

What's Private About Private Law?

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I. ONE SIZE DOESN'T FIT ALL

When lawyers turn to other disciplines in the social sciences and humanities for guidance, they usually do so in pragmatic spirit: they want answers to particular difficult questions. This pragmatic spirit might be both mistaken and philistine: mistaken if it assumes greater determinacy in other disciplines than exists in law, and philistine because this mistake, and the pragmatic spirit in which it is made, shows little or no appreciation of the disciplines invoked. It is a form of intellectual voyeurism.¹ If we nevertheless persist with this seemingly pragmatic and possibly philistine approach, bringing it to bear on one old and apparently irresolvable issue, some determinate guidance is in this instance available. The issue, which is really a nest of issues, can be captured by a disarmingly simple question: is there any significant and fruitful way of distinguishing private from public law? The guidance from other disciplines, as lawyers often find, is on this issue somewhat unhelpful. For, although the content of the guidance is clear — there is no single meaningful distinction between ‘public’ and ‘private’, there being instead a manifold set of distinctions, drawn for quite different purposes and thus having quite different contours — it is unhelpful for lawyers’ usual pragmatic purposes.²

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¹ B Leiter, ‘Intellectual Voyeurism in Legal Scholarship’ (1992) 4 *Yale Journal of Law and Humanities* 79.

² Three fine essay collections confirm this: MP d’Entreves and U Vogel (eds), *Public and Private: Legal, Political, and Philosophical Perspectives* (London, Routledge, 2000); J Weintaub and K Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago, University of Chicago Press, 1997); SI Benn and GF Gaus (eds), *Public and Private in Social Life* (London, Palgrave MacMillan 1983). Also richly informative is R Geuss, *Public Goods, Private Goods* (Princeton, New Jersey, Princeton University Press, 2001). P Cane is one of the few jurists to grasp this feature of the public/private distinction and to consider its implications: see his ‘Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept’ in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Oxford, Clarendon Press, 1987); and ‘Accountability and the Public/Private Distinction’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (Oxford, Hart Publishing, 2003). That the domain of private law can be drawn more or less broadly (or narrowly), depending on one’s purposes, is well noted in N MacCormick, *Institutions of Law* (Oxford, Clarendon Press, 2007) 224–6.

These pragmatic purposes are so named because they revolve around the resolution of particular legal doctrinal questions upon which ‘the’ (or, better, ‘a’) public/private distinction seems to bear. But the resolution of particular doctrinal questions as they occur in specific cases is but one purpose the lawyer might have. Another, broader purpose could well be described as that of getting a clear view of the law’s conceptual cartography, of being able to see how the various branches and components of the legal system fit together (if at all). This broader purpose is animated by the idea, perhaps brought to the fore by critics of the common law yet also important for civilian lawyers, that the law should not be a disorderly, dissonant and incoherent jumble of particular doctrines and decisions. The law should be a *system*, on this view, with different component parts, all of which should function together as a coherent whole. It seems obvious that there is no necessary connection between these two different kinds of purpose. In particular, the pragmatic purpose of discovering solutions to specific legal-doctrinal questions need not be directly determined by broader considerations of conceptual cartography.

The judicial resolution of a particular case might, of course, mediate the relationship between public and private law. But the broader issue of the relationship between public and private law surely need not be resolved first, in order for the resolution of the particular case to be legitimate or otherwise respectable. Similarly, my decision to buy my morning coffee from Mega-Corp rather than Small Cafe, because Mega-Corp’s coffee tastes better, may ultimately have consequences for the retail make-up of my local high street. Yet clearly I do not need to take a stance on the benefits and disadvantages of global versus local capitalism in order to determine which coffee tastes better. It also appears odd to go about constructing any general distinction or set of distinctions such as that between contract and tort, say, or that between private and public law, with a specific case or doctrinal issue in mind. Broad distinctions can be serviceable even when they offer little or no guidance in specific cases. It is still helpful to know the general differences between rugby and wrestling, even though this knowledge is inert when faced with the question of the legitimacy of using wrestling-style tackles in rugby.

The argument of this essay might seem ultimately to deny the truth — that there is no single all-purpose distinction between private and public that can be invoked to straightforwardly distinguish private and public law — it purports to take seriously. For, somewhat perversely in light of the previous paragraphs, the argument is that there is a significant and plausible distinction that can be drawn between public and private law. This argument is developed once two problematic attempts to provide a significant and plausible distinction between private and public law are set aside, in section II. The fulcrum of the argument, outlined in section III, is nevertheless congruent with the claims already made about the plural nature of the public/private distinction(s). This is because the version of the distinction defended here is neither universal nor multipurpose nor binary. It is not universal because it functions to distinguish from one another some, but certainly not all, areas of law often labelled either public or private. It is therefore compatible with the claim that the public/private distinction must be drawn differently for different (including legal) purposes. It is not multipurpose because it operates only at a very general level; it does not purport to give

dispositive answers to pragmatic doctrinal legal questions as well. Nor is the distinction defended here binary, generating ‘either/or’ answers whenever and wherever applied.³ The distinction holds as a matter of degree and in some contexts but not all. This, it is argued, is no reason for embarrassment, nor is the fact that the distinction may be of relatively little use for pragmatic doctrinal purposes. But can such a qualified and not obviously pragmatically useful distinction fulfil the task of all genuine distinctions: can it provide a reliable means of marking a real difference (or set of real differences)?⁴ The argument that follows offers an affirmative answer.

II. TWO FALSE STARTS

The history of legal thought is littered with attempts to distinguish public from private law. While this is no place for a survey of these attempts, it is worth noting two particularly interesting and very different efforts to distinguish the two. Their weaknesses are quite different but both are rooted in ambition: the first effort is regarded by many jurists as insufficiently ambitious, while the problems of the second arise from a surfeit of ambition.

The first effort can be labelled the ‘legal-doctrinal’ distinction and, in English law at least, seems both undeniable and unproblematic. This means of distinguishing public and private law consists of highlighting the various doctrinal and procedural differences between the two domains. 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.⁵ Furthermore, there is now an administrative court in England, thus reinforcing a public law/private law divide.⁶ 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.⁷

³ The term ‘binary’ and its substance belong to Cane. See P 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) 269.

⁴ I thus ignore, for reasons that become explicit in the remainder of the essay, one of the two conditions Duncan Kennedy sets for the distinction: see his ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1349 at 1349. This essay was subject to unsubtle parody in D Shapiro, ‘The Death of the Up-Down Distinction’ (1984) 36 *Stanford Law Review* 465.

⁵ For an overview of administrative law remedies and related issues, see PP Craig, *Administrative Law* (5th edn, London, Thomson, 2003) part 3 and W Wade and C Forsyth, *Administrative Law* (9th edn, Oxford, Clarendon Press, 2004) pt VII.

⁶ From 1981 until 2000 the Crown Office List ensured that only judges with public law experience heard applications for judicial review; as a result of a practice direction of 20 July 2000 the list was renamed ‘The Administrative Court’.

⁷ For a warning that the distinction as currently embodied in English law is a worrisome legal transplant, see JWF 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

But this set of differences undoubtedly adds up to a significant distinction between the two domains and that, surely, is more than sufficient for most lawyers' pragmatic-doctrinal purposes.

Some jurists find this conclusion unsatisfying, without being perfectly explicit as to why. They are content to note the legal-doctrinal distinction between public and private law as just stated, yet then proceed as if it is in need of further explanation and justification.⁸ What, then, is the worry here? Perhaps this: the legal-doctrinal distinction is insufficiently 'deep' or, what likely amounts to the same thing, altogether too contingent. Thus the distinction as currently embodied in English law might simply be an historical accident rather than a well-founded and valuable means of distinguishing private and public law. Espousing this view does not require great scepticism of the jurist or lawyer, but simply awareness that the law, either in the hands of judges, legislators or both, can take wrong-turnings. These turnings can be wrong in legal, moral or political terms. A statute, judicial decision or line of decisions can inhibit desirable doctrinal development, or impact adversely on some aspect of commercial, social or cultural life, as well as embodying morally and politically objectionable distinctions or suppositions.⁹ This awareness inhibits the tendency to regard all legal-doctrinal features and developments as always *prima facie* desirable and justified; it is part of the process of 'demystifying the law'.¹⁰

One way, particularly appealing to contemporary jurists, in which legal-doctrinal features can be given greater — more than 'merely' contingent — depth is by providing them with a normative foundation. Of the two principal candidates currently competing for the role of the normative foundation of private law, only corrective justice is likely to be able to make sense of the distinction between public and private law.¹¹ Efficiency, the main rival to corrective justice and lodestar of both positive and normative economic analysis of law, rarely registers the legal-doctrinal features that non-economically inclined lawyers regard as significant.

the essays in M Freedland and J Auby (eds), *The Public Law/Private Law Divide: Une Entente assez Cordiale?* (Oxford, Hart Publishing, 2006).

⁸ See Cane, above n 3 at 248–9 for some interesting observations on this issue.

⁹ A common law list of shame usually includes *Lochner v New York* 198 US 45 (US Supreme Court, 1905) and *Bartonshill Coal Co v Reid* (1858) 3 Macq 266 (HL), among others. The list should also contain those English criminal law cases pre-dating *R v R* [1992] 1 AC 599 (HL).

¹⁰ Possibly initiated or at least made prominent, in the Anglophone world, by Jeremy Bentham. See HLA Hart, *Essays on Bentham* (Oxford, Clarendon Press, 1982) ch 1.

¹¹ There are, of course, many attempts to articulate the normative content and context of public law, as well as a number of attempts to undermine that project, none of which are discussed here. In England some of the principal contributions are TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) and *Constitutional Justice* (Oxford, Clarendon Press, 2001); PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford, Clarendon Press, 1990); M Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press, 1992) and *The Idea of Public Law* (Oxford, Clarendon Press, 2003).

Economic analysis of law's view of the public law/private law distinction is therefore likely to be as heretical, and as challenging to the normal lawyerly view, as is its view of tort liability.¹²

Corrective justice is conceived by most of its current proponents as a moral or political idea, its guiding precept being that those who wrong others must do something about that wrong.¹³ Stated thus, the idea has obvious intuitive appeal but says little. It requires considerable unpacking, for although part of the notion's appeal is that it regards the relationship between victim and wrong-doer as inherently morally significant, many aspects of this bipolar relation must be further illuminated. So, for example, an account of what does and does not count as a wrong for the purposes of corrective justice is necessary. Some illumination of the ways in which wrongs can and cannot be brought about is also required, as is some indication as to what must be done in response to wrongs. Furthermore, a full and jurisprudentially respectable account of corrective justice must elucidate the basis of the obligation to correct, giving it a foundation in addition to its 'bare' legal existence. What normative reasons are there, beyond the existence of a 'mere' legal obligation, to correct some of the wrongs one does? An account of wrongs and wrong-doing must also of necessity occupy itself with general notions of causation and responsibility.

Not all existing accounts of corrective justice satisfy these requirements or, indeed, regard each of them as genuine requirements, but that is not important here.¹⁴ What is significant is that the two principal contemporary accounts of corrective justice are offered in order to fulfil the role of the normative basis of private law. These accounts may explain some areas of private law better than others and may even need amendment or expansion, including embracing values other than corrective justice itself, in order to provide a foundation for all areas of private law.¹⁵ Yet both of them assuredly regard private law as the domain of corrective justice, although they differ as to what other values are or should be in play there. Jules Coleman, for instance, seemingly allows interplay in private law between corrective and distributive justice considerations, while maintaining that the former animates large areas of

¹² It is misleading to say that lawyer-economists will see no differences between private and public law; the differences they do see, however, are likely to be superficial. A typically trenchant statement of the approach is: 'Practices, institutions, and bodies of law that are wholly unrelated when viewed through the lens of orthodox legal analysis are seen to involve . . . identical economic issue[s]. Whole fields of law are interchangeable when viewed through the lens of economics' (R Posner, *The Frontiers of Legal Theory* (Cambridge, Massachusetts, Harvard University Press, 2001) 40). See also R Posner, *Economic Analysis of Law* (7th edn, New York, Aspen, 2007) pt VII.

¹³ On the variety of views among our current corrective justice theorists as to whether the notion is moral, political or some hybrid, and the difference this might make, see my *Philosophy of Private Law* (Oxford, Clarendon Press, 2007) 259–60.

¹⁴ I have offered a more general statement of these requirements, alongside a more sustained analysis of the two principal contemporary accounts of corrective justice in *Philosophy of Private Law*, *ibid*, ch 8.

¹⁵ This is made vividly clear in Stephen Smith's contribution to this volume.

private law doctrine.¹⁶ Ernest Weinrib, by contrast, holds that corrective and distributive justice are different and incompatible forms of understanding the social world which cannot be combined.¹⁷ It is Weinrib's view of the relationship between corrective and distributive justice, appropriately labelled 'the separation thesis', which can provide a binary distinction between public and private law: the two incompatible forms of justice animate the two different branches of law. The qualification that Weinrib's account *can* provide a distinction between public and private law is important, since this is not an issue to which he gives a great deal of explicit attention. Rather, a version of the distinction can be implied from some of his express comments. This process of implication might be less robust than could be hoped.

Weinrib's account of private law and its very different relation to corrective justice, on the one hand, and distributive justice, on the other, is the second way of separating public and private law under consideration here. It seems beyond doubt that this approach can provide normative depth to the first, the historically contingent current legal-doctrinal distinction between private and public law. The vital issue, then, is whether or not this distinction between the domains of corrective and distributive justice is itself a plausible and robust way of distinguishing public and private law. If intended as a binary distinction between public and private law — a distinction which can tell us, without fail, that some legal-doctrinal issue is either a public or private law matter — then there is an immediate problem. For if this way of distinguishing private and public law relies, as it surely must, on the claim that private law is exclusively the realm of corrective justice, then that claim seems *prima facie* false. This is because, according to some judges and jurists, distributive justice plays a significant role within private law. Both groups could presumably be mistaken about this, either misidentifying corrective justice concerns as distributive justice concerns or wrongly importing the latter into private law.¹⁸ But supporting either of these two claims is not easy for Weinrib. This is because his account of private law purports to take seriously 'juristic experience'¹⁹ and the law's 'self-understanding',²⁰ the latter being in part given by 'the experience of those who are lawyers'.²¹ Doing this must entail taking the views of

¹⁶ See his *Risks and Wrongs* (Cambridge, Cambridge University Press, 1992), part I and ch 20; and his *The Practice of Principle* (Oxford, Clarendon Press, 2001) at 44 and 53.

¹⁷ EJ Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts, Harvard University Press, 1995) 61 and 71–4. Weinrib's thinking has not stood still: for developments see his 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2(1) *Theoretical Inquiries in Law* (online edition), Article 4; 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349.

¹⁸ For discussion of some of the cases see R Mullender, 'Corrective Justice, Distributive Justice, and the Law of Negligence' (2001) 17 *Professional Negligence* 35; and P Cane, 'Distributive Justice and Tort Law' (2001) *New Zealand Law Review* 401.

¹⁹ Weinrib, above n 17, at 3.

²⁰ *Ibid.*, at 14.

²¹ *Ibid.*, at 9.

participants seriously and, while this does not entail that such views be regarded as incorrigible, it requires that departure from them, or any subset of them, must be justified. And, of course, the reasons for overlooking or reclassifying the views of those participants in the institution of private law who regard it as being a domain of both corrective and distributive justice must be consistent with the other commitments of Weinrib's theory. Whether or not Weinrib's theory has the resources to do this is an open question.²²

The opposite side of this argumentative coin is also significant. It holds that there is no good reason supporting the claim, vital to this way of distinguishing public and private law, that public law is a corrective justice-free zone. Indeed, most components of theories of corrective justice — the ideas of wrong, wrong-doing, the duty to correct wrongs, as well as causation and responsibility — seem equally appropriate means of characterising both public law and private law disputes. If I am denied a licence to operate a cab by my local authority on inappropriate grounds such as, for instance, my ethnicity, religion or sexuality, it does not seem bizarre to regard this as a wrong to me, done by a representative person or body of the local authority, which they have a duty to correct.²³ Of course, the wrong is unlike some private law wrongs, but this observation can occlude the fact that private law wrongs themselves are not uniform. Moreover, it might seem that the usual (but obviously not the only) remedy for private law wrongs — an award of monetary compensation — is an inappropriate response to some public law wrongs. Again, this is surely correct, but the point obscures two important issues. First, that there is a range of remedies for private law wrongs, some of which have something in common with public law remedies. And, secondly, that corrective justice theories must, if they are to have explanatory power, either license more than one form of private law remedy or show why remedies other than compensatory damages are unjustifiable.

It might be objected that three vital and closely related features of Weinrib's corrective justice analysis of private law have been overlooked. As a result, our claim that public law is as amenable to explanation in terms of corrective justice as is private law is mistaken. The features ignored are three of the five which constitute the bipolar nature of corrective justice. The latter, for Weinrib, embraces, inter alia, a 'conception of injustice as a violation of quantitative equality; a ... conception of damage as a loss by the plaintiff correlative to the defendant's gain; ... and a ... conception of the remedy as the annulment of the parties' correlative gain and loss'.²⁴ Since this third feature depends for its plausibility upon the truth or plausibility of the second, only the first and second features are discussed in what follows.

Weinrib's view that corrective injustice constitutes a violation of a quantitative equality is a direct derivation from Aristotle. The image Aristotle uses to describe corrective injustice is

²² I have argued elsewhere that it is difficult for Weinrib's theory to do this, consistent with its other aims: see my 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill Law Journal* 605.

²³ The scenario is only very remotely related to *R v Liverpool ex p Liverpool Taxi Fleet* [1972] 2 QB 299 (CA).

²⁴ Weinrib, *The Idea of Private Law*, above n 17, at 65–6.

that of shifting an amount from one equal line to another, so what was once equal (namely, A and B's quantities represented by equal length lines) is now unequal (A, let us assume, having taken 'something' from B so that A's line is now longer than B's).²⁵ Aristotle and Weinrib hold that, provided some other conditions are satisfied, A has a duty in corrective justice to correct the wrong done to B. As is obvious, the damage that results from this wrong (insofar as they differ) is well characterised by the second feature of private law's bipolarity: the damage or loss to B is correlative (which in one sense is a synonym for 'equal') to the gain to A.

These two features of private law's bipolarity present an immediate difficulty for the argument that public law is a realm in which, among other values, corrective justice is realised. It seems, first, difficult to argue that the parties to a public law dispute are equal in any realistic empirical sense. For there is surely always and ever a significant inequality of power between the parties to a public law dispute, since one is usually a representative or manifestation of the state while the other is not. Secondly, it is also very difficult to see how, in a public law dispute like the hypothetical noted above, the defendant local authority's gain (in refusing to issue a cab licence on inappropriate grounds) is in any way equal or correlative to the claimant taxi driver's loss. Is the argument that corrective justice plays a role in public law thus stillborn? Not necessarily.

One difficulty with Weinrib's Aristotelian account of corrective justice is that of unpacking the sense in which the parties to a private law dispute are equal. Weinrib accepts that the equality of the parties, both in terms of their standing *qua* claimant and defendant, and in terms of the gains and losses instantiated in their private law dispute, is primarily notional (or normative) and not factual.²⁶ Thus, the alleged 'gains' I achieve from carelessly running you down are not first and foremost 'real', 'empirical' or 'tangible' gains which exactly equal your loss. Indeed, whatever 'real' losses you suffer from being struck by my negligently driven car (physical injury and the related pain and suffering, as well as the losses associated with medical expenses, time off work etc) seem impossible to correlate with whatever gains, if any, I achieved from my momentary lack of concentration. Your real losses seem to far outweigh whatever real gain I received.

Two questions must be answered about scenarios such as these. In what sense are (i) the parties and (ii) their gains and losses equal? There is a reasonably clear sense in which the parties can be regarded as *normatively* equal: each is taken to be a free agent with the same requirements or needs for manifesting their agency. To realise myself in the world, the very least I need is bodily integrity, some freedom of movement and some minimal level of well-being. All other agents, if they are to realise their agency, require the same. Thus all agents

²⁵ *Nicomachean Ethics*, Book V, 1132a25-1132b21 in J Barnes (ed), *The Complete Works of Aristotle*, vol 2 (Princeton, New Jersey, Princeton University Press, 1984). See Weinrib, above n 17, at 65.

²⁶ Weinrib, *The Idea of Private Law*, above n 17, at 62–3; 76–83; and chs 4 and 5. Henceforth I will speak only of normative equality. Weinrib moves between the two (above n 17, at 62–78), but eventually settles on 'normative' equality (above n 17, at ch 5). For our and Weinrib's purposes, the significant similarity of meaning between the two terms is this: both mean 'non-factual'.

are equal in the abstract sense of needing the same ‘things’, and thus the same spheres of protection, in order to be agents. Agents are therefore equal in standing, insofar as all either are, or are presumed to be, capable of agency, and equal in what they require, in general and minimal terms, to be agents (bodily integrity, freedom and well-being). This account of the equal standing of the parties can be extended to give an account of equality of gains and losses in corrective justice. A corrective justice wrong could be understood as conduct by one party that undermines or removes one or more of the conditions of another agent’s agency. The transgressor obtains an advantage in undermining my agency correlative to the amount my agency is undermined: his freedom and well-being, we might say, is extended to the same degree to which mine is undermined. This extension is not without strain, for the exact nature of the correlativity (or equality) between wrongdoer’s gain and victim’s loss is, to say the least, somewhat oblique. But this at least gives us a sense of how the parties’ equality of standing might inform an equality of gains and losses.

Weinrib, too, uses an account of the parties’ equality of standing to provide an account of the correlativity of gains and losses in corrective justice. And because the account of the parties’ equal standing is normative, so too is the account of correlativity (or equality) in gains and losses. Weinrib’s account is not, however, like the one just offered: his account unfolds via Kant’s account of right, the precise details of which need not detain us here.²⁷ It is important to note, though, that, as the account offered in the previous paragraph makes clear, Kantian right is not the only way in which the normative equality of the parties and the normative equality of their gains and losses could be unpacked. True, that is the path Weinrib takes. It is not, however, the only one available and some reason needs be offered in its favour over and above its fit with Aristotle’s (and Weinrib’s) account of corrective justice. Such a reason is required if the normative account of equality is to inform and explain, rather than be informed and explained by, corrective justice.

Equally important is a point as obvious as it is significant: the doubled-sided notion of equality animating Weinrib’s account of corrective justice is normative not factual. The significance of this is that some conception of normative equality, in terms of both equality of standing and equality of gains and losses, is surely as applicable to public law as to private law disputes. That there is often — perhaps always — a real imbalance of power between the parties to a public law dispute, a factual inequality, is of no more significance from the perspective of Weinrib’s or Kant’s normative conception of equality than is a related imbalance of power in a private law dispute. Nor can it be argued that the factual difficulty of equating the licensing authority’s gain with the taxi driver’s loss means that this public law dispute cannot be conceived in terms of corrective justice. It might, however, be argued that the licensing authority’s normative gain cannot be correlated with the taxi-driver’s normative loss in terms of Kantian right. But the question then arises as to the explanatory power of

²⁷ See Weinrib, *The Idea of Private Law*, above n 17, at ch 5. The account offered in the previous paragraph is broadly Gewirthian. The starting point is A Gewirth, *Reason and Morality* (Chicago, University of Chicago Press, 1978).

Kantian right. Why, given that there are other possible normative accounts of the parties' equality of standing and of gains and losses, does the latter dominate?

That Weinrib's account of corrective justice invokes a normative conception of equality does not justify the judgement that all factual or real inequalities between the parties, either of standing or in terms of their gains and losses, are irrelevant. Factual inequalities are sometimes also markers of normative inequalities. Moreover, a reminder that the obvious factual inequalities of standing and of gains and losses often present in public law disputes are *prima facie* irrelevant, while helpful, does nothing to show that the required normative equality of standing and of gains and losses is actually present in such disputes. This could only be successfully done on a case by case basis but, pending such an analysis, it is helpful and possibly prescient to note the presence of both aspects of normative equality, understood in terms of Kantian right, in the most unpromising of private law cases. Thus, according to Weinrib, this equality exists not only in standard negligence cases, but also presumably in cases of breach of contract in the absence of pecuniary loss.²⁸ If normative equality of gains and losses can stretch this far, then is there any obvious block to extending its range to public law gains and losses? It is also surely apposite to note an obvious normative-cum-juridical equality of standing in public law, particularly in many common law jurisdictions. Here, the state or Crown has legal personality in exactly the same form as do citizens; the ordinary rules of private and criminal law apply as much to the Crown as to any other citizen, unless specific legal provisions grant Crown immunity. Both Crown (or state) and citizen are supposedly equal before and under the law.²⁹

It is not, then, immediately obvious that public law disputes cannot be accommodated within Weinrib's account of corrective justice. In particular, there is no *a priori* reason why the normative conception of equality that underlies the equal standing of the parties and the equality of gains and losses in corrective justice cannot include public law as well as private law disputes. And, even if there is such a reason, it cannot circumvent questions about the legitimacy of Weinrib's Kantian conception of equality: why choose that path rather than others? There might, nevertheless, be an *a priori* reason why corrective and distributive justice cannot be combined. For, although it might be possible to conceive of public law disputes in corrective justice terms, it is a mistake to do so, since this is to combine two notions — corrective and distributive justice — which cannot be coherently combined. This claim provides a warrant for discounting the views of those jurists and practitioners who regard not just private law, but also public law, as realms in which both corrective and distributive justice are in play. It shows how a theory of private law that purports to take the

²⁸ See Weinrib, *The Idea of Private Law*, above n 17, at 136–40 and ch 6. A scrupulous but understated analysis of Weinrib's treatment of contract and related issues is L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115 at 2129–35.

²⁹ For an overview of the Crown's legal status in the UK see M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford, Clarendon Press, 1999). An expansive analysis of the law in Canada is PW Hogg and P Monahan, *Liability of the Crown* (3rd edn, Toronto, Carswell, 2000).

views of participants seriously can nevertheless discount some of those views. What, then, is this reason and what weight does it have?

The reason is the separation thesis itself. In Aristotle it has two principal components, the first identifying the two forms of justice, the second articulating their relationship. As to identity, Aristotle tells us that distributive and corrective justice are recognisable and distinguishable because they embody different mathematical operations — the former consists of geometrical equality, an equality of ratios (or proportions), while the latter is arithmetical equality or an equality of quantities.³⁰ It seemingly follows from this characterisation that the two cannot therefore be intelligibly combined: their relationship is one of incompatibility.³¹ Weinrib accepts the thesis, including this strong incompatibility claim, wholesale. The strength of the latter claim should not be overlooked. It becomes vivid when we note that few who regard corrective and distributive justice as different also accept that they cannot be combined.³²

The basis of the separation thesis in Aristotle seems to be the logic of the concepts themselves, but he provides little by way of argument to support this claim. Even if we accept that the two different terms should or must refer to different concepts, this clearly does not show that these concepts are necessarily incompatible. Nor, of course, does it show that one should displace or dominate the other in any particular or even in all conceivable contexts. It is clear that corrective and distributive justice can be understood in the way Aristotle suggests: the claim that they embody different mathematical operations is not radically implausible, as would, for example, be the claim that they instantiated different colours. But we surely need more than a bare possibility and absence of radical implausibility to accept the claim. This is not just because Aristotle's way of conceiving of corrective and distributive justice seems, within our current intellectual context, somewhat odd. That there is a rich tradition of thought about distributive justice that understands it neither in the formal manner of Aristotle's mathematical operation, nor in Aristotle's substantive terms, solely as a matter of desert, is not a conclusive reason to reject Aristotle's view.³³ More worrying than this is the fact that strong reasons supporting the impermeable boundary between corrective and distributive justice are simply absent from Aristotle's own treatment. The distinction, judged solely within the boundaries of the *Nicomachean Ethics* itself, is plainly little more than a

³⁰ *Nicomachean Ethics*, above, n 25, 1131b12–1131b13 and 1132a32–1132a33.

³¹ But see K Marc-Wogau, *Philosophical Essays: History of Philosophy. Perception. Historical Explanation* (Copenhagen, Ejnar Munksgaard, 1967) ch 2.

³² See Coleman, above n 16. An interesting view of the relationship between the forms of justice is J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 177–93. For expansive views of the components of distributive justice see M Walzer, *Spheres of Justice* (Oxford, Blackwell, 1983) and D Miller, *Social Justice* (Oxford, Clarendon Press, 1976) and his *Principles of Social Justice* (Cambridge, Massachusetts, Harvard University Press, 1999).

³³ The high point of this tradition being J Rawls, *A Theory of Justice* (Revised edn, Oxford, Clarendon Press, 1999).

stipulation.³⁴ It is thus not a particularly rationally robust foundation upon which to build a strong, binary distinction between private and public law.

III. A DISTINCTION WITH A DIFFERENCE

The grounds for regarding Weinrib's separation thesis as generating a distinction between public and private law include not just his invocation of Aristotle's distinction between the forms of justice, but also some admittedly fleeting comments on public law itself.³⁵ The grounds for regarding this attempt to distinguish private and public law as problematic include not only the doubts about the plausibility of the separation thesis itself, but also a suspicion that the hallmarks of bipolarity displayed by private law disputes are also displayed by public law disputes. If this effort to give normative depth to the legal-doctrinal distinction between public and private law is therefore set aside, where else might such depth be sought? What follows is an account of another possible foundation for the distinction between public and private law, although it is not one which claims to map, in any exact way, onto the current legal-doctrinal distinction. Legal doctrine in the common law world is a malleable medium, providing a fairly inhospitable habitat for rigorous and rigid distinctions of any kind, be they purely legal, purely moral, purely political or some admixture of the three.

A. Private and Public Project Pursuit

Put brutally, the distinction is this: it is between the value we place upon individuals having the freedom to formulate and pursue their own projects without warrant from other citizens or the state and the value we place upon our collective power, primarily through law and politics, to change and maintain the social and related structures in which we live.³⁶ If it is true that we value these two realms, and liberal polities must by definition do so, then it needs be established that they are indeed (i) distinct and (ii) similarly important or equally worth upholding, yet (iii) capable of undermining one another. Only if these conditions are satisfied do we have a distinction marking a difference truly worth upholding.

It seems that these realms are indeed distinct. It is both physically and normatively possible for me to devote all my leisure hours to bird-watching or collecting and drinking fine wine or playing amateur football. I need not seek any one's or any body's permission to engage in the former pursuits, although for the latter I will need a group of friends or will

³⁴ The distinction is outlined in *Nicomachean Ethics*, above n 25, at 1131a10–1132b21. For elaboration see EJ Weinrib, 'Aristotle's Forms of Justice' in S Panagiotou (ed), *Justice, Law and Method in Plato and Aristotle* (Edmunton, Academic Printing and Publishing, 1987) particularly at 134–42.

³⁵ Weinrib, *The Idea of Private Law*, above n 17, at 8 and 48.

³⁶ This is a paraphrase of NE Simmonds, 'The Possibility of Private Law' in J Tasioulas (ed), *Law, Values and Social Practices* (Aldershot, Dartmouth, 1997) ch 6 at 144. See also his 'Justice and Private Law in a Modern State' (2006) 25 *University of Queensland Law Review* 229–52. Cane's account of the public/private distinction runs along broadly similar lines but has a very different intellectual lineage. See Cane, above n 3 at 273–75.

have to join a club. The costs and benefits of these possible uses of my time do not have to be determined before I am permitted to continue. Indeed, it might well be the case that my pursuit of these hobbies harms me: I could, as a result of relentless bird-watching or wine drinking, become even more sadly misanthropic than I already am, while constant football playing might give me arthritis. But even here, if I do not harm others, my hobbies are regarded as no one's business but my own. These are just some of the projects I am free to formulate and pursue. Others go beyond the realm of leisure. My choice of employment or career is, as most reliable liberals would agree, a matter for me and no-one else, except those I might consult or whose interests I value. The assignment of careers or modes of employment by a centralised agency pangs not only of the workhouse, but also of the forced labour camp. Similarly the choice to have a family or remain childless is one we assume almost all adults have the right to make; this is not a realm in which government intervention is either welcome or appropriate. Many consumption choices are, we think, also entirely our own: whether I drink coffee or tea, or whether I live frugally or extravagantly, is the legitimate concern of no one but myself. These choices need not be validated by others, either individually or in some collective form, before I am allowed to act upon them. Nor are individuals' choices about the nature of their emotional and sexual lives subject to such unpalatable 'interference'. This is assuredly part of the realm of private and not public project pursuit.

The importance of individuals being both allowed to author large aspects of their own lives independent of the directives of the community, and being protected in that self-authoring, is a theme well-explored by many liberal thinkers. It might be argued that being able to create many significant aspects of their lives for themselves, including not just general matters like a 'life-plan' but relatively small aspects of daily life like particular consumption choices, allows human beings to approximate more closely a fine form of human existence and flourishing. Private project pursuit, on such a view, is one feature of what a good human life looks like. Yet the goodness of such a life does not necessarily arise from the content of the actual choices particular agents make, for these might in some or many cases turn out to be bad choices. Rather, the value of such a life might be found in the fact that such choices can be and are made, whether they turn out to be good or bad. It is the making of these choices, the opportunity to create tracts of one's own life for oneself, that is truly significant here.

The value of private project pursuit need not, however, be rooted in a perfectionist picture of what a good human life looks like.³⁷ It could instead be based upon scepticism about

³⁷ The most interesting recent version of perfectionist liberalism was offered by J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986). There is a good deal of controversy over the extent to which, if at all, JS Mill's account of the advantages of individualism is perfectionist: see ch III of 'On Liberty' in his *Utilitarianism, On Liberty and Considerations on Representative Government* (London, Dent Publishers 1972). For an explicitly non-perfectionist liberalism, see J Shklar, 'The Liberalism of Fear' in NL Rosenblum, *Liberalism and the Moral Life* (Cambridge, Massachusetts, Harvard University Press, 1989) ch 1.

humankind's' ability to know what such a life looks like, and a worry about the use of political power to realise and maintain such a picture. Human history could well suggest that allowing individuals to author large aspects of their own lives creates far less suffering and pain, or far more happiness or preference satisfaction, than when their lives are in large part created for them. But the basis used to articulate the value — or, more likely — *values* of private project pursuit does not matter for present purposes. The significant point is that there is a high degree of convergence among both philosophers and citizens that private project pursuit is indeed valuable, even though there may be disagreement as to why, exactly, this is so. Equally clear is the commitment that flows from valuing individuals' ability to author large parts of their own lives, namely, valuing and protecting the means of such self-authoring. At the very least, this entails a commitment to protecting bodily integrity and freedom of movement, as well as other conditions of individual autonomy.

The realm of public project pursuit could — and probably should — be defined as all that is not private project pursuit. While not particularly helpful, this definition at least avoids the trap of claiming that public project pursuit is about nothing more than the realisation of what economists and social choice theorists call 'public goods'. Such goods are non-rival and non-excludable, but their provision, while being of benefit to many, cannot be protected against free-riders.³⁸ It is thus thought that, in many cases, such goods are best provided by government action of some kind — usually in the form of non-consensual taxation — since this is often the most effective way of reducing or even eliminating free-riding. All citizens, it is assumed, can legitimately be forced to contribute to the realisation of goods from which they benefit. National defence, the system of property and related rights, public order and law enforcement are but three benefits commonly regarded as good examples of (fairly) pure public goods. It is also argued that constitutions, bills of rights, a reliable law of contract as well as good government are relatively pure public goods.³⁹ The problem with the private goods/public goods taxonomy for present purposes is obvious from this list: private law itself is a public good. The private good/public good distinction cannot therefore be used to distinguish private and public law.

But what does the realm of public project pursuit include, beyond some public goods? A slightly more informative answer than the first one is this: all that activity which is conducted through the various instruments of the state. In most liberal democracies, the provision of elementary level education and health care is organised through national bodies supported by taxation and controlled, at some level, by national government or by a combination of national and local government. The actual raising of taxation itself is surely an instance of public project pursuit, as in most societies is the provision and upkeep of national defence, transportation networks and public spaces. There is, of course, nothing necessarily 'public' in the provision of these services in the sense that 'public' (governmental) bodies need not

³⁸ The classic treatment of public goods is P Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 *Review of Economics and Statistics* 387–9.

³⁹ The discussion in J Buchanan, *The Limits of Liberty* (Chicago, University of Chicago Press, 1975) chs 1–4 and 7, is a significant starting point.

necessarily provide them. They can often be provided by ‘private’ (non-governmental) bodies. One point of significance, though, is that although the service provider need not be public in this sense, the payer for the service almost always is: it is central and local governments who fund such services from local and national taxation, rather than ‘private’ subscribers.

That public project pursuit includes activity conducted through various instruments of the state hints at something else that should be included in that class. Are the various instruments of the state constrained in any way in their pursuit of objectives? Are there even some objectives that are and should be beyond their range? The answer to both questions, in the liberal democracies at least, is affirmative. The principal source of constraints on the ends that can be pursued, as well as upon the ways in which permissible ends can be pursued, are the systems of constitutional and administrative law in these societies. Indeed, it is these areas of law that are taken to be paradigmatically ‘public’ because they mediate the relationship between state (and its various instruments), on the one hand, and the citizen, on the other.

The value of public project pursuit at its most general is the value of coordinating and organising various aspects of our collective life together. While such collective endeavour might in some sense be inherently valuable, it is often regarded as valuable only insofar as it brings about more specific values, goals or states of affairs. It is thus not wrong to say that in some instances the value of public project pursuit depends upon the particular goals pursued and achieved. Some public projects – the elimination of inflation, for example – are both short-term and clearly not inherently valuable. The elimination or reduction of inflation is valuable only insofar as it advances other valuable goals or states of affairs: higher employment, or an increased standard of living or a better balance of payments. The effort to reduce inflation will be promptly abandoned once it ceases to achieve those goals or states of affairs. Similarly, investment in particular areas of public transport, or aspects of health-care or education can at any point be scaled back or advanced, depending upon the specific aims of such investment. For, while few would deny that health-care, education and public transport are goods worth achieving and developing in a society, it is hard to argue that investment in each should be unlimited. A once vital public project can thus become only marginally significant or completely insignificant. There is, however, a component of public project pursuit that remains fairly statically valuable. This component is unconcerned with possibly transient policy or community goals; it is that aspect of public project pursuit that consists of the values (and constraints) in accordance with which such goals are pursued. Those values are now most obviously found in constitutions and bills or charters of rights and freedoms, taken in conjunction with the values of procedural fairness or administrative due process.

The ‘value’ of public project pursuit is thus, like the value of private project pursuit, a complex question. A more discriminating approach to both would at least begin with a cartography and analysis of the various particular values realised by these bluntly conceived macro-values. It could proceed to an evaluation and comparison of each particular putative value within each more general class. While we cannot say in advance what the results of such an analysis might be, we can surely say that public and private project pursuit, and the

values constitutive of and realised by each, are both very important. They might, indeed, be equally important, although this idea plainly implies a single metric upon which both can be ranked, each option or set of options having the same weight. If both are genuinely of equal weight, how shall we choose between them?

The choice surely cannot be compelled by reason. If it were, that would undermine the claim that each option is of equal weight. Furthermore, priority rules might resolve a choice between equally ranked options, but if the options are indeed genuinely equal then the priority rules clearly cannot reflect the merits of the options. If they did, the priority rules would either fail to resolve the tie, since the merits are *ex hypothesi* equal, or they would show that there is not after all a tie between equals here. Priority rules must therefore be based on considerations other than those which give value to the options in play. Such rules might, for example, be based solely upon considerations of efficiency in decision-making, insisting that one option be chosen on random grounds if necessary. Recourse to randomness short-circuits what is likely to be a long and relatively fruitless deliberative process. It is also a means of circumventing decisional paralysis which, of course, is particularly important if the decision has consequences for the conduct of others. My inability to decide between Earl Grey and Breakfast Tea is of little moment to anyone but myself, whereas an appellate court's decision as to the validity of a particular construction industry liquidated damages clause could affect the whole industry.

An equal ranking of the respective value of public and private project pursuit is not the only conceptual possibility here. This much was hinted at by the curious locution 'similarly important' in point (ii), at the beginning of this subsection. For the relation between these two values — or, more accurately, congeries of values — might be better understood as that between incommensurables, even though the practical consequence of this is much the same as if the values were equally ranked. Two options are incommensurable if one is neither more valuable than the other, less valuable than the other nor are they equal in value.⁴⁰ A common shorthand characterisation holds that incommensurability marks the fact that there is no common metric by which two or more allegedly incommensurable values can be compared. This characterisation is unexceptionable provided it is not taken as the beginning of a quest for such a metric, for those who believe incommensurability to be a hallmark of our values usually also believe that no such metric will or can be found.⁴¹ For these thinkers, incommensurability is in no sense a failing in our moral, political and legal value systems but, rather, an undeniable and significant truth about them. The significance of this truth is manifest in at least two ways. First, choices between incommensurables cannot be compelled by reasons, in the sense that the choice of one genuine incommensurable X, over another, Y, is a clear requirement of rationality. Or, put in slightly different terms, the choice of one genuine incommensurable over another genuine incommensurable cannot ever be a rational

⁴⁰ See Raz, above, n 37, at 322.

⁴¹ Raz, above, n 37, at 327. See also the essays by E Anderson, C Taylor, M Stocker and J Finnis in R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Massachusetts, Harvard University Press, 1997).

mistake, based upon an erroneous assessment of the reasons pro and con. Yet, although choices between genuine incommensurables cannot be compelled by reasons, such choices can nevertheless be based upon reasons.⁴² Second, the existence of incommensurability supposedly explains our intuitive reactions in many choice situations. On the assumption that these reactions are incorrigible, incommensurability is necessary in order to account for moral (and related) experience. It makes sense of something that is otherwise oblique and this, it is thought, gives the idea validity and salience.

If incommensurability is a feature of some of our values, then choices between incommensurables take much the same form as choices between exactly equally ranked values. The choice between the latter is, in the absence of priority rules, one that is very hard and sometimes seemingly impossible to make. The difficulty, the perceived impossibility, results from a lack of compelling rational guidance: it is simply hard to find grounds for the choice. Exactly the same can and, we might expect, would always be true of choices between incommensurables. There will be reasons pro and con, none of which are obviously rationally more compelling than their competitors. The choice is thus not one we are completely comfortable making; the choice process is anguished, one in which we may often change our minds before eventually coming to a resolution. The resolution is much more an instance of picking rather than choosing.⁴³

It is obvious that the value or values embodied in private project pursuit, and that or those involved in public project pursuit, can undermine one another. While it might be almost practically impossible to reduce the realm of private project pursuit to zero, since some few individuals could presumably always successfully evade surveillance, it can be massively reduced simply by requiring permission for almost any form of human conduct. Were permission granted only if the conduct in question contributed to the common good, then the space for private project pursuit would all but disappear, since one could pursue one's private projects only if they also contributed to public projects.⁴⁴ At this point, it is appropriate to wonder whether the term 'private project pursuit' has any genuine meaning. That private project pursuit can undermine public project pursuit might surprise some. Yet it is surely the case that sufficient individuals' incentives could be unintentionally structured so as to prevent the provision of public goods properly so called. A call for contribution towards, for example, the provision of street lighting in a neighbourhood would fail if those living there could each provide lighting and security for themselves at lower cost. Furthermore, the provision of community goods over and beyond public goods might well be thwarted by attitudes

⁴² Raz, above, n 37, at 339.

⁴³ E Ullman-Margalit and S Morgenbesser, 'Picking and Choosing' 44 (1977) *Social Science Research* 757.

⁴⁴ The argument that property is a form of sovereignty over fellow human beings (a classic instance of which is M Cohen, 'Property and Sovereignty' 13 (1927–8) *Cornell Law Quarterly* 8 at 11–14 and 27–30) can lead to the conclusion that it should be subject to exactly the same constraints as any exercise of government power. One such regularly invoked constraint is, of course, the common good.

engendered by the promotion of private project pursuit. It seems, for instance, that the valorisation of private project pursuit among a population can undermine that population's interest in, and willingness to support, various forms of community activity and participation.⁴⁵

If the differences between public and private project pursuit, and the congeries of values both implicate, are genuine, then what significance does this have for law? A tempting and, in this context, unsurprising answer is that this set of differences can be parlayed into a distinction between public and private law. The distinction between public and private project pursuit simply acts as a framework by which to distinguish the two areas of law: private law is a means of securing and facilitating the realm of private project pursuit, while public law is a means of upholding and facilitating public project pursuit. Since both realms are either equally valuable or incommensurable, and since any one instance of conduct can often have both private and public aspects, we can expect a constant tension between them. Both realms make equally insistent or incommensurable claims upon us and the resolution of these claims, either at large, or within the legal context, is likely to be neither neat nor easy. This way of distinguishing private and public law might be different from many previous attempts but it does not, of course, bring that distinction into being. It does not make visible that which was invisible. Since most mature legal systems at the very least display the sequelae of a distinction between public and private law, and since they also grapple, often inconclusively, with the task of adequately distinguishing these two realms, the current version of the distinction can claim only to make better sense of these sequelae and that process.⁴⁶ Of course, whether or not this particular version of the distinction between private and public law is indeed actually better than the alternatives remains to be seen.

Before any particularly robust judgement can be arrived at on that issue, it is important to appreciate what is not being claimed on behalf of this way of distinguishing public and private law. The distinction does not purport to be a historical one: it is primarily normative. The historical genesis and cultural context of any particular version of the distinction between public and private law is undoubtedly an interesting issue, but it is not one upon which this essay has anything to say, save that history would indeed be kind if it embodied all of our significant normative distinctions. Nor is it being claimed that this way of distinguishing private and public law will be a great boon in deciding particular cases. Yet, by viewing private and public law through the prism of a normative distinction, the argument offered here is open to an obvious challenge. It can be captured with this question: why should this *philosophical, normative* distinction take priority within the law? Furthermore, by eschewing any great instrumental role in the decision of particular cases, the distinction between public

⁴⁵ See RD Putnam, *Bowling Alone* (New York, Simon and Schuster, 2000), a focal point of the contemporary debate on this and related issues.

⁴⁶ Efforts to formulate a distinction can be traced back at least to Justinian's *Institutes*. An interesting historical and comparative treatment is A Tay and E Kamenka, 'Public Law – Private Law' in Benn and Gaus (eds), above n 2.

and private law recommended here is surely redundant. These two objections are the fulcrum of the following two subsections.

B. The Priority of Philosophy?

The distinction between private and public law just elucidated is not a direct inference from or strict implication of some authoritative legal source, nor is it explicitly and fully enshrined in the traditional texts and commentaries of the law. It is a philosophical-normative distinction, provided this rather grandiose term is taken to indicate nothing other than the output of somewhat trite and low-level philosophical reflection.⁴⁷ Yet even if this relative superficiality is overlooked, there is another more obvious problem faced by the distinction: of what weight is it, or can it be, in law? Why should judges or lawyers attend to it? It has no authority in the technical legal sense and therefore cannot be binding upon courts. Moreover, surely this distinction merely replaces a small and relatively shallow legal swamp with a large philosophical quagmire. Shifting the site of discussion from the pragmatic legal-doctrinal terrain of particular cases to the realm of broad philosophical distinctions is a *prima facie* unpromising way of resolving a puzzle and, furthermore, risks delaying further the resolution of particular cases. The distinction seems to invite judges to navel-gaze rather than decide cases. In addition, how can it ever be legitimate for judges' philosophical commitments, or their views as to the precise contours and implications of broad philosophical distinctions, to determine their legal decisions?

This two-sided difficulty can be labelled 'the philosophy problem', one dimension being that of decisional inefficiency, the other raising the issue of legitimacy. As will be seen, both dimensions of the problem are exaggerated. That enmiring judges in philosophical controversies will not help them decide cases is a sub-theme in Judge Richard Posner's work. Posner is specifically concerned with a strand of moral philosophy he calls 'academic moralism' and disagrees with jurists, such as Ronald Dworkin and others, whose jurisprudential advice to practitioners culminates in the claim that judges are (and should be) moral philosophers.⁴⁸ Whether Posner does indeed accurately characterise the position of his opponents on this issue, and the merits of that position more generally, are not of concern here.⁴⁹ Rather, our interest is in the decisional inefficiency that Posner thinks arises from

⁴⁷ The distinction can, however, be given a grander philosophical framework such as that outlined in A. Brudner's unjustly overlooked *The Unity of the Common Law* (Berkeley, University of California Press, 1995) ch 1. The tension between private and public project pursuit is subject to a Hegelian synthesis by Brudner: see p 14 for a sketch of the apparently paradoxical nature of this task.

⁴⁸ R. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Massachusetts, Harvard University Press, 1999) chs 1 and 2. A slightly shorter version of the book was published, under the same title, in (1998) 111 *Harvard Law Review* 1638.

⁴⁹ Perhaps the best and shortest statements of this position are R. Dworkin *et al*, 'Assisted Suicide: The Philosophers' Brief' (1997) 44(5) *New York Review of Books* 41 and R. Dworkin, 'Must Our Judges be Philosophers? Can They Be Philosophers?' *New York Council for the Humanities Scholar of the Year Lecture* (2000) <http://www.nyhumanities.org/soylecture2000html> (last accessed

judicial immersion in moral-philosophical discourse. If Posner is right about this, the problem might extend to judicial immersion in any kind of philosophical discourse, even such a minor aspect of it as articulating and mediating the distinction between private and public project pursuit.

Posner's 'weak thesis' is that academic moral-philosophical positions have not impacted upon the judicial resolution of particular important cases, combined with the claim that such positions actually cannot contribute to that process.⁵⁰ The latter claim appears to have a double foundation. Posner argues, first, that the outputs of academic moralists' arguments are significantly inert and that they therefore have little impact on the deliberative processes of either judges or citizens at large.⁵¹ Second, he argues that even if the issues raised in some legal cases could be tackled through the concepts, techniques and arguments of academic moralism, they will not in practice be so tackled by judges. This is in part because judges, in Posner's view, are just not comfortable with such arguments, and in part because there is usually a plethora of other kinds of argument that judges can and will use in such cases.⁵²

Do these objections to academic moralism also apply to the judicial use of broadly philosophical concepts or distinctions? This seems unlikely, if only because the latter process seems neither directly nor indirectly reducible to academic moralism. The path from one to the other is far from clear. Moreover, such a path is assuredly barred if judicial use of broadly philosophical concepts is, as Posner himself recognises, unavoidable insofar as concepts such as (inter alia) causation, responsibility and intention are the fulcrum of many areas of legal doctrine.⁵³ Furthermore, the specific failing that besets academic moralism, according to Posner, is not necessarily a general failing of all philosophical positions. While Posner might be right that academic moralism rarely motivates conduct and thus is relatively inert in

29 April 2003). Three instalments in what became a somewhat ill-tempered exchange between Dworkin and Posner on the issues raised in Posner, *ibid*, are R Dworkin, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* 353; 'Darwin's New Bulldog' (1998) 111 *Harvard Law Review* 1718; 'Philosophy and Monica Lewinsky' (2000) 47(4) *New York Review of Books* 48-52; and R Posner, 'Conceptions of Legal "Theory": A Response to Ronald Dworkin' (1997) 29 *Arizona State Law Journal* 377; 'Reply to Critics of *The Problematics of Moral and Legal Theory*' (1998) 111 *Harvard Law Review* 1796 at 1796-1806; 'An Affair of State: An Exchange' (2000) 47(7) *New York Review of Books* 60-65.

⁵⁰ Posner, above, n 48, at 1639 and 1693-1709.

⁵¹ *Ibid*, at parts I and II.

⁵² *Ibid*, at 1698-1708.

⁵³ Posner denies that the role these notions play in the law makes academic moralism relevant: see *ibid*, at 1693-7 and 'Reply to Critics of *The Problematics of Moral and Legal Theory*', above n 49, at 1804-5.

practical deliberation,⁵⁴ the truth of this claim entails nothing about the effect that general philosophical distinctions have upon either conduct or deliberation. Posner's attack, remember, strikes only at a very limited sub-class of the broader category of philosophical concepts and discourse. Objecting to a particular species of discourse cannot, without more, undermine the whole genus (assuming the latter is not a single species class).

It is also a mistake to think that this version of the private/public distinction is solely or purely philosophical. For the distinction is also embodied in the political culture of the mature liberal democracies. And it is entirely appropriate, as well as absolutely necessary, for judges to operate within and uphold crucial aspects of that political culture. That the distinction is part of our political culture does not guarantee its ultimate normative significance. Being immanent within a particular political culture is not of itself a demonstration of the genuine value of some particular putative value or set of values. Such a demonstration is far beyond our current task. Rather, our immediate aim is to show that public and private project pursuit are each embedded and valued in our political culture. If they are, then judges have much more to work with than a 'merely' philosophical distinction. But is the distinction indeed 'there', truly rooted in our political culture?

Showing this requires, at the outset, an answer to a prior question: what is 'political culture'? A famous political science account holds that it is, inter alia, 'the political system as internalized in the cognitions, feelings, and evaluations' of the population of a particular nation state.⁵⁵ While not completely unhelpful for current purposes, this statement misses much that is of significance by saying nothing about the institutional manifestation of these values, beliefs and attitudes. If, for example, the value of individual freedom is said to be part of the political culture of some nation state, it is not unreasonable to expect that value to be evidenced not just in a tradition of discussion about its form and nature, but to exist also in that state's formal repositories of public values. Some obvious repositories would include not just that state's constitutional documents, international legal obligations and associated case law, but also the explicit policy goals, or the parameters upon such goals, set by the government of the day and the political parties, and other sources like reports of parliamentary and related committees. Furthermore, it is not unusual to find local government bodies, as well as large corporations and semi-public/private bodies in liberal democracies

⁵⁴ '[T]he arguments pro and con are too flaccid to induce a sensible person to change his beliefs or behaviour': 'Reply to Critics of *The Problematics of Moral and Legal Theory*', above n 49, at 1801. 'Every move in normative moral argument can be checked by a countermove. The discourse of moral theory is interminable because indeterminate': at 1802.

⁵⁵ G Almond and S Verba, *The Civic Culture* (Princeton, New Jersey, Princeton University Press, 1963) 13. They also have a less digestible version: 'The political culture of a nation is the particular distribution of patterns of orientation toward political objects among members of the nation': at 13. Almond and Verba's view of political culture has not changed significantly: see G Almond and S Verba (eds), *The Civic Culture Revisited* (Boston, Little Brown, 1980) ch I (at 26–8) and ch X (at 395–7).

committing, either through charters or other statements of values and goals, to carry out their functions consistent with rights of all citizens of the polity.

Now, although a scrupulous empirical study of these sources cannot be undertaken here, listing them (even non-exhaustively) is surely sufficient to show where any state's expressed commitments to private and public project pursuit are likely to be found. The core claim is, I hope, non-controversial: that the political culture of the mature liberal democracies includes not just the attitudes, values and beliefs of existing citizens, but also the history of public elaboration and institutionalisation of those attitudes, values and beliefs. That these many and varied sources of public elaboration and institutionalisation exist is beyond doubt; more speculative, however, is any claim about their precise content. This essay relies on one such speculative claim, namely, that it will not be hard to find among these sources copious evidence of a commitment to both the goals and values of public and private project pursuit.⁵⁶ The distinction, then, most likely has an institutional life or embodiment and this might well calm those who worry about the prospect of judges mediating, or grappling with, a supposedly vague or intractable (*merely*) philosophical distinction. The distinction is not just philosophical: it is 'ours' collectively, a part of our current polity and a feature, albeit mediated and contested, of our political history and tradition. This particular worry thus seems quite easily dissipated, although it might quickly be replaced with another. This other worry can be highlighted by a question: ought judges to be drawing upon their country's political culture in interpreting and applying the law?

The issue here might seem to be that of the legitimacy of using this political-cum-moral distinction to structure the law. But simply posing the issue in these terms serves to show that it is bogus, for what is being questioned here — the legitimacy of judges working within and upholding the values that constitute our political culture — is something unavoidable and, indeed, necessary. Judges cannot, in fact, do otherwise than interpret the law within the political culture of which it is part because — obviously! — it is part of that culture. This is undeniable unless we believe that those features of our legal systems, like the rule of law, bills of rights, natural justice and the separation of powers, cannot also be part of our political culture. The claim that these features are not part of the political culture of the mature liberal democracies seems *prima facie* very puzzling, apparently assuming a bright-line distinction between easily separable 'political' and 'legal' values and ideas. As a matter of intellectual and cultural history, this assumption is plainly unfounded: that these ideas developed within and have subsequently had very different spheres of influence is false. The fact that these key juristic values were (perhaps only partially) realised in legal systems as the result of political change and struggle which, in Europe at least, was part of the change from feudal systems of governance and economic production to bourgeois governance and capitalist economic production, demonstrates this. The distinction could only be insisted upon by one already committed to the view that law and its key juristic values must exist in a vacuum, somehow utterly unrelated to broad matters of political principle. This is clearly a normative

⁵⁶ Even a starting point confined to purely legal sources furnishes much: see the European Convention on Human Rights, Arts 2–5, 8–12 and 14 and the Human Rights Act 1998, ss 1–6.

commitment, usually founded in what has come to be called ethical legal positivism.⁵⁷ While this commitment might or might not be normatively well-founded, it is inaccurate as a description of many contemporary legal and political systems.

Moreover, all we know about rule-interpretation and application suggests it is a value-laden process. This further bolsters the point that judges deciding cases are often unavoidably immersed in judgements about our political culture. In the face of ambiguity or contestation about the correct scope of a rule, recourse to some account of its point, purpose or value is almost immediate. This, of course, is well known to lawyers and jurists, but it is worth labouring the obvious to remind ourselves of the constraints upon this process.⁵⁸ If the search for the point, purpose or value of some or other proposition of law is not exhausted by its doctrinal or legislative history, where else might lawyers look? One potential source of guidance is the general scheme of values or goals supposedly embodied in, or animating the general area of, doctrine within which the specific dispute has arisen. Another source is the broader scheme of values or goals inherent in the law as a whole: it might, for example, be said that since gender equality is a broad animating principle of contemporary English law, then that value ought to be upheld in each and every area of the law. Now it does not seem odd, as a descriptive matter, to regard some such principles (or ‘goals’, or ‘purposes’) as not only embedded in our law, but also as part of our political culture. Judicial reference to such features of our political culture is thus indispensable, provided the application and interpretation of propositions of law involves recourse to accounts of the point, purpose or value of such propositions.

C. Redundancy and Other Embarrassments

‘. . . it says nothing, it distinguishes nothing . . .’

J Donne, Sermon XV, 8th March 1621.⁵⁹

The most obvious alleged embarrassment for the argument offered here appears serious. It is that the proposed distinction between private and public law is practically useless, since it will not help to resolve cases with which we are familiar — the much discussed, usually

⁵⁷ An exemplar of which is T Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, Dartmouth Publishing, 1996).

⁵⁸ It was LL Fuller who reminded modern lawyers and jurists what they already knew, but sometimes forgot, about the purposive nature of rule interpretation and application: ‘Positivism and Fidelity to the Law — A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630 at 661–9. The reminder is probably as old as legal thought itself: for an earlier instance see S Pufendorf, *De Jure Naturae et Gentium Libri Octo*, C and W Oldfather (trans) (1688 edn, Oxford, Clarendon Press 1934), vol 2, book V, ch XII (On Interpretation).

⁵⁹ J Donne, *LXXX Sermons* (London, M Flesher for R Royston and R Marriot, 1640) 148.

appellate court cases, which seemingly turn on a distinction between public and private law.⁶⁰ Yet, rather than being an embarrassment, this point must instead be embraced because it contains a significant truth. For one reason why this particular distinction between private and public law — or any other version of the distinction, for that matter — does little work for us in the usual range of reported cases is because those cases are hard. Hard cases are complex and require judgement. They cannot be solved by judges in anything like an automatic way by, for instance, an ‘algorithmic’ invocation of some or other version of the public/private distinction. This requires elucidation.

Hard cases are those ‘in which reasonable lawyers disagree’ and ‘where no settled rule dictates a decision either way’.⁶¹ A more helpful but still abstract statement of the hallmarks of hard cases is offered by Neil MacCormick. Such cases usually present one or more of three possible doctrinal issues. 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.⁶² 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 rules of law’.⁶³ 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

⁶⁰ See Cane, above n 3, at 249–61, for a typically sure-footed treatment of some of the principal cases. Those inclined to doubt that legal scholars expect the public/private distinct to do pragmatic doctrinal work should see: Kennedy, above n 4, at 1350–4 (the distinction is problematic in particular cases and thus does not do the work it should); the essays by, *inter alios*, HJ Friendly and KE Klare in the same volume at 1289 and 1358 respectively (Klare holds that the distinction ‘is devoid of significant, determinate analytical content’ (at 1360) when invoked in the cases, this being taken as an indictment); C Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction” 43 (1980) *MLR* 241, at 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 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.

⁶¹ R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978) at xiv and 83 respectively.

⁶² This typology of the features of hard cases, while in some respects compatible with many aspects of Dworkin’s account (*ibid*, chs 4 and 5), is derived from N MacCormick, *Legal Reasoning and Legal Theory* (revised edn, Oxford, Clarendon Press, 1993) chs V-VIII. For elaboration of this position see N MacCormick, *Rhetoric and the Rule of Law* (Oxford, Clarendon Press, 2005), chs 3–10.

⁶³ Posner, above n 48, at 195.

no argument will be acceptable if (i) it 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’.⁶⁴ 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’.⁶⁵ 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’.⁶⁶ It seems to be the case that consequentialist arguments are often the strongest kind of argument in this trio.⁶⁷

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.⁶⁸ Disagreement arises, however, as 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.⁶⁹ However interesting they might be, the details of this

⁶⁴ MacCormick, above n 62, at 152.

⁶⁵ *Ibid*, at 103.

⁶⁶ *Ibid*, at 104.

⁶⁷ *Ibid*, at 127–8.

⁶⁸ A smattering of relatively recent studies (all, curiously, published in English within four years of one another) illustrates the point: R Alexy, R Adler and N MacCormick (trans) *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford, Clarendon Press, 1989); SJ Burton, *Judging in Good Faith* (Cambridge, Cambridge University Press, 1992); K Günther and J Farrell (trans), *The Sense of Appropriateness: Application Discourses in Morality and Law* (Albany, State University of New York Press, 1993); J Levin, *How Judges Reason: The Logic of Adjudication* (New York, Peter Lang, 1992).

⁶⁹ R Dworkin, *Law’s Empire* (London, Fontana, 1986) 244. See also *Taking Rights Seriously*, above n 61, ch 4.

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 the most cursory glance at the cases confirms this. Consider just one example, the House of Lords decision in *Aston Cantlow v Wallbank*.⁷⁰ 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 body for the purposes of s 6 of the Human Rights Act 1998 (HRA). It might thus be regarded as an instance of a public/private distinction being invoked to conclusively determine the decision in the case. But the public/private issue was but one of a range of issues the court had to tackle, the remaining ones including (i) the current state of the law on chancel repairs; (ii) the retrospective applicability of the HRA; 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 Art 1 of the First Protocol of the ECHR. At 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 HRA raises the question of which interpretation of an agreed proposition of law applies (the interpretative choice being between (i) the HRA does apply retrospectively and (ii) the HRA does not apply retrospectively). Determining the compatibility issue (was the parochial church council’s order compatible with Art 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* were closely related: the question of incompatibility with Art 1 only becomes live only if the parochial church council is a public body under s 6. But 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 addressed the English cases on the legal standing of the Church of England, but also arguments of coherence, in which they considered the European Court of Human Rights decisions on, inter alia, the status of Greek monasteries and the Swedish church.⁷¹ 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 exercising a

⁷⁰ [2004] 1 AC 546.

⁷¹ *Ibid*, at paras 42, 48–53, 59–64 (Lord Hope); paras 86–8 (Lord Hobhouse); paras 153–7 and 159–64 (Lord Rodger).

public function.⁷² The nature of public bodies under legislation such as the Scotland Act 1998 was also discussed by Lord Nicholls. 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 bolstering the view that parochial church councils should not be regarded as public bodies.⁷³

There are two additional reasons, both entirely compatible with that just articulated, which suggest that the public/private distinction will do little pragmatic doctrinal work. One reminds us of a feature that the values of private and public project pursuit might have: they might be incommensurable with one another. If this is so, then the process of mediating the boundary between the two realms will be far from simple; decisions to rank one over the other are not compelled by reason, although they are based on reasons. This means the decisions arrived at by some as to which, if any, value should prevail in a particular case will not always and necessarily be regarded as correct and compelling, or even as helpful and influential, by others. The fact that decisions one way or another are not obviously rationally compelling could also explain another odd feature of the discussion about the parameters of public and private law in the common law world. This oddity is the acceptance of two apparently contradictory views. One is that public law does and should dominate private law in the sense of ‘constitutionalising’ it: thus the rights and protections in bills and charters of rights and freedoms must be extended into the sphere of private law. The other holds that private law controls the operation of constitutional and public administrative law, there being no special law for of the state. Public or state bodies are subject to the same law of the land as all citizens, and that law includes private law. Hence we find constitutional scholars expressing the view that private law is the constraining context in which public law exists.⁷⁴

The final reason which suggests it is plausible to think that any version of the public/private distinction is unlikely to do much pragmatic work can be highlighted with a question. It is this: how many other equally broad or even much narrower legal distinctions are ever dispositive of particular 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 we have 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 little use when faced with the fine detail and broad

⁷² *Ibid*, paras 130–2.

⁷³ *Ibid*, paras 15 and 17 (Lord Nicholls).

⁷⁴ Allan, above, n 11, at 127–30.

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.

Other potential embarrassments for the distinction between public and private law as so far elucidated are probably too numerous to consider here. Yet it should be noted that one of the most tempting putative embarrassments, over and beyond its relative lack of pragmatic utility, is not an embarrassment at all. Thus, those tempted to point out that the distinction offered here is of limited range are simply confirming the argument rather than undermining it. Furthermore, the limited range of the argument is doubled-sided, for while one of its obvious implications is that the public/private distinction sketched here must live alongside (and possibly in conflict with) other versions of the public/private distinction *within the same legal system*, there is also a more oblique implication. It is that different versions of the public/private distinction will be found in different political and legal cultures. It is thus conceivable that the version of public/private distinction articulated here will not exist in some, presumably non-liberal, political cultures.

IV. CONCLUSION

What, then, are the goals of private law? For Weinrib, ‘the sole purpose of private law is to be private law’.⁷⁵ Many have found this statement rather gnomic and mystifying, but there is a sense in which it is undoubtedly true, at least from the perspective of the argument offered in this essay. The goal or purpose of private law as a whole is to facilitate private project pursuit — its aim is to allow and enable all citizens to achieve those of their goals that are consistent with a like power being enjoyed by all. Private law is thus a framework within which many different and to some degree incompatible individual goals can be pursued, not only through its obviously facilitative elements like contract law and trusts, but also through those elements, such as tort and property law, that protect some of the conditions of individual autonomy. Saying that private law’s goal is to allow individuals to pursue many of their goals is clearly not to say that it allows or facilitates the pursuit of any or all goals citizens might have. It does not facilitate the breaching of contracts, nor does it provide a means by which some citizens can physically attack others; it also safeguards against many forms of deception and interference with holdings. That private law is not neutral on all aims citizens might have does not show that it cannot be a facilitative body of legal rules. The rules of association football contain many prohibitions but they also undeniably facilitate a particular form of group conduct.

Over and beyond this, the attribution of what (in the Weinribian vernacular) might be called an ‘external’ goal (or goals) to private law appears dubious. Of course, there can be no complaint about jurists and practitioners insisting that private law embody generic rule of law virtues, such as consistency, intelligibility, predictability and non-retrospectivity. Yet these virtues, as their collective name suggests, are not unique to private law. They are most likely internal to the very idea of law itself, if it is to approximate anything like the ideal of

⁷⁵ Weinrib, *The Idea of Private Law*, above n 17, at 8.

subjecting human conduct to the governance of rules. Nor can there be any objection to holding particular branches of private law to their implicit or internal goals: that jurists should evaluate doctrinal developments in the law of contract, for example, with a eye to their consistency with the scheme of values embodied in that area of law seems both obvious and a valuable feature of legal scholarship.

The scheme of values embodied in contract law is assuredly complex for, in addition to providing a means of creating legally enforceable transactions, the law also sets standards as to how transacting parties must behave, these standards sometimes obtaining only in the absence of explicit directives from the parties and sometimes despite or contrary to such directives.⁷⁶ It seems both bizarre and unhelpful to deny that these values can be understood as the goals of contract law, yet this should cause Weinrib no embarrassment. For these goals are significantly 'internal' to the law. They are either implicitly or explicitly embodied in the publicly stated rules of the law of contract, serving to make normative sense of, and to systematise, those rules. And so it is, presumably, with other areas of private law. Is there any additional space for meaningful talk about the goals of private law? Certainly, but this space is primarily the domain of those social scientists and other scholars interested in the side-effects or consequences of the whole (or some area) of private law. It is not a domain in which many private lawyers and jurists are equipped to sport themselves without succumbing to the vice of intellectual voyeurism.

⁷⁶ An admirable treatment of contract law and its animating values is SA Smith, *Contract Theory* (Oxford, Clarendon Press, 2004).