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Interpersonal Human Rights

Hanoch Dagan & Avihay Dorfman†

Our increasingly globalized environment, typified by the significant role of transnational interactions, raises urgent concerns about the commission of grave transnational wrongs. Two main legal strategies—belonging, respectively, to public and private international law—offer important directions for addressing these urgent concerns. One strategy extends state obligations under human rights law to some non-state actors; the other adapts traditional private international law doctrines, notably its public policy exception. Both strategies make important advances, yet both face significant difficulties, which are all fundamentally rooted in what we call “the missing link of privity”—namely, identifying the reason for imposing the burden of plaintiffs’ vertical rights on putative defendants. In this Article, we argue that the moral underpinnings of private law provide the relational key to this missing link. We claim that private law’s normative DNA is premised on a profound commitment to reciprocal respect to self-determination and substantive equality. Because this commitment is the *jus gentium* of our private laws, it can and should be understood as a manifestation of our interpersonal human rights, which should function both as a premise for criticizing domestic rules and as the foundation of aggrieved parties’ standing *vis-à-vis* those who wronged them.

I. Setting the Stage	362
II. Two Strategies	365
A. Extending Vertical Rights to Non-State Actors	365
B. Adjusting Conflicts of Law Rules	368
III. Interpersonal Human Rights	372
A. A Floor of Just Relationships	373
B. <i>Jus Gentium Privatum</i>	377
IV. Addressing Transnational Wrongs	384
V. Concluding Remarks	390

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I. Setting the Stage

Some twenty years ago, when Pfizer, the world's largest pharmaceutical company, sought to gain the approval of the U.S. Food and Drug Administration (FDA) for the use of a new antibiotic (Trovan) on children, it allegedly tested it on Nigerian children without securing their or their guardians' informed consent, and without disclosing or explaining to them the experimental nature of the study or the serious risks involved. These involuntary medical experimentations, which were administered in concert with Nigerian government officials, arguably caused the deaths of eleven children, and left many others blind, deaf, paralyzed, or brain-damaged.¹

Such unhappy interpersonal transnational encounters are part and parcel of an increasingly globalized environment, typified by the significant role of horizontal (interpersonal) transnational interactions. Many of these interactions are of course legitimate—they are not unjust, and they can enhance the autonomy (or well-being) of all participants; but others are more troublesome, at times even morally illegitimate. Indeed, the *Pfizer* case, with which we have started, is merely one example of a type of grievance against private transnational actors—our focus in this Article. To further motivate the discussion, consider two other examples of similarly high-stakes types of grievances: one deals with substandard employment practices in countries like China, Bangladesh, or Indonesia; the other with the recent land grab in several African countries, notably in Sub-Saharan Africa.

There are obviously many happy consequences to the globalization of mass production, not the least important of which is the economic boost it provides to some developing countries. But the extensive use by Western manufacturing companies of foreign contractors, agents, or partners, also implicates sweatshops, whose operations are typified by “deplorable working conditions that include low pay and long working days, unhealthy and unsafe conditions and a regime entailing elements of force and degradation.”² More specifically, these sweatshops do not comply with the minimum labor standards regarding issues like child labor, forced labor, labor discrimination, workplace health and safety, wage minimums, hour-caps, and freedom of association.³ Moreover, often workers “are foreclosed from seeking relief in countries where they have been trafficked or exploited, since those countries usually have poor, corrupt judicial systems, fre-

1. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009).

2. LYN K.L. TION SOEI LEN, *MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS* 23 (2017); see also, e.g., CHINA LABOR WATCH, *TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS* (2011); Marisa Anne Pagnattaro, *Labor Rights Are Human Rights: Direct Action Is Critical in Supply Chains and Trade Policy*, 10 S.C. J. INT'L L. & BUS. 1 (2013).

3. See Alexandra Rose Caleca, *The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing*, 40 BROOK. J. INT'L L. 279, 279 (2014).

quently with complicit government officials.”⁴

Like the globalization of manufacturing, foreign direct investment in developing countries is by and large positive, indeed crucial. But again, it sometimes entails pitfalls, which impose substantial unjustified harms on individuals and communities alike. Consider the recent predicament of members of numerous rural communities, especially in developing countries, whose reliance on access to land for growing food, drawing water, and shelter, is threatened by transfers of land, which they have improved and on which their personal and communal identities are constituted.⁵ As one report documents, in many of these large-scale land acquisitions “those who are selling or leasing land are not the ones who are actually using it,” which is a situation that often generates displacements.⁶ Indeed, many of these large-scale land transfers are often subject to severe problems of capture and unrepresentativeness of local elites and/or governments, which are “effectively unaccountable to their people.”⁷

The failure to hold corporations and other private actors accountable for grave violations of the fundamental private rights of persons when those violations occur in states with weak private law institutions is a matter of growing international concern. Two main legal strategies—belonging, respectively, to public and private international law—offer important directions for addressing these urgent concerns. Both efforts seek to adjust the legal regime governing transnational interactions to an environment in which the international human rights that were traditionally conceived as the rights we have as citizens against our states, are increasingly threatened by private actors on whom people become ever more dependent. One strategy extends state obligations under human rights law to some non-state actors; the other adapts traditional private international law doctrines, notably its public policy exception.⁸

If adopted and implemented, both of the strategies briefly summarized in Part II would offer potent means for addressing abuses of private rights. Unfortunately, their adoption and implementation face significant difficulties. The former strategy lacks a justification for imposing a burden on a private actor in the name of a right that was originally conceived in vertical terms. Its proponents need to explain why individuals should be able to invoke the (vertical) fundamental rights they hold *vis-à-vis* the state against

4. Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 *HOUS. J. INT'L L.* 255, 271 (2013).

5. See generally Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 *STAN. J. INT'L L.* 101 (2013).

6. See WARD ANSEEUW ET. AL, *TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH: ANALYTICAL REPORT BASED ON THE LAND MATRIX DATABASE* 39, 41 (2012).

7. Olivier DeSchutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 *HARV. INT'L L.J.* 504, 528 (2011).

8. There are, to be sure, other routes that have been pursued or suggested, such as seeking the enforcement of corporate social responsibility codes or the invalidation of consumer contracts, which implicate transnational wrongs. See, e.g., ANNA BECKERS, *ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES—ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW* (2015); LEN, *supra* note 2.

private actors as well. The latter strategy faces similar difficulties of both justification and boundaries given the notorious open-endedness of the reference to public policy, its typical association with collective goals, and its traditional use as a mere safeguard that blocks the application of the otherwise applicable foreign law where it contravenes the forum's own unique and deeply held values.

We argue that the best way to respond to these difficulties is by delving into the normative DNA of private law and bringing to light its own human rights underpinnings. We claim that transnational encounters of the kind that concern us should be analyzed through the prism of private law theory because although transnational encounters involve citizens (or residents) of different jurisdictions, they are primarily *interpersonal* interactions.

Private law underpins our daily relationships as individuals, rather than as citizens of a state. It is thus not surprising that the basic prescriptions of private law—such as the injunction not to wrong one another, to keep the promises we make to one another, or to respect each other's property rights—do not depend upon our status as citizens (or, for that matter, any other special relationship we have with a state). To be sure, the building blocks of private law—the concepts of wrong, contract, and ownership—are contested to a degree. This means that there can be differences, maybe even significant differences, amongst different domestic laws—for instance, must liability for defective products be strict or fault-based? This also means that the application of some interpersonal obligations may be legitimately limited to our fellow citizens (broadly defined to include residents and, possibly, some undocumented immigrants). But others, including the most fundamental interpersonal (horizontal) obligations with which private law is occupied, make no such distinctions. A risk-creator, for example, is generally required to discharge the same amount of care—or, more precisely, some minimally required amount of care—irrespective of the risk-taker's citizenship. And at least morally, it seems that the same obligation also applies if the risk-creator's activity takes place on stateless soil inhabited by temporary visitors.

In this Article, we focus on this core set of interpersonal duties, which are not limited to interactions among compatriots, but rather pertain to relationships between individual persons as such. Our main thesis, which we develop in Part III, is that these core—and admittedly minimal—obligations of relational justice, which are premised on reciprocal respect for self-determination and substantive equality, embody our *interpersonal* human rights. Distilling a set of interpersonal human rights highlights the privity that the existing frameworks lack. Indeed, the notion of interpersonal human rights captures a *direct* obligation, rather than one that we owe as subcontractors who act on behalf of the polity as a whole.

Furthermore, founding these interpersonal human rights on the skeleton, or bare bones, of private law as such, allows us to understand them in terms of a *jus gentium*: as principles “discerned interpretively from the

commonalities that exist among the positive laws of various countries.”⁹ In other words, because at its core private law transcends the state, it is not meaningless to consider this set of interpersonal obligations outside or beyond the positive laws of any specific domestic jurisdiction. Therefore, as we demonstrate in Part IV, when we return to address paradigmatic cases of transnational wrongs, these interpersonal human rights can and should serve both a censorial and a residual role—they should function both as a premise for criticizing domestic rules and as the foundation of aggrieved parties’ standing *vis-à-vis* those who wronged them.¹⁰

II. Two Strategies

A. Extending Vertical Rights to Non-State Actors

Recent efforts by human rights lawyers to address grave transnational wrongs beyond the state, focus on extending individual rights from the vertical dimension—as rights against the state—to the horizontal dimension, in which they operate at the interpersonal level. These efforts, to be sure, are not unique to the transnational context. Quite the contrary. They seem to piggyback on the domestic laws of some jurisdictions that go beyond the familiar state action doctrine and conceptualize constitutional rights as fundamental to “the whole legal system including private law enacted by the State.”¹¹

Some manifestations of this direction are now quite commonplace. These aspects, dealing with war crimes like torture or genocide, emerged from the prosecution of Nazi Germany leaders in the Nuremberg trials, whose judgment authoritatively prescribed that, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹² But in the contemporary context, where transnational interpersonal wrongs take many other forms that fall outside of the (rightly delimited) scope of the emerging international criminal law, attempts to push this envelope further abound.

These attempts have culminated (for now) with the “Protect, Respect and Remedy” framework for business and human rights, presented by the U.N. Secretary-General Special Representative, John Ruggie, and adopted unanimously by the Human Rights Council.¹³ The core challenge it

9. JEREMY WALDRON, “PARTLY COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 35–36 (2012).

10. *Cf. id.* at 59; NEIL WALKER, INTIMATIONS OF GLOBAL LAW 197–99 (2014).

11. Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by “Private” Transnational Actors*, 69 MOD. L. REV. 327, 329 (2006); see also, e.g., Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 221 (1996).

12. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 173, 220 (1947); see also, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

13. The current debate—on whether to adopt a treaty on business and human rights—is (unsurprisingly) typified by significant divisions between wealthy and developing nations. See, e.g., Michael Kourabas, *Is a Binding Treaty the Way Forward for Business and Human Rights?*, TRIPLE PUNDIT (July 14, 2015), <http://www.triplepundit.com/>

addresses is to “reduce or compensate for the governance gaps created by globalization,” which derive from the fact that host States of transnational firms—particularly where they are developing countries—may either “lack the institutional capacity to enforce national laws” or “may feel constrained from doing so by having to compete internationally for investment,” while these firms’ home States “may be reluctant to regulate against overseas harm by these firms . . . out of concern that those firms might lose investment opportunities or relocate their headquarters.”¹⁴ Hence the three “core principles” of this framework are: (1) “the State duty to protect against human rights abuses by third parties, including businesses,” through appropriate policies, regulation, and adjudication; (2) “the corporate responsibility to respect human rights”; and (3) “the need for more effective access to remedies,” both judicial and non-judicial.¹⁵

We are concerned, of course, with the second principle, which means that business enterprises should act with due diligence “to avoid infringing” the “internationally recognized human rights” of others and should take “adequate measures” to prevent, mitigate, and, where appropriate, remediate “adverse human rights impacts with which they are involved.”¹⁶ This principle, which is further elaborated by the framework’s guidelines, has been recognized—at least for now—only in soft law instruments, which means that failure to meet this responsibility to respect human rights can “subject companies to the court of public opinion.”¹⁷ But the framework has also already been “endorsed or employed by individual Governments, business enterprises and associations, civil society and workers’ organizations, national human rights institutions, and investors.”¹⁸

This extension of internationally recognized human rights to such corporations and indeed more broadly to the horizontal dimension, is normatively attractive. If human rights’ “overriding aim is to protect the victim’s dignity, then that victim has to be protected from everyone, state and non-

2015/07/binding-treaty-way-forward-business-human-rights/ [https://perma.cc/956E-5RM3]; *Debate the Treaty*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://business-humanrights.org/en/about-us/blog/debate-the-treaty> (last visited June 3, 2018) [https://perma.cc/F8FV-NK7F]; Marta Herrera & Ciara Dowd, *Different Routes, Common Destination: Positions on the Proposed Binding Treaty*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://business-humanrights.org/en/the-diverse-positions-on-the-proposed-binding-treaty-may-map-different-routes-but-they-have-the-common-destination-of-ensuring-corporate-accountability-access-to-remedy> (last visited June 3, 2018) [https://perma.cc/KRV7-G2F6].

14. Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (2008), at 5-6 (hereinafter “The Framework”).

15. *Id.* at 4.

16. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (2011), at 13, 16 (hereinafter “The U.N. Guiding Principles”).

17. The Framework, *supra* note 14, at 8, 16. For a critique of the Framework’s looseness, see Christine Parker & John Howe, *Ruggie’s Diplomatic Project and Its Missing Regulatory Infrastructure*, in *THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS FOUNDATIONS AND IMPLEMENTATION* 273, 301 (Radu Mares ed., 2012).

18. The U.N. Guiding Principles, *supra* note 16, at 4.

state actors” alike, and it does not matter “whether the actor has public functions, is financed by the state, or is simply a private individual.”¹⁹ This intuition is particularly acute in our era in which “the interests protected by constitutional and human rights are becoming just as vulnerable to private agents as to states,” given “the increasing powerful role” of these agents in social life and their “growing impact on the lives of individuals.”²⁰

Although this intuition of extending international human rights law to private actors is widely shared among many NGOs and academic writers, it is less certain “how human rights law, traditionally aimed at states, might be translated to the [horizontal] context.”²¹ Hugh Collins has recently refined the difficulty, which is (as noted) not unique to the transnational context. “The hardest and most intractable challenge presented by the constitutionalization of private law,” he argues, is “the problem of identifying appropriate duty-bearers.”²² As Collins explains, “the project for the alignment of private law with fundamental rights,” which have been “traditionally regarded” to apply only “to relations between the citizen and the state,” “presents no obvious candidates for restrictions on who may be selected as duty-bearers.”²³

One suggested restriction is to adjust the state action doctrine to our era, in which private actors take on previously public roles and impose those duties “on those persons who have a sufficiently public character.”²⁴ A more promising route was recently advocated by Jean Thomas, who argues that “the best way to bring the practical achievements of rights discourse” to bear on private relations is to use the “existing moral practice” of public law as a trigger for private law reform, or more precisely, to extrapolate “new private legal obligations” from “the set of fundamental public law rights.”²⁵ As Thomas argues, this exercise implies that “the special protection associated with” the “vertical relationship between individual and state” can, and indeed should, be “replicated in the private sphere” only in contexts of interpersonal dependency, or more precisely violability.²⁶

Thomas’s account moves in the right direction in that it focuses on the interpersonal interaction and seeks to distill our unmediated demands for

19. ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 546 (2006).

20. JEAN THOMAS, *PUBLIC RIGHTS, PRIVATE RELATIONS* 8 (2015). See also, e.g., Zehra F. Kabasakal Arat, *Looking Beyond the State but Not Ignoring It: A Framework of Analysis for Non-State Actors and Human Rights*, in *NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE* 3, 8, 18 (George Andreopoulos et al. eds., 2006).

21. JENNIFER A. ZERK, *MULTINATIONAL AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 28 (2006). See also, e.g., Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 *TRANSNAT’L LEGAL THEORY* 347, 395, 401, 403 (2011).

22. Hugh Collins, *The Challenge Presented by Fundamental Rights to Private Law*, in *PRIVATE LAW IN THE 21ST CENTURY* 213, 234–35 (Kit Barker et al. eds., 2017).

23. *Id.* at 223.

24. TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 201 (2015).

25. THOMAS, *supra* note 20, at 18–19.

26. *Id.* at 20, 23, 189.

relational justice. But the success of her extrapolative exercise is, as Collins—a sympathetic commentator—claims, uncertain. Collins argues that “the spirit of private law contains a strong presumption that the rights and duties are enjoyed universally,” so it is hard for private law to contain “asymmetrical” duties, such as the duties to refrain from discrimination, which are imposed, for example, on employers and landlords, but not on employees and tenants.²⁷ We will maintain that Collins’s specific concern—rooted in this conventional proposition as per private law’s antagonism to asymmetrical anti-discrimination duties—is based on a prevalent misconception of private law. But his broader point concerning the difficult transplantation of public rights onto private law, is crucial.

Private law, like law more generally, is a justificatory practice. Because law claims to have the legitimate authority to create and enforce rights and duties, its prescriptions must be justified. For private law to meet this demand, it is usually not enough to demonstrate the desirability of the state of affairs that would result if the type of complaint a plaintiff raises were to generate the remedy sought. Rather, we also need to be convinced that people in the defendant’s category should be duty-bound to those in the plaintiff’s predicament. We need, in other words, to be able to justify to the defendant why *she* should be forced to be the agent of remedying the plaintiff’s unjustified harsh predicament.²⁸ Thomas’s account may eventually be able to meet this challenge and thus justify new private law duties.²⁹ But before embarking on such a detour, we argue that it proves more promising to turn to our existing private law and explore the implications of an extrapolative account of its own underlying normative foundations, which are already structured around such relational lines.

B. Adjusting Conflicts of Law Rules

Before we take up this task, we need to consider the ways in which private (as opposed to public) international law faces the challenge of properly addressing grave transnational wrongs. Where a dispute over such a putative wrong erupts, the first substantive (as opposed to jurisdictional) legal question invoked, is which law would apply. This question is addressed by each country’s conflict of laws rules that prescribe which one of the pertinent legal systems should have the substantive legal authority in resolving the dispute. Yet, since its inception, private international law was mindful of the concern that “blind adherence to foreign law”³⁰ might entail results that “violate fundamental principles of justice,” and thus sought to carve out an exception to the conflict of laws apparatus, aimed at targeting

27. Collins, *supra* note 22, at 223.

28. See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 110 (2013).

29. The crucial step in Thomas’s analysis in this respect lies in her account of “the ambit of the undertaking,” in which vulnerability turns into violability. See THOMAS, *supra* note 20, at 192–98. The main suspicion this step invites, is that this element implicitly requires the re-invention of private law. A thorough discussion of Thomas’s complex theory is beyond the scope of this Article.

30. DAVID McCLEAN ET AL., MORRIS: THE CONFLICT OF LAWS 47 (8th ed. 2012).

such “pernicious and detestable” cases.³¹

This exception opens up “an ethical moment” in the seemingly technical conflict of law analysis.³² Originally it was understood as setting the limit to the forum’s comity—a court can disregard such foreign law, though warranted under its conflict of laws rules, “on the ground that [its] application would run counter to the public policy of that forum.”³³ The “limit of comity” notion points out three traditional features of the public policy (or *ordre public*) doctrine that limit its potential use for the task at hand. *First*, the doctrine refers to incompatibility with “the forum’s fundamental legal principles or moral beliefs,” rather than to those which “transcend national boundaries.”³⁴ *Second*, the public policy exception generally³⁵ functions only “as a means of preventing the application of an objectionable foreign law that is applicable under the forum’s choice-of-law rule,”³⁶ rather than as a source for substantive norms other than those of the *lex fori*.³⁷ *Finally*, understood as the limit of the forum’s comity, public policy contravenes the premise of “international-mindedness favorable to the recognition of foreign law,” and threatens to inject into courts “an element of foreign politics.”³⁸ So public policy is used only where the court finds the results of recognizing foreign law in the forum intolerable,³⁹ and— even more important for our purposes— especially where there is a close tie “between the forum and the facts of [the pertinent] transaction.”⁴⁰

Notwithstanding these difficulties, conflicts law may develop a broader notion of *transnational* public policy that transcends state bounda-

31. Monard G. Paulsen & Michael I. Sovern, “Public Policy” in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 969 (1956).

32. See Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 640-41 (2012).

33. Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1028 (1940); see also William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085-88, 2101 (2015).

34. See David Clifford Burger, Note, *Transnational Public Policy as a Factor in Choice of Law Analysis*, 5 N.Y.L. SCH. J. INT’L & COMP. L. 367, 369, 376 (1984); see also, e.g., Karen Knop, *State Law Without Its State*, in *LAW WITHOUT NATIONS* 66, 88-89 (Austin Sarat et al. eds., 2011).

35. The other approach is rarely used by courts. See Paul Lagarde, *Public Policy*, in 3 INT’L ENCYCLOPEDIA OF COMPARATIVE LAW: PRIVATE INTERNATIONAL LAW 3-5 (Kurt Lipstein ed., 1994).

36. PETER HAY ET AL., *CONFLICT OF LAWS* 99-100 (5th ed. 2010) (criticizing an exceptional case in which one state court “used the forum’s public policy offensively as the reason for applying forum law.”).

37. See MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 182-83 (2d ed. 1950) (“Where a foreign legal rule is excluded its place is in most cases filled by the *lex fori*. But this substitution should be restricted as far as possible. If the foreign law normally applicable contains a rule *x* which is unobjectionable, but which is subject to an exception *y*, and if *y* is contrary to English public policy, its exclusion does not entail the application of English law but that of the foreign main rule *x*.”).

38. See Nussbaum, *supra* note 33, at 1037, 1048.

39. See McCLEAN ET AL., *supra* note 30, at 72.

40. See Paulsen & Sovern, *supra* note 31, at 981; see also, e.g., Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 J. PRIV. INT’L L. 201, 210-12 (2008); Lagarde, *supra* note 35, at 22, 31-33, 36-37.

ries.⁴¹ This notion is increasingly present in the jurisprudence of international arbitration tribunals, for which every law (or no law) is foreign law, so that public policy must refer to “the shared values of the international community.”⁴² It thus “involves the identification of principles that are commonly recognized by political and legal systems around the world.”⁴³ But transnational public policy is not strictly limited to arbitration—although not mentioned by name, it seems to guide some European courts as well.⁴⁴ Furthermore, and even more importantly, transnational public policy does not act only as a shield; rather, its main function is “to directly and positively influence the decision,”⁴⁵ which implies that it stands at the top of a truly transnational hierarchy of norms.⁴⁶

These are promising directions, but they are quite preliminary. They also have no trace in many jurisdictions outside (and indeed inside) Europe, notably in American conflicts jurisprudence, which tends (in recent years) to limit, rather than expand, the public policy exception.⁴⁷ But public policy is not the only available tool for introducing the ethical impulse into a conflicts of law analysis.⁴⁸ One alternative tool is the “better law” approach, in which conflicts law should be oriented towards resolving disputes “in a manner that is substantively fair and equitable to the litigants.”⁴⁹ A more focused approach comes from the gradual utilization of private international law in the service of “protection of the weak party”—manifested in “the rules concerning the applicable law relating to consumer contracts, employment contracts, etc.”—or in the name of another “substantive law result, such as supporting the result of the possibility of marriage (known as ‘*favor matrimonii*’ in private international law) or supporting the possibility of divorce (known as ‘*favor divortii*’ in private international law) or supporting the possibility of acquiring main-

41. See Michael Pryles, *Reflections on Transnational Public Policy*, 24 J. INT'L ARB. 1, 3, 7 (2007).

42. Moritz Renner, *Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration*, in INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENTING THEORIES AND EVIDENCE 117, 123-24, 130 (Walter Mattli & Thomas Dietz eds., 2014).

43. Martin Hunter & Gui Conde e Silva, *Transnational Public Policy and its Application in Investment Arbitrations*, 4 J. WORLD INV. 367, 367-68 (2003).

44. See Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 275-76 (Pieter Sanders ed., 1987); Gui Conde e Silva, *Transnational Public Policy in International Arbitration* 120-21, 156 (unpublished Ph.D. dissertation, Queen Mary College, 2007).

45. Lalive, *supra* note 44, at 313. See also Renner, *supra* note 42, at 131-33.

46. See Moritz Renner, *Towards a Hierarchy of Norms in Transnational Law*, 26 J. INT'L ARB. 533, 543 (2009).

47. See Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243, 290 (2018).

48. In addition to the tools mentioned in the text, there are also more covert means, where courts “play with the choice-of-law process to avoid bringing over distasteful law.” *Id.* at 47.

49. HAY ET AL., *supra* note 36, at 53; see generally Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness on Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1949 (2015).

tenance.”⁵⁰ As Veerle Van Den Eeckhout notes, these rules can be understood as an independent body of substantive law: a source of “‘internationally mandatory rules’—rules that are deemed to be applicable in specific legal relationships” within “domains such as international labor law[,] . . . international tort law[,] or international contract law” and “irrespective of the applicable law that customarily governs this legal relationship.”⁵¹

Both openings demonstrate that like public international law, private international law can also be, and to some extent already is, recruited to the mission of addressing the type of transnational wrongs which occupy us here. However, like public international law, private international law is not free from difficulties. The current articulations of transnational public policy suffer from considerable vagueness.⁵² That policy is supposed to be shared by the “international community,” but sometimes this community “seems to denote the international community of states in the public international law sense of the word, sometimes it describes legal concepts shared by different legal systems, and sometimes it refers to the values of ‘international commerce.’”⁵³ Needless to say, that reference to “the better law” is no less (indeed even more) in need of some precision that can guide and constrain—and, more fundamentally, justify—the discretion it affords to the judiciary. To be sure, the basic difficulty from which all of these strategies suffer is not merely epistemic—that is, how to fill out the details of the law at issue. Instead, it is substantive—they lack an elaborate theory (as opposed to bare intuitions) of what this law is.

Moreover, the public policy exception seems to point—as its name suggests—mainly to *collective* goals of a specific jurisdiction or of the world community as a whole. Thus, reliance on transnational public policy is typically made by reference to public international law and regarding topics like the protection of cultural goods, sale and traffic of drugs, traffic of arms between private persons, bribery, corruption, slavery, and embargos of economic sanctions.⁵⁴ One commentator suggested that “[t]ransnational substantive public policy is veered towards the protection of the international trade system and other transnational interests.”⁵⁵ To be sure, commentators also make references to the “role of transnational

50. Veerle Van Den Eeckhout, *Promoting Human Rights within the Union: The Role of European Private International Law*, 14 EUR. L.J. 105, 109–10 (2008). Cf. Karen Knop & Annelise Riles, *Space, Time, And Historical Injustice: A Feminist Conflict-Of-Laws Approach to The “Comfort Women” Agreement*, 102 CORNELL L. REV. 853 (2017). Interestingly, similar policies of assuring minimum protection for the weak side of the relationship and avoiding the rejection of basic liberal rights, like the right to divorce, are pursued in some jurisdictions by employing the public policy exception. See Legarde, *supra* note 35, at 10, 13, 16, 18, 26.

51. Van Den Eeckhout, *supra* note 50, at 113, 119.

52. See, e.g., Pryles, *supra* note 41, at 4.

53. Renner, *supra* note 42, at 131.

54. See Lalive, *supra* note 44, at 282, 293; Pryles, *supra* note 41, at 6. See also, Silva, *supra* note 44, at 254 (mentioning ten proposed rules of substantive transnational public policy, almost all of which are collective).

55. Silva, *supra* note 44, at 159.

public policy . . . in respect of human rights” as well as to its incorporation of a “universal notion of ‘good morals’ or elementary contractual morality.”⁵⁶ These references echo prior use of the traditional doctrine of public policy as a means for the protection of human rights and as an antidiscrimination device,⁵⁷ which also seems to at least partly motivate the evolution of internationally mandatory rules, noted above.⁵⁸ They are again inviting, but also raise a familiar difficulty: justifying (and thus guiding) the adjustment of the doctrines of private international law so as to extend our vertical rights to non-state actors, turns on addressing the missing link of privity. Without horizontal grounds for putative defendants’ obligations, the problem of privity is bound to reemerge.⁵⁹

III. Interpersonal Human Rights

We believe that the moral underpinnings of private law provide the relational key to this missing link.⁶⁰ As we argue in some detail elsewhere,

56. See Lalive, *supra* note 44, at 306–07.

57. See Lagarde, *supra* note 35, at 25, 48–50, 53–54; ALBERT V. DICEY & JOHN H.C. MORRIS, DICEY, MORRIS AND COLLINS ON CONFLICTS OF LAWS 93, 631–33 (Lawrence Collins et al. eds., 14th ed. 2006).

58. See Van Den Eeckhout, *supra* note 50, at 112; see generally Jan Oster, *Public Policy and Human Rights*, 11 J. PRIV. INT’L L. 542 (2015).

59. Changing the character of the public policy doctrine in this way also raises important questions concerning the negative side effects of broad judicial discretion (though it is equally hard to deny that there are effective ways to tackle some of these concerns). However, it is not clear why such concerns are unique to the context of interpersonal human rights. This is especially important in light of the distinction between horizontal and vertical human rights. In the case of the latter, there can be good reasons why domestic courts would not, *even if they could*, intervene in a dispute between a foreign state and a victim of this state’s conduct (and even these reasons are not without limits). Violations of interpersonal human rights are different in the sense that the defendant is not (with some notable exceptions) a sovereign foreign state. (Of course, in some situations—as when the alleged wrong done by the defendant-corporation bears some close connection to the wrongful conduct of a foreign state—the conduct of another state is indirectly judged by a domestic court presiding over a transnational private law dispute. See *infra* note 124.)

60. Some critics of the increasingly disturbing transnational wrongs may see this direction as confusing, maybe even confused. These critics present private law as part of the problem, and hence a dubious candidate for providing a solution. Private law, in this view, is that part of our law that is most resistant to demanding interpersonal claims, and is furthermore essentially national. Each of these features—let alone their combination—renders private law particularly inapt for addressing transnational injustices. See Horatia Muir Watt, *The Relevance of Private International Law to the Global Governance Debate*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 1, 2 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014); Daniela Caruso, *Private Law and State Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 7–8 (2006); Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 514, 540–43 (2016). If these were indeed private law’s essential features, it would have been perfectly sensible to set it aside when confronting these challenges and stick to the other tools for the urgent task they pose to the international community. But, as we hope to show below, the conclusion that we should renounce any possible contribution that private law may make, is both unwarranted and unfortunate. It is unwarranted because private law is neither essentially libertarian nor is it essentially statist. This premature conclusion is furthermore unfortunate because the

private law, properly understood, establishes frameworks of respectful interaction conducive to self-determining individuals, which are indispensable for any society where individuals treat each other as genuinely free and equal agents.⁶¹ Private law is premised on a robust notion of relational justice, that is, reciprocal respect to self-determination and substantive equality. Furthermore, these core interpersonal obligations are fundamentally non-statist, which explains why we can refer to the core demands of relational justice as interpersonal human rights. This conclusion is particularly important in our time, where it seems increasingly unsatisfying to limit our attention to property, contracts or torts at the border given the contemporary significance of social, economic, and cultural cross-border dealings and the global reorganization of our economic and social life.

Our account of interpersonal human rights relies on this particular conception of private law, which we briefly outline below. We realize that other private law theorists offer competing interpretations of the interpersonal responsibilities entrenched in private law. Arbitrating such controversies is, however, beyond the scope of this Article because the core of our thesis does not hang on the endorsement of this particular account. All that is needed for the current purposes is the relatively modest (quite banal) proposition that private law includes much more than duties of abstention—that the law of our interpersonal interactions as individuals is also the law of our interpersonal responsibilities towards one another.⁶²

A. A Floor of Just Relationships

Our conception of private law begins with a proposition that is crucial for this Article: that having a body of law, which specifically governs our interpersonal, horizontal relationships as persons—as opposed to our interactions as subjects of the state or as co-citizens—is normatively significant. Law's orientation toward us as legal subjects is qualitatively salient; it is one thing to treat people as parts of a comprehensive unit of joint responsibility and quite another to address them as self-standing persons.

Recognizing the significance of private law as the law of interpersonal relationships among private individuals does not imply a strict separation

justice of private law has—in sharp contrast to the conventional wisdom—an indispensable role to play in properly addressing transnational wrongs.

61. See generally Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

62. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (forthcoming 2019). As the text implies, private law theories that deny such responsibilities or set their scope at a lower level than ours may have more difficulties endorsing our claim in this Article. The challenge may be particularly acute to views of private law that make its legitimacy wholly dependent upon the state. We have addressed the descriptive, normative, and ultimately conceptual difficulties of these specific accounts of private law in some detail elsewhere, so they can safely remain implicit in this Article. See generally Dagan & Dorfman, *supra* note 61; Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2017); Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism: Comment on Arthur Ripstein, Private Wrongs*, 14 JERUSALEM REV. LEGAL STUD. 37 (2017).

between private and public law. Rather, the importance of private law as a legal category relies in this view on the freestanding significance of the social, a realm that is irreducible to the political (by which we mean the realm occupied by the polity). Recognizing the value (and potential threat) of our horizontal interactions in the array of social spheres governed by private law—such as family, work, home, community, and commerce—implies that goals like efficiency, democratic citizenship, and distributive justice cannot exhaust private law's normative concerns. Private law is a meaningful legal category quite apart from its contribution to these collective purposes. Private law's core moral responsibility lies in delineating what people owe to each other in the framework of social interaction. It supplies a set of considerations that focuses precisely on such social contact, and the dominance of those considerations is private law's distinguishing feature. More than any other part of the law, private law underpins (an important subset of) our quotidian horizontal interactions as persons.

Resisting private law's reductionist understanding as exhausted by collective considerations does not imply that it ought to be analyzed solely as a stronghold of individual independence and formal equality, while leaving the task of realizing the commitments to individual self-determination and substantive equality to the state's vertical institutions, namely to public law. This understanding of private law may seem conventional, but the division of institutional and moral labor on which it relies cannot withstand critical scrutiny. The 'division of labor' view of law fails because of two facts about our human condition—our interdependence and our personal difference—that account for the profound implications of the law governing our interpersonal relationships on our ability to lead a successful life.

Our practical affairs are deeply interdependent. They are replete with interactions with others, ranging from fairly trivial transactions to the most crucial relationships in our lives, such as those related to family, friends, work, and other significant positions we come to occupy in society. These interactions can take either voluntary or involuntary forms of being with others. Thus, we invite others or are invited by others to join projects—occasionally because social interaction is critical to the project, and on other occasions for more instrumental reasons, whereby enlisting others makes our projects practical. Our projects also might render vulnerable the legitimate interests of other people, including those who stand beyond the privacy of such a joint project. Indeed, the ability to lead one's life in general, and certainly successfully so, is influenced at almost every turn by both of these forms of interaction. Our conception of private law must not renounce the responsibility of private law to facilitate such interactions lest it compromise the significance of interpersonal relationships to people's lives.

Moreover, the significance of our standing in relation to others also implies that the terms of the interactions that arise under conditions of interdependence should be assessed as just or unjust. This means—given

that we all constitute our own distinctive personhoods against the background of our peculiar circumstances—that law must not assign the sole responsibility to address our personal differences to public law; that private law cannot contend with the requirement that people respect each other as independent and formally equal individuals. Quite the contrary. Given personal differences and the significance of our interdependence, relational justice—the dimension of justice that focuses on the terms of our interactions as private persons—implies that private law must cast our interpersonal interactions in terms of relationships between self-determining individuals who respect each other for the persons they actually are. For persons to relate as equals, private law must structure the terms of their interaction so that they consist of the conception of the person as a substantively, rather than formally, free and equal agent. Accordingly, private law must not specify these terms of interaction in complete disregard of circumstances as well as constitutive choices—choices which pertain to people’s ground projects (as opposed to their brute preferences)—insofar as they are crucial for the interacting parties’ ability to act as self-determining agents.

Indeed, any polity that takes seriously the commitment to individual self-determination and to substantive equality cannot make these values irrelevant to our interpersonal relationships. Quite the contrary. These values are just as crucial to our horizontal interactions as they are to our vertical ones, although they entail different implications in these different dimensions. Since a just interpersonal relationship must stand for reciprocal respect of each party’s claim for self-determination, relational justice cannot be exhausted by the duty of non-interference. At times it may require law to proactively facilitate people’s cooperative efforts and furthermore, it may impose certain affirmative duties of accommodation founded on such a robust notion of interpersonal respect.

Fortunately, properly interpreted, many important areas of private law are committed to enhancing our autonomy, rather than merely to safeguarding our independence; and private law does not content itself with formal equality, but rather increasingly aims at vindicating our substantive equality. Thus, there are numerous doctrines, which seem straightforwardly justified for an autonomy-based private law, and much less so (if at all) if our private law would have been grounded on a commitment to personal independence. One example comes from the basic rule dealing with mistaken payments, which prescribes that, in principle, the recipient “is liable in restitution.”⁶³ This rule seems troubled, if not outright unjustified, for a strictly independence-based private law, because it enlists the recipient, who is “a purely passive beneficiary,” for the task of remedying “the plaintiff’s unfortunate mistake”—“the consequences of her own freely willed activity”—for which he bears no responsibility.⁶⁴ But our private law, which does *not* rule out all affirmative duties to aid others, finds a

63. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (2011).

64. ALAN BRUDNER, *THE UNITY OF THE COMMON LAW* 247, 253 (2013); see also Frederick Wilmot-Smith, *Should the Payee Pay?*, 37 OXFORD J. LEGAL STUD. 844, 855–61 (2017).

restitutionary obligation in the case under consideration (that is, before any detrimental reliance by the transferee) unobjectionable, indeed laudable. The affirmative duty it imposes on the recipient is a modest one—a trivial burden that neither jeopardizes her self-determination nor seriously undermines her independence. At the same time, it seems justified if mutual respect for the parties' self-determination governs the terms of the interaction between the mistaken transferor and the recipient, from which it follows that the recipient should not be oblivious to the mistaken party's circumstances.

A similar analysis applies to a long list of private law rules dealing with cases in which the interests of a group of people are interlocked, such as when they share an interest in the same piece of property or are all subject to a common liability. Say one of the members of this group incurs some expense in protecting or maintaining the property or performing the shared obligation, thereby benefitting the other members since it is impossible or infeasible to exclude them from this collective good. If private law were to discount people's self-determination and focus solely on upholding their independence, it would have been difficult to justify requiring beneficiaries to make restitution, since, in the typical case, the claimant can show neither harm inflicted on her by the defendant nor the defendant's consent to the exchange.⁶⁵ This, however, is not the approach that private law takes.⁶⁶ Where the parties' interests are sufficiently interlocked to prevent the claimant from reasonably pursuing her self-interest without benefitting others, and where the defendant has no credible nonstrategic motive for not contributing to the collective good, private law typically does facilitate collective action by forcing the beneficiaries to pay their proportionate share of the collective good. This neutralizes the potential free-riding that could undermine the jointly-beneficial collective action and the parties' self-determination.⁶⁷

Consider now private law's commitment to substantive equality, which also helps provide the solution to Collins's concern regarding asymmetrical duties.⁶⁸ The law of fair housing, which prohibits discrimination in the sale or rental of residential dwellings, provides a conspicuous example. An independence-based private law can justify such a prohibition only contingently, that is, only where non-owners do not have sufficient housing opportunities, so that allowing owners to make their selling or renting decisions based on racist or other discriminatory considerations would make non-owners "fully subject" to the choices of these owners.⁶⁹ But this limitation is neither part of our law nor is it normatively justified. Refusing to consider a would-be buyer of a dwelling merely because of her skin

65. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 95 (1974); JULES L. COLEMAN, RISKS AND WRONGS 166-69 (1992).

66. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 23, 26 (2011).

67. See HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 123-63 (2004).

68. See *supra* text accompanying note 27.

69. See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 292 (2009).

color (for example) is wrong because it fails to respect the individual on her own terms—in violation of the private law injunction of relational justice. Buying and renting a dwelling—a major decision of self-determination—exposes people to discriminatory practices at the hands of some homeowners and landlords. Thus, regardless of whether the state takes care of its obligations (in terms of supplying sufficient housing options to all and sustaining integrated residential communities), private law must not, and does not, authorize social relationships that proceed in defiance of the equal standing and the autonomy of the person subject to discrimination.

The law of fair housing is by no means the only example of private law's compliance with the demands of just relationships. There are quite a few other manifestations of this underlying commitment, both within property law (such as the law of public accommodations or the fair use doctrine in copyright) and outside property law (think about the law of workplace accommodation). A particularly revealing example comes from the way accident law addresses people's differing competencies to constrain risky conduct in cases of negligent infliction of loss to life and limb. Overlooking the victim's special makeup in prescribing our interpersonal duties—as the independence-based conception of private law implies⁷⁰—is incompatible with an ideal of relating as genuine equals and with respecting one of freedom's most basic ingredients: the interest in staying alive and physically well in the face of the risky conduct. Fortunately, current law again rejects this approach and follows, instead, the requirement of relational justice, which one should measure by the duty of care owed by the injurer to the victim partially by the latter's capabilities. The injurer must be (and is) responsible to take extra care to protect the disabled person from her dangerous activity.⁷¹

B. *Jus Gentium Privatum*

A discussion of private law as encapsulating interpersonal human rights may be expected to follow the long tradition of natural lawyers who present its building blocks as the pre-political baseline for our social contract, which as such sets the bounds of its legitimate demands.⁷² Our path is different. To be sure, we do not deny that there may be, and probably are, certain private law obligations that are properly conceptualized as legal extensions of the natural duty to refrain from interfering with the external freedom of others. At least parts of the subset of tort law that protects our bodily integrity may reasonably be said to affirm our natural rights and is accordingly analyzed along these lines. But many other obligations prescribed by private law are different in important ways. These obligations—notably those dealing with our holdings—cannot plausibly be understood, despite the many attempts to do so, to be safeguarding our

70. See Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

71. See generally Avihay Dorfman, *Negligence and Accommodation*, 22 LEGAL THEORY 77 (2016).

72. See, e.g., NOZICK, *supra* note 65.

pre-political rights because here private law plays a *power-conferring* role; it eases and at times even constitutes and shapes interpersonal practices.

Both property and contract are such empowering devices which are crucial both to people's personal autonomy (understood in terms of self-determination) and to their relational equality (understood in terms of reciprocal respect and recognition among persons). To be sure, we do not argue that property and contracts include only power-conferring rules. Duties not to interfere with people's rights are relevant to both property law and contract law. But these piggy-backing (duty-imposing) rules would be meaningless in the absence of the power-conferring institutions of property and contract because their role is to protect our ability to apply the powers enabled by these institutions. They rely on and should thus be circumscribed by the normative commitments that explain and justify the legal powers that are characteristic of ownership or contract in the first place.

Contract can be, among other things, "a particularly valuable means for pursuing ends," because by recognizing people's power to undertake obligations, contract enables individuals to provide credible assurances that allow them "to induce promisees to assist them in realizing their ends."⁷³ Property provides its owners with authority over certain resources that is best justified by the respect that others give to such ownership—individuals and the polity as a whole are deferential to an owner's right to self-determine according to her own conception of the good.⁷⁴ Indeed, at least in their best light, both contract and property are understood—in line with our argument per the normative foundations of private law—as frameworks of respectful interaction conducive to self-determining individuals, which are indispensable for any social setting where individuals, ranging from intimates to complete strangers, recognize each other as genuinely free and equal agents.

These conceptions of contract and property are neither pre-political nor are they apolitical.⁷⁵ As empowering devices they cannot be pre-political. To be sure, the autonomy-enhancing premise of both contract and property, as we will argue presently, is not purely conventionalist in the sense of being grounded in some express or tacit consent of the governed. But subscribing to a system that takes this premise seriously is not a result—as it is often presented by natural lawyers—of autonomy's prescriptions per the legitimate *limits* of a social contract. Quite the contrary. The justification for embracing property and contracts as the building blocks of private law follows from the injunctions of such respect based upon the

73. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1609 (2009). See also HANOCH DAGAN & MICHAEL A. HELLER, *THE CHOICE THEORY OF CONTRACT* 37-39 (2017).

74. See HANOCH DAGAN & AVIHAY DORFMAN, *The Human Right to Private Property*, 18 THEORETICAL INQ. L. 391, 403 (2017).

75. The argument here builds on HANOCH DAGAN, *The Utopian Promise of Private Law*, 65 U. TORONTO L.J. 392, 397-402 (2016); AVIHAY DORFMAN, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402, 425-40 (2014).

way our social contract should *actively* design our interpersonal interactions.

Indeed, this underlying premise of both contract and property—our proposed foundation of interpersonal human rights—expresses a fundamentally political idea of being with others in the world, structured around reciprocal respect to self-determination and substantive equality. As we move beyond the most basic rules which protect our bodily integrity, private law is irreducibly political because no private individual living in the state of nature—or for that matter, a private citizen of the state—can legitimately claim authority over other persons with respect to resources they hold or with regards to actions these others may perform based only on their natural right to freedom from interference.

* * *

The fallacy of the attempts to naturalize private law understandably prompts suspicions towards views (such as ours) that attempt to disconnect the allegedly conceptual link between private law and the commands issued by the sovereign state, which sets up a particular (i.e., contingent) set of interpersonal obligations conventionally described as private law.⁷⁶ As noted at the outset, we do not deny the contingency of some subsets of private law. However, our point is that some underlying normative foundations of these private law domains nonetheless transcend the contingency of their positive instantiations. Therefore, they can and should take a critical role in the conceptualization of our interpersonal human rights.

Neither contract nor property is a convention *simpliciter*—neither serves only as a solution to a recurring coordination problem (although they both certainly play this role as well). At least at their humanist core that is the inspiration for our concept of interpersonal human rights, property and contracts—and even more obviously, torts—play a crucial role, as mentioned above, in people’s self-authorship and their ability to relate as equals. This role implies that these conventions are very different from other, garden-variety conventions. By enacting or developing⁷⁷ a convention of *this* kind, society empowers people “to become full agents” and to engage with others in relationships of mutual recognition and respect.⁷⁸ Given the human condition, in which people’s embodiment and develop-

76. Thus, Jeremy Bentham famously announced that the right to property is simply a product of the law or, more precisely, a creature of what John Austin would later call a command issued by the sovereign. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (R. Hildreth trans., 2nd ed. 1914) (“Property and law are born together, and die together.”); see also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 15, 18 (1832).

77. As the text implies, we need not and do not take a position as to whether these conventions can or must arise by deliberate design, incremental adaptation, or rather spontaneously, say, from “a general sense of common interest.” See DAVID HUME, *A TREATISE OF HUMAN NATURE* 490 (1888). Cf. James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 *CORNELL L. REV.* 139, 150–51 (2009).

78. Cf. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *PHIL. REV.* 481, 520 (2008).

ment “involve dependent, interdependent, and mutually enriching relationships with others,” any polity committed to respecting people’s dignity or normative agency—that is, to human rights—is morally obligated to uphold (or establish) such a convention.⁷⁹

This conclusion may justify the prominent role of these private law building blocks in the legal systems of liberal states. Happily, these building blocks are not limited to such states, a point to which we return shortly. Vindicating respect for people’s subjectivity—to their right to self-determination according to their own conception of the good—nicely coheres with the core liberal commitments to individual autonomy and to substantive equality.

The state is, quite understandably, the obvious locus for translating these normative commitments into legal prescriptions. This is the case not only where they apply to the vertical dimension, which deals with our status as citizens, but also where they apply to the horizontal one, which deals with our interpersonal relationships. The reason for this is that even in our era of increasing transnational interconnectivity the state in most cases is still “the most comprehensive legally-based social organization of the day.”⁸⁰ More specifically, notwithstanding the normative attractions of cosmopolitanism, we appreciate the role of sub-global units—which are currently organized geographically and known as states—as *loci* of “coercively imposed collective authority.”⁸¹

There are two dimensions to this role. First, states enjoy significant comparative advantages—in terms of both legitimacy and competence—in performing the necessary tasks of elaborating, implementing, and enforcing interpersonal rights and obligations. This dimension is practically significant but conceptually contingent: it always depends on the calculus of the comparative advantages of the pertinent state and certain non-state institutions.⁸² The second dimension of the states’ unique role is constitutive; states can legitimately set up their own private law scheme to serve distributive justice, democratic citizenship, and aggregate welfare in addition to its core concern of securing minimal interpersonal justice.⁸³ This means that domestic private law may express civic solidarity in excess, but not in lieu of the solidarity prescribed by the core interpersonal injunction

79. *Id.* (as per the convention of promise).

80. Joseph Raz, *Why the State?*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 136, 137 (Nicole Roughan & Andrew Halpin eds., 2017). To be sure, Raz also claims, in line with the discussion which follows, that this significance of state law does not justify exclusively concentrating on state-law or neglecting “other law-like phenomena.” *Id.*

81. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 114, 140 (2005).

82. We emphasize *certain* non-state institutions to rule out most (perhaps all) private institutions. The distinction between state and non-state institutions does not track the one between public and private institutions, but rather between different public institutions (a statist and a non-statist one).

83. Even this dimension is not strictly speaking conceptual—we can imagine a non-statist commitment to (and implementation of) distributive justice or aggregate welfare.

of reciprocal respect to self-determination and substantive equality.⁸⁴ Moreover, the very ideal of relational justice is not binary, but rather a range,⁸⁵ which means that different societies may opt for more– or less–commitments to *interpersonal* solidarity beyond the core minimal requirement of interpersonal human rights.⁸⁶

Acknowledging these advantages implies that states can legitimately shape their private laws in different ways and that they have a legitimate interest in prescribing the terms of transnational encounters that involve their citizens or residents or that implicate or are likely to affect them in some other way (e.g., encounters that happen within their boundaries).⁸⁷ However, it does not imply that property, contracts, and torts are necessarily statist or that the state's private law prescriptions cannot be credibly criticized or censured as violations of our interpersonal human rights when the state fails to fulfill, or even undermines, its instrumental role in securing these rights. Quite the contrary. The underlying normative foundations of private law transcend the state because a significant part of private law's normative weight has nothing to do with our relationship with or through the state.

84. In other words, our account acknowledges the significance of the rights we have *qua* citizens. As we hope to have clarified, the horizontal obligations which correlate interpersonal human rights are not aimed at supplanting—indeed, they cannot supplant—the (potentially more demanding) public obligations of co-citizenship.

85. See JOHN RAWLS, *A THEORY OF JUSTICE* 508 (1971) (citing the notion of range property).

86. Thus, while some duty of care by producers is likely to be part of the non-statist core of private law, its specific configuration and degree is varied, and legitimately so, across jurisdictions. See, e.g., SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, FUTURE* 265 (2006). As we mention in the text, these differences can be justified due to either the choice among varying degrees of interpersonal solidarity or the commandeering of products liability law to the public goals of efficiency or distributive justice.

87. In other words, the new role we ascribe to private law—as a source of interpersonal human rights—is not supposed to supplant the existing public and private international law rules discussed earlier. We do not advocate the universal harmonization of private law or the creation of a uniform body of transnational private law. In this respect, our account departs from otherwise similar individual-centered internationalist perspective of private international law, which was advanced most powerfully by Josephus Jitta at the end of the 19th and the beginning of the 20th century. Private international law, in Jitta's view, should be about "the regulation of a society of individuals beyond the national borders," and thus understood as "the private law of mankind," whose goal is "to satisfy the legal demands of this [namely: the global] society and the dignified relationship between all individuals." ROXANA BANU, *NINETEENTH-CENTURY PERSPECTIVES IN PRIVATE INTERNATIONAL LAW* 79, 82 (2018). "The only one, albeit highly relevant, factor that distinguishes" domestic private law from private international law is in this view that the latter "is supposed to respond to and incorporate the legitimate interests and expectations of a wider society," whereas the former considers "primarily those interests of the national society." *Id.* at 79. Although we share Jitta's impetus, we do not subscribe to his overreaching suggestion in which such *jus gentium* should be a mere subset of an all-encompassing "private law of mankind." *Id.* at 82. (To be sure, this is not the only interpretation of Jitta's approach; other passages, in which he limits this view of private international law to what he called entirely international relationships—those which cannot be localized in a particular community—may suggest that he would have been open to our position. See *id.* at 79.).

Private law governs our interpersonal relationships— that is, our interactions with other persons in their capacity as private individuals, and not as co-citizens. Because these relationships are not mediated via the state and their significance does not rely on their aggregate consequences, the normative foundations of private law are not, need not, and indeed should not, be tied only to specific national systems. We do not deny that sovereign states have an important role in shaping and reshaping their citizens' rights, and this authority applies to rights against the government and rights against other individuals. But just as the traditional understanding of human rights implies that there is a limit to that authority regarding the former type of rights— some rights against the state are beyond its power to abrogate even on behalf of the common good— a humanist framework must acknowledge a core set of interpersonal human rights to which states *must* comply.

* * *

Private law's core prescriptions— our interpersonal human rights— are neither part of a natural law nor do they depend on the state for their legitimate existence. Rather, we submit that the thin skeleton of private law identified above and its underlying commitment to reciprocal respect to self-determination and substantive equality, belongs to the *jus gentium*. *Jus gentium* is typified by Jeremy Waldron as a body of principles that can be extracted from the “overlap between the positive laws of particular states” using “a legal sensibility that is both lawyerly and moralized.”⁸⁸

Jus gentium, as Waldron explains, focuses on “what humans [have] constructed for themselves,” rather than on “the lofty heights of philosophical speculation,” but it does so “in a moral mode”; it thus “lifts us out of the positivist perspective of a particular legal system” without engaging in “pure moral philosophy [associated] with natural law.”⁸⁹ Hence both its limitation and its power. As “noninstitutionalized law” it “has no artillery of its own”; but— thanks to its broad positive acceptability— it enjoys a relatively powerful role in our normative and critical legal thought.⁹⁰ This means that a growing awareness of a substantive body of law of interpersonal human rights may not only support the existing strategies of handling transnational wrongs, which are our focus in this Article; but it may even push towards other increasingly robust institutional venues and procedural paths.⁹¹

88. WALDRON, *supra* note 9, at 28, 35-36. On its face, *jus gentium*'s reliance on domestic legal systems may imply a backdoor return to statism. But notice that the reference here is not to the *authority* of any municipal system, but rather to these systems as *epistemic* sources for the identification of what deserves to be treated as universal principles of (in our case relational) justice.

89. *Id.* at 38-40.

90. *Id.* at 56, 59.

91. Cf. Jeremy Waldron, *Human Rights: Universalism or the Integrity of a Common Enterprise?*, 17 (N.Y.U. Pub. Law & Legal Theory Res. Paper Ser. No. 16-48) (2016) (discussing the “immeasurable educational, psychological, and cultural” importance of

These features of *jus gentium* are far from simple. Waldron pointedly frames the main concerns they raise as “a Scylla and Charybdis situation,” in which one should not include “disreputable” legal regimes so as not to reify “the lowest global common denominator,” and must be wary of the risk of simply “cherry picking one’s consensus.”⁹² Furthermore, Waldron adds that this “navigation,” “needs to be conducted against the background worry about Eurocentrism or white, Anglo-Christian parochialism.”⁹³ We cannot properly address these concerns here. But it is important to note that the last (post-colonial) worry, which is probably the more serious one, seems to be *less*, rather than more, pertinent to our exercise of extracting the minimal core of private law than to the parallel exercise regarding constitutional law or (vertical) human rights law. Thus, for example, given the broad global convergence of the private law injunction against the violation of our bodily integrity, immunizing spousal rapes from tort liability is a clear instance of a violation of an interpersonal human right. It is thus difficult to present a respectable post-colonial critique of the proposition that would condemn legal systems that apply such a rule.⁹⁴ Indeed, the types of wrongdoing which we classify as violations of interpersonal human rights transcend the particularities of the existing legal traditions.⁹⁵ At least within a broadly defined humanist framework—in which other cultures and other sovereignties are worthy of respect because they play a crucial role in people’s lives⁹⁶—the legal treatment of such violations should not be subject to cultural upbringing or other contingent facts about a person’s culture.⁹⁷

Conceiving interpersonal human rights in terms of *jus gentium privatum* provides the missing link of privity needed to complete the important efforts of both public and private international law surveyed above. The Ruggie framework discusses the horizontal duty to respect human rights as a duty that “means not to infringe on the rights of others—put

giving people “recognized legal terms” in which they can “put their grievances and their outrage”).

92. WALDRON, *supra* note 9, at 193.

93. *Id.*

94. Cf. Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 MICH. J. GENDER & L. 89 (2015).

95. See, e.g., Abdul Basir bin Mohamad, *Islamic Tort Law*, in *COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES* 441 (Mauro Bussani & Anthony J. Sebok eds., 2015).

96. For the humanist foundations of the significance of culture see, e.g., CHAIM GANS, *THE LIMITS OF NATIONALISM* (2003); for sovereignty, see the sources discussed and cited in Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 302–05 (2013).

97. We do not deny, of course, that the basic concepts of private law—notably property—have been abused. See, e.g., Martii Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011). But an abuse should be treated as such; it is the product of a “distorted and selective application” of an ideal—the flattery that vice pays to virtue.” Arthur Ripstein, *Distinctions of Power and the Power of Distinctions: A Response to Professor Koskenniemi*, 61 U. TORONTO L.J. 37, 39, 41 (2011). We offer an account of the virtue of property elsewhere. See Dagan & Dorfman, *supra* note 74. See also José E. Alvarez, *The Human Right to Property*, 72 U. MIAMI L. REV. 580, 644–66, 685–89 (2018).

simply, to do no harm.”⁹⁸ But insofar as this maxim is supposed to rely on our vertical human rights, there is, as we have seen, nothing straightforward in this prescription. Rights are thoroughly relational: they are advantages to their holders to the extent that they impose burdens on those subject to their correlatives.⁹⁹ Therefore, their content and scope are intimately connected to the justifications they offer for imposing their correlative duties on a given duty-holder.¹⁰⁰ This means that imposing a burden on a private actor in the name of a right that was originally conceived in vertical terms requires either a specific justification for enlisting a specific subset of actors for a *public* task, or a reconstruction of that right so as to explain why it actually implies a broader set of duty-holders. As we have shown, both undertakings are far from being trivial.¹⁰¹

Our account offers a more straightforward path exactly because it is indigenous to private law. To start with, the duty of reciprocal respect to self-determination and substantive equality is one that typifies law’s demands of private individuals in their interpersonal interactions. This duty, in other words, need not, indeed should not, rely on the policy or collective goals of any specific jurisdiction. Therefore, it provides a secure baseline for evaluating such encounters in their own terms and thus a principled framework for the emerging category of transnational wrongs. Thomas correctly observes that “the moral intuition that something is going very wrong” in the contexts of sweatshops— or for that matter of land grabs or involuntary medical experimentations— derives from the fact that “something is going wrong and that that thing is much simpler than a failure of constitutional theory: one party is wronging another.”¹⁰² So the most straightforward way to capture this intuition is to appreciate the deviation of these episodes from the most fundamental imperatives of our private law— to analyze them for what they are: infringements of interpersonal human rights. Indeed, rather than bypassing private law, transnational lawyers should explore the potential reform of securing the interpersonal justice inherent in private law based on its normative foundation of reciprocal respect to self-determination and substantive equality.¹⁰³

IV. Addressing Transnational Wrongs

Our argument of the *jus gentium privatum* demonstrates that there is a core set of private law norms that are inherently cosmopolitan, and thus

98. The Framework, *supra* note 14, at 9.

99. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32-33 (1913).

100. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975, 987, 994, 1022-23, 1050, 1056-59; see also DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION—fin de siècle* 305, 319, 323 (1997); Andrei Marmor, *On the Limits of Rights*, 16 LAW AND PHIL. 1, 10-14 (1996).

101. See *supra* notes 20-28 and accompanying text.

102. THOMAS, *supra* note 20, at 14.

103. Cf. Karen Knop, *Citizenship, Public and Private*, 71 L. & CONTEMP. PROBS. 309, 312 (2008) (discussing a more cosmopolitan approach to transnational law rather than an approach based in reciprocal self-determination).

should be considered applicable to every interpersonal relation, irrespective of the citizenship of the parties involved. These norms, which we call interpersonal human rights, are broadly grounded in a moral reading of the basic elements of private laws of domestic systems. Unlike traditional human rights, their focus is horizontal, rather than vertical; and unlike traditional private law, they do not purport to set up a full-blown system of rules for interpersonal conduct and coordination, but rather to prescribe global mandatory minimum standards—a floor that cannot be transgressed by state law (including not for the sake of promoting distributive justice or welfare). These interpersonal human rights can thus supply a normative foundation for legal liability that the existing efforts to address grave transnational wrongs so urgently require.

Consider the *Pfizer* case with which we started this Article. This case has been litigated under the Alien Tort Statute (“ATS”)¹⁰⁴ and resulted in a \$75 million settlement after surviving a jurisdictional challenge.¹⁰⁵ The crux of the ATS is indeed jurisdictional, and as such, irrelevant to our topic, but some of the majority’s reasoning in *Pfizer* is instructive. In its endeavor to comply with the prescriptions of the Supreme Court in an earlier case,¹⁰⁶ the majority made a considerable effort to establish that the defendant’s alleged “unspeakable” wrong (conducting nonconsensual medical experimentations on humans) belongs to the particularly “narrow class of international norms for which ATS jurisdiction applies.”¹⁰⁷ Three moves are particularly important for our purposes. The *first*, which typifies every attempt (including ours) to establish a universal principle from a diverse legal record, is to insist that the inquiry should not focus on “each source of law,” but rather take “a more fulsome and nuanced” nature.¹⁰⁸ The *second* move, which echoes the first strategy discussed in Part II, is to bypass the traditional requirement, which has been read into the ATS, of “state action” in order to establish that this case belongs to “a smaller subset of . . . norms actionable against non-state actors.”¹⁰⁹ *Finally*, and most significantly here, the *Pfizer* court struggled to establish, against a particularly critical dissent,¹¹⁰ that the norm at issue belongs to customary international law; namely, that the norm is not one in which states are “separately and independently interested,” but rather one by which they abide “out of a sense of mutual concern” of its consequences in interna-

104. 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

105. See BEN GOLDACRE, *BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS* 118 (2012).

106. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

107. *Pfizer*, 562 F.3d 163, 213.

108. *Id.* at 176.

109. *Id.* at 213.

110. *Id.* at 194–95 (claiming that the majority conflates widespread prohibition of medical experimentation on non-consenting human subjects with an obligatory norm of customary international law).

tional affairs.¹¹¹

This last move may have been necessary in the specific context of the ATS given its nature as a jurisdictional statute.¹¹² But in other contexts, notably in the framework of the two strategies on which this Article focuses, the notion of interpersonal human rights emerging from the *jus gentium privatum* offers a clearer premise. Indeed, the wrongful interaction between Pfizer and its victims is a straightforward case of battery, widely understood in the common-law tradition as protecting human dignity.¹¹³ This is an “easy” battery case—deceitfully procuring consent to a medical experiment on vulnerable children can hardly be compatible with respect to these children’s dignity (even if doing so would be desirable based on cost-benefit analysis). Holding Pfizer liable irrespective of the content of the applicable law is called for by the *jus gentium privatum* framework given the widespread prohibition of medical experimentation on non-consenting human subjects—liability becomes particularly compelling given the even more prevalent, and more fundamental, private law injunction against the violation of our bodily integrity.

There is, however, a practical concern about the substance of transnational tort law that does not show up in Pfizer. It arises in connection with our resistance to reduce a basic tort such as battery to its positivist instantiations, given that what counts as violating human dignity varies across cultures. In particular, the challenge is to show that fixing the mandatory floor for interpersonal violations of dignity in the context of a transnational tort of battery is no mere theoretical speculation.¹¹⁴

111. *Id.* at 176, 185. The recent *Kiobel* case makes it even more difficult to rely on the ATS as a cure for cases of transnational interpersonal wrongs. In *Kiobel*, the Supreme Court held that “mere corporate presence” in the United States is not sufficient to “displace the presumption against extraterritorial application,” so that only claims that “touch and concern the territory of the United States” will be allowed. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

112. This does not mean that the ATS can only be interpreted as requiring a state action or as solely dealing with infringements of customary international law. An originalist alternative has been proposed as one in which the role of the ATS is to redress wrongs committed by private actors, including aliens, with United States sovereign nexus (that is: wrongs affecting national security or commerce). See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

113. Although the civil law tradition employs a different set of legal concepts, it too recognizes a duty against committing battery and imposes liability for failing to meet that duty. See, e.g., BÜRGERLICHES GESETZBUCH (“B.G.B.”) [German Civil Code] §823, translation available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf [<https://perma.cc/3W28-8NUV>] (“A person who, intentionally . . . , unlawfully injures the life, body, . . . freedom . . . of another person is liable to make compensation to the other party for the damage arising from this.”).

114. We believe that the question to be discussed in the main text below is the most challenging for the elaboration of a transnational tort of battery. But we acknowledge that other questions (concerning the burden of proof, the meaning of intent, affirmative defenses, and so on) may also arise. Although we cannot do justice to all these questions in this Article, one concern—dealing with the somewhat complex structural makeup and market dynamism of defendant-corporations—justifies a few comments here. The first worry is that the legal organization of the modern economic firm can sometimes take the form of several divided subsidiaries, incorporated along different jurisdictions. The second worry (of market dynamism) arises in connection with the

Battery gives effect to a norm against offensive and/or harmful contact with another person. The main worry is that substantial cultural variance concerning the question of what counts as offensive contact exists. For instance, some U.S. jurisdictions tend to define offensiveness very broadly to capture mere touching, provided the victim has not authorized it (explicitly or implicitly).¹¹⁵ By contrast, the culture in some other countries may be less touch-sensitive so that merely touching others might appear innocent—at least when it does not carry sexual connotations or other domination-based implications. Hence, the same conduct, say horseplay, can sometimes receive opposite interpretations: offensive conduct and friendly gesture, respectively. Cultural variance of this sort seems to indicate that a transnational tort of battery must not take sides in the debate, in which case there is no compelling reason to impose the former cultural outlook on the rest of the world.¹¹⁶

That said, deference to cultural variance must not swallow the commitment of the *jus gentium privatum* to the dignity of persons, whatever their cultural upbringing might be. The interpersonal human rights paradigm developed in these pages implies that persons possess the ultimate standing over whether, and under what terms, others may use their bodies. After all, there is little sense in the notions of relating as equal and of self-determining agents without securing this standing. This means that torturing, raping, abusing, and other harsh deprivations of bodily integrity are clear instances in which cultural variance has no weight (including not in

growing practices of mergers and acquisitions. Both pose the similar threat of liability evasion. A practice of redressing transnational wrongs may face the hurdle of attributing responsibility to a corporation that, formally speaking, is far removed from the actual tortfeasor (the one that pulled the proverbial trigger, as it were). To address this difficulty, we begin by positing the rather uncontroversial proposition that corporations should be held accountable to (at least) the same standards as natural persons are. Furthermore, there is no reason to let a corporation off the liability hook just because it has a complex structure. Indeed, as the case of tort law's products liability law in the U.S. demonstrates, private law can develop the doctrinal resources to address this issue. To begin with, liability for defective products spans the entire range of actors involved in production and sale, including manufacturers, distributors, and retailers. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). Moreover, products liability law sets aside the formal discontinuity between the predecessor manufacturer and the successor manufacturer of a defective product; it recognizes liability of successor manufacturer for harm caused by defective products sold commercially by its predecessor. See *id.* at § 12. To be sure, incorporating these doctrines to transnational private law would require some modifications (to reflect the fact that not all transnational wrongs are product-related). That said, products liability serves as one among many other doctrinal manifestations of principles and insights in contemporary private law on which courts, scholars, policy-makers, and NGOs could draw to further develop the practice of transnational private law.

115. See *Cole v. Hibberd*, No. CA94-01-015, 1994 WL 424103, at *2 (Ohio App. 1994) (finding that a friend's playful, though unauthorized, kick in the rear is sufficient to constitute a prima facie case of battery); *but see Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972) (playfully putting one's arm around a co-worker's neck does not satisfy the prima facie case of battery).

116. See generally Mauro Bussani & Marta Infantino, *Tort Law and Legal Cultures*, 63 AM. J. COMP. L. 77 (2015) (documenting the doctrinal and institutional implications of cultural variance in tort law).

the form of cultural defense). The duty against committing (transnational) battery does not owe its very existence or significance to the institutional mechanisms that deal with its violations.¹¹⁷ Just like our familiar vertical universal human rights, our interpersonal human rights know no boundaries and cannot be domestically ignored.

The more difficult questions lie in between core violations of dignity and the more peripheral cases of (genuinely) innocent touching. Drawing the precise fault line requires extensive deliberations across different societies and discourses (academic, political, cultural, et alia) in the light of actual cases and changing circumstances. This way of proceeding is an asset rather than a liability for the proposed account, because it allows for informed participation in the process of shaping the content of the tort, which, in turn, helps to cultivate *horizontal*-rights-consciousness in participants. This means that relegating the task of developing the universal norms of interpersonal human rights to domestic courts is not necessarily a second-best solution. Rather, it may helpfully instigate a gradual process of respectful dialogue among national courts seeking to distill the universal core of interpersonal human rights from their diverse, but not chaotic, sets of domestic private law.¹¹⁸ Translating the abstract imperatives of our interpersonal human rights into concrete cases may well benefit from such multicultural dialogue that can also serve as a crucial means for addressing legitimate concerns of parochialism.¹¹⁹

We thus do not aim— here or in general— to produce a comprehensive code of the norms that make up the *jus gentium privatum* of interpersonal human rights. Elsewhere we addressed in some detail the implications of this proposed framework on the land grab cases mentioned at the outset.¹²⁰ We will not rehearse this analysis here, but rather conclude with a few preliminary comments on the way the conception of justice underlying

117. This point is true in the domestic context. Tort law, for instance, is not reducible to the law of tort remedy, litigation, or civil recourse, more generally. Indeed, tort law is primarily a scheme of mandatory reasons that come in the form of primary duties of interpersonal respect for basic rights to bodily integrity, dignity, property, et alia. For more on this point, see Avihay Dorfman, *Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality*, 31 CANADIAN J.L. & JURIS. 5 (2018).

118. Cf. Christopher McCrudden, *A Common Law on Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Michael Kirby, *Transnational Judicial Dialogue, Internationalization of Law, and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008); Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 UTRECHT L. REV. 100 (2012).

119. Cf. Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 482–83 (2005).

120. For our preliminary account, see Dagan & Dorfman, *supra* note 74. See also Hanoch Dagan, *Property Theory, Essential Resources, and the Global Land Rush*, in GOVERNING ACCESS TO ESSENTIAL RESOURCES 81 (Olivier DeSchutter & Katharina Pistor eds., 2015). For some support in the emerging international soft law on these issues, see FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* §§ 7.1, 7.3, 10.1, 16.1, 16.2, 16.8, 16.9 (2012).

our proposed account (relational justice) makes a difference in contemporary debates concerning employment relations in developing countries.

Considerations of distributive justice and welfare can sometimes counsel against foreign interference in the employment law regimes of developing countries. The thought is that it is better to have substandard employment relations than no employment at all (with the resulting adverse consequences of poverty, hunger, and poor health).¹²¹ To the extent that these considerations have some merit in some (though not in all) cases, the notion of relational justice provides a powerful counterforce.

Relational justice constrains the extent to which employment relations can, if at all, be undermined for the sake of advancing distributive justice and aggregate welfare. It does so by adding another dimension of justice to the equation: the relationship between an employer and its employee can be a source of concern and of value quite apart from its effects on society (or the world) as a whole. Like other (that is, vertical) human rights, the notion of interpersonal human rights implies a limit to the extent of subordinating individual rights to collective concerns—significant as they may be. Accordingly, the construction of the powers, rights, and duties that define the employment relationship cannot ignore considerations of interpersonal equality and autonomy. This point is critical not only at the level of legal analysis; rather, it provides the normative foundations—the naming, as it were¹²²—on which employees can draw in their struggle for fair terms of employment. This way of approaching the matter brings home the widely shared intuition that the infamous phenomenon of sweatshops amounts to a transnational wrong, that is, a *horizontal* human rights violation.

The next stage of the argument would focus on determining the threshold standard below which employment relations cannot go. Once again, some easy cases are not hard to identify—exposing an employee to a life-threatening workplace environment is a case in point. Other cases such as those involving forced labor, child labor, and flagrant workplace discrimination also fall in this category. Moving beyond the category of easy cases proves more challenging in theory and in practice.¹²³ As in the case of the transnational tort of battery, working out the details of the appropriate employment relation standard raises questions of norms and of facts that are best left to a gradual development based on a multicultural dialogue that refines and articulates the more precise contours of our interpersonal human rights.

121. See, e.g., Nicholas D. Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, N.Y. TIMES (Sept. 2000), <http://www.nytimes.com/2000/09/24/magazine/two-cheers-for-sweatshops.html> [<https://perma.cc/HYQ4-TN5U>].

122. Cf. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1980).

123. Cf. Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397 (2010); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203 (2004).

V. Concluding Remarks

There seems to be little dispute that our current system of transnational private law faces difficulties addressing grave transnational wrongs and that remedying this predicament is a matter of significant importance and urgency. There are unfortunately many practical hindrances for the efforts currently undertaken in this direction such as the effects of bilateral investment treaties and other possible obstacles dealing with jurisdiction and sovereign immunity. But alongside these difficulties, there is a real conceptual obstacle that underlies many of the problems of the existing, otherwise promising, approaches to these issues—the approaches lack a coherent account of the normative foundations that justify both the unmediated standing of plaintiffs *vis-à-vis* their defendants and their insistence that rectifying the violations they endured need not be contingent upon the specifics of any domestic private law regime. What is missing, in other words, is an account of the connection between the notions of interpersonal human rights and private law.

Refining the doctrine of *jus gentium privatum* and distilling the core interpersonal human rights embodied in private law can provide the long-due normative foundation for the intuitive (justified) demand that perpetrators of grave transnational wrongs right their wrongs even if the applicable law prescribes otherwise. Showing that obligations to reciprocal respect to self-determination and substantive equality are endogenous, rather than external, to the interpersonal relationship may serve as a powerful counter-argument to attempts to evade interpersonal responsibility. We do not claim that this conceptual advance entails full-blown and precise answers to all the questions invoked by grave transnational wrongs—there are admittedly many further challenges (both legal and practical) down the road.¹²⁴ But we hope to have shown that conceptualizing these grievances as violations of interpersonal human rights can, at least, mark a substantial step in a promising direction.

124. One difficulty arises in cases where both private parties and governments are responsible for transnational wrongs, especially where the latter's involvement is structural. See generally Natalie R. Davidson, *Shifting the Lens on Alien Tort Statute Litigation: Narrating the U.S. Hegemony in Filártiga and Marcos*, 28 EUR. J. INT'L L. 147 (2017). These cases may require a modification of our analysis to ensure that the private law paradigm would not improperly obscure the structural responsibility of these public bodies.