

# Public and Private: Neither Deep nor Meaningful?

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... to some faint meaning make pretence ...<sup>1</sup>

Visionaries and philosophers are often prone to grandiose statements. Friedrich Nietzsche's declarations that God was both dead and our longest lie are among the most grandiose.<sup>2</sup> While such claims have almost no equivalents in the pragmatic discipline and practice of law, this certainly does not guarantee that we lawyers work and think free from questionable, mystifying and outmoded beliefs. One such belief is the idea that there is a single and deeply significant distinction between 'public' and 'private' that lawyers have struggled – and are currently struggling – to unearth. Being lawyers, we are almost occupationally unable to make any grandiose claim, not least the one that this belief in the significance of 'the' public/private distinction is one of our longest lies. Our argument is instead that this belief requires substantial amendment. This is because there are many distinctions between public and private, not one; and because the various versions of that distinction operative in law are almost never doctrinally dispositive. We unpack these claims in the three sections that follow. It should, however, be noted at the outset that in denying that 'the' public/private distinction is deeply significant we are not affirming that it is *insignificant*. Our claim is that lawyers are prone to exaggerate its importance, to regard it as more fundamental and determinative than it

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<sup>1</sup> John Dryden, *Mac Flecknoe* (London: D Green, 1682), l.1.

<sup>2</sup> See Friedrich Wilhelm Nietzsche, *The Gay Science*, Bernard Williams (ed.), Josefine Nauckhoff (trans.) (Cambridge: Cambridge University Press, 2001), paras. 108, 125, 343, 344.

really is. It is no more significant than the legion of complex and multiform concepts – like reasonableness, intention, causation etc – that lawyers interpret, apply and contest every day.

## 1 Not One but Many

The claim that there is not one but many versions of the public/private distinction can be disaggregated into two principal components.<sup>3</sup> The first holds that there is no single version of the public/private distinction operative in law and life but a number; the second insists that some legal versions of the distinction operate either practically (in particular cases) or juristically (in legal thought, teaching and commentary). We attempt to unpack and substantiate both components in this section and the next. In this section, we elucidate five versions of the public/private distinction, each of which is worth separating because, when

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<sup>3</sup> That this claim is something of a platitude in the social sciences and humanities is evident from S. Benn and G. Gaus (eds.), *Public and Private in Social Life* (London: Croom Helm, 1983); B. Moore, Jr., *Privacy* (New York: ME Sharp, 1984); J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: 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 University Press, 2001). Peter Cane is one of the few jurists to grasp this feature of the 'the' public/private distinction in the legal context: see Peter Cane, 'Public and Private Law: A Study in the Analysis and Use of a Legal Concept', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence: Third Series* (Oxford: Clarendon Press, 1987); Peter Cane, 'Accountability and the Public/Private Distinction', in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003). On the propriety of extending the claim to the juristic realm, see William Lucy, 'Private and Public: Some Banalities about a Platitude', in C. Mac Amhlaigh, C. Michelon and N. Walker (eds.) *After Public Law* (Oxford: Clarendon Press, 2013), ch. 2, s. II. Section III of that chapter overlaps with s. I of this chapter and we are grateful to the editors and publisher of that volume for permission to use that material here.

taken together, they accommodate many 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 reduces once we appreciate that our apparently conflicting intuitions embody some or many of the following different distinctions between public and private and is further alleviated by noting two other related points. First, that there is a degree of permeability between the versions of the public/private distinction such that attempts to delineate one version can be affected, both positively and negatively, by delineations of other versions of the distinction. Second, different versions of the public/private distinction can play different roles within our thought and practice. This issue – dubbed, for want of a better term, ‘methodological’ – and the permeability of the boundaries between the various versions of the distinction are the fulcrum of section II. That different versions of the distinction can function in three quite different ways – within legal discourse, external to it and simultaneously internal and external to it – adds to the complexity of our thought about public and private. But it does not show that that distinction is either deeply meaningful or completely dispositive in legal disputes. Section III addresses the latter point by examining the role one version of the public/private distinction played in some relatively recent cases. We argue that, in these cases the role played by the distinction was not dispositive and that this point should not be regarded as news. It is, rather, a banality with which we lawyers are completely familiar, although sometimes prone to forget.

**The order of treatment begins with the broadest versions of the distinction (those that apply to all or many social domains) and concludes with a fairly narrow version (which applies to only one social domain).<sup>4</sup> This expository strategy is adopted in part as a cue for the issues explored in sections II and III.1.** The first way of distinguishing public and private is by contrasting matters of general concern with matters of individual concern. 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 Forum etc).<sup>5</sup> 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

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<sup>4</sup> By ‘social domains’ we have in mind nothing more precise than the discernibly different sets of institutions, practices, rules and expectations that constitute social reality.

<sup>5</sup> For an admirably clear and brief discussion of these issues, see Geuss, *Public Goods*, ch. 3. The Greeks, it seems, did not view these matters in the same way: for an interesting discussion of fourth century Athenian thought see Moore, *Privacy*, ch. 2; A. Saxonhouse, ‘The Classical Greek Conceptions of Public and Private’, in Benn and Gaus (eds.), *Public and Private*, ch. 15, provides a broader but no less interesting survey.

concern over some matter and remain private.<sup>6</sup> 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’.

Bearing in mind these 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

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<sup>6</sup> 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, 1656, 1700), pp. 154-5. 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’: Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), pp. 28-9.

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 the related many (public) and the unrelated few (private).<sup>7</sup> 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 our 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.<sup>8</sup> 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

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<sup>7</sup> We do not claim that the quantifiers (‘almost all’, ‘many’, ‘some’, ‘few’) in these two formulations are ultimately logically robust; we hold only that they have some intuitive and serviceable ‘everyday sense’.

<sup>8</sup> 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* [2011] UKUT 421

individuals'.<sup>9</sup> 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.<sup>10</sup> 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 judgment.

In the exercise of this judgment, 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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 meditation.<sup>14</sup> 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

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<sup>9</sup> *Verge v. Summerville* [1924] AC 496 (PC) at 499 (Lord Wrenbury).

<sup>10</sup> See *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] AC 297 (HL) ('*Oppenheim*').

<sup>11</sup> See *Joseph Rowntree Memorial Trust Housing Association v. Attorney General* [1983] Ch 159 (Ch); *Re Neal* (1966) 110 SJ 549 (Ch).

<sup>12</sup> *Inland Revenue Commissioners v. Baddeley* [1955] AC 527 (HL) at 592 (Lord Simonds) ('*Baddeley*').

<sup>13</sup> See *Re Hetherington (Deceased)* [1990] Ch 1(Ch); *Neville Estates v. Madden* [1962] Ch 832 (Ch).

<sup>14</sup> *Gilmour v. Coats* [1949] AC 426 (HL).

too small ('numerically negligible'<sup>15</sup>), or consists of members all or many of whom have a personal nexus with the benefactor(s).<sup>16</sup> 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.<sup>17</sup>

The current version of the distinction, understood as marking a line either between almost all and some, on the one hand, or between related many and unrelated few, on the other, is not only significant because instantiated in this area of law. It is also significant because it presents a particularly vivid contrast with the second version of the distinction, examined below. The contrast concerns the state. While to the forefront of the second 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.<sup>18</sup> 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

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<sup>15</sup> *Oppenheim* [1951] AC 297 at 306 (Lord Simonds).

<sup>16</sup> The personal nexus limit was thoroughly explored by the House of Lords in *Oppenheim, ibid.*

<sup>17</sup> See *Baddeley* [1955] AC 527 (Methodists in West Ham and Leyton too small a group to be 'public').

<sup>18</sup> On which, see N. Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach', in P. Leyland and T. Woods (eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone Press, 1997) 136. For a recent attempt to conceptualise the state, see N. Barber, *The Constitutional State* (Oxford: Clarendon Press, 2010).



collective body of people, on the one hand, and a powerful and presumably charismatic individual or collection of individuals, on the other. 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.<sup>19</sup> 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 seems not to have existed.

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 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, i.e. 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.

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<sup>19</sup> The argument belongs to Quentin Skinner: a lucid and magisterial presentation is chapter 14 of his *Visions of Politics*, volume II (Cambridge: Cambridge University Press, 2002). A shorter version is ‘The State’ in T. Ball, J. Farr and R. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989).

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 of 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.

There might be a problem with this attempt to inscribe this distinction in 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 scrutinised. 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. 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).

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 judgment 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 the second, at least as that distinction is sometimes drawn by lawyers in the context of administrative law. Almost all lawyers are uneasy about accepting the distinction as drawn in administrative law as a comprehensive and deeply significant version of the

public/private distinction. As drawn therein, the distinction misses 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.

2. The second version of the distinction between public and private is often to the forefront of contemporary minds. It is 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.<sup>20</sup> 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 first version of the 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

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<sup>20</sup> S. Benn and G. Gaus, ‘The Liberal Conception of the Public and the Private’, in Benn and Gaus (eds.), *Public and Private*, pp. 50-52, provide a brief survey of instances in which this version of the distinction – or something very like it – has been invoked by social and political theorists.

have relatively recently been provided by private companies through a web of genuine and sometimes mock-contracts with a local or central government authority.<sup>21</sup> Indeed, this process of semi-privatisation and ‘contractualisation’ of public services is now a fairly common feature of many nation states. It is a process which, while undoubtedly public, is also significantly private.<sup>22</sup> There are two quite different senses in which this process is public. First, it is public because the services 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 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 service provision either public or private? Posing the question in this bivalent form shows its foolishness. It is clearly a hybrid that does not sit entirely comfortably under either 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

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<sup>21</sup> 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).

<sup>22</sup> Indeed, the practice of contracting-out has caused the courts a great deal of classificatory difficulty in the administrative and human rights law contexts: see, notably, *R v. Servite Houses; ex parte Goldsmith* (2001) 33 HLR 35 (QB); *YL v. Birmingham City Council* [2007] UKHL 27 (‘YL’).

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 judgments 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 judgments as contradictory bespeaks simple-mindedness.

If this picture is accurate, then it in part explains why the two principal legal versions of this distinction between public and private (or between public and non-public) are far from dispositive.<sup>23</sup> 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. It 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’.<sup>24</sup> 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.<sup>25</sup> What, then, do these two approaches tell us?

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<sup>23</sup> As will be seen in section III, our view is that there are indeed more than two versions of the distinction in play in this context.

<sup>24</sup> We are following Cane, ‘Accountability’, p. 249.

<sup>25</sup> 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 *Cambridge Law Journal* 90.

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 approach is most evident in Strasbourg, where the European Court of Human Rights must determine under Art 34 of the European Convention on Human Rights<sup>26</sup> whether a particular body is a ‘governmental organisation’ precluded from filing Convention claims of its own,<sup>27</sup> but it also looms large in domestic law.<sup>28</sup> The functional approach is also reducible to a single, albeit slightly more complex question: is the process, conduct or decision in question one typically public or 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.<sup>29</sup>

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<sup>26</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, entered into force 3 September 1953 (‘ECHR’).

<sup>27</sup> Art 34 provides that Strasbourg ‘may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a [Convention] violation.’

<sup>28</sup> See, e.g., *Holy Monasteries v. Greece* (1995) 20 EHRR 1; and, for analysis of the law in this area, A. Williams, ‘A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] *Public Law* 139 at 145-54.

<sup>29</sup> *R v. Datafin; ex parte Panel on Takeovers and Mergers* [1987] QB 815 (CA) (‘Datafin’); *R v. Advertising Standards Authority Limited, ex parte The Insurance Service Plc.* [1990] 2 Admin LR 77 (QB). .

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. We do not believe that this is always or even often so, which 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. But why have these two approaches in particular taken root? As a matter of chronology, the institutional approach predated the functional approach, but the latter arose and has assumed prominence because of the weaknesses of the former. One particularly glaring weakness is that, when viewed from the perspective of the institutional approach, the processes of contracting out and privatisation serve to remove many state activities from the purview of judicial review. The functionalist approach is more obviously interested in the locus rather than the form of public power. Contemporary administrative practices and institutional forms are therefore as much grist to its mill as were more traditional organisational forms of state power. For current purposes, the crucial point is that 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 at least 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 one chooses for breakfast and what one does with one's 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 we did above, that the first version of the distinction exerts a gravitational pull over other versions, such as to create a slight but insistent disquiet with them.

3. The third version of the distinction, like the first, warrants the judgment 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 either of the previous two versions of the 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 first and second versions, 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 and maintained? An obvious path would be to seek contributions from all who will and do 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. 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 A 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. 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.<sup>30</sup>

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<sup>30</sup> 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) 9 *Journal of*

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.<sup>31</sup> 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’. Nevertheless, if their claim is 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.<sup>32</sup> 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

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*Libertarian Studies* 47; T. Cowen, ‘Law as a Public Good’ (1992) 8 *Economics and Philosophy* 249; D. Friedman, comment (1994) 10 *Economics and Philosophy* 319; T. Cowen, rejoinder (1994) 10 *Economics and Philosophy* 329.

<sup>31</sup> See J. Buchanan, *The Limits of Liberty* (Chicago: University of Chicago Press, 1975), chs. 1-4 and 7.

<sup>32</sup> The term belongs to Osterfeld, ‘Anarchism’; his principal argument is that security is not such an ‘indivisible lump’.

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 operate within more than one system.<sup>33</sup> A single private law system for all would reduce this particular cost and others besides.

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<sup>33</sup> 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.

Therefore such a system might 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 which 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 the non-excludability problem 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. 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 to 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 version of the distinction between public and private is claimed to be implicit within many legal systems, operating as an insufficiently noticed structuring principle underpinning 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 often invoked as a critical tool, a means of illustrating the gender inequality embedded within the formal equality of modern legal systems in particular and of liberal

thought more generally.<sup>34</sup> 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 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 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 judgments. 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

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<sup>34</sup> A classic treatment of English law is K. O’Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985); a classic from political philosophy is C. Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’, in Benn and Gaus (eds.), *Public and Private*, ch. 12.

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. If we set aside the actual case law on this article and consider how provisions *might* be interpreted, an obvious and apparently innocuous starting point is to construe them in light of the language, cultural context and everyday common sense of the society in which they figure.<sup>35</sup> 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 judgments 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. 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 in 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 legal redress of that inequality is difficult. 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

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<sup>35</sup> 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*, second edition (Oxford: Clarendon Press, 2009), ch. 9.

problem of ‘subtle distortions of prejudice and bias’<sup>36</sup> that enter into adjudication via some of the common assumptions and understandings of ordinary language. And, as our hypothetical tale about Article 8 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’.<sup>37</sup>

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’.<sup>38</sup> This view automatically downgrades the alleged crime in question, suggesting it is not worthy of a proper police response. The consequence 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.<sup>39</sup>

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 political dubious

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<sup>36</sup> John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) p. 235.

<sup>37</sup> *Ibid.* The study of private law we 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 p. 10 and in ch. 5.

<sup>38</sup> See L. Richards, S. Letchford and S. Stratton, *Policing Domestic Violence* (Oxford: Oxford University Press, 2008), p. 10.

<sup>39</sup> S. Edwards’ now dated *Policing Domestic Violence: Women, Law and State* (London: Sage, 1989) was a pioneering study.



and which often serve to subvert the law's commitment to formal equality. While it is true that the law must be interpreted in the light of the language, concepts and understandings of the community of which it is part, not 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 judgment entails should always be made explicit.

5. The final way of distinguishing public and private is a means of distinguishing only public and private *law*. It is a purely legal-doctrinal version of the public/private distinction 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.<sup>40</sup> There is now an administrative court in England, thus reinforcing a public law/private law divide. 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,<sup>41</sup> 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.<sup>42</sup> 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

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<sup>40</sup> For an overview of administrative law remedies and related issues, see P. Craig, *Administrative Law*, sixth edition (London: Thomson, 2008), pt. 3; H. Wade and C. Forsyth, *Administrative Law*, tenth edition (Oxford: Clarendon Press, 2009), pt. VII.

<sup>41</sup> 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 Mark Freedland and Jean-Bernard Auby (eds.), *The Public Law/Private Law Divide: Une Entente assez Cordiale?* (Oxford: Hart Publishing, 2006).

<sup>42</sup> See Cane, ‘Accountability’, pp. 248-9 for some interesting observations on this issue.

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 objectionable distinctions or suppositions.<sup>43</sup> 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’.<sup>44</sup>

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.

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<sup>43</sup> 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.

<sup>44</sup> 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.

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. In his dissenting judgment in *R (Weaver) v. London and Quadrant Housing Trust*, for example, Rix L.J. cited no less than ten different factors to justify his conclusion that a registered social landlord was not performing a public function when managing and allocating housing stock.<sup>45</sup> The mutability and context- (or jurisdictional) dependence of the legal-doctrinal version of the public/private distinction also generates another and quite different response to that just noted. For some, this very mutability and context-dependence are sources of worry, since the distinction might well be drawn in a morally or politically mistaken way. This view implies some or other normative blueprint against which various ways of drawing the public/private distinction are measured; the current legal-doctrinal version of the distinction is or becomes objectionable if and when it departs from the ukases of the blueprint. Needless to say, this response fits ill with the tenor of this essay and some of its difficulties have been explored elsewhere.<sup>46</sup>

## **2 Functions, Labels, Permeability**

There is an obvious objection to the discussion in the previous section: it has passed too glibly over legal and non-legal versions of the public/private distinction and, in doing so, has failed to note that different versions of the distinction might operate in quite different ways and with reference to very different criteria of success and failure. It is hard for us to deny the force of this objection, since its substance is the crux of the point we made earlier, namely, that different versions of the public/private distinction might differ quite markedly in their

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<sup>45</sup> [2009] EWCA Civ 587 (*Weaver*) at [148]-[159].

<sup>46</sup> For further discussion, see Lucy, 'Private and Public', s. II A 1.

'methodological' standing. Once it is accepted that some versions of the distinction are constructed within different intellectual, pragmatic and cultural contexts, that they might therefore utilise different criteria of success and failure, and that they can perform quite different functions, it becomes deeply tempting to place all five versions within one or other of two allegedly mutually exclusive categories. The temptation must, however, be resisted.

The first category includes *general* versions of the distinction. These are so named because they have a life in the wider culture of particular societies, being part of ordinary discourse, yet are often 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 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 new versions of the public/private distinction, purport to articulate and discover already existing but not sufficiently appreciated versions of the distinction. Already existing but insufficiently noticed versions have life not just within scholarly social scientific work but also beyond it, in some particular social and cultural context.

The other category includes *specific* versions of the public/private distinction which, in contrast with general versions, are coined only by lawyers about the law. This contrast must be extended a little, for specific versions of the public/private distinction 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 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.<sup>47</sup> 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. Some general versions of the distinction can be 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.

All but one of the five versions of the distinction sketched above can take general form. The first version, henceforth labelled 'the public/private interest' version, is general because it is neither developed by lawyers nor used exclusively by them. It operates as a general structuring principle for whole legal systems and has so significant a gravitational pull over many specific versions of the distinction as to cause dissatisfaction with them. However, we also noted that something like this general version of the public/private interest distinction is

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<sup>47</sup> Some effort has been made to substantiate this claim elsewhere: see William Lucy, *Philosophy of Private Law* (Oxford: Clarendon Press, 2007) pp. 26-44; William Lucy, 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill Law Journal* 605; William Lucy, 'The Crises of Private Law', in T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State-expectations, Privatization and Private Law* (London: Dartmouth, 1998) 177; William Lucy, *Understanding and Explaining Adjudication* (Oxford: Clarendon Press, 1999) chs. 2-3.

frequently articulated and refined by the courts in one particular legal context and its dual resonance – sounding in both legal and non-legal contexts – is significant. First, it serves as a reminder that, while 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 – 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<sup>48</sup> – they are nevertheless grappling with exactly those issues that animate any effort to utilise a general form of the public/private interest distinction. Second, it is clear from these cases that, while general versions of this distinction resonate within the law, the specific legal articulations of this distinction have no equivalent resonance at the general level. There is thus an undoubtedly asymmetric relation of influence between general and specific in this context which might be replicated elsewhere. Third, the dual resonance of the public/private interest distinction shows that the categories of ‘general’ and ‘specific’ really cannot be mutually exclusive. Just two versions of the public/private distinction can be appropriately assigned only to one or other category, while the public/private interest version and the other two clearly resonate or have analogues in both.

The second version of the distinction – hereinafter ‘the state/non-state’ distinction – is one of these, having both a general and a specific form. In both forms the distinction is intended to function as a means of drawing and policing the parameters of the state. And while that aim is indeed important, the intention can be thwarted by the very malleability of the ‘state’. Like all social products, this complex of institutions, practices, norms and expectations can be re-made, sometimes intentionally and deliberately – as we see in the privatisation of some state functions which has been portrayed in some jurisdictions as a ‘rolling back’ of the powers of state and government – and sometimes as the unintentional consequence of other intentional

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<sup>48</sup> See *The Independent Schools Council v. The Charity Commission* [2011] UKUT 421 at [14].

actions (as when temporary economic imperatives trigger state intervention in a particular domain which then becomes permanent and extended to other similar domains). The very plasticity of the social world thus ensures that efforts to map it are always at risk of redundancy and supersession.<sup>49</sup> Changes in the role and extent of the state are therefore almost guaranteed to cause difficulty for this version of the public/private distinction, insofar as it is rooted in a particular social and historical context, for changes in that context will likely affect the efficacy and accuracy of the distinction. Some might take this risk as a reminder of the futility of offering historically specific versions of state/non-state distinction, turning instead to the task of developing a respectable normative blueprint for the role of the state wherever and whenever found. While there can be no general intellectual objection to that process, its utility as a means of mapping and understanding our present condition can rightly be questioned.

Although it is important to realise that the courts in many common law jurisdictions are articulating specific legal analogues of the state/non-state distinction when deciding judicial review or some human rights cases, it is equally important to appreciate what they are not doing when doing this. One thing the courts clearly do not do is enter into an opened-ended analysis of the role of the contemporary state. They almost never inform themselves of contemporary social-scientific accounts of the modern state nor do they catalogue, except insofar as it is crucial to the dispute in hand, the changing tidemarks of state activity over time. Nor is it the case that many social scientists engaged in exactly this kind of study of the state/non-state spheres inform themselves of the efforts of the courts in marking these boundaries. But this is not to say that the delineation and interrogation of both general and

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<sup>49</sup> For a bold and ambitious statement about the made and thus 'remake-able' nature of social reality, see R. M. Unger, *Social Theory: Its Situation and Its Task* (Cambridge: Cambridge University Press, 1987), chs. 1-6 and pp. 210-15.



specific versions of the state/non-state distinction go on completely independently. For it seems to be the case that the asymmetry noted in the discussion of the public/private interest distinction operates here, in the sense that while general versions of the state/non-state distinction pay no heed to specific versions, specific versions can in two senses be conditioned by the discourse about general versions.

One sense is this: lawyers can make use of and recommend distinctions, ideas and theories formulated outside the methodological perspective of their discipline. Legal academics might do this in order to throw light on some aspects of the law, either at the level of specific doctrinal issues or at the level of broad structuring principles for the legal system as a whole. And legal practitioners might do this insofar as it promises a solution to a particular legal dispute acceptable to a court. In these two ways, then, general versions of the state/non-state distinction can penetrate the legal domain, the domain of specific versions of the distinction. Furthermore, there is a second sense in which general versions of the state/non-state distinction might well affect the specific versions of the distinction lawyers articulate. The effect here is less direct than that just noted, but no less significant, and has already been hinted at in our discussion of the public/private interest distinction. All general versions of the public/private distinction, current in the wider culture, can serve to destabilise and breed dissatisfaction with most specific versions. That, we think, is evident when lawyers struggle with the notions of public interest and public benefit in equity, and is also in play when lawyers endeavour to pin down the sources or function of the 'state' in administrative law. The specific distinctions drawn are almost always regarded as tentative and in some sense ultimately unsatisfying. The latter sense, we suggest, flows either from what we (lawyers) know of the general version of the distinction we are articulating and deploying in a specific legal context, or by what we know of different general versions of the distinction. Knowing, for example, of both the first and third versions of the public/private distinction means we are

aware of the plausible senses in which all law is public; distinctions drawn between public and private legal power, as are sometimes required in the administrative law context, come to seem quite unsatisfactory in this light.

The fourth version of the public/private distinction, which we will christen the ‘public/private life’ version, is the remaining distinction of the five that has dual resonance. In its general form, the public/private life distinction is portrayed by social scientists, philosophers and jurists as a morally and politically questionable organising principle of many existing legal systems. Yet efforts to map a boundary between public and private life also exist within the law, as we saw from the discussion above: insofar as most legal systems incorporate a provision or doctrine akin to article 8 of the ECHR, then they will need to draw this boundary. As well as this dual resonance, the asymmetry noted in the discussion of the public/private interest and state/non-state distinctions probably exists here also. Even a superficial familiarity with the courts’ efforts to draw a boundary between private and public life, and an equally superficial grasp of the various general versions of this distinction, shows that the former make almost no impact on the latter, save that they sometimes function as grist for a critical mill. For on the rare occasions that proponents of general versions of the public/private life distinction do indeed engage with specific versions, the latter are almost invariably regarded as unsatisfactory.<sup>50</sup>

Given their obvious dissimilarities, it seems odd to hold that the third and fifth versions of the public/private distinction have something in common. The similarity is methodological: both versions are similar among the five sketched here because their status is univocal, resonating within only one domain. The third version, hereinafter the ‘public/private goods’ version, is interesting in that it lacks any specific analogue, while the fifth version – the ‘legal-doctrinal’

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<sup>50</sup> See, e.g., O’Donovan, *Sexual Divisions*, ch. 5.

version – is interesting for the exactly opposite reason: it lacks any general analogue.<sup>51</sup> The public/private goods distinction lacks any specific analogue or resonance possibly because of its genesis at the hands of economists and game theorists. Their concerns seem to have no specific legal equivalents, except in the sense that the existence of law itself, or particular branches thereof, is or might be a public good. The legal doctrinal distinction lacks any general analogue for a substantively similar reason - it is the product only of lawyers' hands and is responsive (or was thought to be responsive) only to uniquely legal concerns.

The fact that three of the five versions of the public/private distinction have a dual resonance is quite compatible with the claim that specific and general versions of these distinctions have different functions. Some specific versions are intended to answer a precise legal question, usually within the realm of some specific statutory provisions and body of case law, whereas some general versions are efforts to understand and explain aspects of the social world at a fairly abstract level. But these different functions do not prevent accounts of one or other version of the distinction at the general level influencing accounts of the same distinction at the specific level; nor do they prevent different general versions of the distinction affecting – positively or negatively – one another. What seems unlikely, though, is that different specific versions of the distinction will or can affect one another, for the simple reason that these occupy quite different legal doctrinal domains. That the two former claims (general versions of the distinction can and do affect specific versions, and that different general versions can affect one another) do indeed characterise much contemporary thought about 'the' public/private distinction cannot be shown in any detail here, since that would require a broad and detailed survey of the various idioms used, along with an elucidation of their many

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<sup>51</sup> Unless this version of the distinction is regarded as a misguided surrogate for the second, in which case it must have a general analogue. We, however, do not see any strong connection between the second and the fifth distinction.

intersections and disjunctions. In lieu of such a survey, we proffer those two claims, henceforth combined into one and labelled ‘the permeability thesis’, as a putative explanation of the sense of quagmire, impasse and dissatisfaction lawyers often experience when articulating ‘the’ public/private distinction. It is therefore especially troubling that the permeability thesis is likely to be received with some scepticism by lawyers.

Two considerations animate this scepticism. One is that all lawyers are familiar with what we might call the law’s stipulative sovereignty, its power to define words and concepts in its own way and for its own purposes.<sup>52</sup> From the surely undeniable point that the law can to some extent coin its own technical vocabulary, it is tempting to move to the claim that the law’s store of language and concepts stands independently of the language and concepts of non-legal life. This claim becomes radically implausible in so far as it holds that all the law’s concepts and words can have a technical meaning bearing no relation at all to the meaning those same words and concepts have in non-legal life. For even if that were possible, it would be profoundly undesirable, since it thwarts the very point of law and legal systems, namely, to act as a means of subjecting human conduct to the governance of rules.<sup>53</sup> That point is, of course, one that embraces many other more specific and far less abstract goals and purposes, none of which could be achieved if the directives that make up a legal system are utterly unintelligible to its addressees. So, while some legal concepts and words can and do bear a technical meaning for some specific purposes, not all can if law is to fulfil its principal function. Lawyers long familiar with the law’s technicality must neither exaggerate its range nor forget the significance of law’s many and myriad overlaps with ordinary meaning,

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<sup>52</sup> Transport Act 1968, s. 159(1)(b) (“‘land’” includes land covered by water’); Roads (Scotland) Act 1984, s. 151(1) (“‘days’” means clear days’).

<sup>53</sup> This, of course, is Lon Fuller’s characterisation of law’s ultimate function: L. L. Fuller, *The Morality of Law*, revised edition (New Haven: Yale University Press, 1969) at, e.g., pp. 46 and 96.

language and concepts. The point may seem abstract, but it is also viscerally practical for any judge who must direct a jury or make herself plain to non-lawyers. Practical concerns such as these surely also animate the doctrine of judicial notice in the common law world.<sup>54</sup>

It is, then, a mistake to think that law's stipulative sovereignty undermines the permeability thesis. For, while it is clearly not impossible for most legal systems with which we are familiar to contain provisions defining 'public' and 'private' in a technical way for some specific purpose, this possibility cannot of itself rule out the 'interference' from other, broader legal and non-legal conceptions of public and private that the permeability thesis posits. Furthermore such interference, albeit across a broad range of legal concepts and words rather than just the notions of public and private, is to be expected. If law is indeed a means of subjecting human conduct to the governance of rules, then its rules must be intelligible to their addressees. And that presupposes that the content of some of those rules overlap, in terms of meaning, with the language, words and concepts of those to whom they apply.

There is, however, a second and related reason why lawyers might be sceptical about the permeability thesis. All lawyers and many non-lawyers know that legal analysis, either in chambers, the court room, or the seminar room, is not an argumentative free-for-all. The kind of considerations that lawyers can invoke in this process form a relatively limited class, but they go slightly beyond the bare letter of the law, as found in statutes and cases. For cases and statutes are read by lawyers in light of more general legal considerations, which include not just broader principles of law under which particular cases and statutory provisions can be subsumed, but also 'internal' legal considerations of fairness and efficiency, as well as general extra-legal considerations of justice and common sense. While the latter might present a door through which the permeability thesis can enter, lawyers are likely to resist this

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<sup>54</sup> On which, see E. M. Morgan, 'Judicial Notice' (1944) 57 *Harvard Law Review* 269.

prospect because they know well that the number and type of both legal and extra-legal factors to which they and other lawyers can properly refer are rigorously policed. How? Simply by the existing expectations and standards of their professional group. Socialisation into that group, through both non-vocational and vocational legal training, informs would-be lawyers of the type of considerations, in addition to the bare letter of the law, that carry weight in legal analysis. Those considerations also often provide a particular ‘reading’ of specific cases and legal issues, for the mere fact that a case has been decided by a senior appellate court does not determine how, exactly, lawyers subsequently understand or interpret the case. Indeed, it is quite possible for the reading of a case to change quite radically among lawyers, and not just as a result of a later appellate court decision.<sup>55</sup> How might that come about?

The best answer also seems like the least informative: the professional group changes ‘its’ mind on some matter. But is the group really so cohesive that it can be personified in this way? Some have thought so. Consider Brian Simpson’s account of cohesion in a customary legal order, of which common law systems are obvious instances:

A customary system of law can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy. There must exist within the group – particularly amongst its most powerful members – strong pressures against innovation; young members of the group must be thoroughly indoctrinated before they achieve any position of influence, and anything more than the most modest originality of thought treated as heresy.<sup>56</sup>

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<sup>55</sup> The fate of the dissenting judgment in *Candler v. Crane and Christmas & Co.* [1951] 2 KB 164 (CA) is a vivid instance of an appellate court re-reading or re-inventing a precedent.

<sup>56</sup> A. W. B. Simpson, ‘The Common Law and Legal Theory’, in A. W. B. Simpson (ed.), *Oxford Essays on Jurisprudence, 2nd Series* (Oxford: Clarendon Press, 1973), ch IV at p. 95.

Were this account true of the contemporary legal profession, then it might indeed seem like a potential block to the permeability thesis. But this is only a matter of appearance: this account does not purport to characterise contemporary common law legal systems nor does it. Rather, it is an account of conditions which ‘were almost ideally satisfied’ in ‘past centuries’.<sup>57</sup> That those conditions are not currently ‘ideally satisfied’ nor particularly likely to be so in the near future is evident, in many areas of the common law world, from both the nature of contemporary legal education and the practices of appellate courts and senior judges. Legal education is now much more a matter of exploring the insights other disciplines offer about law than it once was,<sup>58</sup> while appellate courts, in the UK at least, are ostensibly much broader in their reading and citations than they were. The latter is plain not only from the fact that judgments in, for example, the Supreme Court and former House of Lords are often dotted with references to the law and legal commentary of other jurisdictions;<sup>59</sup> they also frequently cite and discuss academic and related legal commentary. Of course, these changes are assuredly a matter of degree but, when combined with the apparently increasingly common propensity of our judges to engage in extra-judicial speaking and

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<sup>57</sup> *Ibid.*

<sup>58</sup> Data over and beyond the anecdotal evidence of those who have taught for a number of years is hard to come by, but see: H. Barnett, ‘The Province of Jurisprudence Determined – Again!’ (1995) 15 *Legal Studies* 88.

<sup>59</sup> For interesting discussion see M. Siems, ‘Citation Patterns of the German Federal Supreme Court and of the Court of Appeal of England and Wales’ (2010) 21 *Kings Law Journal* 152; T. H. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010); B. Markesinis and J. Fedtke (eds.), *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (London: Routledge, 2006); B. S. Markesinis, *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years* (Oxford: Hart Publishing, 2000).

writing,<sup>60</sup> they suggest that the legal profession is nowhere near as inward looking and insular as it might have been. Indeed, it is not a great exaggeration to claim that these are signs of an unprecedented general intellectual openness and engagement across all aspects of the legal profession. Such openness and engagement provides a fecund environment for the permeability thesis and a barren one for the conditions Simpson identifies.

Lawyers' scepticism about the permeability thesis seems, then, to be misplaced. But even if the thesis is immune to these lawyerly concerns, its status must not be exaggerated. It is forwarded here only as an empirical claim and, as such, it is ripe for testing and either confirmation or rejection. It is certainly not a conceptual truth. The thesis might therefore at some point fail to characterise our thinking about public and private. If and when it does, then our thinking about 'the' public/private distinction will assuredly have changed.

### **3 Indeterminacy**

We now turn to our second principal claim, that the versions of the public/private distinction operative in law are almost never doctrinally dispositive. By the latter we mean simply that, when in play in the kind of cases with which we are familiar, 'the' public/private distinction is rarely utterly conclusive to the resolution of those cases.<sup>61</sup> In part this is a result of the properties of that kind of case and in part a result of properties 'the' distinction itself has, most of which we have already noted. That is the argument offered here but, before unpacking it, two preliminary points must be made. The first highlights an obvious limitation:

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<sup>60</sup> Which brings with it some hazards: see Susan Bartie and John Gava, 'Some Problems with Extrajudicial Writing' (2012) 34 *Sydney Law Review* 637; David Dyzenhaus, *The Constitution of Law* (Cambridge: Cambridge University Press, 2006), pp. 27-32.

<sup>61</sup> See the cases referred to in sections 1 A and 1 B above; a typically sure-footed treatment of some of the principal public law cases is provided by Cane, 'Accountability', pp. 249-61.



the argument we actually provide shows only that *one* version of the distinction, invoked in only *one* area of law, is almost never doctrinally dispositive. The version of the distinction in play is the second – the state/non-state distinction – and, as we will see, our brief characterisation of the way in which it operates in the case law in section II was far too bluntly drawn. Considerations of space and time dictate this narrowness of focus, but so, too, do considerations of argumentative clarity and weight. A powerful case in relation to one instance of the distinction can ground a presumption that such a case could be made in other instances, although it is an obvious mistake to move too quickly from *one* to *all*. The second point is a calming notice. Some might regard our effort to show that ‘the’ public/private distinction is almost never dispositive in the case law as a pointlessly sustained restatement of the blindingly obvious, for who ever thought the contrary? Who, that is, ever thought that ‘the’ public/private distinction should or ought to do dispositive doctrinal work? Our answer to that question is this: many influential legal scholars in the common law world.<sup>62</sup>

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<sup>62</sup> Some instances: D. Kennedy, ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1349 at pp. 1350-4 (the distinction is problematic in particular cases and thus does not do the work it should); Henry J. Friendly, ‘Public-Private Penumbra-Fourteen Years Later’ (1982) 130 *University of Pennsylvania Law Review* 1289; Karl E. Klare, ‘Public/Private Distinction in Labor Law’ (1982) 130 *University of Pennsylvania Law Review* 1358 (holding that the distinction ‘is devoid of significant, determinate analytical content’ (at p. 1360) when invoked in the cases, this being taken as an indictment); M. Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’, in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 21 at p. 38 (the courts’ reluctance to expand judicial review to contracted out power presumptively threatens the law’s ability to ensure that ‘constitutional values are observed by private actors performing public functions’, the implication being that the public/private distinction is the sole means of determining whether such power can be regulated by the law); C. Harlow, ‘“Public” and “Private” Law: Definition without Distinction’ (1980) 43 *Modern Law Review* 241 at pp. 242-50 (purported demonstration that the distinction does not do any substantive work in the English cases, this being regarded as baleful). It is senseless to complain that the

The cases in which the state/non-state version of the distinction is in play are, like the cases where other versions are in play, hard appellate court cases. Hard cases are complex and require judgment. They cannot be solved by judges in anything like an automatic way by, for instance, a ‘logarithmic’ invocation of the state/non-state distinction or of any other proposition of law. This, it has been said, is because hard cases are those ‘in which reasonable lawyers disagree’ and ‘where no settled rule dictates a decision either way’.<sup>63</sup> A more expansive and helpful, but still abstract statement of the hallmarks of hard cases, was offered by Neil MacCormick, who maintained that such cases usually present one or more of three possible doctrinal snags. First, they might raise a question as to which interpretation, from a range of two or more available interpretations of an agreed proposition of law, applies to the case at bar. Second, they arise from doubt as to which proposition of law, from a range of two or more incompatible propositions of law, applies to the case at bar. Finally, they might raise the question of whether or not any proposition of law applies to the case at bar.<sup>64</sup> These cases thus require not just a statement of the correct applicable proposition of law, but also argument justifying that precise statement of the law. MacCormick shows that in the UK judges typically seek to justify their doctrinal choices in hard cases by three different kinds of argument. Two of the three kinds of argument are intra-systemic, involving considerations internal to the legal system. Of these two, one kind – arguments from consistency – embody ‘a fundamental judicial commandment: Thou shalt not controvert established and binding

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distinction does little or no work in the cases if one thinks, as this essay argues, that it can do little or no work in the cases.

<sup>63</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), pp. xiv and 83 respectively.

<sup>64</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, revised edition (Oxford: Clarendon Press, 1978, 1993), chs. V-VIII. For a more recent elaboration of this position see Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford: Clarendon Press, 2005), chs. 3-10. MacCormick’s hard case typology is only in some respects compatible with Dworkin’s (on which, see *ibid.*, chs. 4-5).

rules of law'.<sup>65</sup> Arguments from consistency are narrow in the sense that they focus solely on propositions of law in the immediate vicinity of the dispute in question, holding that no argument will be acceptable if it: (i) is clearly incompatible with a closely contiguous proposition of law; and (ii) is unsupported by one of the remaining two kinds of argument.

The focus of the second kind of argument – from coherence – is still upon considerations internal to the legal system, but is nevertheless wider than the focus of arguments from consistency. This is because considerations of coherence test, reject or commend an argument in a hard case by reference to its resonance (or lack of it) with principles and values of the legal system as whole, rather than just the area of doctrine within which the case has arisen. Such arguments, says MacCormick, rest on the assumption 'that the multitudinous rules of a developed legal system should 'make sense' when taken together'.<sup>66</sup> The focus of consequentialist arguments – the third type of argument invoked by judges to justify their decisions in hard cases – is extra-systemic, looking to the effects of a hard case ruling one way or another on society as a whole. Rather than being concerned with what makes sense within the legal system, they are concerned with 'what makes sense in the world'.<sup>67</sup> What, then, is the criterion of sense here? It consists of evaluating the consequences of a decision one way or another. It is a matter of 'choosing between rival possible rulings in a case [and] involves choosing between what are to be conceived of as rival models for, rival patterns of, human conduct in society'.<sup>68</sup> It seems to be the case that consequentialist arguments are often the strongest kind of argument in this trio.<sup>69</sup>

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<sup>65</sup> MacCormick, *Legal Reasoning*, 195.

<sup>66</sup> *Ibid.*, p. 152.

<sup>67</sup> *Ibid.*, p. 103.

<sup>68</sup> *Ibid.*, p. 104.

<sup>69</sup> *Ibid.*, pp. 127-8.

This account of how judges do and should decide hard cases can be contested but, for non-sceptics at least, the space for dispute is limited. Just about all non-sceptical jurists accept a picture of what hard cases look like which is very similar to that offered by MacCormick; the same jurists also agree that the arguments MacCormick finds judges actually using when deciding cases are indeed appropriate considerations for judges to use.<sup>70</sup> Disagreement arises, however, as to which of these kinds of consideration should dominate: Ronald Dworkin, for instance, has little truck with MacCormick's claim that consequentialist arguments do and should dominate other arguments. Consequentialist arguments are, of course, far too similar to arguments of policy in the Dworkinian schema and, as we all now know, arguments of principle trump arguments of policy.<sup>71</sup> However interesting they might be, the details of this internecine jurisprudential dispute are not germane here. Our point, remember, is the claim that most reported cases in which the (or 'a') public/private distinction features are hard cases. Being such, they raise the three broad doctrinal issues, and are resolved by any combination of the three distinct kinds of argument, just noted.

What, then, is the moral of this story? That expecting any version of the distinction between public and private law to be *of use* in judicial decision-making is a mistake, if 'of use' is taken to mean 'conclusively dispositive of any particular hard case'. Hard cases are not, and can never be, so easily resolved. Even a cursory glance at the Human Rights Act 1998 and judicial review case law illustrates this. Furthermore, these cases are not merely hard cases:

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<sup>70</sup> A smattering of relatively recent studies (all, curiously, published in English within four years of one another) illustrates the point: R. Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon Press, 1978, 1989); S. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992); K. Gunther, *The Sense of Appropriateness* (Albany: State University of New York Press, 1988, 1993); J. Levin, *How Judges Reason* (New York: Peter Lang, 1992).

<sup>71</sup> Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), p. 244. See also Dworkin, *Taking Rights Seriously*, ch. 4.

they are hard cases which manifest a relatively high level of indeterminacy as a result in part, at least, of the existence of multiple sub-versions of the state/non-state, public/private distinction. We therefore supplement the principal argumentative claim of this essay – that there are many versions of the public/private distinction – with a related but subsidiary claim, that there are numerous versions of this particular public/private distinction.

Consider section 6 of the Human Rights Act 1998, which provides that ‘[i]t is unlawful for a public authority to act in a way which is incompatible with a [European] Convention right.’ The term ‘public authority’ is undefined but includes what are known as ‘hybrid’ public authorities: that is, ‘any person[s] certain of whose functions are functions of a public nature’.<sup>72</sup> But s. 6 also implicitly includes ‘core’ or ‘obvious’ public authorities, which are unlike hybrids because they must comply with the Convention in everything they do, whether public or private activity. This is due to s. 6(5), which relieves hybrids, but not core public authorities, of the obligation to obey the Convention when ‘the nature of the act is private’. Section 6 is therefore something of a matryoshka doll, containing a nest of different sub-versions of the public/private distinction, all supposedly ultimately geared to distinguishing ‘state’ from ‘non-state’. The first, between core public authorities and private persons, is institutional in nature. It looks to who the body in question is, focussing on the distinction between bodies constitutionally bound to act for others and those, on the other hand, permitted to act for their own ends within the confines of the law.<sup>73</sup> The second sub-distinction, between public and private *functions*, focusses instead on what the body *does* in the circumstances in question: it is the function that gives rise to its classification as either

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<sup>72</sup> Human Rights Act 1998, s. 6(3)(b).

<sup>73</sup> See *Aston Cantlow v. Wallbank* [2003] UKHL 37 at [7], [14] (Lord Nicholls), [62] (Lord Hope), [86] (Lord Hobhouse), [156] (Lord Rodger).

public or private.<sup>74</sup> The third, generated by s. 6(5), is between public and private *acts*. Even if a body is presumptively a hybrid public authority by virtue of performing a public function, the Convention will still not apply if the act in question is public rather than private. The distinction between functions under s. 6(3)(b) and acts under s. 6(5) is tricky and underdeveloped, leaving this third sub-distinction somewhat stunted and malformed compared to the first two.

Section 6(5) was overlooked altogether in early cases concerning the meaning of public authority under s. 6<sup>75</sup> and even when, as in more recent cases, courts did recognise its significance, they have applied it so as to denude it of any real purpose. In *Weaver*, Elias L.J. and Lord Collins M.R. believed that the act in question would be of the same nature as the function to which it pertained if the former was ‘part and parcel’ of or ‘inextricably linked’ with the latter.<sup>76</sup> The idea was applied broadly, too, with the termination of a tenancy by a registered social landlord being regarded as part and parcel of its function of managing and allocating housing stock. Whilst a broad application is understandable given the obvious need to prevent s. 6(5) from unduly undermining the scope for rights protection set by s. 6(3)(b), it has the side-effect of suggesting that s. 6(5) will make little difference in practice. This is

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<sup>74</sup> This was made clear in *YL* [2007] UKHL 27 at [61] (Baroness Hale), [105] (Lord Mance), in the wake of a heavily institutional focus in earlier cases like *Poplar Housing and Regeneration Community Association v. Donoghue* [2001] EWCA Civ 595 (‘*Poplar Housing*’) and *R (Heather) v. Leonard Cheshire Foundation* [2002] EWCA Civ 366. Whether *YL* actually marked a substantive shift away from the institutional approach is another matter, however: see J. Landau, ‘Functional public authorities after *YL*’ [2007] *Public Law* 630 at p. 636.

<sup>75</sup> In *Poplar Housing* [2001] EWCA Civ 595 at [69]-[70], for instance, Lord Woolf CJ simply gave a list of factors to support his conclusion that the body was a hybrid public authority, giving no indication as to whether they bore on the nature of its function or of its act.

<sup>76</sup> *Weaver* [2009] EWCA Civ 587 at [76] (Elias LJ), [102] (Lord Collins MR).

principally because the courts are yet to rule that a given act is not part and parcel of the public function to which it is said by the applicant to pertain. On a conceptual level, the distinction between functions and acts was restated and affirmed by Lord Neuberger in *YL*:

‘The former has a more conceptual, and perhaps less specific, meaning than the latter. A number of different acts can be involved in the performance of a single function’.<sup>77</sup>

Yet the crucial point is that, if viewed as a conclusively dispositive touchstone, this statutory version of the public/private distinction is a complete failure. If the courts are satisfied that the body is not an institutionally public person, they must still go on to ask whether it is performing a public function and then, if it is, a particular public act. They can only resolve the public/private issue *itself* by considering three different iterations of the state/non-state (public/private) divide. Even having found that the body *is* a public authority, the courts will still have a number of other issues to tackle.

The House of Lords’ decision in *Aston Cantlow v. Wallbank*<sup>78</sup> provides a good illustration of the range of issues that can be in play. This case did indeed raise a question about the nature of public and private functions, since one of the issues the court had to address was whether or not a parochial church council of the Church of England was a public authority under s. 6. It might thus be regarded as an instance of ‘the’ public/private distinction being invoked to determine conclusively the decision in the case. But the public/private issue was only one of a number of pertinent issues in the case, the remaining ones including: (i) the state of the law on chancel repairs; (ii) the retrospective applicability of the Human Rights Act 1998; and (iii) the question of whether or not the parochial church council’s order to lay rectors was compatible with the lay rectors’ rights under Article 1 of the First Protocol of the ECHR. At

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<sup>77</sup> [2008] 1 AC 95 at [130].

<sup>78</sup> [2003] UKHL 37.

least three of the four issues in this case – the law on chancel repairs being relatively unambiguous – are easily subsumable under one or more of the abstract hallmarks of hard cases. So, for example, the issue of the applicability of the Human Rights Act 1998 raises the question of which interpretation of an agreed proposition of law applies (the interpretative choice being between (i) the Human Rights Act 1998 does apply retrospectively and (ii) the Human Rights Act 1998 does not apply retrospectively). Determining the compatibility issue (was the parochial church council’s order compatible with Article 1?) was a matter of either choosing between different propositions of law or different interpretations of an agreed proposition of law.

It is undeniable that two of the issues in *Aston Cantlow v. Wallbank*<sup>79</sup> were closely related: the question of incompatibility with Article 1 becomes live only if the parochial church council is a public authority under s. 6. Yet it is simply wrong to regard the public/private issue as the only or even the most significant matter in the case. Furthermore, it is no surprise to find the judges resolving the question of the public or private status of a parochial church council via arguments of coherence and consistency. The judgments of Lords Hope, Hobhouse and Rodger include not just arguments of consistency, in which they address the English cases on the legal standing of the Church of England, but also arguments of coherence, in which they consider Strasbourg’s decisions on, *inter alia*, the status of Greek monasteries and the Swedish church.<sup>80</sup> These strands of legal doctrine were less significant in Lord Scott’s judgment, perhaps because his view, unlike that held by Lords Nicholls, Hope, Hobhouse and Rodger, was that the parochial parish council was a hybrid public authority,

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at [42], [48]-[53], [59]-[64] (Lord Hope), [86]-[88] (Lord Hobhouse), [153]-[157], [159]-[164] (Lord Rodger).



exercising a public function.<sup>81</sup> The nature of public authorities under legislation such as the Scotland Act 1998 was also discussed by Lord Hope.<sup>82</sup> Interestingly, consequentialist arguments featured in the judgments only fleetingly. They took the form of discontent about the potential harshness of the law on chancel repairs and played a role in bolstering the view that parochial church councils should not be regarded as public bodies.<sup>83</sup>

Cases in the judicial review context also rarely revolve around one single disputed interpretation of the public/private (state/non-state) distinction. The issues in play in such cases are just as diverse as those animating the Human Rights Act cases. Thus, even if a body is found to be performing a public function under the Civil Procedure Rules ('CPR'), so the decision in question is amenable to judicial review, this will not of itself determine the outcome of a hard case. A court will still have to satisfy itself that the body has acted unlawfully according to the principles of good administration (the duty to act fairly, rationally and the like), that there is no reason to make use of the judicial discretion to withhold the remedy the claimant seeks, and so on. One particularly well-known case illustrates the point. In *Datafin*<sup>84</sup> the Court of Appeal held that the Panel was amenable to judicial review in its capacity as *de facto* regulator of City take-overs, but nevertheless held that it had not acted unlawfully by dismissing the applicant's complaint that a bidding rival had breached the Panel's City Code.<sup>85</sup> This raised three quite separate issues: whether the Panel is amenable, whether it has acted unlawfully according to the relevant substantive principles and whether,

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<sup>81</sup> *Ibid.* at [130]-[132].

<sup>82</sup> *Ibid.* at [42].

<sup>83</sup> *Ibid.* at [15], [17] (Lord Nicholls).

<sup>84</sup> [1987] QB 815 (CA).

<sup>85</sup> The Panel's regulatory activities have now been placed on a statutory footing: see Companies Act 2006, s. 942(2).

if the answer to the two previous questions is affirmative, the court should issue the remedy sought.

Although Sir John Donaldson M.R. believed that the answers to the second and third questions were relatively clear,<sup>86</sup> the resolution of all three undoubtedly called for judgment and consequentialist arguments featured at each stage. Donaldson M.R. was particularly vocal in his view that the Panel should in principle be amenable to judicial review – for the reason that it wielded wide-ranging *de facto* powers that would otherwise lie beyond the law’s reach: ‘Suppose, perish the thought, that it were to use its powers in a way which was manifestly unfair? ... Parliament could and would intervene ... but how long would that take and who in the meantime could or would come to the assistance of those who were being oppressed by such conduct?’<sup>87</sup> Arguments from consistency featured in the amenability analysis, too, as is evident from the lengths to which their Lordships went to emphasise the compatibility of their conclusion with the existing case law in this area. Donaldson M.R. remarked that ‘given its novelty, the panel fits surprisingly well into the format which this court had in mind in [*R v. Criminal Injuries Compensation Board; ex parte Lain*].’<sup>88</sup> Lloyd L.J. was more emphatic: ‘I do not accept ... that we are here extending the law’.<sup>89</sup>

Consequentialist arguments feature in the court’s analysis of the second and third issues, which analysis centred around the Panel’s curious position as a *de facto* regulator responsible both for devising and policing the City Code. Donaldson M.R. believed there was ‘little scope for a complaint that the panel has promulgated rules which are ultra vires, provided that they do not clearly violate the principle proclaimed by the panel of being based upon the

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<sup>86</sup> See *Datafin* [1987] QB 815 at 844.

<sup>87</sup> *Ibid.* at 827. See also at 845-846 (Lloyd LJ).

<sup>88</sup> *Ibid.* at 838 *R v. Criminal Injuries Compensation Board, ex parte Lain* is reported at [1967] 2 QB 864 (QB).

<sup>89</sup> *Ibid.* at 849.

concept of doing equity between one shareholder and another'.<sup>90</sup> As for remedies, he held that the 'only circumstances in which I would anticipate the use of... certiorari and mandamus would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice'.<sup>91</sup> Declaratory orders, he believed, were generally more appropriate:

in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties ... I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve the individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest ...<sup>92</sup>

More interestingly still, in certain judicial review cases – a domain in which the various sub-versions of the state/non-state distinction are most obviously in play – the courts also have recourse to a quite different version of public/private distinction. It is the fifth, legal-doctrinal version of the distinction and it is invoked in the effort to ensure that an applicant is not abusing the process of the court by pursuing the wrong procedure. This is the 'procedural exclusivity' rule. Whereas the amenability issue relates to the function the defendant performs, this rule implicates a different version of the public/private distinction because it seeks to distinguish between public and private *claims*.<sup>93</sup> It operates to prevent applicants

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<sup>90</sup> *Ibid.* at 841.

<sup>91</sup> *Ibid.* at 842.

<sup>92</sup> *Ibid.*

<sup>93</sup> The courts keep the two issues quite separate in the sense that amenability cases determine the amenability issue and procedural exclusivity cases determine the procedural exclusivity issue. Even though the courts will often need to address the amenability issue before deciding whether there has been an abuse of process

taking undue advantage of any choice they might have as to whether to follow public-law or private-law procedure, by channelling them into the appropriate procedure given the nature of their claim. Public-law claims should reside in judicial review; private-law claims in private-law causes of action like contract, tort and so on.

The rule derives from *O'Reilly v. Mackman*,<sup>94</sup> in which the claimants were prisoners who sought to contest their conviction of disciplinary offences under the Prison Rules by proceeding through writ in the Queens' Bench and Chancery Divisions of the High Court. The House of Lords unanimously held that this was an abuse of process. Although the claimants proceeded in private law, the decision-maker (the board of prison visitors) was fairly obviously a public body, the claimants were arguing their claim on the basis of a breach of the rules of natural justice and they sought a declaration that the board's decisions were void. To all intents and purposes, their claim, if successful, would have had the same effect as the award of a quashing order in judicial review. As Lord Diplock explained, this was because the Secretary of State was empowered to remit a disciplinary award and would presumably have done so following a declaration by the High Court that the award was a

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in the circumstances (they cannot be sure, for instance, that a claimant should have pursued a judicial review rather than a private law claim without being sure that the defendant was amenable to judicial review in the first place), the *issues* are distinct: there is almost no cross-referencing and no cross-fertilisation between the two. However, a notable trend-bucking judgment is *R v. East Berkshire Health Authority; ex parte Walsh* [1985] QB 152 (CA), in which the Court of Appeal held that it was an abuse of process for the applicant, a nurse, to seek judicial review against the defendant health authority, his employer, when dismissed for misconduct. Although the judgment was couched in procedural exclusivity terms, the real issue should have been amenability: it is clear that the applicant would never have had a viable judicial review claim because of the courts' well-established rule that judicial review will not lie against the use of contractual power.

<sup>94</sup> [1983] 2 AC 237 (HL).

nullity.<sup>95</sup> The claimants also seemed to have no arguable cause of action in private law, their choice of procedure merely camouflaging an altogether different type of claim.<sup>96</sup> All things considered, their Lordships thought that the claimants' choice of private-law procedure served only to circumvent the various procedural protections designed to safeguard the decision-maker (shorter time limits, and so on) in judicial review.

The procedural exclusivity rule has proved difficult to apply in circumstances where applicants have arguable claims in both public and private law on the same set of facts. This might be the case, for example, if 'private' rights that would usually be enforceable against a public body in contract or tort can be enhanced or diminished by the exercise by that body of a statutory discretion. If the applicant wishes to challenge the use of that discretion, it is by no means self-evidently clear which procedure they should pursue. Fiddly and unconvincing distinctions arise as a result.<sup>97</sup> In recent years the courts seem to have taken a more relaxed stance than they did immediately post-*O'Reilly*, tolerating a greater degree of flexibility and allowing choice to claimants whose claims straddle both public and private law. As Sedley L.J. remarked in *Clark v. University of Lincolnshire and Humberside*, 'the ground has shifted considerably since 1982 when *O'Reilly v. Mackman* was decided.'<sup>98</sup> In *Clark* itself, which concerned a contractual challenge to a university's decision to fail the claimant's undergraduate dissertation for plagiarism, the Court of Appeal held, in Lord Woolf M.R.'s words, that 'the court will not strike out a claim which could more appropriately be made [in

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<sup>95</sup> *Ibid.* at 274.

<sup>96</sup> As Lord Scarman recognised in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) at 178.

<sup>97</sup> Contrast, e.g., *Cocks v. Thanet District Council* [1983] 2 AC 286 (HL) and *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL).

<sup>98</sup> [2000] 1 WLR 1988 (CA) ('*Clark*') at [16].

judicial review] ... solely because of the procedure which has been adopted'.<sup>99</sup> But the *O'Reilly* rule still remains, as Lord Woolf was at pains to stress: the court may strike out a claim 'if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court'.<sup>100</sup> Thus, for some applicants at least, the public/private nature of their claim will continue to *matter*. The procedural exclusivity rule is therefore a further issue that may stand in the way of the courts' disposal of a hard case and yet another example of our central claim, that there are many public/private distinctions rather than just one.

That these particular cases – all of which concern various iterations of the state/non-state version of the public/private distinction and some of which concern the legal doctrinal version of that distinction – are hard cases seems certain. If we are right in this, then they constitute the first step of a more general claim unsubstantiated here, namely, that almost all cases that concern any version of the public/private distinction are hard cases. And, if that is so, then it is surely a mistake to expect the distinction to perform anything like a doctrinally dispositive role in those cases. Furthermore, we have offered additional reasons why no version of the distinction should be expected to do doctrinally dispositive work: first, because it is rare for there to be only one single version in play; and second, even if there is only one single version in play in a hard case, that single version is assuredly no less malleable than any other version of the distinction nor less subject to 'interference' from other versions of the distinction. That is the force of the permeability thesis outlined in section 2. Yet there is one further and quite different reason which suggests it is implausible to think that any version of the public/private distinction can do doctrinally dispositive work. It is most

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<sup>99</sup> *Ibid.* at [38].

<sup>100</sup> *Ibid.*

economically expressed by this question: how many other equally broad or even much narrower legal distinctions are ever dispositive in particular hard cases?

The distinction between *mens rea* and *actus reus* in the criminal law is often just as contested and as unhelpful – as in need of mediation and elaboration – as that between public and private law. The distinction, which all common lawyers take for granted, between contract and tort is equally tricky and hardly ever dispositive; nor is the fact that it rarely resolves particular hard (or perhaps even easy) cases ever regarded as a reason for rejecting the distinction. Rather, this fact is taken to indicate something meaningful about the nature of the distinction itself. Lawyers' expectations about the pragmatic power of these distinctions are apparently nowhere near as high as the expectations held of the public/private distinction. There are, of course, two quite different inferences that can be drawn from this observation. One is that we are wrong to expect so little of these other distinctions. The other is that low expectations are justified, because distinctions of this kind are of limited use when faced with the fine detail and broad range of issues presented by hard cases. Obviously, the arguments already advanced in this essay give reason to favour the latter, rather than the former, inference. And this has important implications for the on-going debate about 'the' public/private distinction in the contexts we have just considered.

Since 'the' distinction is indeterminate and rarely if ever dispositive, lawyers are issued with the stark reminder that it just cannot be an 'algorithmic' solution to any interesting or complex legal question. It is, rather, but one piece in a broader jigsaw that seeks to dispose of hard cases justly. Awkward terms like 'public function' and 'public authority' – which, as our analysis suggests, are unavoidably open to re-interpretation and contestation – are therefore unlikely to be defined in such a way as to generate unanimous assent. Nor is much lost if this is so. For even if the courts' definition of these terms happens to exclude the activities of

some bodies that wield considerable power from the scope of judicial review or the Human Rights Act – the Jockey Club, for example<sup>101</sup> – it does not follow that the definition is flawed and must be re-thought. There may be other useful ways in which the common law can regulate such bodies, as the courts themselves have recognised,<sup>102</sup> and legislation surely remains a viable option in the event that the common law as a whole proves inadequate. Parliament should, after all, retain some role in regulating society’s myriad power imbalances.

Conversely, over-inclusiveness is not necessarily a problem. In the event that the definition of a public function is extended by the courts to encompass, say, the activities of private and charitable organisations providing services on behalf of central and local government- an inclusion which may be unpalatable to some<sup>103</sup>- it should be borne in mind that a number of mechanisms will remain open to the courts to mitigate any resulting harshness to the would-be public authority. In the Human Rights Act context, for instance, nothing stops private organisations pleading their own Convention rights as a defence to Convention-based claims against them – even when they are performing public functions under s. 6(3)(b).<sup>104</sup> In the judicial review context, too, the substantive principles of good administration should be malleable enough to adjust to the particular situation. *Datafin*<sup>105</sup> provides a good example of

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<sup>101</sup> See, notably, *R v. Disciplinary Committee of the Jockey Club; ex parte Aga Khan* [1993] 1 WLR 909 (CA) (on judicial review) and *R (Mullins) v. Jockey Club Appeal Board (No. 1)* [2005] EWHC 2197 (Admin) (on judicial review and the Human Rights Act 1998).

<sup>102</sup> As demonstrated by e.g. *Nagle v. Feilden* [1966] 2 QB 633 (CA); *Bradley v. Jockey Club* [2005] EWCA Civ 1056. .

<sup>103</sup> Dawn Oliver would be against such a move in the Human Rights Act context at least: Dawn Oliver, ‘Functions of a public nature under the Human Rights Act’ [2004] *Public Law* 329.

<sup>104</sup> See Williams, ‘A Fresh Perspective’.

<sup>105</sup> [1987] QB 815.



this, through its cautious application of those substantive principles to the City Panel.<sup>106</sup> In short, public-authority status is not the only factor that determines a body's legal liability. Given the malleability of terms like 'public authority' and 'public function', and the resulting disagreement that can ensue over how to interpret them, lawyers would do well to remember that algorithmic determinacy here is a chimera.

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The arguments of this essay must not be misunderstood. By showing that there are many versions of 'the' public/private distinction rather than one, and that various versions of the distinction should not be expected to do dispositive doctrinal work, we are not aiming to close down the conversation about public and private, either among lawyers or any other group. Rather, our aim is to engender more and better conversation. If there are indeed many salient distinctions between public and private, some of which have analogues within the law while others extend far beyond it, then attending to and interrogating these various distinctions is surely worthwhile. Only that will allow us to see the true complexity of our situation. Our thinking about public and private manifests a range of sometimes related and intersecting, sometimes divergent and discontinuous issues and we ought not to be surprised when this complexity is inscribed in various practices and social-institutional forms. This messy reality is not, however, immediately visible. It becomes clear only when we reject the urge to regard all that we see and think about public and private as manifestations of a single, ostensibly simple, issue.

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<sup>106</sup> Malleability is also particularly evident in the procedural fairness context, which is notoriously fact-sensitive. Lord Reid made this clear, for instance, in *Ridge v. Baldwin* [1964] AC 40 (HL) at 64: 'What a minister ought to do in considering objections to a scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable.'