] The words are spoken by former sex worker Lizzie in Angela Carter's novel *Nights at the Circus* (London 1984), 21.
[7] Bitton, above note 2, [1].

the measure of love, support and protection that she needs. He makes it ever more crucial that he do his spousal duty towards her by continually doing the very opposite. It is a double whammy. If he were not so abusive, his wife would not be so dependent on him. That is indeed the plan, conscious or not. The abuser wants his spouse to be more dependent upon him than their marriage would otherwise require. So he creates the conditions in which, terrorized by his own behaviour, and with nobody else to turn to (for he often blocks other sources of support), she depends ever more on the petty indulgences that he rarely bestows, the tiny crumbs of acceptable treatment that for her have become so inflated in importance.[8]

I can see now that by using marriage as an example of a defeasibly valuable type of relationship, early in chapter 1, I might have seemed to be oblivious to this way in which marriage can set its own potentially lethal traps. In particular, the expression 'defeasibly valuable' might have been read to imply that only occasional - 'accidental' - factors destroy the value of marriage. But that implication does not hold. Later in chapter 1, as Bitton notes, I suggest that the duty of care, central to the tort of negligence, could be analyzed in two ways. On one analysis the duty of care is a ('strictly relational') duty that forms part of certain defeasibly valuable relationships, such as inviter-invitee and teacher-pupil. On another analysis it is a ('loosely relational') duty that arises from a relationship of vulnerability. It protects one, the rightholder, against the special dangers that she faces from the actions of another, the dutybearer. In *Donoghue* v *Stevenson*,[9] I suggest, Lord Atkin made an exquisitely smooth transition from the 'strictly relational' to the 'loosely relational'

[8] This is obviously a boiled-down and one-dimensional extract of the extremely complex psychology of domestic abuse. For a helpful review, see Robert Bornstein, 'The Complex Relationship Between Dependency and Domestic Violence', *American Psychologist* 61 (2006), 595.

[9] [1932] UKHL 100.

analysis. How was such an exquisitely smooth transition possible? It was possible because many if not all defeasibly valuable relationships are also relationships of vulnerability. The threat to their value, in virtue of which their value is defeasible, lies within the defeasibly valuable relationships themselves. The vulnerable party, as Bitton says, is 'within a systemic socio-political power-relation that constantly threatens to turn them into victims.'[10]

I would not put it that way. Why not? Mainly because there is nothing wrong with having power, even systemic power, over others. I have a some power over my children (e.g. I can stop their pocket money). They have some power over me (e.g. they can gang up on me very effectively). That power seems healthy enough to me. What is wrong is not power but the abuse of it. I can entirely see why reading the words of the imaginary husband in Bernard Williams' vignette - 'she's my wife!' - might instantly be associated in the minds of some readers with an abuse of power.[11] One may hear the stentorian tones of a Victorian *paterfamilias* asserting ownership and control. But Williams' actual example repays closer attention. The husband in his example has great power (*ex hypothesi* he has the power to save his wife from drowning) but there is no hint that he is abusing it. If Williams is right, he is only doing his spousal duty. Does one really regret that - whether by a 'systemic socio-political power-relation' or otherwise - this drowning woman has someone on the bank who is there for her, someone who has a strictly relational duty to save her, and who has both the ability and the motivation to perform that duty, for her sake, without further ado?[12]

[10] Bitton, above note 2, [7].

[11] Williams, 'Persons, Character, and Morality' in A.O. Rorty (ed), *The Identities of Persons* (Berkeley 1976), 197 at 213-5.

[12] One might, I suppose, be worried less about the husband's power and more about Williams' lapse into gender stereotypes. Do we have to have a damsel in distress character and a knight-in-shining-armour character? The husband may not be a Victorian patriarch, but Williams still has Victorian tastes in

I have been focusing so far on Bitton's remarks about what I called the 'primary' duties of private law. But in a way her remarks about the 'secondary' duties of private law, the remedial duties, cast a more troubling shadow over my work. Bitton spells out very clearly a worry that lurks beneath much of *From Personal Life to Private Law*. The worry is that the remedial regime of private law is conservative. It prioritizes 'holding on' over 'letting go', as I put it in chapter 5. The aim of the award of damages is to put you back on the track you would have been on, had the defendant's wrong not knocked you off it. But what, asks Bitton, of the person who has little worth holding on to and hence little to let go of? That person is missing from the picture. Tort law has no remedial tools to provide her with the fresh start that she needs. Her damages will be assessed according to where she was already going at the time of the wrong, for better or for worse, and not according to where she might better aim to go now that the wrong (or the legal recognition of the wrong) has, so to speak, liberated her to live differently. Holding on is covered by damages but *moving on* is not, even when moving on would be a much better choice. The best one gets to do is to move on by redeploying damages that were calculated to allow one to hold on, and since one *ex hypothesi* had little worth holding on to, those damages won't pay for much of a fresh start.

I do have some remarks on the subject of moving on in my final chapter, which Bitton did not see. But I must admit that, like Bitton, I remain unsatisfied. I did not get to the bottom of the problem even though it was often on my mind. To begin with, I think we should probably distinguish two situations. One is the situation in which the wrong (or catalogue of wrongs) is what makes moving on a better choice than holding on. The

melodrama, doesn't he? That's not totally fair. Williams was responding to remarks by Charles Fried, in *An Anatomy of Values* (Cambridge, Mass. 1970), 227. Fried made it a husband-and-wife saving-from-drowning case. You can always reverse or replace the example if you like.

other is the situation in which moving on is a better choice than holding on quite apart from the wrong, and the wrong, or the remedy for the wrong, merely gives one the opportunity to do it. The book contains several inter-related discussions of the second situation, illustrated using material from Larry David's comedy show *Curb Your Enthusiasm*. In the show, Larry damages Ben Heineman's car and sends money to Heineman to cover the repair. Heineman doesn't get the car repaired, but spends the money on something completely unrelated. Larry is predictably aggrieved.[13] In the book, I express sympathy for Larry's position, although I think he goes too far (as usual) in trying to uphold it. The basis of my sympathy? Larry has the duty to repair the car and Heineman thwarts his performance of that duty.

But that would not be the case if, say, Larry had injured Heineman in the original collision such that Heineman would be too disabled, from now on, to travel by car. How is Larry to do his reparative duty now? A repaired car would be no use. Let's say, indeed, that there no realistic mobility solution for the injured Heineman. For the last thing he needs now is to be reminded of his past life: the open road, the wind in his hair, etc. He now needs to live a completely different life. In the book, as in other work,[14] I make much of the so-called 'continuity thesis' according to which, in giving content to reparative duties, one is always looking for the next best thing to replace whatever was lost. But isn't that, at a certain point, a daft thing to be looking for? Isn't it better, eventually, to forge a new life without regard to its continuity with the old? Maybe. But I am not so sure that the 'continuity thesis' strictly speaking runs out at that point. A new life for the severely disabled Heineman could surely qualify as the next best thing to provide now, given that it is too late to

[13] 'The Korean Bookie', *Curb Your Enthusiasm* (dir. Bryan Gordon, HBO, 27 November 2005).

[14] Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice', *Law and Philosophy* 30 (2011), 1.

bring back anything of Heineman's old life. If so, Larry is surely duty-bound to fund that new life on the ordinary basis. He is duty-bound to fund it by way of reparative damages according to the continuity thesis. The difficulty is only in deciding *which* new life. How lavish? How satisfying to Heineman? And so on.

I say that the difficulty is 'only' in making that decision, as if it were a minor issue. But clearly it is not. Eventually one begins to think about how Heineman's life, although completely different, could be somehow *as good as* the one he had before. Alas, there is no natural metric for comparing the overall quality of lives. There are only artificial proxies cooked up, for better or worse, by economists. The law may have to end up adopting one of these. A new life *no more expensive* than the one that went before is a proxy often used by the law. It may be a serviceable proxy for the law but it does not travel well into personal life.

You may say that in these remarks I have lost sight of the key issue raised by Bitton. She is interested in the case of systemic victims, blighted by abuse or oppression, for whom a life as good as the one they had before would still be terrible. The continuity thesis is the problem here, she might say, not the solution. But again I am not so sure. If the wrongdoer is the one who has made her life terrible by his wrongs[15] – as in many a case of domestic abuse – then his reparative duty under the continuity thesis isn't a duty to put his victim back into the terrible position that she would have been in had the domestic abuse continued,

[15] Bitton is also interested in cases in which this condition is not satisfied, such as CA10064/02 *Migdal Insurance Company* v *Abu-Hana* (2005) 60(3) PD 13 in the Supreme Court of Israel. I regard it as a virtue of the continuity thesis that it does not support Justice Rivlin's reasoning in that case as reported by Bitton, above note 2, [17–18]. As reported by Bitton, Rivlin's reasoning shifts the remedying of public wrongs (e.g. failure to ensure better life prospects for Arab children in Israel) onto random tort defendants (e.g. negligent drivers) irrespective of whether they played any part in the public wrongs in question. I find it odd that such a privatization of public duty is regarded as a progressive measure. (I am aware, however, of different readings of what Rivlin says.)

uninterrupted by legal intervention. No, it is a duty to put her back into the position she would have been in had his wrongs against her not been committed. The law of torts, as Bitton notes, is ill-equipped to deal with this situation, but that is not because the continuity thesis stands in the way. It is because private law, like criminal law, is tailored to respond to one wrong at a time. It is not attuned to dealing with courses of conduct over extended periods with compound effects. This feature (a side-effect of adherence to the 'legality principle', itself an aspect of the ideal of the rule of law[16]) is frustrating, but we can't blame our frustration on private law's built-in conservative feature. What the situation calls for, after all, is *even more* conservatism on the part of the law. We need the law to be willing to ask how the plaintiff's life might have gone if only, many years ago, she had not married her abuser. In chapter 5, the appeal of holding on is used, eventually, to explore the appeal of *going back*. In the case of the abused spouse, moving on and going back should not be regarded as rival paths. For in moving on, the abused spouse may well be aiming to reinstate the life she would have had, and indeed the person she would have been, had she never been lured into the psychological (and sometimes physical) cage created by her abuser. It is common to describe the process of moving on from such grim experiences as a process of recovery. My chapter 5 helps us to see why.

2. Keating on rights and coercion

Although he agrees with me that other writers have gone too far the opposite direction, Greg Keating suspects that I go too far in my attempts to reunite the concerns of private law with the

[16] Consider the points made by Croom-Johnson J in *R* v *Wimbledon Justices* ex parte *Derwent* [1953] 1 QB 380.

concerns of personal life.[17] Here is one example. Keating thinks that there is a gap between personal life and private law in respect of the rationale for reparative measures. I don't mean that he rejects my continuity thesis, according to which the normal case for repairing one's wrongs is that by doing so one conforms, so far as it can still be done, with reasons with which one failed to conform in committing the wrong. A duty of repair, he agrees, is a duty to do the 'next best thing' following the breach of a primary duty.[18] A gap between personal life and private law emerges, however, in what Keating takes to *count as* the next best thing in each of the two settings. In personal life, '[r]epairing (or mending) the relationship ... is the presumptively better option'.[19] In private law, however, the relevant repair is (presumptively?) not a repair to the relationship between the parties but to ... something else that we will come to shortly.

We don't need to know what Keating regards as the presumptive *reparandum* in private law in order to see how his views differ from mine here. For, as my reply to Bitton already makes clear, I do not think one can generalize very much about the 'better option' in applying the continuity thesis to the repair of wrongdoing inside personal relationships, or anywhere. My 'defeasibly valuable' (a defining feature of special relationships comprising strictly relational duties) certainly doesn't imply Keating's 'presumptively to be mended after wrongdoing'. The fact that some valuation is capable of being defeated does not entail that one should presume that it is not defeated, i.e. that one should take a particular epistemic stance towards the possibility of its defeat. And the fact that something is valuable, although it does entail that one should respect it, surely does not entail that it is better to preserve it than to abandon it.

[17] Keating, 'Comment on Gardner: Duty and Right in Personal Life and Private Law', this issue.
[18] Ibid, [7, 10].
[19] Ibid, [9].

It may be thought that my remarks on respect for valuable things in chapter 5 cast doubt on this last remark. Those remarks point to a difference in rational salience between existing valuable things (e.g. a valuable relationship that one already has) and valuable things that might yet come into existence (e.g. an alternative valuable relationship one might strike up instead). Does this not support my counting the fact that you and I are already friends in favour of our staying friends? Maybe. But it is a long way from there to the proposition that it is better to preserve the friendship than to abandon it. It all depends on the strength of the case for abandoning it. If you commit serious wrongs against me of the kind that the law might reasonably take an interest in, the case for abandoning our friendship is already fairly strong. Does the fact that we are already friends count for enough to warrant holding on to our friendship in spite of the wrong? It all depends on the particulars of the friendship and the particulars of the wrong. There is no presumption. Indeed, to my way of thinking, there is no tenable generalization.

The same holds in classic private law relationships. In place of the relationship between friends, consider the relationship between contracting parties. There is an excellent, mature literature on the 'relational' view of contracts.[20] (In chapter 1 of the book I relabel it the 'doubly relational' view of contracts). On this view the contractual relationship is often a device used to create and sustain a wider non-contractual relationship between the parties to it. The parties are customer and supplier, say, or lawyer and client, or employer and employee. They envisage an ongoing relationship along those lines, persisting somewhat independently of the contract. They know that the contractual relationship between them is also there. They regard it, in the main, as providing protection against deterioration of their other

[20] Inspired by the brilliant writings of Ian MacNeil, many of them collected in MacNeil, *The Relational Theory of Contract* (ed Campbell, London 2001).

(non-contractual) relationship. But they may also regard the contract as a good guide to some aspects of their non-contractual relationship. The contract may settle the essentials of timing and pricing and reporting and consulting. It may serve as a common point of reference. The parties may put their heads together and look at their respective contractual duties as part of the non-adversarial aspect of keeping their non-contractual relationship going. They may tweak the contract from time to time to make sure that the legal position continues to reflect the development of their non-contractual relationship. And so on. That is private law playing its part in the keeping alive of valuable relationships, which may include the cordial mending of them after breaches of duty. Where the parties have been letting each other down and eroding their trust in each other through misunderstandings of what they agreed, for example, a serious conversation about the contract (including about money owing under it by way of remedy for breaches) could be just what is needed, whether it functions to improve their understanding or to improve their motivation or to improve their attitude or whatever.

I have the impression that Keating, thinking of private law, thinks principally of litigation. Indeed, thinking of litigation, he seems to think mainly of the process of enforcement that may lie at the end of it, once there is a court order. That being so, it is hardly surprising that he does not connect private law with the sustaining of people's relationships. Although some litigation is undertaken on cordial terms to help overcome shared problems, the more common situation is that by the time we are in litigation our main relationship (customer and supplier, lawyer and client, etc.) has indeed broken down. A fortiori by the time we have to resort to enforcement of the court order. If we were on good terms before you obtained summary judgment against me and attached my bank account, we certainly aren't any more. But all of that, notice, is a long way down the line. Private law does a lot of work for us, in guiding and supporting us, before we even get into dispute, never mind resort to litigation, let alone

turn to coercive mechanisms. As H.L.A. Hart says, the coercive mechanisms 'are in as sense a *pis aller*: they are secondary provisions for a breakdown in case the primary intended peremptory reasons are not accepted as such.'[21] In private law we might prefer to say 'tertiary provisions' here since the duties of repair that are thrown up by the continuity thesis may already be thought of as the 'secondary' ones. But that does not alter the key point. The key point is that private law does not begin and end with private litigation. So the relationship-destroying potential of private litigation should not blind us to the wider relationship-building potential of private law. Indeed, as I explain in the book, some relationships are *possible* only thanks to private law. The settlor-trustee relationship is a classic example.

I was a little surprised to find Keating playing up the relationship-destroying potential of private litigation, given his initial confession that he tends to 'share Gardner's doubts that the form of the tort lawsuit should loom as large as it does in the tort theories of Coleman, Ripstein, Weinrib and others.'[22] Looking back over his remarks, however, I see what he must have meant when he wrote this. He worries about the excessive playing-up of 'secondary' provisions, provisions for the repair of wrongs, a playing-up that is encouraged by the 'corrective justice' fixation of the three theorists he lists. Whereas I worry a lot more about the premature playing up of what I have just called 'tertiary' provisions, provisions for the enforcement of rights through the courts. Keating clearly does not share *that* worry. Witness:

> [A] distinctive feature of a legal right—perhaps even *the* distinctive feature of a legal right—is not that its violation gives rise to an

[21] H.L.A. Hart, 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham* (Oxford 1982), 254.
[22] Keating, above note 17, [1].

obligation of reparation, but *that the obligation of reparation is coercively enforceable by a court of law*.[23]

I strongly disagree with Keating's analysis of the nature of legal rights in this remark. Chapter 6 of my book, the final chapter, returns to this theme, which is only briefly traversed in chapter 1. It is a real pity that chapter 6 was not ready in time to provide it to my commentators. In that chapter I discuss at greater length the lawyer's principle *ubi ius, ibi remedium* and deny it the status of conceptual truth that it enjoys in Keating's discussion. I read it, rather, as a recommendation for the treatment of private-law rightholders by the courts. Like any recommendation it needs to be defended on its merits. We need to ask, in particular, why these particular people should get staunch public backing while the sick and homeless, when they were not reduced to that condition by torts or breaches of contract, are left to rot. The answer may be that *ubi ius, ibi remedium* should be extended to the sick and homeless as well. For they are victims of public wrongs. But that is a subversive proposal in the context of contemporary private law theory. It is almost axiomatic among contemporary private law theorists (I leave aside the economists) that the official backing provided to those who are privately wronged, in the form of legal machinery put at their disposal, is not to be understood as a redistributive policy choice.

I am not sure where Keating stands on this point, but it should be fairly clear from my chapter 5 where I stand. It is central to my book, and indeed to my larger body of work on private law, that on this point, if on no other, I align myself with the economists.[24] The question of who should enjoy support for

[23] Ibid, [7] (emphasis in original).

[24] It does not follow, of course, that I support economically optimal norms of distribution. People who get the question right don't always get the answer right. My main discussion of the topic, outside my book, is Gardner 'What is

their private-law cause through the courts of law is a distributive question. It is a question of distributive justice. It involves policy choices no different in kind from those bearing on the allocation of public housing and the allocation of public healthcare services. Or, if those examples are too fraught for you, consider the allocation of convenience and safety among various classes of road users that is made possible by traffic management devices such as traffic lights, zebra crossings, speed humps, chicanes, and cycle lanes. It is central to my thinking that the distribution of rights to corrective justice in private law is akin to all that. Reining in the old 'property' paradigm for access to corrective justice in the courts is, for me, rather like reining in the old 'motorist' paradigm for safety and convenience on the roads.

I say that I am not sure where Keating stands on this point for the same reason that I postponed, a few pages ago, the question of what Keating takes to be the typical (presumptive?) *reparandum* in private law cases. The reason is that Keating casts quite a lot of what he says in a familiar private lawyer's argot, the same argot that, in the book, I studiously avoid. I am not sure how much difference his rival formulations make, and in particular to what extent they mark genuine disagreements between us.

Keating is concerned, for example, about the way in which I 'treat duty as the master concept' in the analysis of private law and sideline 'rights-talk'.[25] It is true that I sideline rights-talk. But do I sideline rights? Not at all. I agree that all the duties recognized by private law are duties owed to someone, and that the someone in question is, in each case, a rightholder. The someone is a rightholder because the case for the duty proceeds from the value that the existence of the duty brings into his life (including by helping to protect the value already in it). Keating speaks here of the 'interests' of the rightholder, and so would I,

Tort Law For? Part 2. The Place of Distributive Justice', in John Oberdiek (ed), *Philosophical Foundations of Tort Law* (Oxford 2014)

[25] Keating, above note 17, [12].

were it not that the word 'interest' has acquired sectarian overtones in the literature on rights. An 'interest theory of rights' has a lot of extra baggage to carry around these days, and I can do without that.[26] But it does not follow that, in my book, I deny the centrality to private law of rights as protectors of interests.

I have no quarrel, then, with Keating's proposal – finally we get to it! – that the *reparandum* in private law cases is a 'right violation'.[27] I just don't put it that way, for putting it that way masks the key point that, in private law just as in personal life, what matters at the point of repair is getting as close as one still can to doing what one should have done when one breached the primary duty (a.k.a. 'violated the right'). There may be limits to what private law, or any kind of law, can contribute to getting one to put things right if one is disinclined to do so. But that does not mean that private law must have its own specialized objective called 'vindication of rights'.[28] Normally, vindicating a right just means doing what can still be done to undo (mitigate, mend) the right's violation in accordance with the continuity thesis. That is what we normally do to put things right outside the law, and it is what private law normally tries to get us to do to put things right. Why do I say 'normally'? In the book (chapter 4) I add some reflections on a range of para-reparative actions (apology, confession, the payment of token or symbolic sums, etc.) that remain available when there is nothing left to be done in accordance with the continuity thesis. These reflections were not available to Keating at the time of his writing. But they do not lead me to any dissent from his view that what is at stake in the reparative apparatus of private law is 'vindication of rights'. Again my only disagreement with him is that, in my view, the same holds (albeit often stated differently) in personal life too.

[26] See e.g. Eric Mack, 'In Defense of the Jurisdiction Theory of Rights', *Journal of Ethics* 4 (2000), 71.
[27] Keating, above note 17, [11].
[28] Ibid, [12].

In the round, I see little to dissent from in Keating's summary proposal that '[t]ort [law] is about claims that persons have *qua* persons to have certain central interests in security respected.'[29] After all, I give both security and respect a central role in my chapter 5 explanation of the value that tort law (and more generally private law) protects. True, I don't much favour the language of 'claims' that Keating uses. But again that is a pragmatic move on my part. Such talk reinforces adversarial preconceptions. It also tends to add an extra layer of confusion in the theory of rights. For some reason many people have come to associate Hohfeld's technical term 'claim-right' with the strange thesis that a right *is* a claim.[30] That is clearly a category mistake. A claim is a speech-act. Whatever a right may be, it is no speech-act. Of course there are many speech-acts concerning rights. That I have a certain right may be asserted, claimed, denied, challenged, etc. But a right that I have is not to be identified with the assertion or claim that I have it any more than the violation of that same right is to be identified with someone's denying or challenging its existence. There are also many rights concerning speech-acts. But the fact that I have a certain claim to make (e.g. in court, or on the internet, or in this reply to Keating) does not entail that I have a right to make that claim, any more than the fact that I have no claims to make (say because I am too young to do any claiming) entails that I lack any rights.

I tend to think, however, that Keating is not a suitable target for these rather literal-minded grumbles. He does not really mean 'claims'. He just means 'rights'. That is also what I am talking about, by and large, when I talk about the duties we owe to each other. Keating's language remains more faithful to that favoured in tort textbooks, and in the judicial decisions that they

[29] Ibid, [12].

[30] e.g. Joel Feinberg, 'The Nature and Value of Rights', *Journal of Value Inquiry* 4 (1970), 243; Leif Wenar, 'The Nature of Rights', *Philosophy and Public Affairs* 33 (2005), 135.

document. But that does not point to any deeper disagreement between the two of us. At least I don't think it does. If there is anything in Keating's summary proposal that strikes me as worth debating it is the '*qua* persons' part. In some of his remarks Keating unpacks this to mean that only the 'essential' security interests of persons are among those that tort law protects. That seems mistaken to me. I can't see any illuminating sense in which my freehold interest in the unused strip of land to the side of my house counts as 'essential'; yet I can still sue you for nominal damages in trespass when you take a short cut across it. Indeed I can't see anything 'essential' about interests in private property, which are heavily protected by modern tort law. A regime of private property strikes me as just one possible regime among others for coordinating the use of resources. Even if Keating were right, however, that the law of torts protects only our 'essential' security interests, the topic of my book is not restricted to the law of torts. I am also interested in the law of contract, which generously protects my interest in making a profit, no matter how inessential it may be to my security that I make it.

3. Ripstein on relationality

Both Keating and I charge Arthur Ripstein with insulating the concerns of private law too much from those of personal life. In his comments in this issue of the *JRLS*, Ripstein stands up for this insulation in the end.[31] At the start, however, he lays a version of the same charge against me. He is sceptical about my chapter 1 attempt to distinguish strictly relational duties from loosely relational ones. It is not my position in chapter 1 that the duties we owe to each other in private law are only loosely relational, whereas those we owe each other in personal life are strictly relational. (That sounds more like Keating's position.)

[31] Ripstein, 'Morality and Law Through Thick and Thin', this issue.

Rather I suggest that recent writers, including Ripstein himself, have inflated the relational character of private law. They have tended to represent private-law duties as if they were by their nature strictly relational duties – akin to those that hold between friends and spouses and siblings and lovers – when they need only be loosely relational. The effect of this representation, in my view, has been to add undue credibility to the idea that the rationality of private law argumentation must be in some special way bipolar or bilateral, such that ordinary reasons arising from the impersonal state of the world do not govern it. This is played out in a deep resistance to 'policy' arguments in private law cases – not a resistance based on the limits of judicial expertise or the value of predictability in judicial decisions or such like, but a resistance based on the idea that 'policy' arguments invoke a kind of reason that has no rightful place in private law argumentation.

In chapter 1, I resist the offending picture in two main steps. First I try to deromanticize even strictly relational duties. That a duty is strictly relational means that it exists for the reason that the person who owes the duty and the person to whom it is owed stand in some special relationship. Their relationship is a complete and defeasibly sufficient reason for the duty. I argue, however, that this reason may itself exist for impersonal reasons, i.e. simply because the availability of the relationship makes the world a better place. Second, I note that the reason why I owe a duty to another person need not be the fact of our special relationship. It may simply be the fact of your vulnerability to my actions. Then the duty is loosely relational. It is a duty owed by me to you (that is the relational bit) but there is no mention of any valuable relationship between us in the reason for its existence. The reasons are ordinary non-relational reasons. I argue that some private-law duties are indeed strictly relational (notably contractual duties and fiduciary duties). But these are special cases. They contrast with much of tort law, the duties of which – these days – tend only to be loosely relational.

The qualification 'these days' attracts some detailed critical comment from Ripstein. To illustrate my chapter 1 distinction, I admittedly put a very particular spin on Lord Atkin's famous speech in *Donoghue* v *Stevenson*.[32] As I mentioned above in response to Bitton, I understand the speech as steering us from a strictly relational to a loosely relational interpretation of the 'duty of care' in the law of negligence. Ripstein thinks that this is a mistaken reading. I can see the appeal of his alternative, in which the duty was already (what I would call) a loosely relational one even before Lord Atkin got to it. As Ripstein says, however, it is strange for two philosophers of law to be fighting their respective corners by wielding rival interpretations of twentieth century legal history.[33] Nor, in the end, does Ripstein make that the main basis of his critique. It mainly paves the way for him to attempt a pincer movement against my distinction between strictly and loosely relational duties. On the one hand:

> The thickest examples of special relationships that Gardner considers – parent/child, teacher/student, physician/patient – are valuable along multiple dimensions, and when they go well, they create and sustain distinctive forms of value. It is worth noting, however, that one part of their internal structure – minimally, the duty of care – does not lose any of its significance in cases in which that source of value is compromised or even absent. A kidnapper who kidnaps a child is morally and legally required to act *in loco parentis*, subject to the full range of moral duties that apply to parent/child relations, including seeing to the child's bodily and emotional needs and to its education and moral development. This is not because there is a valuable kidnapper/kidnapped child relationship to which adherence to duties of loyalty and care partially constitutes or even contributes.[34]

While on the other hand:

[32] Above note 9.
[33] Ripstein, above note 31, [2].
[34] Ibid, [6].

> Even [in the latter debased relationships] there is a kind of value available, a kind of good that is realized in people being guided by the minimal demands of justice in the minimal rights of others. The value isn't in the vulnerability; it is in the other person's careful comportment in situations of vulnerability.[35]

The first of these passages returns us to a point I already made in response to Bitton: many if not all defeasibly valuable relationships are *also* relationships of vulnerability. Even when the value evaporates, the vulnerability may remain. That is the very fact that makes it possible for Ripstein and me to disagree about the correct interpretation of the duty of care in negligence law prior to *Donoghue* v *Stevenson*. Many duties owed by one person to another have two possible rationales, one owed to the value of the relationship they are in, the other owed to their vulnerability to each other. The cases I had in mind when I pointed this out in debate with Bitton were those of domestic abuse, where someone (as we might be inclined to say) kidnaps his own spouse. But there are also implications for the case of a stranger-kidnapper. If she kidnaps a young child to bring up as her own, she may become a parent to him and she may then owe him strictly relational duties. She may even owe him a duty of love. But meanwhile the child is highly vulnerable to the actions of his kidnapper, and his kidnapper therefore has various duties that are akin to those of a parent. Should we say that the kidnapper is '*in loco parentis*'? The expression, together with the idea it represents, is now largely obsolete in English law.[36] I have always found it unfortunate. It encourages the thought that the duties of strangers towards children must be derived (by delegation or otherwise) from the strictly relational duties of

[35] Ibid, [8].

[36] See e.g. *Woodland* v *Swimming Teachers Association* [2013] UKSC 66. (Exception: the idea may still have some legal role in connection with the criminal-law defence of 'reasonable chastisement of a child'.)

parents – as if the fact of a child's vulnerability were not enough by itself to give rise directly to duties owed by those to whose actions they happen to be vulnerable. It seems to me that the shift away from the *in loco parentis* doctrine in twentieth century England echoes, perhaps even forms part of, the shift in legal thinking that I credited to Lord Atkin. A special relationship need not be invoked to get a tort-law duty off the ground.

Contrary to the impression given by his invocation of *in loco parentis*, Ripstein agrees that a special relationship need not be invoked to get a tort-law duty ('minimally, the duty of care') off the ground. Some parental duties, thinks Ripstein, are not owed to the defeasible value of parenting. They are owed simply to the vulnerability of children to the actions of others. Parents just happen to be the people to whose actions children are most often vulnerable. That is why some of the duties that parents owe to their children are also owed by kidnappers. Since this chimes with my interpretation of *Donoghue* v *Stevenson*, I am not sure how it qualifies as a criticism of my views. Maybe it is not intended to be a criticism of my views. Or maybe Ripstein is criticizing me only for leaving open the possibility that a strictly relational duty that I owe could have the very same content as a loosely relational duty that I also owe. Leaving open that possibility, however, is the main point of my encounter, in chapter 1, with Bernard Williams and his 'she's my wife' vignette. It is the very lesson we learn from George and Lennie in *Of Mice and Men*: the value of a friendship, complete with its strictly relational duties, can include the better protection that it offers one against those (including the friend) to whose actions one is vulnerable, and who may therefore anyway owe one loosely relational duties. That the same 'security' reasons may

count in favour of a duty both *via* the friendship and apart from the friendship is my deromanticizing move against Williams.[37]

This move, however, pushes me straight into confrontation with the second passage I quoted from Ripstein, what we may think of as the other prong of his pincer. In the book I tried to maintain (some may think 'shore up') the distinction between strictly relational and loosely relational duties by denying the value, even the defeasible value, of being in the situation of what I called an 'Atkin neighbour', i.e. of *merely* being vulnerable to the actions of another. Who (without ulterior reasons) should want to fall into the hands of a kidnapper or an abusive spouse? Ripstein replies: Well, there is the potential value of their doing their duty while you are in their (albeit otherwise unwelcome) hands. I agree that there is value in doing your duty. In chapter 4 (not in the bundle I provided to Ripstein) I offer some brief reflections on the value of bare conformity to reasons, including reasons for belief and emotion. Beliefs and emotions, unlike actions, do not have to be valuable in order to be reasonable. Nevertheless, there is some value in having reasonable beliefs and emotions, because there is some value in the mere fact that one conforms to a reason. This value extends to the mere fact that one does one's duty. Nevertheless it does not bear, as Ripstein suggests it does, on the stability of my distinction between strictly and loosely relational duties. For that distinction is drawn at the level of the reasons why one *owes* the duty. A strictly relational

[37] This shows that Ripstein is being too generous, above note 31, [7], when he writes of 'the instrumentalism that Gardner rightly seeks to avoid.' Although it happens that I am not a (total) instrumentalist about personal relationships, there is nothing in my chapter 1 that 'seeks to avoid' such instrumentalism. On the contrary, I chide Williams for underestimating the instrumentality of close personal ties. On this point, chapter 1 of my book echoes criticisms I made many years ago of Ernest Weinrib's *The Idea of Private Law* (Cambridge Mass 1995). See Gardner 'The Purity and Priority of Private Law', *University of Toronto Law Journal* 46 (1996), 459.

duty is a duty that one owes for the reason that one is in a defeasibly valuable relationship with the person to whom one owes it. Could it be the case that the value in mere performance of one's duty (as such) is also the reason why one has the duty? No. The value that lies in mere performance of the duty cannot explain why it is a duty. One does not have any duty just in virtue of the fact that it is a good thing to do one's duty whatever it may be. So the value mentioned by Ripstein – some call it 'deontological' value – does not point to any breakdown of the distinction between loosely and strictly relational duties.

In the last part of his comment Ripstein develops the idea of the deontological value in 'Atkin neighbour' relations, and the value of private law as enabler of such value. He does so mainly by contrasting my account of how private law attaches outcomes to agents, and which outcomes it attaches, with his own:

> Many things can interfere with your pursuit of your goals ... . At least some of these are things that others have reason not to do. ... [But that] just seems to be a different kind of reason than those that give rise to liability, and not just because in cases of narrative dispute, the law has to draw the line somewhere. Instead, the law seems to draw its lines in a systematic way, based on what people have against each other.[38]

My main difficulty here is with Ripstein's word 'based'. Why? Because 'what people have against each other' is, so far as I can see, just a laconic way of redescribing the assembled rules of private law, one that infuses them with a vaguely proprietarian flavour. Whether you welcome that infusion or not (I for one do not[39]) a laconic redescription of the *explanandum* is not the same

[38] Ibid, [9].

[39] The existence of property is itself just another pay-off of the system that stands in need of a basis. At the same meeting at which Ripstein commented on my book, I commented on his book *Private Wrongs* (Cambridge, Mass 2016). The resulting paper is 'Private Authority in Ripstein's *Private Wrongs*',

thing as an explanation. That the rules of private law regulate what people have against each other does not reveal any *basis* for those rules or for their assemblage. True, the rules are assembled in a 'systematic' way, and not only in the sense that they belong to one and the same legal system. Also in the sense that the courts of that legal system are inevitably faced with the task of reconciling various otherwise competing rules of private law. That task is never-ending: every refinement of a rule in the name of reconciling it with another rule yields some new inconsistency elsewhere. Nevertheless, there is at any given moment a measure of local coherence in any mature body of private law doctrine. That local coherence means that one rule (or cluster of rules) can intelligibly be offered as the 'basis' for another. That is how the illusion takes hold that a redescription of private law is also an explanation of private law. I agree with Ripstein that the law 'seems' to draw its lines 'based on' what people have against each other. But that is how things are supposed to seem. It is how the law fosters the useful myth of its own autonomy. In reality the law *determines* what people have against each other (a.k.a. their private-law rights) and its doing so is not a basis for anything, but rather the very thing that stands in need of a basis.

One subtext of my book is that theorists of private law often expect too much coherence, and hence too much determinacy, in the basis of private law. They find it unsatisfying to be told, as value pluralists like me are wont to tell them, that a lot of considerations are relevant to the work of private law and that those considerations often pull in different directions, giving rise to a great deal of potential indeterminacy. They also find it unsatisfying to be told, as legal positivists like me are wont to tell them, that the law's main job is to resolve such indeterminacy by the use of its authority. As Ripstein expresses that point, 'the law

Jerusalem Review of Legal Studies (2016) 14, 52, in which I say more about the rational contingency of the property paradigm in private law.

has to draw the line somewhere'. My book does not trespass much on the question of where to draw which lines in private law because I regard such line-drawing as largely a job for a court or a legislature, not a philosopher. Appellate courts, in particular, are expert systematizes of reasons into rules, and of rules into bodies of rules. Their work is needed because life in general is extremely unsystematic. It is rife with ambivalence, conflict, and tragedy. My job, as a philosopher of private law, is mainly to bring out the sources of ambivalence, conflict, and tragedy that make it important to have an assembly of rules along the general lines of private law. Those rules are in a sense arbitrary. They could be different without being any the less defensible. Yet they typically arbitrate between a range of defensible possibilities. There is typically something in them, some orientation or gist, that is not merely the will of the law but reflects the force of reasons. The trick is to be able to pick that something out. *From Personal Life to Private Law* is a book mainly about the orientation or gist of private law, the general lines along which it runs, which do not always lead in one direction. I am sure that this will make the book a cause of considerable frustration for those looking for a mode of analysis that offers more coherence, more determinacy, or more autonomy for private law. Inasmuch as my critics in this issue of the *JRLS* are looking for such a return on their intellectual investments in the subject, I thank them for their forbearance, as well as their generosity and thoroughness, in commenting on my low-yield work. For fear of debasing the currency of apology, I shy away from saying sorry yet again!