Constitutional Rights and Private Law: Foundations

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Abstract

Constitutional rights and private law are on a collision course. Constitutional rights have many consequentialist aspects, grounded in collective responsibilities to bring about states of affairs amounting to social justice. Because social justice is affected by the actions and activities of private agents, constitutional rights often intrude into areas of law regulating private relations, such as tort law or contract law. The problem is that private law rights have many deontological aspects: they are grounded in personal responsibilities to treat others in certain ways regardless of considerations external to our direct relations with them.

This thesis makes the first steps in mediating these conflicting legal clusters. It sees both right-types as important parts in legal systems that try to preserve their integrity and legitimacy in conditions of moral pluralism. A delicate balance must therefore be found between subordinating private law to constitutional rights and immunizing it from their scrutiny. As a first step, most constitutional rights should not entail duties for private agents, as this would risk the politicization of private relations. However, they can burden private agents indirectly, by creating state duties about the regulation of private relations.

To discharge these constitutional duties without ignoring, distorting, or eroding the relational normativity of private law rights, state agents must carefully locate public inroads into private law in contexts in which private agents are responsible to attain or sustain social justice: sometimes personally and sometimes as part of the political collective. Such bridges from large-scale consequentialist prescriptions to small-scale interactions are not foreign to private law. But they are often undertheorized and underdeveloped. For constitutional rights to realize social justice through private law effectively, they must be broadened and placed on solid foundations. This requires connecting them to the normative features of each right-type and the conflicting moral paradigms underlying them.

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A Tale of Two Paradigms

1.1. Hercules

In around four billion years, scientists predict, our galaxy—the Milky Way—is scheduled to collide with a neighbouring galaxy—Andromeda. Such galactic mergers are not always violent: they do not always involve the collision of stars; and apparently, they are quite common in our universe: this is how it evolves. Closer to home and to the topic of this thesis, the evolution of the normative universe also oscillates between order and chaos: at times it is surprisingly coherent and reassuring; but in others conflicting and confusing.

In this thesis, I tend to some of the collisions between two galaxies: the constitution and private law. These are two incredibly complex normative systems comprising a multitude of constantly moving and interacting parts: one system guides state action and enshrines the values we are committed to as a political collective; the other system guides us as private agents and shapes our personal, communal, and market relations.

Collisions between these systems are normal features of liberal legal systems. The famous American case of *Shelley v. Kraemer* (1948),[1] for example, dealt with the practice of restrictive covenants limiting the occupancy of houses by (and thus also sale to) members of certain social groups (in that case, it was 'people of the Negro or Mongolian Race'). The Supreme Court of Missouri accepted the claim that the restriction, agreed between private parties, applied against the purchasing African-American family; but the American Supreme

[1] *Shelley v. Kraemer* 334 US 1 (1948).

Court decided that its enforcement was discriminatory and therefore in violation of the Equal Protection Clause of the 14th Amendment to the Constitution, that binds judges.

The Supreme Court of the United Kingdom dealt with a somewhat opposite claim—about eviction.[2] Following the 2008 financial crisis, the parents of a woman suffering from various health problems could not keep making the mortgage payments for her house. The daughter's claim that respect for her right to 'private life and home' requires subjecting the bank's ensuing eviction claim to substantive fairness tests was denied: it was held that the formal eviction rules adequately balanced her rights and the bank's property rights.

Staying on these shores of the Atlantic, we find the twin cases of *Bull v. Hall* (2013) and *Masterpiece Cakeshop* (2018): Christian service providers—hotel keepers in the United Kingdom and a bakery owner in the United States—refused to provide services to same-sex couples—to provide a double-bed in the first case and a wedding cake in the second.[3] While the British Supreme Court decided that the right to equality had the upper hand, the American Supreme court decided that the discrimination was constitutionally permitted.

Similar questions arise in other contexts: in labour law, for example, about employers' ability to monitor their employees' private emails;[4] or in family law, about the property-sharing regime applying between partners in ongoing romantic relationships.[5] Such questions traditionally fall in private law: the legal domain regulating the direct relations between non-state actors. However, the cases above are about more than just the relationship between isolated pairs of individuals: importantly, they implicate the commitments of political collectives, translated to constitutional rights that states must respect, protect, and promote.

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2 *McDonald v. McDonald* [2016] UKSC 28.
3 *Bull v. Hall* [2013] UKSC 73; *Masterpiece Cakeshop v. Colorado Civil Rights Commission* 584 US _ (2018).
4 *Bărbulescu v. Romania*, App no 61496/08 (ECtHR, 5 September 2017).
5 *Quebec (Attorney General) v. A* [2013] 1 SCR 61.

Constitutional Rights-Based Horizontality

Moral theorists often deal with questions about how we, as acting agents, should treat others. Private law often builds and elaborates on such debates. The cases above introduce another party: the state—an institutional apparatus acting on behalf of the political collective. Political theorists often deal with questions about how the state, as a collective agent, should conduct itself. Constitutional law often builds and elaborates on such debates. The problem this thesis tries to theorize lies in the overlapping area of these four normative clusters.

The constitution's prescriptions about horizontal relations could be approached from many angles. I approach it from a right-based perspective. I focus on the interactions between constitutional rights and private law rights: norms that create robust relational connections between one agent's responsibility and others' well-being. For example, when asking whether Kraemer, living a few blocks away from the house that the Shelley family purchased, has a private law right to prevent them from occupying it, we could be asking whether he or the involved state agents (there, judges) have constitutional right-based duties towards the purchasers (or other affected parties) not to interfere with the transaction.

We see here the 'horizontal dimensions' of constitutional rights. Much attention has been given in the past decades to their 'positive' dimensions: to the notion that they not only proscribe but also prescribe certain actions or activities. The vertical–horizontal distinction deals with the locus of the right's application: vertical right-norms regulate the state–citizen relations while horizontal right-norms regulate the relations between non-state parties. As we can see in the examples above, constitutional rights often have quite a lot to say about the actions and activities of private agents and the states of affairs that they bring about.

This thesis focuses on the constitutional right-based duties of state agents to create, repeal, or change the private law rights and duties of non-state agents. This way of putting

things distinguishes it from more state-sceptic attempts to tackle the problems reflected in the examples above: from accounts criticizing traditional state-centered constitutionalism and doubting the ability of modern states to secure the basic interests and needs of individuals in the market and the private sphere in conditions of privatization and globalization.[6] This kind of scepticism could ground claims that sometimes constitutional (or human) rights directly burden private agents with duties to other private parties.[7]

While such approaches are important in some contexts (for example, when it comes to constraining international corporations operating in weaker states), the context I focus on requires bringing the state's role into focus rather than minimizing it. I will not contest scepticism about the state on empirical grounds (though recent experience shows that when things go wrong—when facing a pandemic, for example—states have important roles to play). Rather, I will point at some of the important responsibilities states have in combating private injustice and say why and how they ground constitutional right-based duties.

But, importantly, questions of constitutional rights-based horizontality are answered not just by our conception of the constitution: they also touch the nature of private law and our interpersonal moral relations. Private law theory and practice have been dealing for a long time with questions about the place consequentialist considerations have in it (often grouped under the label 'public policy'). To serve as a bridge between constitutional law and private law, a theoretical account of the place constitutional rights have in private law reasoning and deliberation cannot operate only from the top down: it must navigate between these domains, with the hope of facilitating a mutually beneficial form of normative interaction.

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6 See, for example: Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State', in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 327, 327. See also: Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press, 2019) 18.

7 Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015).

Great Expectations

This thesis offers a theoretical account of the indirect effect of constitutional rights in private law. While some constitutional rights (for example, against slavery) can bind all legal agents alike and the application of others (for example, to a fair trial) is determined by the nature of state involvement, the implications of rights like dignity, liberty, equality, or privacy—that, I claim, have consequentialist aspects—is more nuanced: they bind only state agents, but their prescriptions address states of affairs consisting of private actions and activities; they expose private law to ongoing consequentialist scrutiny, but hopefully without eroding or distorting the relational normativity underlying many of its right-norms.

The challenge is that many constitutional rights obligate the state to bring about states of affairs that often touch private law rights and duties: for example, to secure privacy in the workplace or equality in the housing market. Private law rights, however, are often focused on the small-scale actions and activities of private parties—on intentions, proximity, negligence, and other agency-related considerations—and resist the forms of instrumentalization that often accompany constitutional scrutiny focusing on interests and needs. In this sense, what I treat as central cases of constitutional rights and private law rights are the tips of two colliding normative icebergs: two moral paradigms, with different visions of social justice and the relations between public and private in the legal and political systems. One paradigm sees the private as subordinated to the public, the other as separate from it.

Having said that, it is still unclear how violent their collision will be. Unlike NGC 6052—the name given to a collision happening 230 million light-years away from Earth in the Hercules constellation—we can do more than just observe and try to figure out what is happening. When legal particles are involved, understanding can pave the way for reducing frictions, resolving some conflicts, and containing the moral implications of others.

Thus, while I depart from a somewhat diffident Berlinean starting point of moral pluralism, I try to maintain a Dworkinian—or even Herculean (the imaginary judge—not the constellation)—optimism about the possibility of moral progress. I believe that we can reach more than a mere *modus vivendi* between these normative systems—that we can get them to interact in mutually productive ways. We can see the trend towards constitutional rights-based horizontality as aiming at legal coherence, integrity, and justification;[8] not by trying to sustain separation or subordination between private and public in law, but by engaging them in a complex but well-structured process of normative reasoning.

Of course, finding the winding path between the instrumentalization and politization of the private in law and rigid forms of separation between public and private is not easy. But we are already on this path, and it will be very difficult to turn back by repealing most of the constitutional rights that we see as located in the moral core of liberal legal regimes. The best we can do now is find our way down that path. This project tries to chart the first few steps in this journey, that we already started to make; and not only in constitutional law: there are many public inroads into modern private law, through which constitutional rights and social justice considerations can and do seep in, without wreaking too much havoc.

This chapter aims to introduce this collision of two moral paradigms, reflected in the constitutional phenomenon of right-based horizontality, and to locate it in its conceptual, historical, and normative contexts. Constitutional horizontality cannot be treated as a technical and contingent implication of the wording of certain right-norms: it tends to materialize, in one form or another, in every liberal legal system. I will try to show why this is so, and what kind of normative challenge it poses for legal theory and practice.

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[8] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996). See also: Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law' (2008) 121 *West Virginia Law Review* 1, 23–25.

1.2. Conceptual Framework

This thesis deals with rights and right-based duties. Both constitutional law and private law contain other types of norms: principles like the separation of powers or the rule of law and procedural rules about litigation, for example. Some of the claims I make could apply, with relatively small modifications, to some of these other norms. However, my attention is focused on rights. First, and this seems rather straightforward, rights have been front and center in political and legal debates in liberal democracies in the past decades. Second, and this is more contested, rights are sometimes seen as central and even fundamental building-blocks of these two legal domains: a dominant strand in private law theory sees it as 'rights-based'; and constitutional rights are often treated as the constitution's beating heart. I will revisit these claims in the next chapters and have some things to say about the costs of the use of the language of rights; but rights and right-based duties are the focus of this thesis; and therefore, I must start by saying a few words about what I take them to be.

To begin with, it should be noted that I am not dealing with rights in the 'sub-atomic' level of abstraction Wesley Hohfeld's famous analysis focuses on.[9] In the spirit of American legal realism, he saw much legal talk about rights as imprecise: it is more accurate, he thought, to dissect them to 'claim-rights', 'liberties', 'powers', and 'immunities'. As I will claim in the next chapters, while Hohfeld's analysis is enlightening and helpful, it cannot be all there is to rights in constitutional law or private law: in both domains we take rights to be more abstract (and in the former more than in the latter). We pay a certain price in terms of analytical accuracy to work with more deliberatively accessible rights. Thus, we focus on clusters of Hohfeldian incidents that tend to be treated as complex wholes.

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[9] For a survey of Hohfeld's ideas, see: Heidi M. Hurd and Michael S. Moore, 'The Hohfeldian Analysis of Rights' (2018) 63 *American Journal of Jurisprudence* 295.

That is, we talk about a constitutional right against the state to privacy even though it can be limited quite regularly; or a private law right against nuisance even though it is in fact a cluster of claim-rights, liberties, and powers that apply against many separate agents. In this level of abstraction, we are closer to the conceptual debate about the nature of rights between the Interest Theory and the Will Theory.[10] Here we are talking not just about their parts but also about what ties them together: thinking about rights without addressing their point seems reductive; we could be noticing the trees but missing the forest.

I will introduce these conceptions of the nature of rights by touching their positions about the 'correlativity' of rights and duties. Then, I will connect these conceptual positions to the debate about 'claimability' of rights, which is more morally robust and touches not just their existence conditions but also the ways in which they operate in our practical reasoning: it touches their normative force and moral value. This preliminary debate about the nature and force of rights is meant to set the stage for the ensuing discussion about the consolidation of private law and constitutional law, constitutional rights-based horizontality, and the moral paradigms at play behind the scenes. Most importantly, it will allow me to distil these conflicts to two ideal right-types before closing this chapter: as claims, rights can have agent-centered or beneficiary-centered justificatory grounds, that often determine their degree of relationality—the tightness of the connections between them and duties. However, before tying the normative structure of rights to underlying normative considerations about agency and well-being, I must say a few words about what rights are and about the kind of normative considerations at play when reasoning about and with them.

[10] Alon Harel, 'Theories of Rights', in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) 191.

Correlativity and the Nature of Rights

The concept of correlativity touches the normative relations between rights and duties. According to the Interest Theory, rights can exist independently of duties. In Joseph Raz's version of this theory, a person has a right when an aspect of his interests 'is a sufficient reason for holding some other person(s) to be under a duty'.[11] Rights therefore serve as 'intermediate conclusions in arguments from ultimate values to duties'.[12] Rights are grounded in values and can themselves entail 'waves of duties', that can be shaped by the interests of third parties,[13] and can be directed at different agents in different circumstances.[14]

John Tasioulas claimed, as part of his account of moral human rights, that when considering their existence, we focus on the right-holder's interests and on 'human capacities, available resources, and general features of social life': we can say at this intermediate stage that a right exists before fully specifying its correlating duties.[15] Joel Feinberg talked in this regard about the 'manifesto sense' of rights: moral claims that needs must be met—for example, a starving person's claim to have access to food—even if it is unclear who they obligate and how (these are 'the natural seed from which rights grow').[16] Such rights are important for theorists like Tasioulas because they serve as moral standards that shape our reasoning about the further allocation of particular duties to particular agents.

But this non-correlativity is a concern for other theorists, like Onora O'Neill, that claimed that a right that does not specify concrete duties fails to function as a right.[17] This

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11 Joseph Raz, 'The Nature of Rights', in *The Morality of Freedom* (Oxford University Press, 1986) 165, 166.
12 Ibid 165.
13 Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27, 33; Alon Harel, 'Revisionist Theories of Rights' (1997) 11 *Canadian Journal of Law and Jurisprudence* 227.
14 Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 509–512.
15 John Tasioulas, 'The Moral Reality of Human Rights', in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press, 2007) 75, 88–95. See also: James Griffin, *On Human Rights* (Oxford University Press, 2008) 107–110.
16 Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243, 254–255.
17 Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427, 433–434.

takes us to the Will Theory of rights. In H.L.A Hart's version, the main point of rights is to give the right-holder ('a small-scale sovereign') control over the duties of another—the freedom to constrain another's freedom: we have a right only when we have such control.[18] There are no waves of duties: only direct normative connections between single right-holders and duty-bearers; and a right-holder's control over duties cannot be limited to realize others' rights and interests, unless they have direct rights against him. Can we, as individual right-holders, control a right to be well-fed? If to fulfil it we need to establish an institutional scheme of welfare services, the answer seems to be 'no'. The Will Theory does not see rights as the grounds of duties (and further concrete rights). Thus, in effect, it entails a strict correlation between rights and duties: the question of which rights we have already answers further questions about who our rights obligate and how.[19]

This brings to the surface these theories' foundations in the writings of Kant and Bentham.[20] The Will Theory sees rights as strictly correlative in the sense that they are agent-relative and patient-relative: they require a particular agent to treat or avoid treating a particular patient in certain ways.[21] Rights and duties are 'bipolar': 'like the opposing poles of an electrical apparatus'.[22] The Interest Theory, on the other hand, sees rights as agent-neutral and patient-neutral: they are about states of affairs that must be brought about, and it could be justified to burden third parties with duties to contribute to their realization, and it could be justified not to realize them to further the interests of third parties. I will say more about these ideas, but this is enough to get us to the claimability of rights.

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18 H. L. A. Hart, 'Legal Rights', in *Essays on Bentham* (Oxford University Press, 1982) 162, 183

19 David Lyons, 'The Correlativity of Rights and Duties' (1970) 4 *Noûs* 45, 46–48.

20 N.E. Simmonds, 'Rights at the Cutting Edge', in *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 2000) 113, 134–145, 213–216.

21 Hurd and Moore (n 9) 318.

22 Michael Thompson, 'What it is to Wrong Someone? A Puzzle about Justice', in R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press, 2006) 333, 335.

Claimability and the Force of Rights

Many of the questions dealt with in this thesis have less to do with the conceptual debate about whether rights exist and more with the moral debate about their force and value: about how they operate in particular deliberative practices. A helpful starting point in this regard is Feinberg's idea that rights get their special moral significance from the fact that they are valid claims that form parts of rule-governed social practices.[23]

From the claimant's side, Feinberg's thought experiment of a world without rights is instructive. Norms constraining agents with the purpose of benefiting others can exist in Feinberg's 'Nowheresville'; but when people address someone about a norm regulating his behaviour towards them, their address is epistemic in nature: they just remind the duty-bearer that he is well-placed to respond to a general norm applying to him.[24] Duty-bearers follow such norms not out of concern for beneficiary's welfare but to avoid harming the community or compromising their own moral integrity: affected individuals are, in a way, just 'raw material for wrongdoing'.[25] Back in our world, this seems to be the case when we address people about things like recycling or voting: our interests are not entirely personal—they reflect concern for collective goals or the addressee's moral integrity.

'Real' rights, in our world, have a 'personal orientation': they are claimed on behalf of their beneficiaries and for their own sake (and, in many cases, at their own discretion).[26] This is the case, for example, when I address a neighbour about throwing plastic bottles in

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23 Feinberg (n 16) 252–253.

24 Ibid 243–249; Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006) 6–7; Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford University Press, 2019) 39–43.

25 Thompson (n 22) 352, 372.

26 Alan Gewirth, 'Why Rights are Indispensable' (1986) 95 *Mind* 329, 335–337. See also: Cruft, *Human Rights* (n 24) 46–61, 80–83; Shelly Kagan, *Normative Ethics* (Westview Press, 1998) 170–172; Stephen Darwall, 'Bipolar Obligation', in *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press, 2013) 20, 26–27; David Owens, 'The Roles of Rights', in in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 3.

my back yard: not because I worry about the collective effort to protect the environment or his moral integrity, but because he harms my interest in a clean garden. This expresses the connection between rights and their holders' well-being and the control they give them (or their representatives) over the normative situation between them and the duty-bearer (and, in a way, between the duty-bearer and the relevant normative community).[27]

Rights are also special because of the ways in which they are attached to the agency of duty-bearers and constrain their practical reasoning and actions: principles, values, goals, or imperfect duties also burden agents but differently. From the perspective of claimability, the constraining normative force of right-based duties is derived from their constitutive connection to legitimate or valid claims by others.[28] We might be wrong if we do not do enough to protect the environment or help the poor, but we do not wrong anyone in particular by unilaterally discounting the (good) reasons to do these things.[29]

The right-holder's normative position acts as a constraint on the duty-bearer. As acting agents, we are constrained by reasons that could figure in right-claims against us. Since we have a duty to exercise our agency in ways that respect others as right-holders, we must bring their potential right-claims to bear on our practical reasoning. We are constrained by the need to offer justifications to rights-claimants if they call us to account.[30] Appealing to some reasons might fail to do the job here: as Thomas Nagel claimed, we fail to respect the right holder if we justify our treatment of him by presenting ourselves as 'benevolent bureaucrats' distributing benefits and burdens in society—respect requires our justifications to address our direct normative connection (Nagel locates here the force of deontological

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27 Darwall, 'Bipolar Obligation' (n 26) 29–31; David Owens, *Shaping the Normative Landscape* (Oxford University Press, 2012) 51–61.
28 R. Jay Wallace, *The Moral Nexus* (Princeton University Press, 2019) 49–51, 57–59.
29 Ibid 69–71¸ 76–86.
30 Cruft, *Human Rights* (n 24) 61–68. See also: Owens, 'The Roles of Rights' (n 26) 12–16.

constraints).[31] The special normative force of rights is derived from the way in which they narrow the duty-bearer's discretion by shining a bright light on reasons relating to the right-holder's welfare while excluding other reasons unrelated to it.[32]

How does this relate to the more conceptual debate about the nature of rights? claimability is one thing that separates rights from other normative incidents and forms of address. While duties,[33] or wrongness and wrongdoing,[34] are not inherently relational— for example, there can be duties to oneself and wrongness can be related to no agent in particular— the wrongdoing involved in right-violations is always relational, to some extent.

Now, it is important to notice that this existence condition can be satisfied relatively easily, and thus that it leaves room for many versions of the Interest Theory. It might be suggested, for example, that talk about moral human rights assumes 'humanity' as an amorphous collective agent operating in the background.[35] This might have been what Feinberg meant when he stated that 'manifesto rights' are claimed 'against the world'.[36]

But claimability is not just a binary existence condition and a constituent feature of rights—it is also a richer and more complex standard for their moral evaluation: we can say similar things about autonomy (as a condition for someone being a moral agent and an ideal he can realize in his life to varying degrees), dignity (as something we always have and as something we can act with to varying degrees), and the rule of law (a condition for a normative system to qualify as legal and an ideal to can realize to varying degrees).

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31 Thomas Nagel, 'War and Massacre' (1972) 1 *Philosophy & Public Affairs* 123, 136–138. This idea is reflected, in a way, in Scanlon's Contractualist moral theory—see: Thomas Nagel, 'Scanlon's Moral Theory', in *Concealment and Exposure: And Other Essays* (Oxford University Press, 2002) 147, 149–151.

32 Raz, 'The Nature of Rights' (n 11) 183, 192.

33 Joseph Raz, 'Liberating Duties', in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) 29, 33.

34 See, for example: Victor Tadros, 'Wrongdoing and Respecting Value', in *Wrongs and Crimes* (Oxford University Press, 2016) 27.

35 Violetta Igneski, 'Collective Duties of Beneficence', in Saba Bazargan-Forward and Deborah Tollefsen (eds), *The Routledge Handbook of Collective Responsibility* (Routledge, 2020) 447, 453–455.

36 Feinberg (n 16) 255.

Thus, rights can successfully answer the 'who' question by obligating some agent, but still fail to be 'genuine', 'meaningful', or 'real' rights by failing to adequately answer the 'how' question and specify concrete duties.[37] Importantly, the concern here is not about whether rights exist but about their context-dependent value as parts of ongoing practices.[38] For example, O'Neill's concerns about 'the free-floating rhetoric of rights' that 'focuses on recipience' and about 'statist' accounts of moral human rights seem to be motivated by the difficulties of claiming them against 'rogue' or 'weak' states; but there are also concerns about rights not having 'practical import' or being ineffective that are relevant when talking about relatively well-functioning liberal democracies.[39] Like a blunt knife can still be a knife, a concern could arise that some rights are bad instances of rights because they fail to exhibit the relational normative connection captured by the idea of claimability.[40]

This does not count in favour of the Will or the Interest theories; and as I will claim throughout the thesis, elements of both have central places in modern liberal legal systems.[41] Hart himself claimed that while the Will Theory works well with 'ordinary' law, it 'requires supplementation in order to accommodate the important deployment of the language of rights by the constitutional lawyer and the individualistic critic of the law, for whom the core notion of rights is […] basic or fundamental individual needs'.[42] The mixture of correlativity, claimability, and force of rights changes from one context to the other. We can start seeing this by surveying the consolidation of private law and constitutional law.

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37 Tasioulas (n 15) 98.

38 Tim Hayward, 'On Prepositional Duties' (2013) 123 *Ethics* 264, 285. See also: David Frydrych, 'The Case Against Theories of Rights' (2020) 40 *Oxford Journal of Legal Studies* 320.

39 O'Norah O'Neill, 'Agents of Justice', in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge, 2005) 37, 41–50.

40 See also: Thomas (n 7) 151–160.

41 On pluralism and the nature of rights debate, see also: Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' (2009) 46 *San Diego Law Review* 819; Siegfried Van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 *Pacific Philosophical Quarterly* 104.

42 Hart, 'Legal Rights' (n 18) 193.

1.3. Historical Background

To understand the challenge of constitutional horizontality, we must understand the historical background against which it arose: the consolidation of private law and constitutional law. This historical process cannot be separated from the contested and multifaceted concepts of public and private. The distinctions between them go back thousands of years: in ancient Greece, we find a distinction between civic and political relations and intimate relations in the household;[43] and in ancient Rome, a distinction between matters of collective interest like citizenship or sovereignty and matters of private interest like market transactions,[44] and on its basis a legal distinction between the law that pertains to public matters and the law that pertains to private relations (and in 'private' law, further distinctions).[45]

During the Middle Ages, such political or moral distinctions faded away: mostly because the public domain shrank, as the authority of feudal rulers was conceptualized in terms of contract and property—it was based on an alleged agreement and could have been bought and sold.[46] As a result, legal distinctions also lost much of their traction: since the institutions we would define as political, collective, or public were small and occupied with rather limited tasks, there was less need for a special body of law addressing their conduct.[47] It is for this reason that this period is of less interest to us. The real action—normative conflicts between public and private—starts in the period of early modernity.

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43 Arlene W. Saxonhouse, 'Classical Greek Conceptions of Public and Private', in S.I. Benn and G.F. Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983) 363.

44 Jeff Weintraub, 'The Theory and Politics of the Public/Private Distinction', in Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice* (The University of Chicago Press, 1997) 1, 11.

45 Eric Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford University Press, 2009) 50–57.

46 N. E. Simmonds, 'Private Law, the Market, and the State', in *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press, 1984) 120, 120.

47 J. W. F. Allison, *Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press, 1996) 42–43. See also: R. C. van Caenegem, *An Historical Introduction to Private Law* (D. E. L. Johnston tr, Cambridge University Press, 1992) 17, 24.

The Restrained State

Social developments, mostly from the 16th to the 18th century, revitalized the public domain and the distinctions between public private in and out of law.[48] The scientific revolution facilitated advancements that shifted economic activities from agriculture and dispersed manufacturing to centralized industries; and the improved living and education standards and the replacement of land by other forms of capital gave birth to a bourgeois middle class.

With time, the political and legal cultures changed as well. It was realized that states not only can but also should perform more elaborate tasks. They replaced the church as the institution providing basic goods such as public order, education, and health. State institutions grew bigger and more ambitious; and legal systems replaced traditional convention-based norms with norms that could coordinate the activities of multitudes of strangers.

The other side of the coin was a growing suspicion towards and fear of the state. The great political revolutions of the 18th century gave birth to the thought that states should be limited and controlled by their constituencies.[49] This idea was paired with market ideology—the belief that we all benefit from transactions between (formally) free and equal individuals—and with the principle that society should not intervene in private relations unless one individual harms another.[50] Together, they justified the notion that a 'natural' and 'pre-political' sphere of human activity should be isolated from state intervention.[51]

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48 Van Caenegem, *An Historical Introduction to Private Law* (n 47) 2–3, 45–47, 33–34, 107–109, 125–128. See also: Nils Jansen, 'Duties and Rights in Negligence' (2004) 24 *Oxford Journal of Legal Studies* 443, 451–458; Charles Donahue Jr., 'Private Law Without the State and During its Formation' (2008) 56 *American Journal of Comparative Law* 541.

49 Allison (n 47) 45–49, 55–56.

50 The 'harm principle' appeared, most notably, in the French *Declaration of the Rights of Man and of the Citizen* (1789) and in John Stuart Mill, *On Liberty* (1859).

51 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger tr, MIT Press, 1989) 3–12, 74–75; William Lucy, 'What's Private About Private Law?', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 47, 60–61.

One outcome of these opposing trends—of empowering and restraining the state—was the consolidation of private law: on the one hand, ideals of central planning and nationalism facilitated the creation of unified legal systems, reflecting local cultures; on the other hand, the private sphere and the market needed to remain autonomous and protected from state intervention.[52] The codification process in 19th century Europe—most notably, the French (1804) and the German (1900) civil codes—is the culmination of these trends. Around the same time, private law started formulating as a distinct category in the Common Law: it was then that it made the transition from formalist to more substantive thinking—lawyers started reasoning in terms of obligations, torts, contracts, and so on.[53]

While legal reformers did not see themselves as promoting a particular ideology, they did tend to center around *laissez-faire* ideas.[54] In their attempts to guarantee legitimacy for the emerging system of private law, they tended not to offer the promotion of justice on a grand scale: rather, they offered pairs of litigants a fair resolution to 'their' dispute—fairness and justice were mostly seen as relevant between them. At most, instrumental benefits were aimed at facilitating market practices and enabling individual choice.[55] Common Law judges—pulling most of the weight of creating Anglo-American private law at the time—responded to the changing socio-economic conditions, but stayed loyal to their pragmatic and incremental method, with its strong emphasis on legal stability.[56]

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52 van Caenegem, *An Historical Introduction to Private Law* (n 47) 6, 55–58, 83–85, 116–117, 134–137, 159–165; Habermas, *The Structural Transformation* (n 52) 79–80, 141–142.

53 Descheemaeker (n 45) 191–195; Steve Hedley, 'Courts as Public Authorities, Private Law as Instrument of Government', in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 89, 97–104.

54 Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999) 120–122; Dan Priel, 'The Political Origins of English Private Law' (2013) 4 *Journal of Law & Society* 481.

55 Michael Lobban, 'The Politics of English Law in the Nineteenth Century', in Paul Brand, and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge University Press, 2012) 102, 116–123.

56 Michael Lobban, 'Common Law Reasoning and the Foundations of Modern Private Law' (2007) 32 *Australian Journal of Legal Philosophy* 39.

In this picture, public law still serves a modest and negative role: limiting the state's promotion of public policy or the common good. The main task of constitutions adopted at the time (such as the American) was to keep the state in check, rather than to empower or guide it. In some legal systems, like the English, public law was almost non-existent: there was hardly any distinction between public and private in law and no robust conception of the state, whose actions were regulated, in most cases, by adapting private law tools (a point I will go back to in the next chapters, when talking about constitutional rights).

Private law, on the other hand, was seen as having a basic (perhaps even constitutional) role: public law was focused on limiting the state while private law was focused on protecting the individual's moral and legal status as a free and equal citizen and his natural and pre-political rights, mostly to life, liberty, and property.[57] Private law created a sphere of autonomy by protecting existing entitlements, facilitating their consensual exchange, and offering recourse for non-consensual harm.[58] This, Duncan Kennedy claimed, is the foundation for the moral paradigm of the restrained liberal state, the activities of which are usually limited to passively mediating conflicts of mostly negative and stringent rights.[59]

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[57] John Henry Merryman, 'The Public Law–Private Law Distinction in European and American Law' (1968) 17 *Journal of Public Law* 3, 11; Dan Wielsch, 'Responsible Contracting: The Requirements of EU Fundamental Rights on Private Law Regimes', in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017) 257, 260–261.

[58] Descheemaeker (n 45) 118; Stein (n 54) ch. 5; Alice Erh-Soon Tay and Eugene Kamenka, 'Public Law–Private Law', in S.I. Benn and G.F. Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983) 67, 73–81; Hugh Collins, 'Utility and Rights in Common Law Reasoning' (2007) 30 *Dalhousie Law Journal* 1.

[59] Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 209, 366.

The Ambitious State

The picture sketched above still inhabits the minds of many legal practitioners and theorists. However, as the twentieth century progressed, it seemed more and more out of tune with the socio-economic reality and the changing moral sensibilities. It was realized that judges can no longer deny effective remedies from individuals suffering harms as a result of social activities benefitting the political collective: for example, to hold employees responsible for their own injuries or manufacturers to have no 'privity' with consumers. In other words, it became difficult to isolate 'private' rights and duties from 'public' considerations.

The popular conception of the state kept fluctuating between fear and obsoleteness on one hand and hope and necessity on the other. Two world wars proved states to be grave threats to individual rights; and the emerging global economy created regulatory challenges that induced states to accept institutional structures like the European Union or the World Trade Organization, thereby weakening the hold of the idea of state sovereignty on the legal and political imagination.[60] However, it was also realized that when states retreat from certain areas of social activity, other actors (like large corporations or heads of families) step into the vacuum and threaten vulnerable individuals (like consumers or children). Additionally, states still had great resources at their disposal; and were therefore still seen as responsible for protecting the individual's basic rights: as reflected in Hannah Arendt's post-war idea of a 'right to have rights'[61] and the proliferation and growing influence of constitutional bills of rights and international human rights treaties—ambitious legal devices seeing the state as not merely a danger to our rights but also as their guardian. Thus, the political collective's responsibilities to attain and sustain social justice became more demanding.

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[60] Philip Selznick, *Law, Society, and Industrial Justice* (Russel Sage Foundation, 1969) 245–246.

[61] Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (Schocken Books, 1951).

Hope and trust—in experts, science, the management of risk, economic and political institutions, and the state—are basic features of modernity.[62] While constantly under threat, some of their aspects are more resistant to populist politics: the ideals of the individual as a fully rational chooser, the market as self-correcting and liberty-maximizing, and the private sphere as natural, are still far from retaking our political and legal cultures. Thus, we are still seeing extensive state interventions in consumerism, healthcare, housing, education, and other areas of social activity. It is accepted that the mask of being neutral or natural must be torn off the faces of certain social institutions: that sometimes their spontaneous development must be regulated, especially by the state;[63] and that we can minimize certain risks and share their costs if they materialize into harms through public and private insurance schemes, like workers compensation or mandatory insurance for drivers.[64]

These ideas erode the illusion that private law is an autonomous legal domain isolated from collective goals and social justice. They carve out parts of its traditional jurisdiction and subordinate parts of it to public policy and to constitutional right-based duties to respect, protect, and promote certain interests and needs. Such 'external' incursions were complemented by 'internal' changes in private law, pushing it in the same direction.[65]

To begin with, private law disputes are no longer only between individual agents: in most cases, at least one of the parties is not a natural person but rather a public or private legally-created corporation—participating directly as a litigant or indirectly as an insurer. Since corporations distribute the costs of liability to the public, private law disputes cannot

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62 Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990) 21–39, 114–149.

63 Roberto Mangaberia Unger, *Law in Modern Society* (The Free Press, 1976) 203.

64 Jenny Steele, 'Risk Revolutions in Private Law', in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 75.

65 N. E. Simmonds, 'The Changing Face of Private Law: Doctrinal Categories and the Regulatory State' (1982) 2 *Legal Studies* 257; Kit Barker, 'Private Law: Key Encounters with Public Law', in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 3, 5–19.

ignore questions about these costs' allocation. Add the fact that many legal disputes do not even reach a substantive judicial resolution, but rather end in an out-of-court settlement between the parties, usually according to the internal rules and strategies of large corporations (like the internal rules of insurance companies about claims against them).[66] There is much talk, in this regard, in many legal systems, about the 'vanishing trial'.[67]

This changes the division of labour between judges and other state agents: legislators and administrators, isolated to a lesser extent from the public interest and the power-plays of politics, often intrude into domains traditionally controlled by judges, who themselves come to see their own role as more political, and thus to be less careful about promoting public policy.[68] Private law is no longer just about the protection of existing entitlements and the facilitation of their consensual exchange: it promotes equality through anti-discrimination law, spreads the costs of harms through various liability regimes, and performs many other 'public' functions. It is in this regard that Owen Fiss criticized Lon Fuller's account of adjudication and of law that sees some disputes as 'purely private', as 'rooted in a world that no longer exists. [… A] horizontal world, in which people related to one another on individual terms and on terms of approximate equality'; 'Our world', Fiss added, 'is a vertical one; the market has been replaced by the hierarchy, the individual entrepreneur by the bureau'.[69]

It could be said that justice is no longer seen as a strictly relational matter of whether one agent directly harmed another. As Samuel Scheffler claimed, a more systematic way of addressing moral questions was needed in light of the growing involvement of social and

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66 P. S. Atiyah, *The Damages Lottery* (Hart Publishing, 1997) 22, 99, 108; Richard Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85.

67 Carlo Vittorio Giabardo, 'Private Law in the Age of the Vanishing Trial', in Kit Barker, Karen Fairweather, and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 547.

68 Collins, 'Utility and Rights' (n 58) 6–14.

69 Owen M. Fiss, 'The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 30, 36–37, 44.

political structures in our personal lives: while it made sense, in the past, to think about justice in the confines of direct and isolated relationships between individuals, in modern societies we are connected more tightly. Thus, when it comes to some large-scale questions of social justice, the prescriptions of 'small-scale' values may be inadequate, or even worse: 'an illusion, deriving from an understandable but mistaken tendency to apply essentially interpersonal concepts outside the domain in which they have a genuine application'.[70]

These points are often ignored by private law theorists and practitioners.[71] They opt for the response Nigel Simmonds described as 'resistance'—an attempt to retain the traditional picture and the distinction between public and private in law—rather than 'revision'.[72] However, it seems reasonable to say that modern private law—the normative system shaping labour and marital relations, granting remedies for discrimination, and keeping large multinational corporations in check, for example—not only does more than the traditional picture shows, but actually should do more. It must be more responsive to collective values of social justice and to the constitution's prescriptions. Private law can no longer be mostly protective, assuming that justice will be brought about through the spontaneous actions of individuals or public law. Justice on a social scale is something that must be more actively sought.

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[70] Samuel Scheffler, 'Morality and Reasonable Partiality', in *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2012) 41, 69–72.

[71] Dan Priel, 'Private Law: Commutative or Distributive?' (2014) 77 *Modern Law Review* 308, 315–318.

[72] Simmonds, 'Private Law, the Market, and the State' (n 46).

1.4. Horizontal Dimensions

The consolidation of private law and public law was shaped by socio-economic factors and moral sensibilities. This can explain the seesaw swing trend—the decline of the public and rise of the private in early modernity and the opposite movement in the post-war period. This section focuses on one aspect of the rise of the public: the growing recognition of the horizontal dimensions of constitutional rights. However, I will claim throughout this thesis that this trend also reflects the resilience of the private in law: the power a more conservative moral paradigm exerts over legal imagination and reasoning, that prevents this constitutional phenomenon from taking its most ambitious and progressive forms.

Against some intuitions and common narratives surrounding this trend, it starts with the *de*constitutionalization of private law: with it losing the foundational role it had during early modernity and the *laissez-faire* era to the constitution (broadly construed).[73] Constitutional norms (also, for my purposes, of judicial origin) came to be seen as fundamental legal building-blocks and as 'higher' law. Importantly, they came to address questions about how individuals should be treated as a matter of rights and entail ambitious prescriptions obligating the political collective to bring about states of affairs in which interests and needs, enshrined in rights, are respected, protected, and promoted. It is in this sense that modern constitutions reflect the progressive paradigm described in the previous section.

This more ambitious conception of the constitution and the changing moral sensibilities in the post-war period induced the tentacular expansion of the constitution and law into what was seen as the private sphere. For example, one of the ways in which Germany sought to recreate its legal system after its corruption during the Nazi period was to place the right

[73] Merryman (n 57) 17.

to human dignity at the foundation of its legal order: a position from which, it exerted influence over the evolution of all areas of law, including private law.

With time, the conception of rights as foundational and exerting force over the regulation of horizontal relations spread to other legal systems. In Europe, it was in large part due to its adoption by the European Court of Human Rights; and in other areas of the world—Colombia, Israel, and South Africa, for example—it was a result of the migration of moral and constitutional ideas. The case of South Africa became famous because of the attempt (similar in ways to that of Germany) to break away from a past of injustice (here, the Apartheid regime), because the Constitution (1996) amended what was seen as a deficiency in an Interim Constitution (1993)—of giving insufficient weight to constitutional rights in the regulation of horizontal relations—and because of the special model that was adopted.

Even in legal systems in which the constitution's influence over the regulation of horizontal relations is more limited—such as the United States, the United Kingdom, and Canada, still very much loyal to their common law history—law expended into what was seen as the private sphere. For example, the American civil rights revolution—seen by some theorists, like Bruce Ackerman, as a constitutional moment, despite resulting only in statutory acts—extended equality-protecting and promoting norms to social domains like voting, employment, housing, and education.[74] A trend towards anti-discrimination is evident in the United Kingdom and Canada as well—as are other examples for the influence of constitutional rights over the regulation of horizontal relations between private actors.

Following Ackerman, I embrace a broad definition of 'the constitution' for the purpose of talking about constitutional rights-based horizontality: my claims could apply, with relatively minor modifications, to rights listed in legislative bills of rights,[75] to international

[74] Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Belknap Press, 2018).
[75] Such as the New Zealand Bill of Rights Act 1990.

human rights incorporated into national legal systems,[76] and perhaps even to basic common law rights.[77] All these normative sources could contain rights grounded in commitments of the political collective to guarantee the basic interests and needs of those towards whom it is responsible (I focus, throughout the thesis, on citizens; but residents, immigrants, foreigners, or enemy combatants, for example, can have constitutional rights against the state).

Definitions of constitutional rights-based horizontality will be responsive to our goals in approaching this legal phenomenon and its aspects on which we focus—and indeed, many definitions surface in cases and the literature in attempts to describe the form that this normative bridge between the constitution and private law takes or should take.[78] Some distinctions are pragmatic in nature; others are affected by considerations relating to the peculiarities of particular legal procedures or court structures. I will largely ignore such considerations and focus on ideas of a more theoretical and general nature.

A first distinction is drawn between 'vertical' and 'horizontal' application of constitutional norms. It regards the agent burdened with constitutional duties—in our case, rights-based duties: vertical application refers to constitutional norms generating duties for state agents; and horizontal application to norms generating duties for private agents (norms can generate duties in both ways, of course). From this point things become more complicated: roads diverge, and different models of constitutional rights-based horizontality emerge.

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[76] Such as the United Kingdom's Human Rights Act 1998.

[77] See, for example: T.R.S. Allan, 'In Defense of the Common Law Constitution: Unwritten rights as Fundamental Law' (2009) 22 *Canadian Journal of Law and Jurisprudence* 187.

[78] See, for example: Aharon Barak, 'Constitutional Human Rights and Private Law', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 13; Alison L. Young, 'Mapping Horizontal Effect', in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 16; Jud Mathews, *Extending Rights' Reach* (Oxford University Press, 2018).

Progressive Models

Direct or full application refers to cases in which the constitution directly burdens a public or private agent with constitutional duties; indirect application refers to a situation in which a public agent's constitutional right-based duties obligate him to change the sub-constitutional law applying between private agents: for example, a judge, declaring a contract preventing the sale of a house to minority members as unconscionable; or a legislative amendment to anti-discrimination laws, so they cover more cases of housing discrimination.

Armed with these distinctions, we can talk about a model of direct horizontality, that is often associated with South Africa and Ireland: in these legal systems private actors could have a right of action against private actors infringing their constitutional rights.[79] Common talk of horizontal 'effect' is misleading here: it is not that constitutional rights have implications in horizontal legal relations, but that they themselves apply in them, directly. Under a direct application model, to go back to an example presented above, same-sex couples have not only concrete anti-discrimination rights but also a general equality right applying against private service providers; while service providers—like hotel managers or bakery owners—will, in turn, have a general right to express their religion against these couples.

As we see, constitutional rights can be located on both sides to a dispute. When these rights are not absolute and deontological (like the right against slavery recognized in the 13th Amendment to the Constitution of the United States) their conflicts must be resolved through balancing or adjusting. But even when rights are located only on one side of the dispute, many modern constitutions allow the limitation of the rights listed in them to respect, protect, or promote interests and needs not enshrined in such rights. The special thing about fully

[79] Their models differ, which is less significant for my purposes—see: Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 *International Journal of Constitutional Law* 61.

horizontal models is that the kind of constitutional deliberation and reasoning that are typical for cases involving the state will appear in disputes between private parties. This does not mean, of course, that the right to equality will not entail more burdensome state duties compared to the duties of private service providers, for example: after all, private service providers, unlike the state, are constitutional right-holders. However, in terms of the reasoning process—of how judges, for example, bring the constitution to bear on the duties of private agents—there is no qualitative difference between them and the state.

As will be seen in the fourth and fifth chapters, direct application comes in degrees. However, the important thing at this point is that it embodies a progressive vision of the constitution, as a tool that dictates the terms of interaction between private parties, and not just how state agents should conduct themselves. This model leads quite naturally to the growing involvement of the political collective in what are traditionally seen as private relations: many aspects of the regulation of these relations are seen as constitutional matters. In a sense, as was noted above, this model disposes of the distinction between public and private agents with regard to the presumptive duties entailed by constitutional rights.

However, this model was rejected by most legal systems; and even when it was adopted, it was in a more restrained manner: usually, by accepting the qualitative differences between public and private agents.[80] While this leaves private agents and relations exposed to other more indirect effects, we see here doubts about full and direct horizontality. They reflect considerations of autonomy, personal responsibility, moral agency, and the relational and often small-scale values that underlie many of our private law relations.

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[80] See, for example: Dawn Oliver and Jörg Fedtke, 'Comparative Analysis', in Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007) 467, 479–484; Michael Dafel, 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 *South African Journal on Human Rights* 56.

Centripetalism

These considerations pushing against full horizontality are fundamental to the opposite moral paradigm, that sees the constitution mostly as a limitation on state action rather than a repository of values that shapes our more direct social interactions. This moral paradigm entails an opposite model: under it, it is not just that constitutional rights do not bind private agents, but that their effects are aimed to minimize harms caused by the state. Thus, horizontality exists to the extent that the state intervenes in horizontal relations. Such models are often associated with the American Constitution: most rights listed in it prevent the government from being intimately or directly involved in right-limiting conduct, but do not obligate it to protect rights from third parties or to promote them in general.

Much criticism against this model claims that it is incoherent, as both state action and inaction have implications for the interests and needs enshrined in constitutional rights. However, it must be noted that distinctions like the ones between acts and omissions, intending and foreseeing, or doing and allowing, are common in moral theory. While their application to the state could raise problems compared to their application to individuals, as a starting point it gives us the tools to define a model of purely vertical application.

This model is deontological in the sense that it focuses on acts: while it does not deny that all state actions and inactions have indirect implications, in most cases it requires state agents to focus only on the direct results of their actions. It applies more smoothly to some rights—for example, to a fair trial or to life—that we might want the state to respect even if it leads to an overall harm to the interests they enshrine (for example, it will result in more unfair trials or deaths). However, it can apply to all rights: the right to equality, for example, could only entail that the state should treat or avoid treating us in certain ways, rather than making sure that we are treated in certain ways in general, by private agents as well.

This model entails a rigid separation of public and private: constitutional rights are relevant only when and to the extent that the state is involved in our affairs. In some of its forms, it entails that the constitution and private law just tend to different moral problems that do not overlap: each legal domain has its separate jurisdiction. The important thing for now is that it isolates private law from many social justice considerations.

The model of pure verticality was also rejected by most modern liberal legal systems; and even in the United States it takes a more nuanced form. Here we face an opposite problem than the one the model of full horizontality faced: not moral residues of the private but of the public. The modern conception of the constitution seems to sit uneasily with the claim that it is largely silent in relation to the regulation of horizontal relations. Even if we do not hold private agents constitutionally accountable, we are still required, as a political collective, to respect, protect, and promote their basic interests and needs in all social spheres.

One of my central claims will be that while we see divergence across legal systems, and while there is no single universally justified model of constitutional rights-based horizontality, there is a sense in which the idea itself, when combined with modest liberal commitments we find in Anglo-American legal systems, entails a pull away from the two types of models described above and towards more intermediate and nuanced models. The claim is not that this trend of convergence is an emerging empirical reality (though it seems to be);[81] it is that these extreme models seat uneasily with liberal moral commitments.

Distinctions between public and private are important with regard to questions about who constitutional rights burden as duty-bearers, but less so when it comes to their substantive prescriptions: state agents must therefore make sure that they are adequately respected, protected, and promoted in all social activities, relations, and interactions. These nuanced

[81] Oliver and Fedtke (n 80) 517–519.

shades of the relations between public and private are better captured by focusing attention on 'effects' and the kind of reasons for action entailed by constitutional rights.

This is the stuff, I will claim, that models of 'indirect horizontal effect' are made of. In a nutshell, they hold that constitutional rights obligate only state agents, but the reasons for action they entail, and their resulting duties, require state agents to perform certain actions when regulating horizontal relations.[82] This model emerged in the German legal system, but versions of it were adopted by the European Court of Human Rights, the European Court of Justice, and in liberal democracies like Canada, the United Kingdom, and Israel.

Private law, like any other area of law, must live up to certain constitutional standards—many of which relate to right-norms and the states of affairs they require the state to realize or prevent. However, indirect models take seriously the values endemic to private law: they do not see it as constitutional law applied to horizontal relations. They work with a more nuanced conception of the relations between public and private in law.

The three types of models presented here are idealized: even after going into further details in the next chapters they will remain somewhat abstract, and often slightly fade into each other. For example, indirect effect models can be stronger (and closer to direct application) or weaker (and closer to pure verticality). However, the important point at this stage is to understand the different positions they represent with regard to the historical trends presented in the third section, and the ways they use right-norms to shape the regulation of horizontal relations. These positions, I will now claim, manifest more abstract moral paradigms: opposing conceptions of public and private in morality, politics, and law.

[82] See also: Mathews (n 78) 4.

1.5. Two Moral Paradigms

By now, it should be clear that I approach the topic of constitutional rights-based horizontality both as part of a historical process and as a structural feature of modern legal systems that aspire to justification, coherence, and integrity: an attempt to bridge our commitments as a political collective and our personal obligations to one another. In this sense, it demonstrates the tensions between public and private in law. Debates about these concepts and their tensions are not technical or conceptual, but often ideologically charged. As John Merryman noted, if one has progressive tendencies, he might hold with Lenin that 'all law is public law'; but if one is more conservative, he might, with Austin, 'reduce public law to a part of the law of persons'.[83] More generally, if one has progressive tendencies, he might, with Bentham, subordinate personal life to public morality; but if one has conservative tendencies, he might, with Nozick, see political morality as interpersonal morality writ large.

That distinctions between public and private are contested and had and have complex moral implications, does not mean that we should forgo our attempts to draw them. While rigid public–private distinctions are descriptively inaccurate and morally problematic, a variety of flexible and context-dependent distinctions could be helpful.[84] In this vein, it could be claimed that constitutional rights-based horizontality can exhibit more or less 'publicness' or 'privateness' in different senses and from different perspectives.[85] The idea—to which I return in later chapters—is that the private can be distinct from the public in morally, politically, and legally meaningful ways without being entirely isolated from it.

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[83] Merryman (n 57) 13.

[84] Stanley I. Benn and Gerald F. Gaus, 'The Liberal Conception of the Public and the Private', in S.I. Benn and G.F. Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983) 31; William Lucy and Alexander Williams, 'Public and Private: Neither Deep not Meaningful?', in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 45.

[85] Lucy, 'What's Private About Private Law?' (n 51); Barker, 'Private Law: Key Encounters' (n 65) 20–21.

Thus, we can transcend 'the orthodoxy entrenched by the Victorians', that conceals 'the extent to which the distinction between public and private law depends on substantive issues of political theory',[86] and see the categories of public in private as manifesting 'conflicting paradigms or ideal types, representing internally coherent and externally conflicting logical trends or "moments" […]'.[87] This is important. My understanding of the phenomenon of constitutional rights-based horizontality is framed by the idea that it manifests a collision between two more abstract and general moral paradigms: ideal-typical visions of law and the state, grounded in different ways of approaching moral deliberation and reasoning.[88]

An understanding of this phenomenon that divorces it from its broader normative context will be partial and impoverished: quite like trying to understand the Himalayas, Andes, or Alps without taking tectonic pressures into account. In this section, I try to delineate these two conflicting paradigms and show why and how they should frame our understanding of the phenomenon of constitutional rights-based horizontality. Later down the road, these paradigms will serve as stabilizing Archimedean points, helping us find our way around the categories of public and private in the context of legal reasoning.

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[86] Simmonds, 'Private Law, the Market, and the State' (n 46) 131. See also: Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd edn, Oxford University Press, 2013) 5–6, 15–30; Hanoch Dagan, 'The Limited Autonomy of Private Law', in *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013) 104.

[87] Tay and Kamenka (n 58) 83. See also: Lucy, 'What's Private About Private Law?' (n 51) 58.

[88] See: Kennedy (n 59) 364–368; Martin Loughlin, *Public Law and Political Theory* (Oxford University Press, 1992) 59–61; Jürgen Habermas, 'Paradigms of Law' (1996) 17 *Cardozo Law Review* 771; Hugh Collins, *Employment Law* (2nd edn, Oxford University Press, 2010) 14–20; Thomas W. Merrill, 'Private and Public Law', in Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, and Henry E. Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press, 2020) 575.

The Divided Moral Person

We can start feeling the pull of these paradigms with an example. Following a purse robbery by a poor person, a young purse owner with a heart condition suffers a heart failure and undergoes emergency surgery. Focusing on the victim and his direct interaction with the robber, it seems that the latter should pay the medical costs; but focusing on the robber and his socio-economic condition, it might feel harsh for the political collective to burden him with such devastating costs. Cases like this are often debated in tort law classes, as they demonstrate the clashes and tensions between competing moral paradigms.

What we see in this example, I will now claim, are two moral paradigms the clashes of which can be seen in every corner of the law. It makes no sense to ignore one paradigm's prescriptions as cold-hearted or cruel or the other's as emotional or egoistic: both are deeply embedded in our moral life and thought; each picks up some of the world's moral luggage, to borrow Bernard Williams's phrase.[89] Both are important to understand the phenomenon of constitutional rights-based horizontality, one of the main points of which—I will claim throughout this thesis—is to structure, contain, and alleviate their conflicts.

Nagel said that the recognition of rights is 'a moral and social practice' that 'answers to a need deeply rooted in human nature'.[90] But human nature pulls in different directions when thinking about morality in general and rights in particular: an idea reflected not just in moral theories,[91] but also in neighbouring domains.[92] Psychological research suggests that when we ascribe responsibilities to persons we tend to focus on their active side—to consider

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89 Bernard Williams, 'A Critique of Utilitarianism', in *Utilitarianism: For and Against* (Cambridge University Press, 1973) 77, 137.

90 Thomas Nagel, *Equality and Partiality* (Oxford University Press, 1991) 140.

91 See, for example: R. M. Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford University Press, 1981); Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986).

92 See, for example: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982); Daniel Kahneman, *Thinking Fast and Slow* (Penguin Books, 2011).

them mostly as agents that leave an impact on the world; and when we ascribe rights to them, we tend to focus on their passive side—as patients who could be benefited or harmed in various ways.[93] To go back to the example above, when ascribing responsibility for the harm suffered by the owner we focus on the robber as an agent, but when thinking about rights the dire situation society allowed the robber to be placed in surfaces.

Among the ways of describing this division, the one that best captures what I have in mind is between agency and well-being.[94] One perspective focuses on how the exercise of our agency—intentions, attitudes, and actions—affects others; the other, on how our well-being—interests and needs—are served or harmed by others.[95] These perspectives, to borrow John Rawls's words, are 'the outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human life'.[96]

In the third section I distinguished between the restrained and the ambitious state. Here I add that the former is largely a manifestation of a conservative moral paradigm that dominated early modernity, while the latter is a manifestation of a progressive moral paradigm that ascended in the post-war period. I also add that the conservative paradigm focuses on agency and responsibility, while the progressive paradigm focuses on interests and needs. These conflicting perspectives, as I suggested, can help us expose the normative environment in which constitutional rights-based horizontality materializes.

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93 Kurt Gray and Chelsea Schein, 'Two Minds Vs. Two Philosophies' (2012) 3 *Review of Philosophy and Psychology* 405. See also: F. M. Kamm, 'Moral Intuitions, Cognitive Psychology, and the Harming-versus-Not-Aiding Distinction' (1998) 108 *Ethics* 463.

94 Darwall, *The Second Person Standpoint* (n 24) 126–130; Amartya Sen, 'Well-Being, Agency and Freedom' (1985) 82 *Journal of Philosophy* 169; Martha C. Nussbaum, 'Flawed Foundations: The Philosophical Critique of (a Particular type of) Economics' (1997) 64 *University of Chicago Law Review* 1197, 1203–1206; David Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007) 5–7.

95 Thomas W. Pogge, 'The Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions' (1995) 12 *Social Philosophy and Policy* 241.

96 John Rawls, *A Theory of Justice* (rev edn, Harvard University Press, 1999) 9.

Horizontality in Context

The challenge of constitutional rights-based horizontality is that the legal norms regulating horizontal relations must live up to rights-based moral standards embraced by the political collective. In their pure form, the two paradigms have no place for this challenge, as they collapse the concepts of public and private into each other. Let us start with the conservative paradigm. Focused on personal agency and responsibility, it embraces the liberal status quo position of mutual freedom and separation: we have mostly negative duties not to harm one another and positive duties only when we assume them. It is suspicious towards grand regulatory schemes and state intervention in the market and in civil society, and thus public law has a modest and negative role, while it is private law that is seen as foundational. Since it sees constitutional rights mostly as shields against intrusive state action, it also sees them as applying mostly vertically: they do not have much to say about our horizontal relations. In a way, I will claim, it sees the kind of responsibility underlying the constitution as similar or even identical to the one underlying our right-based duties to one another.

The progressive paradigm, on the other hand, sees personal responsibility as shaped by collective goals, principles, and values. It focuses on our interests and needs as beneficiaries of others: be it state institutions, employers, hotel managers, or family members. It focuses not on actions falling within people's scope of responsibility, but on how the political collective and its members can arrange things so that the best states of affairs will be brought about. Private law is not foundational and does not delineate our status as agents—rather, it is just one more regulatory tool at the disposal of the collective. Legal disputes are opportunities to promote public policy or calibrate the system of constitutional rights. Direct application is a natural implication of these ideas: private actors should bear constitutional rights-based duties, unless collective and constitutional reasons count against it.

One of the main themes of this thesis, which will be developed mostly in the fourth and fifth chapters, is that both paradigms capture some important parts of the moral universe, and that the trend of constitutional rights-based horizontality reflects a delicate interplay between them—that is, it reflects the idea of moral pluralism: an acceptance that the normative universe contains inherently conflicting considerations that cannot be housed under a unified scheme. No paradigm is 'truer' or more 'correct' or 'justified' than the other, in our context. Rather, we must be sensitive to both—and expose the intricate web of normative connections underlying and connecting them—to adequately engage this constitutional idea.

Modern liberal legal systems aspire, as a matter of principle, to be as loyal as possible to the constitution's prescriptions about the states of affairs amounting to social justice; but also to preserving a private sphere of action, which requires a body of legal norms regulating interpersonal interactions in relative isolation from collective moral concerns. These competing aspirations necessitate mediation, rather than subordination or separation. But this task is difficult in light of the different nature of the constitution and private law: a difference rooted in the fact that they realize two opposite moral paradigms.

This brings out the difference between horizontality and the neighbouring concept of constitutionalization. While the former often results in the latter, the two are not the same. Talk of constitutionalizing private law or criminal law usually means reforming these areas of law in light of the constitution's demands. This reform process is, importantly, top-down. Horizontality, on the other hand, is a mediating normative principle that is located in between the constitution and private law. I will claim that it reflects a commitment to the idea of moral pluralism, and therefore sensitivity to the relational normativity that forms part of the private moral paradigm of regulation and underlies the legal practice of private law.

Constitutional rights-based horizontality developed, to a great extent, as a response to normative concerns and tensions that underlie all modern liberal legal systems. It is therefore not a coincidence that we find this constitutional phenomenon (explicitly or implicitly) in practically all such legal systems. My claim will be that the commitment to moral pluralism and to the integrity and robustness of the practices in which constitutional and private law rights are claimed, pull legal systems towards indirect models of horizontality that reject rigid public–private distinctions from the perspective of state agents creating, changing, or abolishing private law norms, but embrace such distinctions when considering the extent to which private agents should be burdened with rights-based duties.

The observable trend in modern constitutional practices is to absolve private agents from constitutional right-based duties, but to burden state agents with such duties to create more concrete sub-constitutional rights-based duties that contribute, over time and across horizontal interactions, to the realization of an adequate scheme of constitutional rights. The fourth chapter will deal mostly with the argument for why it is state rather than private agents that should bear these duties, and the fifth chapter will deal mostly with the shape that these complex constitutional rights-based duties could and should take.

The next task, though, before bringing this introductory chapter to a close, is to distil the conflict between the two paradigms—a conflict reflected in the consolidation of private and constitutional law and the trend towards constitutional rights-based horizontality—to the conflict between two ideal right-types: strictly relational private law rights and loosely relational constitutional rights. Going ahead, most of the thesis will deal with these normative structures, often leaving the underlying moral pressures latent and implicit.

1.6. Normative Structures

In this section, I zoom in on certain aspects of the right-norms that complicate the challenge of constitutional right-based horizontality; or more accurately, on the normative structure, or 'skeletal' features,[97] of two idealized right-types: strictly relational and agent-centered private law rights that reflect the conservative paradigm; and loosely relational and beneficiary-centered constitutional rights, that reflect the progressive paradigm.

Of course, I do not claim that all constitutional and private law rights have these normative structures: only that the central cases—chosen for the purpose of theorizing constitutional rights-based horizontality—have them. More accurately, my claim is that these legal domains exhibit certain tendencies, explained by their normative connections with the moral paradigms, to recognize rights that have a certain normative structure: their procedures and subject matters respond to different interrelations between agency and well-being.

Theoretical debates about the normative structure of private law norms are common: there seems to be an agreement that many rights and duties in it are relational, dyadic, correlative, or bipolar.[98] In constitutional theory, the topic is dealt with less directly, but it is addressed, in a way, in debates about other topics, such as the principle of proportionality, positive and socio-economic rights, or American exceptionalism. By engaging these legal domains as practices of rights-claiming, I offer accounts of these normative structures, explain why they are antithetical, and show how they shape constitutional horizontality.

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97 Bernard Williams, 'From Freedom to Liberty: The Construction of a Political Value' (2001) 30 *Philosophy & Public Affairs* 3, 4–5.

98 See, for example: Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107. I will go back to this theme in the second chapter.

The Grounds and Forms of Rights

In the second section, I described rights as relational normative connections between one person's agency and another person's well-being. Now I want to add that some rights, that focus on agency, are strictly relational; while other rights, that focus on well-being, are just loosely relational. There are two distinctions here: between the justificatory grounds which serve as the moral foundations of rights and the normative form that rights take. I refer to the combination of grounds and form as the normative structure of rights.

I start with grounds.[99] The general idea is that there are different paths leading from values to rights: in some, we are led by agent-centred considerations about the responsibility of the duty-bearers whose actions we consider constraining (positively or negatively); in others, we are led by beneficiary-centred considerations about the potential right-holders who stand to benefit from the imposition of the constraint.[100] The difference is not that one path goes from duties to rights while the other goes from rights to duties, but rather that there is an even more foundational level of values underlying rights and duties.[101]

Beneficiary-centeredness and agent-centeredness both come in varying degrees, but pure positions seem problematic. For example, I said that accounts of moral human rights that seem purely beneficiary-centered often assume humanity as a collective agent. On the other hand, there are doubts about the Kantian position that holds that we should avoid doing certain things to others purely out of respect for our own autonomy and the moral law.[102] Whether these positions are possible in morality is beside the point, as we are focusing on

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[99] In a way, I focus on what Weinrib referred to as the 'general conception of the justifications that underlie the norms': Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA Law Review* 621, 626.

[100] On the distinction between these justificatory paths, see: Matthew H. Kramer, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 2000) 7, 35–39.

[101] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 70–71.

[102] Nagel, 'War and Massacre' (n 31) 132–133. See also: A. John Simmons, *The Lockean Theory of Rights* (Princeton University Press, 1992) 37; F. M. Kamm, 'Conflicts of Rights' (2001) 7 *Legal Theory* 239, 243.

legal rights; and in this regard, as noted in the second section, some degree of relationality is needed: my right cannot be justified only by the need to preserve your moral integrity, nor only by the need to respect, protect, or promote certain interests or needs of mine.

However, I will claim that private law rights are dominantly agent-centred: while some beneficiary-centred considerations (such as bodily integrity, property, or privacy) play a role in their justification, agent-centred considerations constrain them. I add that a restrictive conception of personal responsibility functions as a gate-keeper in private law. It explains, for example, the reluctance to impose duties of beneficence or protection, even in cases of easy rescue, and why positive rights are recognized only when the duty-bearer assumed them by engaging in certain practices or activities. The right-claimant's burden of showing that the duty-bearer is responsible, duty-bound, and liable to him, reflects the default position in liberal interpersonal morality, of mutual freedom and separation.

On the other hand, I will claim in the third chapter that many constitutional rights are dominantly beneficiary-centred: while some agent-centred considerations (about the state's agency) play a role in their justification, beneficiary-centred considerations constrain them. I claim that a prescriptive conception of collective responsibility allows us to focus on what the state can do for beneficiaries of its actions. This explains, for example, why many constitutions and human rights documents merely state that 'everyone' should enjoy certain goods or that 'no one' should suffer certain harms, while leaving it to state agents to unpack these vague prescriptions and bring the states of affairs they mandate about. The practice of rights-claiming against the state reflects egalitarian notions of social justice, rather than the default interpersonal position of freedom and separation: we claim them not as dissociated individuals but rather as members of the political collective.

Following these different interplays of agency and well-being, rights in these legal domains have different forms: their 'vectors' or 'compasses', point in different directions.[103] When it comes to private law rights, the values underlying them already point in a certain direction: they are agent-relative and patient-relative, in the sense that they provide reasons to particular agents to treat particular patients in certain ways. These rights are strictly relational (a term I borrow, with some alterations, from John Gardner),[104] as a result from the fact that the right-claim must be attached to the duty-bearer's responsibility: it will be either a negative right not to harm the right-holder (for example, by punching or defaming him) or more demanding and positive rights when the duty-bearer assumed extended responsibilities towards him (either by doing something, like making a promise or engaging in a risky activity, or by standing in a certain relationship with him, as with parents and children).

Many constitutional rights, on the other hand, are merely loosely relational: they are relational in the sense that they tie agents and beneficiaries together—the typical case is the state and its citizens—but they refer to states of affairs that should be attained without fully determining who should be burdened with duties to bring them about. For example, the right to privacy will burden police officers with duties, but perhaps, indirectly, also private internet service providers. Since the kinds of agency and responsibility they are grounded in are often prescriptive and collective, the focus can stay on the beneficiaries: the allocation of concrete duties is determined according to what best serves their interests and needs; and thus, in the spirit of the Interest Theory, this allocation is often flexible and dynamic.

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[103] For distinctions in this spirit, see: Waldron, *The Right to Private Property* (n 101) 107; Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 *Yale Law Journal* 1233, 1248–1250; Pavlos Eleftheriadis, *Legal Rights* (Oxford University press, 2008) 136.

[104] John Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018) 23, 50. See also: Ernest J. Weinrib, 'Non-Relational Relationships: A Note on Coleman's New Theory' (1992) 77 *Iowa Law Review* 445; John Oberdiek, 'It's Something Personal: On the Relationality of Duty and Civil Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 301, 319–320.

I will show in the second and third chapters how agent-centeredness is coupled with strict relationality and beneficiary-centeredness with loose relationality. These pairings reflect not only the distinction between the Will and the Interest theories, but also the distinction between deontology and consequentialism.[105] While this latter distinction is also contested and multifaceted,[106] it is useful. Some rights-based reasons and duties are more personal and concrete while others more collective and general.[107] Deontology seems to be more agent-centered—as is implied by the fact that *deon* means 'duty' in Greek; while consequentialism, as a form of results-oriented teleology ('telos' meaning 'goal' or 'purpose'), shifts the focus from our active side as agents to our passive side as beneficiaries.

It is a central a theme underlying this thesis that a conservative paradigm—tied more strongly to deontology, agent-centeredness, and strict relationality—and a progressive paradigm—tied more strongly to consequentialism, beneficiary-centeredness, and loose relationality—frame the recognition of constitutional and private law rights, and as a result the trend of constitutional rights-based horizontality. This legal phenomenon cannot be theorized without uncovering these latent normative connections, which I merely alluded to here.

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[105] Stephen Darwall, 'Agent-Centered Restrictions from the Inside Out' (1986) 50 *Philosophical Studies* 291.

[106] Jonathan Quong, 'Consequentialism, Deontology, Contractualism, and Equality', in Serena Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Oxford University Press, 2018) 306, 308–312.

[107] Eric Mack, 'Agent-Relativity of Value, Deontic Restraints, and Self-Ownership', in R. G. Frey and Christopher W. Morris (eds), *Value, Welfare, and Morality* (Cambridge University Press, 1993) 209, 214; Mark Schroeder, 'Teleology, Agent-Relative Value, and 'Good'' (2007) 117 *Ethics* 265, 275–278.

Methodological Notes and Caveats

This thesis tries to offer a theory of the horizontal dimensions of constitutional rights. Many aspects of this topic have been dealt with in political debates, judicial decisions, and academic work. However, philosophical engagement with it is sparse: most theoretical work focuses on the shape constitutional rights-based horizontality takes or should take in particular legal systems, and therefore engages normative features endemic to them rather than more general considerations about the nature of rights, the constitution, private law, collective and personal responsibility, moral pluralism, and the interrelations between them and other normative factors. While this thesis focuses on Anglo-American legal systems, and the particular shape this constitutional phenomenon takes in them, many aspects of the theory on offer are independent from these legal systems and are therefore relevant for others as well.

Now, I am not trying to capture the 'essence' or 'nature' of constitutional or private law in these legal systems.[108] I am only focusing on some of the right-norms recognized in them. When talking about them, I am not engaging in the kind of conceptual analysis that focuses on common linguistic usage.[109] I am interested in the general forms of justification used by participants in practices of rights-claiming; but the reason is that they manifest the normative paradigms I presented above—not that they are common or well-accepted.

This theory is not entirely foreign to current practice: I focus on right-types that I see as central to them and are treated as such by practitioners and theorists,[110] and I try to participate in the ongoing normative dialogue through which they evolve.[111] However, since my

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[108] Gerald F. Gaus, *Political Concepts and Political Theories* (Westview Press, 2000) 32.
[109] Jules Coleman, *The Practice of Principle: In Defence of a Pragmatic Approach to Legal Theory* (Oxford University Press, 2001) 3–9; Stephen A. Smith, 'Taking Law Seriously' (2000) 50 *University of Toronto Law Journal* 241, 247.
[110] William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007) 21–22, 51–52.
[111] Ronald Dworkin, 'What is Law?', in *Law's Empire* (Harvard University Press, 1986) 1, 13–15.

explanation is normative, it is located in the philosophical—rather than social scientific, historical, or doctrinal—domain.[112] To borrow Dworkin's famous terms, while it must fit current legal practices (it cannot be a figment of my imagination) I have some leeway to reconstruct the legal materials to present them as clear, coherent, and justified.[113]

Normative explanations cannot stray too far from our moral ideals. In this sense, it is impossible to provide a normative explanation for some practices, like slavery or genocide. This is obviously not the case with constitutional rights-based horizontality: while our current legal systems (to which my account tries to stay loyal to some extent) are far from ideal, we have enough good things going on in them that can serve as the foundations for an account of constitutional right-based horizontality which will be morally appealing.

My argument takes agent-centered and strictly relational private law rights and beneficiary-centered and loosely relational constitutional rights as its two 'constants' and then goes on to see which understanding of constitutional rights-based horizontality can best preserve their morally-appealing endemic features. That is, I take two ideal right-types as the starting points for my argument and then let their interrelations take their course. As ideal-types, these starting points are purposefully accentuated abstractions arranged into unified and antithetical constructs: some of their features are exaggerated in an attempt to uncover less visible structures, trends, and forces. The idea is that they help us understand the world even if they do not exist in their pure form and perhaps even if they could not. This is the case, for example, with 'secularism' or 'democracy': they form important parts of our understanding of the world even if there are no perfectly secular or democratic societies.

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[112] Isaiah Berlin, 'Does Political Theory Still Exist?', in *Concepts and Categories* (Henry Hardy ed, 2nd edn, Princeton University Press, 2014) 187.

[113] Ronald Dworkin, 'Integrity in Law', in *Law's Empire* (Harvard University Press, 1986) 225. see also: Stephen A. Smith, *Contract Theory* (Oxford University Press, 2004) 4–13.

In this sense, the relations between the constitution and private law are not only about the relations between these right-types; but my reconstruction will strip them of many of their features which are more distant from the central cases of rights we find in them. This does not mean that other accounts of this normative phenomenon cannot or should not focus on its other aspects—on the contrary, since my account is aware of its limitations and partial focus, it more than invites explanations exploring these other aspects.

Most importantly, my account offers only a partial justification of this trend—that focuses on the values inherent in the practices of constitutional and private right-claiming, contesting, and adjudicating; and their reflection of the deeper roles the two paradigms play in our legal systems. My ideas draw on theories of social and interpersonal justice and the importance they ascribe to rights-based practices. While I will try to connect legal practices to underlying moral practices, the justification of these moral practices goes beyond the scope of this thesis: it falls in mainstream political and moral theory.

On the other hand, I also leave much work to be done 'downstream': I will not say how particular doctrinal problems involving constitutional horizontality should be solved. My goal is to create the theoretical foundations for such claims. For example, it should allow regulators, judges, and lawyers to engage problems related to online or workplace privacy or to the replacement of tort law by an insurance scheme: I can only shed light on some central but abstract normative aspects of these issues. What I do hope to do, is to strengthen some normative connections—not only between public and private law and between political and interpersonal morality, but also between these areas of law and these areas of morality. This is the intermediate level of abstraction this thesis operates in. As we proceed, many of these methodological assumptions and caveats will become clearer (or so I hope).

1.7. The Road Ahead

Like many good stories, this project has a classic dramatic structure. Following this exposition, the rising action unfolds in the next two chapters in which we meet our protagonists and get to know their background stories. I dig in more thoroughly into the normative structures of the two ideal right-types and their connections to the underlying moral paradigms. In the fourth chapter, we get to what might be called (because the bar is low) the dramatic climax: to the conflict between the protagonists. While the first chapters are largely interpretative and morally restrained, the fourth chapter is more ambitious in the sense that it touches the importance of the right-types in modern liberal legal systems, and the ability of different models of constitutional right-based horizontality to accommodate them.

After a kind of Goldilocks exercise that builds on Rawls's attempts to find a middle-ground for his theory of justice between Libertarianism and Utilitarianism, I claim that the scope of loosely relational constitutional rights should normally exclude claims against private agents, but that claims against state agents could be about private actions or activities. This leads to the fifth chapter, and the falling action: we explore the implications of this indirect effect model for the realization of loosely relational constitutional rights through private law. Again, a Goldilocks exercise is necessary: now, between a unionist model, that asks state agents to bring about the best constitutional states of affairs by consequentializing relational norms, and a separationist model that either subordinates the private and relational in law to the public and consequentialist or, alternatively, isolates the former from the latter. My claim is that middle ground can be found only if we accept the truth of moral pluralism: conflicts between the paradigms cannot be ironed-out nor ignored—they must be engaged in a well-structured process that accepts the imperfections of the normative universe.

The sixth chapter forms the denouement. The proposed model is applied to some parts of private law deviating from its neat and idealized normative core: to the complex reality of modern private law, that includes corporations, insurance, and a variety of activities regulated in domains like consumer law, labour law, and family law. I further explore the two paths winding from consequentialist right-based prescriptions to private law: translation—finding aspects of our collective responsibility that can be attached to private agents' personal responsibility; and allocation—burdening private agents performing public roles with tasks discharging our collective responsibility. I try to show that private law is much more fragmented than its theory and practice often present it to be—and that there are many cracks through which the prescriptions entailed by loosely relational constitutional rights could enter. However, I claim that private law can still retain its integrity as an ideal-typical form of regulation, that complements, pushes back against, and gives shape to the horizontal regulatory prescriptions entailed by loosely relational constitutional rights.

In the seventh and final chapter I take stock, and touch some general themes that I mentioned throughout the thesis. I try to locate constitutional rights-based horizontality in the bigger story of the tension between public and private in law and politics. My main conclusion, again, is that moral pluralism requires us to work harder, but it leaves room for optimism about law's ability to benefit from the stress test created by the regulatory prescriptions entailed by loosely relational constitutional rights. I claim that the way to achieve moral and legal progress is not categorical and conceptual rigidity but context-sensitivity and incrementalism. In this sense, constitutional horizontality is not asking private law to do something it has not done before; but it might give it a long overdue progressive push, that will help it find its place in the modern liberal legal system.

Chapter 2
Private Law Rights

2.1. Introduction

Private law contains many types of norms and many types of right-norms; but one right-type, that is both prominent in mainstream private law theories and poses the most complex challenges for constitutional horizontality, is my theoretical starting point: the idealized central case that forms the backdrop for the discussion to follow. Agent-centered and strictly relational rights, that I locate in this chapter in private law's core, are not just grounded in competing values, but embody a different way of engaging in moral and legal reasoning.

This chapter explains how such rights can isolate horizontal relations from values 'external' to them, including those entailed by constitutional rights. The general idea is that private law's core supervenes on moral practices of interpersonal rights-claiming, which are themselves fundamental parts of what I called the conservative moral paradigm. The moral infrastructure of this core, as a result, is dominantly deontological.

This does not mean that 'progressive', 'political', or 'public' private law theories or doctrines are wrong or out of place—and definitely not uncommon. While certain contingent but basic procedural features of private law push back against them, I leave room for questions about their place in private law to the next chapters. To answer them, we must first understand the nature and strength of the resistance shown by some parts of private law, that manifest to a great extent underlying interpersonal practices of right-claiming, to such external perspectives. These parts are, in a way, the most private parts of private law; and we must understand them to figure out how public rights and values could come to shape it.

This brings me, in a way, to unpack Ernest Weinrib's claim that private law is 'an elaborate exploration of what one person can demand from another as of right'.[1] However, instead of appealing, like Weinrib, to Kantian moral theory, I appeal to the claimability and relationality of rights. The relational normativity of private law rights can explain why we are called to account for our alleged private law wrongs only by those we allegedly wronged; why the right-claimant's success in receiving a remedy hinges on him proving that another agent is responsible, duty-bound, and liable to him; and most importantly, why there are implicit justificatory limitations on the potential content of private law rights.

My claim is that some interests and needs, in their abstract and beneficiary-centered form, struggle to ground private law rights: they are not connected well enough to a 'choice-sensitive' and 'restrictive' conception of responsibility, central in interpersonal rights-based practices like private law. It is true that state agents—representing the political collective—are heavily involved in the practice of private law. However, since they create and change norms that will be claimed and contested as rights by private agents, it is more difficult for them to resist the normative forces giving private law rights a strictly relational normative structure—though, I will claim in later chapters, sometimes they must do so.

The fact that at the end of the private law production line stand private right-holders waiting to claim their rights should inform our thinking about the public responsibilities and duties of state agents with regard to this legal practice. However, this chapter is still leaving state agents largely out of the picture: it focuses on the parties to private law relations and explains the strictly relational normative structure of their mutual rights and these rights' connections to the underlying interpersonal and conservative moral infrastructure.

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1 Ernest J. Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press, 2012) 230.

Zeroing-In

As stated in the previous chapter, my goal is not to capture the essence or nature of private law. However, if the norms I take to pose the big challenge with regard to constitutional rights-based horizontality were marginal in this system, this thesis would be much less interesting. Thus, it is important to stress that they are located in what much of the current orthodoxy in private law theory and practice see as its 'normative core': most notably, the rights of potential tort victims to be free from certain harms, the rights of promisees to have contractual promises made to them kept, and the rights of property owners to exclude others from their property.[2] This puts aside, for now, some parts of private law—especially ones related to corporate and commercial activities—that will be touched in later chapters.

I should be clear about the nature of my claims about private law's core in this chapter, that is geared towards a very particular purpose. First, I focus on rights rather than other normative incidents, like principles, rules, or imperfect duties, that might also form central parts of private law. Second, I focus on primary rather than secondary rights, dealing with how we should treat one another and cooperate. Again, secondary rights and duties might have important roles to play in private law (some of which will be touched later).

Third, I deal not only with the legal norms Hohfeld referred to as rights in the 'narrow sense', but also with powers: for example, not only the right not to have contractual promises made to us broken, but also the right to enter into contracts; or not just the right not to have our property used, but also the right to buy or sell it. Fourth, I am also talking about the basic level in which protected interests are defined in abstract terms. While I will claim that we do not have private law rights to property or privacy, for example, it is important to see that our

[2] On this distinction between the core and the margins, see: Thomas W. Merrill and Henry E. Smith, 'The Morality of Property' (2007) 48 *William and Mary Law Review* 1849.

private law rights do assume basic delineations of our interests, performed by property law when it comes to 'things',[3] and tort law when it comes to our bodies (whose borders are usually clearer, but when they are not, we tend to engage in property-like debates).

Thus, I embrace the following somewhat simplistic account of private law's core. At the basic level, we have a layer of norms defining our entitlements in our body and property. Then, there is a layer of negative rights applying universally and protecting our entitlements. This is most notably the business of tort law; but contract law, labour law, family law, fiduciary law, and the law of unjust enrichment also contain such norms. Finally, we have a layer of more complex and positive norms, normally arising out of special horizontal interactions or relations. This is most notably the business of contract law; but other areas of private law also determine how we enter or leave relations like marriage or work and their content.

My claim is that the ideal-typical private law 'core norm' is an agent-centered and strictly relational primary right, legally connecting two private parties. As will be seen in later chapters, the core's boundaries are vague and contested, but the important thing is that many of the norms theorists and practitioners see as central to Anglo-American private law have the normative structure I describe below. This does not mean that those norms that do not—that are located at private law's 'margins'—are less important. On the contrary, I will claim that accounts of constitutional rights-based horizontality must appreciate their role in the regulation of horizontal relations. However, this chapter's goal is mainly to see why some right-norms, located in private law's core, pose greater challenges when it comes to this constitutional phenomenon. Understanding why they pose these challenges will also help us see how the constitution can be brought to bear on other areas of private law.

[3] Henry E. Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691.

Normative Aspirations

I am not making the claim—at least not yet—that private law, or its areas I discuss, should dominate the regulation of horizontal relations. The charitable reconstruction I offer here—that takes private law's abstract self-conception as rights-based and private seriously—will be put to the test in later chapters and faced with the justificatory challenges created by the phenomenon of constitutional rights-based horizontality. My claim is that a coherent account of private law's core, that sees it as comprised of normatively robust rights, cannot ignore the ways in which its connections to the underlying morality of rights-claiming make it private in morally important ways and tie it to values like liberty, agency, and responsibility at the expense of values like social justice, need, and vulnerability.

So much for the aspect of justification. As to the aspect of fit, I try to remain somewhat proximate to the legal practice of private law as it currently is—at least roughly—by building on the theme, central to interpretative and philosophically-oriented theories of private law, that the normative structure of its norms is 'bipolar', 'correlative', 'bilateral', 'dyadic', 'directed' or any other neighbouring term. In some cases, this normative structure was grounded in broader moral theories (for example, Kantian or Hegelian);[4] in other cases, and this is closer to a central theme of this thesis, in moral practices of rights-claiming.[5]

The bipolarity theme has been explored in many theoretical works. I focus my efforts not on justifying it, but rather on unpacking some of its aspects that are relevant for thinking about constitutional rights-based horizontality. I want to show that this normative structure is relevant not only for litigation and the remedial aspects of private law—the topics usually

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4 Weinrib, *The Idea of Private Law* (n 1); Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd edn, Oxford University Press, 2013).

5 Benjamin C. Zipursky, 'Philosophy of Private Law', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 623.

drawing theoretical attention. While bipolarity sheds light on some procedural aspects of private law, it also touches the law-creating actions of state agents and the use and application of private law norms by private agents in their own affairs (for example, in forming contracts, marriages, or corporations, or deciding which risks they should take).[6]

The idea that private law consists of normatively robust right-norms rather than mere price tags,[7] that obligate private agents to one another, ties it to what might be called 'ordinary'[8] or 'moderate'[9] liberal interpersonal morality: a type of threshold deontology including various constraints and options. My claim is not that this morality is rights-based—it is just that private law supervenes on some of its rights-based parts. This connection is demonstrated most clearly, I will add, in the gate-keeping work done by a specific conception of responsibility in private law: it shapes not only the justifications for the imposition of liability in litigation but also the justifications for the creation and change of private law norms—in both cases, the status quo position of mutual freedom and separation is often embraced.

This chapter unfolds in the following order. In the second section I briefly describe a 'public' conception of private law which is grounded in the progressive paradigm. In the third section I try to explain how the progressive vision misses some basic aspects of private law, tied to its nature as a system of right-claiming and contesting and some of its basic procedural features. In the fourth section I describe the kind of responsibility that underlies interpersonal practices of right-claiming and contesting, like private law. In the fifth section I unpack its implications for the normative structure of private law core norms. Finally, in the sixth section, I reconnect this normative structure to the conservative moral paradigm.

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6 Jeremy Waldron, 'Clarity, Thoughtfulness, and the Rule of Law', in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, 2016) 317.

7 Stephen A. Smith, 'The Normativity of Private Law' (2011) 31 *Oxford Journal of Legal Studies* 215.

8 Shelly Kagan, *The Limits of Morality* (Oxford University Press, 1989) 2–4.

9 Samuel Scheffler, *Human Morality* (Oxford University Press, 1992) 100.

2.2. The Public Side of Private Law Rights

The theme of relationality in mainstream private law theory emerged, to a great extent, as a response to strands in the theory and practice of private law that approached it with a rather consequentialist state of mind; and played, for some, too fast and loose with its basic values and concepts—for example, rights, responsibility, or causation—that were seen as amenable to reinterpretation in light of the needs and goals of the political collective.

Now, private law has always served collective goals—it contributed, for example, to the consolidation of markets: it was shaped by both 'principle' and 'policy'.[10] This became more visible following the attack of Legal Realism on Formalism and Conservatism—that started with writers like Marx and Bentham: one of the few things they agreed on was that social—and especially legal—institutions must be 'demystified'; that is, we must resist the temptation of seeing them as 'natural' embodiments of a 'neutral' status-quo.[11]

After the Second World War, this awareness turned into more coherent theoretical claims. It was then that political and legal actors grew more comfortable with seeing private law as one part of the institutional apparatus of the regulatory state, that they can shape and reshape according to their goals and the social circumstances. These ideas are often associated with 'law and economics' or the 'economic analysis of law',[12] but beyond it, approaches more sensitive to the distributive implications and progressive potential of private law were adopted.[13] Thus, large-scale considerations were brought to bear on private law: the regulation of states of affairs like 'accidents',[14] was evaluated from the reformer's perspective.

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10 Stephen Waddams, 'Private Right and Public Interest', in *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2009).

11 H. L. A. Hart, 'The Demystification of Law', in *Essays on Bentham* (Oxford University Press, 1982) 21.

12 On this distinction, see: Guido Calabresi, 'Of Law and Economics and Economic Analysis of Law: The Role of the Lawyer', in *The Future of Law and Economics* (Yale University Press, 2016) 7.

13 William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007) 328, 335–337.

14 Guido Calabresi, *The Costs of Accidents* (Yale University Press, 1970).

These developments led, for example, to reforms in tort law.[15] Regimes of strict liability were established to deal with the costs of harms of defective products, which were dispersed among those enjoying them.[16] Causation requirements were relaxed—for example, the liability of corporations was determined according to their market share.[17] Some litigation-based regulatory schemes—dealing with harms resulting from workplace or car accidents, and in New Zealand, bodily injuries more generally—were replaced with private or public insurance schemes seeking to grant fast and fair compensation.[18]

Attempts were made not just to curb the regressive consequences of private law but also to tackle broader social injustices.[19] We can see this, for example, in family law, that recognized rights to make marriage and divorce related decisions, to form spousal relations, to parent, to enjoy shared property, and against different forms of abuse or neglect of children;[20] or, to go back to an example mentioned above, anti-discrimination laws were adopted as a tool designed to promote various forms of equality on a social scale.

What we see here, it was claimed, is a shift from corrective and interpersonal to collective and social justice.[21] This vision of private law is dominantly consequentialist: it seeks to use it to bring about desirable states of affairs. This is seen rather easily in the cost-benefit calculations of economic theories and doctrines,[22] but distributive justice considerations have a similar moral infrastructure. Both manifest the progressive moral paradigm.

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15 Gregory C. Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72 *Fordham Law Review* 1857.

16 George L. Priest, 'The Invention of Enterprise Liability' (1985) 14 *Journal of Legal Studies* 461.

17 Richard Delgado, 'Beyond Sindell' (1982) 70 *California Law Review* 881.

18 Geoffrey Palmer, 'Accident Compensation in New Zealand: Looking Back and Looking Forward' (2008) *New Zealand Law Review* 81.

19 Tsachi Keren-Paz, *Tort, Egalitarianism and Distributive Justice* (Ashgate Publishing, 2007).

20 John Eekelaar, 'Family Law and Legal Theory', in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Family Law* (Oxford University Press, 2018) 41, 47.

21 Robert L. Rabin, 'Some Thoughts on the Ideology of Enterprise Liability' (1996) 55 *Maryland Law Review* 1190, 1193.

22 See, for example: Richard A. Posner, 'Wealth Maximization and Tort Law: A Philosophical Inquiry', in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 99.

Beneficiary-Centeredness

The starting point is the focus on well-being at agency's expense. It reflects what Williams called 'negative responsibility': we are responsible not just for what we do or bring about directly but also for what we should do.[23] When thinking about the direct relations between individuals, we care not just about how they treated each other but also about the large-scale states of affairs that their conduct or its regulation could potentially bring about: for example, we force Seller to sign a contract with Buyer to alleviate social conditions of discrimination, thereby expanding their responsibilities beyond their direct relations.[24]

This means that if we decide to create something that resembles a bipolar litigation scheme, it will have to be for instrumental reasons: for example, by allowing tort victims to bring rights-claims against tortfeasors we create better deterrence.[25] We can say that when the right-claimant calls the duty-bearer to account he acts 'as a private prosecutor bringing an action not only on his own behalf but also as an "agent" of the state'.[26] It is often the case, for example, that when the state fails to protect people from harm, tort law 'serves as a watchdog'.[27] This private law feature goes back to nineteenth century rules about 'common carriers' endangering public health and safety.[28] But it seems even more relevant in our day and age, in which politically connected industries—for example, oil, tobacco, guns, pharma, or technology—are able to slip rather easily and repeatedly through the regulatory net.

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[23] Bernard Williams, 'A Critique of Utilitarianism', in *Utilitarianism: For and Against* (Cambridge University Press, 1973) 77, 93–96.

[24] Jules L. Coleman, 'The Structure of Tort Law' (1988) 97 *Yale Law Journal* 1233, 1241; Jules L. Coleman, 'Doing Away with Tort Law' (2008) 41 *Loyola of Los Angeles Law Review* 1149; John Oberdiek, 'Method and Morality in the New Private Law of Torts' (2012) 125 *Harvard Law Review Forum* 189, 201.

[25] Coleman, 'The Structure of Tort Law' (n 24) 1242–1243.

[26] Jules L. Coleman, *The Practice of Principle* (Oxford University Press, 2001) 19.

[27] Michael L. Rustad, 'Torts as Public Wrongs' (2011) 38 *Pepperdine Law Review* 433.

[28] Ibid 449.

Certain private law norms can therefore be seen as having a public or even constitutional role.[29] In this sense, right-claimants are not the only beneficiaries of their rights: they are parts of a larger group—be it the entire political collective segments of it (for example, the consumers of a certain product). More importantly, this also means that the account of responsibility at work here is slightly distant from ordinary or common morality. Calabresi's treatment of causation, for example, sees it in 'functional terms': if its requirements become too rigid and resistant to instrumental use, they should be disposed of.[30]

Such a consequence-oriented approach typifies not only economic theories. Gregory Keating's theory of tort law, for example, sees the moralistic language focusing on 'wrongfulness' as an artifact of the past: we would be better to allocate responsibilities in the ways that best protect us, vulnerable individuals, from certain types of interpersonal harms.[31] We find similar tendencies in Dagan and Dorfman's theory as well: they see private law as means of ensuring that we not only respect, but also protect and promote each other's autonomy and choice;[32] and this, in certain circumstances, can burden us with duties do or avoid doing things we are not—strictly speaking—responsible for: for example, to alleviate some consequences of other people's poverty.[33] Keating, Dagan, and Dorfman insist that we do not act in such cases as representatives of the political collective—and in this sense, separate their theories from economic theories; but it is important to see that in certain interpretations, their theories stretch our personal responsibility to bring socially desirable states of affairs.

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29 Ibid 470.

30 Guido Calabresi, 'Concerning Cause and the Law of Torts' (1975) 43 *University of Chicago Law Review* 69, 105–108.

31 Gregory C. Keating, 'Is Tort Law "Private"?', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 351, 353–358.

32 See, for example: Hanoch Dagan, 'Autonomy and Pluralism in Private Law', in Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, and Henry E. Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press, 2020) 177.

33 Hanoch Dagan and Avihay Dorfman, 'Poverty and Private Law: Beyond Distributive Justice' (SSRN, 2 January 2021).

Loose Relationality

The weakening of personal responsibility as a private law gatekeeper—that I embrace myself in later chapters, albeit in more nuanced terms—opens the door, we will see, for considerations about large-scale states of affairs to justify rights, duties, and liabilities: justifications at least partly external to the legal relations they address. For example, we might recognize a rule absolving potential tortfeasors from liability if it will be shown that it increases social equality or better protects future potential tort victims (from future tortfeasors).

The important normative connection here is not between the parties to private law relations but between each party and some beneficiary-centered values.[34] Our reasons to bring states of affairs in which these values are realized precede our horizontal relations: they are agent-neutral and patient-neutral. Private law relations are opportunities for private parties to act on their predetermined general reasons, that just become more concrete.

One of the implications—remember, I am not trying to make critical claims here—is that it is not just that private litigation could recognize loosely relational rights, that are shaped by considerations external to the parties' relations, but that its very existence becomes contingent. From a societal perspective certain harms are bound to result from certain activities; and focusing on discrete and isolated acts might be a less effective way of tending to them: we might choose to replace litigation with alternative regulatory arrangements, like public or private insurance schemes or administrative health and safety regulations.[35]

What interests me in this regard is not the claim that this way of approaching private law is foreign to current legal practices.[36] It is the 'minimal relationality' of private law rights

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[34] Mark Geistfeld, 'Economics, Moral Philosophy, and the Positive Analysis of Tort Law', in Gerald J. Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 250, 257–259.
[35] Keating, 'Is Tort Law "Private"?' (n 31) 361–371.
[36] Lucy, *Philosophy of Private Law* (n 13) 35–41.

and duties, to borrow Esper and Keating's term, describing the duty of care in negligence.[37] This opens the door for the recognition of abstract private law rights, to autonomy or equality, for example: like under direct application models, we could call other private agents to account for failing to respect, protect, or promote, some aspect of these complex rights.

While I claim in later chapters that in some cases a relaxation of strict relationality and reduction in the weight of agent-centered values are required, it is important to notice that it comes at a price: especially when talking about interpersonal rights, rather than rights against the state or large business corporations, for example. While in these latter cases the moral infrastructure underlying right-claims opens the door for more prescriptive accounts of responsibility and to consequentialist considerations, when it comes to private individuals overly loose relationality might present the use of rights as technical and even slightly rhetorical, and as neglecting important aspects of our agency and responsibility.

My goal in the rest of the chapter is not to criticize or chastise the progressive paradigm's view of the regulation of horizontal relations: after all, I will claim in later chapters that sometimes state agents have constitutional rights-based duties to embrace this perspective when creating or changing private law norms. However, as I claimed above, my goal in this chapter is to describe an account of the normative structure of private law rights and duties that seems not only to fit more smoothly in the moral fabric of interpersonal relations between private parties but also to pose a greater normative challenge to constitutional rights-based horizontality. This other account of private law rights, I will claim, is grounded in the conservative paradigm's vision of the regulation of horizontal relations.

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[37] Dilan A. Esper and Gregory C. Keating, 'Putting Duty in Its Place: A Reply to Professors Goldberg and Zipursky' (2008) 41 *Loyola of Los Angeles Law Review* 1225, 1242, 1247, 1255–1258.

2.3. *Private Law Right-Claims*

In this section, I start transitioning towards an explanation of the normative structure of the right-norms I locate in private law's core. My point of departure is the moral infrastructure I take this core to supervene on: practices of interpersonal rights-claiming and contesting. I claim that this infrastructure is reflected in some of private law's basic procedural features—and that these, in turn, solidify certain constraints on the possible content of its norms. When it comes to these constraints—that mainstream interpretative private law theory sees as central to it, at the very least—the progressive paradigm's vision of private law comes up short. At this point, I take this failure to be explanatory rather than normative; but in later chapters I add that in many cases it entails some worrying moral problems as well.

My claims depend on the connection between private law and the interpersonal moral practices underlying it, and on the rejection of the claim that law can use normative language in a 'detached' or 'technical' manner:[38] more narrowly, that private law rights and duties can be merely 'formal' or 'nominal' from a moral perspective—that there are no limitations on their possible form or content, since they are disconnected from moral norms. This would have meant not only that we can, with Liam Murphy,[39] explain or justify them in instrumental terms, but also that we are free to shape their normative structure.

The failure to distinguish between different types of norms in this regard is evident not just in instrumental theories of private law such as Murphy's, but also in the mainstream civil recourse theory of John Goldberg and Ben Zipursky. They are concerned with the robust normativity of legal rules, featuring in Hart's response to early positivism.[40] But what I care

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38 Luis Duarte D'Almeida, 'Legal Statements and Normative Language' (2011) 30 *Law and Philosophy* 167.

39 Liam Murphy, 'Purely Formal Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 19.

40 John C.P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Harvard University Press, 2020) 96.

about is not whether private law rules are morally obligatory (the context in which Murphy seems to finds instrumental approaches to private law more convincing).[41] My claim is that while private law right-norms do not mirror moral norms, there are important normative connections between them: leaving their obligatoriness aside, they respond to, build on, and shape moral norms, and get much (though not all) of their value from them.[42]

This does not mean that public or private participants in the practice of private law cannot treat its right-norms as mere 'signposts' or 'placeholders'.[43] Just that if they do that too often, private law will lose some of its ability to harness the normative force of rights: this problem touches law's grounding in morality rather than morality itself. While the distinction is not always simple, it is important, as we will see in later chapters: it gives state agents some leeway in bringing the constitution to bear on private law right-norms.

At this point, it is enough to assume that while state agents shaping private law can take wrong turns and fail to ground right-norms in solid moral foundations, they are not being deceptive or grossly incoherent.[44] Thus, if they designate some norms as rights, we can assume that it is not just an attempt to utilize the rhetorical force of this term to promote collective goals.[45] This opens the door for an analysis of the underlying moral practice of interpersonal right-claiming and contesting and its manifestations in private law. The general idea, to be introduced here and further developed in later chapters, is that when private law norms work well, they are embedded in the moral fabric of the horizontal relations they form parts of; and this necessitates a certain continuity between law and morality.

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41 Murphy, 'Purely Formal Wrongs' (n 39) 37–38.

42 Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708; Andrew S. Gold, 'The Relevance of Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 41, 45–47.

43 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

44 Stephen A. Smith, 'Taking Law Seriously' (2000) 50 *University of Toronto Law Journal* 241.

45 Coleman, 'The Structure of Tort Law' (n 24) 1244.

Formal Reflections

In the previous chapter, I introduced Nagel's claim that deontology (which he referred to as 'absolutism') 'is associated with a view of oneself as a small being interacting with others in a large world', and that 'the justifications it requires are primarily interpersonal'; while forms of consequentialism 'are associated with a view of oneself as a benevolent bureaucrat distributing such benefits as one can control to countless other beings, with whom one may have various relations or none', and the justifications they require are 'primarily administrative'.[46] This distinction, grounded in the different roles we can occupy as justifying agents, is tied in important ways to some of the basic features of the practice of private law.

In the next chapters, I claim that state agents cannot normally ignore the interests and needs of right-holders, even when they are not directly involved in interactions between them and other private actors: for example, when the state signs a contract to buy chairs. The state has rights-based duties to act as a 'benevolent bureaucrat'. Thus, even if we want to say that the activities of state agents regulating horizontal interactions (for example, promoting health and safety in the workplace) are part of private law,[47] they are not part of its core. State agents must always act on behalf of the political collective, and thus cannot claim rights on behalf of themselves or particular individuals they represent in particular circumstances.

This stands in contrast to a first central formal feature of private law, reflecting an interpersonal form of normative relations—of the kind Nagel had in mind: private law rights are claimed by their holders or their representatives. It is easier to see this in the scheme of litigation: private law liability and responsibility are determined in processes that start and end at the will of an aggrieved private party. This is an aspect of private law that Goldberg

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[46] Thomas Nagel, 'War and Massacre' (1972) 1 *Philosophy & Public Affairs* 123, 137–138.

[47] Hanoch Dagan and Roy Kreitner, 'The Other Half of Regulatory Theory' (2020) 52 *Connecticut Law Review* 430.

and Zipursky place at the center of their civil recourse theory.[48] But this is not true only about litigation: private law right-holders have discretion about if and how to claim them—an idea reflected in the Will Theory of rights, that sees control of the right by its holder as its basic feature;[49] in Hohfeldian accounts of legal relations as consisting of 'bilateral bonds' and claim-rights as rights 'in the narrow sense';[50] and more generally, in individualistic accounts of rights that emphasize the right-holder's control over the normative situation.[51]

As Waldron noted, such approaches to rights seem to relate them 'to a particular aspect of moral personality: the active, practical, and assertive side of human life, as opposed to the passive, affective, or even pathological side'; rights are associated with agency, self-determination, and independence, are correlated mostly with duties of non-interference, and are often grounded in 'principles of laissez-faire and minimalist theories of the state'.[52] This echoes the claims made in the previous chapter about the conservative moral paradigm.

The negative implication, as Darwall noted, is that we are accountable in private law only to particular individuals—rather than third parties or the political collective—that have the right, standing, and authority to call us to account for allegedly wronging them.[53] A distinction was drawn in this regard between a criminal law paradigm, under which wrong-doers are called to account on behalf of the political collective, and a private law paradigm, under which the wronged party calls the wrongdoer to account on his own behalf. [54]

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48 John C. P. Goldberg and Benjamin C. Zipursky, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917.
49 H. L. A. Hart, 'Legal Rights', in *Essays on Bentham* (Oxford University Press, 1982) 162.
50 Pavlos Eleftheriadis, *Legal Rights* (Oxford University press, 2008) 116, 120, 123–124.
51 David Owens, 'The Roles of Rights', in in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 3, 7–12.
52 Jeremy Waldron, 'Introduction', in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 1, 11.
53 Stephen Darwall and Julian Darwall, 'Civil Recourse as Mutual Accountability' (2011) 39 *Florida State University Law Review* 17.
54 R.A. Duff and S.E. Marshall, 'Public and Private Wrongs', in James Chalmers, Fiona Leverick, and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 70, 79; R. J. Wallace, *The Moral Nexus* (Princeton University Press, 2019) 98–100.

The second formal feature of private law I want to highlight is that the right-claim is addressed particularly at the legal agent it would have burdened as a duty-bearer. Again, it is easier to see the procedural legal manifestation of this idea: the fact that private litigation is a zero-sum game—that whatever the right-holder gets must be extracted from particular legal agents called to account.[55] Even in cases in which remedial costs are flexibly allocated in a non-binary fashion, it will be between the litigating parties. Thus, put differently, if the right-holder cannot find a responsible agent to direct his claims at, they do not even 'get off the ground'.[56] We normally receive private law remedies only from the duty-bearers we successfully called to account—not from third parties or the political collective at large.

Private law right-claims, like all right-claims, must be good answers not only to the 'why me' question (why should I benefit from the imposition of a right) but also to the 'why you' question: why should this agent be burdened with a right-based duty?[57] When it comes to private law's core, this idea is shaped by the fact that both the claimant and the addressee are private parties. This, I will add now, imposes limitations on the kind of reasons the right-holder can potentially ground his right-claim in—and therefore on the kind of reasons state agents can use when justifying their decisions to change or apply private law rights. These reasons (and again, I am not fully justifying this claim in this chapter, but merely trying to present it as clear and intelligible) should avoid instrumentalizing the normative position of the right-holder—not to treat him as a 'private attorney general'—or the duty-bearer—not to burden him with liabilities and duties exceeding his domain of personal responsibility.

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55 Lucy, *Philosophy of Private Law* (n 13) 22–23; Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 286.

56 John Gardner, 'Backward and Forward with Tort Law', in Joseph Keim Campbell, Michael O'Rourke, and David Shier (eds), *Law and Social Justice* (The MIT Press, 2005) 255, 258–259.

57 Hanoch Dagan, 'The Limited Autonomy of Private Law', in *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013) 104, 110.

From Form to Substance

To see a private law right-claim as made on behalf of the political collective, or as addressed against the person who is just best-placed to promote some collective goal, is off key, both morally and legally. The language of rights imposes limitations on private law rights-based reasoning. Of course, we can choose not to use this language when regulating horizontal relations. But as things stand, we see many private law norms as interpersonal rights.

We might struggle to understand some private law relations by using terms like goals, principles, or imperfect duties. In this sense, rights seem to be, at least in Anglo-American legal culture, constitutive parts of some private law relations. We can try to imagine contractual promise-keeping as something that lies in the public sphere—thus making every potentially or actually broken promise 'our' business; or, to blur the boundary between crimes and torts by seeing tortfeasors as wronging 'us'. In later chapters, I raise concerns about such ideas. Here it is sufficient for me to say that this is just not how private law seems to work: as seen in the procedural scheme briefly sketched above and many of private law's substantive doctrines. Even if some strands in private law pull in other directions, in its core we find normatively robust interpersonal rights, directly connecting private agents. The interpersonal moral infrastructure brings with it a certain style of legal reasoning and deliberation endemic to private law (familiar to private theorists and practitioners) that focuses on each duty-bearer's responsibility and on his immediate relationship with the right-holder.[58]

At this stage, my claim is that, as Weinrib notes, there are principles of rights-based reasoning that are embodied in a 'structural principle' creating a certain 'pattern of argument' in private law:[59] this principle reflects 'a conception of the relationship between private law

[58] Kit Barker, 'Private Law: Key Encounters with Public Law', in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 3, 13–14.

[59] Ernest J. Weinrib, *Corrective Justice* (Oxford University Press, 2012) 10.

parties and the kinds of reasons for liability that are appropriate to that relationship'.[60] This principle shapes the normative structure of private law right-norms. As Rob Stevens adds in this regard, the form of private law relations imposes constraints on the kind of reasons that can justify rights and duties in them: 'they must be reasons that tie this particular right-holder to this particular duty-bearer'; they must be 'bilateral' and 'right-shaped'.[61]

It is here that the scary idea of 'deontology' reenters the picture. Private law rights reflect the idea that what a certain agent might do, personally, might differ from what brings the best states of affairs, considered impersonally, about.[62] It could even be wrong to bring the best state of affairs about. This idea that the rightness of actions is tied to their nature rather than to large-scale states of affairs is reflected in accepting rights as intrinsically rather than instrumentally valuable and as applying interpersonally and relationally.[63] It is no coincidence that deontology focuses on our duties and distinguishes, for example, between doing and allowing or intending and foreseeing: distinctions that private common law has been tackling, unpacking, and applying for centuries. What I want to do now is to show how these ideas are manifested in what I called in the previous chapter the grounds and form of the ideal-typical private law right—that is, in its normative structure.

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60 Ernest J. Weinrib, 'Private Law and Public Right' (2011) 61 *University of Toronto Law Journal* 191, 191.
61 Robert Stevens, 'Private Law and the Form of Reasons', in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 119, 124.
62 On this idea, see: Paul Hurley, *Beyond Consequentialism* (Oxford University Press, 2009) 118–128.
63 Ibid 144–150, 167–172.

2.4. Grounds

All rights are at least loosely relational. That is, they always connect, in stronger or weaker ways, the well-being of a right-holder and the agency of a duty-bearer. Private law rights are no different: they contain both beneficiary-centered and agent-centered normative particles. My claim in this section is that the latter pull state agents harder when deliberating and reasoning about the creation and change of private law right-norms. This stands in contrast to what we will see in the next chapter, when talking about constitutional rights: there, the constraints imposed by agency-related considerations are weaker, and thus allow rights-based reasoning to focus on the interests and needs of potential beneficiaries.

The principle of the separateness of persons shapes both legal domains; but its implications are different: as part of interpersonal as opposed to political practices of rights-claiming, it requires us to show that the setback to the right-holder's well-being we seek to remedy by recognizing a right is adequately tied to the duty-bearer's agency. It is not enough to point at the contribution to the right-holder's well-being, no matter how significant it is, just like it is not enough to point at the wrong or even evil nature of a person's conduct to justify placing him under a right-based duty. These are the first signs of relationality.

But in the case of private law rights, relationality does not mean parity between agent-centered and beneficiary-centered considerations. My claim is that the former shape the ways in which the latter can influence private law rights-based reasoning: that is, agent-centered considerations, centering around a particular conception of personal responsibility that I present below, perform a gate-keeping function in private law similar to the one they perform in general interpersonal and rights-based morality. This conception of responsibility is our starting point in exploring the normative structure of private law rights.

Restrictive Personal Responsibility

In a sense, as John Gardner noted, responsibility is inherently relational and assumes actual or potential others to which one is response-able.[64] However, there are still many differences between being responsible in general and being responsible to someone: to 'having' a responsibility to another particular person about something.[65] What interests me is the connection between having a responsibility and being burdened with a right-based duty to another person. The basic idea here is that while responsibility is not necessarily located at the ground-level of normative reasoning, it is more basic than rights-based duties, in the sense that the potential or actual impact on others of what we do or fail to do, can make us responsible to them in various ways;[66] and this can change our normative relations, place us under duties, and give them the authority and standing to call us to account.[67]

This type of responsibility is 'backwards-looking', but in a more nuanced sense than this term is often used. What I am talking about is not the ascription of responsibility for current states of affairs (Bert should clean the mess in the kitchen—and not Ernie). The allocation of right-based duties can relate to future states of affairs (Seller is responsible to disclose some information to potential buyers to avoid misleading them).[68] While there is a sense in which we are talking about responsibility for 'outcomes',[69] or 'consequences',[70]

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64 John Gardner, 'Relations of Responsibility', in Rowan Cruft, Matthew H. Kramer, and Mark R. Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press, 2011) 87.

65 Angela M. Smith, 'Responsibility as Answerability' (2015) 58 *Inquiry* 99, 111–113.

66 On 'substantive responsibility, see: T.M. Scanlon, 'Forms and Conditions of Responsibility', in Randolph Clarke, Michael McKenna, and Angela M. Smith (eds), *The Nature of Moral Responsibility: New Essays* (Oxford University Press, 2015) 89, 105; and on 'assignments of responsibility', see: David Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007) 84.

67 John Martin Fischer and Neal A. Tognazzini, 'The Physiognomy of Responsibility' (2011) 82 *Philosophy and Phenomenological Research* 381, 394.

68 Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 30–35.

69 Tony Honoré, 'Introduction', in *Responsibility and Fault* (Hart Publishing, 1999) 1.

70 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) 287.

when thinking about the allocation of primary rather than secondary rights and duties, we are not focusing just on what Hart called 'liability-responsibility':[71] as Gardner noted, it is a somewhat rigid, narrow, and remedial conception or notion of responsibility.[72]

The kind of responsibility in play in our regard is closer to what Scheffler called a 'restrictive' and 'common-sense' conception of responsibility: it limits our moral world as agents by distinguishing between what we do and what we fail to prevent and between people with whom we have special relationships and strangers.[73] This conception seems to underlie Dworkin's claim that liberal interpersonal morality tends to focus on our responsibility as agents and what we must do for others rather than our interests and needs.[74] It is reflected in Hart's distinction between 'general' rights, correlating with universal negative duties (that is, duties not to harm others in particular ways), and 'special' rights, that could entail positive duties and are usually incurred volitionally (for example, a duty to keep a promise).[75]

The implication is that we have some degree of control over our duties at the expense of our welfare as beneficiaries of others' actions. When it comes to general duties, we have no choice about whether to incur them, but they leave room for choice by requiring us mostly to avoid harming others rather directly (easy rescue cases are a possible exception). Special duties might leave less no room for choice after we incur them—they might consist of what Hart called 'role-responsibilities': 'spheres of responsibility […] requiring care and attention over a protracted period of time'.[76] Here choice enters the picture at an earlier point in time:

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71 Lucy, *Philosophy of Private Law* (n 13) ch. 2.

72 See also: John Gardner, 'Hart and Feinberg on Responsibility', in Matthew H. Kramer, Claire Grant, Ben Colburn, and Antony Hatzistavrou (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (Oxford University Press, 2008) 121, 132–133.

73 Samuel Scheffler, 'Individual Responsibility in a Global Age', in *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press, 2002) 32, 36–38.

74 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2013) 285–289, 300–303.

75 H. L. A. Hart, 'Are There any Natural Rights?' (1955) 64 *Philosophical Review* 175, 183–188.

76 On such 'role-responsibilities', see: H.L.A. Hart, 'Postscript: Responsibility and Retribution', in *Punishment and Responsibility* (2nd edn, Oxford University Press, 2008) 210, 212–214.

when we decide whether to engage in activities or to perform actions that entail assumptions of responsibility. For example, when signing a contract or opening a grocery store, we incur responsibilities about certain aspects of other people's well-being—to deliver goods on time or to take measures protecting the health and safety of customers.[77]

This kind of responsibility is therefore not grounded in our control of particular situations,[78] nor does it require that responsibilities will be assumed voluntarily:[79] all it requires is a certain level of awareness of the normative implications of our actions and the ability to avoid them. The important thing for us is that in most cases the fact that we can benefit others is not enough to establish our personal responsibilities: ascription of restrictive responsibility must be grounded in some exercise of our agency, even if negative and implicit (though there are exceptions, such as responsibilities to our parents or our communities).[80]

Thus, the restrictive conception of responsibility operates between our choice and our rights-based duties to others as a gate-keeper, drawing the boundaries of our normative relations with others in ways that preserve our agency and ability to comprehend and shape (even if not completely control) our mutual obligations. What I want to add now is that this restrictive conception of responsibility underlies private law rights-based reasoning and shapes the justificatory grounds of its core right-norms as agent-centered: while the justification must be relational to some extent, common private law has been, historically, occupied with trying to achieve congruence between our duties and liabilities and our responsibilities.

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77 David Enoch, 'Tort Liability and Taking Responsibility', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 250.

78 For such accounts of responsibility, see, for example: Philip Pettit, 'The Capacity to Have Done Otherwise: An Agent-Centred View', in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001) 21; Joseph Raz, 'Being in the World' (2010) 23 *Ratio Juris* 433.

79 Joseph Raz, 'Promises in Morality and Law' (1982) 95 *Harvard Law Review* 916.

80 Samuel Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy & Public Affairs* 189.

Agent-Centeredness

Anglo-American private law has been and still is often reluctant to impose duties of beneficence or protection, even in cases of easy rescue, absent some assumption of responsibility.[81] Positive and strict liability duties are often incurred by engaging in relatively well-defined activities or practices.[82]Arthur Ripstein claimed that this preference is rooted in the 'irreducibly relational notion of private right';[83] and Stevens explained it by noting that 'the starting point of the common law is based upon a premium placed upon our freedom to choose how to live our lives'.[84] To me, it seems reasonable to say that we see here a reflection of the restrictive conception of responsibility, which might entail, further downstream, certain notions of private right or liberty. The restrictive conception is grounded in the idea that we should have some degree of control over our normative relations with others.[85]

Of course, there are exceptions, some of which will be touched in later chapters. There are also attempts to show that some apparent exceptions do reside under the rule (for example, to tie our strict and positive duties of restitution following unjust enrichments, that we cannot avoid being burdened with, to our personal responsibility).[86] My point here is merely that the restrictive conception of personal responsibility has a strong pull in private law rights-based reasoning, but I leave its force and limitations to later chapters.

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81 Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) ch. 3; Peter Benson, 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60 *University of Toronto Law Journal* 731.

82 John Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', in Lisa M. Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press, 2014) 207, 219.

83 Ripstein, *Private Wrongs* (n 81) 64.

84 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 9–14.

85 John Oberdiek, 'It's Something Personal: On the Relationality of Duty and Civil Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 301, 313, 316.

86 See, for example: Stephen A. Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 *Texas Law Review* 2177; Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm. And Keeping the Lid on Pandora's Box', in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of Unjust Enrichment* (Oxford University Press, 2009) 146, 162–171.

This does not mean that justifications for private law rights are purely agent-centered: just like it is not enough to point at a setback, no matter how bad, to one's well-being,[87] it is not enough to point at the reprehensible nature of someone's conduct to burden him with a right-based duty.[88] In this sense, the justifications of these rights are relational: they tie someone's agency to the well-being of another. However, as stated above, the parity between agent-centered and beneficiary-centered considerations is largely formal.

The liberal status-quo position of mutual freedom and separation is reflected in the structure of litigation: the burden is on the claimant to show that it must change. Since harm is more widespread we focus on the wrongness of the actions that brought it about: the framing of private law rights-based reasoning is that we harm one another all the time, but that just some types of harms, tied to our responsibility in certain ways, are also wrongful. There is no baseline in private law's core against which we measure harms or benefits which does not refer to the conduct of others:[89] it is only wrongful if it was brought about wrongfully. For example, when thinking about whether children have a right to provision from their parents' estate even when the latter deliberately left the former out of their will, courts asked to prove not need, but rather the parents' moral obligations to support the children.[90] Even 'social' private law norms could be explained, as I will claim below, by tying them to notions of fairness or good faith that we are personally responsible to adhere to.

Another way of teasing this framing out is to see that while agent-centered considerations find their way into private law rights-based reasoning rather directly, beneficiary-

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87 Stephen R. Perry, 'The Mixed Conception of Corrective Justice' (1992) 15 *Harvard Journal of Law & Public Policy* 917, 924–931.

88 Ibid 932; Benjamin C Zipursky, '*Palsgraf*, Punitive Damages, and Preemption' (2012) 125 *Harvard Law Review* 1757, 1769–1771; Arthur Ripstein, 'Private Law and Private Narratives', in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001) 37, 57–58.

89 Benson, 'Misfeasance' (n 81) 748–749, 768.

90 Brian Sloan, '*Ilot v The Blue Cross* (2017): Testing the Limits of Testamentary Freedom', in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing, 2019) 301.

centered considerations must always take a slight detour: the justificatory paths leading from them to private law rights must go through agent-centered considerations; the interests and needs we want to protect must be located in some agent's sphere of responsibility.[91] In the end, agent-centered considerations, building on concepts like fairness, foreseeability, reasonableness, or good faith, are the ones leading the way in these paths. We reflect on whichever interests and needs are implicated in the relevant interaction, but mostly in an attempt to figure out which responsibilities the involved agents should be burdened with.

For example, I have no duty not to reduce your house's use-value by opening a bar next to it, but I do have a duty not to do so by setting it on fire negligently. It is difficult to explain the difference in beneficiary-centered terms: for example, to say that you have an interest in not having your property's use-value reduced in certain ways. Rather, you seem to have a general interest in your house retaining its use-value, some aspects of which fall in my scope of responsibility. In the same way, our health, privacy, dignity, and many other interests and needs are protected in private law only partially. It is in this sense that I take the grounds of private law rights to be relational, but also agent-centered: they focus on our responsibilities to those affected in particular ways by our actions and omissions.[92]

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91 Perry, 'The Mixed Conception' (n 87) 934–935; Victor Tadros, 'Secondary Duties', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 185, 200–205.

92 Cane, *Responsibility in Law and Morality* (n 68) 49–50.

2.5. *Form*

This section unpacks the ways in which the normative structure of private law rights responds to the restrictive conception of responsibility. First, it affects their correlativity with and inseparability from duties. Second, these close-knit right–duty pairs tend to exclude 'external' considerations. In a way, these are two sides of the coin of strict relationality. They are also captured by the metaphor of 'bipolarity':[93] the two poles of right and duty are required to 'close the circuit', and once it is closed there is no room for external intervention.

The theme of bipolarity has been explored quite extensively in private law theory.[94] Its leading exponent has been Weinrib: his central claims in this regard are that the justifications for private law rights and duties are limited to considerations that 'attend to both parties in their interrelationship',[95] are 'elements in the parties' immediate interaction as such',[96] and do not aim at achieving 'goals external to the parties' relationship'.[97] My approach deviates from his in two important ways. First, he sees private law as strictly relational through and through, while I focus on its core—which, as I show in the sixth chapter, is limited in scope. Second, even at the core, I see relationality as less strict: the considerations justifying rights and duties need not be identical—a requirement excluding promise-keeping, for example, from justifying contractual norms, as it applies differently to each contracting party.[98] I see strict relationality as requiring that the justifications will be connected—a connection that different accounts of promise-keeping demonstrate—rather than identical.

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93 Michael Thompson, 'What it is to Wrong Someone? A Puzzle about Justice', in R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (eds), *Reason and Value: Themes from the Moral Philosophy– of Joseph Raz* (Oxford University Press, 2006) 333, 335.

94 William Lucy, 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill Law Journal* 605, 612–613.

95 Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA Law Review* 621, 624.

96 Ernest Weinrib, 'The Insurance Justification and Private Law' (1985) 14 *Journal of Legal Studies* 681, 683.

97 Weinrib, 'Private Law and Public Right' (n 60) 192.

98 Weinrib, *The Idea of Private Law* (n 1) 50–53; Weinrib, *Corrective Justice* (n 59) 17. For further criticism, see: Kenneth W. Simons, 'Justification in Private Law' (1996) 81 *Cornell Law Review* 698.

On the other hand, I see strict relationality as stricter than just referring to norms that apply interpersonally: that determine how agents should treat others as opposed to how they should conduct themselves in general.[99] As Goldberg and Zipursky concede, this definition of relationality, that they adopt, is also exhibited by some criminal and administrative law norms.[100] For Dagan this is not a problem, as he sees administrative action realizing relational justice (for example, setting workplace health and safety standards) as part of private law.[101] But from my perspective—that focuses on private law's rights-based core, that reflects and solidifies underlying interpersonal moral practices—something is missing here.

While I agree with Dagan that risk reduction, for example, is an important feature of regulation that forms the background against which private law operates, for the purpose of thinking about constitutional horizontality it seems to fall out of private law's core: the fact that no interpersonal right-claiming is involved opens the door for aggregative and beneficiary-centered forms of reasoning, less diametrically opposed to public law reasoning.

The meaning of private law core-norms consists of more than their semantic content: the fact that they are rights, claimable in the context of private interpersonal relations, affects their meaning as well. The pragmatic context of such right-claims has not merely procedural but also substantive implications. The fact that both the claimant and the addressee are private actors shapes the normative structure of their legal relations. It distinguishes the private agent against whom we claim rights about the risks that he took and materialized in harm to us and the administrative agency, against which claims are made about aggregative risks and harms, or the criminal offender whose actions (as I claim below) wrongs the public as well.

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[99] Goldberg and Zipursky, *Recognizing Wrongs* (n 40) 92–93.

[100] See also: John C.P. Goldberg and Benjamin C. Zipursky, 'Rights and Responsibility in the Law of Torts', in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, 2012) 251, 261.

[101] Dagan and Kreitner (n 47) 629–637.

Correlativity

In the next chapter, I will claim that some constitutional rights are importantly separate from their entailed duties: they are not correlated with particular duties, but rather—in the spirit of the Interest Theory—entail 'waves of duties'. Here, I claim that private law exhibits the opposite structure: rights are inseparable from their tightly correlated duties; rights do not act as intermediary conclusions in arguments leading from values to duties, since we often reason from these values to rights and duties simultaneously—to a right–duty nexus.

It makes less sense to talk, for example, about rights to property or dignity. In this abstract form, they are not claimable against other private agents: on the one hand, it will be burdensome for private agents to recognize these interests as general rights—to hold that we must avoid harming all property or dignity interests of others; on the other hand, it is highly unlikely to find cases in which private agents assumed the responsibility to protect or promote, or even respect, all aspects of these complex and demanding interests. Thus, we find in private law rights against trespass or defamation, rather than to property or dignity.

Private law rights are not two-term rights, referring to persons and states of affairs in which they enjoy certain goods or do not suffer certain harms, but three-term rights referring to a right-holder, a duty-bearer, and an action or activity.[102] Two-term private law rights are prima-facie rights: they are presumptive, in the sense that some aspects of theirs might turn out not to be rights at all. Their presumptive form could still be helpful: for example, there could be good reasons to avoid reducing property to a 'bundle of rights', applying against countless private agents with little holding them together.[103] But we also have good reasons

[102] John Finnis, *Natural Law and Natural Rights* (2nd edn, Paul Craig ed, Oxford University Press, 2011) 201, 218–219.

[103] Christopher M. Newman, 'Using Things, Defining Property', in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 69, 74.

to avoid abusing the language of rights by talking about a private law right to property: we could talk, perhaps, about a 'right to exclude', which forms the core of a cluster of property rights, tied together by various goals, principles, and other normative incidents; but we must also concede that the 'lumpiness' of this cluster will decrease in certain contexts: for example, when we move from land to intangible forms of property, like copyright.[104]

Thus, it could be useful to talk about presumptive two-term private law rights: they can be seen as 'heuristic shortcuts' and can save information or deliberation costs and help individuals stay within their rights.[105] But this should not distract us from the fact that it is three-term rights—even if in the general form of 'we have a right not to be hit by others'—that will tend to be definitive, at least when talking about private law's core.[106]

An important thing about these more concrete rights is that they do not function as inputs into arguments about the allocation of duties. We do not see them as instantiations of more general 'mother-rights'.[107] For example, defamation cases do not demonstrate conflicts between the rights to free speech and dignity: we take them into consideration, but they entail no right-based duties, nor frame the normative situation or leave moral residue if limited—some of the main things that separate rights from mere values, interests, or principles.

While in constitutional law duty-bearers are under pressure to engage the entire scope of abstract rights, in private law duty-bearers are free to engage only their aspects that are implicated in particular contexts: usually, contexts involving relational wrongdoing, properly tied to their personal responsibility. It is in this more foundational level that we

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[104] Simon Douglas and Ben McFarlane, 'Defining Property Rights', in James Penner and Henry E. Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 240.

[105] Andrew S. Gold and Henry E. Smith, 'Scaling Up Legal Relations' (SSRN, 13 April 2018).

[106] R.B. Grantham and C.E.F. Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 *Cambridge Law Journal* 717, 737–738.

[107] See also: Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107, 119–120; Peter Benson, 'Equality of Opportunity and Private Law', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 201, 221.

think about beneficiary-centered interests and needs like property or dignity: we focus on their implications for responsibility—the shadows they cast over our choice as acting agents. In this sense, private law rights are not inputs into arguments about the allocation of duties, but rather outputs, reflecting an antecedent responsibility-focused deliberation.

This does not mean rights are just the 'analytical reflex' of the recognition of duties,[108] or that private law requires 'duty-based reasoning'.[109] It is more accurate to say that private law rights and duties form tightly correlated pairs, but that justifying deviations from the status quo of mutual separation pulls us 'to focus on the "duties" side of the equation'.[110] It is in this spirit that I read Patrick Atiyah's claim that English law has 'been more prone to start with duties, and to treat rights as the incidental flow-on from duties, rather than to start with rights and impose duties to protect those rights'.[111]

Neither rights nor duties have justificatory priority in private law: they form inseparable pairs. However, agent-centered considerations are more dominant in shaping these pairs; and thus, Atiyah's complaint that beneficiary-centered considerations are often neglected,[112] or Keating's complaint that private law theories tend to focus on wrongs rather than rights,[113] are not entirely off the mark. At this point, I do not evaluate these claims: I introduce them just to shed further light on the correlativity of rights and duties in private law, from a perspective focusing on right-claiming and contesting in this legal domain.

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[108] Weinrib, *The Idea of Private Law* (n 1) 123–126.
[109] John C.P. Goldberg and Benjamin C. Zipursky, 'The Moral of *Macpherson'* (1998) 146 *University of Pennsylvania Law Review* 1733, 1845.
[110] Tadros, 'Secondary Duties' (n 91) 198–199.
[111] P. S. Atiyah, *Pragmatism and Theory in English Law* (Stevens and Sons, 1987) 18. See also: Neil MacCormick, *Legal Right and Social Democracy* (Oxford University Press, 1984) 223.
[112] Atiyah, *Pragmatism and Theory in English Law* (n 111) 21.
[113] Gregory C. Keating, 'Duty or Right? A Comment on John Gardner's *From Personal Life to Private Law*' (2017) 15 *Jerusalem Review of Legal Studies* 152, 153–158.

Exclusion

The inseparability of private law rights and duties is grounded in the restrictive conception of responsibility. The other side of the coin is the way in which external considerations are excluded from decisions involving these rights and duties: the reasons for action they give private agents create a circle it is very difficult to break into from the outside.[114] What these legal norms do is to pull certain interpersonal actions or activities from their social context and give them a deontological shape, largely isolated from external considerations.[115] It is here that we see even more clearly the conservative moral paradigm pulling the strings and imposing its particular conception of the principle of the separateness of persons.

The argument here builds on three claims, which I largely stipulate here and further develop in later chapters: first, much of the moral value of private law right-based duties comes from their normatively robust relational connections to potential claims by others; second, claimants are not representing the political collective—they act on their own behalf, as private agents; and third, since claimants are addressing private agents in private capacity, their claims cannot normally address collective goals. As claimants and as duty-bearers, we lack the resources, capacity, and authority to figure out which large-scale states of affairs should be deemed important enough to shape our interpersonal rights and duties.

This has two implications. First, there is no coming 'into the circle' from the outside: for example, others have no standing to call me to account for wronging a promisee by breaking a promise. Second, there is no going 'outside the circle': for example, a promisee lacks the standing and authority to call me to account for wrongs on behalf of the political

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[114] In the context of moral theory, see also: Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006) 8, 12–13.

[115] TT Arvind, 'Obligations, Governance and Society: Bringing the State Back In', in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 259, 271.

collective. In principle, considerations of distributive justice or social welfare seem to be in the wrong normative key as far as private law right-claims are concerned.[116] Only the promisee I made a promise to can call me to account, and only about the promise I made to him—and the same goes for my answer: I cannot claim that I should be allowed to break my promise because it will maximize social welfare or induce more future promise-keeping.[117]

What seems to bother many private law practitioners and theorists—and moral theorists criticizing different forms of consequentialism—is summing up or aggregating between relationships.[118] The concern is not just about aggregating across people: for example, regulating my actions and activities in ways that induce you to keep more contractual promises or cause less harms negligently. It is more basically about not trying to induce me to break less promises and causing less harms negligently: even only in my own affairs.

Private law exhibits resistance to what Scheffler called a 'maximizing rationality',[119] in the sense that each action or activity are treated in relative isolation. While we define some things as 'wrongs', we do not directly try to bring about states of affairs in which they occur less (a point Atiyah made about contract law).[120] It is not that we stop caring about bringing such states of affairs about—just that conformity with the reasons that private law duties entail apply to particular agents in particular relations:[121] other agents (like judges or insurers) could have other reasons (some of which will be discussed in later chapters).

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116 John Oberdiek, 'Structure and Justification in Contractualist Tort Theory', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 103, 109–110, 119–120.
117 Wallace (n 54) 135–138.
118 Lorraine E. Weinrib and Ernest J. Weinrib, 'Constitutional Values and Private Law in Canada', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 43, 67–71.
119 Samuel Scheffler, 'Agent-Centered Restrictions, Rationality, and the Virtues' (1985) 94 *Mind* 409, 414.
120 P. S. Atiyah, 'The Practice of Promising', in *Promises, Morals and Law* (Oxford University Press, 1981) 138.
121 John Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018) 108–110.

For now, it can be said that when excluding corporations and commercial activities and focusing on private law's core, its rights and duties exclude collective goals and values: they are bipolar or strictly relational.[122] To a great extent, they operate as Nozickian 'side-constraints'.[123] While they contain beneficiary-centered elements of the natural rights tradition,[124] their Kantian agent-centered elements are more dominant: as Waldron noted, this account of rights focuses more on how agency must be exercised—each agent is concerned mostly with keeping a clean personal moral slate—rather than on our interests and needs.[125] As Nagel noted, these are rights not to be treated by others in particular ways, rather than rights to not suffer certain harms or enjoy certain goods in general.[126] They obligate duty-bearers not to violate rights even if by doing so they can prevent several violations.[127] Like in Dworkin's famous theory of 'rights as trumps', to which we will get in the next chapter, aggregation and tradeoffs are allowed only in 'catastrophic' cases.[128] This captures the normative structure of private law core-rights and the moral ideas underlying them: their connection with the conservative paradigm, that I want to elaborate on now.

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122 Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 261.

123 Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974) 28–31.

124 On the complex connections between Lockeanism and Kantianism, see, for example: A. John Simmons, *The Lockean Theory of Rights* (Princeton University Press, 1992) 41–59, 68–87, 336–352.

125 Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 76–77; Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 505.

126 Thomas Nagel, 'Libertarianism Without Foundations' (1975) 85 *Yale Law Journal* 136, 143–144.

127 Michael Otsuka, 'Are Deontological Constraints Irrational?', in Ralf M. Bader and John Meadowcroft (eds), *The Cambridge Companion to Nozick's* Anarchy, State, and Utopia (Cambridge University Press, 2011) 38, 41–46.

128 Nozick (n 123) 29–30; Dworkin, *Justice for Hedgehogs* (n 74) 473.

2.6. *The Private Side of Private Law Rights*

Before closing this chapter, I want to take a step back and reconnect it to the bigger picture presented in the first chapter. The general idea I want to convey here is the 'privateness' of the normative structure I have been describing. One private party's right-claim against another private party about their respective legal positions is located closer to the private end of the public–private spectrum, even if the state is involved: when the state creates or changes the rights that will be claimed by private actors, it is constrained, in ways I will further explore, by the underlying moral practices of interpersonal rights-claiming.

Private law has public aspects, as conceded even by Weinrib—who sees it as more private than most and as isolated from almost all political and collective values: he agreed, for example, that it is more public than alternative dispute resolution schemes since it is systematic and involves the state as an adjudicator whose every decision must meet standards applying to the legal system as a whole.[129] I add in later chapters that there are other forms of publicness—and political and collective values—that find their way into private law. But this does not reduce the usefulness of the ideal-typical staring point. A good way to understand a complex normative system like private law is to start with a relatively simple and idealized account of its central features: in our case, the right-based core, that poses a greater challenge to processes of constitutional right-based horizontality. Only then, gradually, we complicate the picture by moving to the normative system's margins—a task I will only get to in the sixth chapter. Before that, I will try to further unpack the abstract and somewhat embellished picture of private law's core presented in this chapter and its implications for different forms and models of constitutional rights-models horizontality.

[129] Weinrib, 'Private Law and Public Right' (n 60) 196–197; Ernest J. Weinrib, 'Adjudication and Public Values: Fiss's Critique of Corrective Justice' (1989) 39 *University of Toronto Law Journal* 1.

Into the Tunnel

The core of private law focuses, in the spirit of the conservative paradigm, on certain aspects of our social life and the moral universe. It gives a central place to the values of freedom and responsibility when seen as agent-centered, at the expense of a myriad of other values, like vulnerability or need. It could be claimed that the state makes an effort to minimize the intrusion of the legal apparatus of private law on our personal lives: when it places us under a duty towards another individual and holds us responsible for a state of affairs and duty-bound to another individual, it not only tries to tailor our liability narrowly, but also to ground it in our own choices and past exercises of our agency. It excludes both pure beneficiary-centered values and collective values from shaping our private law obligations.

It is important to distinguish the reasons that I present for this tendency from the kind of Conservatism that is often associated with private law and goes back to the days of Sir Edward Coke (famously criticized in this regard by Thomas Hobbes): private law (like the common law more generally) is sometimes seen as an ongoing normative practice evolving almost organically and spontaneously while staying close to its moral trajectory and maintaining a certain level of coherence.[130] This conception of private law is often grounded in general Hayekian skepticism about the ability of any public agent or institution to comprehend the effects of large-scale systems and use these systems to achieve socially desirable results;[131] or alternatively, in concerns about the competence and democratic legitimacy of the judiciary, that, it is assumed, has the monopoly on developing private law.[132]

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[130] Weinrib, *The Idea of Private Law* (n 1) 13; Benjamin E. Zipursky, 'Pragmatic Conceptualism' (2000) 6 *Legal Theory* 457, 468–469. See also: Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 105, 116–117.

[131] F. A. Hayek, *Law, Legislation, and Liberty: Vol. 2—The Mirage of Social Justice* (Routledge, 1982) 24–25.

[132] See, for example: Ross Grantham and Darryn Jensen, 'The Proper Role of Policy in Private Law Adjudication' (2018) 68 *University of Toronto Law Journal* 187, 197–198.

Seeing the ongoing operation of private law as grounded in robust Conservative ideas fails to present it in the best light and lacks a good fit with legal practices: it is not only that, as already mentioned, all state branches are involved in its development, but also that it is not as stagnant and unresponsive to collective needs and values as such claims make it to be, as we will see in the sixth chapter. Leaving room for such public moments in the ongoing operation of private law requires us to tie its agnosticism about collective values and large-scale states of affairs to thinner normative commitments, like its right-based form.

We do consider large-scale states of affairs, but they must always be connected to the agency and responsibility of particular agents. Over time, beneficiary-centered values just get buried under many layers of agent-centered rules that become 'entrenched and ossified' and relatively immune to influence by 'external' considerations.[133] This results in the exclusion of collective considerations and 'public purposes' from the 'series of fortuitous relationships between pairs of litigants' which forms (the core of) 'private law'.[134]

This normative tunnel vision provoked many harsh criticisms of traditional private law theories and principles as libertarian,[135] regressive,[136] anachronistic,[137] or isolated from the rest of the regulatory system.[138] I will revisit these criticisms in later chapters: the point here is that even if its implications are congruent with Hayekian conservatism, Kantian formalism, or institutional and democratic concerns about the judiciary, for my purposes it is not crucial to tie private law's core's privateness to such contested moral ideas.

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[133] Schauer, *Thinking Like a Lawyer* (n 130) 15–16, 106. See also: Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 35, 38, 52.

[134] Weinrib, 'The Insurance Justification and Private Law' (n 96) 687.

[135] Stephen R. Perry, 'Professor Weinrib's Formalism: The Not-so-empty Sepulchre' (1993) 16 *Harvard Journal of Law & Public Policy* 597, 603–607; Dan Priel, 'The Political Origins of English Private Law' (2013) 4 *Journal of Law & Society* 481, 502–507.

[136] George P. Fletcher, 'Corrective Justice for Moderns' (1993) 106 *Harvard Law Review* 1658, 1668.

[137] Gregory C. Keating, 'Personal Inviolability and "Private Law"' (2007) 1 *Journal of Tort Law*.

[138] TT Arvind and Joanna Gray, 'The Limits of Technocracy: Private Law's Future in the Regulatory State', in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 237, 238.

Private and Public

It is the language of rights that distances private law's core from the progressive paradigm, that sees legal agents as associated individuals trying to bring about desired states of affairs, and pushes it towards the conservative paradigm:[139] private law's normative starting point is that we are dissociated individuals with negative duties not to harm others and positive duties that are incurred by concrete exercises of our agency.[140] Like in the Kantian universe, it is a system of stable, concrete, and mostly negative rights, that do not require legal agents to appeal to collective values as part of complex balancing procedures.[141] Reasons for action that are third-party-regarding or community-regarding are normally irrelevant: we focus our normative efforts on individuals we come in direct contact with.

Importantly, private law norms are not directives about how we should act but about which rights others have against us. They can exercise them in whatever ways they see fit. It is in this sense that the regulatory tool of private law is not used by the state to 'intervene' or 'govern' but rather to 'coordinate' and 'empower'.[142] The bipolar normative and procedural structure and the form of deliberation and reasoning that state agents employ when they create or change private law norms reflect this: as a general rule—which I will qualify later—they do not do so while aiming to promote collective goals or aggregate values.

This creates a separation between public and private in this part of law. The general idea is that we accept that some forms of unfairness and injustice will be created through or

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[139] See also: Donal Nolan and Andrew Robertson, 'Rights and Private Law', in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2011) 1, 2–7, 26.

[140] Brudner (n 4) 5.

[141] Nigel E. Simmonds, 'Rights at the Cutting Edge', in *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 1998) 113, 117–118, 135–136, 176–186; Hillel Steiner, 'Working Rights', in *A Debate Over Rights* (ibid) 233, 264–274. See also: Peter Cane, 'Rights in Private Law', in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2011) 35, 48–49

[142] Benjamin C. Zipursky, 'The Inner Morality of Private Law' (2013) 58 *American Journal of Jurisprudence* 27, 36–42.

not prevented by the operation of this part of law with the assumption that they will be dealt with by state institutions through other legal domains that are less restrained by the moral infrastructure of rights-claims, with its agent-centeredness and strict relationality.[143]

The important distinction here is not about the values that are basic in or internal to each domain, or about the conception of the person we work with: as I will claim later, private law agents remain citizens in all their legal interactions. Rather, it is about the normative structure in which these values are housed and their forms of engagement. Even if, as I claim later, we can bring public values and consequentialist prescriptions to bear on the ongoing operation of private law, this requires us to understand strict relationality and the normative limitations it imposes on our deliberation and reasoning.

This sheds some light on the complex distinction between private law (especially tort law) and criminal law. The distinction between private litigation and public prosecution was already alluded to. It is important to see that despite the facts that historically, tort law developed, to some extent, from criminal law,[144] that they still share a similar vocabulary, and that private law does not necessarily deal with less serious wrongs,[145] the procedural distinction reflects important distinctions with regard to the kind of wrongs and calling to account featuring in these legal domains. While the details are contested, there is a relative consensus that criminal law wrongs are public: the political collective is sharing the wrong with the criminal victim; it owes him and other individuals duties to call perpetrators to account;

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[143] Weinrib, *The Idea of Private Law* (n 1) 45, 208–213; Oberdiek, 'Structure and Justification' (n 116) 111; Brudner (n 4) 352, 355; Jules L. Coleman, 'The Practice of Corrective Justice', in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 53, 54–56; Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391.

[144] David J. Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59

[145] S.E. Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 8.

and perpetrators are responsible and accountable to victims and to the collective.[146] While private law norms give individuals discretion about their enforcement, criminal law norms declare that something is not to be done,[147] and thus their enforcement is public.[148]

While it is not entirely accurate to say that private law duties are imposed just for the benefit of particular others rather than society as a whole,[149] it is clear that there is something more interpersonal, relational, or deontological—more private—in private law right-norms. It is for this reason that I tend to see state 'private law' rights and duties (the state does own property, enter contracts, cause harms negligently, and so on) as falling outside private law, and not only in its margins, as I will claim other corporate agents' rights and duties do. The entire agent-centered apparatus, including the restrictive conception of responsibility, seems to be much less relevant when talking about state responsibilities, duties, and liabilities.

In this vein, Tofaris and Steel claimed that justifications against liability for pure omissions in negligence (unless an agent-centered exception applies) are weaker when applied to the state—and especially to institutions like the police, that are tasked with monitoring and preventing certain harms to vulnerable individuals.[150] This is an important line of thought, that will be further explored in the next chapters: the nature of the state as a moral and legal agent is crucial for understanding constitutional horizontality.

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[146] Ibid 18–22; Duff and Marshall, 'Public and Private Wrongs' (n 54); Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016) 162; Ambrose Y. K. Lee, 'Public Wrongs and the Criminal Law' (2015) 9 *Criminal Law and Philosophy* 155. For a critical evaluation of such claims, see: James Edwards and Andrew Simester, 'What's Public About Crime?' (2017) 37 *Oxford Journal of Legal Studies* 105.

[147] A.P. Simester and Andreas von Hirsch, 'The Nature of Criminalisation', in *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 3, 4–5, 12–14.

[148] Jesse Wall, 'Public Wrongs and Private Wrongs' (2018) 31 *Canadian Journal of Law and Jurisprudence* 177.

[149] Nicholas J McBride, *The Humanity of Private Law—Part I: Explanation* (Hart Publishing, 2019) 40.

[150] Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police' (2016) 75 *Cambridge Law Journal* 128.

2.7. Conclusion

This was all a rather abstract and impressionistic sketch: highlighting some features of private law, downplaying others. But I hope it demonstrates the connection between private law's core and the domain of morality dealing with our duties towards other people: 'what we owe to each other', as Scanlon famously referred to it; a normative domain with a special 'manner of reasoning'.[151] I tried to connect the work of moral theorists like Feinberg, Nagel, Darwall, and Wallace, to the criticism against reductive accounts of private law rights and duties, and to the normative and procedural structure of private law's normative core. I did not provide a robust moral justification for this connection but mostly tried to explain the way it underlies private law's ongoing operation, that in turn solidifies and concretizes it.

Again, I must also emphasize that my claims are not absolute. There are and should be deviations from the bipolar structure, even in the core of private law; there are 'release valves' and exceptions to many bipolar rules; there are hybrid creatures, like class actions; there are domains, such as consumer law, in which public and private institutions work in tandem. We are not in the highly idealized Kantian universe that forms the background for some (important) private law theories: while they do capture some aspects of private law, we will see in the sixth chapter that they abstract away from some pieces of the puzzle that I find important, especially when approaching questions of constitutional horizontality.

My goal in this chapter was to leave as much room for further questions as possible. I therefore tried to be careful in my description of the bipolar structure: both in terms of its area of application and in terms of its components. The distinction between the core and the margins of private law will allow me to point at the areas of the regulation of horizontal

[151] Thomas Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998) 6–7.

relations that should be more liberated from its constraints. My less restrictive account of the nature of the strictly relational normative structure will allow me to be more hospitable towards a great variety of moral values and to leave room for positive duties and the promotion of collective goals, as long as they can be appropriately appealed to in a legal dispute involving a private right-claimant and a private agent answering his claims.

The most important thing I want to take from this chapter is that there is a difference between saying that the political community is present in private law cases in various ways and saying that the disputants make and contest right-claims on its behalf. If this was true, private law would have really been 'public law in disguise'.[152] The ways in which the political collective influences private law rights and duties are more nuanced. Thus, there might be some instrumental justifications for the bipolar procedural structure, but they cannot be our point of departure. Taking private law seriously as a discursive and self-reflective normative practice means, at the very least, placing its core on solid foundations.

The moral practice of rights-claiming and contesting, I believe, provides these foundations, while leaving us with enough leeway to raise questions about its interactions with external prescriptions, like the ones created by constitutional rights. Before raising these questions, however, we must first understand these prescriptions. This requires us to transition from interpersonal morality to political morality and from the individualistic tendencies of the conservative paradigm to the warm embrace of the progressive paradigm.

[152] Leon Green, 'Tort Law Public Law in Disguise' (1959) 38 *Texas Law Review* 1.

Chapter 3
Constitutional Rights

3.1. Introduction

This chapter is, in a way, a mirror image of the previous chapter: there, I described an ideal-typical agent-centered and strictly relational private law right—here, I describe an ideal-typical beneficiary-centered and loosely relational constitutional right; there, I claimed that this normative structure reflects moral practices of right-claiming, grounded in a choice-sensitive restrictive conception of personal responsibility—here, I add that a prescriptive and permissive conception of collective responsibility allows and often pushes constitutional rights to take a different normative structure. The main point is that while the practice of private law rights-claiming supervenes on interpersonal moral practices, the practice of constitutional rights-claiming supervenes on political moral practices: public agents are burdened with duties to discharge collective responsibilities to bring about and sustain large-scale states of affairs of social justice—to ensure that basic beneficiary-centered values are respected, protected, and promoted to an adequate extent in society.

Many of the rights found in modern constitutional bills of rights and human rights treaties have a consequentialist rather than a deontological structure: they do not focus on the direct relations between public agents and right-holders but declare that the latter should enjoy certain goods or not suffer certain harms. While the type of private law rights I discussed reflect the Will Theory's emphasis on choice and control, there is a type of constitutional rights that reflect the Interest Theory's emphasis on bringing about socially desirable states of affairs (however we define them) through the allocation of rights and duties.

The relaxation of agency-related limitations (because public agents are expected to have greater resources, weaker autonomy interests, and a central social role) allows constitutional rights to function as intermediate conclusions, more remote from duties. A big challenge in this regard is to show why despite the fact that parts of their scope do not correlate duties they still possess the relational normativity of 'real' rights. I try to meet this challenge, and add that the loose relationality and partial correlativity of these rights allows them to function as consequentialist standards against which we evaluate particular legal norms and the ongoing activities of various public agents.[1] This is a fundamental role constitutional rights play in modern liberal legal systems: it allows them to serve as the bridge between morality and law Dworkin presented so forcefully.[2]

This does not mean that there is no place for strictly relational constitutional rights: on the contrary, they capture important aspects of liberal political morality. Thus, again, I do not try to offer definitive accounts of the constitution or constitutional rights, nor to capture their nature or essence. I offer a theoretical reconstruction of a type of right that I see as central to modern liberal constitutional practices—and that, to a great extent, creates (or exacerbates) the challenge of constitutional rights-based horizontality. Thus, there are some aspects of constitutional rights-based reasoning that I downplay and others that I accentuate: my goal is to set the stage for the next two chapters, in which I try to see what happens when we put the two ideal right-types in the same room—when loosely relational constitutional rights affect the creation or change of strictly relational private law rights. Again, to fully understand the challenge of horizontality we must start with the kind of rights—here, constitutional rights—that push it towards the most normatively stormy waters.

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1 This is the answer I offered in Tom Kohavi, 'Loosely Relational Constitutional Rights' (12 December 2020) *Oxford Journal of Legal Studies*, which is (loosely) based on this chapter.

2 Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1996).

Zeroing-In

This chapter deals with a subset of our vertical rights against the democratic political collective. I am thinking about rights in different levels of abstraction: some refer to our ability to enjoy certain goods—for example, water, food, or health; others to our ability to engage in certain activities—for example, to vote, work, or marry; and others are normative clusters that entail certain prescriptions regarding goods and activities, but also relate to our status as moral agents—for example, to dignity, equality, or privacy. Such rights, I will claim, share a similar beneficiary-centered and loosely relational normative structure.

As noted in the first chapter, I embrace a rather abstract and inclusive definition of 'constitutional', that incapsulates legislative bill of rights and international documents incorporated into national legal systems. I do not focus on entrenchment in a formal constitution or the ability to strike down conflicting laws as the mark of constitutionality, as many theorists do: the effectiveness of institutional and procedural means of ensuring that constitutional norms are adequately respected, protected, and promoted, is context-dependent; and for our purposes, there is no need to draw bright lines in this regard. The important thing is that the kind of rights I talk about are substantively related to moral commitments of democratic and liberal political collectives, that were placed at the foundations of their legal systems. Thus, for example, if ones sees the European Union as a political collective, the rights in the European Convention on Human Rights can be seen as constitutional for our purposes.[3]

A challenge that I see as more central to this thesis is not to show that the rights I am talking about are constitutional but that they are rights. Doubts have been voiced in this regard about right-norms enshrining 'socio-economic' interests, like health, housing, or work; but

[3] See, in this regard: Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution' (2015) 32 *Social Philosophy and Policy* 244.

they apply to right-norms enshrining interests, like dignity, equality, or privacy as well. The concern, voiced by critics like Grégoire Webber, is that these norms are just 'helpful heuristics', 'normative shortcuts', or 'redundant placeholders'.[4] Like Pinocchio, they have the potential to become 'real' rights through legal processes, but they themselves are not.

The deep problem that seems to worry the critics is that these norms do not have the normative structure of a right: they fail to create a relational connection between an agent's responsibility and a beneficiary's well-being.[5] On the one hand, because they are abstract and complex, they fail to be conclusive and determinate and constrain the actions of agents. On the other hand, because they can be regularly limited, they provide weak protection to their beneficiaries and do not make any duty-bearer accountable directly to them.[6] This led defenders of modern constitutional rights-based practices, like Kai Möller, to concede that many of the rights recognized in them enshrine 'trivial' interests, and have no special normative force: that they often function like 'mere interests and policy considerations'.[7]

I will try to alleviate such concerns as we progress, while further exploring the importance of grounding constitutional horizontality in rights, as opposed to goals, values, or principles, for example. In general, my goal is to elucidate the conceptual features of the type of constitutional rights I am talking about and their importance more gradually, by touching examples and practical problems, rather than by offering categorical definitions.

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4 Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 122–123; Grégoire Webber, 'On the Loss of Rights', in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 123, 129–131.

5 Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996) 131.

6 Webber, 'On the Loss of Rights' (n 4) provides a summary of these criticisms. See also: Alon Harel 'Why Rights Matter', in *Why Law Matters* (Oxford University Press, 2014) 13, 26–37; Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015) 145–149; Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 98–110, 232–233.

7 Kai Möller, 'Proportionality and Rights Inflation', in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 155, 156, 159, 165–166.

Normative Aspirations

Behind every interpretative account there is a tug of war between justification and fit. This chapter, it might seem at certain points, allows justification pull slightly stronger: it might seem that I embellish the current state of the law a little too much. Having said that, I am talking about constitutional rights as they are in Anglo-American legal systems rather than just how they ought to be. The fact that certain legal actors in these systems fail to engage them in appropriate ways is a different matter. Again, my account is taking the concepts and values internal to constitutional law as it is seriously, but it is not exclusively tied to the subjective understandings of participants in this normative practice.

This chapter builds not just on the language used in constitutional documents (that is, as we will see, beneficiary-centered) but also, like in the previous chapter, on the nature of practices of rights-claiming, contesting, and adjudicating. An assumption I make in this chapter, and justify in the next, is that constitutional rights apply against public agents. Even when they apply directly against non-state agents (as in the case of the right against slavery in the United States, for example) they do not treat duty-bearers as dissociated private actors, but rather as agents burdened with aspects of the collective responsibility to attain and sustain social justice. Onora O'Neill claimed in this regard that if we see states as the primary agents with regard to how justice and rights are realized in a certain territory—with private actors mostly abiding by state-created legal norms—we should make this wholly explicit.[8] What I try to do in this chapter is to clarify the practice of directing constitutional rights at states, so that we could evaluate its justification and horizontal implications in the next chapter, in which I keep digging into the nature of the state as a collective constitutional agent.

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[8] Onora O'Neill, 'Agents of Justice' in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005) 37, 38–42.

The other side of the coin is that we claim these rights not as private beneficiaries, but as members of political collectives. Now, these rights are claimed by residents and foreigners as well: for example, by potential immigrants and even enemy combatants. Again, I focus on what I take to be the central case in our regard: the right claimed by the citizen against the state. While liberal states have some responsibilities and duties to all individuals, those that I focus on—that have more robust horizontal dimensions—seem less contested in the context of the state–citizen relations (though, again, I need not draw rigid lines here).

Much like in the previous chapter, I start with an account of what I see as the marginal case of rights in the legal domain in question. I refer to them, in a non-derogatory manner, as reflecting the 'private aspects' of constitutional rights. This is more confusing than talking about the public aspects of private law rights as the constitution seems entirely public. I claim that some constitutional rights are private in the sense that they focus on bipolar interactions between the state and particular citizens, in relative isolation from the rest of society.

I then go on to claim that many modern constitutional rights-based practices deviate from this understanding of constitutional rights: they reflect an understanding of rights that sees them as less deontological and more consequentialist. The beneficiary-centered values enshrined in them do not require the state to perform or avoid particular actions but rather to bring about or sustain certain large-scale states of affairs: that is, they are not just about what the state does to us but more generally about what happens to us. These rights burden state agents with ongoing dynamic responsibilities and duties to constantly evaluate and modify the legal system in light of complex and tentacular prescriptions. Understanding these consequentialist aspects of constitutional rights, as standards for the evaluation of the creation and change of sub-constitutional norms, is the key to understanding their horizontal dimensions and the ways in which they shape the regulation of horizontal relations.

3.2. The Private Side of Constitutional Rights

This section still has one foot, in a way, in private law: I claim that some constitutional rights have the agent-centered (or state-centered) and strictly relational normative structure discussed in the previous chapter. A good place to start, is what might be called the 'classical' liberal story about constitutionalism, that takes us back to the laissez-faire days when the conservative paradigm dominated debates about law and the state. In that story, the cornerstone of liberal democracy was the protection of the private sphere: liberty was seen as dependent on a limited government; majority rule was seen as legitimate only within boundaries; and constitutional rights were seen as a response to fears of excessive state action—they were designed to keep the state in check, thereby leaving individuals free to shape their lives in a market and civil society largely isolated from undue political intervention.

This way of thinking stands behind what was called a 'culture of authority' that sees public law as focused on 'delimiting the borders of public action'.[9] There are many examples reflecting this paradigmatic thinking about constitutional law—in many cases, from the United States, whose constitution is one of the oldest around.[10] Take, for example, the American 'state action' doctrine: according to it, the rights in the federal Constitution entail mostly duties not to harm right-holders directly—but the state does not violate these rights if it harms right-holders incidentally while trying to promote other (legitimate) goals,[11] or if it fails to prevent or respond to harms caused to them by private third parties.[12]

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9 Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Oxford University Press, 2010) 112–114, 118.

10 I will not expand here on the 'American exceptionalism' in the fields of constitutional and human rights—see, for example: Lorraine E. Weinrib, 'The Postwar Paradigm and American Exceptionalism', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 84.

11 Michael C. Dorf, 'Incidental Burdens on Fundamental Rights' (1996) 109 *Harvard Law Review* 1175.

12 Erwin Chemerinsky, 'Rethinking State Action' (1986) 80 *Northwestern University Law Review* 503.

Thus, the right to free speech might not protect individuals against 'neutral' limitations—for example, aimed at protecting public order or national security;[13] the right to abortion might not protect women against onerous regulation on abortion providers openly aiming at promoting benign goals such as health and safety;[14] and the right to equality might not only leave private actors free to discriminate and will not address disparate impact as an indirect result of state action, but also disallow affirmative action initiatives.[15] In all these cases, it is the state's direct actions and activities that constitutional rights address.

Such examples are not limited to the American legal system. It was claimed that the Magna Carta, the Bill of Rights 1689, and the traditional Common Law, aimed mostly at ensuring the rule of law and good administration rather than to protect individual rights.[16] Or, to take a more recent example, the European Court of Human Rights has responded to certain rights-claims by evaluating the process in which the right-infringing law was debated, created, and upheld by state agents.[17] It found, for example, that there was no violation when a broad ban on political speech was adopted in the United Kingdom following an extensive parliamentary debate—largely ignoring the impact it had on the right-claimant's interests.[18] What we see here, I will now claim, is a conception of constitutional rights that sees them as state-centered and strictly relational. Much like in private law, focusing on the boundaries of the acting agent's responsibility brings with it a deontological normative structure.

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13 Elena Kagan, 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 *University of Chicago Law Review* 413, 491–505.

14 Linda Greenhouse and Reva B. Siegel, 'The Difference a Whole Woman Makes: Protection for the Abortion Right after *Whole Woman's Health*' (2016) 126 *Yale Law Journal Forum* 149.

15 Ian Haney-López, 'Intentional Blindness' (2012) 87 *New York University Law Review* 1779.

16 See, for example: Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 18–20, 33.

17 Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473.

18 Tom Lewis, '*Animal Defenders International* v *United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77 *Modern Law Review* 460, 468.

State-Centeredness

While all constitutional rights are grounded in beneficiary-centered considerations, some of these considerations open the door for a kind of derivative agent-centeredness. The starting point is that the ways in which the state exercises its agency are of no intrinsic importance:[19] since the state is an artificial collective agent, we care only about the implications of its actions on individuals (including the state officials performing these actions). However, importantly, this does not mean that there cannot be deontological rights against the state: just that if there are such rights, they are ultimately grounded in beneficiary-centered values. We can see constitutional rights as deontological not because we want to preserve the state's moral integrity, nor because of complex consequentialist calculations, but because of reasons uncovered in interpretative processes enquiring into the nature of the beneficiary-centered values underlying these rights and the forms of public engagement they require.[20]

It could be claimed, for example, that while modern liberal states often 'trade' lives with other lives and other interests and rights when building roads,[21] there is something offensive towards this right—and towards our human dignity—in sacrificing life, in certain circumstances, in a principled manner to minimize deaths.[22] Similar claims could be made about the right against torture and inhuman or degrading treatment or punishment and aspects of the rights to equality, free speech, and freedom of religion. Some aspects of our well-being, it could be claimed in this vein, justify deontological constitutional rights.

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19 David Enoch, 'Intending, Foreseeing, and the State' (2007) 13 *Legal Theory* 69, 85–90.

20 Mattias Kumm and Alec D. Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing', in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 67. See also: Elizabeth S. Anderson and Richard H. Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503, 1513–1514, 1519–1521.

21 Steven Lukes, 'Comparing the Incomparable: Tradeoffs and Sacrifices', in Ruth Chang (ed), *Incommensurability, Incomparability and Practical Reason* (Harvard University Press, 1997) 184, 191–192.

22 Alon Harel, 'Necessity Knows No Law', in *Why Law Matters* (Oxford University Press, 2014) 108.

In line with the Diceyan tradition of seeing public law as an extension of private law applying to the state, the account of responsibility underlying these rights is similar to the one underlying private law.[23] The state has negative duties not to harm us in particular ways, and positive duties only when it assumed responsibility towards us: for example, it is responsible for the health and safety of prisoners or for justifying zoning decisions to local residents. Our focus, when engaging these rights—as can be seen in the American state action doctrine, for example—is on the state's choices, intentions, or actions, and their direct results.

We are more concerned, for example, about the state not taking sides in cultural or religious affairs or contaminating the market of ideas than about the ability of minority members to participate in the labour market or to publicly convey their opinions. The interests and needs enshrined in constitutional rights are not seen as important in themselves, but much like in private law mostly help delineate the duty-bearer's responsibilities and duties.

In this regard, it was claimed that American constitutional rights reflect a relatively indirect, partial, and indeterminate concern for individual interests and needs: they are more concerned with how the government acts.[24] Across the Atlantic, it was claimed that the human rights theory underlying the common law 'had not yet accepted that human rights are values which need to be protected per se, rather than only when state action is involved'.[25]

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[23] See, for example: Martin Loughlin, 'The State, The Crown and the Law', in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 33; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, 2012) 289; Olivier Beaud, 'Conceptions of the State', in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 269, 281.

[24] Richard H. Jr. Fallon, 'Individual Rights and the Powers of Government' (1993) 27 *Georgia Law Review* 343, 358–359. See also: ibid 364–365; Matthew D. Adler, 'Rights against Rules: The Moral Structure of American Constitutional Law' (1998) 97 *Michigan Law Review* 1, 13–14; Ashutosh Bhagwat, *The Myth of Rights* (Oxford University Press, 2010) 4, 64.

[25] Brice Dickson, 'Repeal the HRA and Rely on the Common Law?', in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds) *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing, 2015) 115, 121.

Strict Relationality

The other side of the coin of the derivative state-centeredness (or agent-centeredness) that some constitutional rights exhibit is an aversion to tradeoffs, to balancing, and to acting as intermediate conclusions: these rights are tightly paired with correlative duties. While these rights are not all absolute, they have a deontological normative structure that requires duty-bearers to respect rather than protect or promote them. The scope of each right is determined categorically and while focusing on direct interactions between the duty-bearer and the right-holder, whose borders are usually well-defined. For example, American constitutional theory and practice deal quite often with complex questions about what consists of government establishment of religion or content-based limitations of speech. Once the right's scope is determined it can be limited only in special circumstances: like Nozickian side-constraints, they cannot be limited even to prevent violations of rights of the same type.

Also like in private law, these rights grant right-holders the authority and standing to call duty-bearers to account for wronging them while addressing their actions in their immediate relations. The right-holder must have control over these rights if he is to be able stand for himself against the political majority and the powerful state through which it acts. These rights do not serve as intermediate conclusions and the grounds of further rights and duties: for them to perform this role, the right-holder would have had to surrender some control over the right's exercise, and this would betray the logic underlying them.

These ideas are reflected in Dworkin's account of rights as trumps, that, to a great extent, reflects, builds on, and theorizes American constitutional practices.[26] For him, the main point of rights against the state is not to protect interests or needs, but to exclude certain

[26] For similar accounts, see also: George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) 23–24, 105, 117–118; Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and Justification' (2014) 64 *University of Toronto Law Journal* 458, 469–476.

'suspicious' justifications for right-limitations.[27] Thus, he tried to tame the normative potential of rights—even the general right to be treated with equal concern and respect—by stating, for example, that they apply only against the state,[28] discharged in each state–citizen relationship separately ('person by person');[29] and could be traded-off only in 'catastrophic' circumstances.[30] Whether as a result of his concerns about utilitarianism or the tyranny of the majority (on a national or, in the American context, state level), he sees these rights as strictly relational: as shields against the promotion of 'political' goals or values. In non-catastrophic cases, when thinking about how to treat a particular citizen, the state cannot consider the rights of other citizens: this would have led to trade-offs. Strictly relational rights establish a right–duty nexus that is relatively isolated from the rest of the legal system.

Such strictly relational constitutional rights are important parts of the liberal menu of rights against the state: for example, it does seem worse for it to harm us intentionally than to allow us to be harmed.[31] These rights obligate it to treat or avoid treating particular right-holders in certain ways and to operate in areas of social activity in which it intervenes in an even-handed and formally neutral manner. These rights are by no means easy to discharge and can have wide-scale implications. They fit in the classical liberal story about the state, in which the cornerstone of democracy is liberty, that is dependent on limitations placed on the state. Constitutional rights are seen, in this story, as a response to our fear of excessive state action—a fear that our distant and recent history show is not wholly unwarranted. My claim in the rest of this chapter is not that there is something wrong with these rights: it is that they are not the only type of constitutional rights recognized in modern liberal states.

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27 Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *American Journal of Jurisprudence* 93, 130.
28 Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *Journal of Legal Studies* 301, 304.
29 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2013) 330.
30 Ibid 473. See also: Dworkin, *Freedom's Law* (n 2) 354.
31 Adam Omar Husein, 'Doing, Allowing, and the State' (2014) 33 *Law and Philosophy* 235.

3.3. Constitutional Right-Claims

In the next chapter, I will try to show that beneficiary-centered and loosely relational constitutional rights are constitutive parts of liberal social justice regimes. In the rest of this chapter, I make the more morally modest and largely interpretative claim that some of the rights we find in modern constitutional documents have this normative structure. We can see this in the terms used in these documents and in the nature of rights-based legal practices.

Strict relationality or bipolarity fail to capture the normative structure exhibited by many modern constitutional rights; and, in a way, their public or political aspects. While in some cases we make legal rights-claims as dissociated individuals, in others make them as associated citizens taking part in a shared political project;[32] while in some cases we claim our rights against private agents, in others we claim them against public agents.

We must therefore understand the concepts of the state and the political to understand the kind of normativity underlying these constitutional rights (and perhaps constitutional law more generally).[33] I am not going to address claims about the state's obsoleteness, since at least for the moment states still cast a large shadow over questions of constitutional rights and social justice: a fact reflected in the proliferation of international human rights treaties and constitutional bills of rights (and captured in Arendt's idea of a 'right to have rights'),[34] that often treat the state as the main guarantor of our fundamental rights.

As modernity progressed, and despite the atrocities committed by states in the twentieth century, political discourse in liberal states drifted away from the libertarian conception

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[32] Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd ed, Oxford University Press, 2013) 3–7.

[33] Quentin Skinner, 'A Genealogy of the Modern State' (2009) 162 *Proceedings of the British Academy* 325, 361–364; Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 183, 205–208.

[34] Hannah Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (Schocken Books, 1951).

of the state as a necessary evil. States proved themselves capable of promoting social justice, and laissez-faire ideas as often limited: even Thatcherism and Reaganomics did not entirely dismantle welfare state institutions such as progressive taxation and various public services; and the recent pandemic showed that when things go wrong, it is states that we turn to.

As part of this trend, constitutionalism came to be seen as a progressive force. A European (or global) constitutional model,[35] replaced the American model as the dominant one in the past decades. Under it, it is not only that new constitutional rights were recognized, but also that rights came to have a new foundational role in the legal system and a normative structure reflecting this role: they came to entail more positive duties and to shape the regulation of private activities. Importantly, they are no longer seen merely as checks on excessive state action, prescribing what is prohibited or permitted for it to do: they also determine what it is required to do. They do not just protect individual interests and needs from the state, but also ensure that they are respected, protected, and promoted by it.[36]

The moral infrastructure underlying modern constitutional rights is highly political: distinctions between rights and consequentialist forms of social justice are difficult to draw. The flags and banners of constitutional rights were raised above many progressive reforms and social movements, and thus they came to be seen as parts of public practices in which we deliberate about the justification of different regulatory schemes. While, as we saw, in some cases members of the political collective make rights-claims that are only about how the state treated or should treat them, other constitutional rights-claims are more 'multipolar': strongly tied to the interests, needs, and rights of third parties and to collective goals. This, I now suggest, is reflected in the practices in which these rights are claimed.

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35 Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).
36 N. W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 2–6.

Formal Reflections

The formal features of constitutional law reflecting this moral infrastructure are less visible than the zero-sum nature of private law disputes. The practice of constitutional rights-claiming is also relational, procedurally: rights-claims address the relations between citizens and the state.[37] But if we look deeper, we see that it is only loose relationality that the modern liberal practice of constitutional rights-claiming and contesting exhibits.

Traditionally, constitutional adjudication was limited to an injury suffered by particular claimants: we only had standing to address harms we suffered. Interestingly, this model was described as a 'private rights model',[38] or as a 'private-law model of public law'.[39] With the transition to the twentieth century, and especially after the Second World War, emerged a 'public law litigation model'.[40] As apex courts adjudicating constitutional disputes became central actors in the development of the political and legal systems, there was a transition to a 'public action paradigm',[41] or a 'public interest conception of public law'.[42]

Under this model, judges have more authority and control over the proceedings; outsiders such as civic organizations or regulatory agents are involved; remedies are more flexible and forward-looking, and thus also the dispute's focus, which no longer deals only with the vindication of the particular plaintiff's right.[43] As Cass Sunstein noted, the problem with bipolar models of public law adjudication is that sometimes 'the right–duty relationship between the government and any particular legal complainant is not crisp and bilateral'.[44]

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37 Thomas (n 6) 151, 156–159.
38 Henry P. Monaghan, 'Third Party Standing' (1984) 84 *Columbia Law Review* 277, 279–280.
39 Cass R. Sunstein, 'Standing and the Privatization of Public Law' (1988) 88 *Columbia Law Review* 1432.
40 Abram Chayes, 'The Role of The Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281.
41 Monaghan (n 38) 279–280.
42 Jason N.E. Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications', in John Bell, Mark Elliott, Jason N.E. Varuhas, and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 45.
43 Chayes (n 40) 1302.
44 Sunstein (n 39) 1446.

Right-holders do not just claim that the state wronged them but also that it wronged the collective: they call the state to account not just in their own capacity as an aggrieved individual that forms one part of a bipolar relationship but also as representatives of those that the state acts on behalf of.[45] To say that the interest claimed here is just about not having one's rights limited in improper ways,[46] gets things backwards, and reflects an individualistic, self-centered, and adversarial account of constitutional rights-claiming and contesting.

The state is not another private service provider we all happen have separate legal relations with. This is reflected in the relaxation of constitutional standing rules: even public interest groups or concerned citizens can sometimes raise constitutional right-claims.[47] Unlike in private law, the procedural framework is heavily shaped by instrumental considerations, and right-holders are often seen as private attorney general.[48] Thus, we do not always have the unique standing and authority to claim our own constitutional rights.

These ideas reflect a 'culture of justification'.[49] At its core, lies the 'right to justification', that is gaining popularity in constitutional theory: the right to have the state justify its decisions to citizens affected by them.[50] However, this right is strictly relational: it arises in bipolar interactions between the state and particular citizens. In the broader context of the culture of justification, this right is instrumental to ensuring that the regulatory prescriptions entailed by constitutional rights about state actions and inactions will be taken seriously

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45 Varuhas claimed that these are two distinct domains of public law—see: Jason N.E. Varuhas, 'Taxonomy and Public Law', in Mark Elliott, Jason N.E. Varuhas, and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 39, 63–71.

46 Monaghan (n 38) 285–286, 312–313. See also: Richard H. Jr. Fallon, 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113 *Harvard Law Review* 1321, 1360–1362.

47 Varuhas, 'The Public Interest Conception' (n 42) 57–60.

48 Louis J. Jaffe, 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff (1968) 116 *University of Pennsylvania Law Review* 1033; Fallon, 'As-Applied and Facial Challenges' (n 46) 1363–1368.

49 Cohen-Eliya and Porat, *Proportionality and Constitutional Culture* (n 9) 111–122.

50 On this right, see: Kai Möller, 'Justifying the Culture of Justification' (2019) 17 *International Journal of Constitutional Law* 1078. For a structural understanding of this right, see: Rainer Forst, 'The Justification of Human Rights and the Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711.

by various state agents. The regulatory aspect of these rights need not be seen as competing with the justificatory aspect;[51] but it is the latter aspect that manifests the most normatively demanding features of loosely relational constitutional rights, and that induces constitutional horizontality to take more progressive and ambitious forms.

Another formal reflection of the moral infrastructure underlying constitutional law—a natural implication of the remarks above about standing and the regulatory aspect—is that disputes between a citizen and the state do not have a zero-sum nature nor exclude external considerations. Loosely relational constitutional rights can be limited not only to respect, protect, or promote the rights of others, but also to promote various collective goals.[52] In this regard, Owen Fiss's criticism of 'the tailoring principle'—'the insistence that the remedy must fit the violation'—is apt.[53] Remedial decisions by judges cannot treat the constitutional wrong as an isolated incident: the question is not who between the litigating parties should bear a concrete burden, but rather how the system of constitutional rights, when properly adjusted, reflects on their respective legal rights and duties. This interconnectedness is relevant not only for judges, but for every decision made by a state agent.

Therefore, contrary to Dworkin's claim, state agents cannot discharge their constitutional right-based duties 'person by person': to return to a metaphor used in the previous chapter, the constitutional circuit is not closed; or, alternatively, it is multipolar rather than bipolar. What we see here is that both from the side of the rights-claimant and from the side of the responding state (that is also the potential duty-bearer) the constitutional practice of right-claiming and contesting manifests an underlying political moral infrastructure.

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51 Frank I. Michelman, 'Israel's "Constitutional Revolution": A Thought from Political Liberalism' (2018) 19 *Theoretical Inquiries in Law* 745, 749–755.

52 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 80–82, 262–277; Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 193–198.

53 Owen M. Fiss, 'The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 46–50.

From Form to Substance

The next stage in the argument is to see how this formal framework invites a more consequentialist understanding of constitutional rights, in the spirit of the Interest rather than the Will theory. As Wallace (whose relational theory of morality was mentioned in the previous chapter) noted, the transition from private agents to artificial or constituted public authorities brings aggregative reasoning and considerations into focus.[54] The state must often act as Nagel's 'benevolent bureaucrat', even when discharging its right-based duties.

The starting point is that unlike private individuals, the state might actually disrespect us as persons and citizens if it ignores our interests and needs when engaging others, even as rights-holders. There is a tension in such cases between our inviolability or independence and our 'unignorability' or 'unsacrifiability': a reflection, it was claimed, of two different aspects of our dignity.[55] While in our interpersonal relations respect might require that we see others as inviolable more often than unignorable, our relations with the state are different: its greater ability to predict and respond to harms to our interests and needs and its social roles change the meaning of its actions—aggregation and risk-management are two basic and almost unavoidable aspects of the activity of the modern state.[56]

Thus, it could be claimed that for the state, aggregation and consequentialist thinking often take the basic principle of the separateness of persons more seriously than attempts to be blind to factors exceeding the state's bipolar and separate interactions with citizens.[57] There are important differences between recognizing the equal moral status of persons and

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54 R. Jay Wallace, *The Moral Nexus* (Princeton University Press, 2019) 227–229.

55 Kasper Lippert-Rasmussen, 'Moral Status and the Impermissibility of Minimizing Violations' (1996) 25 *Philosophy and Public Affairs* 333.

56 Barbara H. Fried, 'What Does Matter? The Case for Killing the Trolley Problem (or Letting it Die)' (2012) 62 *Philosophical Quarterly* 505, 509–517.

57 Iwao Hirose, 'Aggregation and the Separateness of Persons' (2013) 25 *Utilitas* 182, 193–197.

their separateness and the ways in which we unpack and systematize their implications.[58] That the state, as a right-based duty-bearer, takes into consideration other right-holders and even collective goals (reflecting, in the end, individual interests and needs) does not mean that it treats us as 'receptacles' of value or mere 'carriers' of rights: it does this because this is what it means to respect us in certain contexts.[59] We do not assume a 'mass person' or 'social entity' whose interests and needs are enshrined in constitutional rights,[60] nor see the violation of the rights of the few as 'made right' by the greater good.[61] Treating rights as comparable is not the same thing as treating them as fungible or interchangeable (like bills of money): we acknowledge genuine trade-offs, in the sense that a benefit to one does not cancel the harm to the other, and there is a residue of moral regret.[62] Our separateness does not disappear in close-knit groups like the family, so of course not in the state.[63]

On the other hand, from our perspective as right-claimants, respect for us as right-holders is not determined by how the interests and needs of other individuals are set aside, but by how our interests are taken into account.[64] Sometimes, the best we can expect from the state is to bring our normative position as right-holders to bear on its deliberation and reasoning rather than seeing us as one citizen among many or as just another member of the political collective: it should still see itself as particularly accountable to us as right-holders,[65] even if it is also be accountable to other individuals at the same time.

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58 Will Kymlicka, 'Rawls on Teleology and Deontology' (1988) 17 *Philosophy & Public Affairs* 173.

59 Richard Yetter Chappell, 'Value Receptacles' (2015) 49 *Noûs* 322; Ben Eggleston, 'Consequentialism and Respect: Two Strategies for Justifying Act Utilitarianism' (2020) 32 *Utilitas* 1.

60 Alastair Norcross, 'Two Dogmas of Deontology: Aggregation, Rights, and the Separateness of Persons' (2009) 26 *Social Philosophy and Policy* 76, 77–78.

61 John Rawls, *A Theory of Justice* (rev edn, Harvard University Press, 1999) 26.

62 Yetter Chappell (n 59). For a criticism of constitutional rights in this regard, see: Urbina (n 6) 101–105.

63 Edward Harcourt, 'Demandingness and Boundaries Between Persons' (2018) 26 *International Journal of Philosophical Studies* 437.

64 Simon Cabulea May, 'Moral Status and the Direction of Duties' (2012) 123 *Ethics* 113, 124.

65 Thomas (n 6) 161–164, 169–171; Joseph Raz, 'Liberty and Rights', in *The Morality of Freedom* (Oxford University Press, 1986) 245, 249–251; Carl Wellman, *Real Rights* (Oxford University Press, 1995) 259–261; Tim Hayward, 'On Prepositional Duties' (2013) 123 *Ethics* 264, 279–280; Rowan Cruft, 'Why is it

While focusing on ourselves in claiming some rights is justified, in other cases it is a form of self-centredness;[66] and it might actually be a form of disrespect for the state to treat us as egoistic beings, who see their relations with it as adversarial or marketized. Thus, an explanation and a genuine attempt to get the system of rights right is a justified response in these situations. This is not just a reflection of the unique nature of the state's agency and responsibility, but also of how we often see our well-being members of the political collective: for example, many accept that our rights to liberty and freedom of movement could be limited in an attempt to contain a pandemic. It does not mean that we do not have these rights anymore or that we disappear in a communitarian puddle: these are still normatively robust rights, reflecting our moral status and well-being; but they can be limited without it being construed as us being used as means or sacrificed.

There are different justifications for why citizens of liberal democracies can and often should be burdened with the costs of justified state actions, that discharge their collective responsibilities.[67] These justifications need not go as far as seeing this as a case of 'shared responsibility': citizens are not held responsible for something they did together with others (like the responsibility of a violent mob, for example).[68] But we are part of political project (and it is from this perspective that the state's responsibilities and duties to strangers seem to be typically strictly relational); and this has implications for our right-claims and for the normative structure that our rights can take—the topic to which I turn to now.

Disrespectful to Violate Rights?' (2013) 113 *Proceedings of the Aristotelian Society* 201; Elizabeth Ashford, 'The Nature of Violations of the Human Right to Subsistence', in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, 2018) 337, 343–349; Mark McBride, 'Raz's Definition of a Right' (2018) 13 *Ratio Juris* 460.

66 Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford University Press, 2019) 78–79.

67 See, for example: Anna Stilz, 'Collective Responsibility and the State' (2011) 19 *Journal of Political Philosophy* 190; Avia Pasternak, 'Limiting States' Corporate Responsibility' (2013) 21 *Journal of Political Philosophy* 361.

68 Shannon Fyfe, 'Shared Responsibility and Failures to Prevent Harm', in Saba Bazargan-Forward and Deborah Tollefsen (eds), *The Routledge Handbook of Collective Responsibility* (Routledge, 2020) 216.

3.4. Grounds

I already said that in the traditional liberal story about constitutionalism, that sees the state as a danger, we limit it by means like checks and balances, separation of powers, and bills of rights. The normative focal point is state action. Here I add that the modern constitutional story is more about the citizen as a beneficiary of state action. The focal point is the individual and his interests and needs. The importance of limiting state action is only of derivative importance when it comes to constitutional rights: there might be better ways to respect, protect, and promote the beneficiary-centered values that underlie them.

This shift is of great importance: when we start with acting agents, we tend to carefully delineate the scope of their responsibility by focusing on specific actions—when we start with beneficiaries, we tend to focus on states of affairs relating to their interests and needs and remain more agnostic about the allocation of rights and duties designed to bring these states of affairs about. The difference is seen in many modern constitutional documents. The European Convention on Human Rights, for example, does not mention the state or its duties—instead, it focuses on the rights-holders: it declares that everyone has rights to enjoy certain goods or benefits or not to suffer certain harms or burdens.

As Thomas notes, 'all the moral weight is placed on the importance of each individual: her safety, her well-being, and her thriving are of paramount importance'.[69] The abstract beneficiary-centered phrasing of such right-norms highlights interests and needs as worthy of respect, protection, and promotion, and leaves it to public agents to figure out their right-based duties in this regard: they must decide how to bring about the states of affairs in which these complex rights are brought together under a unified normative scheme.

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[69] Thomas (n 6) 108.

These are not strictly relational 'three-term' rights, that refer to a right-holder, a duty-bearer, and an action or activity (Bert must not assault Ernie): they are two-term rights that refer to the right-holder and a state of affairs (Ernie should not be assaulted).[70] The agent-neutral and beneficiary-centered values that these rights are grounded in are more visible and closer to their surface, compared to what we see when it comes to strictly relational rights: a right to physical integrity rather than against battery, to dignity rather than against libel, and so on. Loosely relational constitutional rights wear their moral hearts on their sleeves; they reflect more than our interests and needs directly affected by state action.

Formally, the fact that the content of these rights does not include the identity of the duty-holder is less dramatic, as they obviously obligate the state (whether they also obligate private citizens is another question, to which we will get in the next chapter). Having said that, there is still a big question here: can a right-norm's substance have nothing to say about which actions it forbids or obligates the duty-bearer to perform? As I said in the first chapter, rights can successfully answer the 'who' question by obligating the state but still fail to be 'genuine', 'meaningful', or 'real' rights by failing to adequately answer the 'how' question and specify concrete duties.[71] What I want to claim in the rest of this section is that the special nature of the state's agency and responsibility allows us to use the language of rights in this regard without abusing it: the state's prescriptive collective responsibility creates the moral infrastructure that makes such abstract rights-claims possible and important.

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[70] Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Hart Publishing, 2018) 26.

[71] John Tasioulas, 'The Moral Reality of Human Rights', in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press, 2007) 75, 98.

Prescriptive Collective Responsibility

Scheffler claimed that the two foundations of the restrictive account of responsibility—a vision of social relations as consisting primarily in direct and clearly demarcated interactions; and a phenomenology of agency that distinguishes between acts and omissions, near and remote effects, and individual and group involvement—are under pressure in the modern world; and that this raises concerns about our habit of focusing on the individual agent as the primary locus of responsibility.[72] Indeed, when thinking about problems like poverty, discrimination, online privacy, or pandemics, the restrictive conception is limited. While its shortcomings appear in many contexts, they are very clear when it comes to the state.

The modern state is not 'intimately involved' in the creation of the problems mentioned above, nor is it always clear that it assumed responsibilities to tend to them. But this seems slightly irrelevant: like other institutional agents with no autonomy interests, we care less about what the state did about these problems and more about what it can do. When it comes to this question, institutional agents have many advantages over individual agents—for example, in terms of resources or information analysis capabilities.[73] Beyond its greater capabilities—and unlike private institutions—the state has a central moral role in society: to ensure that basic interests and needs are respected, protected, and promoted to a justified extent—to secure what John Rawls called 'background justice', by correcting the unjust results that uncoordinated private actions bring about over time.[74] It could be said that it is burdened with the complex responsibilities Hart referred to as 'role-responsibilities'. [75]

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[72] Samuel Scheffler, 'Individual Responsibility in a Global Age', in *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press, 2002) 32, 38–46.

[73] Michael Green, 'Institutional Responsibility for Moral Problems', in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge, 2005) 117.

[74] John Rawls, *Political Liberalism* (2nd edn, Columbia University Press, 2005) 266, 282.

[75] H.L.A. Hart, 'Postscript: Responsibility and Retribution', in *Punishment and Responsibility* (2nd edn, Oxford University Press, 2008) 210, 212–213.

The state's responsibility has two important features for our purposes. The first is that it is collective.[76] The state is, after all, an institutionalized agglomeration of people authorized to act on behalf of the political collective: while there are many complexities in debates about collective agency,[77] there is a general agreement that the state is a collective agent, that has attitudes, makes choices, and performs actions, above and beyond its constitutive members. To a great extent, it is the constitution (in its substantive, procedural, and institutional aspects) that solidifies the state as an agent acting on behalf of the political collective and burdens it with responsibilities exceeding those of individual citizens.[78]

While in private law we assume the justification of the status quo and focus on deviations from it, here we evaluate the status quo itself: we ask questions about poverty, public health and safety, or discrimination, for example. The responsibility to tend to such matters is collective—as Iris Marion Young claimed (following Arendt): 'this is a specifically political responsibility, as distinct from privately moral or juridical'.[79] The perspective of the private agent, from which 'there is no *we*, but only aggregates of *I's*', is not the only possible one.[80] As Derek Parfit noted, agent-neutral values seem to entail collective goals—or, in our case, responsibilities—to bring about desirable large-scale states of affairs.[81]

The second feature of the state's responsibility is that it is forward-looking, or prescriptive: the weaker limitations imposed by autonomy and choice and the state's moral role in society give us greater flexibility in delineating its responsibility. Thus, we do not do that

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[76] Marion Smiley, 'Future-Looking Collective Responsibility: A Preliminary Analysis' (2014) 38 *Midwest Studies in Philosophy* 1.

[77] For a general survey, see also: Marion Smiley, 'Collective Responsibility', in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer 2017).

[78] Alan Gewirth, *The Community of Rights* (The University of Chicago Press, 1996) 54–62; Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents' (2001) 15 *Ethics and International Affairs* 67, 69–74; David Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007) 97–104.

[79] Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 107–112.

[80] Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2000) 7.

[81] Derek Parfit, *Reasons and Persons* (Oxford University Press, 1984) 27.

just by ascribing meaning to its past actions and choices (like we do with the shop owner or contractual promisor, for example). The idea of a 'social contract' is metaphorical and opens the door for prescriptive moral analysis: when we ask what the state is responsible for, we often really mean to ask what it should be responsible for. As the idea of the 'living constitution' conveys, the answer to this question could change even if our interpretation of the state's past actions or choices remains stable: it is the social circumstances and our moral convictions about what the state should do about them that matter.[82]

This kind of responsibility can be grounded in the moral nature of various projects and activities: a party-invitee can be responsible to bring wine to the party, children can be responsible to contribute around the house, and the state can have certain responsibilities grounded in the nature of the liberal political project. This is not just a weak form of backward-looking responsibility (like vicarious liability or complicity).[83] It is a morally robust, forward-looking, and prescriptive form of responsibility, reflecting the state's role.

Political and legal theorists often ignore the state's uniqueness as a moral agent.[84] They think 'in hopelessly individualistic terms',[85] and work with a legalistic and 'personified' account of responsibility.[86] This is evident when it comes to the American state action doctrine that was already mentioned; but it has traces in other legal systems, principles, doctrines, and even in theories, like Dworkin's, that see constitutional rights as inherently strictly relational. I will get back to some of these points later. Now, it is more pressing to unpack the implications of the prescriptive conception of collective responsibility.

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82 See, for example: David A. Strauss, *The Living Constitution* (Oxford University Press, 2010).

83 Young, *Responsibility for Justice* (n 79) 17–19, 103–104; Adam Omar Hosein, 'Doing, Allowing, and the State' (2014) 33 *Law and Philosophy* 235, 246–250. See also: John Gardner, 'Book Review: Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*' (2004) 114 *Ethics* 827.

84 See, for example: Enoch, 'Intending, Foreseeing, and the State' (n 19) 91; Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge University Press, 1995) 60–62.

85 Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* 687, 695–696.

86 Young, *Responsibility for Justice* (n 79) 97–100.

Beneficiary-Centeredness

The previous section pointed at some differences between the kind of agency and responsibility underlying private law rights and those underlying constitutional rights. An important implication of these differences is that they allow us to focus on potential beneficiaries when deliberating and reasoning about rights instead of carefully trying to maintain an adequate degree of congruence between the burdened agent's responsibilities, duties, and liabilities—and to shift our gaze, at least as a first step, from actions to states of affairs.

An important feature of modern constitutional rights-based practices in this regard is the distinction between their abstract scope and their scope after they were justifiably limited by sub-constitutional norms in particular circumstances.[87] This distinction builds on a similar one in moral theory between rights-violations and rights-infringements. To take a famous example, a backpacker breaks into a secluded cabin to survive an unanticipated storm and uses food and wood in it without the permission of its owner. The 'specificationist' holds that there can be no conflict of rights here, as all relevant considerations figure in their delineation: if we decide that the backpacker acted within his rights, the owner has no rights in this regard.[88] The 'generalist', on the other hand, can hold that both parties have rights, as the owner's right relates, abstractly, to non-consensual use and recognizes that there will be exceptions, but does not specify them. A second normative stage is required to decide whether the limitation of the abstract right falls into an implied exception—whether it is a justified infringement—or whether it does not—whether it is an unjustified violation.[89]

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87 See, for example: Gerhard van der Schyff, 'Interpreting the Protection Guaranteed by Two-Stage Rights in the European Convention on Human Rights: The Case for Wide Interpretation', in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press, 2013) 65.

88 John Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325.

89 Judith Jarvis Thomson, 'Some Ruminations on Rights' (1977) 19 *Arizona Law Review* 45; Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' (1978) 7 *Philosophy and Public Affairs* 93. In

At the first stage, in which we delineate the abstract right—when, in the Interest Theory's terms, we move from values to rights—we focus on the right-holder's interests: we ask what it means to own property, for example. Considerations related to others are introduced only in the second deliberative stage, in which we move to more concrete rights and duties. This means that in the end of first stage we have a relatively pristine, abstract, and beneficiary-centered right, that is open to further well-specified limitations.

When delineating the scope of loosely relational constitutional rights we engage in interpretative inquiries into our conceptions of the person and society and in more consequentialist considerations of the possible contribution their recognition can make to bringing states of affairs in which interests and needs are best served.[90] We are focusing on the beneficiaries of each right and do not narrow their scope to factor in competing considerations. We do not hold, for example, that the right to health does not cover some basic treatment because it is expensive, or that the right to free speech does not cover harms to reputation or privacy: we delineate the scope of 'health', 'speech', and other interests and needs enshrined in such abstract constitutional rights in relative normative isolation.[91]

This means that distinctions that affect strictly relational (constitutional law and private law) rights delineations (for example, between doing and allowing or intending and foreseeing) are less central when it comes to loosely relational constitutional rights-delineations (though they might be introduced when realizing them). One of their main points is to focus on states of affairs rather than how they were brought about. Thus, when delineating them

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the legal context, see also: Stijn Smet, 'On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights' (2017) 17 *Human Rights Law Review* 499.

90 James Griffin, *On Human Rights* (Oxford University Press, 2008) 44, 127–128; Leif Wenar, 'The Value of Rights', in Joseph Keim Campbell, Michael O'Rourke, and David Shier (eds), *Law and Social Justice* (MIT Press, 2005) 179; Dimitrios Krytisis, *Where Our Protection Lies* (Oxford University Press, 2017) 182–189.

91 Laurens Lavrysen, 'The Scope of Rights and the Scope of Obligations', in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR* (Cambridge University Press, 2013) 162.

we do not focus on the degree or nature of state involvement: to revisit examples mentioned above, while it matters if our ability to convey a certain message to the public, apply for a certain job, or undergo an abortion, are limited directly or intentionally by the state, indirect limitations resulting from the public promotion of 'benign' goals or private limitations, are not excluded from the scope of our rights to free speech, equality, or abortion, that are not just about what the state does to us, but about how we do, more generally.

A purely beneficiary-centered and non-relational analysis does not capture how the recognition of such beneficiary-centered and abstract rights is made possible by assumptions we make about the state's agency and responsibility, and their special connection to certain aspects of our well-being as beneficiaries of potential state action. Unlike private individuals, state agents can be in violation of their constitutional right-based duties even by doing nothing: for example, failing to respond to a pandemic or a rising tide of racism or poverty. That is, we can talk about wrongfulness here even if no agent directly wronged another.[92] This is trickier in interpersonal morality: as there is no 'residual wrongdoer', we tend to assume that if no one was wronged directly, the state of affairs is just. But in liberal political morality—at least of the Rawlsian or egalitarian variant—we often see the state's responsibility as more systematic, and this is reflected in the structure of loosely relational constitutional rights. The focus is on the right-holder as a potential beneficiary of state action (or inaction).

[92] For criticism of traditional conceptions of rights in that regard, see: Martti Koskenniemi, 'The Effect of Rights on Political Culture', in *The Politics of International Law* (Hart Publishing, 2011) 133, 136, 139.

3.5. Form

In this section, I unpack the normative structure built on the prescriptive conception of responsibility and the beneficiary-centeredness it facilitates. I try to show how it differs from competing accounts of the normative structure of modern constitutional rights, how the correlation between these rights and the duties they entail is merely loose and allows them to serve as intermediate conclusions, and how they allow considerations external to the direct relations between the right-holder and the duty-bearer to shape their legal positions.

A basic feature of loosely relational constitutional rights is their consequentialism—in the spirit of the Interest Theory. Their main point is that the constitution requires us—the political collective—to bring about states of affairs in which, for example, we are free from physical threats, hunger, or disease; enjoy a justified degree of privacy and access to health services or to the political and legal systems; and can communicate our opinions to others, manifest our religion, and participate in protests and demonstrations. The political collective has rights-based duties to bring these complex and interdependent states of affairs about.

Now, when talking about the loose relationality of these rights against the collective, I do not mean to suggest that they must always be respected, protected, and promoted, by all of its members, taken individually: that is, that private agents could violate them. I will only reach the topic of these rights' horizontal dimensions in the next chapter. The thing is that to fully comprehend our options in discharging constitutional right-based duties, we must first understand the nature of these duties and what they require of us as a collective.

What can already be said at this point is that loose relationality is not non-relationality: while it is not necessarily about the bipolar relations between two parties, taken in relative isolation from the rest of society, it is also not about the relations between a right-holder and a protected value: the way we often think about moral human rights (though, as I said in

the first chapter, I think we often assume humanity acts as a residual collective agent). While the details of how constitutional rights are directed at the political collective are still unclear, it can already be seen that this direction has important normative implications.

On the other hand, the degree of relationality here is looser than the one found in accounts of constitutional rights that see them as having the normative structure rights often have in interpersonal relations. Dworkin, for example, saw his account of rights as trumps as 'the political equivalent of the most familiar sense in which the idea is used in personal morality'.[93] Webber criticized (what I call) loosely relational accounts of constitutional rights for failing to see them as 'as relations between persons', thereby divorcing them 'from the moral-political context in which they are claimed'.[94] Thomas, whose approach runs parallel to mine in many ways, sees all rights as applying between two persons and as entailing agent-relative constraints.[95] This means, for example, that if private agents cannot know which implications a right has for them, it cannot be a right as it is not 'sufficiently directed'; but if someone (say, a state agent) solves this problem by allocating concrete duties to agents, they thereby rob private agents of their agency for reasoning from rights to duties.[96]

What I try to do in this section—and this is a central step in my general argument—is to show that the kind of normative relations that rights create can exist between individual right-holders and collective duty-bearers: that not all rights tie individuals together in practical nexuses comprised of strictly relational rights and duties.[97] The starting point in unpacking loose relationality is to see how the type of responsibility at work here allows us to conceive of rights as standards shaping the allocation of more concrete norms.

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93 Dworkin, *Justice for Hedgehogs* (n 29) 327–329.
94 Webber, 'On the Loss of Rights' (n 4) 132.
95 Thomas (n 6) 159, 161–164, 169–171.
96 Ibid 147.
97 Andrea Sangiovanni, 'Human Rights, Interests, and Variation', in Ester Herlin Karnell and Matthias Klatt (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford University Press, 2020) 53, 60, 66.

Non-Correlativity

This section seats between the first stage of constitutional rights-based reasoning, of rights-delineation, and the second stage, of rights-realization. As I said, the scopes of loosely relational constitutional rights form complex consequentialist standards against which state action is evaluated. The challenge is that some aspects of theirs might not entail concrete rights and duties: they will not be realized in sub-constitutional law. For example, we saw that we have a right to free speech even if it could be limited to protect someone's privacy, or a right to freedom of movement even if it could be limited in an attempt to fight a pandemic.

The abstract language of loosely relational constitutional rights entails a certain level of agnosticism about how to bring constitutional states of affairs about.[98] While these rights must eventually, after the second stage, be translated to concrete, consistent, and action-guiding norms,[99] they start their normative life by entailing vague prescriptions. The concern is that this is a conceptual impossibility, as all rights must possess what Raz called 'peremptory force':[100] they must provide stringent, decisive, determinate, or conclusive reasons.[101] This is what separates them from values,[102] or responsibilities,[103] and their entailed duties from imperfect duties the violation of which wrongs no one in particular.[104]

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98 Cruft, *Human Rights* (n 66) 143–149; Thomas (n 6) 147; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) 219–220; David Bilchitz, *Poverty and Fundamental Rights* (Oxford University Press, 2007) 89–92.

99 Elizabeth Ashford, 'The Inadequacy of our Traditional Conception of the Duties Imposed by Human Rights' (2006) 19 *Canadian Journal of Law and Jurisprudence* 217; Pavlos Eleftheriadis, *Legal Rights* (Oxford University press, 2008) 118–119.

100 Joseph Raz, 'The Nature of Rights', in *The Morality of Freedom* (Oxford University Press, 1986) 165, 183, 192.

101 Webber, 'On the Loss of Rights' (n 4) 146; N.E. Simmonds, 'Constitutional Rights, Civility, and Artifice' (2019) 89 *Cambridge Law Journal* 175, 181–185; Benedict Rumbold, 'Towards a More Particularist View of Rights' Stringency' (2019) 25 *Res Publica* 211.

102 Cruft, *Human Rights* (n 66) 161–162.

103 Corinna Mieth, 'On Human Rights and the Strength of Corresponding Duties', in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter, 2012) 159, 181–182.

104 Simon Hope, 'Kantian Imperfect Duties and Modern Debates Over Human Rights' (2014) 22 *Journal of Political Philosophy* 396. See also: Eoin Daly, 'Republicanizing Rights? Proportionality, Justification, and

The answer to this concern starts with Raz's claim that 'rights have a special force which is expressed by the fact that they are grounds of duties, which are peremptory reasons'.[105] Rights, as intermediate conclusions, are not supposed to have peremptory force—duties do. Rights have a special force. We should not expect them, therefore, to be stringent, decisive, determinate, or conclusive: indeed, it would have gone against their dynamic and consequentialist nature, envisioned by the Interest theory, if this were true.

A loosely relational constitutional right, to borrow Feinberg's words, is 'a must have […] not wholly translatable into any number of must do's'.[106] This is crucial if we want these rights to act as dynamic standards shaping the allocation of further rights and duties. In this role, they act as inputs into normative deliberations, not just their outputs—as reasons rather than rules, in the sense that they apply simultaneously, can conflict without being adjusted with one another in a zero-sum manner, and do not disappear from the normative universe if they are outweighed in certain instances.[107] When they are outweighed or excluded from a decision, it is only in a particular context and only temporarily.[108] The reason is defeated at the sub-constitutional level but it keeps operating in the constitutional level: as Aharon Barak claims, at this level it keeps operating as an ideal we strive to realize.[109] In this sense, the abstract scope of these rights is not 'prima facie': these rights always maintain their robust constitutional normativity, even when they are defeated as reasons for regulation.

Non-Domination', in Ester Herlin-Karnell, Matthias Klatt, and Héctor A. Morales Zúñiga (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford University Press, 2019) 197, 206–212.

105 Raz, 'Liberty and Rights' (n 65) 249.

106 Joel Feinberg, 'Duties, Rights, and Claims' (1966) 3 *American Philosophical Quarterly* 137, 143. See also: Rowan Cruft, 'Human Rights as Rights', in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter, 2012) 129.

107 Joseph Raz, 'Postscript to the Second Edition: Rethinking Exclusionary Reasons', in *Practical Reason and Norms* (2nd edn, Oxford University Press, 1999) 178, 187.

108 I will go back to this point in the fifth chapter.

109 Barak, *Proportionality* (n 52) 86. See also: ibid 38–42, 83–98.

This is important not just because of reasons touching the 'moral remainder' of right-infringements: about explanations, apologies, or compensation.[110] It is also important because we want state agents to constantly strive to realize their full scope, even if the society in which this is possible seems remote. For example, while murder is not part of our liberty rights, killing should be, as we want state agents to reflect on it when shaping self-defence norms in criminal law and tort law. These rights' scopes do not cover all actions falling within their 'semantic reach':[111] they are also shaped by normative considerations. However, they are still broad, as we want state agents to reflect on many complex considerations.

Importantly, this imbues their entire scopes—even temporarily defeated regulatory prescriptions—with special normative force. As Larry Sager noted, constitutional rights could be seen as 'conceptual icebergs': even the submerged and not judicially enforceable parts are important for understanding the constitution as a whole, for the justifications of rights-based decisions of judges and other state branches, and for public deliberations about law and the state.[112] For such purposes, it is important to see such rights as more than a collection of strictly relational right–duty pairs. In this sense, all reasons entailed by these rights have a prominent role in public practical reasoning, that other normative incidents do not: public agents must explore their entire scopes and their implications for their decisions. Because these rights are complex and their requirements change, there are no clear distinctions between different parts of their scope, in terms of their special force; even if some parts will receive more weight in the second deliberative stage to which we turn now.

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[110] Danny Frederick, 'Pro-Tanto Versus Absolute Rights' (2014) 45 *Philosophical Forum* 375, 388–392.
[111] Urbina (n 6) 230–231, 246–248. See also: Cruft, *Human Rights* (n 66) 149–156.
[112] Lawrence Sager, 'Material Rights, Underenforcement, and the Adjudication Thesis' (2010) 90 *Boston University Law Review* 579, 584–585.

Inclusion

When reasoning about strictly relational rights we tend to ignore their implications for the interests and needs of third parties or collective goals, but part of the point of loosely relational constitutional rights is to take such considerations into account. We do not give weight to consequentialist reasons just by limiting the scope of strictly relational rights: a feature of rights accepted by liberal theorists like Rawls and Nagel.[113] We actually allow such reasons to form part of our constitutional rights-based deliberations. As claimed in the third section, this is an inevitable implication of the complex form of collective agency underlying state action and the state's responsibilities to attain and sustain social justice.

Since we were generous when delineating these rights' scope, they are interconnected and conflicting.[114] We just delayed many difficult questions to the stage in which we realize them in sub-constitutional law. Since they are elaborate and pervasive, public agents face a normative spider's web, to borrow Fuller's metaphor: 'a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole'.[115] A pull of libel law in one direction, for example, means more free speech, while a pull in the other direction means more privacy. To use another metaphor, these rights are not 'isolated islands'.[116]

This is reflected in the common use of limitations clauses and proportionality tests in post-war constitutional practices.[117] There are some strictly relational threshold conditions: for example, the legitimate purpose requirement categorically excludes some justifications

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[113] Rawls, *Political Liberalism* (n 74) 292, 295–296, 333–335; Thomas Nagel, 'Personal Rights and Public Space', in *Concealment and Exposure: And Other Essays* (Oxford University Press, 2002) 31, 32–36.

[114] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 23–24, 48; Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 193–198.

[115] Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 395. For a similar use of this metaphor, see: Shue, 'Mediating Duties' (n 85) 693.

[116] Amartya Sen, 'Consequential Evaluation and Practical Reason' (2000) 97 *Journal of Philosophy* 477, 500. See also: Aharon Barak, 'Forward: A Judge on Judging' (2002) 116 *Harvard Law Review* 19, 43.

[117] Barak, *Proportionality* (n 52) 80–82, 262–277. See also: Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart, 2007) 131, 153–164.

for rights-limitations (like discriminatory goals). But once we move past them, we enter a more consequentialist terrain: when public agents consider what their right-based duties to a particular person are, they must take into account their right-based duties to others and their more general and imperfect duties to promote collective goals.[118] That is, they cannot focus only on their immediate actions and their relatively direct implications.

This means that it is misleading to talk about these rights as 'trumps' or as having 'lexical priority'.[119] On the other hand, it is also a mistake to say that this makes them 'weaker', in some sense, compared to strictly relational rights, whose scopes already exclude those areas in which competing rights or values outweigh them. Strictly relational rights are limited, but just in advance: the difference lies not the force of rights but the stability and simplicity of rights-based reasoning—it is a matter of how we want duty-bearers to engage them.[120] When it comes to loosely relational constitutional rights, as I said, we want to bring abstract and complex standards to bear on the ongoing activities of public agents.

The idea is not to 'maximize' these rights: to engage in the kind of 'utilitarianism of rights'.[121] The normative relations among rights and between them and other values are more complex than a one-dimensional, simple, consequentialist calculation: both the complexity of values like autonomy, privacy, or equality and their interdependence means that we cannot just 'maximize' them:[122] it seems better to say, with Robert Alexy, that our goal is to try and 'optimize' them in one relatively coherent system.[123] This optimization does not take place

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[118] Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2010) 4 *Law and Ethics of Human Rights* 34; George Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' (2011) 24 *Canadian Journal of Law and Jurisprudence* 129.

[119] See also: Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law and Philosophy* 1.

[120] Wenar (n 90) 187–188; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174, 187.

[121] Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974) 28.

[122] George Letsas, 'Rescuing Proportionality', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 316, 324–328.

[123] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 47–48.

at the delineation stage,[124] in which rights are treated in relative isolation. Rather, it takes place in the stage in which public agents try to realize them: then, they do not engage them in their abstract form—for example, try to balance equality and liberty; rather, they engage aspects of theirs and degrees of their realization that are implicated in particular factual circumstances.[125] While adequately delineating their scope is often necessary to adequately realize them, it is realization that public agents are duty-bound to get right: normally, we cannot challenge the delineation if it does not affect the realization of our rights.

It is the realization stage that introduces the first wave of right-based duties. It is here that rights get their weight—which is in fact the weight of the duties they entail. Their weight is affected, in the spirit of the Interest Theory, by how well they serve the interests and needs of third parties or collective goals.[126] It is these duties, rather than rights, that conflict with each other: on the constitutional level, these rights are abstract and contain their theoretically conflicting areas; but when abiding by the regulatory duties to realize them in sub-constitutional law, state agents must often decide which duties to discharge and which to leave unfulfilled. The degree to which each right is realized depends on many factors; and thus, it is difficult to talk about their violation in simple binary terms. Since they provide the public duty-bearer with leeway about how to bring the desired states of affairs about, there is some flexibility about the thresholds below which we talk about their violation.[127]

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[124] For such a claim, see: Alison L. Young, 'Proportionality is Dead: Long Live Proportionality!', in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 43.

[125] Virgilio Afonso Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 *Oxford Journal of Legal Studies* 273.

[126] Joseph Raz, 'Rights and Politics' (1995) 71 *Indiana Law Journal* 27, 33; Alon Harel, 'Revisionist Theories of Rights' (1997) 11 *Canadian Journal of Law and Jurisprudence* 227.

[127] Feinberg 'Duties, Rights, and Claims' (n 106) 141; Goodin (n 84) ch. 5.

3.6. The Public Side of Constitutional Rights

I revisit the stage of delineation in the next chapter, and the stage of realization in the one that follows. Before moving forward, I want to reconnect this debate to the political moral infrastructure underlying it: that is, to the progressive moral paradigm. The public nature of loosely relational constitutional rights is shaped by the combination of two factors: first, their special relational normative force—that is, the fact that they are 'pre-emptive, action-guiding and have coercive implications', and 'specify the paths and opportunities open to the right-holder';[128] and second, their consequentialist role as standards for the allocation of more concrete legal norms, with the goal of bringing desirable states of affairs about.

Both strictly relational and loosely relational constitutional rights cannot be too complex: legal agents must be able to familiarise themselves with and rely on them. The specification strategy runs into problems in this regard as it seems that it is better to know that we have abstract rights that could be limited in certain circumstances than more stringent rights containing countless exceptions. But here loosely relational rights run into a problem: since they can be limited quite regularly, an increased degree of social solidarity and trust in the political collective are required—we must assume that they will be limited only when this is necessary and proportionate. The important thing is not the quantity or severity of limitations but the quality of justifications offered for them: we accept, for example, that during a pandemic many of our rights will be limited for a relatively prolonged period—this does not mean that we lose these rights, just that the public practice in which their limitations are justified will become denser and occupy a more visible role in society for a while.

[128] Eleftheriadis (n 99) 124–125.

The idea is not that all our constitutional rights need to be stringent like the rights against torture or slavery: it is that we must have a sufficient degree of trust in our political and legal systems. This brings to light these rights' cultural dependence and roles in constituting social practices that solidify our basic moral values as political collectives—that bring into focus our conceptions of the person and of society, and highlight certain aspects of our well-being as beneficiaries as worthy of respect, protection, and promotion.[129] Take, for example, public debates about what we can do with our property, who we can marry, what can we publicly say about politics, which medical services should be available to us, or what personal information can internet service providers ask us to surrender to them: in such cases and others, public debates are shaped by constitutional rights-based considerations.

Loosely relational rights—more than strictly relational stringent rights—help us see situations of moral conflict without ignoring their tragic nature: they are not 'trumps' that put an end to moral conflict, but reasons that structure our deliberations. To borrow Waldron's words, these rights are not 'moral absolutes, standing tragically unemployed, on the sidelines of a world riven by distasteful conflict and hard choices. On the contrary, they are supposed to be our best, most honest, and most respectful response to such a world'.[130]

Such social practices do not just help political collectives achieve clarity about their moral values—they also feed back into the moral foundations of rights and strengthen them. As history shows, rights are not worth much if they have no public support: as James Madison wrote over two centuries ago, rights must 'become incorporated with the national sentiment' to 'counteract the impulses of interest and passion'.[131] Constitutional rights are not

[129] Harel 'Why Rights Matter' (n 6).
[130] Jeremy Waldron, 'Nozick and Locke: Filling the Space of Rights' (2005) 22 *Social Philosophy and Policy* 81, 109. See also: Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 509.
[131] Letter to Thomas Jefferson (17 Oct. 1788). See also: Rex Martin, *A System of Rights* (Oxford University Press, 1993) 60–64, 69.

just reflections of the political and legal cultures underlying them, nor measures agreed on in moments of collective moral transcendence: they refine social justice values and imbue them with special force, derived from the relational normativity of rights, without grinding them into specific and rigid rules. From this perspective, the weak 'organic connection with the existing legal rules' is not a cause for concern when it comes to loosely relational constitutional rights:[132] it is part of the promise they hold as evaluative standards.

This means that while, formally, public agents need only conform rather than comply with the reasons entailed by such rights (they need not act with the intention to respect, protect, or promote the values underlying them),[133] to attain and sustain the social practices giving these rights much of their value they will often have to do more. Because these values are so complex, incidental respect, protection, and promotion are highly unlikely: public agents will therefore have to develop and strengthen the institutional disposition to do so, and quite often to demonstrate these dispositions through actions to the general public.

Loosely relational constitutional rights cannot be treated as mere summaries of their underlying values.[134] The use of the concept of rights to refer to them is not just a 'linguistic and procedural accident'.[135] Their normative robustness means that we cannot tolerate 'banal […] recourse to rights language'.[136] The constraints on public agents are not just technical legal requirements: they reflect an attempt to engage in a kind of alchemy, fusing together complex consequentialist standards with the relational normativity of rights, that is itself grounded in, reflects, and solidifies underlying moral practices.

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[132] As it is, for example, for Simmonds—see: Simmonds, 'Constitutional Rights' (n 6) 191–192.
[133] Raz, 'Postscript' (n 107) 179–180.
[134] See: Webber, *The Negotiable Constitution* (n 4) 122–123; John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127, 133–135, 138–141.
[135] Eoin Daly, 'Freedom as Non-Domination in the Jurisprudence of Constitutional Rights' (2015) 28 *Canadian Journal of Law and Jurisprudence* 289, 309.
[136] Martti Koskenniemi, 'The Effect of Rights on Political Culture', in *The Politics of International Law* (Hart Publishing, 2011) 133, 134, 151.

The Steam Engine

An important feature of loosely relational constitutional rights in this regard is their 'normative demandingness': a feature that has often been associated with different forms of consequentialism and criticized for being too burdensome for individual agents. The special thing about them in this regard is the constant need to address complex standards regarding large-scale states of affairs—standards possessing the robust relational normativity of rights. This is a huge change for legal systems in which state agents were accustomed to justifying their decisions by appealing to nebulous terms like principle, policy, tradition, or precedent, and in which the relevance of rights was dependent on rather formalistic considerations about the degree or nature of state involvement in particular factual circumstances.

Loosely relational constitutional rights combine the supreme legal status of the constitution, the normative force of rights, and complex consequentialist prescriptions. To respect, protect, and promote them, public agents can no longer be satisfied with not harming individuals in relatively direct and well-defined ways: they must explore the ways in which their actions or inactions can contribute to the attainment or preservation of the most adequate and coherent system of rights; and this means that the realization of other values can no longer limit constitutional rights more than is necessary and proportional.[137] This allows constitutional rights to frame the practical reasoning of public agents.[138]

This shows that legal and moral practices of respecting, protecting, and promoting rights cannot focus on one or two of the state's branches, or exclude certain basic social institutions like the media or the market. Fuller, for example, famously claimed that judges

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[137] Frederick Schauer, 'Proportionality and the Question of Weight', in Grant Huscroft, Bradley W. Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 173, 180.

[138] Mattias Kumm, 'Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution', in Vicky C. Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 51, 57.

will struggle with highly complex 'polycentric' legal disputes.[139] This is something to consider: the adjudicative process has its limitations (a topic I touch in the fifth chapter). But we cannot say, categorically, that the requirements of loosely relational constitutional rights should be tended to only by the government or the legislature. This is seen quite well in states of emergency: during the recent pandemic, for example, local and national public authorities wanted to limit the freedoms of movement, assembly, and protest; and it was very important that these rights can be limited only by proportional laws that could be adequately supervised by courts and the public rather by capricious and unconstrained administrative acts, which often fly under the public radar despite having dramatic implications.

But the nets cast by loosely relational constitutional rights are important not just (and perhaps not even mostly) because of their negative and protective roles: some of their most important implications in recent decades relate to large-scale legal reforms—for example, combating discrimination in the labour or housing markets, ensuring fairer criminal trials, or making the formal structure of the family more flexible. Rights (for example, to equality or liberty) were utilized by activists and legal reformers to overhaul antiquated legal domains, principles, and doctrines; they brought political collectives to evaluate the most distant corners of their legal systems in light of social justice principles. It was claimed, in this regard, that there is a 'rights inflation':[140] that the spread of rights will lead to the reduction in their value and force. But this critique cannot serve as a categorical argument against the use of abstract rights in public debates: it just shows that we must always ask whether the language of rights is effective in harnessing public support and whether we are using it properly.

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[139] J.W.F. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *Cambridge Law Journal* 367.

[140] Möller, 'Proportionality and Rights Inflation' (n 7).

Public and Private

In the first chapter, I presented the claim that during the Middle Ages political rule was seen, to a great extent, as located in the private sphere: it was thought of in terms of a 'contract' between the ruler and the ruled, and their mutual obligations were seen as strictly relational. While the liberal social contract tradition is more abstract and sophisticated, it left similar traces on our constitutional discourse. It draws our attention to acting state agents and thus opens the door for the conservative paradigm to shape our constitutional discourse.

The common law has a grand tradition of using private law tools to regulate the state, that is treated as just another private organisation; a tendency still exhibited in some cases by English law.[141] In a similar vein, it was claimed that the American Supreme Court acts as a 'private law court in a public law system': that it works according to a dispute resolution model; focuses on isolated bipolar legal interactions; treats rights as mere protections against purposive state actions; and disregards third-party and collective interests.[142]

Dworkin's account of rights as strictly relational trumps was criticized in this regard for ignoring the public aspects of constitutional rights;[143] and it was even claimed that the 'rights-as-trumps ideology' pulls American constitutional law in a problematic direction:[144] towards a kind of rights-talk that is individualistic, suspicious of the state, ignores structural injustices, and maintains rigid distinctions between public and private and between courts as protectors of rights and other state agents as promoters of public policy.[145]

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[141] Jason N.E. Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) 171–172, 181–184. See also: Skinner (n 33) 354–360.

[142] Jamal Greene, 'A Private Law Court in a Public Law System' (2018) 12 *Law & Ethics of Human Rights* 37.

[143] Robin West, 'Rights, Harms, and Duties: A Response to Justice for Hedgehogs' (2010) 90 *Boston University Law Review* 819, 821–829.

[144] Jamal Greene, 'The Supreme Court 2017 Term—Forward: Rights as Trumps?' (2018) 132 *Harvard Law Review* 37, 38–56, 67–74.

[145] Robin L. West, 'Tragic Rights: The Rights Critique in the Age of Obama' (2011) 53 *William and Mary Law Review* 713.

Much like private law, constitutional law is pulled by the conservative moral paradigm. Sometimes this pull is congruent with beneficiary-centered considerations that underlie strictly relational and technically or derivatively agent-centered constitutional rights. But the danger, on which I will have more to say in the next chapter, is that we will see all or most constitutional rights as having this more deontological normative structure. What I tried to show in this chapter is that in the twentieth century, and especially after the Second World War, our constitutional rights-based discourse (together with our human rights-based discourse) started being pulled by the progressive moral paradigm, that does not focus on isolated social interactions but takes the bird's-eye view and brings various moral standards, among them constitutional rights, to bear on the evolution of law and the state.

The abstraction and complexity of loosely relational constitutional rights means that there are no 'black holes' in the legal system, immune from their influence.[146] It is also here that we see the power of the concept of constitutionalization,[147] and what Feinberg called the 'manifesto sense' of rights.[148] A manifesto is a public and often political declaration or proclamation. Political collectives on a large scale will necessarily have manifestos. They need not be expressed in terms of rights; and even if they are, they can be negative and limited. But in many liberal democracies the language of rights is used in a more ambitious way: it expresses a collective commitment to social justice and to turning our attention to forms of injustice the state is involved in less intimately. It is here that distinctions between public and private come under enormous pressure and where the horizontal dimensions of loosely relational constitutional rights—the topic of the next chapters—come to light.

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[146] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 194. See also: T.R.S. Allan, *The Sovereignty of Law* (Oxford University Press, 2013) 9, 12.

[147] Martin Loughlin, 'What is Constitutionalisation?', in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 47.

[148] Joel Feinberg, 'The Nature and Value of Rights' (1970) 4 *Journal of Value Inquiry* 243, 254–255.

3.7. Conclusion

In earlier writing, Dworkin claimed that when the state promotes one right at the expense of another, 'it has not weakened or cheapened the notion of a right; on the contrary, it would have done so had it failed to protect the more important of the two'.[149] He did not only recognize that sometimes the state must balance competing rights but also that it may limit them to 'obtain a clear and major public benefit'.[150] In later writing, Dworkin opted for his more famous and strictly relational conception of rights as trumps.

This might be a case of what Charles Taylor referred to as 'Maginot Line mentality': defining a concept over-narrowly to defeat our theoretical adversary, but at the cost of making the concept itself less useful.[151] In a way, this chapter is an attempt to resurrect Dworkin's early and less developed ideas about constitutional rights. My claim is not that his later ideas are of no value—on the contrary: they capture a crucial part of our constitutional rights discourse. But just like there is no single concept of rights (as Hart noted), there is no single concept of constitutional rights. It is not that one side to this debate is wrong while the other is right: these conflicts about the nature of rights are not pathological but are the result of the nature of human life and moral experience, which the opposing ideas reflect.[152]

Of course, the language of rights can be abused—and the greater political ability to limit them rightly makes those more suspicious of the state nervous. And, of course, there is more work to be done, uncovering the context in which constitutional rights are claimed, contested, adjudicated, applied, and debated. But the points made above convey, I believe,

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[149] Ronald Dworkin, 'Taking Rights Seriously', in *Taking Rights Seriously* (Harvard University Press, 1977) 184, 194.
[150] Ibid 191, 199–200.
[151] Charles Taylor, 'What's Wrong with Negative Liberty?', in *Philosophy and the Human Sciences* (Cambridge University Press, 1985) 211, 215.
[152] Bilchitz (n 98) 73–74, 80.

that it is at least possible for political collectives to give expression to their commitments to social justice and individual well-being in terms of loosely relational constitutional rights. The crucial question is whether using the language of rights in this regard can better help us confront the moral problems tied to our responsibilities as liberal political collectives—and as I started claiming, and will further claim in the next chapters, I believe that it can.

Seeing all constitutional rights as inherently bipolar or strictly relational fails to take into account the less interpersonal context in which they are claimed and the kind of agency and responsibility to which they latch on. While strictly relational constitutional rights are also answers to political and public problems, loosely relational rights manifest a deeper concern with the consequentialist, large-scale, dimensions of social justice. It is this focus, when coupled with the normative force of rights, that puts us in a normative seismic activity zone, in which the conservative and progressive paradigms clash, often violently.

As I claim in the next chapter, if constitutional rights were inherently agent-centered and strictly relational, there would not be much rights-based horizontality to talk about: their horizontal dimensions would be very modest.[153] But once we accept that constitutional rights can have a consequentialist normative structure, we invite a host of problems related to our ability to attain and sustain social justice through private law, which is a domain containing, in its core, agent-centered and strictly relational right-norms. Much of moral theory deals with the clashes between consequentialism and deontology: obviously, my goal is not to resolve them. What I do in the next chapters is to show how they manifests themselves in the small corner of the normative universe of constitutional rights-based horizontality.

[153] See, for example: Avihay Dorfman, 'Private Law Exceptionalism? Part I: A Basic Difficulty with the Structural Arguments from Bipolarity and Civil Recourse' (2016) 35 *Law and Philosophy* 165, 187–189.

Chapter 4

Horizontal Delineation

4.1. Down the Rabbit-Hole

The previous chapters kept private law and constitutional law apart and focused on describing idealized conceptions of right-norms that I see as central in them for our purposes: agent-centered and strictly relational private law rights and beneficiary-centered and loosely relational constitutional rights. The closer rights in these domains are to these ideal-types, the more complex the challenge of constitutional rights-based horizontality becomes. In the next three chapters, I bring these right-types together and try to unpack this challenge.

This chapter deals with two questions about the inclusion of horizontal dimensions within the scope of constitutional rights: do they entail prescriptions about our direct private law relations—about our mutual rights and duties? If they do, should we see them as granting us the standing and authority to direct constitutional right-claims at other private actors? These questions do not address the realization of these horizontal dimensions in concrete horizontal legal norms: it might be the case that the scope of constitutional rights has horizontal dimensions, but they are weak and almost never realized.

The previous chapter started making claims about the scope and realization of constitutional rights, but it was largely explanatory. This chapter starts moving towards the justification end of the Dworkinian spectrum. I claim that when thinking about how to see the scope of loosely relational constitutional rights we should take seriously our ability to accommodate the two ideal right-types in one normative system. Thus, conceptions of constitutional rights-based horizontality that sever its connections to political practices of rights-

claiming addressing our collective responsibilities or to interpersonal practices of rights-claiming addressing our personal responsibilities, are morally problematic—if, and I will try to substantiate this assumption, we see value in such rights-based practices.

My claim is that while fully horizontal or purely vertical models of constitutional horizontality could be justified in some cases, indirect effect models are usually better suited for modern legal systems—and it is no coincidence that we see a certain trend towards them in constitutional practices. The nuanced nature of indirect effect models helps preserving the robust normativity of constitutional law and private law rights while alleviating the deeper tensions their conflicts manifest between consequentialism and deontology. Purely vertical models isolate the private from the public while fully horizontal models subordinate the private to the public. Indirect effect models, however, hold that while there are important distinctions between public and private in terms of who we can claim our rights against, they are much weaker when it comes to these rights' substantive regulatory prescriptions.

The claims I make in this chapter are that we should normally be able to claim our loosely relational constitutional rights only against state agents, but that these state agents have complex and demanding duties to create, change, or repeal private law norms in light of the consequentialist prescriptions entailed by these rights. For example, I cannot normally direct a general constitutional equality right-claim against a seller that refused to provide me a certain service; but I can direct a right-claim against state agents that can adjust our mutual private law rights and duties to prevent such cases of discrimination. Describing this more nuanced position about the scope of constitutional rights is the main goal of this chapter. It sets the stage for the discussion to follow about their realization: only after we understand the nature and breadth of their prescriptions can we tackle the questions arising out of their conflicts with each other and with other normative considerations.

Jazz

Philosophical theories of constitutional rights-based horizontality or the horizontal dimensions of constitutional rights are sparse. There is quite a lot of writing on the topic,[1] and much of it deals, in a way, with the tensions between public and private and between the two moral paradigms. But it is usually not generalized and systematic enough to qualify as a theory. An exception in this regard is Jean Thomas's work,[2] to which I already alluded. However, while Thomas focuses on cases in which we might want to bypass the state—for example, when it comes to big multinational corporations' activities in developing countries—I focus on cases in which, as I see it, we should make the state's roles more visible and explicit. I will get to the regulation of corporate and market activity in the sixth chapter, but my entry point is different: I claim that when thinking constitutional horizontality in Anglo-American legal systems, we should work from ideas about the state's responsibilities and duties.

This is important because once we strip constitutional horizontality from some of its legal garments, we can see that it was dealt with quite extensively by liberal political theory: particularly in debates about John Rawls's theory of justice and more generally about clashes between the moral prescriptions that guide collective and state action and the moral prescriptions that guide interpersonal and private action. In this chapter, I build on some of the main themes in these philosophical debates to shed light on the latent features of the phenomenon of constitutional horizontality. Interestingly, it is not only the case that some philosophical theories and principles could help us understand it but also (and perhaps more surprisingly)

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1 See, for example: Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001); Andras Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing, 2005) Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007); Gert Brüggemeier (ed), *Fundamental Rights and Private Law in the European Union* (Cambridge University Press, 2010); Verica Trstenjak and Petra Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (Springer, 2016); Jud Mathews, *Extending Rights' Reach* (Oxford University Press, 2018).

2 Jean Thomas, *Public Rights, Private Relations* (Oxford University Press, 2015).

that some legal insights can contribute to our understanding and further development of liberal ideas about of the moral tensions between public and private.

This chapter is therefore more like jazz than classical music: it tries to bring together separate and different bodies of normative thought to form a relatively unified and coherent theme. There is no centralizing or commanding score: different ideas will lead us in different parts of the way and it will be my job to make sure not only that we are constantly treading in the right direction but also that we end up with helpful insights on our hands.

This will be quite tricky, because the musical metaphor is not only methodological: it also reflects one of the central themes of this thesis, that I start exploring in this chapter—that the trend in modern liberal legal systems towards constitutional horizontality reflects an acceptance of the of idea moral pluralism; an understanding that legal systems realize disparate and often conflicting moral values—in our case, in their rights-based doctrines and practices. This, I add with an eye to the next chapter, requires us to engage in unique forms of legal deliberation and reasoning: fragmented but also well-structured, that can transition between different moral perspectives and levels of abstraction.

The idea of moral pluralism will be discussed more fully in the next chapters. In this chapter we start feeling its pull when presenting and criticizing, in the next four sections, two opposing and competing understandings of the horizontal delineation of constitutional rights: two models of rights-delineation. Their failures will serve as the platform on which I present, in the sixth section, the model of indirect horizontal effect, whose implications for the horizontal realization of constitutional rights are the topic of the next chapter.

Goldilocks

This chapter is structured around John Rawls's work. I will not try to guess what he would or should have said about our topic. Rather, I use his theory's development over the years, criticisms of it, and some ideas reflected in it, to tease out latent features of constitutional rights-based horizontality. This choice assumes some connections between the principles of social justice that Rawls and other liberal theorists discuss and the principles of 'constitutional justice' manifested in loosely relational constitutional rights. In both cases, we start with a list of values—some ground and are enshrined in rights—addressing questions about how things should go and how people should be treated in our society.

Since these are prescriptions at a high level of generality and abstraction, questions of scope tend to pop up rather quickly. Do we appeal to them regarding all legal or moral problems? Do they determine, for example, what kind of goods and services we should be able to exchange in contracts? Or whether harms we suffer as a result of the negligent actions of others should be compensated by them or by an insurance scheme? Do they apply in the same way to all of the social institutions under their purview? Is there a protected sphere, isolated from their influence? To what degree should it be isolated? Should it by regulated by other—legal or moral—principles, values, or rights? If it should, what should be the relations between them and the social or constitutional principles, values or rights?

Such problems hunt almost every large-scale normative system or theory; and they are relevant both about social justice and about constitutional law. In his earlier writings,[3] Rawls was satisfied with saying that his social principles of justice, concocted behind the 'veil of ignorance', regulate 'the basic structure of society': crudely put, the main economic, political, and legal institutions, and their operation over time. However, after his theory was

[3] John Rawls, *A Theory of Justice* (rev edn, Harvard University Press, 1999) 4–6, 47, 109.

criticized both for being too narrow and failing to address 'private' injustices in the market and the family and for being too broad and failing to respect religious and cultural diversity, he came to realize that he should be more careful in delineating the basic structure.

When addressing these criticisms, Rawls tried to find a middle ground between two paths: the libertarian and the utilitarian.[4] Each presents a different failure in delineating the scope of social justice in conditions of social and moral pluralism. The libertarian, using a thin conception of the state, leaves little room for large-scale principles, values, and rights and thus tends to see the constitution as applying to a relatively small set of social institutions. The utilitarian, on the other hand, sees the personal as political: all social institutions fall under the basic structure and are, in our context, directly regulated by the constitution.

Rawls's misgivings about these two paths that social justice could take are important to us because they are close relatives of two potential understandings of constitutional rights-based horizontality: the purely vertical and fully horizontal (or direct application) models—that manifest the conservative and progressive moral paradigms, respectively. The failures of these paths and these models, to which I dedicate most of this chapter, are supposed to lead us to the third path of indirect horizontal effect and help us understand it and the challenges it creates. While my claims do not depend on this, I believe that this is the path that Rawls sought in the later stages of his life (though he never got to fully develop it); and that modern liberal legal systems are fumbling for, in their own slow and clumsy way.

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[4] John Rawls, *Political Liberalism* (2nd edn, Columbia University Press, 2005) 259–265. See also: Larry Alexander, 'The Jurisdiction of Justice: Two Conceptions of Political Morality' (2004) 41 *San Diego Law* Review 949; Samuel Scheffler, 'The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism' (2005) 79 *Proceedings of the Aristotelian Society* 229.

4.2. The Libertarian Path

The next two sections deal with the libertarian approach to social justice and its close relative: the purely vertical model of constitutional rights-based horizontality. The starting point is the structure of classic libertarianism as a theory of social justice. I am not concerned with the (narrow) list of values it adopts but with its approach to political philosophy: the idea, to borrow from Nagel's critique of Nozick, that 'it is possible to determine what governments may and should do by first asking what individuals, taken a few at a time in isolation from large-scale society, may do'.[5] It was claimed, in this regard, that Nozick 'turns the moral part of common sense against the political part';[6] and that his theory of justice 'addresses but a small part of morality': the 'enforceable duties we owe individuals'.[7]

The libertarian applies the morality of small-scale relations or the kind of deliberation and reasoning underlying interpersonal rights-claims to large-scale questions of social or constitutional justice. It is not just that this often entails a rigid public–private separation, but also that it 'colonizes' the political domain of state action with moral prescriptions more suitable for interpersonal relations: reflecting a particular conception of the principle of the separateness of persons and the restrictive conception of responsibility.

A basic feature of Nozick's approach to social justice is that it is dominantly backwards-looking and procedural. States of affairs are justified if we all have rights to our holdings; and we have these rights if no unjustified actions were performed in bringing these states of affairs about. In non-catastrophic cases, rights (including constitutional rights) are therefore agent-centered and strictly relational. Much like in private law, wrongful action

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5 Thomas Nagel, 'Libertarianism Without Foundations' (1975) 85 *Yale Law Journal* 136, 139–140.

6 Lester H. Hunt, *Anarchy, State, and Utopia: An Advanced Guide* (John Wiley & Sons, 2015) 9–10.

7 Peter Vallentyne, 'Nozick's Libertarian Theory of Justice', in Ralf M. Bader and John Meadowcroft (eds), *The Cambridge Companion to Nozick's* Anarchy, State, and Utopia (Cambridge University Press, 2011) 145, 147.

with regard to social justice is always tied to someone's restrictive responsibility. Even if we see the Lockean trio of rights to life, liberty, and property as beneficiary-centered, we do not treat them as loosely relational: we do not say that we, as a political collective, have rights-based reasons or duties to bring about states of affairs in which they are best realized. Social justice does not consist in bringing about certain large-scale 'patterns' or 'end-states', which would require to unjustifiably limit people's strictly relational liberty and property rights.[8]

Little is left of the liberal state in this picture: the entire apparatus governing horizontal relations in society consists of consent-based arrangements. Importantly, even forms of 'left libertarianism' can mostly allow rather than require the limited activities of 'protection agencies' enforcing thin criminal codes and dispute resolution schemes for civil disputes. It is, as Peter Vallentyne helpfully put it, a 'private-law state'.[9] Such a state 'embraces no aggregate policy vision in light of which the ripple effects flowing from the assertion of rights could be evaluated. Like trees or flowers on medieval manuscript margins, rights are treated in monadic isolation', and the state–citizen relations are given a horizontal form.[10]

It is very difficult to justify or explain constitutional rights that entail robust consequentialist and horizontal prescriptions for state agents in this state. Libertarian constitutionalism is based on consent rather than robust moral values going down to the nature of the shared political project. Attempts by state agents to address harms to our basic interests and needs could be a matter of fraternity, charity, or efficiency, for example, but not of social justice, which is about how we suffer harms, not just the fact that we do. This is the basis on which the purely vertical model of constitutional rights-based horizontality rests.

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8 Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974) 26–35, 149–174.

9 Peter Vallentyne, 'Libertarianism and the State' (2007) 24 *Social Philosophy and Policy* 187, 194–196.

10 Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 77–78.

The Purely Vertical Model

This model is an idealized version of the American state action doctrine.[11] The idea behind it is that regardless of the language used in constitutional rights articles—for example, even if we talk about liberty, equality, or free speech—rights are seen as state-centered and strictly relational.[12] The prescriptions they entail are about the state not being intimately or directly involved in harms to protected interests and needs: normally, therefore, they leave the state free to harm individuals indirectly, to fail to protect them from third parties, or not to promote and strengthen their rights. It will be burdened with these more demanding responsibilities and duties only if it chose to assume them: for example, by establishing a public school system, running prisons, conducting criminal trials, or imposing zoning regulations.

It is not just that constitutional rights can only be claimed against the state: it is also that they are focused on state choices—constitutional rights-based scrutiny is triggered, normally, by deliberate state action; the degree to which these rights constrain it is determined according to the extent and nature of its intervention in various social interactions and activities. Crucially, the decision about whether to intervene is usually not covered by constitutional rights, and thus the state can normally avoid many of the burdens they entail.

If this sounds familiar, it is because this model is a natural outgrowth of the common law: it employs a choice-sensitive restrictive conception of responsibility, that entails strong interpersonal boundaries and hesitancy to recognize positive duties.[13] For example, the Fourteenth Amendment to the American Constitution prohibits the state from denying persons

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[11] Frank I. Michelman, 'The Bill of Rights, the Common Law, and the Freedom-Friendly State' (2003) 58 *University of Miami Law Review* 401, 401–406; Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter, 2014) ch. 3. See also: Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387, 415–422.

[12] The language of the American Constitution, it should be noted, is largely state-centered.

[13] Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88 *Michigan Law Review* 2271, 2313–2326.

the ‘equal protection of the laws’. Let us assume that Ernie applies to a private university and is denied on the ground of his skin colour. Though the university is a creature of the law and enjoys legal rights and protections, under a purely vertical model there is no infringement of the right to equal protection because the state was not intimately involved. Equality is given a formalistic state-centered rather than substantive agent-general meaning: we enjoy equal protection from the state but not by the state and from each other. The only legal way to induce a state agent to change the regulatory framework applying to our private relations is by showing that the state is strongly implicated in the actions of the person harming or failing to benefit us: for example, if Ernie shows that the university receives public funding, the state might be an ‘accessory’ to the act of discrimination.

Questions regarding the regulation of horizontal relations are rarely framed in terms of the horizontal application or effect of constitutional rights. This model disarms them from their ability to burden public agents with duties regarding our horizontal relations. Under the idealized purely vertical model, it is only in the pockets of assumed increased responsibilities in which public agents, much like private agents, bear rights-based duties to protect and promote our interests and needs through the regulation of horizontal relations.

Outside these pockets, the protection or promotion of equality or privacy, for example, are seen as collective goals rather than rights-based duties. This is a result of seeing these rights as a response to the harms posed by the state: if we cleanse the domain of constitutional rights from conflicts, the resolution of which would have required us to appeal to ‘political’ considerations (a feature of Kantian theories, like Dworkin’s) we leave little room for horizontality. To accept the state’s role as a protector of our rights in the private sphere requires us to trust it and to grant it the leeway to settle complex conflicts of rights. This is, therefore, another case in which horizontality conflicts with rigid and categorical distinctions.

Hansel and Gretel

This way of seeing questions of constitutional horizontality has practical implications regarding how we try to solve them. The first problem is that the purely vertical model imports the default interpersonal position of mutual separation to constitutional rights-based reasoning: these rights rarely obligate the state to act to protect or promote them, just like rights in private law. We might care about the state's decision-making process if it decided to act in ways that harm right-holders, but as long as it remains static we usually leave it in peace.

Now, there are beneficiary-centered justifications for allowing state agents some discretion about when and how to intervene in horizontal relations: the constitution does not constrain every state decision. The problem is that this model gives the state not some, but nearly absolute, discretion. This often reflects a reliance on formalistic justifications that are only loosely tied to beneficiary-centered values: reasons like a public–private distinction, the state's moral integrity, the democratic process, or federalism are invoked without actually connecting them to their implications for individual well-being in particular cases.

Even if there are justifications for the state not to protect and promote Ernie's equality rights in relation to his university admission, would we say the same thing about the state's duties to protect a small child from his abusive custodial father, following several hospitalizations and concerns of social workers? These were the facts of the *DeShaney* case, in which the American Supreme Court held that the state's inactions (beyond officially recording the concerns of social workers), resulting in permanent brain damage caused by traumatic injuries, do not consist of a violation of the child's equal protection right.[14]

In the terms I used, the judges employed a choice-sensitive restrictive conception of responsibility. The Fourteenth Amendment, it was decided, applies in cases where the state

[14] *DeShaney v. Winnebago County* 489 US 189 (1989).

actively limits the individual's liberty, but not when liberty is threatened by others. An appeal to a prescriptive conception of collective responsibility could have led to different conclusions. What we see here is an anthropomorphization of the state and a mistaken application to it of the same moral principles that we apply to individuals in interpersonal relations.

The second problem the purely vertical model creates is that even if the state decides to intervene in horizontal relations and the door is opened for a constitutional rights-based scrutiny, we often end up asking the wrong questions: we are not anthropomorphizing the state but fetishizing its legal involvement. We see this when we think about the relevance of constitutional rights in a particular case by focusing on the nature and extent of state involvement: we are worried about how much of the total funding of the university is provided by the state; or how many of its employees are receiving state benefits; or whether any other more elusive trail of normative breadcrumbs could lead us back to the state.[15]

The other side of the coin is that the nature and extent of the harm suffered by us, as affected patients of the actions of others, is beside the point—again, much like in private law. Thus, for example, if intimate details about our lives are being traded by large corporations to which we gave questionable 'consent', or if a bank can evict us from our house after being five minutes late in our mortgage payment, it is not a constitutional concern; but if a police-officer sets one foot in our house without a warrant, it is a constitutional concern of the first degree and a violation of our privacy rights. The difference between the cases does not lie in the nature of the harm we suffer but in the nature of the state's involvement. In this vein, it could be claimed that the American Supreme Court declared the restrictive covenant in *Shelley v. Kraemer* unenforceable not because of a deep concern for equality or a recognition of the state's positive duties to eradicate racist discrimination, but because it wanted to

[15] See also: Colin D. Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *Cambridge Law Journal* 90.

keep its hands clean.[16] Constitutional horizontality is merely a side-effect of using courts to enforce private law rights: not an implication of the structure of constitutional rights.[17] This can create arbitrariness in state decisions: for example, holding that a restaurant cannot discriminate customers only if it rents parking spaces in a public facility;[18] and importantly, can create a form of regulation that just moves from one breadcrumb to another instead of dealing directly with social injustices. This seems to be the case, for example, with the eradication of voting discrimination in the United States: every time the federal government dealt with one form of discrimination, another one—with more nuanced connections to the state—materialized; the state is just playing cat and mouse with discriminating practices.[19]

The purely vertical model ignores the fact that many interpersonal norms that we now take for granted were shaped by the state—for example, that husbands do not own their wives (or their wives' property), or that employers cannot work their employees for twenty hours a day even if the latter 'agree'. By seeing constitutional rights as being about how the state treats us, it makes questions of rights-based horizontality—which rights-based duties the political collective has regarding the actions of husbands, employers, landlords, journalists, doctors, and other private agents, when they affect our interests and needs—largely irrelevant. These are not seen as matters of social justice, that form part of our constitutional rights, but as matters settled in the political arena. This way of thinking created the rift in private law theory and practice between rights and policy: external 'interventions' are seen as pursuing political interests rather than realizing rights. However, it is often the case that rights—constitutional rights—have quite a lot to say about such interventions.

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16 *Shelley v. Kraemer* 334 US 1 (1948). See also: Thomas (n 2) 31.

17 See, for example, Brudner's reference to the 'public integrity' of courts: Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd edn, Oxford University Press, 2013) 34.

18 *Burton v. Wilmington* 365 US 715 (1961).

19 Mathews (n 1) 129–132.

4.3. Burdening the State

Assuming that the social status quo is constitutionally justified prior to state action reflects a failure to understand the nature of the modern liberal state and the role loosely relational constitutional rights have in it. These rights, that appear in most modern constitutional documents, are grounded in a prescriptive conception of collective responsibility rather than in a choice-sensitive, restrictive and largely individualistic and reactive conception of responsibility; and are parts of political rather than interpersonal practices of rights-claiming.

Certain basic interests and needs of members of the political community should just be met to a sufficient extent: we should just be able to find a job, feed our children and send them to school, receive compensation for the negligent harms others cause us, enjoy access to the legal system, be able to participate in the political process, receive needed medical attention, and enjoy a sufficient degree of privacy and a sense of personal safety, to give a few examples. This does not mean that the political collective cannot fail to bring about states of affairs in which all these interests and needs are satisfied to a sufficient extent; just that when it does, it fails in doing something that it was responsible and duty-bound to do.

In the spirit of libertarianism, the purely vertical model ignores the beneficiary-centered, loosely relational, and consequentialist aspects of constitutional rights. The idea that the beneficiary-centered values underlying constitutional rights can only be realized if the state is directly involved or if the political majority decides to do so, ignores the qualitative difference between individuals and the state as moral agents. It robs constitutional rights of their robust consequentialist normativity and prevents them from constraining and shaping the deliberation and reasoning underlying the regulation of horizontal relations. This should concern us not only because private law will not be as justified as it can, but also because their application is a condition for the legitimacy of regulation, in all social domains.

Background Justice

Rawls was worried that his theory of justice exhibits libertarian tendencies. Expanding the scope of the basic structure is not enough, if in the background still lies the failure to recognize the state's special moral role in society. For example, *Shelley v. Kraemer* was followed by a tide of anti-discrimination legislation, but as claimed above, it does not seem to reflect a shift of focus from discriminatory intent to outcomes or from deontology to consequentialism and an acceptance of the state's positive duties in this regard.[20] These legislative reforms were very important, but they still reflect only a limited collective commitment to substantive equality: constitutionally, the state must still protect and promote it only when it intervenes in various activities. One possible implication of this half-hearted collective commitment is that in the past decades inequality rose to historical levels in societies in which anti-discrimination law gained prominence (a point I briefly revisit in the closing chapter).

The problem that feminist, socialist, and other left-leaning philosophers pointed at is that many social injustices materialize in private activities in which the state is not intimately involved: for example, in the market or the family.[21] But because it can ameliorate some of the power disparities and harmful activities that bring these injustices about, we cannot say that a lack of state intervention is neutral or natural: the existence of a 'private' sphere is a result of a political decision.[22] This is one implication of Hohfeld's analysis of rights: there is no legal void; legal abstention is a choice just like legal intervention.[23]

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[20] For such claims, see: Mark Tushnet, 'State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations' (2002) 3 *Chicago Journal of International Law* 435, 440–442.

[21] See, for example: G. A. Cohen, 'Where the Action is: On the Site of Distributive Justice' (1997) 26 *Philosophy & Public Affairs* 3; Susan Moller-Okin, 'Justice and Gender: An Unfinished Debate' (2004) 72 *Fordham Law Review* 1537.

[22] See, for example: Alon Harel, 'Public and Private Law', in Markus D. Dubber and Tatjana Hornle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 1040.

[23] Van der Walt, *The Horizontal Effect Revolution* (n 11) 151–154; Marco Jimenez, 'Distributive Justice and Contract Law: A Hohfeldian Analysis' (2016) 43 *Florida State University Law Review* 1265, 1299–1306.

Tending to such injustices is not a matter left to the market or to the majority's will: it is part of what social justice is and must underlie our constitutional thinking about the state's responsibilities. When thinking about them, we must 'cut off the head of the king',[24] to borrow Foucault's words. In modern societies, basic interests and needs are threatened not only by the state, but also by private agents; and not only by their direct or institutionalized actions, but also by their participation in practices that form power structures, attitudes, beliefs, and dispositions: pervasive racism or unhinged capitalism, for example.[25] That is, repressive power can also be positive, creative, nuanced, latent, and diffuse; not held by particular agents that exercise it on others in isolated interactions. In such conditions, the market and civil society will struggle to maintain social justice.

While Rawls did not necessarily take on board all these claims, he did feel that he should respond to this 'leftist' critique in some of his last published pieces of writing.[26] He emphasized—not only regarding families but also regarding churches, universities, firms, and labor unions—that 'the principles defining the equal basic liberties and fair opportunities of citizens always hold in and through all so-called domains'; and added—and this seems to be an addition aimed at feminist criticisms of his theory: 'if the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing'.[27]

A central idea Rawls had in this regard is that of 'background justice'.[28] The premise is that it is unlikely that separate uncoordinated private actions will be able to sustain social

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[24] Michel Foucault, *The History of Sexuality—Volume 1: An Introduction* (Robert Hurley trans, Pantheon Books, 1978) 88–89.

[25] Ibid 82–91. See also: Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 *Oxford Journal of Legal Studies* 75.

[26] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review* 765; John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press, 2001).

[27] Rawls, *Justice as Fairness* (n 26) 164, 166.

[28] Ibid 55–57; Rawls, *A Theory of Justice* (n 3) 7; Rawls, *Political Liberalism* (n 4) 266, 269–271, 282. See also: Thomas Nagel, *Equality and Partiality* (Oxford University Press, 1991) 83–84.

justice: the accumulated results of isolated fair actions might be unfair from a broader perspective. We need an institutional framework—constantly evaluated and adjusted—that corrects these unjust trends: for example, by ensuring access to education, imposing progressive taxes, or adopting anti-discrimination norms. While Rawls talked about social justice, his ideas apply in our context as well. As I claimed, the normative structure of loosely relational constitutional rights makes them susceptible to violation through no direct action of any particular agent: the state has responsibilities and duties to respond to certain acts of third parties and even changes in the social circumstances. These rights constrain public agents not just if and when they decide to act: decisions about whether and how to act lie at the heart of the collective effort to sustain background social justice—an effort which has been supported in the past decades by public practices of constitutional rights-claiming.

Constitutional rights, against the libertarian, address social patterns and processes and not just isolated actions.[29] They do not reflect the Hayekian idea that 'nobody has the responsibility or the power to assure that these separate actions of many will produce a particular result for a certain person'.[30] They focus on social conditions rather than on 'incidents of wrongdoing'.[31] To borrow Waldron's words, when it comes to loosely relational constitutional rights 'we must do our thinking in political philosophy and not just moral philosophy', and consider 'how they fit together as a system and how the rights of one person might be made compatible (concretely, not just in theory) with the rights of another'.[32] Thus, these rights' scopes cannot ignore the interactions between private parties, or social trends affecting the basic interest and needs of members of the political collective.

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29 Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 71.
30 F. A. Hayek, *Law, Legislation, and Liberty: Vol. 2—The Mirage of Social Justice* (Routledge, 1982) 31–33.
31 Owen M. Fiss, 'The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 22.
32 Jeremy Waldron, 'Nozick and Locke: Filling the Space of Rights' (2005) 22 *Social Philosophy and Policy* 81, 108–109

Lost in Translation

The problems I have been talking about appear not only in pure vertical models, but also in models—often treated as ones of indirect horizontal effect—that translate rights to values or principles before bringing them to bear on private law. Traces of this approach can be found in Germany,[33] South Africa,[34] or Canada,[35] for example.[36] Thus, we see the Canadian Supreme Court holding that constitutional rights do not bind judges in private law disputes;[37] but that judges must still 'apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution'.[38] It was later emphasized that 'the party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with Charter values'; values that do not ground rights and duties, but just 'provide the guidelines for any modification to the common law which the court feels is necessary'.[39]

The basic problem remains: constitutional rights apply only when the state acts. However, judicial development of the common law—unlike legislation or regulation—occupies a special category, in which state agents have no constitutional right-based duties.[40] Thus, instead of rights-based reasoning, we get something that looks more like 'rational policy assessment',[41] that merely takes more abstract 'guidelines' into account.

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33 Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 574, 585.
34 Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.
35 Mathews (n 1) ch. 7.
36 See also: Aharon Barak, *Human Dignity* (Cambridge University Press, 2015) 103–113.
37 *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd* [1986] 2 S.C.R. 573, 600.
38 Ibid 603.
39 *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, para. 95, 97.
40 See also: Mathews (n 1) 195–196; Tzvi Kahana, 'Hybrid State Accountability and Hybrid Rights', in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press, 2016) 173.
41 Kumm, 'Constitutional Rights as Principles' (n 33) 582.

This model of translating constitutional rights to values was embraced by private law theorists: for example, Weinrib claimed that they are included 'within the ensemble of considerations that matter for private law' and contribute to the determination and specification of its categories.[42] More generally, Dagan and Dorfman, claimed that distributive considerations could fit private law's relational form if we can repackage them as interpersonal duties: for example, employers could be burdened with duties to make the workplace inclusive to employees' needs and landlords with duties against discrimination of tenants or buyers.[43] This resembles the transition of relational egalitarians from distributive patterns to forms of equal interactions and to what Elizabeth Anderson called 'justice of agents'.[44].

The reason I am grouping such ideas with libertarianism is that they manifest, in certain interpretations, a public–private distinction: a view of the regulation of horizontal relations that focuses on the restrictive responsibility of agents. Beneficiary-centered values are always on the table, but only if we can translate them to terms that respect our personal restrictive responsibility. Under this model, cases in which it might be legitimate to burden agents that are not personally responsible for some social harm or trend undermining background justice with duties, can only be dealt with by using public law tools.[45]

While judges often enjoy great interpretive leeway when translating rights to values; and while, as Dworkin demonstrated, values and principles are crucial parts in legal systems

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[42] Lorraine E. Weinrib and Ernest J. Weinrib, 'Constitutional Values and Private Law in Canada', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 43.

[43] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 *Columbia Law Review* 1395, 1439–1445; Hanoch Dagan and Avihay Dorfman, 'Justice in Private: Beyond the Rawlsian Framework' (2018) 37 *Law and Philosophy* 171, 173, 176.

[44] Elizabeth Anderson, 'The Fundamental Disagreement Between Luck Egalitarians and Relational Egalitarians' (2010) Supplementary Volume 36 *Canadian Journal of Philosophy* 1, 2.

[45] See also: Ernest J. Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107; Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391.

aspiring to coherence and integrity;[46] there is still a big gap between treating rights as rights and treating rights as values. The translation strand of the purely vertical model does not treat constitutional rights as rights when it comes to the regulation of horizontal relations. Constitutional values constrain judges when they interpret existing private law norms but are much softer when it comes to their creation or change.[47] If they fail to take such values into account, they do not wrong anyone in particular, and no one has the standing and authority to call them to account as a constitutional wrongdoers, thereby narrowing their discretion.[48]

Thus, the constitution is too quiet about the rights-based duties of judicial agents to respect, protect, and promote loosely relational constitutional rights in horizontal relations. Such models end up disconnecting parts of our horizontal relations from our responsibilities as a political collective. It draws arbitrary distinctions between judicial and other state agents; and in judicial decisions, between interpreting and creating private law norms—too much hangs on the linguistic content of private law and the nature of state involvement.[49]

This state-centered tendency is reflected in the greater willingness of judges to use policy considerations to deny private law rights-claims than to impose duties: [50] the former case, as opposed to the latter, is seen as a state intervention in the status quo. But part of the point of recognizing loosely relational constitutional rights is to challenge the status-quo and to burden the state with the ongoing burden of securing background justice. This requires us to utilize all of the tools in our disposal, without leaving constitutional 'black holes'.

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46 Anton Fagan, 'Determining the Stakes: Binding and Non-Binding Bills of Rights', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 73.

47 Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 355–359; Gonçalo de Almeida Ribeiro, 'The Effects of Fundamental Rights in Private Disputes', in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2018) 219, 235–238.

48 Mathews (n 1) 182–183.

49 Larry Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 *Constitutional Commentary* 361, 362–367.

50 Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 261, 272–279.

4.4. The Utilitarian Path

We need a more ambitious model of constitutional rights-based horizontality. It is here that the fully horizontal model enters the picture. That is, we are taking the utilitarian path. Again, there are many variants of utilitarianism, building on different values. I focus on an idealized version of its structure as a political theory; and thus, what I say is relevant if we broaden its basis from utility or welfare to the myriad of values enshrined in constitutional rights. The basic idea I want to convey is that the fully horizonal model resembles some forms of utilitarianism and is therefore exposed to some philosophical criticisms directed against them.

The starting point is that the utilitarian, unlike the libertarian, leaves room for small-scale principles, values, and rights and thus for questions about the horizontal dimensions of constitutional rights. The problem is that these questions are asked in the wrong way: they can form parts of right-claims private agents address at each other. As 'higher law', the constitution obligates not only state agents: we are seen as public agents in our capacities as, for example, landlord or tenants, professors or students, husbands or wives, employers or employees, and other roles we perform in different horizontal relations. In principle, all social institutions, practices, activities, and actions, fall under the basic structure of society or the constitution, if they can be utilized to bring about socially desirable states of affair.

Under fully horizontal models, any private agent can call us to account for failing to discharge our constitutional right-based duties. Importantly, because of the consequentialist and abstract nature of loosely relational constitutional rights, we can be burdened with such duties whenever we are well-placed to bring a better social state of affairs about: for example, if we can promote equality or reduce poverty, strengthen the practice of contractual promise-keeping, or make fast food chains more respectful of their customers' health and safety. We

are burdened with right-based duties not because of something we did but because of something we can do: because we are well-positioned to respect, protect, or promote constitutional rights. While the libertarian tends to ignore the prescriptive conception of collective responsibility, the utilitarian tends to ignore the restrictive conception of personal responsibility.

Two types of criticism were directed against such consequentialist forms of thinking. The first, beneficiary-centered, criticism is that they allow too much: for example, to sacrifice our life to save several other lives. This criticism is less forceful in our context, in which beneficiary-centered rights form part of the good to be realized and there is no need, as I said in the previous chapter, to embrace a 'utilitarianism of rights': we can hold that life should be sacrificed, for example, only in unusual and tragic circumstances.

The second, agent-centered, criticism is that some forms of consequentialism demand too much: for example, that we sacrifice our loved one's life to save several other lives. The problem in the constitutional context is not the duties we end up carrying: more weight could be given to our liberty not to hurt our loved ones, if we see it as falling within the scope of a constitutional right. Since we are also bearers of rights, the burden we end up carrying could be reasonable. The problem lies in the second-order level of reasoning about our first-order duties. It is that we must consider both how we can contribute to attaining or sustaining various complex large-scale states of affairs—the reduction of poverty, for example—and which concrete duties we have, if at all, in particular contexts, after we balanced the good we can bring about with the costs of doing so, including to ourselves. The problem, as Dworkin claimed regarding duties to maximize utility or welfare, is that such duties 'never sleep'.[51] Consequentialism, even in forms that take this second-order burden into account, is epistemically burdensome; and so, I will claim, is the fully horizontal model.

[51] Ronald Dworkin, 'The Common Law', in *Law's Empire* (Harvard University Press, 1986) 275, 294.

The Fully Horizontal Model

This model is, in many ways, the structural opposite of the purely vertical model. Crudely, it entails that constitutional rights apply in the same way against state and private agents in term of their scope. Since private agents, unlike state agents, also have constitutional rights (when considering state duties not to discriminate we need not give weight to its autonomy rights), there are differences in terms of the content of concrete duties these types of agents end up carrying (private agents could discriminate when the state could not).

However, there will be smaller differences in terms of the presumptive duties to respect, protect, and promote constitutional rights: of these rights' abstract scopes. Some rights might apply only against the state—to a fair trial or political participation, for example; and others might have broader scopes against it—it seems more offensive and troubling for the state, as an enormous political apparatus, to discriminate or limit free speech; but in many cases, we will not distinguish, categorically, between the state and private agents: we will not say, for example, that only the state should reduce inequality or poverty.

In legalistic terms, constitutional rights could justify horizontal duties and liabilities. This is the formal state of affairs in Ireland and South Africa.[52] Irish constitutional law allows private agents to sue private agents that violated their constitutional rights for damages: while judges in Ireland have been cautious in applying constitutional rights when private law already addresses an issue, when it does not the constitution was applied in ways that do not always pay attention to the differences between state and private duty-bearers.[53]

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[52] See, generally: Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 *International Journal of Constitutional Law* 61.

[53] Colm O'Cinneide, 'Irish Constitutional Law and Direct Effect—A Successful Experiment?', in Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007) 213.

The Constitution of South Africa (1996) amended the Interim Constitution (1993) by recognizing, among other things, that rights in the Bill of Rights apply against all 'natural or juristic persons'.[54] So, for example, it was decided in *Khumalo v. Holomisa* that while newspaper editors and journalists could give less weight to the privacy interests of public office-holders about which they publish articles, they must 'act with due care and respect for the individual interest in human dignity prior to publishing defamatory material'.[55]

Questions arise about what distinguishes these 'direct' forms of application from 'indirect' forms.[56] German constitutional law, for example, holds all state agents under constitutional right-based duties not to directly harm constitutionally-protected interests and needs and to create the private law the best serves them.[57] Private agents can make constitutional right-based claims in court that private law causes of action should be recognized or repealed. The difference might seems to be that in the case of full horizontality the court recognizes preexisting horizontal duties while in the case of indirect effect it discharges its own duties by creating private law duties. This way of drawing the difference is accurate, but still quite formalistic and reductive. From a perspective focusing on our reasoning as participants in practices of rights-claiming—that shape our mutual normative relations—the difference between the models is deeper than that. It has implications not just for the relations between state agents (if judges do not create sub-constitutional but constitutional norms, later legislative amendments might be more difficult) but also the relations between private agents.

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54 Article 8(2).

55 *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) par. 44.

56 Mattias Kumm and Victor Ferreres Comella, 'What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect', in Andras Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing, 2005) 241, 252–256; Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63, 70–74.

57 Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

Moral Agency and Integrity

The formalistic account of the difference between direct and indirect effect fails to give due weight to the requirement of 'going through the state' (that much of the rest of this thesis will deal with). In this sub-section, I try to point at the problems with the fully horizontal model without getting too much ahead of the line of argument: the focus is still on the epistemic burden placed on private agents and some of its practical implications.

As a first step, it is importance to see that legal norms are relevant not only when we face litigation. As Dworkin noted, there is an 'interplay between law and morals in ordinary practical life, even when no lawsuit is in prospect and each citizen is judge for and of himself'.[58] As Waldron adds, to adequately abide by legal norms in our own affairs we must internalize them, reflect on them when interacting with others, make evaluative judgements about what they require, and self-monitor and modify our behavior accordingly.[59]

The problem is not the vagueness of loosely relational constitutional rights. As Waldron notes, it could be a sign of respect for us as agents that the law uses abstract standards rather than ordering us around like sheep.[60] Shiffrin adds, in this regard, that there is value in inducing private agents to reflect on the moral values underlying abstract legal norms before they apply them in their affairs.[61] Importantly, such standards 'may empower citizens in their interpersonal relations to ask that others alter their conduct or take seriously considerations that might have been neglected or otherwise received relatively short shrift'.[62]

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58 Dworkin, 'The Common Law' (n 51) 300–301. See also: ibid 310–312; Ronald Dworkin, 'Liberal Community' (1989) 77 *California Law Review* 479, 502–504.

59 Jeremy Waldron, 'Vagueness and the Guidance of Action', in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 58, 65.

60 Jeremy Waldron, 'Clarity, Thoughtfulness, and the Rule of Law', in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, 2016) 317.

61 Seana Valentine Shiffrin, 'Inducing Moral Deliberation: On the Occasional Virtues of Fog' (2010) 123 *Harvard Law Review* 1214.

62 Ibid 1227.

Indeed, we find in private law abstract standards like good faith or reasonableness—and they have valuable interpersonal moral roles. However, keeping this in mind, three problems arise when it comes to loosely relational constitutional rights. First, at least when talking about individual agents (rather than corporate agents), private law standards still require us to deliberate on a smaller scale compared to these constitutional rights, that ask us to consider social, economic, and cultural variables on a social scale. This is why Rawls claimed, regarding the realization and preservation of background justice, that private individuals cannot 'comprehend the ramifications of their particular actions viewed collectively'.[63]

Second (and this is, again, a matter of degree), respecting, protecting, and promoting loosely relational constitutional rights is not a requirement limited to particular well-defined activities or practices: like, for example, strict liability when it comes to dangerous activities or good faith when it comes to contracting. As I claimed, private law traditionally protected a relatively narrow list of interests and needs, which was delineated mostly by tracking agent-centered considerations: particular aspects of our bodily integrity, property, or privacy, most notably. Because of their beneficiary-centered nature, loosely relational constitutional rights apply in almost every activity or practice their holders participate in: the interests and needs they highlight—a much longer list—can be potentially affected in countless ways.

Third, while private law norms bind us interpersonally, loosely relational constitutional rights bind us politically: if, for example, we choose to hire the more qualified candidate for a job at the expense of a candidate belonging to a minority community, we could be called to account for failing to promote equality—and we will be called to account by this candidate not merely as a private agent but as a representative of the political collective. We do not take the translation route and try to make the backwards-looking claim that employers

[63] Rawls, *Political Liberalism* (n 4) 268. See also: Rawls, *Justice as Fairness* (n 26) 51–52.

assume responsibilities and duties to promote equality in certain well-defined ways: rather, we claim that because employers control valuable resources—a position in a company, for example—they have a constitutional right-based duty to promote equality.

This makes a big difference. The fully horizontal model invites private rights-claimants to help the state figure out which constitutional right-based duties other private agents should be burdened with: it authorizes them as 'private attorney generals', that make rights-claims both in their behalf and in ours.[64] Failures to act in some ways towards our neighbours, employees, or students would wrong not just them, but also us. In a way, this is slightly similar to the much-less-liberal practice of denunciations under which public order is enforced from the bottom-up and through constant interpersonal scrutiny manifested in mutual calling to account for various public transgressions.[65] The problem, in our case, is not that we are answerable to too many individuals, but that we are answerable to the collective.

While we are talking about liberal democracies, the fully horizontal model does raise concerns about its appetite to devour our private sphere of action,[66] its potential to expose us to the threat of arbitrary legal power exercised over us by others,[67] and its attempt to have our mutual relations conform to 'normal' moral patterns that might turn state regulation into custodial supervision and threaten to distort these relations, in which we always participate, under this model, as public agents.[68] Unlike the threat of state intervention posed by criminal

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64 Stephen Darwall, 'Bipolar Obligation', in *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press, 2013) 20, 32–33.

65 See, for example: Sheila Fitzpatrick and Robert Gellately, 'Introduction to Practices of Denunciation in Modern European History' (1996) 68 *Journal of Modern History* 747.

66 Veronique Munoz-Dardé, 'Equality and Division: Values in Principle' (2005) 79 *Proceedings of the Aristotelian Society* 229, 261–272. See also: Thomas W. Pogge, 'On the Site of Distributive Justice: Reflections on Cohen and Murphy' (1998) 29 *Philosophy and Public Affairs* 137,158–161.

67 See, or example: T.R.S. Allan, 'The Rule of Law as the Rule of Private Law', in Lisa M. Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press, 2014) 67.

68 Jürgen Habermas, 'Paradigms of Law' (1996) 17 *Cardozo Law Review* 771, 779.

law norms, here it is our peers—employees, students, or customers, for example—that have the standing and authority to call us to account for our constitutional transgressions.

The concern here is not only that they lack legitimacy and authority—a concern that will be addressed in the sixth chapter—but also that it distorts our relations with ourselves and with others. We will be less focused on our own agency and responsibility. The notion (as flimsy as it is) that our lives are lived 'from within',[69] might be eroded, if we must constantly reflect on how we fare regarding the realization of collective goals. As Bernard Williams famously claimed, it could alienate us from our actions and convictions.[70]

Strictly relational private law duties tend to be constrained by agent-centered considerations and thus to be tied to our self-centered sense of agency. This, as Tony Honoré claimed, is important not just for our self-respect but also our respect to others.[71] By building on and elaborating the restrictive conception of responsibility, private law helps delineate the inherently vague boundaries between our separate lives,[72] and this allows us to see each other as more than parts of the political collective.[73] As I further claim in the next chapter, the collective dimension of our constitutional duties could overshadow and crowd out the interpersonal dimension of our rights-based duties to other private agents. This is a rather natural implication of the fully horizontal model, and in fact forms part of its rationale.

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69 Bernard Williams, 'Consequentialism and Integrity', in Samuel Scheffler (ed), *Consequentialism and its Critics* (Oxford University Press, 1988) 20, 35.

70 Ibid 49. See also: Joseph Raz, 'Being in the World' (2010) 23 *Ratio Juris* 433, 451; John Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018) 172–175.

71 Tony Honoré, 'Introduction', in *Responsibility and Fault* (Hart Publishing, 1999) 1, 10.

72 Gardner, *From Personal Life to Private Law* (n 70) 58–87.

73 Brudner (n 17) 314–315.

4.5. Unburdening the Individual

The fully horizontal model is problematic not only as a matter of feasibility—because it might ask of us more than we can deliver, due to our lack of knowledge and resources—but also as a matter of its tendency, shared by many progressive, reform-oriented, theories, principles, and doctrines, to ignore our agency and responsibility and the ways in which their a-political nature constitutes, in ways to be further explored, our interpersonal relations. While Mattias Kumm talked about the 'total constitution' with regard to the German indirect model, his claims about the subordination of the entire legal systems—and, I add, of the private in law by the public—applies with greater force to the fully horizontal model.[74]

Now, it is important to stress that the fully horizontal model can be justified in certain circumstances; for example, when trying to eradicate severe and persistent forms of injustice: as is the case with the 13th Amendment to the American constitution abolishing slavery or with the post-apartheid South African constitutions. In such cases, we want to induce private parties to reflect on and engage public moral considerations and to empower them to call others to account when they fail or might fail to do so. We want to bring public and collective values and principles to bear on deliberations internal to interpersonal legal relations.

But these cases should not distract us from the idea, basic in post-war liberal thought, that there are good reasons to maintain some (not absolute nor uniform) distinctions between public and private in morality and in law. While the answer to the libertarian challenge was to expend the scope of social justice and the constitution, the answer to the utilitarian challenge is to try and contain them by carefully contracting and limiting their scope.

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[74] Kumm, 'Who is Afraid of the Total Constitution?' (n 57). See also: Alexander, 'The Public/Private Distinction' (n 49) 368–369.

Such concerns are reflected in many problems with applying and developing principles of constitutional right-based horizontality in Irish law,[75] and the South African transition towards a less direct model.[76] These legal systems' difficulties with implementing the fully horizontal model led them to unburden private agents, to some extent, from legal duties requiring them to directly engage constitutional rights in their daily lives.

The crucial move here is to distinguish between the constitutional rights-based duties of the political collective and those of private agents: only the former bears the direct burdens of respecting, protecting, and promoting constitutional rights; and it then allocates to private agents duties to contribute in concrete ways to this collective endeavor. In more philosophical terms, we move from act-consequentialism to rule-consequentialism: rather than evaluating individual acts or activities against public standards we evaluate social institutions and the norms they create.[77] This move is a response to criticisms made against consequentialism as a decision procedure or method of deliberation for individuals, but not as a standard for moral evaluation (from which such procedures and methods could be derived).[78]

This point was also made by Henry Shue about some human rights-based duties: he claimed that 'isolated and uncoordinated efforts by individuals are materially wasteful and can be psychologically oppressive to no good purpose'; and that while 'indirect duties could be more demanding than direct duties', the 'institutions established for the purpose of coordinating individual responses' can constitute an important 'psychological buffer'.[79]

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75 See, for example: Sibo Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance' (2009) 31 *Dublin University Law Journal* 263.

76 See, for example: Friedman (n 56).

77 See, generally: Brad Hooker, 'Rule Consequentialism', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016 edn).

78 David O. Brink, 'Utilitarian Morality and the Personal Point of View' (1986) 86 *Journal of Philosophy* 417; Paul Hurley, *Beyond Consequentialism* (Oxford University Press, 2009) 36–46.

79 Henry Shue, 'Mediating Duties' (1988) 98 *Ethics* 687, 696–697.

For Onora O'Neill, the fact that 'detailed control is needed to "achieve progressively the full realization" of very complex sets of potentially conflicting rights, which must be mutually adjusted'—an effort often resulting in the imposition of 'complex demands and burdens on all activities and all areas of life'—is a reason to be skeptical about the recognition of socio-economic and other positive moral human rights.[80] But as we saw, many modern constitutions already recognize loosely relational rights and thus create this normative complexity: the question, now, is how to face it when thinking about these rights' scopes.

My claim is that we should see these rights' scopes as covering only state rather than private actions, even if these state actions are about the regulation of horizontal relations. We are narrowing their scope by excluding private actions: for example, I have no constitutional right that you respect my privacy, protect my bodily integrity, or reduce my poverty. It is not just that only state agents could be called to account for constitutional rights-violations, but also that it is only their deliberation and reasoning that are normally burdened with potential right-claims grounded in the prescriptive account of collective responsibility.[81]

I said in the previous chapter that part of the point of separating the scope of loosely relational constitutional rights from their justified limitations is that we want those burdened with them to constantly engage them in their abstract form. But I also said we do not narrow their scopes to take into account the interests and rights of others. Therefore, it is important to emphasize that we do not narrow the scope of constitutional rights in term of the states of affairs they call for: for example, we do not change the meaning of privacy, bodily integrity, or equality. What we change is the agents these rights normally constrain. In normal circumstances, we unburden private agents from having to engage them as right-norms.

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[80] Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427, 436.
[81] See also: de Almeida Ribeiro (n 47) 242–246.

Rawlsian Indirectness

From the early stages of his writing, Rawls tried to utilize the indirect-consequentialist strategy.[82] In his later writing, when trying to find the path between libertarianism and utilitarianism, his theory came to include two distinctions in this regard: first, between two schemes of rules—a complex scheme realizing and sustaining background justice that applies to large-scale institutions, and a simpler scheme applying to private agents; and second, between two systems of principles and values—a social justice scheme for the evaluation of the basic structure and a local justice scheme for the evaluation of small-scale actions and activities.[83] These distinctions push back against the libertarian privatization of the public and the utilitarian publicization of the private by burdening the state with increased burdens while at the same time liberating individuals from complex rules and social justice principles.

Rawls qualified his answer to the leftist critique (that the principles of basic rights and equal opportunity 'always hold in and through all so-called domains') by adding that they do not apply directly to private actions made within the institutions forming the basic structure: 'a domain is not a kind of space, or place, but rather is simply the result, or upshot, of how the principles of political justice are applied, directly to the basic structure and indirectly to the associations within it'.[84] Social justice always holds, but sometimes indirectly.

Against the libertarian, social justice imposes constraints on all social institutions: for example, even within family relations, women and children are still citizens and therefore do not lose their basic rights and liberties.[85] Against the utilitarian, social justice does not bind private agents: we cannot violate it in our interpersonal actions and activities since it

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82 John Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3.

83 Rawls, *Political Liberalism* (n 4) 267–269. see also: Scheffler, 'The Division of Moral Labour' (n 4) 239–240; Samuel Freeman, 'The Basic Structure of Society as the Primary Subject of Justice', in Jon Mandle and David A. Reidy (eds), *A Companion to Rawls* (John Wiley & Sons, 2014) 88, 99–101.

84 Rawls, *Justice as Fairness* (n 26) 166.

85 Ibid 164; Rawls, 'The Idea of Public Reason Revisited' (n 26) 791.

must be further specified in terms of more concrete moral and legal norms—for example, by translating the principle of equal opportunities to specific legal norms.[86]

This sheds light on a question that was debated in private law theory: is it part of the basic structure?[87] First, it seems to me that even if judges need not apply social justice in all private law cases, there are no justifications for categorically exempting all activities and norms falling under the practice of private law from its demands: it will seriously hinder our collective ability to realize and preserve background justice (especially since the rich and powerful became quite good at evading taxes and administrative regulations).

But the more basic point is that in its binary form—is private law in or out—this is the wrong question to ask. Much less is at stake than it assumes: even if private law is out, social justice can apply to it indirectly; and even if it is in, it need not apply fully. The binary question treats social justice and private law as static and homogenous.[88] Even if there are some inherent conflicts between them (and I claimed there are) questions about the extent to which we can bring them closer and have them work in tandem are on the table.

This can be done if private agents realize social justice but their efforts are coordinated by public agents. That is, public agents—including judges, when they apply or change common law norms—might have social justice duties to tend to personal attitudes actions, activities, or practices in ways that private agents do not.[89] We want to ensure that indirect and concrete social justice duties will effectively realize and preserve social justice (contra libertarianism) while not being too onerous (contra utilitarianism).

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86 Rawls, *Political Liberalism* (n 4) 267–268; Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 *Oxford Journal of Legal Studies* 213, 220–221, 234.

87 See, for example: Weinrib, 'Correlativity, Personality' (n 45) 144–145; Ripstein, 'Private Order and Public Justice' (n 45); Stephen Perry, 'Ripstein, Rawls, and Responsibility' (2004) 72 *Fordham Law Review* 1845.

88 Kok-Chor Tan, *Justice, Institutions, and Luck* (Oxford University Press, 2012) 37–38; Miriam Ronzoni, 'What Makes a Basic Structure Just?' (2008) 14 *Res Publica* 203.

89 Kok-Chor (n 88) 44–47; Pogge, 'On the Site of Distributive Justice' (n 66) 164–166.

Individual Responsibility and Social Justice

This does not mean that we have no individual responsibility at all for social justice. To begin with, as members of the political collective, we have imperfect duties to create the conditions in which the state can discharge our collective responsibilities. Rawls, for example, talks about duties to bring about and further just institutions and to publicly deliberate and educate children in certain ways.[90] Shue adds that 'among the most important duties of individual persons will be indirect duties for the design and creation of positive-duty-performing institutions that do not yet exist and for the modification or transformation of existing institutions that now ignore rights and the positive duties that all rights involve'.[91]

This means that the distinction between social and interpersonal justice is not binary: personal responsibilities are shaped in many ways by collective responsibilities.[92] This goes against 'familiar convictions' that, Dworkin noted, 'assume a division of public and private responsibility'.[93] We cannot, as Nagel hoped, be 'publicly egalitarian and privately partial':[94] liberal states do not operate optimally, and they probably never will. Thus, as Gerry Cohen adds, while private agents need not be as dedicated to social justice as state agents are, we cannot, if we believe that it should be realized, self-servingly blind ourselves to it.[95]

On the other hand, this does mean that the same principles that are relevant for the evaluation of public institutions are also relevant for the evaluation of private actions and activities, as Liam Murphy claimed.[96] If we want to preserve the space individuals need to

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90 Rawls, *A Theory of Justice* (n 3) 93–101, 293–301; Rawls, *Political Liberalism* (n 4) 199–200, 440.
91 Shue, 'Mediating Duties' (n 79) 703
92 Martha Nussbaum, 'Forward', in Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) ix, xxi–xxii.
93 Dworkin, 'The Common Law' (n 51) 299. See also: John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1, 3
94 Nagel, *Equality and Partiality* (n 28) 59, 86. See also: ibid 53–54
95 G. A. Cohen, 'Introduction', in *Rescuing Justice and Equality* (Harvard University Press. 2008) 1, 10–11.
96 Liam B. Murphy, 'Institutions and the Demands of Justice' (1998) 27 *Philosophy and Public Affairs* 251

form, pursue, and revise a conception of the good,[97] we cannot casually place them under abstract public duties to promote 'whatever it is that just institutions are for': we should care about how social justice is realized in practice and not just about its realization;[98] and in this regard the distinction between public institutions and private agents is important.

I focus on two complex and nuanced paths leading from social to interpersonal justice. The first, that was already mentioned, is the translation path. Horizontal relations are often situated against a background of social injustice; and we are exposed to risks of wronging others by exploiting or exacerbating it: we have no control over the existence of injustice, but we do about how we respond to it and to its implications in our interpersonal relations.[99] This is an important theme in Dagan and Dorfman's theory of private law (that I already mentioned in the context of libertarianism): we have no private law duties to promote others' interests and needs or to realize social justice but we do have duties to accommodate their shortcomings—including those that were caused by social injustices like poverty.[100]

But there is another path leading from social to interpersonal justice. As Dworkin noted, 'the state's pervasive public responsibility' can explain why, sometimes, we have public duties, like treating others with concern and respect.[101] The idea here is that the political collective can burden us with interpersonal rights-based duties that are tied very weakly to our personal responsibility. We can use state institutions to make us do things, like alleviating poverty or realizing gender equality, that we have no personal responsibility to do

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97 Rawls, *Political Liberalism* (n 4) 54–56, 268–269; Freeman (n 83) 101–105; Kok-Chor (n 88) 26–31.

98 Murphy, 'Institutions and the Demands of Justice' (n 96) 280, 283.

99 Adity Bagchi, 'Distributive Injustice and Private Law' (2008) 60 *Hastings Law Journal* 105; Emmanuel Voyiakis, 'Rights, Social Justice and Responsibility in the Law of Tort' (2012) 35 *UNSW Law Journal* 449, 464–468; Emmanuel Voyiakis, 'Contract Law and Reasons of Social Justice' (2012) 25 *Canadian Journal of Law and Jurisprudence* 393, 405–407; Zhong Xing Tan, 'Where the Action Is: Macro and Micro Justice in Contract Law' (2020) 83 *Modern Law Review* 725.

100 Hanoch Dagan and Avihay Dorfman, 'Poverty and Private Law: Beyond Distributive Justice' (SSRN, 2 January 2021).

101 Dworkin, 'The Common Law' (n 51) 296.

nor choose to do in our private lives.[102] Even private agents that did not cause social injustice and do not exploit or enjoy its implications can still have responsibilities to do some things about it, that can serve as justifications for burdening them with horizontal duties. This responsibility is grounded in their membership in a liberal political collective and in their participation in various public practices. Exactly how close this takes us to the full horizontality model in terms of the substance of private law norms is a matter to be discussed in the next chapters; but the important thing at this point is that the allocation of public responsibilities is made here by state agents: there is no direct horizontal application.

This does not mean that social injustice will always entail, in itself, right-based duties for private individuals to 'pick up the slack' of our collective failures: such duties to do more than what we are personally responsible for are often dependent on state allocation. Absent an official distribution of duties, victims of injustice might be able to address their claims only at the state or at individuals not doing their parts—while the members doing their parts might have only imperfect duties of mutual aid and beneficence.[103] That is, sometimes official state action is required to solidify our public responsibilities as members of the political collective in terms of rights-based duties. These two ways in which social justice can trickle down into our private lives as moral and legal agents form crucial parts of indirect effect models. I will revisit them in the next chapters. But before moving on, I must offer a basic definition of this model and its take on the scope of constitutional rights.

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[102] Nagel, 'Libertarianism Without Foundations' (n 5) 145–146. For criticism on Nagel in this regard, see: G. A. Cohen, 'Political Philosophy and Personal Behavior', in *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press, 2001) 148, 168–174.

[103] Laura Valentini, 'The Natural Duty of Justice in Non-Ideal Circumstances: On the Moral Demands of Institution Building and Reform' (2017) *European Journal of Political Theory*.

4.6. Horizontal Indirect Effect

Purely vertical models result in the creation of a public–private divide regarding the scope of loosely relational constitutional rights and in the restraint of their consequentialist potential. Fully horizontal models result in the dissolution of this divide as they unleash this potential by allowing these rights to be claimed in all horizontal relations. The indirect effect strategy, latent in Rawls's theory of justice, tries to preserve a degree of privateness in some social activities, practices, and relations by allowing these rights to be claimed only against state agents; but to prevent their isolation from social justice by accepting the complexity and pervasiveness of state duties to regulate them in certain ways.

This strategy is suitable for the European Court of Human Rights, as only states can be defendants in it. It also seemed to have been adopted in the British Human Rights Act, that applies only against state agents, including judges (British judges are still hesitant to recognize new private causes of action while relying on constitutional rights, but this does not seem to be because their scope is narrowed or because they are treated as values).[104] But in our context the important thing is not official legal recognition: from our abstract theoretical perspective, the idealized indirect model exceeds procedural or political contingencies. The important thing is its normative structure and the moral grounds on which it rests—the general topics to which the rest of this thesis is dedicated. I want to understand how failures to adequately regulate horizontal relations could result in constitutional right-violations, but of the state and not of the private agents whose actions were insufficiently regulated;[105] and which implications this has for the dominantly relational practice of private law.

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[104] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *Modern Law Review* 878, 886, 901.

[105] See, generally: Aharon Barak, 'Constitutional Human Rights and Private Law', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 13.

Horizontal Dimensions

Article 39(2) of the Constitution of South Africa determines that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Article 3(1) of the British Human Rights Act determines that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Such articles are important for making private law more compatible with the constitution; but these imperfect judicial duties exist side by side with right-based duties to respect, protect, and promote constitutional rights: the duties to interpret law and to develop it in light of the constitution apply beyond private law; and they do not possess the robust relational normativity that constitutional rights-based duties possess.[106]

When thinking about the scope of loosely relational constitutional rights with regard to indirect effect, the focal point remains large-scale states of affairs related to social justice. In some cases, interpretation does the job: we might be able to adequately promote equality, for example, by reading 'couples' in an insurance contract as also referring to same-sex couples, thereby granting each partner the right to claim benefits. In other cases, incremental development can suffice: we can extend the rule reversing the burden of proof in negligence, for example, from hospitals to business corporations providing other services.

However, the duty to respect, protect, and promote constitutional rights can and often does require more than these things: it can mandate the creation of new norms or the abolition of existing norms. For example, in the *Campbell* case,[107] the British Supreme Court held that the tort of 'breach of confidence' covers a case in which pictures of the famous model Naomi

[106] Friedman (n 56) 76–77.
[107] *Campbell v MGN Ltd* [2004] UKHL 22.

Campbell leaving a rehabilitation center were displayed in a tabloid without her consent—importantly, the judges denied that they created a new tort of invasion of privacy (though it does seem that as a matter of fact they did).[108] This judicial choice raises not only problems internal to private law (for example, the concept of 'confidence' seems to have been stretched here beyond any reasonable limits) but also to constitutional law: for example, is it more than possible that recognizing an explicit right-norm, rather than sneaking privacy in through the back door, would better protect and promote the right to privacy in horizontal relations—a right that is under serious threats these days both in the workplace and online.

Indirect effect models can require states to take such measures when regulating horizontal relations, because the scopes of loosely relational constitutional rights cover what has been traditionally labeled as private relations. For example, it seems unquestionable today that these rights apply in the workplace: that the right to private life and correspondence, addressed in *Bărbulescu*, could require the state to regulate the ways in which employers monitor their employees' use of email or other messaging services, even when it involves the employer's property, and introduce adequate safeguards against abuse;[109] or that the right to free speech, implicated in *Sanchez*, could require the state to protect the ability of employees to criticize and ridicule their managers and co-workers by publishing cartoons and articles in a trade union's newspaper, distributed and displayed on the employer's premises.[110] The horizontal dimensions of loosely relational constitutional rights could require the state to take active measures designed to respect, protect, or promote them in horizontal relations. This creates a triadic—rather than the traditional bipolar—normative structure.

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[108] See also: Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law' (2008) 121 *West Virginia Law Review* 1, 16–17.

[109] *Bărbulescu v. Romania* App no 61496/08 (ECtHR, 5 September 2017) par. 110, 120–123.

[110] *Sanchez v. Spain*, App no 28955/06 (ECtHR, 12 September 2011) par. 58–63.

The Triadic Structure

Under the indirect effect model, each horizontal interaction is regulated by a complex cluster of norms: the parties' respective private law rights and duties; imperfect state duties to interpret and develop private law to accommodate the constitution; and constitutional right-based state duties—both strictly relational duties to treat each party in particular ways and loosely relational, interdependent, and often conflicting duties to bring certain states of affairs about through the regulation of horizontal relations. In the *Sanchez* case mentioned above, for example, it was held that the state law allowing the employees' dismissal does not amount to a violation of their free speech rights, as it is required to protect the rights to respect, dignity, and reputation of the criticized and ridiculed manager and co-workers.[111]

The cases of *Masterpiece Cakeshop* and *Bull v. Hall*, mentioned in the first chapter, demonstrate conflicting approaches in this regard. In the first case, the Supreme Court of the United States overturned a decision of the Colorado Civil Rights Commission (affirmed by the Colorado Court of Appeals), finding that the refusal of a Christian bakery owner to provide a wedding cake to a gay couple amounted to unlawful discrimination.[112] Interestingly, the Supreme Court's decision largely ignored the competing rights to equality and freedom of religion: it focused on the disrespectful, hostile, and non-neutral conduct of the Commission.[113] It was therefore held that Colorado 'violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint'.[114]

On the other hand, the starting point of the Supreme Court of the United Kingdom in *Bull v. Hall* was the conflict between the right of the hotel owners to manifest their religion

[111] Ibid par. 57, 68–79.
[112] *Masterpiece Cakeshop v. Colorado Civil Rights Commission* 584 US _ (2018).
[113] See ibid 12–16.
[114] Ibid 16.

by refusing to provide a double-bed to a same-sex couple, and the couple's right to equality and respect for their private lives. The court emphasized that 'while both parties can assert their rights against the state, Mr Preddy and Mr Hall cannot assert their rights directly against Mr and Mrs Bull, who are private citizens'.[115] That is, the court recognized the horizontal dimensions of the implicated constitutional rights and their indirect effect. However, it failed to tie the justification of the anti-discrimination norm deciding the case the right to equality: the horizonal dimensions of only one right were treated as relevant to the case.

Under indirect effect models, we start by asking which constitutional rights are implicated in the relevant horizontal interaction. This is the stage of delineation. When delineating the scope of the implicated rights we can be informed by the current private law framework and the values underlying it: for example, we can ask—as the British Supreme Court failed to— whether in the anti-discrimination rules realize the right to equality. In this sense, the delineation of constitutional rights need not be a purely top-down process.

A similar conflict of approaches was evident in *Evans v. UK*.[116] It dealt with a woman that started fertility treatments with her partner before her ovaries were removed due to pre-cancerous tumors. After the relationship broke down, her partner wanted to exercise his legal right to have the embryos destroyed by the clinic. The important thing for us is that while the British courts saw the case as one in which the state intervenes in the private relations between the woman and the clinic, the European Court of Human Rights saw it as one concerning the state's positive duties to balance the partners' rights to respect for private and family life—to become or not to become a parent—and public interests, like the importance of consent and legal clarity and certainty (a balance that it was held the British law did strike).

[115] *Bull v. Hall* [2013] UKSC 73, par. 5.
[116] *Evans v. UK*, App no 6339/05 (ECtHR, 10 April 2007).

What we see in these cases is a triadic normative structure: it involves each private party's private law rights and duties, their constitutional rights, and the state's constitutional duties. Many private law theorists tend to focus on the relations between private parties and neglect the relations between each party and the state.[117] My claim is not that the rights and duties these theories address are less important: just that they are only part of the picture. Accepting the importance of strict relationality in private law's core does not entail ignoring the state. When state agents engage us as private legal agents—as family members, employees, tenants, or consumers, for example—they still see us as part of the political collective and as constitutional right-holders.[118] This is important, because some constitutional rights brings beneficiary-centered values into focus: values that private law, with its own focus on agent-centered concepts like choice, proximity, or causation, often ignores.[119]

Thus, while we can talk about private law relations, legally, as relatively independent from constitutional relations, the same cannot be said about horizontal interactions when seen from a broader normative perspective, engaging the legal system as a whole. From this perspective, every interaction is regulated by a complex cluster of norms.[120] The important thing for us at this stage is that this cluster includes the state's constitutional right-based duties to regulate our horizontal relations in certain ways. It is these horizontal dimensions of loosely relational constitutional rights, that do not bind private agents but shape their mutual private law rights and duties, that stand at the basis of the model of indirect effect.

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[117] Stephen A. Smith, 'The Rights of Private Law', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 113, 141.

[118] But see: Brudner (n 17) 5–6, 15–25; Hanoch Dagan and Avihay Dorfman, 'Postscript to *Just Relationships*: Reply to Gardner, West, and Zipursky' (2017) 117 *Columbia Law Review Online* 261, 267.

[119] Vladislava Stoyanova, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations Under the European Convention on Human Rights' (2020) 24 *International Journal of Human Rights* 632, 645–648.

[120] Nils Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 447.

4.7. Conclusion

This chapter dealt with the horizontal delineation of the scope of loosely relational constitutional rights. Its main goal was to point at the problems of purely vertical and fully horizontal models: the former, relegating the consequentialist aspects of social justice and constitutional rights to the domains of interpersonal morality or politics; the latter injecting consequentialism and the political into interpersonal practices of rights-claiming. This reflects the connections of these models to libertarianism and utilitarianism and the two moral paradigms.

My claim is not that these models are never justified: not in law and not in other normative systems. For example, multicultural societies often require thinner constitutional arrangements: heavy state intervention in private relations (for example, between members of a religious minority) could be problematic, and therefore state-centered models could be more justified. The same goes for some rights particularly focused on the dangers posed by the state: for example, to a fair criminal trial or political participation. On the other hand, some strictly relational constitutional rights—for example, against torture or slavery—could apply directly to horizontal relations without raising many of the concerns mentioned above.

However, in most cases models of indirect effect will be more suitable: they can free individuals from the heavy normative burdens that accompany the engagement with loosely relational constitutional rights, while avoiding the creation of social-justice-free or constitution-free domains, by burdening state agents with consequentialist right-based duties to adequately regulate horizontal relations. Seeing the scope of loosely relational constitutional rights as creating this form of indirect effect is an important step forward. However, it is still a modest step. Many of the problems related to constitutional horizontality arise in the stage in which we try to realize these broad and complex rights in one normative system.

Chapter 5

Horizontal Realization

5.1. Introduction

The previous chapter defended an intermediate position about the horizontal reach of loosely relational constitutional rights: they do not directly entail duties for private agents, but they do burden state agents with duties to ensure that they are respected, protected, and promoted in private relations (rather than applying only when the state is intimately involved). That is, they constrain private agents indirectly by shaping the regulation of horizontal relations.

After the stage of rights-delineation, we have a list of abstract rights against the state, entailing prescriptions about the regulation of horizontal relations: for example, rights to security as roadside cyclists, to privacy as employees, or to property as spouses. In the first stage, we can tackle a few potential problems created by their horizontal implications: most importantly, we push back against pure verticality and full horizontality. However, because that stage is only thinly consequentialist and we treat loosely relational constitutional rights in relative isolation when delineating then, we are oblivious to many of their implications. These implications and the normative conflicts they create are dealt with at the second stage of constitutional rights-based reasoning: the stage of rights-realization. In it, state agents implement these rights in sub-constitutional law. To do that, they must systematize these rights' prescriptions with other legal and moral rights, values, and principles.

The second stage of constitutional rights-based reasoning is often conceptualized as being about the ex-post judicial evaluation of rights-limiting state actions: usually, about the application of proportionality (or similar) tests determining their legitimacy. But such

judicial interventions enforce pre-existing constitutional rules about the extent to which constitutional rights should be realized rather than create them anew. These realization norms, when seen as performing an ex-ante guiding role, instruct state agents about how to unpack the prescriptions entailed by the rights that were generously delineated.

These rights, I said, create waves of duties. The first of which is directed at state agents that are required to materialize further waves in different legal norms. The questions I address in this chapter focus on how state agents transition from their abstract duties to these more concrete norms while taking other considerations into account. Which constitutional right-based duties do state agents have when regulating horizontal relations? What is their nature and scope? That is, to what extent do these duties determine the content of sub-constitutional norms? What happens when they conflict with each other? Or when they conflict with non-constitutional rights, values, or principles? Such questions, we will see, are tied to ongoing debates in moral, political, legal, and constitutional theory.

Like in the previous chapter, I try to defend an intermediate position. On one end of the spectrum, lies a model of rights-realization that tries to achieve systematization through consequentialization: it determines the ways in which constitutional rights should be realized in private law according to the states of affairs they bring about. It erodes the relational rights, values, and principles endemic to horizontal relations by forcing them into a consequentialist mould. On the other end, lies a model that tries to achieve systematization through separation: it sees these legal domains as operating on separate moral planes. It accepts the relational foundations of private law, but either subordinates it (and them) to constitutional law, or immunizes it (and them) against constitutional scrutiny. I will try to find a middle ground, which I start developing in this chapter and then unpack more fully in the next.

Abstracting Away

A common example for indirect effect is a defensive claim in court: a litigating party claims that his constitutional rights require the limitation or change of a private cause of action the exercise of which harms his protected interests or needs. For example, it could be claimed that the right to equality justifies the limitation of the right to prevent minority members from moving into a house they bought;[1] that the right to private life and home justifies subjecting the right to evict unpaying mortgagors to fairness or proportionality tests;[2] or that the right to privacy justifies the prevention of dismissal decisions grounded in information procured by reading employees' private correspondence.[3] However, as claimed in previous chapters, offensive indirect horizontal effect claims—that a private law cause of action should be recognized—are also on the table: for example, that the right to autonomy justifies compensating individuals that received medical treatment without their informed consent.[4]

Both types of claims raise problems endemic to litigation, like retroactive changes of the law or the competence of private parties to make constitutional claims, that I leave aside for now. The horizontal aspects of constitutional rights bind non-judicial state agents independently of actual right-claims: they are duty-bound to consider such right-claims even if they are not addressed at them. While indirect effect is always about the interactions between persons, they need not be about actual (past or future) interactions. For example, a parliament member could come to realize that the constitutional rights to security, autonomy, and equality require the replacement of tort law in its traditional litigation-based and relational form by a New Zealand style administrative scheme combining sanctions and insurance; and

1 *Shelley v. Kraemer* 334 US 1 (1948).
2 *McDonald v. McDonald* [2016] UKSC 28.
3 *Bărbulescu v. Romania*, App no 61496/08 (ECtHR, 5 September 2017).
4 See, for example: Nili Karako-Eyal, 'Has Non-U.S. Case Law Recognized a Legally Protected Autonomy Right?' (2009) 10 *Minnesota Journal of Law, Science, and Technology* 671.

could claim—since, as I noted, loosely relational constitutional rights need not be claimed only and directly by their holders—that the members of the legislature have constitutional duties to implement this legal reform, which will result in many changes to the rights and duties private citizens have towards each other (that is, in indirect horizontal effect).

While such cases of indirect horizontal effect also have some idiosyncratic features, they are 'purer' for our purposes, as they ignore some particular considerations related to litigation that often draw our attention. I will touch these considerations later, but first we must get a good grip on challenges arising more upstream: touching the nature of the values and the forms of reasoning and engagement involved in the realization stage. I am starting with the structure of normative reasoning state agents engage in when regulating horizontal relations in the shadow of their constitutional right-based duties: with how they decide which values are relevant, in which ways, and how they systematize them.

What complicates their task is the combination of, on the one hand, the normative structure of loosely relational constitutional rights—their consequentialist prescriptions about large-scale states of affairs—and on the other, the ability (often recognized in constitutional 'limitations clauses') to limit them when they conflict with each other, with other constitutional norms, and with non-constitutional and even non-legal considerations. This means that when state agents realize constitutional rights they must deal with many diverse normative considerations: in a way, they are asked to monitor the gates to the legal system and determine which moral considerations—often reflecting economic, cultural, social, psychological and other reasons—should serve as justifications for the limitation of constitutional rights. This is obviously a very complex task, even when focusing on the narrower context of horizontality. However, progress could be made by teasing out some of the fundamental normative features of conflicts involved in the practice of constitutional rights-realization.

The Road Ahead

When creating, changing, or applying private law norms, state agents must resolve conflicts between the prescriptions entailed by constitutional rights and other moral and legal factors. How should we understand this normative activity? One suggestion—the 'unionist' or consequentialist model—is to see the normative structure of loosely relational constitutional rights as shaping their conflicts with other normative incidents: if these rights are about states of affairs in which interests and needs are respected, protected, and promoted, incomplete realizations must bring about better states of affairs, in these terms. We engage and evaluate various private law arrangements through a consequentialist prism, even if that requires us to 'consequentialize' relational and small-scale rights, values, or principles.

In the next two sections, I present and criticise this model, that seems to be accepted by many constitutional lawyers, as bringing us too close to full horizontality, and as ignoring or distorting the relational normativity that shapes and gives value to horizontal legal relations. The preservation of the private in law requires some discontinuities between private and constitutional law when reasoning about the realization of constitutional rights.

However, these discontinuities cannot form a complete separation: we cannot see the morality underlying private law as isolated from the constitution. Some private lawyers embrace such models in an attempt to free the ongoing practice of private law from distributive, political, or policy considerations. However, they have a problem when discussing the creation or change of private law norms from the 'outside'—for example, when considering the replacement of tort law with alternative schemes: regarding such questions, they either accept the lexical priority of external considerations or see them as largely irrelevant for private law, thereby immunizing strictly relational private law rights from their scrutiny.

I claim that while some normative discontinuities between public and private in law, context-sensitivity, and categorization of the norms and values underlying the regulation of horizontal relations are morally important, we cannot resort to simple binary distinctions. While we must offer some protection to relational norms from crude forms of systemization in the ongoing operation of private law, we must also allow the constitution to be brought to bear on the process in which private law norms are created, changed, and applied. I will offer a model of rights-realization that seeks to combine some of the deliberative features of constitutional rights, private law rights, the common law, and interpersonal morality. The challenge is how to fit public moments into a private legal domain without wreaking havoc on the complex and subtle normative relations it regulates. I will claim, in line with the liberal strand recognizing the truth and principle of moral pluralism, that we cannot draw rigid lines here but must aspire to reach systematization through incremental development.

This will bring me, finally, to the problems most commonly addressed when thinking about horizontal effect: the clashes between the constitutional rights of parties to actual legal relations. I will touch the problems state agents face when they engage concrete private law disputes—most notably in litigation—against the background of the requirements entailed by loosely relational constitutional rights. This raises problems that I already hinted at, like retroactivity and the representation of public interests by private parties. I will return, within this framework, to the two paths leading from constitutional rights to private law: the somewhat more restrictive path of translation—tying aspects of social justice to personal responsibilities; and the more ambitious path of allocation—burdening private agents that perform public roles with aspects of our collective responsibilities. I further address these paths in the next chapter, as the main goal of this chapter is to understand the rights-realization stage. It is only after we understand its complexities that we can more fully explore these paths.

5.2. Unionists

The realization of constitutional rights requires the systemization of different normative factors. The first model I examine tries to achieve systematization through consequentialization. It flows quite naturally from some common and seemingly uncontroversial assumptions about how the constitution interacts with other normative factors. It builds on the idea that the constitution has normative priority in the legal hierarchy of norms. Thus, when engaging questions about the realization of constitutional rights—including their horizontal dimensions—we just follow the basic constitutional prescription of optimizing them.

The other side of the coin is that when we do not realize a constitutional right to its fullest extent—for example, when recognizing a tort limiting free speech or a contractual rule limiting liberty—we must have a constitutional justification. The most common justification in modern constitutional practices is that the limitation is proportional to the benefits it brings about. While the proportionality tests change from one legal system to another, a common requirement (the last test, often referred as proportionality 'in the narrow sense') is that the 'benefits' resulting from the limitation will outweigh the 'harms' it brings about.

This requirement serves as the foundation of the unionist model of rights-realization. It seems straightforward that if loosely relational constitutional rights have a consequentialist normative structure, we will only be permitted to limit them if doing so will bring a better state of affairs about. This brings the full force of consequentialism to bear on private law and gives the unionist-consequentialist model its top-down form. Two versions of this model are possible. A simpler version sees constitutional rights as the DNA of the legal system and private law as their further elaboration and adjustment in particular contexts.[5]

[5] Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341; Hugh Collins, 'The Constitutionalization

The simpler version assumes a separation between the constitution and sub-constitutional law and is thus not fully consequentialist: part of the point of consequentialism, in its ideal form, is to take all relevant considerations into account. Thus, I will revisit the simpler model later, when talking about separationism. Under a complex unionist model, we do not hold that we first satisfy all the reasons for regulation derived from constitutional rights and only then engage other reasons: while these rights are agnostic about some regulatory questions, they still require state agents to explore the normative horizon of their decision in order to figure out which considerations are relevant—if not as parts of the scopes of constitutional rights, then as potential result-oriented justifications for their limitations.

The inclusive consequentialist model is still top-down, in the sense that the abstract and beneficiary-centered right-norms—for example, liberty, equality, property, or privacy—set the terms in which other normative considerations can join public reasoning about regulation. These other factors must be embedded in a form of reasoning focusing on the consequences of regulation for large-scale states of affairs. Even if some such states of affairs do not fall in the scope of constitutional rights, these rights still frame the deliberative process: state agents do not just focus on large-scale states of affairs—they often also see their first task as ensuring that these rights are not limited more than is necessary. Other rights, values, and principles are therefore seen mostly as potential justifications for rights-limitations. While it seems somewhat complex and clunky when described in these abstract terms, it is in fact quite straightforward (a feature of this model contributing to the appeal of consequentialist private law theories, that have a similar normative structure). I will try, in the rest of this section, to explain this model. I will criticize it in the next section.

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of European Private Law as a Path to Social Justice?', in Hans-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing, 2011) 133, 136–139, 142.

The Vacuum Cleaner

New York Times v. Sullivan dealt with the decision, by an Alabama jury, to award unusually high damages to a police commissioner whose alleged civil rights abuses were described in an ad in the newspaper—a decision spurring a wave of lawsuits by Southern officials against media outlets, thereby threatening to use tort law to stifle the civil rights movement and the freedom of the press. The American Supreme Court ruled that libel against public officials requires either knowledge of its falsity or reckless disregard for its potential falsity.[6] Ignoring the state-centered reasoning (that there is state action since courts used tort law to limit free speech),[7] the important thing for us is that the focus is not on the direct interaction between the newspaper and the official—the relational wrongfulness of the publication—but on the implications for the market of ideas and the accountability of public officials that were seen as values underlying the right to free speech. To take another example, when we consider how to realize the rights to health and autonomy in medical treatment, we can consider the implications for the quality, price, and availability of such treatments in general.

One challenge that this model of rights-realization faces in the context of the regulation of horizontal relations is that many small-scale rights, values, and principles included in its consequentialist calculus are not about states of affairs: they are, as I claimed in the second chapter, strictly relational. If promise-keeping or due care are not about what happens on a social scale but about the immediate interaction of isolated pairs of legal agents, how can we include them in a consequentialist calculus? Some moral theorists claim in this regard that the 'consequentialist vacuum cleaner' can absorb such normative considerations.[8]

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6 *New York Times v. Sullivan* 376 US 254 (1964) 265.
7 Jud Mathews, *Extending Rights' Reach* (Oxford University Press, 2018) 143–147.
8 David McNaughton and Piers Rawling, 'Agent-Relativity and the Doing-Happening Distinction' (1991) 63 *Philosophical Studies* 167, 168.

One suggestion is that the consequentialization of relational values can be achieved by evaluating states of affairs from the separate perspectives of moral agents rather than from one impartial perspective: each agent has a separate ranking of consequences, shaped by the nature of his involvement in bringing them about.[9] Take, for example, the constraint on killing one person to save two others. We allow moral agents to aggregate and minimize harms; but they must give weight to the fact that their involvement in a killing makes things worse from their perspective: therefore, they might be allowed to kill one person only to save a hundred others, or a million. This move is supposed to allow the aggregation of harms that relate to states of affairs while preserving the force of deontological constraints.

Whether this works in the case of individual agents is beside the point,[10] as it does not work with state agents. Loosely relational constitutional rights bind one collective agent, and are largely oblivious to the nature of its involvement in horizontal relations: we care less about which things we can say that it did or was involved in. When we constitutionally evaluate its regulatory choices, we adopt an impartial and beneficiary-centered perspective.

What the state can do is to adopt an impartial perspective but give weight not to the nature of its own involvement but to the nature of the involvement of private agents: to how they contributed to bringing various states of affairs about.[11] The state's analysis is therefore not purely forward-looking: for example, it can hold that a state of affairs is worse because it is brought about by breaking a promise or by causing harm negligently.[12]

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9 Campbell Brown, 'Consequentialize This' (2011) 121 *Ethics* 749; Douglas W. Portmore, 'Consequentializing Commonsense Morality', in *Commonsense Consequentialism: Wherein Morality Meets Rationality* (Oxford University Press, 2011) 84.

10 Paul Hurley, 'Consequentializing and Deontologizing: Clogging the Consequentialist Vacuum', in Mark Timmons, *Oxford Studies in Normative Ethics, Volume 3* (Oxford University Press, 2013) 123; Monika Betzler and Jörg Schroth, 'The Good of Consequentialized Deontology', in Christian Seidel (ed), *Consequentialism: New Directions, New Problems* (Oxford University Press, 2019) 115.

11 R. Jay Wallace, *The Moral Nexus* (Princeton University Press, 2019) 229.

12 Amartya Sen, 'Consequential Evaluation and Practical Reason' (2000) 97 *Journal of Philosophy* 477, 487–494; Derek Parfit, *On What Matters: Volume One* (Oxford University Press, 2011) 373–374.

State agents can include in their analysis the forms of engagement and realization that relational norms require. It can be claimed, for example, that while contractual promise-keeping is of value, this value should not be maximized by inducing private agents to make more promises or by having them ensure that other private agents keep their own promises.[13] Thus, we can give weight, in evaluating states of affairs, to strictly relational values.

The important thing is that we avoid maximization because we want to bring the best large-scale state of affairs about: for example, because we want the make the practice of contractual promise-keeping as robust as we can. While relationality figures in our consequentialist regulatory deliberations, its role is subsidiary: it is just that the states of affairs constitutional rights require state agents to bring about often include patterns of action, practices, or institutions, that are constituted by relational rights, values, or principles.

The value of relational moral factors is instrumental: we just use them to bring certain large-scale states of affairs about; and it is these states of affairs that we fundamentally care about. This is even more evident when it comes to tort law: if we want those harming others in certain ways to take responsibility for their actions by ensuring that their victims receive fair compensation, why not establish a liability insurance scheme, funded by those engaging in dangerous activities, coupled with administrative and criminal sanctions?

Much like the twister taking Dorothy from Kansas to Oz, the unionist model takes the relational rights, values, and principles underlying private law from their natural habitat in isolated interactions to large-scale states of affairs. They are consequentialized so that we could determine the extent to which they realize constitutional rights. While this move is natural for many policy makers, it is not without costs. But before turning to its critique, I must touch another aspect of this model: its nuanced rejection of moral pluralism.

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[13] Hurley, 'Consequentializing and Deontologizing' (n 10) 127–131.

Procedural Monism

The idea of moral pluralism means, crudely, that we cannot systematize all our moral values under one unified scheme.[14] Substantive moral monism holds that there is one 'super-value' (like utility in utilitarianism, for example). Procedural moral monism does not deny the existence of conflicts between different moral values but holds that we can engage in interpretative processes that make these values compatible,[15] or that these values are fully commensurable in the sense that they can be located on a general scale.[16] Procedural forms of monism hold that conflicting moral values can be made compatible parts of a unified normative system without violently reducing them to one master-value.

The normative umbrella can be a qualitative scale on which we rank the goodness of states of affairs: under the unionist model, we rank the states of affairs regulation could bring about by how well they serve our interests and needs and the extent to which they realize (or not limit) constitutional rights.[17] Every legal norm is supposed to go through this trial by fire. We do not hold that liberty and equality do not conflict or collapse them to interests and needs that we aggregate quantitively: rather, we hold that we should limit the former to promote the latter in cases like *Bull v. Hall*, by making qualitative distinctions between the states of affairs that each regulatory option brings about.[18] The unionist model sees the conflict as real, but also resolvable by appealing to complex consequentialist reasoning about the goodness of the large-scale states of affairs that horizontal rights and duties bring about.

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[14] Isaiah Berlin, 'Two Concepts of Liberty', in *Liberty* (Henry Hardy ed, Oxford University Press, 2016) 166, 212–217.

[15] Ronald Dworkin, 'Do Liberal Values Conflict?', in Mark Lilla, Ronald Dworkin, and Robert Silvers (eds), *The Legacy of Isaiah Berlin* (New York Review Books, 2001) 73.

[16] Matthew Adler, 'Law and Incommensurability: Introduction' (1998) 146 *University of Pennsylvania Law Review* 1169.

[17] Virgilio Afonso Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 *Oxford Journal of Legal Studies* 273, 280–283.

[18] *Bull v. Hall* [2013] UKSC 73.

With the exception of the legitimate purpose prong of the proportionality tests (ruling out certain types of justifications for rights-limitations) this model does not allow normative discontinuities and non-aggregative relations: there is only one tier of practical reasoning—one continuum on which all relevant considerations are located.[19] This reflects the culture of justification that underlies modern constitutional law and the idea that there are no 'black holes' immune from constitutional—here, consequentialist—scrutiny.[20]

As an example for how this model could work in practice, it might be helpful to look at the attempt to consolidate indirect discrimination law. In *Griggs*,[21] for example, the American Supreme Court discussed the adverse effect on African-Americans of a company policy requiring a high-school diploma or the passing of certain tests as a condition of employment or promotion. It was decided that while there was no discriminatory intent, the policy is discriminatory since there was no business necessity in making these requirements.

The interesting thing is that in their attempts to establish indirect discrimination law and adverse effect doctrines on stable ground, theorists and practitioners made arguments that could fall under the unionist model.[22] They extended the concept of discrimination away from direct interactions between legal agents and relational concepts like intent or responsibility towards the interests and needs of vulnerable persons, as seen from a broader perspective. When asking what discrimination is, we consider what we need it to be to bring the best states of affairs about in terms of large-scale equality, rather than what it is in the interactions between private parties. There are no discontinuities here between the relational wrong and the consequentialist prescriptions entailed by loosely relational constitutional rights.

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19 See also: Ruth Chang, '"All Things Considered"' (2004) 18 *Ethics* 1, 2.
20 See, for example: Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 194.
21 *Griggs v. Duke Power Co.* 401 US 424 (1971).
22 On such attempts, see the essays in: Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018).

5.3. Meeting the Optometrist

The unionist-consequentialist model of constitutional rights-realization flows naturally from certain truths about the hierarchy of legal norms: whenever a constitutional right is impaired by sub-constitutional legal norms, state agents must follow the constitution's norms about rights-realization—manifested, for example, in the proportionality tests. Beyond certain thresholds like the strictly relational aspects of constitutional rights or the legitimate purpose test, partial realization of constitutional rights must bring better states of affairs about.

What could possibly be wrong with that? The unionist model does not hold that state agents should not consider relational moral factors: constitutional rights can be limited to respect, protect, or promote them. It only holds that while private agents may follow them in their relational form in their private lives, in the public practice of constitutional rights-claiming, deliberating, adjudicating, and reasoning, they must figure in a consequentialized form, as relating to patterns of conduct that form parts of large-scale states of affairs.

My concern is not that systematization through consequentialization is never possible or desirable; nor that constitutional rights and relational rights, values, and principles are incomparable. It is that having state agents engage the latter from a consequentialist perspective comes at a price that we should not ignore.[23] Consequentialism is not a morally neutral form of reasoning: a consequentialist moral attitude has practical implications.[24]

Obviously, public reasoning about horizontal legal rights cannot be purely relational: the states of affairs their creation or change bring about must have some influence over the justification of state decisions.[25] As Rawls claimed, 'all ethical doctrines worth our attention

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[23] Peter Schaber, 'Are There Insolvable Moral Conflicts?', in Peter Baumann and Monica Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press, 2004) 279, 285–289.

[24] S. Andrew Schroeder, 'Consequentializing and its Consequences' (2017) 117 *Philosophical Studies* 1475.

[25] For such claims about relational reasons, see, for example: Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006) 59–60, 245.

take consequences into account in judging rightness'.[26] Constitutional models of rights-realization are not ethical doctrines, but one of the main justifications for the trend towards constitutional horizontality is that we do want private law to answer questions about the states of affairs it brings about and their implications for constitutional rights.

However, a question still remains about how we bring horizontal rights and duties to answer these questions: about the ways in which we expose their underlying relational rights, values, and principles to consequentialist evaluation. The unionist model is crude. It calls for constant and direct consequentialization, even if it means dragging relational normative factors 'kicking and screaming to the tribunal of justice'.[27] This attitude towards the regulatory process, I will suggest, is problematic in the context of private law. Claims in this spirit were made by private law theorists, in attempts to protect it from politicization or distributive justice considerations. But my claim is not that the problem lies with the account of the good underlying the unionist model—that private law manifests mutual Kantian freedom, or the right of civil recourse, or autonomy and substantive equality, for example.

My claims target the form of reasoning used by the unionist model: regardless of the values underlying it, which are, in the case of constitutional rights, quite diverse. When state agents consequentialize relational concepts like discrimination, they often ignore or distort the small-scale moral rights, values, and principles underlying them. The unionist model is bound to miss or erode some of the intricate interpersonal moral patterns that private law is grounded in and solidifies in a complex feedback loop. This model of rights-realization, in its instrumental consequentialization of relational morality, is therefore likely not just to harm values internal to private law but to also fail to realize constitutional rights.

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[26] John Rawls, *A Theory of Justice* (rev edn, Harvard University Press, 1999) 26.
[27] Jeremy Waldron, 'The Primacy of Justice' (2003) 9 *Legal Theory* 269, 272.

Ignoring Relationality

The first problem this model suffers from is that it increases the danger that state agents will disregard relational moral factors when evaluating the regulation of horizontal relations. This danger always exists—but this model exacerbates it. This danger involves two somewhat opposite types of costs. In some cases, relational rights, values, and principles will not receive adequate weight: they will need legal support—in the form of a recognition of a private law wrong, for example—that will not arrive. In other cases, these moral factors will be so normatively robust that attempts to realize constitutional rights in their legal vicinity while ignoring the relational context will fail the regulatory attempt or even backfire.

Why are state agents are likely to ignore relational moral factors under this model of constitutional rights-realization? To begin with, they have constitutional right-based duties to give relational factors due weight in their deliberation only if they are located within the scope of a constitutional right. If they do not, state agents might be wrong to neglect them, but they will not wrong anyone in particular. If relational moral factors are seen mostly negatively—as potential limitations on constitutional rights—and if working out the requirements of constitutional rights is a very complex task that requires a great deal of attention from state agents, it is easier for them to ignore relational moral factors.

Even if the value of promise-keeping or not being harmed negligently find a home in constitutional rights—for example, as part of the rights to autonomy and bodily integrity—it is likely that some aspects of theirs will be neglected. State agents approach them from the bird's eye view: as parts of large-scale states of affairs, consisting of many practices, activities, and actions. Thus, thinking about the regulation of horizontal relations will likely cover only those aspects of relational moral factors that could be consequentialized.

What is usually missed here is the complex moral web of mutual reliance and responsibility that our horizontal relations—even those that are more marketized—form parts of. The problem is that some relational rights, values, or principles—grounded in various motivations, attitudes, and other interpersonal forms of engagement—fare badly when examined from a political perspective, as parts of large-scale states of affairs.[28] It is commonly claimed, in this regard, that political liberalism (including its Rawlsian version) tends to neglect questions of personal responsibility and agency, in light of its focus on institutional and systematic arrangements and allocations of benefits and burdens on a social scale.[29]

Is the clash between the hotel keepers' freedom of religion and the gay couple's right to equality all there is to the refusal to provide a double-bed to the latter? Is better compensation to accident victims all there is to considering whether to replace tort law with administrative schemes? Surely, there are intricate patterns of mutual respect, reliance, and responsibility at play in these interactions, that resist translation to large-scale terms.

This takes us back to moral pluralism. The resistance of relational moral factors to consequentialization is not just contingent or pathological, and it does not reflect a failure on our behalf: it is an implication of the nature of human life, imagination, and thought, that these moral factors reflect. To distort them in order to avoid moral conflict, Isaiah Berlin claimed, is 'either self-deceit or deliberate hypocrisy'.[30] The potential for distortion exists in horizontal effect cases, as we are pulled, often simultaneously, by conflicting rights, values, or principles, manifesting the progressive and the conservative moral paradigms.

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[28] See, for example: John C. P. Goldberg and Benjamin C. Zipursky, 'Accidents of the Great Society' (2005) 64 *Maryland Law Review* 364.

[29] Samuel Scheffler, 'Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics' (1992) 21 *Philosophy & Public Affairs* 299; Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 *Fordham Law Review* 1811, 1820–1829.

[30] Berlin (n 14) 216. See also Nagel's and Williams's articles in Mark Lilla, Ronald Dworkin, and Robert Silvers (eds), *The Legacy of Isaiah Berlin* (New York Review of Books, 2001).

The idea I want to resist is that we can reduce the justification of horizontal norms to the states of affairs they bring about.[31] This is not just a point about how private agents see their duties to keep their contractual promises or to avoid negligently harming others—it seems uncontroversial that beneath certain thresholds, the reason why we keep our promise to this promisee or not injure or compensate this person inheres in our direct relations.[32] It is a point about the moral reality that forms part of the background for regulation: to understand it, state agents must engage in 'a less indirect, nonstatistical form of evaluation' that focuses on the rights, values, and principles, internal to our mutual relations.[33] They should engage the strictly relational rights regulating private relations in their own terms.[34]

There is a temptation of seeing this problem as easily solvable: if we could only make state agents think really hard about the regulation of horizontal relations, they will eventually overcome their limitations as human agents and perhaps even outdo the moral philosophers by successfully consequentializing relational morality. This temptation should be resisted. Even if in some cases state agents could pull it off, in many cases they will not.

Thus, we are likely to see failures to provide adequate legal support to relational moral values.[35] As Seana Shiffrin claimed, even if state agents need not enforce relational morality through private law when there are no consequentialist or instrumental justifications for doing so (which means that private law will usually not mirror morality), they still have good reasons to leave room for private agents to be guided by such norms.[36] Private law's idleness could weaken the hold moral norms have over us. For example, even if recognizing

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31 Samuel Scheffler, 'Agent-Centered Restrictions, Rationality, and the Virtues' (1985) 94 *Mind* 409, 418.
32 Stephen Darwall, 'Demystifying Promises', in Hanoch Sheinman (ed), *Promises and Agreements: Philosophical Essays* (Oxford University Press, 2011) 255.
33 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) 166, 177. See also: Berys Gaut, 'Rag-bags, Disputes and Moral Pluralism' (1999) 11 *Utilitas* 37.
34 Thomas Nagel, *Equality and Partiality* (Oxford University Press, 1991) 141.
35 Hanoch Dagan and Avihay Dorfman, 'Justice in Private' (2018) 37 *Law and Philosophy* 171, 176–178.
36 Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708.

wrongs in the financial realm will not result in great instrumental benefits as many market actors will work around them, it might still be something state agents have reasons to do: the vacuum created by not doing so could be filled by other norms—for example, about profit-making or internalizing externalities—that will leave less room for more morally conscience agents to act morally, and with time might even be seen as the market's own morality. To take another example, replacing tort law with an insurance scheme could have social benefits, but also increase the distance between us and our sense of agency and responsibility for the harms we cause others.[37] If we embrace a purely consequentialist perspective, we might fail to notice such cases in which moral norms require legal support to be able to guide us.

In other cases, ignoring relational morality might harm the goals underlying regulation. Private law's relational normativity can and often does push back against the recognition of wrongs. As the case of indirect discrimination shows, sometimes we cannot stretch the understanding of a relational wrong beyond certain limits.[38] Attempts of what Waldron called 'persuasive definitions'—labelling certain conduct as wrong in order to create around it an intricate moral web of attitudes, blame, and accountability—often fail.[39] As advocates of the legal promotion of equality concede, private law often brings with it a 'language of blame' that focuses on who should bear which burdens and why: realizing constitutional rights in private law can backfire by distracting us from more systemic aspects of the problem we face—that is, it could actually reduce our ability to promote equality.[40] Such outcomes are not inevitable, but will often result from a consequentialist regulatory focus.

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37 David Enoch, 'Tort Liability and Taking Responsibility', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 250.

38 Samuel R. Bagenstos, 'The Structural Turn and the Limits of Antidiscrimination Law' (2006) 94 *California Law Review* 1, 40–47.

39 Jeremy Waldron, 'Indirect Discrimination', in Stephen Guest and Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (F. Steiner, 1985) 83.

40 Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 113–122; Sandra Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?', in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 31, 47–50.

Distorting Relationality

Another problem with the unionist model is that it tends to positively distort or erode the relational normativity underlying private law, by defining private conduct as wrong for the wrong reasons.[41] It results in a 'crowding out' effect.[42] Legal norms change the habitual exercise of motivations, dispositions, attitudes, or evaluations that constitute some of our horizontal relations; and can thus strengthen or erode the normativity endemic to them. For example, hotel keepers might see their duty not to discriminate as something they owe the political collective and part of their business costs (like paying taxes) rather than as a sign of their respect and responsibility to their customers; and media editors and reporters might be more committed to the market of ideas and political accountability than the dignity or privacy of the subjects of their reports, that they will tend to see as 'public figures'.

Legal systems are practices that shape our relations with others over time.[43] When considering our choices, exercising powers, claiming rights, abiding by duties, or responding to allegations, we more than merely brush up against the norms that guide us. Assuming a reasonable level of transparency regarding the reasons guiding state agents—that is, private agents are aware of the justifications for the creation or change of legal norms[44]—we are 'coming into touch' with the legal norms regulating our conduct in ways that 'prime' us to reflect on and engage the moral rights, values, and principles that underlie them.[45]

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41 Mark Timmons, *Moral Theory: An Introduction* (2nd edn, Rowman and Littlefield Publishers, 2013) 160.

42 Emad H. Atiq, 'Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives' (2014) 123 *Yale Law Journal* 1070.

43 Leslie Green, 'Should Law Improve Morality?' (2013) 7 *Criminal Law and Philosophy* 473.

44 Even if we could create a strict separation between the norms applying to state agents and the norms applying to individuals (see: Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625), we might be uncomfortable with the means required to do so: it might result it what Williams referred to as 'government house utilitarianism' (Bernard Williams, 'Theory and Prejudice', in *Ethics and the Limits of Philosophy* (Routledge, 2006) 94, 108).

45 Dan Priel, 'Jurisprudence and Psychology', in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 77, 88.

This is especially true regarding private law. We might tend to engage norms in some areas of law (regulating financial activities, for example) in a detached manner, as if they are the rules of a game. But as already claimed, there is something inescapably moral in a system of right-norms regulating interpersonal relations: we are accountable to and wrong each other if we fail to abide by them. Even when the creation of a norm was originally aimed at promoting collective goals, with time, if things work well, it becomes embedded in the moral fabric of our mutual relations—as a right. This is a basic theme in Gardner's work, that sees private law as dealing with 'ordinary human concerns' internal to our mutual relations.[46] Goldberg and Zipursky made a similar point when claiming that legal norms are better internalized if people can fit them 'into their moral, social, and professional frameworks'.[47]

Sometimes, when private law works effectively in this technical sense, the results are problematic. Injecting public considerations into private relations can create unexpected ripple effects, given the intricacy and complexity of their cultural, social, economic, and moral fabric. To go back to indirect discrimination, this would be the case if extending the wrong will not only fail to protect and promote equality to a sufficient extent, but also paint this area of law in political and instrumental colours: some private agents will stop seeing discrimination as an interpersonal wrong, tied to their responsibility toward others, but rather as part of a political project of bringing about collectively desirable states of affairs.

Shiffrin offers another example, built on the idea mentioned above that our everyday moral decisions depend on habits of deliberation, shaped by social institutions—notably, the legal system. Shiffrin claims that because private law helps consolidating the cultural background against which promissory norms are respected, accepting instrumental conceptions

[46] John Gardner, *From Personal Life to Private Law* (Oxford University Press, 2018) 8–9.
[47] John C.P. Goldberg and Benjamin C. Zipursky 'The Moral of *Macpherson'* (1998) 146 *University of Pennsylvania Law Review* 1733, 1841.

or doctrines—for example, seeing efficient breaches of contracts as permissible—risks eroding the normative robustness of contractual promise-keeping in society. It is difficult, in this regard, to create or preserve a rigid distinction between law and morality.[48]

Another example is what is often labelled 'defensive medicine'. The expansion of medical malpractice law in recent decades induced some medical practitioners to resort to a relatively technical and formal adherence to rigid rules. Over-regulation is often criticized in this regard for the great financial costs it results in, or the harms of unnecessary medical procedures;[49] but there is also the more nuanced harm of eroding the attitudes and motivations that constitute doctor–patient relations, and that could not be easily translatable to consequentialist terms. The law casts the wrong shadow on these relations.

Scott Hershovitz talked in this regard about the expressive function of tort law: he claimed that it constitutes many of the moral norms we live or want to live by; and it does that, importantly, by recognizing horizontal rights, thereby imparting on us 'the dignity of the right-bearer',[50] and tying some aspects of our well-being to the responsibility of others.[51] We have other institutions aimed at supporting those who suffer serious harms; but only one institution that recognizes the wrongs we cause each other as such;[52] and while we can try to evaluate the consequences of tort law performing this expressive function, it will do little to help us understand and engage the norms internal to this legal rights-based practice.

The general point is that some of our horizontal relations give us strictly relational reasons, some of which ground rights-based duties. To adequately engage in these relations

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48 Shiffrin (n 36) 740–743.

49 See, for example: Michael D. Frakes, 'The Surprising Relevance of Medical Malpractice Law' (2015) 82 *University of Chicago Law Review* 317.

50 Scott Hershovitz, 'Treating Wrongs as Wrongs: An Expressive Argument for Tort Law' (2017) *Journal of Tort Law* 18.

51 Ibid 23.

52 Ibid 24.

and their internal values, some degree of exclusion of external consideration is needed.[53] As Scheffler noted, it is not that relational reasons act as limitations on the realization of agent-general values but that they offer an independent form of moral engagement.[54]

Thus, even if we do not want to enforce relational moral norms but just allow private agents to follow them in their horizontal relations, state agents must go beyond recognizing these norms' existence: they must positively protect them at the point of application to prevent them from being crowded out by instrumental considerations. This 'preferential treatment' is at odds with the unionist model, that locates all considerations justifying the realization or limitation of constitutional rights on a single normative continuum, relating to how our interests and needs as right-holders are served in large-scale states of affairs.

Taking the crowding out effect (and similar phenomena) into account when engaging in consequentialist deliberations will not do. The reason is that the problems with the unionist model go down to its foundations—not just the technique that it employs. While it does not result in full horizontality (constitutional rights are directed only at the state), it also tends to erode interpersonal practices of rights-claiming and contesting that often serve as the moral foundations of private law relations. Thus, it weakens private law's ability to realize different rights and values—whether relational or not. The unionist model embodies a certain caricature of the liberal state (criticized from the left and the right) as a set of institutions we trust to legally arrange things so that we treat each other fairly. This state-centered form of thinking often comes at the expense of developing the motivations, attitudes, or dispositions constituting patterns of respect, responsibility, reliance, and accountability, without which many of our personal, communal, and market relations are much less valuable.

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53 Joseph Raz, 'Liberating Duties', in *Ethics in the Public Domai*n (Oxford University Press, 1994) 29, 41–42.

54 Samuel Scheffler, 'Projects, Relationships, and Reasons', in R. J. Wallace (ed), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press, 2004) 247, 252, 257–258.

5.4. Separationists

Charles Fried claimed that private law cannot be created in a pure top-down process: abstract moral values can 'descend from on high but stop some twenty feet above the ground'—from there, we work from within private law 'to complete this structure of ideals and values, to bring it down to earth'.[55] This point is often made about how we should understand law or parts of it: as a critique of functional or instrumental explanations and theories.[56] However, it is also relevant to how state agents should reason, prescriptively, about what the law should be. The idea is that they should not consult only 'public' rights, values, or principles when regulating horizontal relations—not because they are underspecified, but because they endanger private law's ability to stay connected to and reflect the relational rights, values, and principles endemic to and constitutive of the horizontal relations it regulates.

This is a central lesson I take from the principle of moral pluralism and the difficulty of translating relational factors to consequentialist evaluations of large-scale states of affairs. Nagel noted that there seem to be no acceptable principles governing the systematic combination of such diverse moral considerations: 'if we try to satisfy constraints coming from both directions, the strain might be too great'.[57] What we have here is not mere incompatibility (we cannot realize values together) but opposition: the values condemn each other.[58] It is for this reason that I claimed that an active effort is required to protect relationality from the imperialistic consequentialist tendencies of loosely relational constitutional rights.

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[55] Charles Fried, 'Artificial Reason of the Law or: What Lawyers Know' (1981) 60 *Texas Law Review* 35, 57. For similar ideas about Rawls's theory, see: Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 *Oxford Journal of Legal Studies* 213.

[56] John C. P. Goldberg and Benjamin C. Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 *Fordham Law Review* 1563.

[57] Nagel, *Equality and Partiality* (n 34) 49.

[58] Thomas Nagel, 'Pluralism and Coherence', in Mark Lilla, Ronald Dworkin, and Robert Silvers (eds), *The Legacy of Isaiah Berlin* (New York Review of Books, 2001) 105, 106–107.

We can bite the bullet and tolerate norms that are out of tune with their normative environment. This often seems to be the preferable solution for constitutional and human rights lawyers: they are less concerned about the 'integrity' of private law or horizontal legal relations, as far as these issues fall outside the scope of constitutional rights. But this concession is too quick. We can do better: not by housing conflicting considerations under one consequentialist umbrella, but, as Nagel suggested, by developing more nuanced forms of accommodation that work out and contains them: 'the aim should not be to deny pluralism but to encompass it in a system that permits conflicts to be adjudicated without the triumph of one master value';[59] or, in our case, of one form of practical reasoning.

In this section, I present models of rights-realization that accept moral pluralism: that do not seek to unify the legal domains under a single reasoning process. Instead, they drive a wedge between them and see them as operating on separate moral planes. A 'constitutional priority' version of this model sees relational rights, values, and principles as operating in the spaces constitutional rights leave vacant—that social justice is agnostic about. A 'private law immunity' version, on the other hand, gives constitutional rights priority in deciding whether to adopt private law institutions but not about how to do it: once they are up and running only relational considerations are apt for reasoning about their ongoing operation.

Separationist models offer a somewhat rigid way of dealing with the implications of moral pluralism for constitutional rights-realization: employing conceptual and categorical distinctions. Interestingly, such models seem to operate in the background of central theories of private law: that is, they capture another ideal-typical vision (opposite to the unionist one, common in constitutional law) of the realization of constitutional rights in private law. But perhaps more surprisingly, they are also reflected in some aspects of Rawls's theory.

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[59] Ibid 109–110.

Social Justice and Local Justice

The starting point in this regard is Rawls's concern that normative systems (and theories of justice) in which there are no clear priority rules or methods for resolving conflicts between different moral principles will have to resort to unprincipled ad-hoc decisions grounded in intuitions.[60] This concern seems to underlie several categorical distinctions about the realization of the principles of justice that were embedded in his theory.

In the previous chapter, I touched his limitation of the principles social justice to the basic structure of society: other institutions are regulated by social justice, I said, only indirectly. Rawls referred to the principles of justice to be 'followed directly by associations and institutions within the basic structure' as 'principles of local justice' (a term he borrowed from John Elster).[61] Thus, against some opposing claims,[62] Rawls did not see social justice as definitive of justice in the liberal state: there are also principles of local justice.[63]

He never fully developed the idea of local justice, but did emphasize that 'in general, principles for the basic structure constrain (or limit), but not determine uniquely, the suitable principles of local justice'.[64] Churches cannot burn heretics, universities cannot discriminate minority members, spouses cannot deprive each other of their property, parents cannot prevent medical care from their children, and so on. These constraints are context-dependent and shaped by the 'nature and role of the association, group, or relation at hand'.[65]

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60 Rawls, *A Theory of Justice* (n 26) 34.
61 John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press, 2001) 11.
62 See, for example: G. A. Cohen, 'Introduction', in *Rescuing Justice and Equality* (Harvard University Press. 2008) 1, 3–4; Colin M. Macleod, 'Applying Justice as Fairness to Institutions', in Jon Mandle and David A. Reidy (eds), *A Companion to Rawls* (Wiley & Sons, 2014) 164, 168–169.
63 Samuel Scheffler, 'The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism' (2005) 79 *Proceedings of the Aristotelian Society* 229, 248–249.
64 Rawls, *Justice as Fairness* (n 61) 11.
65 Ibid 164.

Naturally, there is a lot of ambiguity here, which was not dispelled by the theoretical focus on delineating the boundaries of the basic structure rather than the question of how the indirect effect of social justice actually works. In a way, many philosophers trying to understand Rawls saw the basic structure debate as entailing mostly questions about the scope of social justice, while ignoring many questions regarding its nuanced realization.

The realization of the principles of social justice is dealt with in a somewhat neglected part in Rawls's theory: the four-stage sequence, in which, these principles (concocted behind the veil of ignorance) are gradually implemented (in congruence with the veil being lifted) in the institutions of the basic structure.[66] These are not practical prescriptions about how we should engage in regulation: they are, like the original position, expository devices. They offer a way of seeing the neat separation between social justice and local justice.

Following the original position, there are constitutional, legislative, and application (administrative and judicial) stages. Each stage typifies a different normative activity and a different perspective from which to think about the moral evaluation of the basic structure. In each stage, we adopt a different level of abstraction and exclude some factual and normative considerations. Thus, we can choose how to tend to different practical questions, leaving each stage to deal with those most suitable to its deliberative features.[67]

In the second stage—a 'constitutional convention'—the principle of equal rights is translated, along with other institutional requirements, into a constitution. Like in the stage of constitutional rights-delineation, the convention focuses on how basic interests and needs can be served in various large-scale states of affairs. The situation is slightly different in the third, legislative, stage. In it, the distributive principles of fair equality of opportunity and the

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66 Rawls, *Justice as Fairness* (n 61) 48; John Rawls, *Political Liberalism* (2nd edn, Columbia University Press, 2005) 397–399. See also: Macleod (n 62).

67 See also: Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA Law Review* 621, 632.

limitation of inequalities to those serving the worst off people in society are realized in sub-constitutional law. Legislators consider economic, cultural, and other considerations that were not dealt with in the previous stages. They are not constrained by local justice, but still must be responsive to how individuals follow it in order to create the best basic structure (and legal system) from the perspective of social justice. Social justice is not absolute: the difference principle might not apply fully to all contracts,[68] or family relations; and members of churches or universities might not enjoy political rights about their operation.[69]

The legal scheme created in this stage is applied to particular cases in the final stage by state agents (administrators and judges) and private agents (in their own affairs). While Rawls does not address this topic, it seems that there is room in the final stage for principles of local justice. A family of local justice principles that received a great deal of scholarly attention is corrective justice. If social justice focuses on large-scale states of affairs from a distributive perspective (on allocations of benefits and burdens), corrective justice focuses on how they were brought about.[70] It is not a mere instrument for the preservation of just allocations: it as an independent principle that operates on a different moral plane.[71] Social-distributive justice is dynamic: it does not entail particular rules or requirements about momentary allocations—it aims to bring certain allocations about over time, through institutional design. Among the possible institutional arrangements, many are compatible with and leave room for principles of corrective justice.[72] This allows us to say, in the spirit of moral pluralism, that local justice and corrective justice are not absorbed in social justice: they are tending to entirely different types of justice-related questions.

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68 Rawls, *Political Liberalism* (n 66) 283.
69 Rawls, *Justice as Fairness* (n 61) 10–11.
70 Stephen R. Perry, 'On the Relationship Between Corrective and Distributive Justice', in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 2000) 237, 238–244.
71 Ibid 247. See also: Steven Walt, 'Eliminating Corrective Justice' (2006) 92 *Virginia Law Review* 1311.
72 Perry, 'On the Relationship' (n 70) 255–263.

Constitutional Priority and Private Law Immunity

Under the 'constitutional priority' interpretation of the Rawlsian scheme, local justice serves either as data we consider when shaping the legal system (like economic cultural factors), or as a residual category of justice that shapes law only in the spaces left vacant by social justice. While social justice does not determine what local justice is, or how private agents follow it, it determines when local justice can be realized in law. This determination does not involve balances or trade-offs between social and local justice: they do not interact or conflict. Rather, it is just that social justice is agnostic about certain regulatory questions, that have no serious distributive implications and do not affect the ability to attain and sustain background justice. As advocates of this interpretation of the Rawlsian scheme note, there is a sense in which it subordinates the private in law to the public.[73] In the constitutional context, it means that whenever a regulatory question falls within the scope of a constitutional right, we do not consider local justice until we finish attending to the right's prescriptions.

Sometimes, it seems that corrective justice theorists like Ernest Weinrib, Jules Coleman, and Arthur Ripstein accept this model: they see the question of whether it will actually be realized in private law as not answered by it but by distributive or social justice. A common example is whether to institute a traditional, litigation-based, relational tort law—that realizes the principles of corrective justice—or an alternative public scheme, comprising of insurance and administrative or criminal sanctions. This question is not answered by the corrective justice theories of private law offered by these prominent writers.[74]

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[73] Kevin A. Kordana and David H. Tabachnick, 'On Belling the Cat: Rawls and Tort as Corrective Justice' (2006) 92 *Virginia Law Review* 1279, 1289.

[74] Jules L. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 402–403; Ernest J. Weinrib, *The Idea of Private Law* (2nd ed, Oxford University Press, 2012) 24–25, 210; Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) 292–294. See also: Stephen R. Perry, 'Professor Weinrib's Formalism: The Not-so-empty Sepulchre' (1993) 16 *Harvard Journal of Law & Public Policy* 597, 608; John Gardner, 'The Purity and Priority of Private Law' (1996) 46 *University of Toronto Law Journal* 459; John C.P. Goldberg and Benjamin Zipursky, 'Civil Recourse Revisited' (2011) 39 *Florida State*

Thus, with the possible exception of Goldberg and Zipursky's civil recourse theory, that they ground in the Lockean social contract and natural rights traditions,[75] private law theorists usually do not hold the strong position according to which it (or some of its domains) must be instituted in its traditional, litigation-based, strictly relational, form. Having said that, they are still often less permissive than the constitutional priority model, and full-blooded instrumentalists, like Liam Murphy.[76] While they do not see local justice operating at the stage in which we choose whether to go down the private law path, if we do, they see local justice taking over significant parts of the regulatory process.[77]

The claim is not just that that social justice has very little to say about private law's ongoing operation.[78] It is also the claim that the concepts private law operates with (like causation, foreseeability, reasonableness, or good faith) are independent from social justice (perhaps they are even 'pre-political').[79] Thus, social and distributive justice considerations or constitutional rights cannot serve as adequate justifications for private law rights and duties. If they entail horizonal prescriptions—that we should enjoy privacy in the workplace, for example—the state will have to choose whether to tend to them by 'public' regulatory tools, or to surrender control over the regulatory process to private law litigation. If it does opt for a private law scheme, local justice and strict relationality take over.

University Law Review 341, 342–347. Zipursky referred to this position in tort theory as 'quietist'—see: Benjamin C. Zipursky, 'Coming Down to Earth' (2006) 55 *DePaul Law Review* 469, 475.

75 John C.P. Goldberg and Benjamin C. Zipursky, 'Tort Law and Responsibility', in John Oberdiek (ed), *Philosophical Foundations of the Law Torts* (Oxford University Press, 2014) 17, 27.

76 Liam Murphy, 'Purely Formal Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 19, 35.

77 Similarly, Zipursky claimed that while a 'deontological purist' position is rare in tort theory, there are some 'coherence purism' and 'integrity watching': Zipursky, 'Coming Down to Earth' (n 74) 471–474, 485–486.

78 For the claim that social has quite a lot to say in this regard, see: Kordana and Tabachnick (n 73).

79 See, for example: Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 *Florida State University Law Review* 163 174–178, 198–199; Ernest J. Weinrib, *Corrective Justice* (Oxford University Press, 2012) 3, 11, 18.

5.5. Hitting the Iceberg

Separationist models agree that local justice is separate from social justice but see the constraints the latter places on the former differently: one version sees constitutional rights and social justice as entailing complex consequentialist prescriptions about private law that determine which spaces are left for local justice to operate in; the other sees constitutional rights and social justice as answering upstream questions about whether to take the private law path, but once we take it, local justice gains control over its ongoing operation.

Under these interpretations of the separationist model, there is no direct conflict between social and local justice: they just operate on separate planes (which we could interpret more or less extensively). This solves the distortion and erosion problems, but it creates a new problem: the separation between constitutional rights and private law is too strong—it leaves no room for interaction, balance, or adjustment between these normative clusters.

Under the constitutional priority version, local justice merely supplements or fills the gaps left by social justice and constitutional rights.[80] Since their prescriptions are extensive, they are silent only about few aspects of the regulation of horizontal relations.[81] This seems to be the model *Bull v. Hall* expresses: once it is seen that the rights to liberty and equality are implicated, the judges ignore principles of local justice and the relational context of the case and create a rule that reflects a simple and direct balancing of these rights.

The constitutional priority model recognizes local justice as independent but does not see it as competing with social justice: thus, much of private law is applied constitutional law. This is, in a sense, just a limited unionist-consequentialist model. The problem is that this model not only ignores the recognition, in most modern constitutions, of the ability of non-

[80] Scheffler, 'Distributive Justice (n 55) 232.
[81] See, generally: Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, 512–515.

constitutional considerations to justify constitutional rights limitations—it also reflects a simplistic conception of the constitutional and the legal implications of moral pluralism.

Indirect effect models accept the conflicts of public and private considerations, and see local justice pushing back against social justice. The constitution's superior legal status is not translated to categorical priority in deliberations about the regulation of horizontal relations.[82] While the constitution and private law are not peers, they are also not an officer and a soldier or a parent and a child: constitutional reasons do not pre-empt reasons grounded in private law's normative structure or underlying values.[83] If we want private law to reflect its many connections to interpersonal rights-based morality, we must bring it to bear on regulatory reasoning even before constitutional rights-based considerations run out.

We should be careful, however, from restraining constitutional rights in ways that immunize private law from them: from seeing the constitution as superior only as long as it does not intrude into private law's domain. Since loosely relational constitutional rights are often agnostic about the means of their realization, the claim could be made that they could shape the regulation of commerce or the workplace, for example, but if they point towards the recognition of horizontal rights—that is, towards the establishment of what we normally refer to as traditional private law—then they must clear the stage for local justice.

While it is important to preserve some senses of the privateness of horizontal relations, they can suffer some exposure to collective values without becoming entirely political or public. While constitutional rights could be agnostic about their realization, they do entail some more particular prescriptions about internal private law affairs; and, as Brudner adds,

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[82] Mayo Moran, 'The Mutually Constitutive Nature of Public and Private Law', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 17; Michelle Flaherty, 'Private Law and its Normative Influence on Human Rights', in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 207.

[83] I am referring here to Raz's famous 'service conception' of authority—see: Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003.

there is no reason why these prescriptions cannot be 'coherently cabined' along private law's relational aspects, without submerging private law in public law.[84]

While we do not want the relations between constitutional rights and private law to be like the officer–soldier or parent–child relations, we also do not want them to be like those between considerate neighbours that just take each other's interests into account.[85] One of the main points of the trend towards indirect horizontal effect is to have private law answer questions about its implications for constitutional rights. We want to preserve the relational normativity of horizontal legal relations while responding to the systematic challenges presented by the constitutional-consequentialist rights-based perspective.[86] In this section, I start charting the middle path between the unionist and the separationist models.[87]

I want to tease out the normative features our model of constitutional rights-realization should exhibit with the example of friendship.[88] On the one hand, friendship has agent-general value as a state of affairs: for example, it contributes to our happiness, enriches the ways we experience life, and provides comfort and support in times of need. Participants in friendship relations often reflect on these benefits when making friendship-related decisions: for example, when deciding whether to dedicate more time to one of their friends, or whether to stop being friends with someone who has a bad influence over their lives.

On the other hand, resorting to such consequentialist calculations, instrumental from the perspective of specific friendships, too often, will fail to adequately realize the value of

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84 Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd edn, Oxford University Press, 2013) 30–31.

85 Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in Hans-W. Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press, 2014) 26, 36–37.

86 See also: Samuel Scheffler, 'Morality and Reasonable Partiality', in *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2012) 41, 72.

87 For an attempt to find a similar path, see: Bruce Chapman, 'Law, Incommensurability, and Conceptually Sequenced Argument' (1998) 146 *University of Pennsylvania Law Review* 1487.

88 See: Gardner, *From Personal Life to Private Law* (n 46) 30–31, 37–38; Philip Pettit, 'Consequentialism and Moral Psychology' (1994) 2 *International Journal of Philosophical Studies* 1, 3–6, 10–12.

friendship and in a way make us worse friends—under a certain threshold, not friends at all. The thing is that a constitutive aspect of friendship is some degree of isolation from considerations external to particular friendships—including the value of friendship itself when seen from a consequentialist perspective. This has implications for how we should make decisions internal to particular friendships: we should not necessarily try to have as many friends as we can, help our friends because we want to enjoy the good of friendship in our lives, or avoid helping a friend—to move his apartment, for example—because the costs incurred by us by helping him exceed the long-term benefits friendship with him produces for us.

Private law relations share some of the normative features of friendship. This has implications for how state agents should engage their regulation. The model that I will present—and then unpack in the next section and chapter—distinguishes between two levels of reasoning: a particular and more visible level and a general and less visible level. While they are two sides of the same coin, the distinction between them is important.

A multi-layered conception of practical reasoning is adopted by moral philosophers like Raz, Nagel, Scanlon, Darwall, and Scheffler. Their criticisms of consequentialism target not only its account of the good, but also its failure to take into account second-order reasons about how to engage first-order reasons. The general idea is that in some cases we might not deny the goodness of a state of affairs, but still have reasons to ignore it in our deliberation or give it less weight. Distinguishing between these levels allows us to avoid the problems of the unionist model without resorting to the separationist models. Importantly, I will claim below, despite its complexity when presented in philosophical terms, it is reflected in basic features of the common law, when examined at a high level of abstraction.

Contextualism

Public reasoning about the regulation of horizontal relations contains a tension that we experience as friends. On one hand, friends cannot be blind to the states of affairs friendship-related decisions bring about and their implications for them or for others: unconditional support might be a popular ideal, but in fact decisions internal to our friendships must contain some evaluation from an external perspective. In our context, state agents must consider the constitutional-consequentialist implications of the regulation of horizontal relations.

On the other hand, the connections between internal decisions and external evaluations cannot be too crude or leave a big trace: if we constantly consider the states of affairs our friendship-related decisions bring about or are constantly reflecting on the ways in which instrumental considerations shape it, its value diminishes. In our context, the intensity, type, and frequency of constitutional scrutiny of private law relations could determine the extent to which relational rights, values, and principles are jeopardized. The deliberations of state agents affect the value private agents can derive from their horizontal relations.

This is the basic tension between external scrutiny and internal integrity: against the separationist model, we must resolve conflicts between social and local justice; against the unionist model, we must do so without resorting to crude consequentialist reasoning. My claim is that if we examine the modern regulation of horizontal relations in Anglo-American legal systems at a high level of abstraction, a two-level model of reasoning (which is, naturally, not necessarily adequate in other normative contexts) emerges.

The first, more visible, level in which social and local justice interact builds on the idea of contextualism. In the writing of philosophers from Aristotle to Berlin, it is a solution to the problem of incomparability: conflicts between abstract moral rights, values, or principles—like liberty and equality—cannot be resolved by appealing to a general formula, rule,

principle, or ranking, but only in the context of particular cases—by appealing to their special features.[89] The resolution of conflicts remains 'incompletely' generalized or theorized;[90] it is not located in a larger scheme in which all moral variables fit together. We do not approach these conflicts with a general solution that we apply to them, and we do not leave them with such a solution, since we resolved them by appealing to their particular features.[91]

In our case the problem is not incomparability in the strict sense, since I did not make the strong claim that consequentialization is impossible—only that even if it works it takes a moral toll. Contextualism helps reduce this toll by taking some of the edge off consequentialist deliberations.[92] Take the *Bărbulescu* case for example: in it, an employer's decision to dismiss an employee after reading his private correspondence was discussed. A *Bull v. Hall* type solution would have meant ending up with a balancing formula according to which reasons of a certain weight or nature are required to justify limitations of privacy in the workplace (or in general)—a formula that would apply in all adjacent cases.

The European Court of Human Rights opted for a more contextual approach. It was asked, for example: was the employee informed about the nature and extent of monitoring? Was his correspondence accessible without his knowledge? Why were the measures taken? Were less intrusive measures available? It was held that there was a violation of the right to privacy;[93] but the result could have been different given other answers to these (and further) questions. By asking them, particular aspects of the right to privacy were isolated.

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89 Thomas Nagel, 'The Fragmentation of Value', in *Mortal Questions* (Cambridge University Press, 2012) 128, 135; George Crowder, 'Pluralism, Relativism, and Liberalism', in Joshua L. Cherniss and Steven B. Smith (eds), *The Cambridge Companion to Isaiah Berlin* (Cambridge University Press, 2018) 229, 237–240.

90 Cass R. Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733.

91 Vladislava Stoyanova, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations Under the European Convention on Human Rights' (2020) 24 *International Journal of Human Rights* 632, 638–641. See also: Gaut (n 33) 45.

92 Samantha Besson, 'Human Rights in Relation', in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, 2017) 23.

93 *Bărbulescu* (n 3) par. 139–141.

A general rule that covers many horizontal interactions requires us to embrace a more abstract perspective that better accommodates consequentialist prescriptions about states of affairs and tends to ignore or distort relational morality. But if state agents see their 'choice situation' as more particularized, they can engage only certain aspects of the consequentialist prescriptions applying to the case at hand.[94] They can engage their 'relationalized' aspects, that are better tied to the agency and responsibility of the involved parties.

This takes us to the first path from social justice to local justice: translation—finding connections between private agents' personal responsibility and states of affairs that form parts of social justice. We can say, for example, that covenants preventing the purchasing of houses by minority members are unenforceable: not because this is what social equality requires, but because this kind of action, when performed against background of inequality, is a relational wrong; or, we can hold that religious institutions are allowed to discriminate when hiring employees performing primarily religious duties, like priests or rabbis: not because this reflects a general balance between liberty and equality, but because it is not wrong to discriminate, considering the nature of the position and relations between the parties.

The translation path falls more neatly in the domain of moral theory, that deals with 'what we owe to each other', to borrow Scanlon's phrase again. It is agent-centered and does most of its work with concepts related to our personal responsibility, like choice, intention, foreseeability, or causation. Since the relationalization of consequentialist considerations is strong here, in many cases taking this path will result in weaker forms of indirect effect—the influence of constitutional rights will be relatively limited, as much of their consequentialist edge will be taken off, so they could fit in an agent-centered normative scheme.

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[94] Ruth Chang, 'Putting Together Morality and Well-Being', in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press, 2004) 118, 140–147.

We must be able to say, of course, why religious organizations are allowed to discriminate potential employees based on their sexual orientation while obligating religious hotel owners to provide all couples with double beds, regardless of their sexual orientation. This creates tensions between generality and particularity in the horizontal realization of constitutional rights. These tensions will not disappear, and they cannot be ignored. Often, the best we can do is to contain them by utilizing methods of reasoning, like analogy (that have been in use in the common law for centuries), that are more particularized. They can allow us to address only the consequentialist right-based prescriptions implicated directly in each case, while ignoring many of their large-scale prescriptions.

Thus, for example, on this level of deliberation we do not deal with the general right to privacy but with a more specific right not to be dismissed after particular invasions of it. This aspect of the general right is only modestly consequentialist: it does not deal with large-scale states of affairs, that serve as the background for circumscribed decisions about specific interactions, practices, or actions. Such modest and localized consequentialist prescriptions can be adjusted with relational moral elements without consequentializing them: moral deliberation starts with the agency and well-being of private parties and their direct interaction—we are not creating a balancing rule, grounded in consequentialist considerations, and apply it to the case at hand, but work from the case towards such considerations. This raises a concern, mentioned in the previous chapter about purely vertical models: there, the concern was that by translating loosely relational constitutional rights to values we narrow their scope and thereby fail to see certain questions of social justice as rights-related; here, the worry is that even if we construe these rights' scopes broadly, we will fail to tend to their large-scale prescriptions if we just move from one contextualized decision to the next.

Behind the Scenes

Part of the point of loosely relational constitutional rights is to guarantee background justice, which is affected by a great number of interconnected private actions and activities. While the first level of deliberation is not merely responsive or unprincipled,[95] we are partly blind if we just move from one particular decision to the next. We might end up too close to the private law immunity model and treat constitutional rights as values.

This takes us to the allocation path, that is more fully consequentialist and could be seen as a stronger form of indirect effect. It builds on the fact that some horizontal actions—like hiring an employee or selling a house—are not purely private: they also form parts of public practices affecting the realization of social justice. Thus, for example, even if there is no relational interpersonal unfairness or wrongness in hiring the more qualified employee and not the minority member, we can say that the latter should be hired—the justification being that a collective effort is required to promote equality in and through the labour market, and hiring agents play a part in this effort, which makes them quasi-public agents.

The distinction between translation and allocation is not always clear-cut; and there are cases in which they overlap: in which we are both personally responsible for something and play a part in a public practice discharging a collective responsibility for it. However, the allocation path seems to fall more neatly in the domain of political theory: it deals with our collective responsibilities to attain and sustain social justice. While in the constitutional context they are allocated by state agents, the state often cannot discharge them without the cooperation and contribution of private agents, operating in the market and civil society—and we could therefore have responsibilities exceeding our personal responsibility.

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[95] Hare distinguished between an immediate 'level-1' and a sophisticated 'level-2' forms of moral thinking—see: R. M. Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford University Press, 1981).

This raises the question of how can state agents know when they need to take this path, without constantly reflecting on large-scale consequentialist prescriptions. How can we be friends if we constantly ask if we face a special case in which we must engage external considerations? Phillip Pettit talked in this regard about 'standby consequentialism': we are blind to some considerations but only 'when no red lights go on, no signals of alarm sound'—for example, if our friend asks us to move not his apartment, but a dead body.[96] We can reflect on such reasons and should not stop feeling their pull: to borrow Raz's terms, they always operate 'behind the scenes'.[97] These reasons can shape particular internal decisions—for example, we will help our friend, but only if certain conditions are met; but they can also make us shift gears, and transition to a more consequentialist mode of reasoning.[98]

It is difficult to see constitutional rights or other norms performing these roles if we conceive of the legal system as a static array of rules. But as Waldron claimed, it is a dynamic deliberative practice: an institutional scheme under which public and private agents inter-act.[99] It is often assumed that the constitution's superiority must be demonstrated in every interaction with sub-constitutional legal norms: that every limitation must be explored and evaluated in consequentialist terms. But the idea of standby consequentialism, that has some traces in Rawls's thinking on distributive justice, shows that superiority can manifest itself in more nuanced ways, over time; rights-realization, therefore, can be more incremental.[100]

There is a second-order level of reasoning that determines where on the complex spectrum running from local and relational justice to social justice and consequentialism our

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96 Philip Pettit, 'The Inescapability of Consequentialism', in Ulrike Heuer and Gerald Lang (eds), *Luck, Value, and Commitment: Themes from the Ethics of Bernard Williams* (Oxford University Press, 2012) 41, 45–50.

97 Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 176.

98 Tracy Isaacs, *Moral Responsibility in Collective Contexts* (Oxford University Press, 2011) 101–102.

99 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1.

100 Sunstein, 'Incompletely Theorized Agreements' (n 90). See also: Henry S. Richardson, 'Specifying Norms as a Way to Resolve Concrete Ethical Problems' (1990) 19 *Philosophy and Public Affairs* 279.

first-order reasoning should be located. The extent to which consequentialist rights-based reasons shape first-order decisions, via the paths of translation or allocation, depends on second-order reasons. We have first-order reasons to put in place particular forms of regulation: for example, to recognize a new cause of action. But we also have second-order reasons touching the time, place, and manner in which state agents should engage first-order reasons. For example, institutional and democratic reasons often figure in decisions of state agents about whether to engage in reform or about its desired scope. Another reason often mentioned in the private law context is legal stability: norms cannot be changed too often.

I want to add that relational rights, values, and principles also serve as second-order reasons against external interventions in horizontal relations. Second-order reasoning does not work only from the top-down: relational considerations also get a say about when and how they will be consequentialized and engaged from a broader perspective. Of course, we can say that constitutional rights have cores that always require state agents to embrace a consequentialist perspective. However, delineating them is an interpretative task that can accept some discontinuities between different aspects of agency or well-being.[101] It is important to embrace a minimalistic approach to these cores, at least in the horizontal context; and beyond them, to leave the thresholds of consequentialization abstract and flexible: making them explicit risks turning private law into applied constitutional law with reasoning focusing mostly on these thresholds, rather than the facts of each case—they could steer the decision towards to more general end of the spectrum regardless of second-order reasons.

Second-order reasons determine how state agents should see their choice situation: how particularized it should be and whether the full consequentialist force of loosely relational constitutional rights should remain latent, whether more circumscribed interpretative

[101] See also: James Griffin, *On Human Rights* (Oxford University Press, 2008) 68–69, 80.

efforts are sufficient, whether alternative avenues of regulation should be turned to, and so on. It might be objected that this violates the rule of law and deviates from the 'culture of justification' that underlies much of modern constitutional law. In reply, it is important to emphasize that while second-order decisions are contextual and therefore not fully specified, they are engaged with by state agents openly and publicly: while they do not offer a concrete formula, rule, or principle, they can and should present the factors their decision is grounded in and explicate the relations between them.[102] Since many of these factors relate to how the legal system operates over time, it is difficult to come up with clear rules about when we should see certain choice situations in more general terms: as more public or political. The idea of moral pluralism teaches us that we should not expect quick and easy answers here: we will have to struggle, gradually, to work through this complex normative terrain.

Second-order reasoning takes into account not only the context of each case, but also the ongoing and dynamic nature of loosely relational constitutional right realization. State agents must consider the ways in which the legal system shapes our attitudes, dispositions, and values and thus our conceptions of agency and responsibility. This allows a gradual progress towards further politicization of certain aspects of our horizontal relations. For example, even if we see the requirement that employers consider the distributive implications of all their hiring decisions too burdensome, we might still find that in some cases they should do that: let us say, if requiring presence in the workplace for long hours harms primary caregivers, even though it is less crucial in some lines of work. Through such cases, we gradually change the meaning of employers' responsibility for equality in the workplace. This is a form of contextualism, but one that does consider the bigger consequentialist picture; and it should inform second-order reasoning about how to engage particular legal decisions.

[102] Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1998) 136–147.

Importantly, consequentialist reasons are not ignored. We are not saying that they are no longer important—only that in a particular context they are not: like a piece of evidence that was procured by illegal means is not unimportant since it can still tell us the truth, but it is excluded from a criminal trial.[103] Similarly, when we make decision about a dismissal following a breach of privacy by focusing on the interaction between the parties, neglecting more extensive considerations about privacy protection in the workplace, the reasons to engage in reform operate behind the scenes and shape the choice situation. They remain latent, but in future cases they might spring into action and shape them as more public.

This model of constitutional reasoning might appear more complex and less intuitive than it actually is because I described it in abstract terms. As I will claim in the next section and the next chapter, it actually captures important parts of the legal reasoning employed by state agents shaping the regulation of horizontal relations in the common law tradition. They always reflected on second-order reasons about how and when to engage first-order reasons for regulation; they always tried to stay closer to the contextual end of the spectrum in private law cases and to progress incrementally; they also engaged, in special judicial decisions and through legislative and administrative action, in large-scale consequentialist reasoning; and their first-order decisions often took the translation or allocation paths. This is important, as it means that the tools required to realize loosely relational constitutional rights through private law are already in its toolbox, and are not as foreign to it as they might seem.

[103] N. P. Adams, 'In Defense of Exclusionary Reasons' (2020) *Philosophical Studies*. See also: Charlie Webb, 'Three Conceptions of Rights, Two of Property' (2018) *Oxford Journal of Legal Studies* 1, 7–10.

5.6. The Common Law Machine

The problems of the unionist model pushed us towards the idea of moral pluralism: we tried to find ways of ensuring that constitutional rights are adequately realized in the regulation of horizontal relations without consequentializing private law rights and duties and their relational normativity. Even if consequentialization is possible, we have reasons for trying to avoid it. On the other hand, we also have reasons not to respond to pluralism with separationist models: not the constitutional priority model that marginalizes local justice, nor the private law immunity model that fails to accept the constitution's legal supremacy and isolates relational normativity from external scrutiny. While the unionist model offered us a crude and excessive form of interaction between social justice and local justice, the two versions of the separationist model offer none of it. A middle-ground was required.

Therefore, I paired the idea of moral pluralism with the ideas of contextualism and standby consequentialism. Against the unionist model, the normative status and consequentialist prescriptions of loosely relational constitutional rights are unpacked in ways that tend to ignore or distort relational moral factors to a lesser extent. Against the constitutional priority model, relational rights, values, and principles, can push back against constitutional rights: in first-order conflicts that take place closer to their natural habitat and in second-order conflicts in which they resist the consequentialization of first-order conflicts. Finally, against the private law immunity model, constitutional scrutiny of private law is possible: usually in a more particularized form, but in some cases in a more robust top-down form.

What I do in this section and in the next chapter is to further concretize these abstract ideas in a blueprint of a model of constitutional rights-based horizontality. Up to this point, my criticism of other models of rights-realization was abstract and disconnected from more practical—procedural and institutional—questions. I wanted to avoid being distracted by

such questions when uncovering the normative features of constitutional rights-realization and the conflicts involved in this task. Now that the theoretical framework is in place, I try to show that it is better suited to the practice of private law and the regulation of horizontal relations than the other models. While my account is not fully interpretative, as I do not work from the practice to the theory, I still find it reassuring that the model does track some general features of legal practices and seems able to fit in them more smoothly.

It is here that I finally get to the starting point of most accounts of horizontal effect: litigation. While all state agents contribute to the realization of constitutional rights in horizontal relations, I start with judges because litigation it is still the central (though not only) arena in which we claim and contest our constitutional and private law rights (often simultaneously). Importantly, as Nagel claims, the focus on right-claims often brings judges to ignore or give less weight to instrumental considerations and to embrace a more 'fragmentary approach'.[104] In this vein, judicial decision-making is often seen as the incremental and context-specific refinement of rules,[105] and as involving reasoning behind the scenes.[106]

Thus, much of the action closer to the particularistic end of the spectrum takes place in courts. Here the proposed model works better than the unionist model, that turns litigation into a constitutional playground. However, I will add that as we drift towards the more general end of the spectrum, judicial decision-making must be complemented by legislative and administrative activities. Here the proposed model works better than separationist models, that often ignore the legislative role of judges, their ongoing dialogue with other state agents, and the involvement of these other agents in the practice of private law.

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[104] Nagel, 'The Fragmentation of Value' (n 89) 136.

[105] Roderick Bagshaw, 'Tort Design and Human Rights Thinking', in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 110, 114.

[106] Emily Sherwin, 'The Rules of Obligations', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 445, 451–456.

Down in the Trenches

As mentioned, indirect effect claims can take a positive or a negative form in litigation: they can be used to convince judges to recognize or to change private causes of action. One problem with such claims is their retroactivity. This is a general problem in constitutional law, but it is exacerbated in our context. Deciding that legally permissible state action is in fact impermissible because it violates constitutional rights—for example, it amounts to unjustified discrimination—is different from deciding this in a horizontal effect context. First, constitutional remedies against the state are usually forward-looking: often changing the law to make it constitutionally adequate. Second, even if backwards-looking remedies are granted (for example, compensation for rights-violations) it still seems that fairness considerations carry less weight here. The problem in horizontal effect cases is that judges change the legal implications of past private actions by finding that they violated constitutional rights.

This need not be a serious problem. A flexible remedial approach could allow judges to declare a legal norm regulating horizonal relations unconstitutional, but apply it to the case before them—and even to future cases for a certain period of time.[107] The reliance of private parties on existing legal norms should not be privileged over other affected interests—it is just one more factor to be considered by judges: the more pressing the situation, more important the right implicated, and more severe the harm to it, the less tendency there should be to suspend the results of unconstitutionality. I see no good reasons to categorically rule out constitutional rights-claims or effects in private litigation without engaging the implications of retroactivity for our agency and well-being on a case-by-case basis.

[107] On suspended declarations of invalidity, see: Kent Roach, 'Remedies for Laws that Violate Human Rights', in John Bell, Mark Elliott, Jason N.E. Varuhas, and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 269, 277–281. See also: Gonçalo de Almeida Ribeiro, 'The Effects of Fundamental Rights in Private Disputes', in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2018) 219, 248–253.

A more worrying problem, for me, is the public nature of such right-claims and the ability of private parties to address them. Constitutional cases traditionally involve the state as the addressee: if a citizen shows that his rights were limited (the stage of right-delineation), the burden moves to the state to show that the insufficient realization is justified. The state might have to address complex social considerations when justifying its regulatory choices: for example, to show that an anti-discrimination norm actually reduces discrimination; that a tort actually increases the security of pedestrians, medical patients, or consumers; or that not enforcing certain contracts will not excessively diminish the autonomy of potential contractors. Can we ask private litigants to address such considerations?[108]

This is worrying not only because it places a very heavy burden on private litigants, and not only because it might reintroduce the risk of politicizing horizontal relations, but also because the final decision will have many implications for unrepresented third parties. Even if we assume that judges have the competence to deal with polycentric issues (and this is my assumption), in adversarial legal systems they depend on the parties to provide them with the information needed to address the factual and normative problems the case presents, and this is something that private litigants might struggle with.

The problem is worse because the parties' constitutional rights are directed at the state—not at each other. Horizontal effect cases are actually about conflicts between the state's constitutional duties to each party (separately).[109] They look like horizontal conflicts because vertical rights serve as justifications for private law norms. In *Bull v. Hall*, for example, the anti-discrimination norm regulating the transaction is shaped by considerations relating to the parties' rights to equality and to manifest their religion. These rights serve, among other considerations, as factors determining whether anti-discrimination law meets

[108] Bagshaw (n 105) 132.
[109] Collins, 'On the (In)compatibility (n 85) 49–50. See also: Waldron, 'Rights in Conflict' (n 81) 506.

the constitutional requirements of rights-realization: a question we answer for each party separately. These rights do not directly conflict at the constitutional level. It is just that their realization in sub-constitutional law serves as a justification for the limitation of other constitutional rights: the realization of the right to equality justifies limiting the right to manifest religion (and vice versa). What is at stake is whether the state fulfilled its constitutional duties. Should we have private parties engage such questions? The problem is not necessarily the complexity of the arguments they will have to make or the evidence they will have to gather (private law cases can be complex as well) but the political nature of the dispute: the party defending the constitutionality of private law will have to make the state's case.

This is serious concern, but it is also not deadly. First, judicial private law decisions are not entirely particularistic, and have a dimension of law-creation that affects third parties. Second, it is common practice that state agents participate in the proceedings of high-profile private law cases that have large-scale implications. Third, non-judicial state agents can often revise judicial decisions through later legislation and administrative regulation.

Fourth, run-of-the-mill horizontal effect litigation should lie closer to the particularistic end of the spectrum of generality,[110] and focus on the localized aspects of constitutional rights—the translation and allocation routes should allow judges to develop private law in an incremental and context-sensitive manner. This does not require replacing constitutional rights with values in private law litigation. This strategy involves, like the indirect model, a degree of what Jud Mathews termed 'strategic ambiguity' about the relevance of constitutional rights to common law adjudication.[111] But there is a distance between ambiguity and contextualism and seeing judges as operating beyond of the constitution's reach.

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[110] On a similar 'two-track' approach to remedies, see: Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response' (2016) 66 *University of Toronto Law Journal* 1.

[111] Mathews (n 7) 191.

The required ambiguity should be achieved by focusing on particular aspects of constitutional rights: when creating, changing, or applying private law norms, judges can frame their decision as relating to a particular context.[112] When recognizing a cause of action, or deciding that a cause of action does not apply, they can narrowly tailor their decision. They will have to engage in proportionality analysis, but it can be so straightforward that it will often stay in the background of the decision: as the more consequentialist or 'public policy' aspects of decisions about unconscionable contracts or mass torts—matters that seem no less 'political' or 'public' than workplace privacy or roadside safety—often do.

Judges, whether they like it or not, always exhibit some policy preference when they decide private law cases: even if the preference is for moral short-sightedness. Such preferences can be connected to second-order reasons: for example, about judicial competence or the danger of politicizing the common law or certain horizontal relations. Litigation, under the proposed model, would normally focus on the soft edges of constitutional rights; which, in time, will also fade into the background, once private law duly accommodates them. Polycentric decision-making requires state agents to engage in an ongoing process of mutual adjustments, each agent focusing on a particular problem, while relying, partly, on 'tacit knowledge', not fully specified in terms of general principles, and remaining blind to many consequentialist and forward-looking considerations and abstract moral values.[113]

[112] We can see it as an 'as applied' decision, to borrow an American term—see: Richard H. Fallon Jr., 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113 *Harvard Law Review* 1321.

[113] See also: Shivprasad Swaminathan, 'What the Centipede Knows: Polycentricity and 'Theory' for Common Lawyers (2020) 40 *Oxford Journal of Legal Studies* 265.

Justificatory Ascent

If constitutional rights rather than values apply in private law litigation, it is impossible to categorically exclude rights-based judicial duties to engage in more consequentialist forms of reasoning. While, against the unionist model, they often remain behind the scenes and thus do not completely constitutionalize private litigation, sometimes red lights do go on and alarms do sound. Then, against the separationist models, we must consequentialize relational and small-scale considerations to evaluate the large-scale implications of private law.

Conservative theorists, like Hayek—sceptical about the ability of any individual or collective agent to effectively regulate large-scale states of affairs, that should therefore be left to markets—were enthusiastic about the common law system, that tended to develop incrementally while ignoring many large-scale implications of particular decisions.[114] This entails two mistakes about private law. First, state agents often take private law's implications and policy considerations into account—not only when legislators and administrators 'intervene' in it through large-scale reforms, but also in many judicial decisions.

Second, private law cannot remain short-sighted and oblivious to its large-scale implications while enjoying real autonomy in the legal system. As noted above, separationists secure a mere mirage of autonomy by either leaving private law susceptible to all 'external' interventions or by unconstitutionally immunizing it from them. Real autonomy consists of it being part of a system in which its relational aspects are given due weight when considering when and how we bring other public or political considerations to bear on them.

Private law need not reflect what Cohen called 'big-C Conservatism'—entailing the idea that when it takes a wrong turn (as it does) it can 'work itself pure' incrementally, from

[114] F. A. Hayek, *Law, Legislation, and Liberty: Vol. 2—The Mirage of Social Justice* (Routledge, 1982) 24–25. See also: Karl Popper, *The Open Society and Its Enemies* (5th edn, Routledge, 2002 [1945]) 170–182.

within.[115] It can reflect a 'small-C conservatism', that entails respecting values rather than embracing maximizing and consequentialist forms of engagement.[116] This reflects the idea of moral pluralism and the general rejection of the unionist model. But it is also in line with exposing private law to some forms of external scrutiny: sometimes state agents, including judges, must press pause and fine-tune private law's strictly relational framework. Private law theories often ignore this end of the spectrum of generality: they refer to decisions made here as political, implying that judges engaging in them exceed their mandate.

But it is crucial to see that private law can only remain private, to an extent, because the possibility of external scrutiny always waits behind the scenes, even in court cases: even if in many cases considerations of legal stability or relational morality have the upper hand, we should not assume that they have a monopoly over private law.[117] In cases like *Donoghue v. Stevenson*,[118] giving birth to modern negligence law; or *New York Times v. Sullivan*,[119] protecting freedom of the press—judges abstract from the particular facts before them and treat the case somewhat instrumentally, as a platform for law-creating action.

Dworkin claimed, in the context of his interpretative theory of law, that judges should give 'local priority' to norms closer to the cases they tend to, but that 'justificatory ascent'—appealing to more remote and abstract norms—including, I add, the moral values underlying them—is always 'on the cards'.[120] In a similar vein, Rosco Pound claimed that judges

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[115] Weinrib, *The Idea of Private Law* (n 74) 13. See also: Hanoch Dagan and Avihay Dorfman, 'Postscript to *Just Relationships*' (2017) 117 *Columbia Law Review* 261, 269–270.

[116] G. A. Cohen, 'Rescuing Conservatism: A Defense of Existing Value', in R. Jay Wallace, Rahul Kumar, and Samuel Freeman (eds), *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon* (Oxford University Press, 2011) 203.

[117] See, for example: Peter Jaffey, 'Policy and Principle and the Character of Private Law' (2020) 11 *Jurisprudence* 387.

[118] [1932] AC 562.

[119] N 6.

[120] Ronald Dworkin, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* 353, 356–358. For further claims about this dual nature of legal concepts, see: Shyamkrishna Balganesh and Gideon Parchomovsky, 'Structure and Value in the Common Law' (2015) 163 *University of Pennsylvania Law Review* 1241.

must resolve the tension between 'mechanical jurisprudence' and a 'jurisprudence of ends' through contextual judgements that form parts of a dynamic normative practice. As Dagan adds, the 'moments of "jurisprudence of ends" should not be too frequent', and we must take into account their destabilizing effects; but these more reflective moments—in which legal actors expose and evaluate the values underlying doctrine—are necessary.[121]

This is very much in line with the proposed model of rights-realization. Importantly, it allows these moments in judicial decisions as well. This does not mean that judges operate in them exactly like legislators or administrators: on the contrary, the common law machine is at its best when each state branch utilizes its advantages. Legislators have the democratic authority and legitimacy to resolve controversial moral conflicts,[122] and can express the collective's moral commitment to certain values.[123] But legislation is often distorted by sectional interests, lobbying, or big money. We need the independence and expertise offered by administrative agencies and tribunals—that, as the Canadian Supreme Court recognized, are sometimes better situated than judges to interpret and realize constitutional rights.[124]

Judges have an important role to play in the consequentialist end of the spectrum. As Shiffrin claimed, judicial decisions promote legal coherence by applying basic concepts like responsibility, good faith, or reasonableness to different factual patterns,[125] and they give 'voice to a local understanding of our mutual moral relations, one that underpins the governing culture and expectations citizens form about each other'.[126] Even constitutional courts,

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[121] Hanoch Dagan, 'Doctrinal Categories, Legal Realism, and the Rule of Law' (2015) 163 *University of Pennsylvania Law Review* 1889, 1891–1908.
[122] Da Silva (n 17) 299–301; Lewis A. Kornhauser, 'No Best Answer' (1998) 146 *University of Pennsylvania Law Review* 1599, 1620.
[123] Seana Shiffrin, 'Common and Constitutional Law: A Democratic Legal Perspective' (Tanner Lecture, 2017) 42–48.
[124] Mathews (n 7) 194.
[125] Shiffrin, 'Common and Constitutional Law' (n 123) 18–19.
[126] Ibid.

like the South African, are engaging in a rights-based dialogue with litigants that focuses on their interests and needs in ways framed by the adversarial legal process. While the docket of supreme courts is often shaped by who has the resources to be heard,[127] judges still often serve as legal first responders in cases of constitutional rights-violations. Even when legislators and administrators create or change concrete private law norms, and even when members of the public are more directly involved in the regulatory processes, their actions are isolated from particular disputes and thus more distant from relational moral factors.

Even when indirect effect requires the creation or change of private law norms, we do not want state agents to ignore private law as it is and its underlying morality. My claim is not only that constitutional rights do not apply directly to private agents, but also that we want them to interact with private law: and here judges have an advantage. To say that when judges create new private law causes of action they engage in direct application of the constitution,[128] misses this point. Beyond procedural questions about who claims constitutional rights against whom, the distinction between direct and indirect effect is important with regard to the space constitutional rights leave for other normative factors.[129] While there could be sophisticated fully horizontal models, the preference for 'working through' private law and for contextualism under indirect effect models helps solidify private law as a practice and protect its autonomy and integrity over time—a point I will revisit in the next chapter, in which I further unpack the model by applying it to different areas of private law.

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[127] Frederick Schauer and Richard Zeckhauser, 'The Trouble with Cases', in Daniel P. Kessler (ed), *Regulation versus Litigation: Perspectives from Economics and Law* (University of Chicago Press, 2010) 45.

[128] For a claim in this spirit, see: Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63, 70–73.

[129] Mathews (n 7) 6.

5.7. Conclusion

The previous chapter claimed that loosely relational constitutional rights should not be seen as applying purely vertically or fully horizontally: that in most cases they obligate state agents (and only them) to ensure that they are respected, protected, and promoted to a justified extent in all social interactions. This chapter added that when state agents try to realize these rights through the regulation of horizontal relations, they should normally avoid unionist or separationist models: in most cases, they should embrace a more nuanced context-sensitive model. This model can reduce the risks that state agents will ignore or distort the relational moral rights, values, and principles underlying private law or that private litigation will turn into a constitutional arena; while, on the other hand, avoid completely subordinating private law to constitutional law or immunize it from constitutional scrutiny.

My focus was not on the contents of the regulatory toolbox: mostly reinterpreting or changing private law (by repealing or creating its norms). Rather, it was on how to approach the choice between these tools from a normative perspective, taking into consideration the nature of constitutional norms of rights-realization and the nature of private law. In most cases, I claimed, legal reasoning should start with particular factual circumstances and work towards constitutional rights: whether by relocating some of their requirements to the strictly relational domains of personal responsibility or by allocating collective responsibilities to private agents. These types of justifications are typical of judicial decision-making, but many administrative agencies and tribunals and often legislators appeal to them as well when engaging in more localized reforms of private law norms. In special cases, legal deliberations resort to a higher level of abstraction: state agents work from constitutional rights to their requirements in particular horizontal circumstances. Such deliberations often underlie legislation and administrative action, but also high-profile judicial decisions.

When deciding about the level of abstraction in particular cases, state agents consult second-order reasons: not only about which regulatory tool should be chosen—can the tort law norm be reinterpreted to better accommodate the constitutional right to privacy or must a new tort law norm be created, for example—but about how to see the choice situation: how severely are constitutional rights violated? How sensitive are the relational values at stake to distortion? How competent is the relevant state agent to tend to the issue? And so on. In most private law cases, constitutional rights operate only at this level: behind the scenes. There is always the possibility, though, that they will spring into action as first-order reasons, thereby consequentializing state deliberations about the regulation of horizontal relations.

The hope is that the regulatory system, as a whole—the common law machine—will be able to maintain a balance between particularism and generality, while gradually pushing private law towards better conformity with constitutional rights. This, in a way, is what we are seeing in Anglo-American legal systems in the past decades: though at a slow pace and without an organizing theory. Private law is definitely not oblivious to public or consequentialist considerations, and it often contributes to the realization of constitutional rights. However, to a great extent, private law litigation is still isolated from collective considerations or interferences;[130] the involvement of non-judicial state agents is sporadic and unprincipled;[131] and general reform is seen as based in policy considerations, foreign to private law.[132] On the other hand, horizontal effect is still often treated as the regular application of proportionality tests to private law norms that are seen as serving, largely, an instrumental role.

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[130] See, for example: Linda Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 *Oxford Journal of Legal* Studies 59.

[131] See, for example: T.T. Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013).

[132] See, for example: Ross Grantham and Darryn Jensen, 'The Proper Role of Policy in Private Law Adjudication' (2018) 68 *University of Toronto Law Journal* 187.

My goal in this chapter was not to make these tensions disappear. I actually think that they are signs of a healthy normative system. I would have been worried if, in light of the complexity of the regulatory efforts required to reign in and steer modern societies, we would have been able to see consequentialist proportionality tests as definitive of the ways in which constitutional rights should be realized; or if we could have separated the legal system to two non-conflicting domains. As Waldron noted, 'the world really is a complex place and we should not pride ourselves on confronting it with principles whose simplicity represents moral dilemmas as much easier than they actually are'.[133]

But sometimes progress is made not by seeking perfection but by working through imperfections. To quote Leonard Cohen: 'you can add up the parts, you won't have the sum. You can strike up the march, there is no drum […] There is a crack in everything. That's how the light gets in'.[134] It has been my goal in this chapter to uncover some of the imperfections surrounding the task of realizing loosely relational constitutional rights in the regulation of horizontal relations. These are merely first, sketchy, and rather abstract steps. The theorization of constitutional horizontality is in its early stages. With time, I hope, a horizontal effect common law will form and provide greater certainty and order. Some mid-level distinctions and principles (located between local and concrete norms and abstract constitutional rights) will be embraced. They will serve as anchors and guidelines for state and private agents navigating these treacherous normative waters. However, some further steps could still be made at the higher level of abstraction in which this thesis operates. I believe we can get a better understanding of the proposed model by applying it to parts of private law that have been largely marginalized so far, but are actually central to it in practice.

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[133] Jeremy Waldron, 'Rights', in Robert E. Goodin, Philip Pettit, and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (2nd edn, Blackwell Publishing, 2007) 745, 748.

[134] Leonard Cohen, 'Anthem', in *The Future* (Columbia Records, 1992).

Chapter 6

Indirect Effects

6.1. A Midlife Crisis

The previous chapters offered a rough sketch of indirect constitutional horizontality. It was built on certain assumptions, abstractions, and idealizations since its goal was mainly to point at some problems caused by embracing purely vertical or fully horizontal approaches to delineation or unionist or separationist approaches to realization. While avoiding these options relieves some of the normative pressure much of it still lingers. My general goal in this chapter is to tend to additional sources of pressure by elaborating more positively about indirect constitutional horizontality, thereby further clarifying some of its abstract features.

As I hope is evident after the previous chapter, aspirations to alleviate the pressure in its entirety are somewhat untenable and misguided. However, some progress could be made by reducing the level of abstraction and generalization and drawing some distinctions about how the model actually applies to different areas of private law: up to this point, I talked about private law's core and took its connection to the restrictive conception of personal responsibility—and therefore the strictly relational normative structure of the rights we find in it and its resistance to constitutional horizontality—to be rather uniform. Well, it is not.

Beyond applying the model, this chapter also aims to bring it closer to private law as it actually is. For example, many of the activities private law regulates involve corporations: directly as right-holders or duty-bearers and more indirectly as insurers. A spectrum of privateness emerges, running from multinational corporations like Amazon or Chevron to mom-and-pop grocery stores. The spectrum keeps stretching to unincorporated individuals:

for example, some contracts (like standard online contracts) often reflect our autonomy and choice to a lesser extent than others (like a house letting contract); and some tortious relations (like a duty not to negligently hit parking cars) implicate our agency and responsibility to a lesser extent than others (like battery or libel). While some private law areas seem to be more resistant to publicization and constitutionalization (family law or personal contracts, for example) others seem less so (consumer or labour contracts, for example).

In many areas of private law, the bipolar bubble is not intact. We can find not just surgical interventions modifying concrete norms with the aim of promoting collective goals. We also see abstract standards, like good faith or reasonableness, through which public considerations can shape the substance of private law norms; and we see the partial or complete procedural separation of private law parties through the introduction of public or private third parties, like insurers (for example, regarding car or work-related accidents) or administrative agencies (for example, regarding consumer contracts or workplace safety). Such deviations from bipolarity can accommodate both weak and strong forms of indirect effect.

These expanding margins of private law raise a host of theoretical and practical concerns. They are still often treated as exceptions, in an attempt to present private law as uniformly strictly relational. Another goal of this chapter is to show that even if we see it as a more diverse domain in terms of its relationality, it can still be importantly private. In fact, embracing models of indirect constitutional horizontality—that, to a great extent, widen the public inroads into private law—need not push it over the edge and bring about its disintegration as a coherent regulatory ideal: while it is extremely difficult to offer non-formalistic definitions of private law as a legal domain, that will have determinate doctrinal implications, constitutional horizontality can help resist existing trends eroding private law's ability to perform its unique role as a private legal practice of right-claiming and contesting.

Shifting our Gaze

The previous chapters were largely focused on constitutional rights, with private law serving a secondary role: the goal was to see how we should think about the horizontal delineation and realization of constitutional rights, given certain factors about private law's core that were intentionally presented as posing strong resistance to constitutionalization. Now that we grabbed the tail of a somewhat operational model, we can remove some of the scaffolding we used to build it—some idealizations and abstractions—and work directly on it.

What I hold constant in this chapter is the account of constitutional rights and their horizontal dimensions. I will not change its delineation or realization features. However, I will claim that their actual application is more complex than it seems; and this requires us to enrich the account of private law we are working with. Thus, it could be said that the focus of this chapter shifts to private law. I will survey some parts of it in an attempt to see how the proposed account responds to some of their endemic normative features.

Obviously, I cannot examine more than a sample of areas of private law. Thus, I still do not claim to capture its essence or nature. Having said that, this sample is representative enough to serve as a foundation for a fuller discussion about the actual operation of indirect horizontality. In this sense, my claims can apply to areas of private law that I do not discuss (like fiduciary law or unjust enrichment) and perhaps even areas not yet in existence.

I focus on some tort law and contract law areas that deviate from the picture presented in the second chapter. In some cases, private law's relationality is loosened because agent-centered considerations are weaker while in others because beneficiary-centered considerations are stronger. This is reflected in the adoption of abstract standards and the involvement of third parties and the blurring of private law's boundaries and its internal divisions. These are all sources and signs of publicization and destabilization in private law.

Normative Aspirations

The reason I want to talk about these trends in private law is that they show that perhaps a more extensive and invasive form of constitutional scrutiny is viable, at least in some cases, in which state agents enjoy greater normative leeway. When talking about corporations, for example, there is more flexibility when delineating their constitutional rights and when realizing such rights by burdening them with complex consequentialist duties. When talking about unincorporated individuals no questions of delineation arise, but the resistance to stronger forms of indirect effect is weaker in some of private law's domains.

The next two sections deal with the loosening of strict relationality at the ground level of private law rights: when talking about their justifications. They are followed by a brief presentation of some examples manifesting this looser relationality: the actual ways in which public and consequentialist considerations—in our context, prescriptions entailed by loosely relational constitutional rights—find their way into private law reasoning. This has implications, I will then go on to claim, for how we should conceive of private law as a legal domain. It undermines the simple picture that does not distinguish between its core and its margins and see it as inherently and uniformly strictly relational.

However, I add that we can abide by the legal realist—and constitutional—prescription about engaging private law without overly embellishing it, while still retaining its integrity as a regulatory ideal. Recognizing private law's expanding margins still allows us to engage it—as I did—by starting with its normative and idealized core. As an idealized form of regulation, private law serves an invaluable function in public reasoning about a myriad of questions, including constitutional horizontality. In this sense, this constitutional trend pushes us to situate private law in its normative and social context. Only such integration, I believe, can secure real autonomy for private law in modern legal systems.

6.2. Corporations

In modern economies, many of the basic goods and services are delivered through corporate activity; and therefore we are often harmed by and transact with corporations. A basic worry about horizontal effect is that it will empower corporations more than it does individuals, as corporations often have better means of vindicating their rights: that it will tilt the balance of power even more towards the stronger side in private law relations, like banks.

Much ink has been spilled about the question of whether we should see corporations as a separate entity or just aggregations of individual agents. I will not address this question in its more ontological and metaphysical forms, but try to stick to practical considerations.[1] The starting point is that legal systems have long recognized the legal personality of corporations, that sign contracts, hold property, and have duties of care, for example. It seems that while they are comprised of owners, managers, and employees, they are not just aggregates of individuals: we can say that 'Apple made this phone'.[2] Much of what corporate law does is to constitute corporations as agents that can hold rights and bear duties. On the other hand, we can still say that they are not real persons, in the sense that their interests have no intrinsic moral value: in this regard, their importance is merely aggregative and instrumental.[3]

Different corporations are tied in different ways to the agency and well-being of individuals. Some still function, in certain contexts, as associations of persons—like corporations did in the early days of corporate law: this is often the case with cooperatives, clubs, universities, churches, labour unions, political organizations, and other forms of private

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1 Richard Schragger and Micah Schwartzman, 'Some Realism about Corporate Rights', in Micah Schwartzman, Chad Flanders, and Zoë Robinson (eds), *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016) 345.

2 Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press, 1986) 13–40.

3 Philip Pettit, 'Two Fallacies About Corporations', in Subramanian Rangan (ed), *Performance and Progress: Essays on Capitalism, Business, and Society* (Oxford University Press, 2015) 379.

collaboration forming around a corporate person for the sake of convenience and effectiveness. Even some for-profit corporations can be seen as associational in this sense.

However, there are public corporations—like Coca Cola, McDonald's, Exxon Mobil, Chevron, Facebook, or Apple—that operate in ways that distance them from the agency and well-being of any stable group of individuals. It is not only that many of their shareholders are passive and see them as fungible financial investments, but also that most of their stocks are owned by institutional investors—like pension, mutual, or hedge funds.[4] Individual shareholders are often unaware of which stocks they own at a given moment.

It is such corporations, in which ownership is largely separate from control, and in which the manager and not the entrepreneur is the dominant figure,[5] that corporate law often treats as its central case: this legal domain's main point is then seen as lowering transaction costs and facilitating financial activity.[6] However, it should be noted that corporate law can accommodate many forms of incorporation: in that sense, it has a public—even 'quasi-constitutional'—function, of shaping decisions about which corporations can hold constitutional rights and how state agents should reason about their private law duties.[7]

The main theme of this section is that thinking about corporate rights and duties is, largely, a consequentialist endeavour. My claim is that we can see them as holders of constitutional rights with horizontal dimensions when this serves individual interests and needs, without increasing the danger of over-empowering them, because the nature of their agency gives state agents more leeway to burden them with demanding private law duties.

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4 See, for example: David Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 *American Political Science Review* 139, 148; James D. Nelson, 'The Freedom of Business Association' (2015) 115 *Columbia Law Review* 461, 496–499.

5 Dan-Cohen, *Rights, Persons, and Organizations* (n 2) 18.

6 See, for example: John Armour, Henry Hansmann, Reiner Kraakman, and Mariana Pargendler, 'What Is Corporate Law?', in *The Anatomy of Corporate Law* (3rd ed, Oxford University Press, 2017) 1.

7 Elizabeth Pollman, 'Constitutionalizing Corporate Law' (2016) 69 *Vanderbilt Law Review* 639.

Corporations as Right-Holders

There is little debate about whether corporations should be recognized as private law right-holders. It was also with relative ease that corporations were explicitly recognized by the European Convention on Human Rights as enjoying the right to property;[8] and that the European Court of Human Rights extended other rights (like privacy or free speech, for example) to corporations.[9] Perhaps this is a result of the greater ease with which constitutional rights could be limited under the Convention; and why American constitutional law struggles in this regard. Two recent decisions by the Supreme Court of the United States sparked a heated debate: *Citizens United*, recognizing a corporate right to political speech,[10] and *Hobby Lobby*, recognizing a quasi-constitutional corporate right to free exercise of religion.[11] In the latter case, constitutional horizontality was at stake: the court recognized a corporate right not to be burdened with duties to pay for employees' health insurance, as far as it covers the use of contraceptives, if it goes against the owners' religious beliefs.

A temptation exists, for those worried about the asymmetrical implications of constitutional horizontality in favour of corporations—or at least some corporations—to deny that they can hold constitutional rights. But this idea ignores the normative connections between corporate activities and individual agency and well-being.[12] These connections carry less weight when it comes to state-centered accounts of constitutional rights. This is another reason to be sceptical about them as general accounts of such rights. Often, it is important,

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8 Protocol 1, Article 1.

9 Anat Scolnicov, 'Human Rights as Derivative Rights: The European Convention on Human Rights and the Rights of Corporations', in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press, 2016) 194.

10 *Citizens United v. Federal Election Commission* 558 US 310 (2010).

11 *Burwell v. Hobby Lobby* 573 US 682 (2014). The case dealt with the Religious Freedom Restoration Act—a legislative concretization of the free exercise clause—and not directly with the First Amendment.

12 Margaret M. Blair and Elizabeth Pollman, 'The Derivative Nature of Corporate Constitutional Rights' (2015) 56 *William & Mary Law Review* 1673.

when delineating corporate constitutional rights, to expose and engage these connections. Two paths can be identified in this regard, that Dan-Cohen interestingly tied to two moral paradigms, similar to ones I have been discussing in the previous chapters.[13]

One path focuses on how corporate activities can serve a relatively stable and identifiable groups of individuals. In *Hobby Lobby*, for example, it was the five family members that own the corporation's controlling shares. This group could also consist of managers and employees: they could all be dedicated to not selling particular products or to closing on holy days.[14] Such associational connections will tend to be stronger when talking about non-profits, but categorical distinctions need not be drawn here.[15] All corporations could come to be intricately bound with the autonomy and identity of a group of individuals.[16]

The second path focuses on the influence of corporate activities over a larger and more dynamic group of individuals: for example, the right of commercial speech could be tied to the interests of consumers in making informed decisions.[17] The recognition of corporate rights is tied to their positive social impact: values like autonomy or identity will not salvage a form of corporate speech that contributes nothing to or harms public debate.[18] This is even more so when corporate activities are tainted by strong economic incentives.[19] Having said that, the recognition of corporate constitutional rights could still be justified in such cases, and they could also have horizontal dimensions. The problems that this creates in particular private law contexts are treated, mostly, in the stage of rights-realization.

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13 Dan-Cohen, *Rights, Persons, and Organizations* (n 2) 55–57.

14 Alan J. Meese and Nathan B. Oman, '*Hobby Lobby*, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons' (2014) 127 *Harvard Law Review Forum* 273.

15 Waheed Hussain, 'Corporations, Profit Maximization and the Personal Sphere' (2012) 28 *Economics and Philosophy* 311.

16 Nelson (n 4).

17 *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* 425 US 748 (1976).

18 Meir Dan-Cohen, 'Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State' (1991) 79 *California Law Review* 1229, 1248–1254.

19 See also: Seana Valentine Shiffrin, 'A Thinker-Based Approach to Freedom of Speech', in *Speech Matters: On Lying, Morality, and the Law* (Princeton University Press, 2014) 79, 98–102.

Corporations as Duty-Bearers

In the fourth chapter, I touched the ineffectiveness and normative demandingness arguments against the direct application model. These problems are of smaller dimensions when it comes to big business corporations because of their features as artificial collective agents, operated by a dominant managerial group whose main duty is to make profits. Generally, corporations have greater capabilities to comprehend and respond to the requirements of social justice; and there is much less at stake in terms of moral integrity and autonomy.

For some theorists and practitioners, this opens the door for the imposition of direct human and constitutional rights-based duties on corporations,[20] especially when they operate in weak states.[21] In such circumstances, or when they engage in public activities, like operating prisons or providing electricity, they are seen as mixed public–private bodies.[22] Since they are not fully public, they can relieve themselves of some duties by withdrawing from certain areas of social activity;[23] they can rely on agent-centred considerations and the restrictive conception of responsibility to 'reprivatize' their status as duty-bearers.

This raises another problem with direct application: of legitimacy and authority. I claimed that loosely relational constitutional rights do not perfectly correlate duties: they are often agnostic about how to realize them. We evaluate the duty-bearer's compliance flexibly, over time. When it comes to their application to corporations, we must either introduce state agents concretizing these abstract norms—thereby embracing indirect effect—or give corporations the discretion to unpack these norms themselves. Such deference, however, seems

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[20] See, for example: Nien-hê Hsieh, 'Corporate Moral Agency, Positive Duties, and Purpose', in Eric W. Orts and N. Craig Smith (eds), *The Moral Responsibility of Firms* (Oxford University Press, 2017) 188.

[21] See, for example: O'Norah O'Neill, 'Agents of Justice', in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge Publishing, 2005) 37, 42–50.

[22] Ciepley (n 4). See also: Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford University Press, 2013) 109–131.

[23] See, for example: David Jason Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge University Press, 2014) 89–151.

at odds not only with the profit-seeking motivations and duties of many corporations but also with the nature of the task of monitoring and adjusting the system of constitutional of rights: it is a form of unjustified privatization—not because of some cost-benefit analysis, but because this normative task is inherently public and should be done by agents that are accountable to the political collective and have only its interests in mind.[24] After all, one purpose of the constitution is to constitute the state as the agent with which the buck stops. Thus, for example, it seems that allowing Facebook, Twitter, or Google to regulate online speech—thereby systematizing dignity, privacy, free speech, and other rights and values—especially in the political context, raises problems of legitimacy and authority.

While direct application will rarely be justified, the indirect effect of loosely relational constitutional rights can be stronger: it will be easier for state agents to justify bringing consequentialist considerations to bear on corporate private law duties. While the manner in which corporations observe norms about promise-keeping or negligent harms, for example, can have broader cultural implications,[25] and while there are market-based reasons to burden them with some strictly relational duties,[26] these are instrumental reasons. To engage an agreement between two multinational corporations about the extraction of natural gas by appealing to the morality of promise-keeping, seems to over-extend the jurisdiction of interpersonal morality. Many regulatory failures resulted from the assumption that this kind of morality could guide the regulation of corporate activities. It formed the background against which states failed to prevent corporations from polluting the environment, exploiting employees, corrupting elections, or invading privacy, to give a few examples.

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[24] See, generally: Avihay Dorfman and Alon Harel, 'Against Privatisation as Such' (2016) 36 *Oxford Journal of Legal Studies* 400. For a Rawlsian perspective, see: Chiara Cordelli, 'The Institutional Division of Labor and the Egalitarian Obligations of Nonprofits' (2012) 20 *Journal of Political Philosophy* 131.

[25] Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708, 746–749.

[26] Joseph Heath, *Morality, Competition, and the Firm* (Oxford University Press, 2014) 12–19.

In the context of constitutional horizontality, this means that state agents have more leeway to allocate collective responsibilities to corporations when they perform public roles. For example, when a corporation owns an apartment building, justifying its duties to tenants to keep it in reasonable conditions need not appeal to notions of interpersonal fairness applying to all landlords: we could bring distributive justice considerations to bear on these landlord-tenant relations by appealing mostly to the nature of the corporate agent as a business venture that enjoys legal privileges and performs an important public role.

Take, for example, the case of *McDonald v. McDonald*, that I already mentioned.[27] A tenant claimed that her right to private life and home justified subjecting a bank's right of eviction to fairness tests. That court was right to recognize the bank's constitutional property right, but wrong to briefly reject the tenant's claim: formal eviction rules seem more justified when it comes to small-time landlords, that will struggle to conduct a complex consequentialist analysis; but we can and should place heavier substantive burdens on big corporate landlords, that have greater resources and abilities.

To take another example, in *Sindell* the Supreme Court of California held that pharmaceutical companies could be held liable for harms resulting from drugs they produced according to their market share (unless they prove that they could not have caused the harm that the victim suffered).[28] Similar claims could arise about gun or tobacco manufacturers; but stretching responsibilities and liabilities like this will be much more difficult when it comes to individual agents,. This reflects the fact that as corporations grow bigger the moral framework in which they operate shifts from private to public;[29] and thus, as is the case with state duties, weaker resistance is shown to consequentialist forms of reasoning.

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27 *McDonald v. McDonald* [2016] UKSC 28.

28 *Sindell v. Abbott Laboratories* 26 Cal. 3d 588 (1980).

29 See, for example: Christopher McMahon, *Public Capitalism: The Political Authority of Corporate Executives* (University of Pennsylvania Press, 2013).

6.3. Individuals

In my discussion of corporations, as in the rest of the thesis thus far, I treated the individual as a homogenous construct: as if all individuals whose activities are regulated by private law have the same interests and needs and exhibit the same kind of agency strongly connected with the restrictive conception of responsibility. This kind of uniformity is a feature of two abstract figures often lurking behind private law theory and practice: the autonomous Kantian agent and the rational market actor. As a matter of fact, the nature of our agency and well-being and their interplay change from one social domain to the other. This has almost no implications for the stage of rights delineation, as scopes are determined in relative abstraction, but it does make a difference in the stage of rights-realization.

It is not only the regulation of corporations that invites a more consequentialist form of reasoning.[30] We cannot assume that individuals are always fully autonomous, rational, or equal: the constitution requires us to examine each right-holder's particular situation. This means that we might have to distinguish, for example, between the landlord and the tenant, the employer and the employee, or the seller and the buyer.

Claims about a lack of granularity in private law theory and practice and its often-anachronistic foundations are not uncommon.[31] But they are also constitutional problems. In this section, I claim that the private law's relationality is loosened in two types of cases: when individuals act in ways that do not reflect their full agency (for example, when entering a contract by clicking 'I agree'); and when their interests and needs are particularly vulnerable (for example, when it comes to employees, consumers, or children). In such cases, private law is often not completely bipolar and not strictly relational.

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30 Dan-Cohen, *Rights, Persons, and Organizations* (n 2) 83–84.

31 See, for example: Steve Hedley, 'Corrective Justice—An Idea Whose Time Has Gone?', in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History* (Hart Publishing, 2016) 305, 319–325.

Individuals as Agents

Owing to a great extent to Charles Fried's work,[32] in the past decades many contract law theories focused on the relational normativity of promising. They hoped to separate contract law from tort law and distance it from economic forms of reasoning by highlighting the power-conferring nature of contract law, that allows us to intentionally—rather than merely incidentally—burden ourselves with primary duties.[33] For many theorists and practitioners, personal autonomy became the moral foundation of contract law: tied to our ability to guide our lives and cooperate with other private agents by entering binding agreements.

Even if we assume that the general connections between contract law, agency, and autonomy hold,[34] and that contract law should reflect the morality of promises to a certain extent,[35] a claim could be made these connections are weaker in particular contexts. I have in mind the type of contracts Margaret Radin groups under the heading of 'boilerplate': be it contract with terms listed separately, rolling contracts with future terms, or contracts that we enter by opening a box or clicking 'I agree'.[36] Even if it is morally acceptable to reduce consent in such cases to hypothetical assent (and I have my doubts about it),[37] it is quite far, as Radin justifiably notes, from the traditional idea of a legal contract.

In our context, it seems odd to restrain the normative potential of constitutional rights to protect the relational morality underlying the action of clicking 'I agree'. While it is true that there are good moral reasons to hold us responsible here, they seem to be instrumental:

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32 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).
33 Curtis Bridgeman and John C.P. Goldberg, 'Do Promises Distinguish Contract from Tort?' (2012) 45 *Suffolk University Law Review* 873.
34 Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, 2003).
35 See also: Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press, 2019) 22–35.
36 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013). See also: Nancy S. Kim, *Wrap Contracts* (Oxford University Press, 2013).
37 Radin (n 36) 19–32.

for example, such interactions could facilitate socially desirable transactions—we do want to use computer software and receive online services; and doing so could serve cultural practices solidifying our responsibility for our choices, even those made more casually. One of the important implications of this instrumentality is that we need not dignify all instances of entering such agreements by tying them to our full agency and responsibility. While private law often resists talk about shades of responsibility as a result of the zero-sum nature of liability, the realization of constitutional rights invites such gradation. This means that the farther we are from cases in which our agency binds us to others as duty-bearers, the weaker the barriers for consequentialist scrutiny: for example, it might be justified to allow individuals entering standard online contracts greater leeway in releasing themselves from their duties (perhaps under some penalties), or to burden online sellers with heightened duties of disclosure (perhaps even of actively drawing the buyer's attention).

The second example I want to touch is liability insurance. Much like the story of contract law, it was to a great extent Ernest Weinrib's Kantian theory that shifted the focal point of tort theory from consequentialism to relational morality.[38] Attempts to de-instrumentalize and de-consequentialize tort law emphasized the importance of our responsibility for interpersonal harm (even in cases of strict liability). Corrective justice and civil recourse are two theoretical strands emphasizing the bipolar connections between the tortfeasor and the victim, that became central in theoretical and practical debates about tort law.

The problem is that tortfeasors rarely participate in tort proceedings or compensate victims: in reality, both functions are usually performed by insurance companies.[39] When tort cases reach litigation, tortfeasors' involvement in them is marginal: they are managed

[38] Ernest J. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

[39] Richard Lewis and Annette Morris, 'Tort Law Culture: Image and Reality' (2012) 39 *Journal of Law and Society* 562. See also: P. S. Atiyah, *The Damages Lottery* (Hart Publishing, 1997) 161; Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 *Modern Law Review* 301.

by lawyers and other corporate agents; but actually, they only rarely reach this stage: most cases end in out-of-court settlements, the details of which are often remotely tied to the particular features of the tortious interaction—they are shaped, to a great extent, by instrumental and financial corporate considerations.[40] These considerations will also determine how much the tortfeasor will have to pay for insurance: normally, his only burden.

There are many accounts of how insurance shaped the development of tort doctrine: for example, it allowed the expansion of liability in the past decades without financially devastating individual tortfeasors.[41] However, there is a shortage of accounts of how insurance should shape decisions about reparative duties and liabilities, and how such decisions affect primary norms.[42] Tort law often treats insurance as irrelevant: as a contract between one of the parties and a third party. But purchasing liability insurance is not just a neutral choice: a way in which we discharge our remedial responsibilities.[43] It is tied to our responsibilities: it makes it likelier that we will be able to take responsibility for harms we cause.[44] Sometimes it could be a way of recognizing the moral standing of others—and this, as Hershovitz notes, is a primary expressive function of tort law.[45]

We should therefore be careful when evaluating how robust the normative buffer constituted by insurance is and the extent to which it isolates us from the harms we cause. It

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40 Richard Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' (2018) 71 *Current Legal Problems* 245.

41 Richard Lewis, 'Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room' (2005) 1/05 *Journal of Personal Injury Law* 1; Tom Baker, 'Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action' (2005) 12 *Connecticut Insurance Law Journal* 1; Kenneth S. Abraham, 'Tort Luck and Liability Insurance' (2017) 70 *Rutgers University Law Review* 1.

42 Christopher J. Robinette, 'Two Roads Diverge for Civil Recourse Theory' (2013) 88 *Indiana Law Journal* 543, 564–566; Hanoch Sheinman, 'Tort Law and Distributive Justice', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 354, 381–383. See also: Steve Hedley, 'Making Sense of Negligence' (2016) 36 *Legal Studies* 491.

43 Tony Honoré, 'The Morality of Tort Law: Questions and Answers', in *Responsibility and Fault* (Hart Publishing, 1999) 67, 74–75.

44 See, for example: Arthur Ripstein, 'Some Recent Obituaries of Tort Law' (1998) 48 *University of Toronto Law Journal* 561, 566.

45 Scott Hershovitz, 'Treating Wrongs as Wrongs: An Expressive Argument for Tort Law' (2017) 10 *Journal of Tort Law* 405.

seems reasonable to say that there will be cases in which failing to compensate because insurance was not purchased is negligent: when participating in dangerous sports, perhaps. We also encounter less problems in cases of compulsory insurance, like driving: here, it seems that there is more room for consequentialist reasoning to shape duties and liabilities—for example, by making standards of care stricter or causation requirements more flexible.[46]

The tricky cases are ones in which purchasing insurance is discretionary. While law's authority is not dependent on sanctions, the value of tort law norms would greatly diminish if the shadow they cast over our behaviour is too dim: if judicial decisions have no implications for insurance coverage, and some agents can just buy tort law immunity.[47] Like rights, law's authority could be understood in a more contextual and practical manner; and as such, we can evaluate the extent to which law can actually guide individual behaviour.

On the other hand, if we are able to keep talking about primary and secondary tort law rights, it does not mean that we must maintain the illusion of bipolarity when a tortfeasor is insured. The interesting possibility from the constitutional horizontality perspective is that we can use the cost-dispersal feature of insurance to give greater weight to victims' interests and needs by being more generous with remedies. Importantly, considerations about this will tend to be consequentialist and beneficiary-centered, since tortfeasors are rarely involved, and the important thing to victims—excluding cases in which their main goal is to call tortfeasors to account (in some libel cases, for example)—is quick and fair compensation. The important thing for us is not whether we should maintain the illusion of bipolarity or not but that loosely relational constitutional rights seem very relevant for deciding about this matter, which seems somewhat distant from the kind of small-scale morality that resists consequentialization.

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46 Merkin (n 39).

47 John C.P. Goldberg, 'Ten Half-Truths About Tort Law' (2008) 42 *Valparaiso University Law Review* 1221, 1264–1270; John C. P. Goldberg and Benjamin C. Zipursky, 'Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette' (2013) 88 *Indiana Law Journal* 569, 607–608.

Individuals as Beneficiaries

There are cases in which agency is present but beneficiary-centered considerations push back against strict relationality and the restrictive conception of responsibility. Instead of an interpretative exercise trying to locate aspects of people's interests and needs in others' scope of responsibility, state agents engage in what is closer to a balancing exercise between agent-centered and beneficiary-centered values. This results in deviations from the individualistic status-quo of mutual separation and from the free-market paradigm that dominates the traditional conception of private law; in pockets of more cooperative legal arrangements.[48]

A first example is consumer law: an additional layer of protection that seats on top of traditional contract law doctrines like fraud, duress, or misrepresentation.[49] Consumer law regulates the manner in which information is presented to consumers (for example, its accuracy, visibility, or understandability), the conditions in which transactions could be made (for example age, time, and place limitations or cooling-off periods), and occasionally also their substance (for example, minimal fairness, quality, or safety requirements).

Importantly, the justification of many such norms is not agent-centered or aimed at attaining collective goods.[50] While sellers are not burdened with duties wholly unrelated to their business enterprise, beyond that point beneficiary-centered values get more weight, and open the door for stronger forms of indirect effect. This is demonstrated in Shiffrin's explanation of the fact that deceptive advertising norms may impose liability even if the advertisement is correct, the advertiser had no intention to deceive, and the false inference is not

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48 See, for example: Hanoch Dagan, *Property* (Oxford University Press, 2011) 42–45. See also: Michael J. Sandel, 'Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy' (2013) 27 *Journal of Economic Perspectives* 121.

49 See, for example: 34(3) *Journal of Consumer Policy*.

50 Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press, 2013) 81.

entirely reasonable.[51] As Shiffrin notes, it reflects the moral expansion of our responsibility beyond what is under our control. The moral and legal failure lies in not bringing about a state of affairs in which another party benefits despite their own shortcomings. There is no relational wrongdoing here.[52] Rather, we place additional burdens on the advertiser because we treat him 'as a decentralized agent of the public cooperative project' of allocating goods, 'as a natural complement' to his 'greater control and access to modes of production': in this sense, Shiffrin adds, there are normative similarities between producers and the state.[53] This is the kind of moral analysis that stronger forms of indirect effect are grounded in.

Another example is labour law. Here we are slightly farther away from the traditional market paradigm: work relations often involve more mutual trust, dependence, and reliance compared to consumer relations. Work is not just a source of income: it is also tied to one's identity and forms a centre around which one's professional and social life revolves. In this vein, the past century or so saw many changes to the *laissez faire* approach to work relations: labour law now contains many mandatory provisions, establishing norms about ongoing working conditions (health, safety, or privacy, for example) and about how labour relations can start (anti-discrimination, for example) and end (fair dismissal, for example).

As Collins and Mantouvalou note, many such labour law norms would be endorsed from a human rights or constitutional rights perspective.[54] They respond to disparities of power between the employer and the employee: not just in terms of bargaining power, as our goal is not merely to strengthen employees' ability to looks after their own interests, but also

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51 Seana Valentine Shiffrin, 'Deceptive Advertising and Taking Responsibility for Others', in Anne Barnhill, Mark Budolfson, and Tyler Doggett (eds), *The Oxford Handbook of Food Ethics* (Oxford University Press, 2018) 471. See also: Gregory Klass, 'False Advertising Law', in in Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, and Henry E. Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press, 2020) 391.

52 Shiffrin, 'Deceptive Advertising (n 51) 480.

53 Ibid 489–491.

54 Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment', in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 188.

in terms of the state's ability to directly protect employees' vulnerable interests by adopting mandatory norms. Some of these norms, that burden employers with duties aimed at protecting and promoting employees' interests and needs, are only thinly justified by strictly relational and agent-centered considerations: while it is true that employers are burdened with them because they chose to be employers, their substance reflects mostly beneficiary-centered considerations. In a similar vein, when considering the manner in which employees' constitutional rights could be realized, at the expense of employers' rights, we can treat employers as public actors, discharging aspects of our collective responsibilities: for example, we can say that they should promote equality in their hiring decisions; or create a safe and tolerant environment in the workplace, in which minority members or women could thrive. Such burdensome duties are not always grounded in the employer's moral duties to exercise his powers fairly or in good faith in isolated bipolar interactions: participation in the labour market as an employer opens the door for stronger forms of indirect effect—we allocate to them duties related to the political collective's responsibility to attain social justice.

A final example is family law. It is important to remember that many aspects of what we now see as the family could be and used to be thought of by using the regular concepts of contract and property. There are voices, from the right and the left, calling to treat marriage as another contract, made against the background of the general, individualistic, property regime. There are also attempts to recognize more egalitarian norms, such as property sharing arrangements, by relaxing the notion of consent they are grounded in: for example, to talk about the implicit intentions of married or cohabiting partners, that result in the protection of the financially weaker party upon the relationship's breakdown.[55] But there are also cases reflecting a weaker emphasis on agency and choice: it is accepted that family

[55] John Eekelaar, *Family Law and Personal Life* (2nd edn, Oxford University Press, 2017) 52.

arrangements are chosen at a relatively high level of abstraction—without fully considering all their future legal and economic implications.[56] Choice is seen as one more consideration that should be balanced with other considerations, such as the protection of vulnerable individuals or the fair reward for care-work, that markets tend to ignore.[57]

As Lucinda Ferguson argues, taking the translation route—for example, talking about implicit assumptions of responsibility towards financially weaker partners or children—will meet difficulties in some cases.[58] In them, the focus is on the weaker party's interests and needs, and the connection with the duty-bearer's agency is flimsy.[59] She adds that focusing on interpersonal responsibilities has distracted legal actors from tending to the social injustices involved in some family relations and to our responsibilities as political collectives;[60] and that some spousal and child support private law duties should be seen as cases in which the state delegates responsibilities to private agents to ameliorate collective problems, like social inequality: for example, high-earning husbands were 'used' to shelter their wives from their reduced earning capacities when their marriages broke down. Again, we are taking the allocation path, thus embracing distinctions between, for example, general property law and the more beneficiary-centered 'family property law'.[61] This does not mean that translation is off the table—on the contrary: in the three legal domains mentioned here we find cases in which personal responsibilities are responsive to social injustice. The reason I focused on allocation is that it is normally a stronger form of indirect effect, that is even more remote than the traditional agent-centered framework of private law.

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56 Robert Leckey, 'Cohabitants, Choice, and the Public Interest', in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 115.

57 Ibid 128–129.

58 Lucinda Ferguson, 'Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation' (2008) 22 *International Journal of Law, Policy, and the Family* 61.

59 Ibid 77.

60 Ibid 82–84.

61 See, for example: Andrew Hayward, ''Family Property' and the Process of 'Familialisation' of Property Law' (2012) 24 *Child and Family Law Quarterly* 284.

6.4. Bursting the Bubble

In the previous sections I surveyed samples from private law domains in which relationality seems to be less strict: where interpersonal right-norms leave more room for consequentialist and instrumental considerations and 'outward-looking' duties. In this section, I will further explore this theme, but from a slightly different perspective. My main goal here is to demonstrate that the bipolar bubble is not always intact: there are both standards, like good faith or reasonableness, and third parties, like insurance companies or administrative regulators, that introduce public considerations and collective goals into private law relations.

The main theme is still the publicization of private law that has been taking place for a century or so—a trend that constitutional horizontality exacerbates, by increasing the consequentialist pressure on state agents, instructing them to modify private law through the paths of translation and allocation so that it better accommodates public considerations. It is important to note that, as expected, there is a complex spectrum of such modifications. In the more surgical end, we find particular and concrete legal norms: for example, extending the cooling off period for some type of products from seven days to fourteen days. Of course, the considerations behind such changes could be quite complex—involving economic factors and distributive justice considerations. But the final result is a concrete norm.

I am not expanding on such surgical interventions in this section because it deals with the form of private law norms: not, like the last section, with the ways in which the values underlying them open the door for consequentialist reasoning. I am interested in how certain standards and institutional structures, already part of private law or the background against which it operates, inject public considerations into its ongoing operation. While the reasons for adopting such regulatory measures are often the ones mentioned in the previous section, they make an independent contribution to the loosening of private law's relationality.

Another preliminary clarification is that the bubble-bursting norms discussed in this section are not located only in the areas of private law discussed above: the standard of good faith, for example, applies in many types of contracts—even more intimate ones, tied more strongly to the agent-centered morality of promise-keeping. Having said that, it will be seen that in the areas of private law discussed above (and those with similar normative features) the publicization of private law seems to be more extensive: in them, we often see not only deviations in the form of standards inviting public scrutiny, but also deviations in the form of third-party involvement, including public bodies that the constitution obligates directly.

I will try to take a closer look at some of the holes in the fabric of private law through which constitutional rights-based considerations could enter. In the previous section the focus was on the normative grounds of some legal relations: the involvement of corporations, the weakening of their connection to individual agency, or special interests and needs. This section, as mentioned above, focuses on the output end. This exploration is important not just to show that private law is receptive, to some extent, to public considerations—that the normative relaxation of strict relationality is already reflected in it—but also because it is crucial to integrate these 'deviations' into our understanding of constitutional horizontality by explaining what they do or can do from the perspective of constitutional rights. In this sense, this section focuses not on the why question (why some parts of private law are more susceptible to consequentialization) but on the how question: how consequentialization can take place—how consequentialist prescriptions can be find their way into private law.

Standards

Abstract standards are sprinkled throughout private law. They have been used for centuries to inject public considerations exceeding particular bipolar relations into private law (often referred to in the common law tradition as 'public policy'). It has been suggested by theorists and practitioners embracing indirect effect models, like Barak, that these standards reflect a constitutional balance that could always be altered in particular cases.[62]

Now, the state's choices about the use of legal standards are subject to proportionality tests. Can we ask private agents to limit certain private law rights—not constitutional rights, because we want to avoid full horizontality—only when the limitations are proportionate? It seems that at least in their constitutional law form, these tests are too open-ended for private agents—even business corporations: they require evaluating alternative measures and complex considerations on a social scale, and therefore a great deal of deference towards duty-bearers must be shown to avoid overly limiting their liberty.

However, as a principle, proportionality could serve as a background explanation or justification of private law domains or doctrines.[63] For example, in contract law, it can be used to evaluate the implications of illegality,[64] or to shape the principle of good faith, that exposes contract terms to norms like honesty, trust, exploitation, or unconscionability.[65] In labour law, it can be part of the fairness tests of disciplinary procedures or a requirement for the use of monitoring and surveillance.[66] These are not requirements to limit constitutional

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62 See the examples in: Aharon Barak, 'Constitutional Human Rights and Private Law', in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 13.

63 Zhong Xing Tan, 'The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?' (2020) 33 *Canadian Journal of Law and Jurisprudence* 215.

64 Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart Publishing, 2018).

65 Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297.

66 Collins and Mantouvalou (n 54) 203–206; Pnina Alon-Shenkar and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 *McGill Law Journal* 375.

rights proportionally—that, as the European Court of Human Rights noted, is close to full horizontality.[67] These norms are more limited. First, in terms of the circumstances in which private agents are required to engage them: for example, we ask employers to respect their employees' privacy or free speech only in the workplace—but not to respect their out-of-work life-style choices or their political expressions on social media.[68] Second, the content of the requirements is more limited, given the contexts in which they apply: we do not ask private agents to engage in a detached beneficiary-centered form of reasoning, like the one engaged in by the state, that has no goals, beliefs, interests, or needs of its own. This is why we often see 'business needs' serve as a justification for rights-limitations by corporations (to the great frustration of many advocates of anti-discrimination laws).

The important thing is that standards like fairness, reasonableness, proportionality, or unconscionability, open the door for balancing agent-centered and beneficiary-centered considerations, rather than an interpretive process in which we mostly try to get a good fit between liability and restrictive responsibility. Such standards can pave the way for debates about translation and allocation, helpfully tying them to an existing web of private law norms and principles: state agents can burden private agents with duties that are more responsive to social justice by reinterpreting concepts that are already embedded, to a great extent, in their horizontal relations. This will not always work: for example, it has been difficult to implement hate speech codes vaguely decrying stigmatizing or demeaning speech in universities.[69] It is an ongoing struggle to tie the promotion of social justice to the responsibilities of private agents. Standards are helpful in this regard, as they give judges the flexibility to move from one contextual setting to another while gradually exposing private law to external norms.

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67 *F.J.M. v. United Kingdom*, App no 76202/16 (ECtHR, 6 November 2018) par. 42.
68 See, for example: Collins and Mantouvalou (n 54) 205–206.
69 Erwin Chemerinsky, 'The Challenge of Free Speech on Campus' (2018) 61 *Howard Law Journal* 585.

Third Parties

Beyond surgical changes and the use of abstract standards, we see the introduction of third parties into horizontal relations: sometimes as part of private law and sometimes in the public law background. Such changes do not necessarily have more dramatic legal repercussions compared to the introduction of standards; but they are important because reasoning about these third parties' duties often involves many consequentialist arguments: indirectly, when talking about private parties like insurance parties, and directly when talking about public parties like administrative agencies. In both cases, they bring with them many norms aimed at promoting collective goals—and constitutional rights—into the bipolar bubble.

Take labour law, for example. In the nineteenth century, the contractual terms that defined the mutual obligations of employers and employees reflected whatever 'agreement' the parties entered: there were few substantive or procedural limitations, mostly applying to all contracts. As far as the employer's tort liability was concerned, the trio of no liability for harm caused by fellow workers, contributory negligence, and assumptions of risks, left few employees with compensatory rights following work-related injuries. Fast forward to our time, and it is not only that the state determines many procedural and substantive rules for the contract of employment: state agencies oversee issues like workplace health and safety and intervene in workplace disputes (whether involving labour unions or not), and there is often in place a publicly run no-fault scheme for compensating work-related injuries victims, funded (at least directly) by employers (who are, often, privately insured).

Or take consumer law. Beyond licensing and prior approval requirements—for example, for professions like physicians or products like pharmaceuticals—we see legal norms allowing interests groups, consumers' associations and state agencies to contest contractual

terms or business practices on substantive grounds, like fairness.[70] Beyond that, in some legal systems the use of class actions (similar in their rationale, in a way, to labour unions) is quite common: perhaps most notably in the United States, we see lawyers and litigants act as private attorney generals, calling business actors (often, large corporations) to account for violating the rights of private third parties—again, a deviation from the bipolar picture, in which a seller and a buyer interact directly and in relative isolation.

Next, consider tort law and insurance. It is quite clear that compulsory insurance—common for drivers with regard to the causation of bodily injuries,[71] or in New Zealand for all such injuries—severs the connection between the tortfeasor and the victim: the premiums are not determined according to the harms the insured caused particular victims—their justification and determination are instrumental and consequentialist.

But all types of insurance, even if they are not compulsory and do not introduce the state at all, involve a separation of the tortfeasor and the victim. Insurance can be much more agent-centred compared to traditional tort law: the premiums can reflect the risks each agent creates, thereby tailoring the financial burden in a way that does not ignore risk imposition that did not materialize into harm or that materialized into unusually serious harm (that is, cases falling under what is often known the 'eggshell skull' rule).[72] Now, unlike cases of vicarious liability (for example, of an employer for harms caused by an employee), insurers normally have no direct private law duties to victims: thus, it is not only that, as I claimed above, tortfeasors and victims' first-order rights and duties are directly connected, but also that there is still a sense in which their second-order rights and duties are. However, there

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70 See, for example: Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press, 2001) 11, 41–44.

71 See, for example: Rob Merkin and Sheila Dziobon, 'Tort Law and Compulsory Insurance' in T.T. Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Hart Publishing, 2012) 303.

72 Alexander B. Lemann, 'Coercive Insurance and the Soul of Tort Law' (2016) 105 *Georgetown Law Journal* 55.

is an important sense in which liability insurance introduces a degree of separation to these legal relations, and intervenes as a third-party changing the tortfeasor's normative position. It can even go as far as replacing abstract tort standards like 'due care' or 'reasonableness' with concrete rules about particular safety measures that the tortfeasor should take.[73]

Add to this the fact of the vanishing trial: the now well-known fact that many private law cases are settled out of court.[74] The result is a complex web of normative relations that can no longer be captured with the imagery of bipolarity. It is not just the increasing density and complexity of the 'public' regulatory background of private law relations, that is often 'overtly systemic and consequentialist',[75] but also more direct involvement in these relations by third parties. Even more intimate family relations are now being engaged in against the background of state supervision and potential intervention.[76] Again, this is not to say that indirect effect immediately follows. My claim is just that the door is opened for strong forms of indirect effect because horizontal relations are shaped, often dramatically, by actors whose duties are more responsive to consequentialist considerations, including the prescriptions entailed by constitutional rights, via the translation and allocation paths.

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[73] Omri Ben-Shahar and Kyle D. Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 *Michigan Law Review* 197, 234–235.

[74] Carlo Vittorio Giabardo, 'Private Law in the Age of the Vanishing Trial', in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 547.

[75] T.T. Arvind and Joanna Gray, 'The Limits of Technocracy: Private Law's Future in the Regulatory State', in Kit Barker, Karen Fairweather, and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 237, 237.

[76] Andrew Bainham, 'Private and Public Children Law' (2013) 25 *Child and Family Law Quarterly* 138.

6.5. Disintegration

The previous sections painted a different picture of private law from the one painted in previous chapters, that was loyal, to an extent, to traditional interpretative private law theories. I tried to show that the grounds of private law norms are often not agent-centred; that at times, their connection to the restrictive conception of responsibility is weaker, and in others the focus is placed on beneficiary-centred interests and vulnerabilities; and that this manifests itself in consequentialist inroads into its ongoing operation, whether by adopting abstract and open-ended standards or through the interventions of third parties that operate more instrumentally (like insurance) or have constitutional duties (like regulators).

The weaker indirect effect path of translation and the stronger indirect effect path of allocation can therefore not only change private law norms going ahead—they can already explain many 'publicized' private law norms. Indirect effect, in this sense, is not foreign to the practice of private law. So why does it attract such resistance and concern—especially in its stronger forms—from private lawyers and practitioners, despite not having conclusive implications about the current substantive content of private law?

The main problem, I want to suggest, is the possibility of private law's disintegration: its transformation from a unified normative system to a collection of loosely connected normative clusters, with nothing much holding them together but contingent functional reasons or intuitive and ad-hoc considerations. It could be claimed that private law is already on the back foot in terms of its ability function as a coherent deliberative practice and that reinforcing the public policy battalions with constitutional rights will be the final straw.

The concern here is not merely technical or taxonomical: after all, the division of law into different domains—including the distinction between public and private law—is meant to facilitate effective deliberative legal practices; to help public and private legal actors apply

law (to their or others' affairs) and anticipate or steer its evolutionary course. It is in this regard that legal stability and coherence are often celebrated as fundamental legal virtues, reflecting values tied to the common law method and the ideal of the rule of law.

The concern about disintegration relates both to private law's evolution—which will become muddled and unprincipled if it is not grounded in a distinction between it and public law and an understanding of the internal relations between its domains—and to the integrity of the normative relations it regulates—consequentialist considerations could be the cuckoo in the private law nest, that erodes its ability to respect and protect the values internal to the relations it regulates and their connections to personal agency and responsibility.[77]

Thus, we see many private lawyers and theorists turn to what Simmonds described as 'resistance': attempts to preserve the traditional picture of private law, by treating most of its expanding margins and their connection to collective and public considerations as exceptions or even aberrations.[78] In other words, private law monism is embraced. It is claimed that the socio-economic background is largely irrelevant to its ongoing operation; and that its large-scale implications (for example, that it creates deterrence or reallocates resources) are just side-effects of it operating as a domain of strictly relational rights and duties.[79] The concern is that attempts to embrace more foundational pluralism (saying that private law actually aims at promoting health, safety, or equality, for example) will reduce its coherence and integrity and create problems of incommensurability, that will induce forms of deliberating, reasoning, and decision-making, that are less clear, fair, predictable, and uniform.[80]

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77 Weinrib, *The Idea of Private Law* (n 38) 11–14, 72–75; William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007) 368–370, 383–387.

78 N. E. Simmonds, 'Private Law, The Market, and the State', in *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press, 1984) 120.

79 See, for example: Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA Law Review* 621, 638; Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press, 1999) 11.

80 See, for example: Goldberg, 'Ten Half-Truths' (n 47) 1248–1255; Goldberg and Zipursky, 'Civil Recourse Defended' (n 47) 592–593; Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 325.

Private Law Pluralism

I doubt that one idea or theory could tell us what private law is in all possible contexts and for all practical or theoretical purposes.[81] This is not a big surprise, considering its bottom-up evolution and the richness of the social activities and relations that it regulates.[82] There are many criticisms, in this regard, of the somewhat static nature of traditional accounts of private law, that presuppose 'some sort of timeless essence of private wrongs'.[83] The social world that they seem to locate private law in is the premodern world of discrete and isolated wrongs (in which the restrictive conception of responsibility is more apt).[84]

There is a fine line between coherence and rigidity, especially in conditions of moral pluralism.[85] As Perry, notes, some legal inconsistency is necessary to avoid a form of libertarian myopia.[86] In fact, the normative demandingness of loosely relational constitutional rights obligates state agents to locate private law in its socio-economic context. Thus, we cannot assume a division of labour between ambitious reformers and restrained practitioners, that have modest moral goals and focus on private law's incremental development.[87]

The problem with tying our understanding of private law too closely to current practices is not only that it could easily result in failing the test of fit: for example, we will ignore

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81 Izhak Englard, 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law', in David G. Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 183, 184–185.

82 Christopher J. Robinette, 'Can There be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine' (2005) 43 *Brandeis Law Journal* 369. See also: Hedley, 'Corrective Justice' (n 31) 312.

83 Michael L. Rustad, 'Torts as Public Wrongs' (2011) 38 *Pepperdine Law Review* 433, 495. See also: Hedley, 'Corrective Justice' (n 31).

84 Gregory C. Keating, 'Is Tort Law "Private"?', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 351, 367.

85 Christopher J. Robinette, 'Torts Rationales, Pluralism, and Isaiah Berlin' (2007) 14 *George Mason Law Review* 329.

86 Stephen R. Perry, 'Professor Weinrib's Formalism: The Not-so-empty Sepulchre' (1993) 16 *Harvard Journal of Law & Public Policy* 597, 609–612, 617–619.

87 See, for example: Weinrib, *The Idea of Private Law* (n 38) 11; Jules L. Coleman, *The Practice of Principle* (Oxford University Press, 2001) 5–6; John C.P. Goldberg and Benjamin C. Zipursky, 'Civil Recourse Revisited' (2011) 39 *Florida Law Review* 341, 342–347; Alan Brudner with Jennifer M. Nadler, *The Unity of the Common Law* (2nd edn, Oxford University Press, 2013) 8–9, 26–27; Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) 18–20; Hanoch Dagan and Avihay Dorfman, 'Postscript to *Just Relationships*' (2017) 117 *Columbia Law Review* 261, 269–271. See also: Lucy (n 77) 10.

the prevalence of insurance because practitioners tend to ignore it. The bigger problem is that we are likely to fail to present private law in the best light (even if our moral aspirations are relatively modest).[88] A concern about this was already noted by Bentham, that referred to his former Oxford Professor as 'Everything-as-it-should-be Blackstone': his expository project, Bentham thought, was too tolerant to many of the common law's problems.[89]

Participants in the practice of private law must take constitutional rights into account: as a matter of duty (state agents), right (private agents), or strategy (lawyers).[90] They cannot dismiss the need for large-scale reform as falling in the political realm,[91] while assuming that private law will 'work itself pure'.[92] While the question of how constitutional rights figure in private law reasoning is open for debate, complete isolation is no longer an option once the loose relationality of constitutional rights, that blurs the boundaries between public and private, is recognized. In these conditions, appealing to private law's endemic features in normative argument—for example, the agent-centeredness and strict relationality of some of its right-norms—must place them in their socio-economic context; otherwise, we just treat them as unchangeable timeless artifacts. Here we feel the push towards disintegration in all its force. Loose relationality erodes the foundations of the traditional bipolar picture. This, I want to add, is paired by an increased destabilization of private law's boundaries—both its internal divisions and its external boundaries with other normative domains.

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88 Benjamin E. Zipursky, 'Pragmatic Conceptualism' (2000) 6 *Legal Theory* 457, 468–469. See also: Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations', in Charles E. F. Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing, 2008) 205, 208–210; Hanoch Dagan and Avihay Dorfman, 'Against Private Law Escapism: Comment on Arthur Ripstein, Private Wrongs' (2017) 14 *Jerusalem Review of Legal Studies* 37.

89 J. H. Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas* 22, 25. See also: Richard A. Posner, 'Blackstone and Bentham' (1976) 19 *Journal of Law & Economics* 569, 590.

90 See also: Jane Wright, *Tort Law and Human Rights* (2nd edn, Hart Publishing, 2017) 27–34.

91 See, for example: Weinrib, *The Idea of Private Law* (n 38) 45, 208–213; John C.P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Harvard University Press, 2020) 266.

92 Perry, 'Professor Weinrib's Formalism' (n 86) 609–612, 617–619; Hanoch Dagan, 'Pluralism and Perfectionism in Private Law', in *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013) 161.

Shifting Boundaries

I claimed in the second chapter that for the purpose of thinking about constitutional horizontality, state rights and duties should not be seen as part of private law, as they are remote from the restrictive conception of responsibility. Constitutional horizontality complicates the picture, as it could be claimed to bring private law duties closer to the state's duties, at least in terms of their responsiveness to social justice. However, it also highlights important differences. It is not only that constitutional rights are claimed directly only against the state, even as a contractor or tortfeasor, but also that even strong forms of indirect effect do not entail holding private agents to the same standards we hold the state to.

This could create a problem of disparate treatment: not of agents—the problem that the Diceyan theme of extending private law duties to state agents tried to ameliorate—but of beneficiaries. For example, public and private employees could enjoy different labour law rights. Regardless of whether it will be constitutionally justified to promote equality by levelling down (that is, lowering the standards applying to the state) the important thing is that this question will always surface in cases involving the state. When coupled with the state's duty to always consider the interests and needs of third parties—even when buying chairs, for example—it seems like it is a stretch to refer to its rights and duties as 'private', therefore creating unclarity about we are to locate and engage them in relation to private law.

Another private law border lies between tort law and criminal law. I said in the second chapter that beyond the fact that criminal victims have limited powers to claim the rights protected by criminal law, it deals with a different—more loosely relational—type of wrongs. The criminal wrongdoer is called to account for public wrongs by representatives of the political collective. Again, constitutional horizontality could be an additional source of instability: if the state empowers private agents to claim private law rights that indirectly

help realize the constitutional rights of third parties, it narrows the gap between private attorney generals and criminal prosecutors. As a result, it becomes more difficult to claim that tort liability focuses on harms located in the normative space between the tortfeasor and the victim,[93] especially when taking the more progressive allocation path.

A third shifting boundary lies between power-conferring domains, like contract and property, and the intimate and non-legal domain. For example, it was claimed that there is a trend in the enforcement of family-related agreements (for example, separation, adoption, surrogacy, or co-parenting agreements) towards 'contractualization': such agreements are seen as less 'special', and treated with general contract law tools, despite a special emphasis still being put on protecting the interests and needs of children.[94]

Again, constitutional horizontality could complicate things. Whether an agreement is reached or not, each family-related decision must be regulated in ways that respect, protect, and promote the constitutional rights of all involved parties to a sufficient extent.[95] Treating a contract between parents with the same tools a consumer contract might fail to meet constitutional requirements: rights to family life, for example, often require taking into account the more intimate setting of the former, thus pushing them away from contract law. At the same time, the right to equality might mandate extending family law norms to new family forms: that is, to extend law further into the intimate domain. It is another case, therefore, in which constitutional horizontality exacerbates already existing tensions inside and outside of private law, that threaten the stability of its inner and outer boundaries.

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93 See, for example: Keneth W. Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2007) 17 *Widener Law Journal* 719, 720–721; Benjamin C. Zipursky, 'Philosophy of Private Law', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 623, 650–652.

94 Brian H. Bix, 'Private Ordering in Family Law', in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Family Law* (Oxford University Press, 2018) 257, 263–272.

95 Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act (2005) 25 *Oxford Journal of Legal Studies* 453.

6.6. Reintegration

The concerns raised above, about private law's internal coherence and integrity and its ability to remain distinct from neighbouring normative domains, have been lurking beneath the surface. My claim, in this section, is that indirect constitutional horizontality can actually come to its aid: not by isolating it from its surroundings, but by pushing it towards integration while retaining its core normative features as an ideal form of regulation. It is important not only for private law theorists and practitioners that it remains a normatively robust deliberative practice rather than applied constitutional law (or applied economics, or political theory, for that matter). It is also important to whoever takes constitutional rights seriously.

The reason is not that the constitution enshrines values, rights, or principles that private law (and public law) should realize: an approach that sees private law as an instrument—even if an irreplaceable one, in liberal democracies with a free market economy. While private law, like all legal institutions, has no intrinsic value—it should be replaced if doing so will better serve individual agency and well-being—one of my central points in this thesis is that it reflects and solidifies a different form of deliberation and reasoning. It is not that the values internal to it are necessarily different, as our form of engaging values is: private law is grounded in relational and agent-centered practices of rights-claiming and contesting that are tied to a restrictive conception of personal responsibility—as opposed to consequentialist and beneficiary-centered practices, tied to a prescriptive collective responsibility.

One of the main points behind indirect effect models is an awareness of the limits of consequentialization and the ability to realize social justice by prescribing large-scale states of affairs. Moral progress is slower and more complex than that. As a result of our shortcomings as moral reasoners and as legal reformers, we accept the fact that constitutional and legal institutions are not perfect: while this does not require the isolation of legal domains

from the constitution's reach, it requires allowing them a degree of normative autonomy that is necessary if their own forms of valuation, deliberation, and reasoning are to contribute, in their own unique ways (not entirely translatable to constitutional terms) to public practices, some of which rights-based, trying to bring about and sustain social justice.

Within such practices, distinctions between public and private law and between different private law domains could be important. As Prince Saprai noted, legal categorization helps preserve the normative connections between law and socially accepted moral principles and practices.[96] I touched, in this regard, the claim (made, for example, by Gardner and Goldberg and Zipursky) that private law is continuous with our moral lives: that when it works well, it is smoothly embedded in the fabric of our interpersonal moral relations.

Having said that, there are many ways to reflect and solidify small-scale practices of rights-claiming and contesting in law; and they do not commit us to particular prescriptions about private law, or to dispositive definitions of it that have concrete legal implications. The delineation of private law's inner and outer borders must strike a balance between practicality, stability, and coherence and avoiding mechanical and fetishist forms of reasoning.[97] This delineation could take different forms in different contexts.[98] In our case, it informs our reasoning about how constitutional rights should be brought to bear on private law. It might be that the aspects of private law that I treated as central, located in its core, or highlighting its important normative features, will be marginal for other practical or theoretical purposes.

With this in mind, the first thing to say about private law in our regard is that it regulates the relations between agents that loosely relational constitutional rights do not obligate

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96 Saprai (n 35) 48–63.

97 Dan Priel, 'Two Forms of Formalism', in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 165, 172–175, 185–186.

98 See, for example: Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 197–200; Kevin F.K. Low, 'The Use and Abuse of Taxonomy' (2009) 29 *Legal Theory* 355, 368.

directly: even large multinational corporations, I claimed, are not public to a sufficient extent to be burdened directly by the constitution (though they, like individual actors, could be burdened by strictly relational constitutional norms: for example, against torture or slavery). But this normatively modest idea is still silent about differences between different areas of private law. In this regard, as we saw in this chapter, we face a more complex picture.

To simplify the picture, I engaged private law as having a core of rights and duties. The notion of claimability focuses us on the direct relations between an agent's responsibility and a beneficiary's well-being. While we saw that the bipolar bubble is not intact—whether because corporations or other third parties are involved, because the connections to personal agency and responsibility are weaker, or because certain interests and needs are vulnerable—it is still our central case and point of reference when considering the constitution's indirect effect in the legal relations between private parties. We are always mindful not only of the state's duties to optimize of the system of constitutional rights, but also, unlike in public law, of the relational normativity endemic to the regulated relations: even when we consider regulating corporations, state agents must explore the concrete implications for the agency and well-being of owners, managers, workers, and other parties, and not just for social justice.

What sets private law apart for my purposes is not strict relationality or its legal manifestations: it is the resistance of its rights-based core to constitutional indirect effect, that is grounded in its connections to interpersonal moral practices tying the agency and well-being of private persons. This resistance's force does not diminish with the partial eclipse of the traditional bipolar structure of litigation.[99] On the contrary. Against the growing publicization of private law, the practice of realizing of constitutional rights requires it to function as a regulatory ideal-type that can complement it, shape it, and push back against it.

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[99] On these distinctions, see: Matthew A. Shapiro, 'Civil Wrongs and Civil Procedure', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 87.

Private Law as an Ideal-type

It is often claimed by private law theorists with legal realist tendencies that private law's privateness depends on a background of effective public law institutions. It is claimed less often that public law's publicness depends on a background of effective private law institutions. I want to suggest, against the trends of disintegration and shifting boundaries, that a constitutional order requires private law to function not only as a normatively robust system of interpersonal rights, reflecting small-scale moral values and forms of engagement, but also as a coherent idea: an ideal-typical abstraction that forms an Archimedean point in deliberations about state action and the realization of constitutional rights over time.

It is in this regard that traditional private law principles and abstract theories like those of Weinrib, Ripstein, and Goldberg and Zipursky have an important role to play: highlighting private law's normative uniqueness. However, two adjustments are required if such principles and theories are to preserve their vitality in modern constitutional legal systems: first, they must locate private law's uniqueness in its social context, rather than in isolation; second, they must be careful not to see idealized notions as too continuous with legal practices and as directly resolving doctrinal questions. Their role, from a constitutional perspective, is to reflect and solidify the normativity of practices of horizontal right-claiming and contesting. The public practice of realizing constitutional rights would diminish in quality if the public and private agents participating in it do not work with a normatively robust account of private law as a deliberative practice, rather than a mere system of price tags or a simplistic extrapolation of constitutional law or political theory.

This constitutional role private law has as an ideal-type is more complex, of course. It encapsulates, for instance, its expressive and educational roles: against the background of marketization and corporatization, it is vital to have a vivid image of how we should treat

each other in our more immediate relations. Private law is important for cultivating, facilitating, and solidifying practices of interpersonal responsibility.[100] We must, as I claimed in the previous chapter, building on Shiffrin, at the very least leave room for morally motivated activities in the market and other private settings—not just for individual agents, but also when it comes to more sophisticated corporate agents.[101] As Scheffler adds, while our normative and imaginative ties to the common-sense and restrictive conception of responsibility are under pressure in modern societies—a fact, we saw in this chapter, reflected in the replacement of traditional private law with novel doctrines and institutions—it is still too early to declare the triumph of alternative consequentialist conceptions of responsibility, more remote from how most ordinary individuals conduct their daily lives.[102]

But as Sunstein warns, against the trend of displacing the common law in favour of administrative agencies and legislative schemes: 'compensatory principles exert a tenacious hold on the legal mind, and are often applied in adjudicative contexts in which they are anachronistic or have little or no place'.[103] As I noted above, relying on private law in its traditional form as an ideal-type does not mean accepting its prescriptive priority. Brudner and Goldberg and Zipursky, for example, saw public or consequentialist considerations as playing a part in the regulation of horizontal relations, but a 'peripheral, 'constrained', 'ad hoc', or 'supplementary' part,[104] that is not central in or exhaustive of court cases.[105]

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[100] See, for example: Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press, 1984) 226; John C.P. Goldberg and Benjamin C. Zipursky 'The Moral of *Macpherson'* (1998) 146 *University of Pennsylvania Law Review* 1733, 1816.

[101] See also: Seana Shiffrin, 'Compelled Association, Morality, and Market Dynamics' (2007) 41 *Loyola of Los Angeles Law Review* 317.

[102] Samuel Scheffler, 'Individual Responsibility in a Global Age', in *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press, 2002) 32, 41–44.

[103] Cass R. Sunstein, 'The Limits of Compensatory Justice', in John W. Chapman (ed), *Compensatory Justice: Nomos XXXIII* (New York University Press, 1991) 281, 285.

[104] Brudner (n 87) 354–355.

[105] Goldberg and Zipursky, *Recognizing Wrongs* (n 72) 72.

For my purposes, there is no reason to settle such matters categorically. It is possible, for example, that a tort law case dealing with corporate responsibilities will be heavily consequentialized. It seems more accurate to say that private law has its consequentialist moments, but that their frequency, intensity, and implications are the result of a complex normative interplay with first-order and second-order relational considerations.[106]

Mostly, I would say, we must understand the ideas of claimability and relationality and their benefits and limitations. We cannot just do with them whatever we want: they have a degree of integrity, and must remain tied to our moral life and thought. Having said that, the traditional private law path is not uniform: regulators have many options when approaching horizontal activities and practices. A zero-sum game of public vs. private exists only if we limit our thinking to rigid categorical distinctions: that, as we saw in this chapter, seem quite foreign to the pluralistic nature of modern private law.

In the rest of this section, I briefly survey the deliberative role private law can fulfil in the context of constitutional horizontality. It will usually not solve concrete private law problems: it works at a higher level of abstraction, though not completely abstract, in the sense that it can only be used in deliberations about the general relations between private law and the constitution. Ideas and theories about private law operate, from the perspective of indirect horizontality, at an intermediate level of abstraction: they are meant to supplement, complement, and (as noted in the previous chapter) push back against constitutional ideas about the regulation of horizontal relations. Without them performing this role, the danger is not only that consequentialist considerations will go too far or not far enough, but that they will not even take their most complex and evolved form.

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[106] See also: Victor Tadros, 'Secondary Duties', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 185, 200–205.

The Private Law Path

One of the most important choices with regard to horizontal effect is whether to take what I call the private law path: a choice that, as I noted, private law theory is often silent about. Take, for example, the choice between tort law and criminal law. Civil recourse theory—and the judicial principles it elucidates—are crucial for tackling such questions: it explains why in some cases it is important to allow right-claimants to call wrongdoers to account—and why expressions of moral condemnation need not be directed only through the criminal processes. In fact, tort law could help us with cases lying in the periphery of criminal culpability and with offences that the criminal process is too crude to handle.[107] On the other hand, sometimes, as the European Court of Human Rights recognized, constitutional rights might require the state to go beyond recognizing private law remedies: for example, when it is difficult for private agents to find and to call wrongdoers to account.[108]

On the other hand, sometimes we will want to avoid the private law path because we want to preserve its robust relational normativity. Take, again, the displacement of tort law in favour of insurance schemes: a form of prioritization of contractual market-based allocations of responsibility over more rigid allocations through tort law.[109] Such legal patterns affect the distribution of responsibilities in society.[110] For example, they can reduce the implications luck has on our liabilities to others.[111] Beyond securing fairer and more uniform compensation, insurance can reduce the financial burdens resulting from momentary

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[107] See, for example: Findlay Shark, 'Tort Law, Expression, and Duplicative Wrongs', in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press, 2020) 441.

[108] *K.U. v. Finland*, App no 2872/02 (ECtHR, 2 March 2009) par. 43, 47. In that case, because the alleged wrongdoer operated online, anonymously.

[109] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013) 207.

[110] Victor Tadros, 'Distributing Responsibility' (2020) 48 *Philosophy & Public Affairs* 223.

[111] See, for example: Jeremy Waldron, 'Moments of Carelessness and Massive Loss', David G. Owen (ed), in *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 387; Gregory C. Keating, 'Strict Liability and the Mitigation of Moral Luck' (2006) 2 *Journal of Ethics and Social Philosophy* 1; Tom Baker, 'Liability Insurance, Moral Luck, and Auto Accidents', 9 *Theoretical Inquiries in Law* 165 (2008).

losses of concentration or minor forms of negligence, that because of the zero-sum nature of tort liability result in duties to compensate for the entire scope of harm: this improves the proportionality between blame or responsibility and liability and reduces disparities between agents whose identical or similar actions caused different degrees of harm.[112] Thus, insurance can help us avoid the zero-sum choice that typifies traditional tort theories, between entirely blameless victims and only slightly blameworthy tortfeasors, that often requires theorists and judges to stretch concepts related to agency or causation to award compensation.[113] As Tony Honoré noted, while luck is tied to our sense of agency and self, the requirements of tort law could be softened with insurance if they are to remain legitimate and justified.[114] Agency, responsibility, and causal contributions, need not be thought of and legalized solely in binary terms.[115] Once we accept that, we see that a space is opened for constitutional rights to affect decisions about whether to institute tort law or alternative regulatory schemes.[116]

At times, though, consequentialist considerations could lead us down the private law path. The relational normativity of private law could be more effective in guiding behaviour. For example, research shows that sometimes fines could act as a price and therefore induce people to engage more in the behaviour we seek to deter.[117] Interpersonal rights could, on the other hand, tie our duty not to an amorphous collective but to the well-being of particular others, who will be wronged if we fail to adequately discharge our duties.

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[112] See also: Larry Alexander and Kimberly Kessler Ferzan, 'Confused Culpability, Contrived Causation, and the Collapse of Tort Theory', in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 406.

[113] Arthur Ripstein, 'Equality, Luck, and Responsibility' (1993) 23 *Philosophy & Public Affairs* 3, 13; John C.P. Goldberg and Benjamin C. Zipursky, 'Tort Law and Moral Luck' (2007) 92 *Cornell Law Review* 1123, 1161. See also: Nigel E. Simmonds, 'Justice and Private Law in a Modern State' (2006) 25 *University of Queensland Law Journal* 229, 235–237; Donal Nolan, 'Causation and the Goals of Tort Law', in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 165, 188–189.

[114] Honoré, 'The Morality of Tort Law' (n 43) 86–87, 91.

[115] Alex Kaiserman, 'Partial Liability' (2017) 23 *Legal Theory* 1.

[116] Steve Hedley, 'The Unacknowledged Revolution in Liability for Negligence', in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 99, 108–109.

[117] Uri Gneezy and Aldo Rustichini, 'A Fine is a Price' (2000) 29 *Journal of Legal Studies* 1.

The problem with the inflationary use of relational concepts also arises regarding the application of contract law to 'boilerplate' and similar agreements. The problem is not only that they replace the public regulatory regime with private regimes that benefit the drafting party (usually, a large corporation) and weaken the state's ability to bring about and sustain background justice over time (Radin referred to this as 'democratic degradation'); it is also that treating these agreements as regular contracts reflecting our choice impoverishes and dilutes the moral values we associate with personal agency and responsibility.[118]

Of course, standard and adhesive contracts are legitimate in some contexts, in light of their ability to reduce transaction costs. However, a less rigid and formal approach can be taken to their regulation: for example, the drafting party could be burdened with duties to assist the other party in understanding some terms; particular terms or contract-types could be categorically forbidden, allowed, or require regulatory pre-approval; assent, and factual assumptions about its existence should be handled with care—we could require stronger forms of it when it comes to terms involving the limitation of constitutional rights.[119]

The preference in some legal circles is to stick to disclosure rules and other market-based solutions; but these are often not enough—especially when constitutional rights are involved: it seems that the more important the right implicated, the stronger form of consent we should require, the tighter the public scrutiny, and the greater the benefits to the right-holder and affected third-parties should be. This is highly relevant, for example, for privacy in social media outlets: our agreements with Facebook, Twitter, or TikTok raise not only questions about the integrity of the democratic process (which is, currently, in danger), but also about the use of the rhetoric of contracts to protect them from regulation.

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[118] Radin, *Boilerplate* (n 36) 30, 33–51, 154–185.
[119] Ibid 217–242; Kim (n 36) 174–210.

Another important topic in this regard is the vanishing trial. I already noted that the majority of private law disputes is resolved outside of court. In many cases this is the result of legislative or contractual duties to arbitrate.[120] It is not only that court proceedings are faster and give less room for parties to claim their rights,[121] but that many cases end in out-of-court settlement. In practice, private law adjudication was privatized in the name of the efficient use of judicial resources: often, without scrutiny of the implications for the rights of litigants or third-parties or the state's ability to sustain background justice.

Goldberg and Zipursky replied to such concerns by saying that tort law's point (and private law's more generally) is not to ensure that justice is done, but to provide an avenue for justice: the focus is on the recognition of rights—not their exercise.[122] They agree that inequalities in terms of outcomes are problematic, but are concerned about regulatory solutions, not arising from within private law, since the state might be 'indifferent or even ill-disposed toward alleviating the difficulties that particular victims face'.[123]

With due respect to suspicion of the state, a consequentialist comparison of different regulatory schemes is necessary not only to preserve private law's public functions and the ability of private attorney generals to promote collective interests by calling wrongdoers to account: it is also important to preserve to robust normativity of its relational right-norms.[124] Public access to a sufficient number of adjudicative private law processes and their fairness are important in both regards. Here, again, indirect horizontal effect could come to private law's aid, by pushing back against unprincipled privatization processes. It acts as a dam, preventing private law's relational normativity from floating downstream.

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[120] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 *Yale Law Journal* 2804.
[121] Nora Freeman Engstrom, 'The Diminished Trial' (2018) 86 *Fordham Law Review* 2131.
[122] Goldberg and Zipursky, *Recognizing Wrongs* (n 72) 277–288.
[123] Ibid 134, 139.
[124] Susan James, 'Rights as Enforceable Claims' (2003) 103 *Proceedings of the Aristotelian Society* 133.

6.7. Conclusion

This chapter tried to show that there are many paths that already lead or could lead from the constitution to private law; paths often treated by traditional private law theory as located in the margins of this legal domain, though they are often quite central in current legal practices. There are many translation paths, and quite a lot of allocation paths as well. Of course, more work is required to expose them: like Dan-Cohen's on corporations, Radin's on 'boilerplate' contracts, Hershovitz's on liability insurance, Shiffrin's on deceptive advertising, Ferguson's on familial duties, and Collins' on labour relations and good faith in contracts.

Such contextual explorations should not be seen as part of winner-takes-all battle over private law's soul as a legal domain: it is purely private only as an ideal-type—in practice, even if we limit its borders to rights-and-duties relations between private actors, there is room for public moments, as long as they do not overly politicize and instrumentalize it to the extent that the values internal to the relations it regulates are eroded or distorted.

Such explorations must build on private law's relational normativity without isolating it from its socio-economic and normative surroundings—including the constitution. This task is definitely not easy, and many wrong turns will be taken along the way. Sometimes, a pinch of modesty will be required: recognizing that private law's role in guiding behaviour is more modest than it was, and that it shares it with education, criminal law, administrative law, and insurance markets.[125] On the other hand, private law is unique among these normative systems in reflecting and solidifying horizontal practices of rights-claiming and contesting: in serving as a stage on which a particular type of normativity is publicly deliberated.[126] This function of private law has not only moral, but also constitutional, importance.

[125] See, for example: Dan Priel, 'Tort Law for Cynics' (2014) 77 *Modern Law Review* 703.
[126] See, for example: Dan Priel, 'A Public Role for the Intentional Torts' (2011) 22 *King's Law Journal* 183.

Chapter 7

Concluding Remarks

Many constitutional rights (for example, to equality or privacy) have consequentialist aspects. They are grounded in collective responsibilities to bring about states of affairs amounting to social justice. Because social justice is affected by how private persons treat one another, constitutional rights intrude into private areas of law, regulating the actions and activities of non-state agents. Many private law rights (for example, not to be negligently harmed or to have contractual promises made to us kept), though, have a deontological structure: they are grounded in personal responsibilities to act in specific ways towards others.

I tried to find a way to accommodate these opposing right-types—manifesting conflicting moral paradigms—in one coherent legal system. Both, I claimed, are indispensable for liberal legal systems to preserve their integrity in conditions of moral pluralism. I tried to learn about each right-type's roles both from their own normative features and from the limitations of the other right-type. Thus, for reasons of normative demandingness and legitimacy, we should see most constitutional rights as applying only against state agents: agent-centered private law rights are often more suitable for our direct relations as private agents. However, as private law rights are often ineffective in bringing social justice about, we need constitutional rights to entail prescriptions about the state's regulation of horizontal relations.

This burdens state agents with a complex normative task: bringing large-scale consequentialist prescriptions to bear on small-scale interactions. To avoid ignoring, distorting, or eroding the unique normativity of private law rights (thereby subordinating the private in law to the public and political) state agents must carefully locate public inroads into private

law. At times, these appear in particular contexts in which private agents are personally responsible to respond to social injustice. In others, there are second-order reasons to embrace a broader and more consequentialist perspective: to see private agents, participating in public practices, as discharging aspects of the political collective's responsibilities.

Such inroads and the form of reasoning underlying their recognition are not foreign to private law. However, they are often undertheorized and underdeveloped. Constitutional horizontality requires us to broaden and solidify them. In doing so, we must take into account not only the normative features of constitutional rights, but also of private law as a regulatory ideal-type: as a normative system with a core of interpersonal rights and duties. Private law therefore not only complements and pushes back against the horizontal dimensions of loosely relational constitutional rights, but also allows them to take more developed forms.

This is a violent and abstract summary of complex claims—even more complex than I let on in some parts of this thesis. My goal in this final chapter is to tie some loose ends and connect these claims to some broader themes and ideas. The starting point in this regard is the lingering doubt that, to borrow Fried's metaphor again, I stop a few dozen feet above the ground: that I said much about the normative structure of constitutional rights-based horizontality—the kind of moral and legal values and forms of valuation, reasoning, and deliberation it involves—but not enough to solve concrete legal problems.

In reply, I must emphasize that my goal was mostly to set the stage for more context-specific treatments of private law problems touching constitutional rights: be it housing discrimination, workplace privacy, family property, or deceptive advertising. Theories and doctrines attending to such problems often start 'on the ground', and rise only a few dozen feet above it—even to the extent of not addressing constitutional rights at all. They often focus on the particular doctrinal and moral features of the problems they tackle.

The practice of constitutional rights-based horizontality is not only relatively young in Anglo-American legal systems, but also suffers from its location on the borders of private law and constitutional law. These domains develop while building on thriving, complex, and rich deliberative practices. These practices often touch matters related to constitutional horizontality: sometimes more directly—this is the case mostly with constitutional law, as only a handful of private lawyers dealt with it—and sometimes more indirectly—here we have a wealth of discussions about topics ranging from the nature of proportionality in constitutional law to the place of public policy considerations in private law. However, hardly any comprehensive attempt was made to integrate these debates.

I tried to engage private law and constitutional law theory and their deeper normative foundations in moral and political theory. In this sense, I engaged in mid-level theorization, operating between, on the one hand, ideas like moral pluralism, rights-claiming, responsibility, agency, or social justice, and on the other hand, particular private law and constitutional law problems. My goal was mediation rather than synthesis: I did not try to offer a unified theory of constitutional horizontality, that somehow fuses together normative particles from these different legal domains; rather, I tried to offer a blueprint for a normative structure of reasoning in which we can have these domains interact effectively and fruitfully.

Thus, I leave not only particular doctrinal problems unaddressed, but also the abstract ideas which operate on the ground level of the theory. Much more could be said, for example, about how the translation and allocation strategies work. For example, there are difficult and complex moral questions about when agents could be burdened with duties that are grounded in their participation in social activities and practices rather than their deliberate choices. The answers to such questions must find a delicate balance: treating constitutional rights as ambitious but not imperialistic and private law as flexible but not disintegrated.

That more work is to be done is not a problem with the proposed theory, but a feature of its pluralistic and incremental nature. Hopefully, with time, a body of principle and doctrine will form that further uncovers and concretizes the connections, distinctions, and similarities between the two legal domains and their more central or more peripheral norms. For example, the tendency in private law to recognize duties of beneficence in business or corporate contexts and only duties not to harm or exploit vulnerabilities in more interpersonal contexts could be connected to the differences between the translation and allocation paths. Currently, constitutional horizontality theory and practice still have a rather ad-hoc nature. Exposing such deeper connections will help us take some steps forward.

An important caveat in this regard—and another central theme in this thesis—is that we must be careful not to let incrementalism turn into conservativism. Until now, I only pointed fingers at private law in this regard (for good reasons, considering its track record). However, while constitutional rights can widen the public inroads into private law, they can also create rigid public–private distinctions—for example, by recognizing strong constitutional rights against state intervention in interpersonal affairs, *Lochner* style: not necessarily like in the good old days, by adopting questionable assumptions about responsibility and choice and the market's ability to bring optimal social states of affairs about—but by building on beneficiary-centered rights, like freedom of religion or speech, that will not be scrutinized to a sufficient extent nor balanced with other important considerations. Great care is therefore required in cases like *Hobby Lobby*:[1] state agents must carefully examine the normative context of each case, especially those involving strong corporate actors.

This connects us to another concern. I already mentioned the critique of rights-talk, especially of its American variant. It could be claimed that approaching the topic of social

[1] Elizabeth Sepper, 'Free Exercise Lochnerism' (2015) 115 *Columbia Law Review* 1453, 1498–1507.

justice in private law through the prism of rights and claimability risks the erosion, distortion, or neglect of values that cannot be accommodated by using this language. This might leave us too close to the individualistic status-quo of mutual separation. In response, I tried to show that the language of rights can be open-ended and flexible: that it can accommodate loose and not only strict relationality, and thus leaves room for collective values and for considerations that exceed the direct relations between right-holders and duty-bearers.

It is true that the language of rights frames our practical reasoning by focusing it on the connections between agency and well-being. However, it must be recognized that every decision is framed somehow; and often, the best we can do is try to get the framing right.[2] The language of rights is helpful in this regard both on its own, and from a broader normative perspective. On its own, it is a great progressive force: it can help us refocus and readjust legal principles and rules to better reflect our values—a crucial function for ancient institutions like the common law. It can, for example, create a better balance between veteran rights, like negative liberty or property, that still receive preferential treatment in many private law cases, and modern rights, like dignity or psychological integrity.[3]

But even beyond this, the point of this thesis was merely to add additional tools to our toolbox. For example, to find a place for private law next to criminal law and to allow better use of the functions of these legal domains; or to appreciate the intricacies involved in introducing constitutional rights into intimate domains like the family. The understanding of our moral and legal rights-based practices should both help us make better use of them, and to decide when not to—when other regulatory options would be preferable.

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2 See the discussion in Cass R. Sunstein, 'Moral Heuristics' (2005) 28 *Behavioral and Brain Sciences* 531.

3 See, for example: Dilan A. Esper and Gregory C. Keating, 'Putting "Duty" in its Place: A Reply to Professors Goldberg and Zipursky (2008) 41 *Loyola of Los Angeles Law* Review 1225, 1289–1290.

This is especially important in light of the gravitational pull of private law institutions, which often makes legal reform very difficult. For example, attempts to divert claims away from the American tort law system by establishing no-fault regimes in areas of social activity like the workplace or the road were compromised by persistent adversarialism and opportunism.[4] Thus, we need to understand the nature of right-claims not only to be able to decide when to take the private law path, but also to be able to effectively abandon it.

The stakes for constitutional rights are high in this regard, given the constant pressure to privatize state regulation by allowing the market to allocate goods and burdens. There are many good claims, for example, for why private insurance can manage risks better and more effectively and efficiently than the state.[5] To fully appreciate such ideas, we must be able to understand the connections between litigation, responsibility, constitutional rights, and many of the other normative factors I have been addressing in this thesis. Rights, and especially private law rights, are parts of social practices delineating our responsibility as private agents.[6] As Arendt noted, there is a sense in which if everyone is responsible—if we all take responsibility for something indiscriminately—no one really is.[7]

As Tony Honoré noted, sometimes law is required to bring morality into focus.[8] I claimed that constitutional rights are important in this regard. But this is also true about private law rights: they are often crucial in pushing back against some of the harmful side-effects of unhinged capitalistic practices. This is true not only when it comes to the ability

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4 Nora Freeman Engstrom, 'Exit, Adversarialism, and the Stubborn Persistence of Tort' (2013) 6 *Journal of Tort Law* 75.

5 See, for example: Omri Ben-Shahar and Kyle D. Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 *Michigan Law Review* 197.

6 On the claim that law helps us take responsibility, see: John Gardner, 'The Mark of Responsibility', in *Offences and Defences* (Oxford University Press, 2007) 177, 189.

7 Hannah Arendt, 'Personal Responsibility Under Dictatorship', in *Responsibility and Judgement* (Jerome Kohn ed, Schocken Books, 2003) 28.

8 'The Necessary Connection between Law and Morality' (2002) 22 *Oxford Journal of Legal Studies* 489.

of succession law or limitations of corporate spending on politics and lobbying to prevent the accumulation of wealth and power. It is also true about private law's more expressive and normative function: as part of social practices of right-claiming and contesting against which public debates about regulation take place. This can be demonstrated, for example, in the ongoing attempts to curb corporate activities offering addictive goods and services. As Robert Rabin claims, because it was so difficult to call tobacco companies to account through private law litigation, the decline in tobacco use in the past decades was achieved to a great extent through informational strategies, public-space restrictions, and taxation.[9] Was this a victory for the liberal state? Only if we ignore the rise of other more elusively addictive goods and services that replaced tobacco: for example, social media. We are having a hard time figuring out the duties of social media outlets, partly because we cannot build on a body of law determining the private law duties of big tobacco companies. The same applies to other industries, such as guns, pharmaceuticals, and even computer games. While some regulatory tactics can sometimes be more effective in addressing particular social harms, it is often only private law that can incrementally elucidate abstract ideas about personal and collective agency and responsibility and well-being into horizontal right-based duties.

Appreciating this role of private law does not mean granting it a monopoly over the regulation of horizontal relations. Quite the contrary: one of my main claims was that real autonomy for private law consists in recognizing its limitations and its dependency on many background public norms and institutions. Part of the point of constitutional horizontality is to uncover the ways in which our collective responsibility is implicated in private law:[10] in

[9] Robert L. Rabin, 'Tobacco Control Strategies: Past Efficacy and Future Promise' (2008) 41 *Loyola of Los Angeles Law Review* 1721.

[10] TT Arvind, 'Obligations, Governance and Society: Bringing the State Back In', in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 259.

some cases as a more omnipresent leviathan, while in others as a more elusive Cheshire cat.[11] One of the challenges for constitutional horizontality is how private law can fit, as a rights-based normative system, in the broader regulatory system without being subsumed in it.[12]

One of the things that the Covid-19 pandemic taught us is that well-functioning liberal states are crucial for tackling certain social problems. However, it also showed us how quickly states resort to privatization, especially in times of crisis. Constitutional horizontality could help us ensure that social justice will not be left to market forces. It highlights the state's right-based duties to maintain a strong foothold in critical junctures of our shared political life; often, as noted in the previous chapter, by instituting the correct private law regime.

While private law always dealt with pressures to promote public policy, and while loosely relational constitutional rights share with many policy considerations the consequentialist focus on large-scale states of affairs, rights-based duties are in a different moral key—they possess the robust normativity of rights, derived from their claimability. They introduce a more demanding form of evaluation of private law. In some cases, it might require internal reform in private law; in other cases, it might require complementing it with additional regulation. For example, as I already mentioned, in the several decades since anti-discrimination laws were adopted in Anglo-American legal systems, inequality in these countries rose to historical levels: private law, it appears, is a limited tool in this regard.

Here the consequentialist aspects of constitutional horizontality are important: they resist the myopia of certain legal institutions (and theories). Take the debate about replacing tort law with alternative schemes, that largely subsided after the 1970's. It is a requirement of constitutional horizontality to keep such debates going. State agents, practitioners, and

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[11] This imagery appears in: Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 72.

[12] Jenny Steele, 'Risks Revolutions in Private Law', in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 75.

theorists must constantly explore the potential public inroads into private law, of translation and allocation: often, by working from one particular case to the other; but in some cases, as I noted, by embracing a broader consequentialist perspective.

What is quite clear is that we cannot go back to talking about private law as a purely private legal domain, disconnected from the constitution. While many private law theories and doctrines recognize its public aspects, we still have long way to go in building the bridge between private law and the constitution: and consequentially, between private law and abstract ideas like moral pluralism, agency, responsibility, and well-being.

We face a complex task of elaborating, positively, on how these legal domains can and should interact in practice. It requires us to go beyond debates about necessary and sufficient conditions, often engaged in by moral, political, and legal philosophers: for example, about the definitions of rights, legal authority, or private law; or about private law being part of the basic structure or immune from distributive justice or political considerations. These are important debates, but when talking about private law's ability to accommodate loosely relational constitutional rights from a broader normative perspective they are not enough: in this regard, binary definitions and distinctions will often prove rigid and unhelpful.

When trying to find the middle-ground between subordinating the private to the public in law and creating a rigid separation between them—against the background of moral pluralism—we must adjust our lens to detect smaller normative particles. This means that we will end up on less solid ground. This is uncomfortable for many theorists, but it is the reality of law, experienced on a regular basis by judges and lawyers. The normative universe is complex. If we want our legal systems to preserve their legitimacy and integrity we cannot isolate them from it or from the socio-economic context in which they operate. The best we can do is try to get our bearings straight as we move forward, one step at a time.

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