In Defense of Embedded Atomism: A Reply to Critics

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Abstract

This short article responds to the five critiques of the revised edition of The Unity of the Common Law that appear in this issue of Critical Analysis of Law. Three themes emerge from this response. One is that private law’s autonomy is justified by the need for a sphere of atomism within the total public life sufficient for the dignity of the human individual. Another counters critiques of the possessive individualism upon which private law rests by arguing that its excesses are removed as the dignity in owning becomes integrated into the larger life sufficient for dignity. A third disputes the claim that transactional law’s unity is rendered utopian or defunct by the present disorder in civil society.

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I thank the editors of Critical Analysis of Law, Markus Dubber and Simon Stern, for providing the forum for this conversation and the commentators, Hanoch Dagan, François du Bois, Roy Kreitner, Peter Ramsay, and Igor Shoikhedbrod for engaging thoughtfully and generously with the revised edition of The Unity of the Common Law. I’ll respond to the critics according to the alphabetical order of their surnames.

Hanoch Dagan focuses on the chapter on property law.¹ He disputes my claim that property is normatively established prior to political association and then judicially modified for the sake of the common good of self-determination. More specifically, he rejects my claim that open market exchange legitimates acquisition as “property” for the reason that, given disparities of purchasing power, passing on the formal opportunity to buy cannot count as consent to the purchaser’s ownership. Dagan also rejects the idea that judicial restraints on the social power conferred by common-law property suffice to remedy the latter’s injustice. Indeed, he says, such restraints “add insult to injury” (273).

The idea that unilaterally acquired holdings become property in open market exchange (hence prior to political association for common ends) is crucial to the argument for private law’s autonomy, for without private property there is no private law. My property is validated in open market exchange in that I receive recognition for my ownership of an object’s exchange value only in surrendering the unilaterally acquired object to the ownership of another and only in paying the social cost (reflected in the competitive

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price) of all others’ forgoing the enjoyment of what I receive in return. I anticipated resistance to this idea by expressing the obvious misgivings a reader would have with it. How can others’ passing on the opportunity to acquire the object count as recognition of my ownership if some lack the wherewithal to purchase?

The answer is that, even if ultimately interconnected, the concepts that organize transactional law must be understood in sequence, so that their mutual dependence can be an interconnection between distinct concepts rather than a borderless muddle. So, one must begin an account of property law with a clear concept of property. That concept presupposes for its intelligibility human beings conceived only as free wills—that is, only as capacities for detachment from objects—for only beings independent of objects can master them. Such beings are thus considered in abstraction from their determinate characteristics and therefore from their attributes of rich or poor. But if only free wills can own unfree things, then the social legitimation of their exclusive ownership must likewise refer to nothing but their free wills. It cannot suddenly bring in considerations that were foreign to the concept of property in the first place. Accordingly, the market in which ownership is validated must be conceived as a society populated by free wills considered apart from all empirical inequalities of purchasing power—indeed, even from needs and wants. The feature of the market relevant to the concept of property (and to jurists as distinct from economists) is that it is a system of commodity exchange and ownership recognition, not that it is a system for satisfying needs and wants.

But of course the end of the story regarding property is not the end of the story regarding justice in holdings, for inequality of purchasing power has an obvious bearing on a just distribution of welfare. Welfare is a concept distinct from that of property, and their interconnection is required for full justice in holdings. Allowing welfare to swallow up property submerges the end-status of the person that welfare’s rule is supposed to perfect. Equating the mutual recognition of traders with complete justice in holdings collapses justice in holdings into the interests of those with the means to trade. Justice in holdings is thus the product of the mutual limitation of property and welfare. But legal realists in general and Dagan in particular dissolve property in the allocation of decision-making authority over resources of which the common welfare approves.

There is another point to make here. No instance of dialogic community (mutual recognition) deserves scorn. In ideal market exchange, we see a mutual recognition of the general and the individual will such that the individual’s ownership is omnilaterally recognized in return for the individual’s paying the cost of all others’ frustration. (A symbolic representation of this is the custom at auctions where the losing bidders applaud the winner once he has paid a price that reflects the value they have forgone.) That is an instance of dialogic community embedded amongst individuals conceived at their most egocentric and indifferent to community. It should therefore attract not disdain, but the same sort of wonder with which we behold, say, the manifestations of sociality among lions. I have argued that the just political community is the ensemble of instances of dialogic commu-
nity necessary and sufficient for full human dignity. Private property established in market exchange is one such instance; the rule of the common welfare is another.

Dagan’s second complaint is that judicial modifications of private property for the sake of the rule of a genuinely public law are insufficient to remedy the injustices to which a private property regime inexorably leads. There is need, he says, for the recognition of affirmative duties of concern for self-determination within private law itself, and he claims that I allow for no such duties. Dagan writes: “The only ones who are duty-bound to respect our right to self-determination in this Hegelian world are the legislators and regulators of the welfare system as well as the judges who refuse the endorsement of property rights when such an enforcement is likely to generate unacceptable vulnerability; as individuals, by contrast, we are free to ignore our fellow citizens’ claims for self-determination as long as we strictly respect their independence” (275).

Well, that is not strictly true. In the chapter on torts I argue that negligence law breaches the divide between respect for proprietary sovereignty and concern for self-determination. Negligence law imposes an in personam duty of affirmative concern for agency goods (i.e., things necessary for self-determination), albeit within limits consistent with private law’s premise of atomism and the consequent distinction between misfeasance and nonfeasance. It thus places the right to self-determination within the sphere of our interpersonal relationships, just as Dagan would have private law do. Perhaps Dagan would have private law do more in this regard. Perhaps he would have it enforce private duties of service and care outside the reciprocity constraints of contract and negligence law. But then he is advocating coerced unilateral acts of beneficence tantamount to servitude—something that has no place in the life sufficient for dignity. In the concluding note to the property chapter, I argue that the modern corporation is incipiently a place where reciprocal duties of assistance become embedded within the private sector itself, so that, potentially, the vulnerable are active participants in a subsidiary common life rather than passive recipients of state welfare. Yet Dagan accuses me of consigning the poor to passivity (275). One difference between my view of these matters and his is that my legal world is an objectively existing whole divided into spheres each performing the function required for the life sufficient for dignity, whereas Dagan’s legal world is malleable matter shaped by a realist artificer into whatever assortment of institutions will best further a medley of values.

Dagan thinks that my person-validating account of acquisition fails to explain why the mere existence of unowned things challenges the person’s end-status and, in apparently condoning endless acquisition, rationalizes “some of the less appealing features of human history” (277). I did try to explain the drive to acquisition but perhaps was not sufficiently clear. The idea is that the person’s retreat into the abstract self as the locus of unconditioned end-status is a reflex away from the world of contingent things. As such, it remains dependent on that world in the way that a negative is dependent on what it is a

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2 I deal more fully with this in Alan Brudner, Constitutional Goods 411-20 (2007).
negative of. This dependency contradicts the claim of unconditioned end-status and so generates an intellectual necessity to overcome the contradiction by reducing ostensibly independent things to means for persons. Where dignity is equated with owning, the contradiction engenders a drive to infinite accumulation, hence to a competition for self-validation resulting in the extravagances with which we are all familiar. But far from treating insatiable acquisitiveness as natural to rational agents, a Hegelian account of property relativizes it to an immature phase of human development where dignity is equated with the person’s mastering the non-human world. Such an account, instead of either airbrushing or denigrating private property, faces up to the egocentrism at its base but then shows how acquisitiveness is moderated as the dignity in owning becomes integrated into the life sufficient for dignity—a life that includes limitations on property for the sake of self-determination, family life, corporate life, and citizenship.

Finally, Dagan claims that my account of property is atomistic as opposed to relational and yet property, as Hohfeld saw, ineluctably involves a relation to other persons. In fact, I say that property is a relation among persons as owners of things. Yes, my account is atomistic to begin with, involving a direct relation of subservience between a thing and a person. But my argument’s thrust is precisely to show how the atomistic person is compelled by the necessity of validation to move step by step (notorious possession, reasonable use, exchange) into progressively more robust relations with others. In this way, intersubjectivity is validated as the matrix of valid worth-claims out of the mouth of the very atomistic person who denies the necessity of relation to others; and this dependence of community on the atomistic individual’s spontaneous confirmation in turn allows the atomistic individual to recognize community as the ground of its separate worth as an individual.

By contrast, Dagan privileges a one-sided relational autonomy that effaces the worth of the separate (independent) self and then seeks to retrieve “sole and despotic dominion” over certain kinds of things as an aspect of relational autonomy. But this retrieval is ad hoc and full of contradiction, for how can deference to the property-claims of the isolated individual further relational autonomy? Independence is not, Dagan insists, instrumental to autonomy but rather has intrinsic value. Nevertheless it is a constitutive part of autonomy, which, he thinks, is the ultimate value. But whether instrumental or constitutive, independence is still, on Dagan’s account, unilaterally subordinate to autonomy. And that is unilaterally and illiberally to subordinate the individual to the common good.

François du Bois is sympathetic to the project of recovering tort law from its contemporary immersion in public policy and social insurance but has misgivings about the way I argue for its recovery. He makes three main points. One is that I mischaracterize tort law’s difference from criminal law and social insurance by calling it a law for atomistic in-

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dividuals abstracted from membership in a civic body. In doing so, he argues, I miss or efface the relational aspect of tort law. He, by contrast, sees tort law’s distinctiveness in its giving force to bilateral as opposed to communal relationships—or, in Stephen Darwall’s terminology, to bipolar obligations as opposed to “obligations period” (289). Du Bois’s second point is that, by understanding tort law’s role in a legal system as vindicating the equal worth of persons, I have not made a convincing case for preserving it, for the criminal law is adequate for this purpose. His third criticism makes a similar point with respect to social insurance. It is that, by understanding negligence law as delineating and vindicating equal rights to the material conditions of dignity, my account of tort law “fails to distinguish the duties individuals owe each other under tort law, as a matter of corrective justice, from those they owe each other as fellow citizens, as a matter of distributive social justice” (298).

All three criticisms miss the mark. The first emphasizes one feature of a synthetic presentation of tort law at the expense of another. I do not deny the relational aspect of nuisance and negligence law. On the contrary, I try to show how tort law evolves from the purely atomistic standpoint of trespass to the progressively more relational frameworks of nuisance and negligence law. Yes, the latter torts continue to presuppose the atomistic individual whose stability they simultaneously refute. But this is just the tension (between relationship and atomism) that afflicts private law taken in isolation and that is finally resolved only in the whole I call dialogic community. There, bilateral relations between otherwise dissociated persons and the civic bond uniting citizens are understood as equal phases of a development toward the atomistic individual’s becoming nested in the political community sufficient for dignity. Nor is my contention that private law is a law for dissociated individuals incompatible with du Bois’s claim that tort law is distinctively about bilateral obligations. On the contrary, his characterization presupposes mine. Tort law can regard individuals as having bilateral obligations unmediated by their civic obligations only if it sees individuals as having a claim to respect resting on their own capacities and so independently of their membership in a common life. But to view individuals as morally self-sufficient is to view them as apolitical (not as political animals in Aristotle’s sense), hence as naturally dissociated. Vindicating tort law (and private law generally) requires defending this atomistic conception of the person as itself embedded in the political community sufficient for dignity on which dignity-seeking beings depend.

The second criticism assumes that just because tort and criminal law both vindicate the equal worth of persons, the existence of criminal law renders tort law superfluous on my account. But that assumption is mistaken for the very reason du Bois has for following Darwall. Criminal law vindicates human rights. It regards the criminal as having violated, not merely the specific victim’s right, but the right of humanity that the victim shares with all free agents. Tort law, by contrast, singles out the specific victim and seeks to vindicate his separate person against the tortfeasor’s wrongful subordination of him. Therefore, even though the purpose of both is to vindicate the equality of persons, each is separately essential to that end, for tort law regards the individual in his singularity, where-
as criminal law views him as a *member* of a “moral community” (in du Bois’s phrase). To regard the individual in his singularity, however, is to regard him atomistically. Du Bois wants to preserve the immediacy of the relation between plaintiff and defendant while rejecting the atomism on which immediacy depends. This amounts to wanting to eat one’s cake without having it.

The same problem mars du Bois’s critique of my account of the central features of negligence law. Du Bois writes: “In founding tort law on the same ‘quest for dignity’ by human beings he ascribes to social insurance, Brudner’s approach . . . ultimately fails to provide a robust account of central features of tort law” (292). He then goes on to criticize my accounts of duty, fault, and remedy in negligence law on the basis that they invoke the same abstract equality of persons that underlies social insurance. So the inbuilt reciprocity of the neighbor principle fails, he says, to distinguish bilateral duties from citizenship duties. The idea of fault as imposing a non-reciprocal risk fails to “differentiate between the demands of the parties in a way that would enable us to identify one as a wrongdoer and the other as a victim” (293). The idea of an equal right to the material conditions of dignity fails to explain why the tortfeasor must restore his victim to the level of welfare he enjoyed prior to the wrongful transaction even if that level exceeds or falls short of what is needed for an autonomous life.

The answer to all these criticisms is—once again—embedded atomism. Atomism is the view that individual human beings are morally self-sufficient (their dignity rests on their own innate capacities), hence naturally solitary and mutually indifferent. Embedded atomism is the view that atomism is mistaken if proposed alone but preserved as a necessary part of a political teleology culminating in the life sufficient for dignity. Negligence law is distinguished from social insurance in that it imposes duties of mutual concern between individuals self-contradictorily viewed as naturally self-sufficient and solitary; hence it imposes these duties within limits consistent with private law’s distinction between misfeasance and nonfeasance. That is the contradiction underlying negligence law—a contradiction finally resolved only in the dialogical political community, which preserves all instances of mutual recognition engendered by the atomistic self in its quest for validation. The neighbor principle delineates *in personam* duties of equal and reciprocal care—*in personam* precisely because it conceives the interacting persons as mutually indifferent atoms rather than as members of a civic whole. The idea of non-reciprocal risk causing injury defines how mutually indifferent and equal actors can wrong each other without assaulting the other, trespassing on property, or interfering with the enjoyment of property. That idea assumes a background of socially normal risk relative to time and place (so it doesn’t flatten out the variety of settings, as du Bois contends) and equates wrongful risk with socially abnormal, hence unreasonable risk, just as Lord Reid did in *Bolton v. Stone*.

It is strange that du Bois would see the test of non-reciprocal risk as indeterminate with respect to the risk imposed by cricket clubs and the risk imposed by neighboring res-

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4 [1951] AC 850.
idents. The risk imposed by a cricket club exists independently of tort law; it consists in the danger to well-being created by cricket balls flying over fences. That risk might or might not be excessive relative to the background empirical norm. The risk imposed by a resident (that the cricket club will have to cease operations), by contrast, presupposes a legal regime delineating permissible risk-imposition. It does not exist independently of tort law. But how can a risk that only tort law creates be viewed by tort law as socially excessive—even potentially?

Lastly, we come to remedy. I say that the right vindicated by negligence law is a right not to proprietary sovereignty but to the security against wrongful injury of one’s holdings and bodily integrity now understood as constituents of well-being—as material conditions of autonomy. That is why, in contrast to what is true of trespass, there is no negligence without actual damage. Social insurance vindicates the same right to the conditions of well-being, and because it views individuals as members of a civic body providing collective security against catastrophic loss, it compensates for accidental injury irrespective of wrongdoing up to the level required for a humanly decent life. Tort law, by contrast, views the parties to an accident as mutually indifferent strangers who must compensate those whom they harm only if they have wrongfully harmed them. The requirement of wrongdoing determines the unique way in which tort law vindicates the right to material security. Negligent wrongdoing consists in an implied claim of permission to impose what is objectively a socially excessive risk on a “neighbor”—one that materializes in injury. Tort law’s remedy for the wrong is to invalidate the claim of permission by rolling the world back to where it was prior to the wrongful transaction as far as money can do that. This will sometimes restore the wealthy man to his opulent life and the poor man to his still wretched one. That is the consequence of vindicating a right to material security within the limits drawn by a conception of persons as self-centered. Again, therefore, it is the assumption of atomism that distinguishes tort law from social insurance, and that is what I say throughout the chapter on torts. Because dialogic community vindicates atomism as embedded within (hence limited by) a larger whole, it also vindicates tort law along with its index of compensation and otherwise unstable distinction between misfeasance and nonfeasance (du Bois erroneously says that I abolish this distinction).

Du Bois sketches an account of tort law that, he says, would remedy the deficiencies of mine. Such an account would do away with the general formulations of right and wrong applicable to multilateral obligations and adhere to the situation-specific factors that give rise to bipolar obligations between specific individuals in concrete circumstances. “As it is owed,” he says, “by one specific individual to another, a bipolar obligation can be unique to the persons concerned . . .” (299). Or this: “Negligence liability encompasses a mosaic of situation-specific rights/duties which arise from the particular relationship of the parties rather than from a general overarching principle” (300). Thus, whereas on my account the atomism of free and equal persons grounds the independence of bilateral obligations, on du Bois’s account, particularity abstracted from universality tout court does this
work. But this, it seems to me, does away with the notion of law altogether. It replaces law with the palm tree justice of Deborah.

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In the sort of critical engagement with one’s work for which all of us hope, Roy Kreitner reflects on the role markets play in the project of self-validation that, I argue, informs transactional law from the most primitive stages of unilateral possession and use to the complex form of intersubjectivity achieved in negligence law.\(^5\) Kreitner rightly emphasizes the role of markets in validating ownership (hence the person’s end-status vis-à-vis things) and rightly observes that a special kind of market is required—one in which persons exchange, not only material things, but also promises to exchange values in the future; for only in such a market are persons sufficiently emancipated from dependence on things to be capable of mastering them \textit{qua} exchange values. With Kreitner’s characterization of my view of markets I have only one quibble. I did not intend them to be parenthetical to my account of property and contract law. I meant them to play the crucial role he ascribes to them.

However, Kreitner draws an implication of the importance of markets for my account of contract law that I must disown. He says that, by my account, the common life sufficient for dignity incorporates without revision the markets of advanced capitalism, where money is not simply a means for equating and exchanging consumption goods (C-M-C) but is rather an end-in-itself—the purpose of exchange (M-C-M’). Moreover, he thinks that this account stands in tension with my view of industrial property as embodying political values of worker self-determination and democracy—a view that could be taken as a critique of capitalism’s way of hiding disagreement about substantive value behind agreement about exchange value.

Because, as I argue, exchange in a competitive market validates ownership, what one finally owns is exchange value rather than the thing one possesses in isolation. This is true whether exchange takes the form of C-M-C or M-C-M’. Further, the exchange of promises is the form of exchange in which ownership is perfected because such an exchange achieves the emancipation from material things required of owners. So, the executory contract concluded in a market open to all agents is an essential feature of the life sufficient for dignity. So is the rule of contract law that makes money damages the normal remedy and specific performance exceptional, for the law thereby treats contracting parties as persons untethered to material things unless they figure importantly into self-authored projects. But all this goes to the way contract law must view market traders; it says nothing about how market traders must behave or about how markets must evolve. Traders who promise to exchange X for a certain quantity of currency might be trading for consumption purposes in accordance with the C-M-C model or they might be exchanging for profit according to the M-C-M’ model. It is all the same from the standpoint

of contract law and its institution of the executory contract. It might be that the evolution of markets from C-M-C to M-C-M’ is necessary for the cultivation of the autonomous personality whose endorsement the dialogical political community can count as alone genuinely validating. Hegel seems to have thought so, if paragraph 194 of the Philosophy of Right is an indication. But this, it seems to me, is relevant to the understanding of society and economy, not to contract law.

Now, I do say that where dignity is equated with owning, the project of self-validation takes the form of an unlimited acquisitiveness and that acquisition for consumption, because still dependent on material things, contradicts the end-status sought to be validated. So, where all dignity eggs are in the property basket, there will indeed be an impetus to move from acquisition for consumption to acquisition for the sheer augmentation of value ad infinitum. And this will of course give rise to the domination of persons by a capital run amok that Marx criticizes and that defeats the project of self-validation that acquisition was meant to validate. However, this is true only as long as dignity is equated with owning. As the dignity in owning becomes integrated into the complete life sufficient for dignity, the drive to accumulation is moderated. Hegel saw this happening in the democratically run corporation, where, he says, one’s being a “somebody” rests securely on merit-based membership in a social unit and so need no longer depend on amassing external signs of success in business. So, although the political life sufficient for dignity is possible only under the conditions of advanced capitalism, we can imagine that such a life would also tame the latter’s excesses by integrating ownership into a more comprehensive organization of dignity goods.

Kreitner wonders whether my treatment of industrial property stands in tension with the rest of the property chapter, threatening to disrupt the justification of private property and contractual exchange given earlier. I deal with this issue in the chapter’s concluding note and conclude that it does not. This is because the dialogical political community encompasses all instances of mutual recognition within a well-ordered whole in which no constituent instance claims authority to subsume the rest. The mutual recognition of atomistic property-owners in contractual exchange is one such instance; the mutual recognition of corporation members is another. Because all examples of dialogic community are preserved as mutually supporting parts of a whole, the limitation on industrial property for the benefit of workers has no impact on the right (absent necessity) of a cottage-owner peremptorily to exclude a trespasser. And intuitively that seems right.

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Peter Ramsay’s critique of my work as a whole adduces concerns systematically presented in his important book, The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law (2012). Simply put, the concern is that the inclusive whole in terms of which

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7 Peter Ramsay, The Dialogic Community at Dusk, 1 CAL 316 (2014).
I present the penal law is, in present circumstances, a normative ideal lacking practical reality and explanatory force. The present circumstances are characterized, he argues, by the hegemonic expansion of the real autonomy paradigm in the penal law and by its retreat in the larger political society. So, in the penal law, we see ever greater resort to inchoate offenses in which the act requirement is minimal as well as to negligence as a fault standard for criminal liability, all with a view to protecting the vulnerable from the dangerous character. The formal agency paradigm to which legal retributivism belongs and which connects punishment to the choice of the criminal \textit{qua} rational agent has, he claims, largely disappeared. Meanwhile, in the larger political society we see the reverse momentum: the erosion of the welfare state and of collective bargaining in the interests of incentivizing investment and economic growth.

I'm going to assume that Ramsay's richly detailed picture of the current state of the penal law and civil society is by and large accurate. Indeed, I think it is. Does it follow that an interpretation of the penal law and civil society in terms of an inclusive conception of public reason encompassing both formal agency and real autonomy paradigms departs from reality or, worse, grasps a life that is already defunct? I think not for two reasons.

First, as I say in the Introduction to \textit{Punishment and Freedom} (and as Ramsay acknowledges), there is bound to be a wider gap between the ideal and the real in the penal law than in private law because the internal reason of the penal law is more vulnerable to statutory interference by politicians pandering to anxieties about personal security. So the penal law theorist is entitled to more leeway on the test of fit than is the private law theorist, just because divergences are more apt to reflect short-run fluctuations in social attitudes than to indicate the existence of a better theory. This is particularly so in jurisdictions without an entrenched Bill of Rights and judicial review of legislation. Moreover, the anxieties and political pressures that threaten the penal law's good order in the best of times are increased a hundredfold during the times in which we now live. As a result, what ought to be temporary emergency powers directed to a perceived existential threat become normalized and built into the everyday penal law. This, not (necessarily) overprotective laws themselves, is the mistake that makes the ideal seem unreal. Were anti-terrorism laws that remove the act requirement viewed as expressions of an emergency power, they would not be part of the settled reality that ideal theory must explain, and so their existence would not be troublesome for the theory.

Ramsay might respond that the dominance of the real autonomy paradigm is visible not only in extraordinary anti-terrorism laws but also in the everyday law of sexual assault and gun possession. My answer is that the expansion of what are by nature parts of a whole into the principle of the whole cannot stand as testimony against the imminence of the inclusive whole because the latter proves itself precisely by dialectical inversions of partial principles when treated as absolute. Indeed, the primacy of the inclusive whole is visible in Ramsay's own critical analysis of the "insecurity state" and its internal contradictions. Ramsay assumes that the dialogical political community was realized in a golden age lasting roughly from 1945 to the Thatcher-Reagan watershed and that
what we see now in the penal law and civil society indicates the dialogical political community “at dusk.” I’m not sure that is so. The immediate post-war era might more accurately be viewed as a period when the egalitarian paradigm ruled and economic inequality as such rather than only poverty and exploitative productive relations was viewed as a departure from social justice. Contemporary neo-conservatism might be an overreaction to this mistake. It is precisely swings like these that bring into sight the dialogical whole of which the extremes become moderate parts.

Moreover, the dialogical political community is not satisfied with antagonistic labor-capital relations whether the balance of power lies with capital or (as in the immediate post-war period) with labor. As I suggest in the concluding note to Unity’s chapter on property, the dialogical political community requires the supersession of industrial conflict in a democratic workplace made possible by the separation in advanced capitalist society of the ownership and management of capital. Looked at from yon shore, the post-war swings from labor to capitalist dominance could simply indicate the historical transience of regulated industrial warfare as a solution to class conflict. At the very least this is an open question.

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Igor Shoikhedbrod criticizes my account of property law’s unity from a Marxist perspective.8 Although he acknowledges that my account incorporates Marx’s analysis of the self-estrangement generated by unmodified private property, he nevertheless finds the account wanting in the light of two aspects of Marx’s critique. First, he finds my argument for the “moral necessity” of private property insufficiently attentive to the historical relativity of both private property and the conception of the person it presupposes. Second, he argues that my account of property law ignores the distinction between personal and productive property and would preserve the institutions within which productive property becomes an instrument of domination and heteronomy. Courts applying the doctrines of equity cannot, he rightly says, reach this form of self-estrangement without becoming embroiled in political controversies.

I must plead not guilty to both these charges. As to the first, Shoikhedbrod acknowledges that I disclaim ahistorical validity for my justification of private property and private law. That justification, I say, would have obtained no hearing in ancient Greece or medieval Europe, where human nature was seen as perfected in political virtue and where an autonomous law for atomistic individuals was thus unthinkable. However, Shoikhedbrod thinks that my ascribing moral necessity to private property is inconsistent with this disclaimer of universal validity. I do not see how it can be, given that the moral necessity for which I argue is a necessity relative to the liberal polity that succeeded the medieval one—that is, to a polity whose aim is to give objective reality to the individual’s

claim of final worth. The addressees of my argument are not all intelligent minds—living, dead, and unborn. They are all citizens of liberal political societies.

As to the second criticism, it ignores the admittedly cursory treatment I give to industrial property in the concluding chapter on property. The treatment is cursory because a fully adequate one would have overwhelmed the chapter or at least given it a disproportionate shape. Nevertheless, I think it addresses all of Shoikhedbrod’s concerns. There I acknowledge the special problem engendered by the concentration of “productive” property—property on which human beings depend for their autonomy and self-expression—in a few hands, noting the potentialities for acute human dependence that private property in these means generates. Moreover, I argue that this problem is soluble only by a scheme of industrial democracy whereby managers and laborers cooperatively determine the terms and conditions of employment, and I suggest that the separation of ownership and control in the modern corporation makes such a scheme possible and brings it nearer. Thus, the problems of industrial conflict that Shoikhedbrod rightly emphasizes can be addressed without the collectivization of the means of production that turned the workers’ paradise into a totalitarian despotism. Here I take Bakunin’s side against Marx.

Like Ramsay, Shoikhedbrod makes much of contemporary neo-conservative reactions against organized labor and the welfare state in order to show that the interests of capital and labor are inherently in conflict, hence irreconcilable within the private sector alone. However, we must adopt a perspective more panoptic than this. The dialogical community’s evolution is a story spanning epochs; little about its prospects can be gleaned from what happens within a century, let alone from decade to decade. Moreover, while the absentee stockholder’s interest in profit might collide with the interest in life-plan security of those who sustain the corporation day to day, the law can manage this conflict by allowing concerns of self-determination to trump profit-maximization where doing so would not harm the long-run welfare of the corporation and of those who depend on its survival.