

PRIVATE AND PUBLIC: SOME BANALITIES ABOUT A PLATITUDE

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I. THE PLATITUDE

Of all the platitudes with which we could begin, one is pre-eminently salient. It is not an everyday platitude, of which there are many, but an intellectual platitude, of which there are also many. It holds that there is no single, comprehensive and compelling distinction between ‘public’ and ‘private’. Like all platitudes, this requires only a little unpacking. ‘Single’, of course, means exactly what it says, but what of ‘comprehensive’ and ‘compelling’? For present purposes, let us assume that a distinction is comprehensive if it fits almost all conceivable instances in which it might be appropriately used. Whenever a question about public and private arises, the same single version of the distinction must always be in play. For a distinction to be compelling, we will stipulate that the reasons supporting it are salient and weighty whenever it is in play. Thus the reasons for distinguishing between sheep and goats must have near universal applicability, those reasons always being pertinent in all our interaction with and thought about sheep and goats. A final stipulation: assume that a compelling single version of the sheep/goat, public/private or any other distinction must almost always generate a dispositive bivalent answer. Something must be either public or private, sheep or goat, and the claim that it is one or the other is always either true or false, right or wrong. There is no explicit middle ground.

The three features that the platitude denies – singularity, comprehensiveness and ‘dispositiveness’ – might be regarded as impossibly demanding requirements for any version of any distinction, never mind ‘the’ public/private distinction. But our specification of these features is not absolute, by virtue of the qualifications ‘almost all’, ‘almost always’ and ‘near universal’. This mitigates their stringency to some degree. There is, however, an advantage in conceiving the three features in their most stringent form: any distinction that satisfies them will be maximally powerful, useful and informative. It is also informative and interesting to see how far, and why, specific versions of particular distinctions fall short of satisfying the three features, stringently understood.

The platitude’s three features can be stated in positive rather than negative terms. Taken as an affirmation, the platitude holds that ‘the’ public/private distinction is plural, limited and tentative. This was presumably not always a platitudinous set of claims. The thought it expresses was once perhaps an original and interesting hunch, although it is now a well embedded feature of our knowledge. The field of knowledge in which the platitude holds sway is the human sciences. Thus many historians (economic, social and cultural), anthropologists (cultural and social), sociologists, economists and philosophers make one or more of the following claims, each of which serves either to echo or to support the platitude’s three features.¹ In addition to

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¹ For a rich and varied range of examples, see S Benn and G Gaus (eds), *Public and Private in Social Life* (London: Croom Helm 1983); J Habermas, *The Structural Transformation of the Public Sphere* (Cambridge:

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holding that there is no single, uniquely salient way of distinguishing public from private, these scholars also note that various versions of the distinction not only overlap in some cases but pull in completely different directions in others. One version of the distinction can therefore place in one realm an institution, set of practices, rules or expectations which, on another version of the distinction, is placed within the allegedly opposite realm. A third claim is this: the way in which any particular version of the distinction is drawn depends upon the purposes for which it is used and the wider social, economic and cultural context in which it is invoked. What is ‘private’ in some places and times is not so regarded in other places at other times. Fourth – and partly because of the issues illuminated in the third claim – it is maintained that particular versions of the distinction are almost always controversial and contested. A fifth claim, both common and well substantiated, is that many versions of the public/private distinction yield a genuine and explicit trichotomy – for example, ‘public’ (the state), ‘private’ (the market) and other (civil society) – rather than a simple dichotomy. All versions presumably also yield an implicit trichotomy, simply because there lurks in the background of all ostensibly dichotomous distinctions a third, ‘other’ category. If the world contains more than just sheep and goats, and has dimensions beyond public and private, then this additional and rarely attended to category is indispensable.

What inferences, if any, can lawyers and jurists draw from the platitude? There are three plausible inferences we are entitled to and probably should draw, although only two are discussed in what follows. Sections II and III elucidate them, the third inference having been examined elsewhere.² These three inferences are neither particularly obscure nor complex, nor can they be regarded as innovative and original. They deserve another label: they are banal. Sometimes, however, the obvious and banal needs be brought into focus since, although before our very eyes, we are so close as to be unable to see. As will become clear, the two inferences overlap to some extent and support one another. Taken in conjunction with the third, they generate a plausible, banal – but for lawyers at least by no means commonplace – view of ‘the’ public/private distinction.

Can this view of ‘the’ public/private distinction aid our understanding of public and private law? Not directly. For, while it throws some light on the dissatisfaction we lawyers often experience when grappling with that distinction, it tells us relatively little about how to conceive of public and private law, understood as the task of providing a theoretical framework for these disciplines. Each of the two conceptions of public law that inform this volume – the external conception, in which public law is essentially *droit publique*, and the internal conception, in which public law regulates the *inter se* relations between governing institutions and their relations with individuals³ – resonate with a number of the distinctions between public and private examined herein. But neither conception of public law is made pre-eminently salient as a result. And that is exactly what we should expect, if the suggestion made in section III B below is correct, namely, that ‘the’ public/private distinction is not as normatively deep as often assumed. Most versions of the distinction are a consequence, and not a

Polity 1989); J Weintaub and K Kumar (eds), *Public and Private in Thought and Practice* (Chicago: University of Chicago Press 1997); M P d’Entreves and U Vogel (eds), *Public and Private: Legal, Political and Philosophical Perspectives* (London: Routledge 2000); R Geuss, *Public Goods, Private Goods* (Princeton: Princeton UP 2001).

² The third inference holds that it is a mistake to expect any particular version of the public/private distinction to be dispositive in legal disputes. I discuss it at 70-74 of ‘What’s Private About Private Law?’ *supra* note *. Not all lawyers succumb to the mistake: Peter Cane is a noteworthy exception. See his ‘Accountability and the Public/Private Distinction’, ch. 10 of N Bamforth and P Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing 2003) and ‘Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept’ in J Eekelaar and J Bell (eds.), *Oxford Essays in Jurisprudence, 3rd Series* (Oxford: Clarendon Press 1987) 57-78.

³ See Introduction, ch I, above, at pp . . .

determinant of, prior and deeper normative commitments. Those commitments will surely determine the conception of public (or private) law we embrace, just as they seem to determine different versions of the public/private distinction.

II. BANALITY No. 1

The first banality holds that the platitude is as true of attempts to distinguish private and public in the juristic context as it is in many others. The issue tackled here is the legitimacy of that extrapolation. We cannot simply assume that the platitude applies within the legal context just as it does within others; this needs to be shown. How might this be done? One way is by noting both the longevity and multiplicity of juristic efforts to distinguish satisfactorily between public and private. Such efforts were made in the early Roman republic and beyond (see table IX of the Twelve Tables (449 BC) and the *Institutes* (circa 534 AD), book 1, title I (4)) and they are still with us today.⁴ Moreover, these various efforts to distinguish public and private range from the astonishingly simple, to the complex, multiple and cross-cutting. The longevity and sheer variety of juristic efforts to distinguish public and private form an obvious parallel with efforts to distinguish the two in non-juristic contexts, thus lending plausibility to the extrapolation.

The extrapolation is plainly not a logically necessary inference. I suggest only that it is a plausible move because efforts to distinguish public and private in the juristic realm have a number of features in common with similar efforts in other realms, as the remainder of this essay aims to show. The argument probably cannot be made more powerful than this without an assessment of all the reasons that might show the juristic realm to be exceptional or quite distinct from other realms. While that demanding task cannot be undertaken here, three tempting and not unrelated arguments about law's exceptional nature should be noted. The first takes this form: it could be insisted that the various versions of the public/private distinction espoused by non-lawyers cannot be relied upon when attempting to understand how that distinction operates *within* the law. The public/private distinction as drawn by lawyers is internal to the law - it is intended to operate within particular segments and sub-segments of legal doctrine as a solution to specific legal questions. By contrast, the multiple distinctions between public and private offered by historians, sociologists and others can, at most, serve as organising principles for legal doctrine as a whole, having no operative role within the law. That some versions of the public/private distinction are meaningfully 'internal' to law, while others are 'external' to it, is a significant point. But it is not, as we will see in the following section, sufficiently powerful to block the extrapolation.

The second attempt to block the extrapolation deserves attention because it highlights a familiar aspect of lawyerly experience. This aspect can be dubbed law's 'stipulative sovereignty', the idea being that contemporary legal systems are able to dictate the meaning of the terms and concepts they use. It is thus commonplace for lawyers to remind non-lawyers that legal usage and meaning is often very different indeed

⁴ In Roman discourse at least two understandings of the public sphere were available. One was the public sphere understood as *res publica* (the common property and concern of Roman citizens), while the other conceived the public domain as representing the range of imperial sovereignty or imperium. For discussion of a famous conflict between the former and one sense (self-interest) of 'the private', see Geuss, *ibid.*, ch. III. It seems that medieval law did not regard public/private as marking a significant or interesting distinction or set of distinctions: W Ullman, *The Medieval Idea of Law as Represented by Lucas de Penna* (London: Methuen 1946) 58; C Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge UP 2008) 352 and Habermas, *supra*, n 1, at 7 ("[A] public sphere in the sense of a separate realm distinguished from the private sphere cannot be shown to have existed in the feudal society of the High Middle Ages"). For contemporary juristic discussions of the distinction, see n 12 and 39, *infra*.

from non-legal usage and meaning. That the law does this is not just an expression of the standard stipulative power that all language users have.⁵ Rather, it is thought necessary and appropriate in some circumstances for the law to define words and concepts in a technical, non-standard way in order to accommodate particular legal goals or purposes. This supposedly general truth about law might be invoked in the current context to show that the platitude need not ‘infect’ the law. Law’s stipulative sovereignty, it could be argued, insures it against variations in, and competition between, the sense and uses of concepts like public and private simply because law has the power to fix the meaning of its words and concepts.

Although not implausible, this argument falls short of blocking the extrapolation. While the law’s stipulative sovereignty is undeniable, its range and power are constrained. For one thing, the law’s language and concepts must be intelligible at some level to non-lawyers, if the law is to function as a means of subjecting human conduct to governance of rules. One can only be guided by rules that one can understand. This is as true of non-lawyers wanting to live within the law and to deploy it, as it is of those non-experts charged with making legally significant decisions (such as jurors and lay magistrates). This very general constraint thus requires that the meaning of many legal words and concepts cannot be completely unintelligible to those to whom they apply. This requirement seems quite plausibly to inform another, namely, that the law’s stipulative sovereignty be exercised sparingly. When words and concepts are given technical legal meanings this is usually done explicitly and in order to achieve some or other specific legal goal. Moreover, it is done apologetically, with regret. But why? The tempting answer is because both lawyers and non-lawyers alike take seriously the general constraint just identified. And that, of course, is simply another way of saying that they value some elements of the rule of law ideal.⁶ Finally, note that the argument from stipulative sovereignty just does not work in this particular context. Or, more accurately, it has not worked, since lawyers and jurists in most of the common law jurisdictions still find ‘the’ private/public distinction both problematic and contestable. We are therefore faced with either a domain into which law’s stipulative sovereignty does not extend, or with one into which it has penetrated but without effect.

The point about law’s stipulative sovereignty could be given a theoretically ambitious framework. That framework is systems theory and this is the third way in which the extrapolation might be blocked. For one of the key claims of systems theory is that different normative (and other) systems are marked by ‘operative closure’. This means that they are not open to influence from other such systems except in the general sense that all systems are causally effected by their environment. Operative closure is a matter of one normative system policing its boundaries against other such systems, so that the concepts, ideas and knowledge of one system maintain their integrity and autonomy as against those in other systems. Particular normative systems can, however, utilise concepts, ideas and information from other such systems, but those concepts, ideas and information become part of the accommodating normative system. Such concepts, ideas and information therefore cannot function, nor can they have the same meaning, they once did, when part of their original normative system.⁷ For some systems theorists, law is an operationally closed normative system *par excellence*, being particularly effective at policing its own boundaries and thus repelling ‘interference’ from other system

⁵ The classic exemplification of which was offered by Humpty Dumpty: see L. Carroll, *Through the Looking Glass, and What Alice Found There* (London: MacMillan 1872) 72.

⁶ For two near canonical statements, see LL Fuller, *The Morality of Law* (New Haven: Yale UP, rev ed 1969) ch II and J Raz, *The Authority of Law* (Oxford: Clarendon Press 2nd ed., 2009) ch 11.

⁷ See N Luhmann, *Law as a Social System* (Oxford: Clarendon Press 2004) chs 2-4.

domains. This general claim could clearly be invoked within the context of ‘the’ public/private distinction, holding that the understanding other bodies of thought and other possible normative systems have of that distinction will not influence the way in which the distinction is conceived and operates within law.

Systems theory’s notion of operative closure, which asserts the relative impermeability of various systems to one another, is neither unintelligible nor radically implausible. Its problem, in the current context, is the intellectual price that needs be paid to espouse it. That price is high: the wholesale adoption of systems theory itself, in one or other of its current versions and with all its attendant challenges and difficulties.⁸ That is not a price that can be paid here, since a detailed engagement with systems theory is not part of our agenda. This potential block to the extrapolation must therefore remain a vague and brooding possibility hanging over all that follows. And what immediately follows is an elucidation and evaluation of the second banality, save for one final point about the first.

If the platitude can be extended to the juristic realm, then its three features – plurality, limitedness and tentativeness – apply there every bit as much as they apply elsewhere. The third feature, though, has special significance in the juristic context. This is because some lawyers apparently require that the distinction be doctrinally dispositive, that it should resolve actual cases. This is the fulcrum of the third inference that can be drawn from the platitude and, while undoubtedly interesting, it is not addressed here.⁹

III. BANALITY No. 2

The second inferential banality that flows from the platitude has two principal components. The first holds that there is no single version of the public/private distinction operative in the law but a number. The second insists that some – but perhaps not all – versions of the distinction can be in play both practically (in particular cases) and juristically (in legal thought, teaching and commentary). I attempt to substantiate both components by elucidating five general and two specific versions of the public/private distinction. These various versions of the distinction are worth separating because, taken together, they accommodate many of our apparently contradictory intuitions about ‘the’ public/private distinction. These intuitions inform the sense many lawyers have, when grappling with questions of public and private, of hitting an impasse or falling into a quagmire. This sense disappears once we appreciate that our apparently conflicting intuitions can embody many or all of the following different distinctions between public and private.

Before examining the substance of these distinctions, we must note that they also differ in methodological terms. By this I mean that different versions of the distinction are constructed within different intellectual and cultural contexts and might therefore not only utilise different criteria of success and failure, but be intended to perform different functions. In methodological terms, all of the substantively different versions of the public/private distinction examined here can usually be placed within one or other of two categories. On the one hand are general versions of the distinction. These are so named because they often have a life in the wider culture of particular societies, being part of ordinary discourse, and are usually given more precise expression, and certainly more sustained attention, by historians, sociologists and other social scientists. It might be the case that versions of the public/private distinction at large in the culture of particular societies cannot be given more

⁸ The two principal versions on offer belong to Luhmann, *ibid*, and G. Teubner (see his *Law as an Autopoietic System* (Blackwell: Oxford 1983)). A fine critical overview of Luhmann’s theory is M King and C Thornhill (eds), *Luhmann on Law and Politics: Critical Approaches and Applications* (Oxford: Hart Publishing 2006).

⁹ See n 2, *supra*.

precise expression by social scientists because they are already as precise as they can be. But it is almost always true that social scientists, rather than minting a new version of the public/private distinction, purport to articulate and discover an already existing but not sufficiently appreciated version of the distinction. And that existing but insufficiently noticed version, while it might often exist in scholarly social scientific work, is also thought to have a life beyond that work, in some or other society or social context.

On the other hand are specific versions of the public/private distinction which, in contrast with general versions, are made only by lawyers about the law. This contrast can be extended a little, for specific distinctions are additionally *internal* to the law. This says more than that they are made only by lawyers and jurists, for the lawyers and jurists who espouse specific versions of the public/private distinction do so from the viewpoint of participants in, rather than external observers of, the legal system. This might be because some of these lawyers and jurists are indeed participants in the legal system in a limited sense: they are practitioners, such as judges, advocates and legal advisers. Yet it is also because the participants' point of view is the default mode of all doctrinal and much jurisprudential scholarship.¹⁰ Moreover, specific versions of the public/private distinction are usually intended by their proponents to operate *within* particular areas of legal doctrine (such as, for example, administrative law). These versions of the distinction therefore cannot often – if at all – be used as a means of organising or structuring legal systems as a whole.

Many general versions of the distinction are used to do just that, being invoked as organising principles under which many or all substantive legal doctrines are allegedly subsumable. General versions of the public/private distinction are also (i) rarely formulated from within the perspective of participants in the legal system; and (ii) almost never expected by their proponents to do legal doctrinal work. This is mainly because the methodological commitments of academic proponents of general versions of the distinction – they are, *inter alia* historians, economists, and sociologists – entail that the participant's perspective is either suspect or not easily available. There is an interesting asymmetry here, though, which is that lawyers can make use of and recommend distinctions, ideas and theories formulated outside the methodological perspective of their discipline. Furthermore, it is sometimes true that such distinctions, ideas and theories resonate within the law, having a life therein, albeit in nascent or implicit form. That, at least, is what I argue about two of the general versions of the distinction between public and private. Two of the specific, allegedly purely legal versions of the public/private distinction are little more than echoes of one general version of the distinction, while the substance of another general version of the distinction resounds within a particular branch of the law of trusts. This is why, although seven versions of the distinction are in play, only five are discussed separately below. The remaining specific version of the distinction is not reducible to any more general version, but neither is it taken particularly seriously by jurists. This oddity is our starting point, but for one final preliminary observation.

The effort to classify versions of the public/private distinction as either general or specific is not exhaustive, nor do I claim that the various versions of the public/private distinction discussed here are the only versions of the distinction available. The first part of this observation highlights the fact that in this context the options 'general' and 'specific' need not exhaust the available logical space: there might be room for a hybrid

¹⁰ I have made some effort to substantiate this claim elsewhere: *Philosophy of Private Law* (Oxford: Clarendon Press 2007) 26-44; 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill Law Journal* 605-656; 'The Crises of Private Law', ch 7 of T Wilhelmsson and S Hurri, *From Dissonance to Sense: Welfare State-expectations, Privatization and Private Law* (London: Dartmouth 1998) 177-218; and *Understanding and Explaining Adjudication* (Oxford: Clarendon Press 1999) chs 2-3.

category in which versions of the public/private distinction take on features of the other two. My claim is only that the versions of the public/private distinction considered here fit reasonably neatly into one or other category. That there are other conceivable versions of the distinction, which might also either fall within or between these two poles, is a possibility that none of the arguments below rule out. This possibility is, however, left unexplored. We have quite enough to grapple with.

A. Five ways of distinguishing public and private

1. The first way of distinguishing public and private is a means of distinguishing only public and private *law*. It is, in the terminology used above, a specific version of the distinction, being deployed by lawyers from the perspective of lawyers. It is purely legal-doctrinal and, in English law at least, it seems both undeniable and unproblematic. The distinction consists of highlighting the various doctrinal and procedural differences between private and public law. For much of the common law's history in England the remedies for public law wrongs, the rules of standing, as well as the doctrinal requirements for establishing such wrongs and obtaining remedies, have been for the most part different from the wrongs, remedies and doctrinal requirements embodied in private law.¹¹ There is now an administrative court in England, thus reinforcing a public law/private law divide.¹² This set of doctrinal, remedial and procedural differences between public and private law is not, of course, the only possible set. Other jurisdictions draw the distinction in rather different ways.¹³ But there can be no doubt that they add up to a significant distinction between the two domains.

The puzzle here is that some jurists find this way of distinguishing public and private law unsatisfying, without being perfectly clear as to why. They are content to note this legal-doctrinal distinction, yet then proceed as if it is in need of further explanation and justification.¹⁴ What, then, is their worry? Perhaps that the legal-doctrinal distinction is insufficiently 'deep' or, what likely amounts to the same thing, is altogether too contingent. Thus the distinction as currently embodied in English law might simply be an historical accident rather than a well-founded and valuable means of distinguishing private and public law. Espousing this view does not require great scepticism of the jurist or lawyer, but simply awareness that the law, either in the hands of judges, legislators, or both, can take wrong-turnings. These turnings can be wrong in legal, moral or political terms. A statute, judicial decision or line of decisions can inhibit desirable doctrinal development, or impact adversely on some aspect of commercial, social or cultural life, as well as embodying morally and politically

¹¹ For an overview of administrative law remedies and related issues, see P Craig, *Administrative Law* (London: Thomson 6th ed., 2008) part 3 and H Wade and C Forsyth, *Administrative Law* (Oxford: Clarendon Press 10th ed., 2009) part VII.

¹² From 1981 until 2000 the Crown Office List ensured that only judges with public law experience heard applications for judicial review; as a result of a Practice Direction of 20th July 2000 ([Crown Office Practice Direction - The Administrative Court](#)) the list was renamed 'The Administrative Court'.

¹³ For a warning that the distinction as currently embodied in English law is a worrisome legal transplant, see J Allison, *A Continental Distinction in the Common Law* (Oxford: Clarendon Press 1996). A contemporary overview of the distinction in French and English law is provided by the essays in M Freedland and J-B Auby (eds), *The Public Law/Private Law Divide: Une Entente assez Cordiale?* (Oxford: Hart Publishing 2006).

¹⁴ See Cane, 'Accountability . . .', *supra* n 2, at 248-249 for some interesting observations on this issue.

objectionable distinctions or suppositions.¹⁵ This awareness inhibits the tendency to regard all legal-doctrinal development as always *prima facie* desirable and justified; it is part of the process of ‘demystifying the law’.¹⁶

But there are at least two quite different responses to this aspect of law’s fallibility. One response combines a perfectly proper critical awareness of law’s normative (moral and political) fallibility with an equally proper awareness of law’s normative (moral and political) contingency. The latter entails little more than a realisation that some areas of law – taken to include not just chunks of substantive legal doctrine and their constitutive standards, but also procedural rules and broader aspects of institutional design such as the organisation of the trial process – are morally and politically either over-, under- or un-determined. The last possibility exists when some legal rule has no moral or political content, resonance or analogue, the first when quite different substantive moral or political values actually determine the content of the same area of law. The second possibility is realised when various different substantive moral or political values are consistent with the same area of law.

Awareness of law’s moral and political contingency and fallibility provides a fertile soil for this legal-doctrinal distinction between public and private. This version of the distinction is malleable, context-dependent and unlikely to be dispositive in every legal dispute. Its contours have undeniably changed over time and, equally clearly, it has not been and is not now drawn in the same way as its legal-doctrinal equivalent in, for example, French law. Moreover, while the distinction is expected to bear some weight in particular cases, it seems rarely in and of itself dispositive. Judges and jurists usually provide a panoply of reasons to support their decisions in cases in which a public/private question arises and this version of the distinction is almost never itself conclusive.¹⁷ And this, of course, simply reinforces the overarching argumentative refrain of this paper.

The mutability and context- (or jurisdictional) dependence of the legal-doctrinal version of the public/private distinction becomes morally and politically worrisome for some jurists in one or other of the following two scenarios. The first is simply that the distinction, as currently drawn, comes to be regarded as morally and politically mistaken. If that is so, then at some point it is likely that jurists will attempt to reformulate it and, as part and parcel of this process, will cast about for a moral and political blueprint that both explains the mistake and shows how it can remedied. The other scenario is this: jurists and lawyers come to think that the law does and must embody a specific moral-cum-political blueprint and that this blueprint requires the public/private distinction be understood in a precise and exacting way. The current legal-doctrinal version of the distinction is objectionable if and when it departs from the ukases of the blueprint. The principal difference between these two scenarios is one of intellectual temper. In the first, the question as to what the normative basis of the public/private distinction might be is a genuinely open question; in the second, that question already has a compelling answer and the jurists’ job is simply to implement it. There is a degree of normative certainty in the latter which is lacking in the former.

The latter scenario is, I think, the fulcrum of the second response to law’s moral-cum-political fallibility. That the law can make moral and political mistakes is profoundly worrying on this view and jurists should aspire to minimise this possibility. One way of achieving this is by ensuring both that the law has a

¹⁵ A common law list of shame usually includes *Lochner v New York* 198 US 45 (1905) and *Bartonshill Coal Co v Reid* (1858) 3 Macq 266.

¹⁶ Possibly initiated or at least made prominent, in the Anglo-phone world, by Jeremy Bentham. See H L A Hart, *Essays on Bentham* (Oxford: Clarendon Press 1982) ch. I.

¹⁷ One example, from many, is *Aston Cantlow v Wallbank* [2004] 1 AC 546.

secure moral-cum-political basis and that this basis directly informs legal doctrine and legal-institutional design. This approach cannot take the legal-doctrinal version of the public/private distinction seriously without first determining its consonance with the law's moral-cum-political blueprint. If the law's moral fallibility looms large for proponents of this approach, then they are unlikely to take many of the distinctions and doctrines of existing legal systems particularly seriously.

This approach to law's fallibility and contingency informs some efforts to add normative weight to the legal-doctrinal version of the public/private distinction. One temptation here is to draw a bright and impermeable boundary between other, allegedly deep moral notions and use this as the foundation for the legal-doctrinal (or any other) version of the public/private distinction. Some jurists suggest that two pertinent and allegedly deep moral notions are those of distributive and corrective justice, although these are not the only plausible candidates. If it can be shown that (i) these two notions are absolutely incompatible, so they cannot coherently blend into one another or be meaningfully combined;¹⁸ and (ii) that one of these notions animates public law while the other animates private law, then we might be close to generating a single, comprehensive and compelling distinction. But the steps that need be taken for this argument to work look a great deal like unbridgeable chasms. One chasm comes to light with this question: what reasons are there to think that there is a bright and impermeable boundary between distributive and corrective justice, such that considerations of one kind cannot be coherently combined with considerations of the other? The fact that Aristotle thinks this is not enough for, even if we love Aristotle, we should love truth more.¹⁹ And the truth of the matter is that Aristotle's reasons for regarding corrective and distributive justice as uncombinably separate notions are weak.²⁰

The second chasm concerns the *prima facie* lack of fit between existing systems of public and private law, on the one hand, and the allegedly utterly discrete notions of corrective and distributive justice, on the other. The point is that both corrective and distributive justice appear to be in play in existing systems of both private and public law. If this is not to be an embarrassment for proponents of this view, they must either explain this first impression as a mistake or conclude that this impression, while correct, serves only to indict existing systems of public and private law. Establishing the first possibility is tricky. It could involve a further specification of what corrective and distributive justice look like, the result being an improved view of their respective roles with regard to private and public law. It might also entail a closer look at these chunks of legal doctrine themselves, so as to correct the impression that corrective and distributive justice are in play in both. Both tasks are demanding and neither has as yet been discharged successfully.

The second possibility requires an heroic indifference to current law's moral and political status. This manifests itself in this judgement: the law's lack of fit with these two moral notions serves only to undermine its moral and political status and not, of course, the explanatory power of those notions. There is an un-argued rule of explanatory priority at work here and it should be articulated - that law (and perhaps many other aspects of social life, institutions and practices) must embody and fit these moral notions if it is to pass moral muster. But why start with the assumed priority of these notions, if our interest is in the moral and political and other

¹⁸ This seems to be Ernest Weinrib's view: *The Idea of Private Law* (Cambridge, Mass.: Harvard UP 1995) p 61 and 71-4. I have explored another possible normative basis for a distinction between public and private law in 'What's Private about Private Law?', *supra* n *, at 58-69.

¹⁹ I'm mangling a phrase that was once thought to have been said by Aristotle of Plato; he said nothing of the kind (see *Nicomachean Ethics (NE)* in J Barnes (ed.), *The Complete Works of Aristotle*, Vol. II (Princeton: Princeton UP 1984) at 1096a 16).

²⁰ See *NE, ibid*, at 1131a 10-1131b 21.

normative value of the law itself? The question of what moral and political values do animate the law must surely be an open one that we, in part at least, answer by examining the law itself. Positing two or more pre-eminent salient moral or political notions and then indicting the law for not accommodating them either sufficiently, or in the right order, begs the question.

2. A second way of distinguishing public and private is by contrasting matters of general concern with matters of individual concern. This is a general version of the distinction, neither developed by lawyers nor used exclusively by them, although it is frequently articulated and refined by the courts in one context. It usually operates as a general structuring principle for whole legal systems and not only cuts across some specific versions of the public/private distinction, but also serves as a confusing background presence to their elaboration. This way of distinguishing public and private has a gravitational pull such as to cause dissatisfaction with some specific versions of the distinction.

The idea that issues of general, communal concern exist independently of those matters of concern to individuals *qua* individuals had a vivid life in the Roman republic. Matters of general communal concern and ownership were originally marked by the term *res publica* which, in one sense, was used to highlight the property and interests of the Roman army. That term came to be used in a more general sense, to include matters of concern to the community of Roman citizens in general, including their interest in various public spaces (the Agora etc). Yet the term is seemingly always contrasted with those matters of concern only to individuals as individuals rather than individuals *qua* members of sub-groups within the community. The latter restriction is in need of justification, since the assumption that, when defining the realm of the private, 'individual concern' must mean 'single individual concern' (and not the concern of a collection of individuals) is just that: an assumption. This assumption makes it impossible for groups of individuals (incorporated or unincorporated, but smaller than everyone or the vast majority) to join together in their concern over some matter and remain private.²¹ But there is no obvious and strong reason why we should not regard the interest a group of individuals has in some matter as private, provided this group is a sub-group of some larger group. The contrast between public and private in this context is therefore one between all, on the one hand, and many, some or few, on the other. Where the group of individuals with some or other interest is identical with all the members of the only grouping in play, then it seems proper to characterise their interest not as private but as 'the' public interest. The absence of hard and fast rules of usage here also allows another twist: we might, quite properly, regard the interests of a group larger than a mere handful of people as representing the public interest in some circumstances. So, for example, it is not crazy to say that the public interest in some community would be served by the construction of a bridge across a river or a busy road, even when that community is small and when far fewer than all members will use the bridge. This scenario could also be justifiably characterised as an instance of private interest, where that means something more than 'single individual concern' but less than 'the concern of each and every member of the group'.

²¹ This seems to have been James Harrington's view: "the people, taken apart, are but so many private interests, but if you take them together they are the public interest": J. Harrington and J Toland, *The Oceana and Other Works of James Harrington* (London: A Millar 1700; first ed. 1656) at 154-155. For Quentin Skinner, this is an expression of the neo-roman view that the will of the people is nothing more than "the sum of the wills of each individual citizen": *Liberty Before Liberalism* (Cambridge: Cambridge UP 1998) at 28-29.

Bearing in mind the leeways of usage, a plausible interpretation of this version of the distinction between public and private can take alternate form. The two terms could be used to contrast matters of relevance and interest to the whole or the vast majority of a community, on the one hand, with matters which are of relevance and interest to either individuals taken singly or to sub-groups of individuals (parents, occupants of a particular locale etc), on the other. The contrast here is between almost all (public) and some (private), rather than between many and one. Alternatively, the terms public and private could be used to characterise either the interests of all, or the interests of any but the very smallest group, on one hand, and the interests of individuals *qua* individuals, on the other. The contrast here is between many (public) and few (private).²² Since usage licenses both characterisations, a case should be made for preferring one over the other. No such case made is made here, however, since my argument requires only that these different uses be brought to light.

This variability of usage, and the way in which it permits lines to be drawn slightly differently in one and the same context, is evident in the deliberations of the English courts when determining the charitable status of a trust. One test that any trust must satisfy in order to be regarded as charitable in English law is that it be of public benefit.²³ The courts distinguish between sufficiently and insufficiently public groups for this purpose in ways that make use of each alternative formulation of this version of the public/private distinction. Thus it has been held that a trust can be of public benefit even if it benefits only a small number of people in a particular locality. The ‘public’ here is therefore envisaged as a very small, small or medium sized group of individuals with an interest in common; it must, however, be more than just “private individuals” or “a fluctuating body of private individuals”.²⁴ Furthermore, even a very large number of individuals, such as 110,000 employees of a large multi-national company, may not be enough to constitute the public.²⁵ What marks the line between a sufficiently and insufficiently ‘public’ group is thus not immediately obvious. It is something the courts struggle with and, viewed generously, is clearly a matter of judgement.

In the exercise of this judgement, the courts have concluded that trusts for the benefit of numerically very small groups, such as elderly Presbyterians or the occupants of a particular old persons home, benefit a sufficiently public group.²⁶ By contrast, it seems that a trust for the building and maintenance of a bridge open only to impecunious Methodists would not be of public benefit.²⁷ The former small groups are a segment of the public while the latter group, which could be numerically identical, is not: the distinction the courts are drawing here is therefore not one between the very many (public) and the very few (private). The courts have also accepted that trusts for the giving of public masses in a particular church and for the benefit of a specific synagogue are of public benefit, one reason being that both church and synagogue in question were open to the public at large.²⁸ A trust for the benefit of a Carmelite order was held to be non-charitable on the ground that, *inter alia*, the order’s life had no public aspect, but was given over entirely to ‘private’ religious worship and

²² I do not claim that the quantifiers (‘almost all’, ‘many’, ‘some’, ‘few’) in these two formulations are ultimately logically robust; I hold only that they have some intuitive and serviceable ‘everyday sense’.

²³ Charities Act 2006 s 2(1) (b) and s 3. The case law on public benefit prior to the Act is still valid by virtue of s 3(3) of the Act. The Charity Commission’s guidance on the nature of public benefit has recently been found wanting: *The Independent Schools Council v The Charity Commission and others* [2011] UKUT 421.

²⁴ *Verge v Summerville* [1924] AC 496 at 499 (Lord Wrenbury).

²⁵ See *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

²⁶ See *Joseph Rowntree Memorial Trust Housing Association v Attorney General* [1983] Ch 159 and *Re Neal* (1966) 110 SJ 549.

²⁷ *IRC v Baddeley* [1955] AC 527 at 592 (per Lord Simonds).

²⁸ See *Re Hetherington (Deceased)* [1990] Ch 1 and *Neville Estates v Madden* [1962] Ch 832.

meditation.²⁹ It seems that the only sure-fire blocks to charitable status, when the public benefit requirement is in play, is the fact that the group which stands to benefit is either much too small (“numerically negligible”³⁰), or consists of members all or many of whom have a personal nexus with the benefactor(s).³¹ While the courts will sometimes regard a numerically negligible group as private on grounds of its size, they will also usually regard a numerically very significant group as private if there is a personal nexus.³²

The current version of the distinction, understood as marking a line either between almost all and some, on the one hand, or between many and few, on the other, is not only significant because instantiated in this area of law. The point is worth emphasising, though, because it shows how a general version of the public/private distinction can resonate within the law. Neither the Charity Commission nor the lawyers and judges who grapple with the question of public benefit see themselves as striving to articulate non-legal common sense. Rather, they look almost exclusively to the previous cases and the body of doctrinal writing on the topic in order to reach decisions in particular cases. But, as should be obvious from the previous brief sketch of what the courts do, the issues they grapple with are exactly the same as those that animate any effort to utilise a general form of this version of the distinction.

Understood in its general form, the current version of the public/private distinction is significant for another reason. It presents a particularly vivid contrast with the fourth version of the distinction. The contrast concerns the state. While to the forefront of the fourth version of the distinction, the state is almost completely absent in the current version: it is not even a necessary condition of ‘public-ness’ in the latter, while in the former it assuredly is. However, since the state is an almost unavoidable part of contemporary societies, a version of the public/private distinction that does not register its presence risks being thought eccentric. That risk is nevertheless worth taking because the current version of the distinction provides both a salutary reminder about the state itself and warns of an egregious elision.

The reminder is that the state was not always with us. Which is to say, humankind has not always lived with an agency of power and ostensibly legitimate authority separate from a collective body of people, on the one hand, and a powerful and presumably charismatic individual or collection of individuals, on the other hand. The state as we know it, and as it was ‘invented’ in modernity, is something different, in terms of its life-span, deployment of power and ostensible authority, from both Kings and the multitude.³³ How this difference is to be conceived has been a staple of some strands of political philosophy since Thomas Hobbes posed the question and offered a distinctive and tremendously influential answer to it. One important point, for present purposes, is that we need a vocabulary to capture matters of public concern in those contexts, like the classical (not just Roman) world, in which the state as we know it did not exist.

The temptation is to read our modern notion of the state back into the historical record. Because we are familiar with this locus of power, distinct from personal and people power, we tend to assume that every one, during every epoch, was. Once we start doing this, we are no distance at all from the egregious elision. It consists of blurring the distinction – or simply assuming it out of existence – between public concerns and

²⁹ *Gilmour v Coats* [1949] AC 426.

³⁰ *Oppenheim*, *supra* n 25, at 306 (per Lord Simonds).

³¹ The personal nexus limit was thoroughly explored by the House of Lords in *Oppenheim*, *ibid*.

³² See *Baddeley*, *supra* n 27 (Methodists in West Ham and Leyton too small a group to be ‘public’).

³³ The argument belongs to Quentin Skinner: a lucid and magisterial presentation is ch. 14 of his *Visions of Politics*, vol. II (Cambridge: CUP 2002). A shorter version is ‘The State’ in T Ball, J Farr R Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: CUP 1989).

interests that can be conceived independently of the state and those public concerns and interests that unavoidably involve the state. The elision usually involves assuming that the latter must subsume the former, that anything of public or collective interest must *ipso facto* involve the state or be of state interest. This assumption must be converted into an argument and that, surely, is unlikely to be general. It is simply very difficult to imagine what reasons might show that *every* instance of the public interest, as conceived here, is also an instance of state interest or should involve the state.

If the state is not crucial to this version of the distinction, one might well wonder what relevance, if any, the distinction has for law. A rearrangement of legal doctrine around the two poles of this distinction can be attempted. The areas of law currently regarded as constituting private law might be conceived as involving matters of individual concern. The law of contract, torts, trusts, personal and real property certainly allow individuals *qua* individuals, or as members of corporate or unincorporated bodies, to give legal effect to their decisions. Private law not only provides protection for a number interests individuals have (in their persons and holdings, for example), but also allows future planning through contracts and trusts. Public law might be regarded as entailing only matters of collective concern, being of relevance to all or the vast majority of the community. The community's constitution and rules for the deployment of force, for example, could be regarded in this light.

But there might be a problem with this attempt to inscribe the distinction into law. The distinction might not actually work as a general structuring principle for legal systems because it defines one of its poles out of existence. This worry arises once the examples mentioned in the previous paragraph are scrutinized. Think, again, of contract and tort, equity and trusts, personal and real property. While these areas of law surely protect various 'private' interests individuals have, and allow individuals to achieve various goals, is it not equally true that all members of the community have an interest in these areas of law functioning in those ways? If so, then private law, no less than public law, is a matter of public concern, an interest of, and of relevance to, each and every member of the community in which it exists. And, if all of a community's law is of interest and relevance to all members of that community, then all law is in one sense public (law).

Of course, the claim that a community's law is of interest and relevance to all members of that community is only plausible if understood as something other than an empirical truth. The claim normally contains an implicit 'ought' as well as another restriction, for it usually means: all *engaged* members of the group *ought* to interest themselves in their community's law. This 'ought' need not be a moral ought or in any sense other-directed; it can be purely prudential or self-interested. The weight carried by 'engaged' in this claim is considerable and it requires the support, at the very least, of an account of what group membership entails. In the context of the modern state this usually becomes a discussion of citizenship and its limits, although we should not forget that the notion of citizenship predates that of the state.

Is it the case, then, that when deployed in the legal context this distinction actually defines one of its poles away? No. For, although the distinction generates a plausible and informative sense in which all law – public and private – is public, it also allows us to say in conjunction that some areas of law are more private than others. Some areas of law appear designed so as to facilitate and protect individuals in their pursuit of their own personal projects. This might seem like keeping one's cake and eating it, but only if we assume that a distinction between public and private must be unique, comprehensive and dispositive. But this version of the distinction is clearly neither comprehensive nor dispositive, since it does not generate bivalent answers in every instance. It

allows us, instead, to say that one and the same area of law is in some respects public and in other respects private. Some might regard that kind of judgement as sophisticated and informative, but it seems unlikely that all lawyers will agree.

Of all versions of the public/private distinction, the current one exercises strong gravitational force over at least two of the others. These are the two specific versions of the distinction that lawyers invoke within administrative law, which are examined in subsection 4. For, however clear these specific versions are, almost all lawyers are uneasy about accepting them as comprehensive and deeply significant versions of the public/private distinction - they seem to miss too much about public and private. This sense is plausibly explained by the hold that the current version of the distinction has on us. All lawyers know (or feel they know) that all law is significantly public. The current version of the distinction accommodates and nurtures this view.

3. The third version of the distinction, like the previous version, warrants the judgement that there is an interesting and informative sense in which all law is public. The senses that 'public' and 'private' bear here are not, however, the same as the senses they have in the previous distinction. The distinction between public and private as drawn here is altogether more technical and, while not as obvious in either law or the general culture as the second version, it nevertheless captures and conveys an important insight. The distinction has been drawn principally by economists and consists of distinguishing between public and private goods. Pure public goods, on this view, are non-excludable and non-rivalrous. A good is non-excludable if, once available, beneficiaries cannot be prevented from using it. The light from lighthouses has this property since, once lighthouses are functional, seafarers cannot be prevented from benefiting from their light: it is available for all to see. The light from lighthouses is also non-rivalrous, which means that its use by some does nothing to reduce its availability to others. This is clearly not true of many other goods, such as cake and apples, which are excludable and rivalrous. Such goods are quintessential private goods.

One key property of pure public goods – non-excludability – shows the difficulty in providing such goods. How might lighthouses and their attendant light be provided? An obvious path would be to seek contributions from all who stand to benefit from them. A consensual levy upon seafarers is a natural consequence. But purely self-interested seafarers have reason to avoid such a levy and to free-ride for, once light is provided, its non-excludability means that it is provided to all who stand to benefit from it whether or not they have contributed to its provision. An allegedly rational but purely self-interested individual seafarer will therefore conclude that it is better for them to benefit from the good without paying for it, rather than benefit from the good and pay for it. And so, too, will all other allegedly rational but purely self-interested seafarers. Yet if this is so, the free-rider problem not only arises after provision of the good, as in our hypothetical; it will also prevent any pure public good being provided in the first place, if a sufficient number of potential beneficiaries asked for a contribution are rational and purely self-interested. They will conclude that it is better not to contribute and take the benefit if and when the good is provided by contributions from the rest. *All* economists and rational choice theorists accept that coercion is a standard solution to free-rider problems, particularly in the form of power to compel the beneficiaries of public goods to contribute towards their provision and upkeep. *Many* economists and rational choice theorists therefore conclude that the state, in the

form of an organised monopoly of legitimate force, is the best or perhaps even the only way of ensuring the provision of public goods.³⁴

While the argument just sketched takes as its example the light from lighthouses, the view of some influential economists is that it works equally well with regard to law.³⁵ They think this despite the fact that law, unlike the light from lighthouses, is an impure public good at best and that much is often subsumed under the rubric 'law'. But if their claim is nevertheless that all law is a public good, that provokes a number of questions. First and foremost is this: *all* law? This question arises because 'law', when used in the claim that all law is a public good, includes not just the substantive law structured by traditional juristic divisions but also (i) the idea of the rule of law and its components; (ii) the fundamental constitutional compact that is the basis of any polity; and (iii) the notion of security (or lawfulness or stability) that supposedly flows from the presence of (i) and (ii).

One obvious worry is that these different aspects of law are not truly the same and might not therefore all be public goods. Some notions in play under the rubric 'law' seem more like 'indivisible lumps' than others: the idea of security appears, when conceived as characterising a measurable property of community life, to be one from which some members cannot be excluded without wrongdoing.³⁶ So, for example, if a community has the institutions, practices and personnel to ensure that its life is relatively free from crime and disorder, then it is hard to remove that benefit from some without subjecting them to victimisation. Similarly, the benefits of the original constitutional compact, once entered into, appear difficult to ration in anything like a legitimate way. That the benefits and burdens of such a compact affect all who live under it is a fundamental component of its legitimacy. Any subsequent attempt to redistribute those benefits and burdens seems unavoidably to undermine the power of the original compact.

While security and the original constitutional compact both look a great deal like indivisible lumps, and thus like public goods, private law does not. Not, at least, at first glance. Consider this hypothetical, originary possibility about the private law (or laws) of contract. The merchants and consumers of one geographical area use different standards to those in other areas, with merchants and consumers in different areas of economic activity doing likewise. While these different customary laws of contract could well be public goods for the various sub-groups in question, they are certainly not public goods for those outside these groups. The system of contract law used by bakers for bakers cannot be a public good for the candlestick makers excluded from it. This point – that it is conceivable that different laws of contract can emerge in different areas of one and the same polity – could be generalised across all aspects of private law. Thus, just as various groups might rely upon different rules for the creation or interpretation of contracts, so they might also use different rules to protect (*inter alia*) bodily integrity and physical holdings, or to distribute holdings on death.

The possibility of a plurality of systems of private law speaks against private law being a public good, at least at some originary hypothetical moment. Yet the existence of a plurality of such systems within a single polity gives rise to externalities, the principal one being the costs involved to those participants who have to

³⁴ For an introduction to the alleged necessity of the state (and law) as a means of providing public goods see: D Osterfeld, 'Anarchism and the Public Goods Issue: Law, Courts, and the Police' (1989) IX *Journal of Libertarian Studies* 47-68; T Cowen, 'Law as a Public Good' (1992) 8 *Economics and Philosophy* 249-267 and the comment by D Friedman in (1994) 10 *Economics and Philosophy* 319-327 and Cowen's rejoinder at 329-332.

³⁵ See J Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press 1975) chs 1-4 and 7.

³⁶ The term belongs to Osterfeld, *ibid*; his principal argument is that security is not such an 'indivisible lump'.

operate within more than one system.³⁷ A single private law system for all would reduce this particular cost and others besides. And such a system might therefore qualify as a public good for, once it is provided, its use is hard to limit on legitimate grounds. The doubt expressed by ‘might’ is appropriate, however, because even if it can be shown that the good a general system of private law would provide is non-excludable, there remains a question as to whether that good is indeed non-rivalrous. For, insofar as a court system and adjudication are adopted as the means of resolving private law and other legal disputes, the use of that system by some can in some circumstances prevent its use by others. One such circumstance is that in which the justice system is operating at or beyond the limits of its capacity.

This worry, and that about non-excludability, highlight the same general difficulty: is private law a pure public good? But the answer to that question, although interesting as a general matter, is not crucial in this context. For even if the argument in play here does not show that private law is a pure public good, it certainly shows that it has some features similar to such goods. And that is all that needs be shown to make the point that all law – private and public – is public, in the sense of being either a pure or impure public good.

4. The fourth distinction between public and private is often to the forefront of contemporary minds. It is, in effect, a distinction between the public conceived as the realm of the state, on the one hand, and the private understood as the realm beyond or free from the state, on the other. This version of the public/private distinction has different applications, including a role in relation to the provision of goods and services, where public (state) provision is contrasted with private (non-state) provision, and in relation to economic regulation, where public (state) regulation of the economy is compared with private (non-state) regulation. The ‘public’ pole of this version of the distinction can overlap with the public pole of the second distinction, particularly when we move (too) quickly from ‘matter of interest to all or the vast majority’ to ‘matter of state interest’.

The principal difficulty with this version of the distinction is that it cannot always yield a bivalent answer to the question ‘is this activity or conduct, practice or institution either public or private?’ This is primarily because the domain of the state and that of the non-state are both malleable, subject to extension, contraction and hybrid blurring. As to the latter, take the traditional state provision of some standard ‘public’ services, such as public transport, refuse collection, education and health care as examples. It is not only in the UK that these services have recently been provided by private companies through a web of genuine and sometimes mock-contracts with a local or central government authority.³⁸ Indeed, this process of semi-privatisation and ‘contractualisation’ of public services is now a fairly common feature of many Western European democracies as well of many other nation states (such as Canada, Argentina and the US). It is a process which, while undoubtedly public, is also significantly private. There are two quite different senses in which this process is public. First, it is public because the services are provided are of interest and benefit to almost all members of the community; and, second, it is public in the sense that those services are funded, via various forms of taxation, by undeniable instruments of the ‘state’ (local and central government). It is also meaningfully private, this being most evident from the fact that the services in question are delivered by

³⁷ The term ‘externality’ is almost as vague and mystifying as its close bedfellow ‘transaction costs’. For guidance on both, a good starting point is C Dahlman, ‘The Problem of Externality’ (1979) 22 *Journal of Law and Economics* 141-162.

³⁸ There are many treatments of this process. One of the most interesting discussions of English developments is P Vincent-Jones, *The New Public Contracting* (Oxford: Clarendon Press 2006).

companies under a web of contracts which often link not only the funders and providers of services, but also the providers and consumers of services. These contracts include not just provisions relating to cost and quality but related requirements attempting to ensure responsiveness to consumers.

Is this type of ~~hybrid public~~ service provision either public or private? Posing the question in this bivalent form shows its foolishness. It is clearly a ~~This~~ hybrid that does not sit ~~entirely~~ comfortably under ~~neither~~ description but can be accommodated by both. The most natural answer to the question, given the way in which the service provision process has just been sketched, is surely: both. There are, as we have seen, useful and intelligible senses in which that process can be described as both public and private. Once we understand that the question 'is X public or private?' can be answered in a more-or-less, matter-of-degree way, then our understanding of 'the' public/private distinction might improve. For if some activity or conduct, practice or institution might sensibly be both private and public in a number of ways, then it becomes plausible not just to chart those various ways, but also to consider the point of mapping the distinction in each of those various ways. We might then be able to offer judgements like this: for the purpose of constitutional oversight and accountability, activity A is public but, for purpose of applying the rules of contract law, it is private. The temptation to view such judgements as contradictory bespeaks simple-mindedness.

If this picture is accurate, then it in part explains why two specific versions of the distinction between public and private (or non-public) are far from dispositive. In England, these two versions have been developed by public lawyers in an effort to distinguish between the state, conceived as the government, and the proper realm of its activities, on the one hand, and civic society (or the non-state realm), on the other. Both are therefore specific, internal analogues to the general version of the distinction under consideration here. It also seems that both efforts to distinguish public from non-public are intended to do dispositive legal-doctrinal work, although as a matter of fact they rarely succeed in doing so. The two ostensibly different ways of formulating the public/private distinction are best labelled 'institutional' and 'functional'.³⁹ Elements of each appear when the courts are deciding whether or not some conduct or decision is subject to judicial review and/or covered by the Human Rights Act 1998 and/or falls within the ambit of EC law.⁴⁰ What, then, do these two approaches tell us?

The institutional approach to determining 'public-ness', conceived as the domain of the state, is reducible to a disarmingly simple question: is the body or agent in question part of government? The functional approach is also reducible to a single, albeit slightly more complex question: is the process, conduct or decision in question one typically discharged by government? The first approach is a matter of determining where, in the social-cum-political structure, the decision-making body or agent is located; the second involves determining what the decision-making body or agent actually does. Each approach has been refined to include additional, subsidiary questions and tests but, even in their most refined form, each is discernibly distinct in that they can generate quite different answers in one and the same case. Hence the Advertising Standards Authority and the Panel on Takeovers and Mergers could both quite comfortably be regarded as public bodies on the functional approach, whereas neither could be so regarded on the institutional approach.⁴¹

³⁹ I'm following Cane, 'Accountability . . .', *supra* n 2 at 249.

⁴⁰ For a helpful overview of the principal cases under each head, see C Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *CLJ* 90-117.

⁴¹ *R v Datafin, ex p Panel on Takeovers and Mergers* [1987] QB 815; *R v Advertising Standards Authority Limited ex p The Insurance Service PLC* [1990] 2 Admin LR 77.

That each approach can yield different answers in the same case could be regarded as showing that both do dispositive doctrinal work in such cases. I do not believe that this is always or even often so. But that is not to say that these approaches, and the various subsidiary tests they have spawned, do no work at all. They undoubtedly carry some weight in the judicial decision-making process. Yet the crucial fact for current purposes is that the law contains these two quite different approaches for determining public-ness. Why? As a matter of chronology, the institutional approach predated the functional approach. The latter was developed by judges simply as a result of dissatisfaction with the former, their primary concerns being that the development of the administrative state, on the one hand, and changes in the provision and management of what once were regarded as government activities and functions, on the other, set many activities and functions well beyond the sphere of judicial review. If this is correct, then it illustrates yet again that there is not one single public/private distinction in play in the law. For even in this relatively limited segment of law – the component of administrative law concerned with judicial review – there is more than one version of the public/private distinction simply by virtue of there being available two different approaches to drawing that distinction. Although the two different approaches might generate the same answers in some cases, the fact that they can generate different answers in the one and the same case shows that there is more than one public/private distinction in play.

Finally, a point that has been lurking in the shadows of the discussion in this subsection should be brought to light. It is that the contrast yielded by the institutional and functional approaches to determining ‘public-ness’ is probably not well understood as one between the public, on the one hand, and the private, on the other. Rather, the distinction generated seems to be between the public and the non-public and the latter, of course, can include much more than just the realm of the private (however understood). Remember that public, in terms of this distinction, is a surrogate for ‘state’ and the realm of the non-state can surely include not just aspects of the paradigmatically private realm (what I choose for breakfast and what I do with my earnings), but also the public realm as understood in terms of the second distinction (*res publica* etc). This is important because it can explain the disquiet often felt with institutional and functional approaches when taken as a means of distinguishing public and private. For we suspect that not all that is meaningfully public is covered by these two approaches and that not all they relegate to the non-public realm is meaningfully private. This is the point of claiming, as I did above, that the second distinction exerts a gravitational pull over some specific versions of the distinction, such as to create a slight but insistent disquiet with them.

5. The fifth version of the distinction between public and private is claimed to be implicit within many legal systems, operating as a general structuring principle that also informs legal doctrine. The distinction is that between the public realm of politics, law and the market, on the one hand, and the private realm of family, the household and intimacy, on the other. It is invoked as a critical tool, a means of illustrating the gender inequality embedded within the formal equality of modern legal systems.⁴² On this critique, these legal systems have provided less protection for women who are subject to violence by men in domestic contexts, have valued the labour of women in the home less than the labour of men outside the home, and have been loath to enforce allegedly ‘domestic’ agreements between men and women in relationships. The rationale for the law’s hesitancy

⁴² A classic treatment of English law is K O’Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson 1985).

to intervene in these and other areas is, in part, the thought that these realms are quintessentially private and therefore beyond the law's reach.

Few or no proponents of this gender critique of the law deny that there are some areas of social and individual life that should be beyond the law's reach. The difficulty critics highlight with this thought as currently or recently embodied in contemporary legal systems is that it serves to systematically de-value women, their work and their interests. The question of where the limits upon the law's reach lie is a one which should be posed and answered in a genuinely open way and not just on the basis of embedded social practices, assumptions and stereotypes, particularly where these embody morally and politically questionable judgements. It might be thought that contemporary liberal polities already have an answer to this question and there is some truth in that. Most such polities do indeed have a conception of the limits of state power and influence which coexists with a commitment to equality under and before the law. A problem can, however, arise with the way in which such conceptions and their limits are instantiated within legal doctrine as well as with the way in which they inform policing and prosecutorial practice.

As to legal doctrine, consider Article 8 of the ECHR which holds, *inter alia*, that everyone has a right to respect for their private life. Such a right would be recognised by almost all liberal accounts of the limits of the state, yet the qualified guarantee it offers is by no means certain to accord the same value to the interests of men and women. For, if we set aside the actual case law on this article and consider how it *might* be interpreted, albeit unintentionally, in order to reach this end, our starting point is obvious and apparently innocuous.⁴³ A standard interpretative strategy for this and almost every other proposition of law, when they are either ambiguous or simply being applied to a particular legal dispute, involves construing them in light of the language, cultural context and everyday common sense of the society in which they figure. The hope is that recourse to these factors will resolve the alleged ambiguity or guide interpreters as to the limits of the proposition or concept in play. This interpretative strategy is certainly not the only one the courts use. They must, for example, apply propositions of law and their constitutive concepts in light of existing law and that, almost always, necessitates consideration of other similar cases. But the contextual interpretative strategy is significant because it can constitute a Trojan horse by which common but morally and politically dubious judgements and assumptions enter into the law. This could happen with regard to Article 8 in this way. When provoked to deliberate upon the nature and range of 'private life', the courts could simply replicate the notion of private embodied in this version of the public/private distinction. For the view that private life – the domain of family life and intimate relationships – is a women's realm is not particularly uncommon in most societies with which we are familiar. If the courts follow this relatively widespread view of gender roles and the division of domestic labour, then they entrench it the law and, in so doing, immunise it against legal and political change. For if the division of domestic labour is unequal, and if women's work in and contribution towards family life is placed beyond the reach of law, then that inequality cannot be easily legally redressed. The difficulty, then, is not one of straightforward and explicit gender bias in either Article 8 itself or in the courts decisions. It is, rather, a problem of "subtle distortions of prejudice and bias"⁴⁴ that enter into adjudication via some of the common assumptions and understandings of ordinary language. And, as our hypothetical tale about Article 8

⁴³ For the actual case-law, a good starting point is D Harris, M O'Boyle, E Bates and C Buckley, *Harris, O'Boyle and Warbrick: The Law of the European Convention on Human Rights* (Oxford: Clarendon Press, 2nd ed., 2009) ch 9.

⁴⁴ J Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard UP 1971) 235.

suggests, and as some studies of private law have shown, these distortions of prejudice and bias can “effectively discriminate against certain groups in the judicial process”.⁴⁵

Exactly the same distortions of prejudice and bias can inform decision-making in policing and prosecution. The view that the domestic realm of the private is and should be beyond the law certainly seems to explain the hesitancy that police forces and prosecutors have traditionally displayed when dealing with domestic violence. Nowhere is this more obvious than in the once common view among police officers that violence in the home is ‘just a domestic’.⁴⁶ This view automatically downgrades the alleged crime in question, suggesting it is not worthy of a proper police response. And that, of course, is simply to attach less weight to the interests of alleged victims of this kind of crime than to those who suffer exactly the same type and level of violence but in other contexts. Nor need this set of attitudes and assumptions be confined to the policing of domestic violence. There is evidence to suggest that they also inform – or have informed – the exercise of prosecutorial discretion.⁴⁷

It is important to realise that propositions of law need not, as a matter of necessity, be informed by common understandings and assumptions that are morally and politically dubious and which often serve to subvert the law’s commitment to formal equality. For, while it is true that the law must be interpreted in light of the language, concepts and understandings of the community of which it is part, by no means all aspects of that language and those concepts and understandings will be morally and politically dubious. Propositions of law must, first and foremost, be interpreted in such a way as to either embody or be consistent with the legal system’s fundamental values and commitments. Only when that constraint is met should the law aim for broad consistency with ordinary language and common sense.

This version of the public/private distinction calls contemporary legal systems to account for various aspects of their practice in light of their fundamental values. There is no claim that either all law is public or all law is private or that all law is neither. Rather, the fundamental claim that proponents of this version of the distinction make is usually a warning and it counsels, at its broadest, something like this: that words, concepts, ideas and distinctions have power in the world when embodied in conduct, practices and institutions and this power is not always benign. Taken more narrowly, the warning is that ‘the’ public/private distinction has just this kind of non-benign power and we must be aware of this and resist it. In practical terms, it warns us that the realm of the private should not automatically be thought of as a law-free zone and, when it is, that the valuation such a judgement entails should always be made explicit.

B. Bringing order into chaos

It is now plain that more than one version of the public/private distinction can be in play in law and in our thinking about law. Equally plain is that it is a mistake to assume that all versions of the distinction do the same thing, or have the same purpose or aim. Some versions function as attempts to answer specific doctrinal questions – what is the nature of public power for the purposes of judicial review? – while others are means of organising and sometimes rethinking swathes of legal doctrine. This point reminds us that three versions of the

⁴⁵ *Ibid.* The study of private law I have in mind is M Moran, *Rethinking the Reasonable Person* (Oxford: Clarendon Press 2003). Moran reminds us of the significance of Rawls’s observation at 10 and in ch 5.

⁴⁶ See L Richards, S Letchford and S Stratton, *Policing Domestic Violence* (Oxford: OUP 2008) at 10.

⁴⁷ S. Edwards’ now dated *Policing Domestic Violence: Women, Law and State* (London: Sage 1989) was a pioneering discussion.

distinction are in play *within* the law – they are specific versions of the distinction, drawn and utilised by lawyers. The remaining distinctions can be used as ~~are~~ general structuring principles for legal systems as a whole. They are general, not always offered by lawyers, yet sometimes resonate with specific versions of the distinction that lawyers draw. All versions of the distinction are salient for the law, though, in this sense: each is to some extent unsatisfactory from the perspective of one or more of the others, the consequence being that each version can be destabilised by the presence and power of the others. This instability need not be the product of explicit knowledge of all other versions of the distinction but, rather, a consequence of the intuitions that other versions embody. These intuitions explain the common thought among lawyers that talk and analysis of ‘the’ public/private distinction quickly becomes a swamp of confusion and frustration.

Another, but so far only implicit point merits mention. It is that the various versions of the public/private distinction are not in and of themselves deeply significant. Versions of the distinction are, rather, usually the sequelae of altogether more momentous commitments or values. Thus, for example, the fifth way of distinguishing public and private is a consequence of the attempt to highlight and challenge misogyny and sexism and patriarchy. The fourth version of the distinction is, of course, a consequence of a view of the range of a particular polity’s constitutional commitments and of the role of legal accountability within those commitments. And attempts to give normative depth to the first way of distinguishing between public and private usually derive from liberal pre-commitments. In these instances, the distinction is cart, not horse; it is a result of prior normative commitments but not in and of itself deeply normatively significant. This is perhaps just an oblique way of saying that all versions of the distinction are only instrumentally valuable rather than being bearers of non-instrumental value.

This point, and the wider claims about the plural and limited nature of ‘the’ public/private distinction that inform it, might be regarded as a counsel of despair. Because the picture so far painted is somewhat untidy, it might provoke the thought that the responsible intellectual is duty bound to impose order upon this near-Babel. The most tempting way in which order could be imposed, for contemporary jurists at least, is by invoking some or other moral or political blueprint as the anchor for one’s preferred version of the public/private distinction (which, remember, is exactly the response adopted by those jurists who find the first version of the public/private distinction insufficiently ‘deep’). Contemporary jurisprudential thought is marked by its hasty embrace of various substantive moral and political theories and the belief that the most important scholarship is that which explicitly invokes and applies such theories to law.⁴⁸ In this intellectual framework, legal scholarship is always required to have a theory of whatever area of law it focuses upon and ‘theory’ almost always means moral or political theory.⁴⁹

We cannot know, *a priori*, that the enterprise of fixing one particular version of the public/private distinction within a more general moral or political theory will fail. But there is at least one reason to be sceptical about the prospects of success. It consists of the possibility, noted in the discussion of the first version of the public/private distinction, that areas of law (substantive, procedural and other) might be morally and

⁴⁸ This picture of much contemporary legal and jurisprudential scholarship was originally and engagingly (and amusingly, hyperbolically and archly) sketched in a series of essays by P Schlag, a fine starting point being ‘Normative and Nowhere to Go’ (1990) 43 *Stanford LR* 167-191. Schlag’s diagnosis still stands, it seems to me, despite being funny, and despite being part of an intellectual and political programme (second-wave American critical legal studies) that is now nowhere near as fashionable as it once was.

⁴⁹ For an amusingly pungent corrective to this thought see T Weir, *An Introduction to Tort Law* (Oxford: Clarendon Press 2nd ed 2006) ix.

politically either over-, under- or un-determined. Thus there might well be more than one plausible and appealing substantive moral and political theory available to us as a normative anchor for the area of law in question; or all the available appealing substantive moral and political theories might be a bad justificatory fit with the area of law question, so that they provide either no or only limited normative support.⁵⁰ These three possibilities seem likely if it is the case that no one single moral or political theory is pre-eminently salient or obviously correct. Our situation does indeed appear to be one in which we are faced with a family of plausible yet different moral and political theories. On the assumption that each such theory has sufficient normative reach or determinacy to anchor a version of the public/private distinction, the possibility arises that each theory could anchor a different version of the public/private distinction. Babel, it seems, is hereby replaced with meta-normative Babel. Alternatively, if we assume that the moral and political theories available to us are indeterminate, failing to provide compelling normative for some or other version of the distinction, then we must question the point of this normative detour. Babel, it seems, persists but is ignored for the sake of a possibly scenic but unhelpful normative journey.

Much work needs to be done to actually show that one or other of these possibilities is indeed true of the effort to anchor a version of the public/private distinction. That task is not attempted here, for my aim has been simply to problematise and thus slow down the almost automatic recourse to normative theory that is a hallmark of contemporary jurisprudential thought. The 'normative turn' should not be made without reflection, as if it were a guaranteed path to intellectual progress and enlightenment. Far from solving our problems, this 'turn' might compound them. Finally, note that what some might be tempted to regard as the principal vice of the argument of this essay could be taken as its main virtue. For rather than viewing the previous sketch of the varieties of public/private distinction as a chaotic Babel, it might instead be seen as a complex picture. One's ranking of the virtue of intellectual tidiness will in part determine which view one takes, but it needs to be noted that intellectual tidiness is not in and of itself a supreme epistemic or methodological value. If our picture of the various public/private distinctions displays the other formal virtues of a good social-scientific explanation and understanding, then that should be enough to commend it. There is no *a priori* reason to believe that a tidy social-scientific explanation and understanding must always be preferred over an untidy one. Explanations and understandings need only be as tidy as the idea, practice, institution or phenomenon in question allows.

IV. CONCLUSION

As to 'the' public/private distinction, our conclusion must be this: there are many, not one. This is as true of the juristic context as it is of many others. Once we lawyers appreciate this, the search for that will o' the wisp – a single, comprehensive, compelling and doctrinally dispositive distinction between public and private – can end. This should not be taken as an attempt to foreclose discussion of 'the' public/private distinction. It serves instead as an encouragement to discuss 'the' private/public distinction even more, but also better. For the platitude is surely an invitation to itemise, chart and catalogue the various private/public *distinctions* in play about, within and beyond the law. While this catalogue may seem fixed and immutable at particular historical junctures, it can surely always be added to (in principle, at least). If this invitation is accepted, then our

⁵⁰ For further discussion of these possibilities, focussing on quite different juristic contexts, see my 'Method and Fit', *supra* n 10 at 643-647 and 'Equality Under and Before the Law' (2011) *LXI University of Toronto Law Journal* 411-465 at 439-441.

knowledge of the multiplicity of ways of distinguishing between public and private will certainly increase. There is, however, no guarantee that this knowledge will contain a unifying thread.