

Defending Legal Realism: A Response to Four Critics

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Abstract

My recently published book, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013), seeks to revive our understanding of law as a set of institutions accommodating three sets of constitutive tensions: power and reason, science and craft, and tradition and progress. This issue of *Critical Analysis of Law* honored me with the publication of thoughtful and generous book reviews by Alan Brudner, Dan Farbman, Joseph Singer, and Laura Underkuffler. This short essay reflects upon their insightful and important observations and attempts to provide some answers to their interesting and intriguing critiques of my account. I begin with some observations on the relationships between law and politics and on the nature of legislation. I then turn to address the interplay between idealism and reality in law and legalese as well as the ways in which legal theory can be distinctive and at the same time both critical and synthetic. I conclude with some comments on the nature of private law and on the way it serves our right of self-authorship.

I. Introduction

In *Reconstructing American Legal Realism & Rethinking Private Law Theory*,¹ I attempt to offer a new interpretation of legal realism which revives the realists' rich account of law as a set of institutions accommodating three sets of constitutive tensions: power and reason, science and craft, and tradition and progress. I seek to rein in realist descendants who have become fixated on one aspect of the big picture, and to dispel the misconceptions that those gone astray accurately represent the realist legacy or that realism is now merely a historical signpost. Drawing upon texts of Oliver Wendell Holmes, Benjamin Cardozo, Karl Llewellyn, Felix Cohen, and others, I argue that legal realism offers important and unique jurisprudential insights that are relevant and useful for a contemporary understanding of law. Building on this realist conception of law and enriching its texture, *Reconstructing American Legal Realism* also addresses more particular jurisprudential questions. It shows that the realist achievement in capturing law's irreducible complexity is crucial to the reinvigoration of legal theory as a distinct scholarly subject matter, and is also inspiring for a host of other, more specific theoretical topics, such as the rule of law, the autonomy and taxonomy of private law, the relationships between rights and remedies, and the pluralism and perfectionism that typify private law.

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¹ Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (2013).

In their thoughtful and generous book reviews, published in this issue, Alan Brudner, Dan Farbman, Joseph Singer, and Laura Underkuffler offer insightful and important observations as well as interesting and intriguing critiques of my account.² I am deeply indebted for these challenges and thankful for the opportunity to address them and thus clarify—and at times refine—my positions. I am obviously unable to cover in this short response all the points raised in these reviews or do justice to all their subtleties, and I have confined my comments to four themes. I begin with some observations on the relationships between law and politics and on the nature of legislation. I then turn to address the interplay between idealism and reality in law and legalese as well as the ways in which legal theory can be distinctive and at the same time both critical and synthetic. I conclude with some comments on the nature of private law and on the way it serves our right of self-authorship.

II. Law, Politics, and Legislation

Alan Brudner claims that under “[my] guard, law’s distinctiveness becomes conditioned by a false generalization from pathological politics to politics, or at least by a dubious equation of brute power politics with the essential nature of politics” (204). When Brudner talks about “law” he means “common-law adjudication” (203) or “judge-made law” (201), as opposed to statutes (210). And he argues that I fail to see that my “conception of law’s distinctiveness” is, in fact, “identical in nature to a politics of persuasion to what will advance the common good, to a politics of public justification, reason-giving, and accountability” (202). The problem, he observes, is that I “distinguish[] an ideal legal process from a non-ideal political one, hardly an apt comparison” (203). And the unfortunate consequence of this mistake is that “by describing law’s ideal nature in terms equally applicable to ideal politics, [I] delegitimize[] the power exercised by such officials” (203).

Brudner is surely correct to insist that a credible comparison between law and politics should either consider the idealized pictures of both or the likely failures of their actual manifestations (or both). But in order to vindicate its claim of law’s distinctiveness, legal realism need *not* refer to pathological politics. Nor should it subscribe to Brudner’s equation of law with judge-made law. Rather, realists can rely on a credible account of the *ideal* of politics that highlights its difference from their conception of law; and they should resist an understanding of law which thrusts legislation outside of law’s domain.

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As Brudner observes, the core difference, in my account, between law and politics, lies in the elevated role of “public justification” in law (201). My reference to public justification is as the ideal of law, which serves as a benchmark for evaluating its daily operation. Indeed, although law never fully satisfies this ideal and frequently falls far short

² See Alan Brudner, *Realism’s Illusions*, 1 *CAL* 199 (2014); Dan Farbman, *The Scalpel and the Salve: Rekindling Romantic Realism*, 1 *CAL* 212 (2014); Joseph Singer, *Private Law Realism*, 1 *CAL* 226 (2014); Laura Underkuffler, *Reality and Illusion*, 1 *CAL* 239 (2014). Subsequent references appear parenthetically in the text.

of it, it is inspired by it. (I return to the intricate relationship between idealism and reality in law in the next section.) Politics, to be sure, should also include an important component of public justification. But, unlike law, at least in democratic settings, this language of reason should not even claim exclusivity over the political discourse.³ Instead, the *ideal* of democratic politics relies on a unique form of public discourse, in which citizens and their representatives communicate a delicate blend of both reasons and preferences.⁴

Like Brudner, I do *not* equate the grammar of democratic politics to sheer preference aggregation. Indeed, participants in enterprises with an intense and all-encompassing effect on their members' lives are expected not to act or vote merely on their sheer preferences. Rather, they should also give reasons, which take into account the implications of their decisions for other members of the relevant community, even though at times these reasons simply appeal to the reasoner's judgment as to what best satisfies most people's preferences. Indeed, an understanding of democratic governance solely in terms of the impartial aggregation of preferences is wrong because it rejects the typical democratic requirement that people should offer and demand reasons in their attempts to persuade one another as "undemocratic (or anyway extra-democratic)."⁵ Furthermore, because the democratic practice of preference aggregation itself claims legitimacy due to sensible normative reasons,⁶ it cannot dismiss out of hand the role of at least some types of reasons in politics.

But this truism does not imply, as Brudner seems to suggest, that individual or group self-interests, preferences, and tastes have no place in the ideal of democratic politics. Legitimate political claims are not confined to justifications and reasoned judgments about the public good. Plato's ideal of a philosopher king who governs society because of his ability to sacrifice self-interest for the public good⁷ may satisfy the idea of reason as the sole guide of governance, but it is an anathema to the democratic tenet of popular sovereignty.⁸ Ousting people's preferences from the currency of politics is unappealing, and indeed unacceptable. At least on some (most?) issues, people's perceptions of their own good, let alone the intensity of their preferences concerning their political convictions, must matter.

³ My discussion of politics relies on Hanoch Dagan, *Political Money*, 8 *Election L.J.* 349, 351-56 (2009).

⁴ The term "reasons" in this context has the rather minimalist sense of considered judgments about individual rights or the public good, however defined. Preferences are different from reasons because they are at bottom about self-interest and are accordingly weighted by the intensity with which they are held. (This explains the distinction between reasons, which turn on general public validity, and preferences about convictions that do not reflect the cogency or the importance of specific convictions, but rather their holders' passion about these convictions, which is irrelevant to their status *qua* reasons.)

⁵ Robert E. Goodin, *Democracy, Justice and Impartiality*, in *Justice & Democracy* 97, 104-05 (Keith Dowding et al. eds., 2004).

⁶ See, e.g., Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153, 154-55 (Jeremy Waldron ed., 1984).

⁷ Plato, *Republic* 214-15 (Richard W. Sterling & William C. Scott trans., 1985).

⁸ To be sure, there are also prudent reasons for rejecting the Platonic model of government: we are rightly skeptical about any individual claims to superior access to public truth, especially given the immanent concerns of abuse of power by a Platonic king. But these reasons do not exhaust the problems of such a regime.

In varying degrees, the fact that people want certain states of affairs and the degree of their desire are good reasons for directing public policy. People's appeal to what they prefer and by how much is thus a legitimate component of public discourse. At least in a democracy, political discourse "must always take (some) account of people's preferences."⁹

So collective self-rule—politics—is an enterprise involving both the accommodation of conflicting preferences and the refinement of some notion of the public good. In democratic settings neither the language of preferences nor the language of reasons can be the sole acceptable currency of politics; rather, they are doomed to coexist as part of the currency of political participation. Democratic politics is the subset of political discourse situated between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification). Unlike the ideal of law, politics—even (or especially) in its ideal form—must take citizens' actual preferences seriously.

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Indeed, *pace* Brudner, I do not conceptualize the difference between judges and politicians around the (misguided) superiority of the former, but rather around the legitimacy of the latter's reliance on the preferences of their particular constituencies. Curiously, alongside the claim that my account insufficiently respects politics, Brudner equates law with adjudication and thus assumes that legislation—the process through which politicians engage in lawmaking—is something else; that it is not really part of the law.

As I mention in *Reconstructing American Legal Realism*, even though realists, like many other legal theorists, pay particular attention to adjudication, the realist conception of law as a set of coercive normative institutions goes beyond adjudication to consider other arenas replete with lawmaking, law-applying, law-interpreting, and law-developing functions. Joseph Singer is nonetheless correct to imply that I have not sufficiently emphasized the significance of legislation. He is also right to highlight the contribution of legal realism to the democratic conception of private law, in which the (numerous) statutory norms that govern our interpersonal relationships are no longer perceived as "an unfortunate intrusion of politics into the sphere of reason" or "the invasion of oppressive 'regulation' into a protected sphere of 'freedom'" (233), but rather as an alternative means—*complementary* to the common law—of lawmaking (230), which legitimately participates in "shap[ing] the content and values underlying private law" (237-38).

Unlike Singer, I do not think that the intricate relationship "between adjudication and legislation as law-making techniques" amounts to "a fourth tension" (228), on par with law's constitutive tensions of power and reason, science and craft, and tradition and progress. For me, as I have hinted above, it belongs to the realist insight that in law the discursive cohabitation of these three tensions always manifests itself *institutionally*, and taking the institutional characteristic of law seriously is often unwieldy because of the multiplicity and complexities of legal institutions. Be that as it may, Singer must be right in

⁹ Goodin, *supra* note 5, at 104.

claiming that “a legal realist approach to law may benefit from explicit analysis of the [relationship] between adjudication and legislation” (230). This analysis focuses, as Singer demonstrates, on the comparative advantages and disadvantages of these two forms of lawmaking.¹⁰ An important subset of this inquiry addresses not only pathological cases in which legislation “go[es] too far” (232), but also the seemingly banal but significant observation that legislatures “are responsive to the people, but they are more responsive to some people than others” (236). Studying the implications of this observation involves both lessons of my discussion thus far: in a democracy legislation is, and should be regarded as, a legitimate part of the law and as such must be treated as reason-based and public-regarding; but it is obviously also situated in the realm of politics, and thus is often the product of a *legitimate* give-and-take interest-based compromise. A realist theory of statutory interpretation—a challenge that must be left to another occasion—may well begin with this fundamental premise.

III. Idealism and Reality in Law

Both Brudner and Laura Underkuffler are worried that the realist conception of law overemphasizes reality in a way that might undermine law’s idealism. Brudner reminds us of the “respectable tradition of legal thought according to which . . . legal norms command respect for the rights of persons,” and he observes that “the power by which these norms are enforced, so far from detracting from their normativity, realizes their normative force against acts that contradict it.” In this view, which he favors, power is essential to the norm: it is what assures that the right is “mighty,” so that its realization would not be dependent on the virtue of law’s carriers and thus “its normativity would be defeated by the claimed normativity of might” (202).

Legal realists, however, do not deny law’s normativity and they certainly do not argue that legal rights should be contingent upon the virtue of the carriers of law. But they do insist that alongside this ideal, our understanding of law—and the way we study, teach, and practice law—should not focus solely on law’s ideals, in which power and interest are cancelled, but rather should incorporate, to use Underkuffler’s terms, the reality and thus “unmask[] how law falls short of normative ideals and the ends of justice” (253).

Underkuffler acknowledges the importance of such transparency, but she insists that there are situations where the “rejection of illusion . . . is neither practical nor wise” (252), because it may undermine the status of law as “sacred text” (253). There are two readings of Underkuffler’s claims: one threatens the appeal of legal realism, but is—I will now argue—unacceptable; the other nicely fits into the realist conception of law and helpfully highlights the realist emphasis on the tension between power/interest and reason/normativity, which is indeed inherent in law.

Underkuffler’s claim is radical and indeed subversive to the realist conception of law when she seems to sanction government’s “strategic use of illusion” and the ways in

¹⁰ For my own take on some of these issues, see Hanoch Dagan, *Judges and Property*, in *Intellectual Property and the Common Law* 17 (Shyam Balganeshe ed., 2013).

which “perpetuated” illusions are helpful to “reassure” and “convince us to continue to live our lives” even where the truth “is paralyzing, or demoralizing, or otherwise seriously undermining” (250, 252). When this claim is combined with Underkuffler’s reference to the ways “[w]e stress the aspirational ideals of liberty, fraternity, and equality . . . even as our laws and practices often realize more parochial, liberty- and equality-denying interests and outcomes” (251), it is disturbingly reminiscent of Thurman Arnold’s 1935 book *The Symbols of Government*.

Law, for Arnold, “is a way of writing about human institutions in terms of ideals,” which “meets a deep-seated popular demand that government institutions symbolize a beautiful dream within the confines of which principles operate, independently of individuals.”¹¹ Because its function is not so much to guide society as to comfort it, law is “a great reservoir of emotionally important social symbols” which can “give recognition to ideas representing the exact opposite of established conduct.”¹² This is why “the legal realist falls into grave error when he believes” that in demonstrating that law is not what it pretends to be, he points out to “a defect in the law.”¹³ For Arnold, “the escape of the law from reality constitutes not its weakness but its greatest strength,” because if law becomes “too ‘sincere,’” it would “suffer the fate of ineffectiveness which is the lot of all self-analytical people[,] . . . lose [itself] in words, and fail in action.”¹⁴ The most desirable structure of organized society is, Arnold claimed, “one where theories and ideals protect its institutions from criticism and permit them to function with confidence without either guiding them or interfering with them. . . . Where the spiritual government allows the practical institutions the most freedom, there we find the greatest progress and development.”¹⁵ Thus, the tension among different ideals of equality and between the egalitarian ideal and the actual practice is “the greatest instrument of social stability because it recognizes every one of the yearnings of the underprivileged, and gives them a form in which those yearnings can achieve official approval without involving any particular action which might joggle the existing pyramid of power.”¹⁶

This is a very dark view of the law, which I think Underkuffler is not advocating that we adopt. It abandons completely any possibility of ethical justification, making all principles and theories purely symbolic and leaving no intellectual basis on which to justify any moral position. Arnold’s views were thus rightly described as an apology for totalitarian authority¹⁷ and “the epitome of extreme juristic nihilism.”¹⁸

¹¹ Thurman W. Arnold, *The Symbols of Government* 33 (1935).

¹² *Id.* at 34.

¹³ *Id.* at 44.

¹⁴ *Id.*

¹⁵ *Id.* at 123.

¹⁶ *Id.* at 35.

¹⁷ See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* 111-14 (1973).

There is another, happier reading of Underkuffler's claims, one that does not celebrate law's illusions, but rather insists on the significance of law's ideals. Law's "aspirational qualities and justificatory demands," she correctly observes, affect "the presumptions that we bring to legal questions and the way that we, as a society, view transgressions" (251). Therefore, although "few moral or legal principles are observed with anything resembling complete consistency," these failures, she insists, do not justify "abandoning most of these principles or the ideals that they represent," which "goad us toward action, critique our efforts, and force us—continually—to justify deviation or neglect" (251).

Unlike certain misconceptions of legal realism, which *Reconstructing American Legal Realism* hopefully puts to rest, legal realists are happy to concur. Although distortions of law's ideals are part of the life of the law, Karl Llewellyn wrote, they are always deemed to be disruptions, which are "desperately bad": law's inherent quest for justice—the demand of justification—is not just "an ethical demand upon the system (though it is [also] that)," but is rather "an element conceived to be always and strongly present in urge," one that cannot be "negated by the most cynical egocentric who ever ran" the legal system.¹⁹

But this means that law's ideals are anything but illusions. This approach treats our aspirations as goals that we should take seriously in deeds, and not only words. Even if law's ideals can be only imperfectly achieved, we cannot be forgiving if they are knowingly denied, as Underkuffler seems to suggest (251). This is why the significance of law's ideals should not be taken to reveal, as Underkuffler proposes, "another constitutive tension in law beyond those that" I identified, namely a tension "between law as the real, and law as the ideal" (253). Rather, law's ideals should be placed, as they indeed are, at the core of its claim to normativity—the pole of reason in the tension between power and reason. And they should be taken with a grain of salt because when unchecked, law may, as Felix Cohen claimed, serve "to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy."²⁰ The legal realist persistence on constantly confronting law's ideals with the reality of power and interest is justified exactly because of its crucial function in allowing these ideals to properly serve us as a benchmark that is indeed hard to attain, rather than letting them be abused and become a set of reassuring Arnoldian camouflages.

IV. Legal Theory: Distinctive, Critical, and Synthetic

Just as he criticizes my understanding of the way law is different from politics, Brudner is also unsatisfied with the way Roy Kreitner and I typify legal theory. Kreitner and I claim that there are two interconnected aspects to the distinct character of legal theory: the attention it gives to law as a set of coercive normative institutions and its relentless effort

¹⁸ Neil Duxbury, *Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 *Oxford J. Legal Stud.* 11, 32 (1990).

¹⁹ K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L.J.* 1355, 1385 (1940).

²⁰ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 840 (1935).

to engage, incorporate, and synthesize the lessons of the other discourses about law. Brudner argues that by this we reduce the “core identity” of legal theory to a “sponge,” which combines the insights “of the social sciences and humanities that study law” under “its own name,” so that legal theorists can “take notes” in their “interdisciplinary ‘center,’” but have nothing to contribute (206). To be distinctive, Brudner insists, legal theory must be “the continuation at a fully self-conscious level of what legal actors already do intuitively,” and should thus focus on “bringing to light . . . the dialectical (self-critical) reason immanent” in “law’s categories and doctrines in light of law’s own fundamental ends” (206).

On its face, Brudner’s critique seems appealing. I have also argued elsewhere that the assimilationist strategy of a significant subset of “Law and” scholarship, which presupposes that law can only be theoretically analyzed and evaluated by other disciplines, poses a real threat to the identity of law as an academic discipline.²¹ Indeed, if law has no distinctive theoretical core, then the study of law should be understood similarly to that of area studies, and law schools are destined to become loose coalitions of distinct and fragmented sub-disciplines, whose only common denominator is their interest in law.²² From this unsatisfactory conclusion, Brudner seems to deduce that the only viable alternative is to turn inward in an attempt to strengthen the porous boundaries between law and its neighboring disciplines. But this conclusion does not follow. Disciplinary isolation is not the only alternative to disciplinary assimilation, and this is quite fortunate given the pitfalls of an isolationist conception of legal theory.

The hallmark of modern legal theory, as Kreitner and I demonstrate, is the understanding of law as a set of coercive normative institutions. Attention to that combination characterizes a wide range of legal theories with different positions on the relationships among the elements. And while various disciplines have something to say about each of these elements, no other discipline specializes in treating the conjunction.

Brudner may respond that this is a semantic argument without much interest: that legal theorists, in this view, are still “sponge specialists” who gain their insights about the relationship between coercion and normativity from political philosophy, and their insights about normativity and institutions from sociology, and their insights about institutions from economics, and so on. While there is some truth to the idea that insights about each element range across disciplines, this says little about the need for and power of legal theory, thus conceived.

The fact that insights travel and that elements of one discipline rely (implicitly or explicitly) on the insights of another is not an argument against the distinctiveness, robustness, or importance of the discipline or theoretical endeavor. To recall the common example: economics relies on a vision of rationality whose core development lies in the

²¹ See Hanoch Dagan, *Law as an Academic Discipline*, in *Stateless Law: Evolving Boundaries of a Discipline* (Helge Dedek & Shauna Van Praagh eds., forthcoming 2015).

²² See George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 *J. Legal Educ.* 437, 437, 438-39, 441 (1983); David E. Van Zandt, *Discipline-Based Faculty*, 53 *J. Legal Educ.* 332, 334 (2003).

field of psychology; and the psychological inquiry relies, in turn, on a metaphysics of personhood. This chain does not mean there is no internal economic theory, any more than it means that economists should be trained as metaphysicians in order to pursue their scholarly calling. Indeed, reliance of one discipline on insights from another, more basic discipline need not imply that the former is *reducible* to the latter. The reason for this, as James Penner (drawing on Jerry Fodor) explains, is that often “the difference between special sciences and more basic ones is not merely a difference in degree, or the level of abstraction at which they take account of phenomena, but a difference in kind.” This difference relies on the fact that “[b]asic sciences are of necessity blind to the multiply-realised, functional orderings or organisations of matter in the world,” which is exactly the focus of the special sciences.²³

No other discipline thematizes and concentrates on the three constitutive dimensions of law—its coercion, its normativity, and the institutional settings in which it is manifested—as well as on their intricate complex interrelationships, and the resulting combination that we call legal theory is thus bigger than the sum of its parts. Legal theory, thus conceived, is therefore distinctive, robust, and important; it provides legal scholars a theoretical angle and set of tools to evaluate legal phenomena; and it generates perspectives on legal problems that no other discipline specializes in producing.²⁴

But even if reliance on other disciplines does not necessarily rob legal theory of its distinctiveness, wouldn't a conception of legal theory that avoids such reliance and opts for the isolationist strategy be better? I think not. The sponge critique is both correct and important insofar as it warns against the domination of academic legal discourse by the toolkit of another discipline (such as economics) or against the effacement of law's distinctive features, which may occur if legal theory is understood as the sheer aggregation of insights about law gained by using theories and methods of other disciplines. But Brudner's claim goes much further than that, suggesting that these insights should be excluded from the core of law as an academic discipline. Such exclusion must be unacceptable, and the reason for this is founded on nothing less than one of law's most distinctive constitutive features: the fact that its normative prescriptions recruit the state's monopolized power to back up their enforcement. Because legal prescriptions have such far-reaching effects on people at large (and not only on the litigating parties), legal reasoning—the bread and butter of law both as a practice and as an academic discipline—should not blind itself to these broader social ramifications,²⁵ even if, in appropriate cases, it may end up realizing that it cannot or should not (fully) address them. If any discipline should be interested in (and in certain contexts even committed to) incorporate insights from its

²³ James Penner, *Decent Burials to Dead Concepts*, 58 *Current Legal Probs.* 313, 327-28 (2005).

²⁴ This is also why a truly interdisciplinary analysis of law—as opposed to the use of law as raw material for the application of a non-legal disciplinary methodology or theory—faces three challenges: selection, integration, and synthesis, which all require legal scholars, as Kreitner and I show elsewhere, to (explicitly or implicitly) rely on legal theory. See Hanoch Dagan & Roy Kreitner, *The Interdisciplinary Party*, 1 CAL 23 (2014).

²⁵ See Max Radin, *My Philosophy of Law*, in *My Philosophy of Law* 285, 299 (1941).

neighbors—if synthesis is to be an acceptable, indeed important, part of the self-understanding and the disciplinary core of any academic field—it is law.

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Both the legal realist insistence that law is not only adjudication (discussed earlier) and this commitment to legal theory's embeddedness in the social sciences and the humanities are premised on the realist appreciation of the corrupting potential of law's power, which should warn us against conceptions of law that are content with the subset of moral principles which are already embedded in past adjudicative practices. These principles *may* turn out to be, especially in Brudner's hands, "self-critical" and thus allow "dynamism" and "reformation" (206). But not necessarily. They may just as well constitute, as Dan Farberman argues, "false constraints of tradition," which must be exorcised in order for "lawyers and judges [to] become free to push the law toward a more human and useful form" (222). This is why "[w]here a tradition exists," legal realists insist that "it is [critically] investigated and if it is found wanting, it is destroyed" (224).

Farberman is correct in reading in the realist texts such a "spirit of rebellion," which is evident, for example, in "Cohen's almost bloodthirsty gaze at the false idols of formalism" (220). But he claims that my project of *reconstruction* is too "tamed and therapeutic" (224) and insists that a much more radical approach is necessary. Since "[o]nly once the constraints are broken . . . is movement possible" (218-19), the "process of achieving clarity" must begin with destruction (220). Only in destroying can the realists "get down to the work of figuring out the truth" and "assert and defend the place of the human in the law" (220).

This "spirit of rebellion" indeed drives—as it should—the realists' suspicious treatment of doctrinalism. To be sure, unlike many of its caricatures, legal realism acknowledges, and indeed embraces, the felt stability of the doctrine at a given time and place, which plays an important role in addressing both the guidance and the constraint prescriptions of the rule of law. But while the doctrinal language of law typifies the daily life of the social practice of law—could we (metaphorically) call it lawyers' "normal science"?²⁶—it need not and should not inhibit law's critical appraisal.²⁷ This is exactly why realists insist on rejecting the isolationist strategy Brudner offers,²⁸ and advocate suspicion of tradition and willingness to upset law's internal resources so as to enable, indeed facilitate, "paradigm shifts" in its evolution. But this need not—it should not and, on my reading of the original legal realists, it did not—call for a celebration of destruction or "historical exorcism," which almost conclusively presumes that the contemporary legal

²⁶ My reference here to "normal science," and later to "paradigm shift," evokes of course Thomas Kuhn's distinction in Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1962).

²⁷ See Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. Pa. L. Rev. (forthcoming 2015).

²⁸ And this is also why legal realists happily admit in their contribution to the "demotion" of purely doctrinal analysis "to lesser status within the modern U.S. legal academy." But compare John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 Harv. L. Rev. 1640, 1656 (2012), who is critical of this development.

landscape is “a monstrous inheritance” (220). Quite the contrary: the spirit of modernist optimism, which inspires Farberman’s belief in our ability to “make anew”—“to assert and defend the place of the human in the law” (220), also implies that discarding too easily our legal tradition may be unfortunate, because that tradition *may*, as Brudner implies, be worthwhile; after all, it is the product of efforts of people like us—often fallible and self-interested, but nonetheless constrained by reason and at times moved by the people’s rights and the public good. Furthermore, the joy which indulgence in destruction oftentimes generates to its practitioners suggests that advocacy of destruction deserves the same suspicious and thus critical gaze that realists (like Farberman and I) apply to sponsorship of indefensible conventional legal wisdoms.

V. Private Law, Autonomy, and Equality

Finally, while only Brudner criticizes my conception of private law, his critique is—as usual—both sharp and important. Brudner argues that by admitting “collective goods” into private-law entitlements, my understanding of private law “erase[s] private law as a category distinct from public law” (210). He is aware of my distinction “between public ends or values that shape the entitlements and those that do not,” but is unimpressed by it, because he believes that “[n]either economists nor social egalitarians will see in this distinction a serious constraint, because their efficiency and distributive goals shape the entitlements” (209).

I share Brudner’s concern that erasing the *idea* of a private law, which is distinctive from public law, might efface private law’s potential value and eradicate the virtuous role private law plays that cannot be properly performed elsewhere. And I also agree that private law, at its core, governs our horizontal interactions as free and equal persons—namely: neither as patients of the welfare state’s regulatory scheme, nor as citizens of a democracy—and is thus guided by concerns which are different in kind from both efficiency and distributive justice.

My disagreement with Brudner lies elsewhere, and is in fact clearer to me now than it was when *Reconstructing American Legal Realism* was published. As I argue in more recent (mostly co-authored) papers, a liberal private law can, should, and, to a significant degree, already does stand for a robust conception of *just relationships* which is committed to enhancing our autonomy, rather than merely to safeguarding our independence, and is not content with protecting our formal equality, but rather aims at vindicating our substantive equality.²⁹

This conception of private law is indeed very different from the traditional liberal understandings of private law as the law of independence and formal equality, which is

²⁹ Much of the remainder of this section relies on Hanoch Dagan & Avihay Dorfman, *Just Relationships* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537), and Hanoch Dagan & Avihay Dorfman, *The Justice of Private Law* (Sept. 17, 2014) (unpublished manuscript) (on file with author). Some of it draws on my recent work on contract theory, including a piece co-authored with Michael Heller. See Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 *Law & Contemp. Probs.* 19 (2013); Hanoch Dagan & Michael A. Heller, *Freedom of Contracts* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325254).

shared not only by libertarians, but also by modern Kantians³⁰ and Hegelians (notably Brudner³¹) as well as many other liberal egalitarians (like John Rawls and Ronald Dworkin³²). Indeed, liberals tend to conceptualize private law—at least at its core, which is often contrasted with a regulatory layer that may be imposed over its common law skeleton—as that part of our law that is resistant to overly demanding interpersonal claims. Although they insist that a commitment to people’s self-determination and thus to their substantive equality should guide public law, the liberal proponents of this traditional view hold that such a commitment should not affect *private* law; and they invoke the traditional conception of the private-public distinction, which relies on the notion of a division of (institutional and moral) labor between the responsibility of the state to provide a fair starting point for all and the responsibility of the individual to set and pursue her ends using her fair share. They subscribe, in other words, to a private law libertarian position.

This understanding of private law, which renders the canonical liberal commitments to individual self-determination (and not merely independence) and to substantive (and not merely formal) equality irrelevant to our interpersonal relationships, is profoundly unsatisfying. Discarding liberalism’s most important commitments from the realm of private law is troubling due to two facts about our human condition: human interdependence and personal difference.

Our practical affairs are deeply interdependent. They are replete with both voluntary and involuntary interactions with others, ranging from fairly trivial transactions to the most crucial relationships in our lives. We invite, or are invited by, others to join projects, either because social interaction is critical to the project or because enlisting others makes these projects possible or practical. Our projects also might render vulnerable the legitimate interests of other people, including those who stand beyond the privity 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. The traditional conception of private law renounces the responsibility of private law to facilitate such interactions; it thus compromises the significance of our interpersonal relationships to our conceptions of the good life.

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. In this context, once again, the traditional conception is disappointing, especially given the fact of personal difference, namely, the fact that we all constitute our own distinctive personhoods against the background of our peculiar circumstances. The traditional conception of private law replaces a concern for what it is for *real* people to relate to one another as free and equal agents with a concern for what it is for equal abstract beings to relate to one another. By assigning the sole responsibility to address our personal

³⁰ See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Theory* (2009); Ernest J. Weinrib, *Corrective Justice* (2012).

³¹ See Alan Brudner, *The Unity of the Common Law* (with Jennifer M. Nadler) (2d rev. ed. 2013).

³² See John Rawls, *Political Liberalism* 268-69 (1993); Ronald Dworkin, *Law’s Empire* 296, 299 (1986).

differences to public law, the traditional conception thus implicitly rejects any claims private individuals may place on one another as a matter of relational justice.

Taking seriously the facts of interdependence and of personal difference implies that the liberal commitments to individual self-determination and to substantive equality are just as crucial to our horizontal relationships as they are to our vertical ones, although they may entail different implications in these different dimensions. As the law of our horizontal interpersonal relationships, the distinctive value of private law lies in its construction of ideal frameworks of respectful interaction—of just relationships—conducive to self-determining individuals. Only private law can construct and sustain the variety of frameworks for interpersonal relationships that are necessary, given the normative significance of our interdependence, to our ability to form and lead our chosen conception of life. And only private law can cast these frameworks of relationships as interactions between free and equal individuals who respect each other given the persons they actually are, thus affirming and vindicating our claims from one another to relational justice. Both of these prescriptions highlight the private law's distinctiveness, and both require that we abandon the traditional conception of private law and the conventional understanding of the public-private distinction.

A satisfying conception of private law—the law of our interpersonal relationships—appreciates its indispensable role in forming and sustaining the variety of frameworks for our interpersonal interactions which are necessary to our ability to form and lead the conception of our life; it thus endorses private law's structural pluralism. Given the diversity of acceptable human goods from which autonomous people should be able to choose and the distinct constitutive values of those goods, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. This liberal commitment to personal autonomy by fostering diversity and multiplicity is relevant to private law because, given the endemic difficulties of both transactions costs and “obstacles of the imagination,” many of these frameworks cannot be realistically actualized without the support of viable legal institutions. The liberal state should thus enable individuals to pursue valid conceptions of the good by proactively providing a multiplicity of valuable options. A structurally pluralist private law follows suit by including diverse types of private law institutions, each incorporating a different value or different balance of values.

A liberal private law should also affirm and vindicate our claims to relational justice from one another. For persons to relate as equals, their interactions must be cast in terms of relationships between self-determining individuals who respect each other given the persons they actually are, and thus must be partially fixed by reference to their relevant personal qualities. In other words, to guarantee that the interacting parties meaningfully recognize each other as free and equal persons, private law must structure the parties' terms of interaction so that it conceives the person as a substantively (rather than formally) free and equal agent. A truly liberal private law thus requires exactly the kind of accommodative structure that the traditional conception of private law disallows.

Whereas this understanding of private law challenges mainstream private law theories, its prescriptions are by no means strangers to private law itself. Indeed, private law as we know it is quite different from its conventional (libertarian) portrayal. To be sure, private law does not always—let alone fully—comply with these prescriptions: in certain spheres of human interaction it undersupplies such frameworks, while in some others it fails to properly observe the injunctions of relational justice. But rather than undermining this theory of private law, these blemishes highlight its reformist potential, which relies on a critical, yet by no means destructive, approach to tradition, and can therefore help push private law to better conform to its normative promise.

VI. Conclusion

The legal realist literature of the 1930s is not free from excesses, half-baked ideas, and sheer follies. But it also includes a legacy worth reviving. I find the conception of law embedded in it, when read charitably, both insightful and important. In *Reconstructing American Legal Realism*, I attempted to defend its validity and demonstrate its significance to a range of theoretical inquiries. In reviewing my book, Brudner, Farbman, Singer, and Underkuffler pushed me to clarify and refine my positions on the distinction between law and politics, the division of labor between legislation and adjudication, the role of ideals and reality in both law and legal theory, the nature of legal theory in an interdisciplinary era, and the public-private distinction. I hope that my (admittedly sketchy) responses are satisfying. I am deeply grateful to Brudner, Farbman, Singer, and Underkuffler not only for their generous words, but also for the opportunity to be a part of such an intellectually inspiring experience.