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## **As if We Were Strangers: From Social Life to Private Law**

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## As if We Were Strangers: From Social Life to Private Law

J E Penner<sup>1</sup>

***A revised version of this review is forthcoming in Jurisprudence***

### ***I The Scope of 'Private Law'***

The title of John Gardner's delightful new book, *From Personal Life to Private Law*,<sup>2</sup> is *prima facie* misleading. The book is not about private law as a whole, and largely concerns whatever duties to repair a person has following their wrong-doing, so it is mostly about the law of torts and breach of contract. Gardner is happy to acknowledge this, but I don't think he acknowledges enough. Or rather, his admission on this point calls, to my mind, for a little more elaboration as to why the 'tireless themes of private law', also being the 'tireless themes of personal life' (5), are particularly, or specially, relevant to duties of repair, rather than to other areas that private law deals with. Some aspects of those areas, in particular the powers private law grants, to enter contracts, to deal with property and so on, are arguably just as central to any working conception of the connection of personal life to private law that one might table for discussion. So, what is left out? The law of property, equitable wrongs, the law of trusts, and the law of unjust enrichment, to name four (14). The book concerns 'primarily, the law of torts and the law of contracts', (14), but that is not quite correct. The only part of the law of contract Gardner is interested in is breach of contract; the book has nothing to say about the rest of contract law.

One clue to this restriction of focus might lie in the following thing Gardner says (14):

The law of property can be regarded as mainly a long footnote to the law of torts. It provides some of the detailed rules by which things that people do should qualify as trespasses, conversions, and detinues.

One problem with this (I hope I am not speaking merely as a wounded property theorist) is that it skates worryingly close to excusing or endorsing the blunder made by Bentham and Kelsen and exposed by Raz:<sup>3</sup> as a matter of the individuation of laws, treating property law doctrine as fragments of the law of torts misunderstands most of property law's function, which is not duty-imposing, but power-conferring in Hart's terminology; that is, property law is largely

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<sup>1</sup> Kwa Geok Choo Professor of Property Law, National University of Singapore; [https://law.nus.edu.sg/about\\_us/faculty/staff/profileview.asp?UserID=lawjep](https://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawjep); thanks to Mike Dowdle, John Gardner, Andrew Halpin, Rachel Leow, Arthur Ripstein, Arie Rosen, Nicole Roughan, Andrew Simester, Rob Stevens, and Zhong-Xing Tan for helpful comments on an earlier draft.

<sup>2</sup> Gardner, J. (2018). *From Personal Life to Private Law*. Oxford, Oxford University Press. Page references will be in the text in parenthesis.

<sup>3</sup> Raz, J. (1980). *The Concept of a Legal System: An Introduction to the Theory of Legal System*. Oxford, Clarendon Press. , chapter IV.

*facilitative*, regulating liberties and powers that go with having title.<sup>4</sup> The same, of course, is true of the greatest part of the law of contract (the parts not having specifically to do with breach), the law of trusts, and so on. I am fairly certain that Gardner is not mistaken on this point, treating the entirety of the facilitative side of private law as merely background expository material setting up the true norms of ‘delict’ or ‘trespass’, but the way he puts this point is in danger of giving that impression.

So this book is about the breach of civil law duties originating in common law actions and, though less catchy, the book would really have been more accurately entitled *From Personal Life to some Central Private Law Wrongs and their Remedies*.

A person is free to write any book he wants, of course, and a bit of catchy mislabelling is no crime, much less a tort. As we shall see, I am in agreement with much of what Gardner says throughout the book about wrongs and responses in our personal, non-legal lives, and their continuity with tort law and the law of breach of contract – but here is, I think, a genuine worry: how much of our lives, our private law legal lives, is concerned with wrongs and their repair, as compared to how much it devoted to the ‘facilitative’ side of ‘private life’? My life might be unusual (though I don’t think it is) and not much of it has to do with wrongdoing. Some of it does of course. I recently apologized to a friend for getting inordinately worked up for a fairly minor act of inconsiderateness. I have also broken a fair few promises in my time by missing deadlines for conference papers, book submissions, and so on. On my-being-the-victim side of the equation, someone entered my house about ten years ago through a window I left open and stole a crappy old computer (the idiot). I wouldn’t say regularly, but often enough deliveries arrive outside the promised time. But, and again I don’t think I am describing an exceptionally charmed life, wrongdoing and its repair do not seem to take very much of my time.

On the other hand, the liberty and power to enter into relations with other people is mostly what occupies my time outside the study. Planning dates with others, organizing my teaching and other university duties, getting together with friends, shopping for and cooking dinner and so on is very much what is generally on my mind. The legal analogue would be with the law of contract, property, trusts. I expect Gardner would agree with much of this, and moreover see my point about the relative priority in most people’s lives, or at least many people’s lives, about what I have called the facilitative side of personal life and private law. And of

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<sup>4</sup> And, if anything, it is arguable that the tort-property direction of ‘footnote’ travel is the other way around. Most of the conversion cases I have taught do not concern the tort of conversion *per se*. There is, again arguably, not a lot to be ironed out there. The cases rather concern whether, for example, X managed to pass title to Y by way of constructive delivery, (*Thomas v Times Book Company* [1966] 1 WLR 911), or whether it was an implicit term of a bailment that a hirer of a vehicle could hand over possession of the vehicle to a repairer to make repairs (*Tappenden v Artus* [1964] 2 QB 185). The action is initiated by making a claim for conversion, but that is frequently just the means by which other parts of the law, facilitative parts, the gist of the matter, are considered.

course he is free to leave exploring the ‘enduring themes’ (15) of this facilitative side of law (to mention just one, amongst many, the enduring issue of the limits of freedom of contract) for another occasion. I suppose my only complaint, if it is a complaint, is that Gardner’s failure even to mention this facilitative side of private law seems to do both our private life and private law a bit of an injustice.

## ***II The Monism and Continuity Theses and our duties to others***

The central themes of the book are three. The first is that the private law of wrongs and repair is (8)

best understood by reflecting on what we should be doing quite apart from private law, which obviously entails reflection on the reasons why we should be doing it.

This might be called the ‘monist’ thesis (8-9): the reasons that apply to me to act in one way or another, including categorical reasons – ie reasons to  $\phi$  that *prevail*, ie reasons to  $\phi$  which I must take into account irrespective of my otherwise innocuous plans to do otherwise – are all the reasons there are. There are no purely ‘legal’ reasons *per se*, in the sense that the law can just create reasons for action which are not there. Rather, the law can serve my following those reasons which I already have but cannot comply with, or comply with as well, except by doing what the law says. This is, obviously, a more or less general statement of the idea underlying Raz’s ‘dependence thesis’ in relation to the nature of practical authority.<sup>5</sup>

The second theme of the book concerns what has come to be known as the ‘continuity thesis’, first elaborated by Gardner in 2011.<sup>6</sup> This is the thesis that

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<sup>5</sup> Raz, J. (1986). *The Morality of Freedom*. Oxford, Clarendon Press., 42-53.

<sup>6</sup> Gardner J, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1, 28-50. Ripstein provides a ‘rights’ version of the thesis, under which the right to a remedy is the same right as that which was violated. Ripstein A, *Private Wrongs* (Harvard University Press 2016), 234. For the reasons given by Gardner, *ibid.* at 29-30, it seems to me that the ‘rights’ version individuates rights incorrectly. In his most recent writing on this subject, Ripstein A, 'Kantian Perspectives on Private Law' in Gold AS and others (eds), *Oxford Handbook of the New Private Law* (Oxford University Press forthcoming 2020), Ripstein says (at ms 14, my italics), ‘But the Kantian claim is not that the remedy is an equivalent of the right; it is the claim that the *rationale* for the remedy is completely exhausted by the content of the right.’ This looks to me to be a ‘reasons’ version of the continuity thesis in Kantian form, but as Arthur Ripstein has pointed out to me, this does not make these ‘reasons’ accounts parallel, since on Gardner’s view the relevant legal relation is assembled out of, or is the legal specification of, otherwise strictly or loosely relational reasons, whereas for Ripstein the relationship between the potential wrongdoer/potential victim of the wrong is the only source of the reasons in question. See Ripstein A, 'Morality and Law through Thick and Thin: Comment on John Gardner’s *From Personal Life to Private Law*' (2017) 15 *Jerusalem Review of Legal Studies* 138, 145-151.

duties to repair reflect the same reasons which give rise to the primary duty that was breached. If one of the reasons underlying the primary duty not to injure you is that injuries can be painful, and that pain is bad, then that same reason is a reason to do what I can to assuage your pain afterward. More generally, my reasons for not injuring you in the first place also give me reasons to ensure that, going forward, the new world is the world least incompatible with the world that would have existed (or would have continued to exist) had I not injured you at all.

The third theme concerns the nature of the duties we owe to others (8-13). Here Gardner's target is chiefly those who argue for the 'autonomy' of private law. Taking a cue from the monist thesis, Gardner wants to reveal the complexity of the reasons we have that can give rise to duties, duties we have apart from any consideration of the law. Gardner is a value pluralist (as, for the record, am I), and if value pluralism is correct we have little hope of any real determinacy in formulating what ought to be done apart from the law where, say, we have carelessly injured someone. The whole purpose of the law is to provide a workable determinacy in such cases. If this is right, then all the reasons that bear on whether and how the law does this come into play. This extends even to the question of whether it is the victim of a wrong who should be allowed to initiate legal proceedings for the recovery of compensation (199-205) – there is no fore-ordained conceptual connection between being the person who was injured and being the person who is granted the power to pursue a remedy. In view of these considerations Gardner is able pretty much to dispense with 'rights talk' – what is prior and central is our duties, in particular the duty to repair in cases where we have breached a primary obligation that results in an injury or loss to another (20-22, 52-57).

The chapters elaborate upon these themes in different dimensions. Chapter 1 is driven by a distinction between different duties that we have: some are 'strictly relational', roughly those one has because one is in a personal relationship such as a friendship with another. Others are 'loosely relational', where there is no such prior relationship. Understanding the distinction is important, Gardner argues, for understanding different sorts of torts, in particular the loosely relational duty that has developed in the law of negligence. Chapter 2 considers the relation between acts and their outcomes. Gardner ably defends the view that the concept of genuine human agency depends upon seeing that it involves causal responsibility. This shows that those troubled by what has been come to be called 'moral luck' have created a problem for themselves which rests on a conceptual confusion, in particular that of confusing responsibility with blameworthiness. Chapters 3 and 4 explore in detail the application and implications of the continuity thesis. Chapter 4 considers in particular the nature of apologies as a response to wrongdoing, arguing that apologies are not required in virtue of the continuity thesis, though they are rationally intelligible all the same on other grounds. These thoughts are employed to explain the nature of 'general damages', those more or less arbitrarily determined awards which seek to repair the irreparable, such as the loss of a limb. Chapter 5 considers the question why damages awards seek to

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restore the plaintiff to the status quo ante in so far as possible, rather than aiming to provide the plaintiff with resources to move on and start a new, valuable life, given the way circumstances have changed because of the damaging wrong. He defends the rationality of 'holding on' to the value one has, or rather, the values one has so far aimed to realise. This leads to the thought that there is value in security, in protection from disruption, *per se*. The final chapter, Chapter 6, concerns how all this figures in shaping the institution of private law and the structure it has. In particular, Gardner considers the wide latitude the law gives to plaintiffs to pursue a remedy, and gives reasons for doubting that this has much to do with 'liberal' values such as autonomy.

### ***III From Crime to Tort to Breach of Contract***

In the Introduction, Gardner treats us to an interesting bit of autobiography, explaining the way he came to this work (3). He says that one of the reasons he turned to the study of private law, away from his prior focus on criminal law, was that he was confounded by the justification of punishment and the 'blaming' attitudes that accompany it. I find this somewhat intriguing since it is not clear to me that the chief function of the criminal law has any particular conceptual connection to punishment, and neither does he. Let me explain.<sup>7</sup>

Following Raz, we can say that political authorities, because of their ability to operate through various administrative agencies and bureaucracies, create conditions for the better compliance by their subjects with reasons applying to them. For example, individuals may be required on the balance of reasons that apply to them to contribute money for the provision of public goods in their community, and by providing a means (a taxing and spending agency with associated directives governing how its subjects deal with the agency) the authority can provide a conventional means of their doing so, which will make a practical difference in that such a means simply did not exist previously. At first glance, at least, the entire body of official directives can be explained as an authority's institution of conventions, both directly, as in the case of making an authoritative choice that subjects should drive on the left, or indirectly, as in the case of providing a means for its subjects to comply with reasons and then instituting specific conventions which reflect those reasons but which also reflect the character of the authoritative institution and its organs, such as its taxing and spending apparatus, or its provision of criminal courts and punishment facilities.

This analysis is cogent even in areas where the guidance of the law's directives appears to be very far from the setting of standards to solve coordination problems, as in the case of the criminal law. Criminal law is conventionally regarded as reflecting and vindicating moral norms that would exist independently of the existence of any legal system. The injunctions not to murder, to respect the property of others, and so on, are not standards that solve

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<sup>7</sup> The next four paragraphs draw largely on Penner, J. E. (2003). *Legal Reasoning and the Authority of the Law. Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*. S. Paulson, T. Pogge and L. Meyer. Oxford, Oxford University Press: 71-97., ; Penner, McCoubrey & White ch 6

coordination problems. They are (to the extent they are valid, of course) morally required of every individual regardless of the behaviour of others, or of the individual's expectations of the behaviour of others.

But the criminal law does more than simply enforce pre-existing, independently valid moral norms of this kind. The exact extent, scope, and justification of these norms are controversial and uncertain. Whilst the law, to be legitimate, must by and large reflect the moral considerations which underpin these moral norms, the law can and does serve as an authority which solves a coordination problem by specifying in more or less certain terms legal norms which reflect these moral ones.

Further, the law specifies more or less certain responses to and punishments for their breach, and enforces compliance with these norms to deal with those subjects of the law who would otherwise disregard these moral norms. By instituting a criminal justice system, the law creates a better way of dealing with crime, i.e. dealing with criminals in a just, fair, and certain manner, than would leaving it all to self-help, e.g. revenge, feud, vendetta. The 'co-ordination' problem the criminal justice system addresses is the problem or goal of co-ordinating a community's response to crime so as to deal with it in the best way possible.

Now one might think that this is the most important aspect of the criminal law's authoritative function, a point strongly emphasized by Gardner in past writings:<sup>8</sup>

The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence.

Thus, for Gardner, this 'displacement function' of the criminal law is its 'central pillar'.<sup>9</sup>

In a later writing, Gardner situated this claim in the context of another consideration:<sup>10</sup>

What the paper was supposed to offer was a simple explanation of why, *assuming that the guilty wrongdoer should indeed be punished by someone*, the criminal law (as opposed to victims or their families or their sympathizers) should be the one to exact punishment. ... Already, too much academic writing about the criminal law casually runs together questions about the justification of the criminal law and questions about the justification of punishment. ... [T]he criminal should not be seen as a

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<sup>8</sup> Gardner, J. (1998). Crime: in Proportion and Perspective. Fundamentals of Sentencing Theory. A. Ashworth and M. Wasik. Oxford, Oxford University Press: 31-52. at 31.

<sup>9</sup> Ibid.

<sup>10</sup> Gardner, J. (2007). Offences and Defences: Selected Essays in the Philosophy of Criminal Law. Oxford, Oxford University Press., 282-83, footnotes omitted.

merely, or even mainly, punitive institution. Rather, as I explained in 'In Defence of Defences', the criminal law

... is primarily a vehicle for the public identification of wrongdoing ... and for responsible agents, whose wrongs have been thus identified, to *answer for* their wrongs by offering justifications and excuses for having committed them. By calling this latter function 'primary' I do not mean to suggest that it is socially more important. I mean that the proper execution of the other functions depend upon it. Criminal law can be a proper vehicle for ... punishment only because it is a vehicle for responsible agents to answer for their wrongs.

With all of this I largely agree, but I would suggest a change of emphasis. *Contra* Gardner, I *do* think that the public identification of wrongdoing and making the perpetrator so identified answer for their wrong is the socially most important function of the criminal law. It is a moral obligation on any community to *take the side* of the victim over the criminal in some suitably expressive *public* way. A community cannot stand idly by when one of its members maliciously victimises another. This is especially so in the case of serious violations, murder, assaults causing grievous bodily or psychological harm, plundering frauds, and so on. A community is less of a community in so far as it fails to do this. Victims, in the absence of this 'taking their side', are treated as equal to or even less than the perpetrator who victimised them. Taking the side of the perpetrator is the clearest signal possible that the victim is isolated. Such a victim justifiably feels even more aggrieved if, at the same time, she is regarded as still a 'citizen'. We can see this in the contemporary context, perhaps, most vividly in the Black Lives Matter movement. It simply cannot be justified that peace officers can take the lives of citizens with no genuine repercussions, and this has nothing to do with feelings, say, of revenge.

Since feud, vendetta, and so on, are *private* retaliatory responses, they cannot achieve this public, 'community', function. Because this obligation is necessarily collective or communal, it cannot be discharged by an individual, or any number of individuals. In order for this obligation to be discharged, some representative of the community must be instituted. This is not an empirical matter, but a conceptual one.<sup>11</sup>

This is true of family life as well, of course. Family members, in particular parents, cannot stand idly by when, for example, one child attacks another or steals the other's things. Any normal parent or child understands this intuitively. This

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<sup>11</sup> This, to my mind, is the one case where only the 'state' can act to preserve the 'civil condition'. To this limited extent, then, I am with the Kantians when they say that we have an obligation to enter into and maintain the civil condition when we cannot avoid coming into contact with each other. Unlike Kantians, I don't think the same obligation applies when it comes to private law generally, though I shall ask in a moment about a resemblance here with tort law.



doesn't necessarily require the response of punishment,<sup>12</sup> but the wrong cannot be allowed to go unaddressed. A family in which a parent is *indifferent*, or worse, *encouraging* of such behaviour, say by taking the side of the perpetrator, is to that extent a dysfunctional family, or worse.

What particular shape this public response takes in a particular community will naturally vary. Like Gardner, I am an instrumentalist about institutions through and through. In a small, tight-knit religious community, the response might be by way of confession and repentance before a priest, who in this sense acts on behalf of the community of believers. But it is difficult for me to imagine anything but the (more or less) secular state taking on this role in modern, 'pluralistic', societies. And the particular modern form most criminal justice systems take is, as Gardner points out, requiring the defendant to *answer* for their wrong. We make the defendant answer for the wrong, not the victim.<sup>13</sup>

Recognising the conceptual priority of the 'taking the victim's side' over the issue of punishment has an immediate pay-off. It explains why those interested in 'restorative' or 'reconciliatory' responses to crime, even though they may abjure punitive responses, are on the same page so far as this goes. In other words, this 'expressive' aspect of the criminal law is conceptually prior, as Gardner himself makes clear, to the issue of punishment.

So what about punishment? I still think the best introduction to understanding of punishment is found in Alan Brudner's 'Retributivism and the Death Penalty'.<sup>14</sup> Brudner is a leading Hegel scholar and some may find the Hegelian framing of the issues uncongenial or mysterious, as I myself do a little, but the basic point of the essay can be plausibly interpreted, I think, without reliance upon any such framing. On my understanding of it, Brudner's claim<sup>15</sup> is that the correct response to the finding of wrongdoing is pragmatic, or instrumentalist through and through.<sup>16</sup> It must be such as to reassure members of the community that it does genuinely take the side of the victim, and depending upon the civility, self-understanding, sophistication, and empirical security of the community, the

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<sup>12</sup> For example, a direction to take 'self-help'. A parent might tell the victimized sibling, 'Don't let your sister bully you that way – stand up for yourself and give as good back', which might be more effective in the circumstances.

<sup>13</sup> Or rather, we shouldn't. Just uttering this statement immediately and ineluctably, and rightly, brings to mind the lamentable historical (and regrettably, to some extent still, present) of attitudes to and the prosecution of the crime of rape.

<sup>14</sup> Brudner, A. (1980). "Retributivism and the Death Penalty." University of Toronto Law Journal **30**: 337-355.

<sup>15</sup> Summarised *ibid*, at 355.

<sup>16</sup> Which Brudner acknowledges to be a rather counter-intuitive conclusion for a retributivist to make. *Ibid*. Brudner maintains his view in these passages that the deterrence of potential criminals is not a licit ground for punishment, but it seems to me that one factor which may assist in the 'reassurance' sought may involve deterrent considerations. It all depends.

appropriate response will vary. In some cases and societies, only a set-back to the criminal's rights, i.e. punishment, can do so.

Now you may think we have strayed very far from the subject matter of the book, but I think not. The question this inquiry into the nature of the criminal law and punishment raises is whether the private law, in particular the private law's determination and enforcement of a duty of repair, is necessarily implemented by a state in the same way that a state's obligation to institute a criminal justice system is. That, for example, is what the Kantian claims.<sup>17</sup> As far as I can tell, Gardner doesn't address the point in terms, but given his instrumentalism about all law, and private law in particular as expressed in a number of recent writings,<sup>18</sup> he must surely believe the answer to be, as a matter of principle, no. For my own part I am not so sure.

An instrumentalist case may be made, I think, that certain duties of repair need to be instituted by the law just as much as some criminal law prosecutions. Take for example the Bhopal disaster. I cannot see how a community could stand by and let the negligent plant operator just 'get away with it', i.e. get away with paying no compensation, and I am assuming this was a case of pure negligence, ie liability in tort without any criminal liability. Of course, this is perhaps an extreme case, and I am not arguing that all duties of repair have the same urgency, the same, as it were, 'public' urgency.<sup>19</sup> But some do. It would be interesting to have Gardner's views on this.

The duty to repair following a breach of contract is a different kettle of fish again. As far as I can tell, the law could do without enforcing such duties entirely. Again, based on recent writings,<sup>20</sup> Gardner would seem to agree, and through various techniques such as binding arbitration clauses the law of contract seems to be heading in this direction anyway. Though Gardner deplores the recent efforts by corporate actors to make their side of an agreement enforceable whilst effectively

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<sup>17</sup> See Ripstein, A. (2009). Force and Freedom: Kant's Legal and Political Philosophy. Cambridge MA, Harvard University Press. At --; Ripstein, A. (2016). Private Wrongs. Cambridge, MA, Harvard University Press. At --

<sup>18</sup> See, eg, Gardner, J. (2011). "What is Tort Law For? Part 1. The Place of Corrective Justice." Law and Philosophy 30: 1-50. Gardner, J. (2014). What is Tort Law For? Part 2. The Place of Distributive Justice. Philosophical Foundations of the Law of Torts. J. Oberdiek. Oxford, Oxford University Press: 335-353. Gardner, J. (2014). Some Rule-of-Law Anxieties about Strict Liability in Private Law. Private Law and the Rule of Law. L. M. Austin and D. Klimchuk. Oxford, Oxford University Press: 207-223. Gardner, J. (2017). "Dagan and Dorfman on the Value of Private Law." Columbia Law Review 117: 179-201.

<sup>19</sup> Indeed, I think some duties of repair under the current law of torts are preposterously unjust. See Penner, J. E. (2020). Don't Crash into Mick Jagger when He is Driving his Rolls Royce: Liability in Damages for Economic Loss Consequent upon a Personal Injury. Civil Wrongs and Justice in Private Law. P. B. Miller and J. Oberdiek. Oxford, Oxford University Press.

<sup>20</sup> 'Dagan and Dorfman', supra, at 191-194, Gardner, 'Twilight of Legality' [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3109517](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109517), ms 11-12

denying the same to their consumer counterparties,<sup>21</sup> he, quite rightly I think,<sup>22</sup> doubts whether breaches of contract have anything like a ‘public’ element which would weigh in favour of state enforcement for that reason. And there are many and obvious reasons against burdening the state in this way, the most obvious being that private parties may respond to contractual breaches in a number of ways (taking their business elsewhere in future, reputational effects, and so on) which may be typically efficacious in resolving the issues, or at least to some extent preventing and reducing the ill effects of breach, and in any case, one can mostly avoid serious losses arising from breach of contract through the judicious selection of counterparties<sup>23</sup> and judiciously limiting one’s reliance and thus exposure to breach.

#### ***IV Strict and Loose Relationality***

##### *IV.1 Strict Relationality and Special Relationships*

In chapter 2 Gardner sets out to show that some duties in private law are ‘strictly’ relational, whilst others are ‘loosely’ relational. In doing so Gardner aims to steer a path between those for whom the relationality between plaintiff and defendant is mythical (25-26), paradigmatically economic analysts of the law, and for those whom it is a defining feature. As to the latter, though Gardner cites no individuals, one presumes the target is corrective justice theorists for whom the plaintiff-defendant nexus is the defining feature of private law (52-57). This is one part of the book where I think Gardner is faced with several difficulties.

Strictly relational duties are defined as follows (23-24):

A strictly relational duty is a duty that one has for the reason that one stands in some special relationship with the person to whom the duty is owed. By a ‘special relationship’ I mean, in turn, a relationship other than the relationship that we are all said to have with each other simply as persons or human beings or God’s creatures, etc. A special relationship, we might say, is not just a relationship with someone but a relationship with someone *in particular*, from which others must inevitably be left out.

Special relationships in this sense include those between parents and their children, employers and their employees, hosts and their guests, doctors and their patients, lawyers and their clients, and businesses and their customers. They also include, to take some more symmetrical examples, the relationship between spouses, between sexual partners, between friends, between colleagues, between siblings, and between neighbours. Notice that not all the duties that hold between people in such special relationships qualify as strictly relational ones. We all have duties not to (for example) deceive or humiliate or manipulate each other, duties that

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<sup>21</sup> ‘Twilight’ at ms 9.

<sup>22</sup> ‘Twilight’ at ms 11-12.

<sup>23</sup> Cases of monopolies and monopsonies aside.

are owed alike to complete strangers and to those with whom we stand in special relationships. These duties, owed to all, are not strictly relational. Strictly relational duties are distinguished from the rest by the special reason for their existence. The special reason in question is the fact of the special relationship.

On the next page Gardner tells us that ‘strictly relational duties play a significant role in the private law.’ (25) It is in making this claim that I think Gardner may be on shaky ground. To summarise the objection: it seems to me that, in fact, very few private law relationships can be characterised as ‘strictly relational’ in any meaningful sense. In particular, it seems to me that the duties we owe each other under the law of torts and the law of contract may be positively mischaracterised in that way.

Let me begin to substantiate this claim by examining the case Gardner uses to illustrate a loosely relational duty, the duty of care under modern negligence law (46-50). Gardner claims, plausibly to my mind, that prior to *Donoghue v Stephenson*<sup>24</sup> the duty to take care was only imposed upon those in particular relationships – doctor and patient, lawyer and client, passenger and carrier, and so on – but in *Donoghue* such a particular relationship requirement was abolished. The duty to take care is imposed upon all people, and it is a duty to take care owed to anyone you might foreseeably injure. Notice I said ‘particular’ relationship, not ‘special’ relationship, so as to keep the point as neutral as possible. But Gardner does regard each of the particular relationships which figured in the prior law as special relationships as he means the term. Then comes the crucial move Gardner makes in explaining why the new duty of care is only a loosely relational duty. In defending the existence of strictly relational duties, the key ‘was to look for value in the special relationships that are the reasons for those duties’ (48). But I am afraid I see nowhere in the previous or subsequent discussion just what kind of value is in question, in particular whether it is important that the value is intrinsic to some extent, rather than being merely instrumental. Applying an intuitive criterion of value in this context, it is obvious that the relationship of friendship has intrinsic value, and the duties one owes to others in virtue of the friendship are clearly strictly relational on Gardner’s accounting. He uses friendship, as well as marriage, as central examples in his explaining the existence of strictly relational duties. But as the initial quotation reveals, he regards the same to be true of ‘businesses and their customers’, and I must say that whatever the business-customer relation amounts to its value is very far away from that of friendship, and even further from marriage. In particular I should imagine that for most cases of business-customer relationships the value, such as it is, is entirely instrumental, which is not the way we like to think about friendships, much less marriage.

As I said, Gardner does not raise the intrinsic/instrumental value distinction, but two things he says may help us get a better picture of what sort of value he has in mind. The first arises in his discussion of the duty of care in negligence. He says (48):

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<sup>24</sup> [1932] AC 562.

Special relationships, in the sense required to give rise to strictly relational duties, are defeasibly valuable relationships, meaning relationships of types that it is valuable to have in existence, or on the menu, even if they are not always valuable in the way they work out in particular cases. Earlier, I spoke of value that might be added in a 'world in which marriage exists'. That is the kind of impersonal value that distinguishes a special relationship and that explains its ability to give rise to duties. The relationship that holds between Atkin neighbours does not meet this condition. That is not to say, of course, that there is no value in your having or performing your duty towards me, when I am your Atkin neighbour. Of course there is: that someone is kept out of harm's way is analytically valuable; and inasmuch as your having a duty to keep me out of harm's way contributes (instrumentally or constitutively) to keeping me out of harm's way, the duty too is valuable. But that is not the issue. The issue is whether there is any value in my being positioned relative to you such that your action threatens to *put* me in harm's way, and such that I *need* the protection of a duty of care owed by you. Should I want to be in such a vulnerable position, cherish or sustain it when I am in it, etc? Apart from the fact that it lands you with a duty of care towards me, in other words, is there anything to be said in favour of my being your Atkin neighbour? If not, then we are not in a special relationship in the relevant sense and the duty of care is not, after all, strictly relational.

There are two immediate observations to be made, one in respect of the law of torts, the second with respect to the law of contract. As to the first, how much of the law of torts, on this view, is strictly relational? By definition, almost, all torts can be committed against strangers. I am pretty confident that the tort of nuisance, though typically involving as it does near, or nearish, neighbours, is not really a tort that protects the special relationship of neighbourliness, though as we have seen, Gardner does regard the relation of neighbour to neighbour as a special relationship giving rise to valid, existent, strictly relational duties. To put it very bluntly, when my neighbour commits a noise nuisance and I object the vulnerability to which I am subject is clearly not one that I wish, cherish, or try to sustain. There is, I would say, nothing else to be said in favour of your having the duty to keep it down than that you have to keep it down, and as far as I know there is nothing I have ever read about the law of nuisance to think otherwise.

Now, as to contract. Gardner has more to say about contract, so this will just be a first pass at the underlying problem regarding the supposed special relationships which underlie contracts. Let us first notice one aspect of what he says about special relationships: 'A special relationship, we might say, is not just a relationship with someone but a relationship with someone *in particular*, from which others must inevitably be left out.' Now it is analytically true that only the very counterparties to a contract are parties to that contract, and everyone else must 'inevitably be left out'. But this is not true of the seller-buyer relationship as a kind of relationship. Sellers want as many customers as they can get. And the buyer's relationship to the seller is not in any way diminished by the existence of lots of other customers. Friendship and marriage (at least for monogamists) make

very poor analogies here. Secondly, is it right to think that there is something in the buyer-seller relationship (or the insurer-insured relationship, or the banker-account holder relationship, etc, etc) that has any particular value *per se*, that is, any non-instrumental value beyond that which is inherited from the goals the relationship works to serve? Is there anything here, on its own, to cherish or sustain? I am at a loss to see what it is.

If this is right, then *prima facie* at least, Gardner is wrong to suppose that the law of torts and the law of contract do give effect to strictly relational duties. It is all loosely relational. The reasons we owe to others not to commit torts, or breach our agreements, are like those duties which are owed to everyone, along the lines of the ones Gardner mentions: 'We all have duties not to (for example) deceive or humiliate or manipulate each other, duties that are owed alike to complete strangers and to those with whom we stand in special relationships.' Thus: We all have duties not to (for example) assault or defame or negligently injure or breach our agreements with each other, duties that are owed alike to complete strangers and to those with whom we stand in special relationships. Is that not right? To the extent it is right then it is wrong for Gardner to say, 'strictly relational duties play a significant role in the private law' (25), 'strictly relational duties are common in private law (41)', at least as regards our primary duties. As regards our secondary duties, our actual duties of repair, different considerations arise, which I shall canvass below.

A related point about relationships we should cherish: *Ceterus paribus*, friendship being a good thing, I should seek to have as much friendship in my life as I can, balanced of course against other valuable things I might realise. The value of friendship is always, *ceterus paribus*, a good reason for having new friends, deepening one's friendship with the friends one already has, and so on. Can the same be said of buyer-seller relations? Bank accounts? Mortgages? This sounds to me to be a kind of contract fetishism. There is no standing reason of any kind to seek out any of these relationships just for their own sake, any more that one would seek out opportunities to stand in the relation of Atkin neighbour to anyone.

#### *IV.2 Contract and special relationships*

As I said, Gardner says something else about the nature of special relationships underlying strictly relational duties, in a 6-page passage (41-46) in which he discusses the special relationship in contracts and the phenomenon of 'contractualisation'. His opening point, in explaining why he is not signing up to a 'relational theory of contract', under which the actual legal contract is nested within a further relationship of a non-contractual kind – he lists 'supplier-procurer, franchisor-franchisee, landlord-tenant, author-publisher' – is that 'the fact of the contractual relationship itself is the reason for the existence of contractual duties, which are therefore strictly relational, even on their own' (42). This passage already raises difficult questions. I am happy to say that the function of supplying goods, the function of exercising the power of title to put a person in possession, and the function of publishing a book, are themselves fully

understandable apart from whatever contract might be made in respect of them. (I find the franchisee-franchisor example more problematic in this respect, but we can leave it to one side.) But are these functions, and the relationships they create, special relationships to cherish and sustain? I suppose publishing, as an aspect of freedom of speech, is a kind of good, or value, but is it good irrespective of what is published? Is a tenancy or a supply of some good a value per se?

The second issue concerns the conceptual distance Gardner is pointing out between the relation itself and the contract that is there to give it some protection or effect. Is it true that a contractual relationship, by which I mean the actual contract in law, is always something of a different relationship from the 'real', actual, lived, relationship which it frames? Is it wrong to think that, as between two people, the contractual relationship<sup>25</sup> may be all the relationship they have? I must say that that is normally the way I think of things when I buy a bottle of wine from a shop. What other relations lie between me and the shopkeeper? Are we not strangers apart from the sale?

Gardner's next point has to do with the 'plasticity' of contract. He says two things which are clearly right. First: 'Endlessly varied duties can imaginably be created by contract.' (42) Secondly, the plasticity is not limitless (42). On this point Gardner seems to me to miss an opportunity. He says (42-43):

The plasticity of contract has its limits. Leave aside the vexed question of whether there are some fixed terms towards each other that those who enter into contracts cannot but incur, however ingenious their attempts not to do so. A different and more interesting limit on the plasticity of contract is this: there are some relationships that cannot be contractually created. With enough insight and ingenuity, the deontic content of friendship could surely be *emulated* in a contract, such that the parties would be contractually bound to act as if they were friends. But could they be contractually bound to be friends? I think not.

I think his point about friendship is right, but his prior point about the limits to contractual plasticity should, I think, not have been left aside given his purposes. Here's why: There is an ongoing issue in the theory of contract, viz whether we have a law of contract or a law of contracts. The former view emphasises the plasticity Gardner mentions, whilst the latter view emphasises contractual 'types', which it is supposed reflect a limited (though not necessarily small) set of transactional 'kinds', which vary from time to time and place to place, given the sort of transactions (predominantly economic transactions) people get up to. Enlightenment on this issue, to my mind, lies not in taking a side, but in realizing the truth in each. It is contract's plasticity which allows new types to arise, and others to be modified out of all recognition so that they no longer constitute one

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<sup>25</sup> By which I mean to include whatever property laws or other legal relations might be involved, like the passing of title in a sale of goods.

type, but another one.<sup>26</sup> But the idea of type will always be with us so long as there are recognizable types of transaction, such as employment, sale, insurance, banking, and so on. Judges in particular, in the task of interpreting contractual terms so as to give effect to the contract as a whole, will need to get the 'gist' of the transaction in question, in other words the type of contract the terms aim to realise. Some discussion of this might have helped Gardner to explain what the particular, or for him, *special*, relationship might be between the parties which is not reducible to the actual contractual terms between them, but the gist (or 'spirit' (44)) of the arrangement or relationship which gives those terms sense.

Gardner does have this to say about the relation between the contractual terms themselves and the special relationship to which they relate (43-44):

[The example of a 'contracted' friendship] helps us to extend our grasp of the so-called 'relational theory of contracts'. So far, we have cast this theory as drawing attention to the nesting of contractual relationships within non-contractual ones. Now we can add that the nested contract, in such cases, may be an attempt – failed or successful – to replicate some or all of the duties that already help to constitute the non-contractual relationship. Why would anyone attempt such replication? Sometimes, no doubt, to provide motivational reinforcement at the point of performance. But in many relationships, even in some commercial ones, such reinforcement is out of keeping with the original spirit of the relationship. While their non-contractual relationship subsists, the parties work with each other in the hope, and often in the reasonable expectation, that nobody will ever need to consult the contractual terms, let alone insist upon them, never mind call upon the support of the law to uphold them. They would regard resort to the contractual terms, even without the invocation of their legal effect, as already exposing a crack in their relationship. The contract exists mainly to provide a fallback, a framework for *modus vivendi* or orderly exit, in case the non-contractual relationship begins to break down. In marriage and romantic relationships, even the suggestion of a need for such a fallback (a 'prenup') might sometimes be regarded as already an admission of defeat by the party suggesting it, verging on an anticipatory abandonment of the relationship.

This is all sound, it seems to me, as a matter of empirical sociology, but it does little, I would suggest, to explain and elaborate the non-contractual special relationships of value that exist independently of the hovering-in-the-background legal contract. Gardner continues (44, my italics):

Commercial relationships are different. That aptness of fallback arrangements may even be one of the criteria for the relationship to qualify as a commercial one. ... *But it does not follow that we should think of commercial relationships as reducing to contractual ones.* When the going is

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<sup>26</sup> Consider, for example, the development of the mortgage out of the manipulation of the free-hold conveyance by including a conditional term for re-conveyance.



good, the nested contractual relationship typically remains a fallback, designed mainly to make provision for the breakdown of the non-contractual relationship in which it is nested.

I have already said that what the parties need to do is not itself to be reduced to whatever contractual terms they agree to. The gist or spirit of a contract is the function the transaction sets out to realise, a sale, a publication of a book, or whatever. But that does not mean that the parties enter into these transactions outwith the 'shadow of the law' – and indeed, the monist thesis tells us why: the law reflects the contours of these transactions, setting out the relevant duties. The law specifies performance, not just the duties on exit. Therefore, it seems, at least at first glance, that no question of *reduction*, but rather one of *reflection*, arises here. For the life of me I cannot see why Gardner is so insistent upon distinguishing the 'real' relationship from the actual one specified in the contract.

Moreover, it might be said that in so far as the parties to the relationship rely upon their contractual relationship, i.e. the very terms of their legal contract, just to that extent they are *not* giving effect to their 'special relationship' but departing from it. So it is difficult to see what the special relationship-supporting role contract has. This further pulls the law of contract away from its supposed identification as an area of strictly relational duties.

#### *IV.3 Contract and 'Contractual Reductivism'*

But there is another tack Gardner takes, having to do with a bad side of the plasticity of contract, 'contractual reductivism' (44-46, my underlining):

In modern private law, as indeed in much of modern culture at large, there has been a long-standing tendency towards what might be called contractual reductivism where special relationships are concerned, especially but not only in respect of special relationships that can be *initiated* by the making of a contract. Special relationships with relatively fixed deontic content – employer-employee, landlord-tenant, bailor-bailee, and so forth – have increasingly been treated by the law as comprehensively reducible to the contractual relationship in which the parties initially tried to capture that relatively fixed deontic content, and hence as ever more prone to have their deontic content rendered comprehensively plastic, because contractual, in law.

This makes it hard for the law to maintain the integrity of distinctions which, for many purposes, it still needs to draw. The law still needs to draw the distinction between employment relationships and others, for example, in its doctrines of vicarious liability, and for the purposes of various tax, insurance, and licensing regimes. But by giving succour to the idea that the employment relationship is *merely* a contractual one, it has invited erosion of the distinction between employment and its absence. It has invited the exploitation of the plasticity of contractual relationships to create hybrid arrangements, some of them designed to subvert or evade

the law's residual uses of the employee/non-employee distinction. Still holding out against this contractual reductivism are fiduciary relationships and (most) family relationships. They continue to attract the law's recognition as special relationships that have their own relatively fixed deontic content, deontic content that exists quite apart from the attempts of the parties to them to replicate (or evade) that content by contract. However, even they are coming under sustained pressure to submit to total contractualization. It is easy to think of this as augmenting our freedom, allowing us to craft all our special relationships to suit our particular personal goals. Less obvious is the way in which the same developments reduce our freedom, by eroding legal recognition and support for special relationships other than that of contracting party to contracting party. You may think that where the parties to a special relationship have themselves created a contractual fallback, that is no great loss. By the time the parties are resorting to the law to uphold or unwind aspects of their relationship, it is clearly fallback time. It is now for contractualisation to kick in. But this line of thought assumes that the law's only role in recognizing and supporting special relationships is the role of upholder or unwinder when they hit the rocks. It leaves no room for the possibility that the law's recognition of and support for special relationships sometimes contributes to their availability and sustainability in other ways, for example by helping to crystallize their constitutive norms, or to affirm their social significance, or to emphasise their solemnity.

In response to this let me first make one hectoring aside on the more or less fixed deontic content of fiduciary relationships. Fiduciaries have the job of exercising judgment on behalf of (agents) or for the benefit of (trustees) another or others. This is the gist of the arrangement, attracting its own particular rules. The sense of 'gist' here is the same sense in which we can talk about the 'gist' of any particular legal transaction, such as a contract of sale of goods, which in the same way attracts its own particular rules, eg the seller must deliver the goods on time, warrant their fitness for purpose, and so on. And anyone who knows anything about the development of the law of trusts in the last half century or so understands the law of trusts to be just as plastic as the law of contracts. Some of this development is surely unwise, and to be deplored. But it has been so since the 19<sup>th</sup> century– the law has given effect to a principle of 'freedom of trust', just like the principle of freedom of contract (within limits, much like the limits found in contract law doctrine, eg no valid trust can be created for an illegal purpose). As regards fiduciary law specifically, these too are freely tailorable. The 'no profit' rule is, more accurately, the 'no *unauthorised* profit' rule, the 'no conflict' rule the 'no *unauthorised* conflict' rule, and so on. If Gardner means to wave at the idea that the fixed deontic content of the fiduciary relationship is that a fiduciary is held to a higher moral standard than other private law actors, that he must act 'selflessly' or 'altruistically', then he is waving at pernicious nonsense.<sup>27</sup>

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<sup>27</sup> See Penner, J. E. (2014). Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability? Philosophical Foundations of Fiduciary Law. A. S. Gold and P. B. Miller. Oxford, Oxford University Press: 159-175. ; Penner, J. E. (2019). Fiduciary Law and Moral Norms. The Oxford Handbook of Fiduciary Law.

In reviewing this passage, I find myself wishing to repeat the points made above. I am totally unclear on what these special relationships are, and what their value is. Moreover, I am puzzled as to why the *law of contract* should be concerned with these relationships even though have no legal significance *for the law of contract*. Again, Gardner seems to be making the subject of the law of contract relationships which are not contractual. And since he seems not to think much of contractual relationships as such, it is not clear how contract is supposed to connect very well or at all with our lives apart from the law. Notice the underlined phrase. Why should the law of contract *be concerned* with relationships other than those between contracting party and contracting party *qua* contracting party and contracting party, between contracting party and contracting party *as such*?

At the end of the passage Gardner refers to the way that the law can support special relationships, not serving merely as a fallback when things go wrong. But this, rather than securing the point about special relationships and their connection to strictly relational duties, undermines it. In the first place, such a stance depends upon distinguishing the special, valuable relationship, from the contractual relationship, the actual relationship given effect to by contract law. So it cannot be that the contractual relationship in question necessarily or even presumptively inherits whatever value the special relationship itself has. From the instrumentalist perspective we share, the law may do valuable things, here supporting valuable relationships, by means that themselves have no value apart from the way they are used. I happen to think it is a good thing when the state distributes money to families with children, for that tends to assist in the maintenance of the family relationship. But there is nothing at all valuable about just distributing money for the sake of it. By contrast, some people believe that giving money to help others (at least in the right spirit) itself has intrinsic value. The state could support such charitable giving to needy families in various ways, and so supporting such a means would bring not only the enhanced health of the valuable family relationships so supported but would generate intrinsic value in the very giving to boot.

It is true that there are many valuable human relationships which, if they are legalized at all, tend to be legalized by the law of voluntarily undertaken obligations, a lot of which law is gathered under the rubric of contract, though express trusts are also voluntarily undertaken, as is the landlord-tenant relationship, which is in some respects 'contractual', in others more a matter of 'property law'. The labels are not important for the present discussion. What we are concerned with is the facilitative side of interpersonal human interactions, whereunder people can exercise powers to create categorical obligations with each other of various kinds, from the simple power to consent to being touched to the much more extensive powers to deal with one's property and confer rights to one's performance of future acts. Some of these relationships are first and

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E. J. Criddle, P. B. Miller and R. H. Sitcoff. New York, Oxford University Press: 781-796.; Penner, J. E. (2020). Trustees and Agents Behaving Badly: When and How is 'Bad Faith' Relevant? *Fiduciaries and Trust: Ethics, Politics, Economics and Law*. M. Harding and P. B. Miller. Cambridge, Cambridge University Press.

foremost commercial in purpose, others not, such as unincorporated associations like clubs.<sup>28</sup> So we can say, with Gardner, that private law can support and make available these special relationships, without at the same time implying that the law does so as a kind of means which is *distinctly apart* from the particular duties these special relationships otherwise require us to observe. Another way of putting this is that, whatever the connection between actual contracts and these special relationships is, Gardner provides no evidence for, and indeed a fair amount of evidence against, the thought that private law is indexed to strictly or loosely relational duties that we have apart from the law.

#### *IV.4 Is the repairor-reparee relationship a special relationship?*

One of the issues raised by this chapter is whether Gardner thinks that the relationship between the victim of a tort or a breach of contract and her wrongdoer, when the wrongdoer goes about meeting his duty of repair, is itself a strictly relational duty, and if so, what value lies in that (albeit generally temporary) relationship? Gardner says, and I agree, that meeting one's duties is not a zero-sum game between the duty-ower and the person to whom the duty is owed. Complying with one's own duties is a good also for oneself (51-52). The next thing Gardner says seems to me to equivocate about whether the wrongdoer victim relationship that arise when the former meets her duty of repair to the latter is a special one by his lights. Here is the full paragraph (52):

You may say: by the time [someone] is being sued for breach of duty, it is too late for all that. Once we are dealing with legal duties we should think of the question as the question of who gets to be the winner and at whose expense. The situation has turned into a zero-sum game. And we should think of having a duty towards the other as helping to put one on the losing side, not the winning side. [My reply is:] the law is not only there to mop up when things go wrong. For non-special relationship roles, as for special relationship roles, the law is also there to crystallize constitutive norms, to affirm social significance, and to emphasise solemnity.

Another query is whether the continuity thesis has anything to say about this. If the reasons that apply are not such as to reflect a special relationship, do those same reasons foreclose the formation of such a relationship when they are now framed in terms of a duty of repair? Is the same true of strictly relational duties reflecting such a special relationship? When I compensate a friend, is that the discharge of a special obligation in a way that compensating a stranger is not? Is such a difference exists, is it in any way reflected in the law? As we have seen from Gardner's discussion of a 'contractual friendship', a duty with the same deontic content can arise for different reasons. I am merely posing a question here. If, *arguendo*, a duty of repair arises from the breach of what Gardner would characterise as a strictly relational duty, does that duty of repair inherit the primary duty's strict relationality? Does a duty of repair for the breach of a loosely

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<sup>28</sup> See Penner, J. E. (1996). "Voluntary Obligations and the Scope of the Law of Contract." *Legal Theory* 2: 325-357., 345 et seq.

relational duty inherit its loose relationality? I could try to sketch out answers to these questions, but the important point is that given Gardner's emphasis throughout the book on the nature of our duty to repair it seems odd that he doesn't bring in his strict/loose relationality theory to bear on the main topic of the book.

I hope it is clear from the foregoing discussion that I do not object to the strictly/loosely relational duty distinction. Indeed, I am happy to endorse Gardner's general characterization of it. What I question is some of its contours, in particular the way in which he characterises special relationships, and the extent to which this spills over into the primary duties and duties of repair in private law.

### ***V From Family and Friendship to Private Law***

Much of what I say here was foreshadowed in the last section. I do not aim to be cynical, but I think the law tends to treat its players as strangers for the most part,<sup>29</sup> not as those within special relationships. This, finally, raises the question: how much are family and friendship relationships really reflected in the law, in particular in the law of tort or breach of contract, the subject matter of this book?

It is an interesting feature of Gardner's examples, widely drawn from fiction, that they largely have family relations or friendships<sup>30</sup> as their backdrop. Just as a matter of my own intuitions, I don't think the private law of repair really has much to do with these relationships, unlike say, the law of trusts, succession law, family law and so on. Mightn't the private law of repair be *principally* justified because, like the criminal law, it protects and enforces rightful interpersonal relations between strangers, thus helping to build communal reassurance that interpersonal duties will be honoured, and repair properly seen to when they are not? Leaving aside the backstop support that contract law can provide for contractual relationships, mightn't it be wondered whether the law of repair ever *presents itself* as responding to breaches of strictly relational duties, like those of family and friendships.

To raise just one point which shows that contracts in general differ from family agreements, as I pointed out some time ago,<sup>31</sup> many of the agreements that family members undertake are agreements that they have a prior obligation to enter into. Parents must agree who is going to pick up the kids from piano practice today, who is going to call the person to fix the boiler, and so on. It is, by contrast, rare for most contracting parties to have an obligation to come to an agreement in this way.

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<sup>29</sup> Obviously there are exceptions, family law being the most obvious. Perhaps employment law is another.

<sup>30</sup> Or intended friendships, as when one character in *Curb Your Enthusiasm* rear ends the car of another in order to initiate a relationship (103 fn18).

<sup>31</sup> Penner, J. E. (1996). "Voluntary Obligations and the Scope of the Law of Contract." *Legal Theory* 2: 325-357., 335-40, 354-56.

Bringing us back to where we were in Section III, it seems to me that private law has a 'displacement' function not all that dissimilar to the one the criminal law has. Private law, so this line of thought goes, displaces, rather than vindicates, personal life. It makes us as strangers to each other, not personally related in special ways, in special relationships. It treats us as strangers, more or less. As Gardner is happy to admit, the law is a blunt, clumsy, and expensive instrument which scatters all kind of collateral damage in its wake. But, I hazard, it would be even more so if the law of torts and contract took as its reasons for action the preservation of special relationships, and tried to institute those reasons in its rules and judgments.

## ***VI Conclusion***

Any private lawyer with a functioning brain in their head will find this book to be a bottomless source of insight – indeed, I would go so far as to say a source of wisdom. This is just the sort of book which private law needs, not just at the moment (though that too), but as a toe-hold in the exploration of the more common sense understanding of the private law that lawyers such as Hale and his contemporaries prized so much in trying to frame the way that the law (in his case the focus was on the common law, but the point is not parochial) serves its subjects.<sup>32</sup> The anything but parochial 'timeless themes' that Gardner seeks to reveal and interrogate concern the duty of repair. One can only hope for the appearance in the future of *From Personal Life to Private Law II: The Facilitative Side*. Though I expect that would be a longer book.

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<sup>32</sup> See Postema, G. J. (2002). "Classical Common Law Jurisprudence (Part I)." Oxford University Commonwealth Law Journal **2**: 155-180. ; Postema, G. J. (2003). "Classical Common Law Jurisprudence (Part II)." Oxford University Commonwealth Law Journal **3**: 1-28.

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