The London School of Economics and Political Science

Normative Dimensions of the Practice of Private Law

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work.

I declare that my thesis consists of 73,553 words (excluding bibliography).

Abstract

This thesis is an examination of and critical reflection on theoretical approaches in private law theory. First, because private law is a subset of the general category of law, I consider how debates in general jurisprudence around explanatory, descriptive and normative theories about the law can shed light on similar projects in private law. This includes a critical analysis of 'interpretive' theories which purport to explain and justify at the same time. Second, because normative theorizing around private law touches on questions of justice and rights, I consider how recent debates in political philosophy may have a bearing on private law. In this respect I highlight the distinction drawn between 'moralist' and 'realist' approaches to normative political philosophy. I argue that the existing private law theory literature takes a moralistic approach and show what political realism would have to say about private law theory. On a realist view, political philosophy must take moral disagreement as a starting point, and rather than trying to resolve it, it must proceed with this disagreement in mind. Political realism reframes our question from the moralist one of "*What rights and obligations structure the legal relationship between private persons?"* to the realist one of "*How do we act together in the face of disagreement over the question of what rights and obligations structure the legal relationship between private persons?*" This focuses our normative inquiry on institutions designed to allow us to coexist in the face of disagreements over private rights and obligations. Further, it shifts our analysis from questions of justice (about which there is irresolvable disagreement) to questions of legitimacy.

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Introduction

In this thesis, I argue that there are unavoidably normative questions that must be addressed when theorizing about the practice of private law. However, at the same time, I take seriously the fact of disagreement about these normative questions. When I first set out to write this thesis, my aim was to defend a particular theory of contract law. The intuition which grounded my thinking at the time was what I took to be the inherently political nature of contract law; it seemed obvious to me that state enforcement of contracts and the central role they play in the economic system requires us to look at contract theory from a political perspective. But much of the private law theory literature seems to proceed on different methodological terms: private law theorists try to understand private law 'on its own terms'. Many prominent theories of private law take an 'interpretive' approach to the topic. Theorists take judicial decisions and the concepts and reasoning found in them as the starting point for theorization. From here, interpretive private law theorists aim to construct a theory which both explains and justifies the practice on its own terms without drawing on practice-independent values and principles. I was puzzled by how a theorist of contract, property and tort could provide a justification of the practice of private law internally without drawing on moral or political values. This shifted the focus of my thesis. I became interested in questions about methodology: what it is that private law theorists are doing when they do private law theory?

As a result, this thesis is an exploration of and reflection on the different kinds of questions that theorists might ask about the practice of private law and how they go about answering them. In doing so, I wanted to draw on recent debates over methodology in both general jurisprudence and political philosophy. One reason I

believe private law as an object of study is interesting is that it overlaps both with the philosophy of law generally and with political philosophy. Given that private law is a subset of the general category of 'law,' we would expect that inquiry into the nature of law and methodological debates about how we go about answering that question would be relevant for similar inquiries into private law. Relatedly, private law practices overlap with questions in political philosophy. Private law is typically thought to include the practices of contract, property, and tort. These practices represent the basic building blocks of economic systems in society. So, it would be natural to think that debates in political philosophy about distributive justice and legitimacy would have something to say about how we go about theorizing about the practice of private law. In this thesis, I attempt to bring to bear insights from those debates in general jurisprudence and political philosophy on questions about private law.

What I argue throughout this thesis is that there are inescapably normative questions that must be addressed when engaging in certain theoretical projects in private law. This seems clear when it comes to the projects that are explicitly asking a normative question. Asking how a practice such as contract, tort, or property is justified, or how a judge ought to resolve a contract, tort, or property dispute is a normative inquiry. But I show that even accounts that aim to explain or describe the practice of private law have an irreducibly normative dimension to them. An interpretive explanation of the practice of private law involves interpreting the self-understanding of the participants of the practice and what they take the meaning or purpose of the practice to be. But this requires taking a position on whose perspective matters. Further, the project of identifying different areas of law such as contract, tort, or property is similarly normative; it requires taking a position on what elements of the practice ought to be grouped together.

At the same time, while I argue that many of the questions about private law practice require defending a normative position, I also believe that there is intractable disagreement about how to answer them. That is, while I think inquiry into private law practice requires us to take a normative stance, I am skeptical about the prospect of agreement about what that stance ought to be. This places me in the uncomfortable position of saying 'It's the normative question that matters here!' but also saying 'There is inescapable disagreement about how to answer that normative question!' This led me to the literature about realism as an approach to normative political philosophy. Realists argue for a distinctive normativity in politics, one that isn't reducible to moral claims and takes disagreement seriously. I ultimately argue that this apparent tension in private law – between irreducibly normative questions about which there is intractable disagreement – can be dissolved by adopting a realist approach to political philosophy. When thinking about questions about the practice of private law, the realist shifts our focus from trying to get the correct moral account of private law rights and obligations to the legitimacy of institutions that permit us to act in the face of disagreement about the correct moral account of private law.

This thesis is organized into five Chapters. The aim of each is to locate and clarify the normative dimension that is salient for different questions that we might ask about the practice of private law. This includes questions about the explanation of the practice; the description and classification of the practice; the justification of decisions within the practice and the effects of the practice on the motivations of individuals.

Chapter 1 examines the normative dimensions of theories which aim to explain the practice of private law. Here, I focus on 'interpretive' theories. I show how the interpretive methodology adopted by private law theorists takes a position

in a foundational disagreement in the philosophy of social science about how to explain social phenomena. On the one hand, naturalists argue that social practices ought to be explained through the empiricist method of the natural sciences. On the other, interpretivists argue that social explanation requires us to interpret the self-understanding of participants in the social practice; this requires identifying the meaning or purpose of the practice. The private law theorists I examine in this Chapter take up this interpretivist approach. Their aim is to provide an explanation of the practice of contract or tort by rendering intelligible the self-understanding of participants in the practice about what the meaning or purpose of the practice is. However, interpretive theorists of private law don't take seriously the commitments of this method of explanation. Social scientists have acknowledged that the interpretive approach to explaining social phenomena admits of competing possible interpretations depending on whose self-understanding we emphasize. This point has been recognized in general jurisprudence. Philosophers of law who take an interpretive approach to the practice of law have acknowledged that there may be different and potentially conflicting self-understandings of the meaning and purpose of law. What this means is that this kind of explanation is necessarily normative: there is no neutral interpretation of a practice; one has to take a normative stand about why a particular perspective or self-understanding must be privileged over another. I argue that this normative dimension of interpretative theory has not been taken on board in the same way by private law theorists. What is required for an interpretative explanation of the practice of contract and tort is a normative argument for why the self-understandings of some participants in those practices ought to be privileged over others. I call this the *perspectival critique*. Further, interpretivist social science is evaluated according to the normative criterion of coherence. I argue that the demandingness of the coherence criterion depends on the scope of the practice being interpreted. Disagreements about the

way the boundaries of the practice of contract or tort are drawn will result in disagreements about whether the coherence criterion has been satisfied by a particular interpretive theory of contract or tort. I call this the *coherence critique*.

Chapter 2 examines different ways we might approach normative theories of private law practice. I begin by differentiating between two broad approaches: ideal and practice-based normative theories. Private law theorists typically take a practice-based approach; they are interested in normative questions about the existing practice. Interpretive theorists represent the most prominent form of a practice-based approach to normative theorizing about the practice of private law. However, I argue that there are several challenges with the interpretivist claim that we can justify a practice on its own terms without drawing on practice-independent values and principles. Drawing on the literature from general jurisprudence, I suggest that an alternative approach to practice-based normative theorizing about private law is to take a situated, agent-centered approach: we take up the perspective of an agent in the existing practice and ask the practical question of what they ought to do. This approach is grounded in the practice because it takes up a position within the existing practice. It also takes existing practice seriously, because it asks how the practice ought to bear on the question of what the agent ought to do now. But an answer to this question can be grounded in practice-independent principles; we needn't be limited to the moral ideas internal to the practice.

In Chapter 3, I raise and respond to one potential objection to the situated, agent-centered approach to practice-based normative theory: the *priority of description argument.* This argument says that we first need a descriptive account of what contract, tort, or property law is before we move on to the question of how a judge ought to resolve a contract, tort, or property dispute. I argue that classification of legal norms is not necessary in order to answer the question of what a judge ought

to do; what is needed is an argument for the normative significance of past decisions. The project of classification is, in this way, not normatively neutral. Further, I argue that the project of classification risks reintroducing the debate over the grounds of law; classification of a subset of legal norms into doctrinal areas is potentially hostage to disagreement over the identification of the broader set of valid legal norms to begin with. Here I draw again on recent work in general jurisprudence. By taking up the insights provided by legal interpretivists and eliminativists, I show that we can avoid the first step of identifying institutional *norms* and proceed by providing an argument about how institutional *facts* ought to figure in the practical decision-making of a judge adjudicating a private law dispute.

In Chapter 4, I bring a distinctive perspective to bear on questions about the practice of private law. I look at the relationship between private law theory and political philosophy. Most private law theorists accept that one of the important questions for a theory of private law is how the coercive power of the state can be justified in enforcing private law rights and obligations. However, I show that, in providing an answer to this question, most private law theorists adopt what has been called a 'moralist' approach to political philosophy. Private law theorists tend to focus on getting the correct or best moral account of what rights and obligations we have in private law. By contrast, I take up what has been called the 'realist' approach to political philosophy. The realist takes moral disagreement seriously. In the context of private law, the realist asks what state institutions enable us to act in the face of disagreement about what rights and obligations we have in private law. Political realism reframes our question from the moralist one of "*What rights and obligations structure the legal relationship between private persons?"* to the realist one of "*How do we act together in the face of disagreement over the question of what rights and obligations structure the legal relationship between private persons?*" This shifts our focus

from evaluating moral arguments about rights and obligations to questions about the legitimacy of institutions. I draw a distinction between two strands of realist thought: *ordorealism* and *radical realism*. I suggest that an ordorealist approach to private law might take democracy to be a primary source of legitimation for the institutions that enable us to act in the face of disagreement about private law. With that idea in mind, I draw out a number of implications for private law of taking such a view. For one, insofar as the ordorealist has anything to say about private law doctrine, it is that it should be designed to minimise conflict. With respect to questions about how judges ought to resolve private law disputes, the ordorealist focus on democratic legitimacy would constrain a judge's decision-making in certain ways. This means that, on the ordorealist view, an analysis of past decisions is important, not because they reflect correct moral ideas, but because of the legitimacy of the institution of the court. Finally, I discuss the radical realist view, and suggest that it has different implications for the practice of private law. It would push us to question the moral beliefs that are relied upon to justify private law on epistemic grounds. The radical realist's project is negative; it takes seriously the way that existing power structures can shape our moral intuitions and beliefs. We should be attentive to how we come to hold the beliefs we do. The radical realist approach puts pressure on the way boundaries around areas of law are drawn and how such boundaries are justified. This includes the broad boundary between private and public law.

Finally, in Chapter 5, I turn to a different normative question about the practice of private law. Taking an argument by Seana Shiffrin as my starting point, I examine the claim that the law and its justification should not make things more difficult for our moral lives. I call this the Do No Harm Principle. Shiffrin frames this claim in terms of the effects of contract law on promissory morality. I consider two

possible interpretations of Shiffrin's argument. First, I examine it as a claim about one's normative reasons for action. I argue that this interpretation raises more general questions about legal normativity and the duty to obey the law. Second, I interpret this claim as one about the effects of law and its justification on agents' motivating reasons. This interpretation of the Do No Harm principle directs us to a set of questions which private law theorists have not turned their minds to. It tells us that we ought to be sensitive to the effects of law and its justification on the motivation of agents to promote and sustain just institutions. But there is one further modification needed: in light of the previous chapter's arguments about disagreement about justice, the question of motivation to promote and sustain just institutions will also be hostage to disagreement about what justice demands. Thus, I argue that we should interpret the Do No Harm Principle as follows: the law ought not to make it more difficult for agents to be motivated to establish and sustain legitimate systems of cooperation. I then examine two ways in which the Do No Harm Principle might have normative implications for our theorizing about private law. I argue that the way that private law institutions are justified can have a potentially negative effect on the motivations of individuals to support public institutions designed to achieve distributive aims. Second, I draw on literature which suggests that arguments about when we should prefer rules versus standards should similarly be sensitive to these motivational questions. The viability of institutions that allow us to live together in the face of moral disagreement depends on individuals' motivations to support those institutions. We need individuals to be motivated to support and maintain institutional arrangements even when important questions are settled by those institutions in ways they disagree with. Questions about individual motivation have been addressed in the literature on political philosophy about justice, but the Do No Harm Principle pushes legal theorists and, in particular, private law theorists, to take it seriously as well.

Chapter 1: Explaining the Practice of Private Law

I. Introduction

What are philosophers of private law doing when they do private law theory? While some engage in substantive normative argument about how to reform or improve the law, many take their project to be providing an explanation of the practice of private law. This then leads to a question of methodology: what methods are used to explain a social practice like contract, tort or property law, and how are those methods justified? There has been extensive discussion of the methodology of the philosophy of law in general jurisprudence.[1] More recently, there has been increased attention paid to the methodology of private law theory.[2] Nevertheless, more work remains to be done: private law theorists are at times not explicit about their methodological commitments, and those who are have not been subject to the same critical reflection we have seen in general jurisprudence.

The aim of this chapter is to explore issues around the methodology of the philosophy of private law. Specifically, I will focus on theories that attempt to *explain* what a particular area of private law is, using an interpretive method. My starting point is that the object of inquiry for a theory of private law is the practice of private

[1] See, e.g., Alex Langlinais and Brian Leiter, 'The Methodology of Legal Philosophy' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016).; Julie Dickson, *Evaluation and Legal Theory* (1st edition, Hart Publishing 2001).; Michael Giudice, Wil Waluchow and Maksymilian Del Mar, *The Methodology of Legal Theory*, vol 1 (Routledge 2010).

[2] See, e.g., Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2022) Forthcoming Oxford Journal of Legal Studies 1.; Dan Priel, 'Structure, Function, and Tort Law' (2020) 13 Journal of Tort Law 31.; Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press 2016) Chapter 1.; Frederick Wilmot-Smith, 'Reasons? For Restitution?' (2016) 79 The Modern Law Review 1116.

law.[3] Because private law is a social practice, reflection on the methodology of the practice of private law should direct us to think about the methodological commitments of explaining social practices in general. So, I begin by highlighting the foundational disagreement in the philosophy of the social sciences between naturalists and interpretivists.[4] Naturalists argue that theoretical explanation of social phenomena should proceed by using the methods of the natural sciences. Interpretivists argue that an understanding of human practices must reflect the self-understanding of the participants in the practice. They ask: what is the meaning and

[3] The concept of a practice is contested in the philosophy of social science. For example, Steven Turner has critiqued the role of the notion of a 'practice' in the explanatory social sciences. See Stephen P Turner, 'Explaining Normativity' (2007) 37 Philosophy of the Social Sciences 57. For my purposes, I will mean something like Nicholas Southwood's definition of a practice, i.e., "a regularity in behavior among the members of a group that is explained, in part, by the presence within the group of pro-attitudes (or beliefs about the presence of pro-attitudes) towards the relevant behaviour that are a matter of common knowledge." Nicholas Southwood, 'The Moral/Conventional Distinction' (2011) 120 Mind 761, 775.

[4] The use of the term "interpretive" unfortunately creates great confusion and the possibility of obscuring what amount to mere verbal disputes. As I will attempt to draw out through the course of this thesis, we can identify at least three different uses of the term "interpretation" that may have a bearing on questions in private law theory. First, "interpretation" or "interpretivism" reflects the method of humanistic explanations of phenomena in the social sciences – explanations of human practices are not explanations of "brute facts" but interpretations of the meaningful actions of humans engaged in those practices. This is the interpretivism that I focus on in this Chapter, and I will aim to show that this is also the understanding of interpretivism that the theorists of private law that I discuss here adopt. A second use of the term reflects the more general idea that all meaning requires interpretation; as Blackburn puts it "meanings, being meanings *for us*, do not lie on the page or in the record… you cannot read a case or a statue without, well, *reading* it, which means taking it into your mind in the form of judgments." Simon Blackburn, *Truth: A Guide for the Perplexed* (Penguin Books 2006) 162–163. (emphasis in original.) The third way "interpretivism" is used in legal theory is to reflect Dworkin's "legal interpretivism" as "a thesis about the fundamental or constitutive explanation of legal rights and obligations (powers, privileges, and related notions) or, for short, about *the grounds of law*." Nicos Stavropoulos, 'Legal Interpretivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/> accessed 31 October 2022. While there are ways in which these three kinds of "interpretivism" overlap, it is important to keep the differences between them in mind. I discuss the second and third kinds of "interpretivism" in the next two Chapters.

purpose of the practice as understood by the participants in the practice and what are the norms and values that are constitutive of the practice?

My aim is not to take a position on whether we should prefer naturalist or interpretivist explanations of social practices. Rather, I show that some of the prominent thinkers in the area of private law adopt an interpretivist approach to the explanation of the practice of private law. However, I argue those same philosophers of private law fail to take seriously the methodological commitments of that approach to explaining social phenomena. I focus on those theorists who adopt an "interpretive" approach to explaining the practice of private law for two reasons. First, interpretive theory is an approach which has some prominence in the private law literature.[5] Second, while the aim of some theories is to explain private law and the aim of others is to normatively justify or evaluate private law, interpretive theorists claim to be doing both at the same time. So, by interrogating the interpretive method, I identify and clarify the methodological issues around theoretical explanation and justification more generally.[6] I draw on the literature on interpretivism in the philosophy of social sciences to illuminate how that methodology is understood outside of private law. I then argue that, once we get a handle on the methodological commitments of interpretivist social science, private law theorists who adopt this approach are subject to two critiques.

The ambition of many prominent private law theorists is to provide a single general or over-arching interpretation of the practice of private law,[7] or of the practice of a particular doctrinal area such as contract law.[8] I will argue, first, that this aim is

[5] See, e.g., Stephen A Smith, *Contract Theory* (Oxford University Press 2004).
[6] I explore "normative" or justificatory private law theory in more depth in the next chapter.
[7] See, e.g., Ernest J Weinrib, *The Idea of Private Law* (Revised edition, Oxford University Press 2012).
[8] See, e.g., Smith (n 5). I will discuss the views of Smith and Weinrib in more depth below.

misguided. The interpretivist approach proceeds by interpreting social practices based on the self-understanding of the participants in the practice. But this approach admits of the possibility that there may be more than one interpretation of that practice depending on whose perspective we take up. So, to construct an interpretation of the practice of, e.g., contract law, we can focus on the self-understanding of that practice from the perspective of particular participants (e.g. judges), but this does not amount to a single general interpretive theory of contract law as a whole; it is just one of several competing interpretations of the practice of contract.

One way to attempt to side-step this critique is to purport to provide an interpretation of the practice of private law from the perspective of the "law" itself. But this formulation simply obscures the fact that this approach to explaining social phenomena like private law rests on the self-understanding of one or more humans who participate in the actual practice; it is individual humans that give the practice meaning. Framing the explanatory project as the self-understanding of the "law" obscures which individual perspectives are being taken up by the interpretive theorists; it implicitly prioritizes or privileges the perspectives of a limited subset of agents in the practice. This highlights a methodological difficulty which interpretivists in the social sciences such as anthropologists and sociologists have acknowledged, but interpretive private law theorists have not: how can there be a *single* interpretive theory of a social practice if there are different participants in the practice who have different understandings of the meaning and purpose of the practice? Theorists in the social sciences are comfortable with modest theoretical ambitions; they accept that theoretical explanation of a social practice provides *an* interpretation of that particular practice. Private law theorists, by contrast, tend to frame their ambitions in more immodest terms as providing a theory which provides

the interpretation of the practice of contract, tort or property. I argue that if we take seriously the commitments of interpretivist social science, the perspectives of all individuals in the practice are in principle relevant in interpreting a social practice. This puts pressure on the idea that there can be a single interpretive theory of the contract, property or tort from the "law's" perspective. Call this the "perspectival critique".

But even if we set aside the perspectival critique, I argue there is a second way in which private law theorists fail to take seriously the commitments of interpretive explanations of social practices. A core methodological commitment of interpretivist explanations is that the criteria for evaluating a candidate theory of a practice must be *internal* to the practice itself. If we impose normative criteria for the evaluation of a particular theoretical explanation of a social practice from outside the practice, we fail to provide an interpretation of the self-understanding of the participants in the practice. Accordingly, the primary criterion for evaluating a candidate interpretative theory of a social practice is coherence. Coherence is also emphasized by theorists of private law who provide an interpretive explanation of the practice of private law. However, there are further questions about how the coherence criterion applies to evaluate a given theory. I will show that the demandingness of the coherence criterion depends on the scope of the practice being interpreted. The wider the scope of the practice – that is, the more data that a theorist must render coherent through interpretation – the more demanding coherence becomes. But this directs us to questions about how boundaries are drawn around the practice that is the object of theoretical inquiry. The difficulties of this boundary-drawing exercise have been identified by philosophers when it comes to law in general. But private law theorists have failed to acknowledge these same difficulties. Call this the "coherence critique".

The upshot of this chapter is therefore twofold. First, I argue that the ambition of philosophers of private law to provide a single interpretive theory of the practice of a particular doctrinal area of law is misguided. If we take the commitments of interpretive theory in the social sciences seriously, we must accept that there can be more than one interpretive understanding of social practice depending on the perspective of the individuals in the practice that we choose to emphasize. That is, we should give up on the search for a single over-arching theory of contract or tort or property law—or private law in general—and accept a pluralist approach to theorizing about the practice of private law. Second, even if we resolve or side-step the perspectival critique, there is still a question of how coherence is applied as an evaluative criterion for interpretive explanations of the practice of private law. The difficulty with relying on coherence as a criterion is that disagreement about the boundaries of the practice of, e.g., contract, property or tort will result in disagreement about whether the coherence criterion required by interpretivist explanations of social practices has been met.

The argument in this chapter proceeds in three parts. In Part II, I provide a very general summary of the foundational disagreement in the philosophy of the social sciences between naturalists and interpretivists. I set out the core commitments of each camp, with an emphasis on humanist interpretation or understanding of social phenomena.[9] In Part III, I focus on the work of three scholars of private law who explicitly address and justify their methods: Stephen Smith, Arthur Ripstein, and Ernest Weinrib. I show how each of these theorists takes their task to be the

[9] I sometimes refer to the interpretivist method as 'humanist interpretation' or 'humanist interpretivism' because it places emphasis on the human dimension of the method. We are seeking to understand human concepts. This point draws on Taylor, who talks about interpretivism as a 'human science'. Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25 The Review of Metaphysics 3, 3. What Taylor emphasises is that explanation of human or social phenomena requires a humanist approach.

explanation of the practice of private law through the "interpretive" method. I underscore a key methodological argument made by these theorists: to understand private law practices requires interpreting the self-understanding of participants in the practice about the purpose or meaning of the practice. This, I argue, shows that their ambition is to engage in interpretivism of the same sort I discuss in Part II. In Part IV, I show how these three theorists fail to take seriously the methodological commitments of the interpretivist approach to explaining social phenomena like the practice of private law by developing the perspectival and coherence critiques.

II. Explaining Social Practices: Interpretivism and Naturalism in the Social Sciences

In the philosophy of social science literature, there are, broadly speaking, two methodological camps: naturalists and interpretivists.[10] Naturalists employ the empiricist conception of theories and concepts used in the natural sciences. The aim of a naturalist explanation of social phenomena is to articulate laws which provide a systematic understanding of observed behaviour.[11] A naturalist theory posits concepts that are employed in theoretical explanations of social phenomena that can be observed or measured. With a naturalist theory in hand, we can deduce hypotheses that are logically entailed by the theory, and this theory and the hypotheses that it produces can then be tested using experiments that are aimed at predicting behaviour.[12]

Interpretivists reject the application of the methods and concepts of the natural sciences to the explanation of social practices of humans. The scientific approach to

[10] The discussion in this section draws on Mark Risjord, *Philosophy of Social Science: A Contemporary Introduction* (1st edition, Routledge 2014). See, in particular, Chapter 3 of this book.
[11] ibid 38–40.
[12] ibid.

explaining natural phenomena is not suitable for the explanation of social phenomena, the interpretivist argues, because it ignores human subjectivity. A classic statement of the argument in favour of humanist interpretation and against naturalist empiricism was articulated by Charles Taylor.[13] Empiricism, Taylor observes, begins with the neutral description of "brute data"[14] about the world from which concepts are developed to aid theory construction. But the object of inquiry of social theory is the participants in the practice who themselves have already interpreted the world in a particular way; the interpretivist rejects the existence of neutral or uninterpreted brute facts about social reality. Instead, inquiry into a human practice must take account of how the practice is meaningful or purposeful to the participants in the practice. On this view, social practices are constituted by values and norms and any inquiry into such practices must reflect the meaning or purpose of the norm-constituted practice from the perspective of the participants in the practice.[15]

This methodological divergence between naturalist empiricism and humanist interpretivism is one way to draw the distinction between the 'explanation' and 'understanding' of social practices. On the one hand, the aim of inquiry is to explain social phenomena by theorizing about law-like causal mechanisms which can be used to make predictions and can be tested through empirical observation. On the other, the aim of inquiry is to understand social phenomena by interpreting the inter-subjective or common meaning and purpose of the practice. For the interpretivist, the methodological approach to understanding social phenomena is in a sense internal to the phenomena. To ask: "How do we understand what the participants in practice X

[13] Taylor (n 9).
[14] ibid 8.
[15] This is different, of course, from normative theories that purport to tell us what is actually right, or good, or immoral. These do not purport to be interpretations of a given practice; rather, normative theory itself is a practice of specifying what is of value. I am not concerned with such theories here. One could, of course, take a sociological perspective on the *practice of claiming what is moral*.

are doing?", the interpretivist argues, we must ask "How do the participants in the practice understand the purpose and meaning of practice X? What are the norms that are constitutive of practice X?"

The object of interpretivist inquiry is the "[i]ntersubjective meanings, ways of experiencing action in society which are expressed in the language and descriptions constitutive of institutions and practices."[16] However, "[t]he meanings and norms implicit in these practices are not just in the minds of the actors but are out there in the practices themselves".[17] They are not reducible to the beliefs of particular agents. Interpretivists draw a distinction between "consensus" and common or intersubjective meaning. The former refers to "beliefs and values which could be the property of a single person, or many, or all."[18] But the latter, intersubjective meanings, are constitutive of social reality; they "could not be the property of a single person because they are rooted in social practice."[19] They are "in the practices themselves, practices which cannot be conceived as a set of individual actions, but which are essentially modes of social relation, of mutual action."[20]

Accordingly, the aim of the interpretivist theorist is to examine the *experience* of participants in social practices and translate the meaning which is embedded in and constitutive of those practices into a theory. This is in keeping with the fundamental argument against naturalism and its empiricist commitments: there is no neutral, brute data about social reality. Social reality is constituted by practices and expressed in language. The aim of the theorist is to translate the meaning embedded in and

[16] Taylor (n 9) 29.
[17] ibid 27.
[18] ibid 28.
[19] ibid.
[20] ibid 27.

norms which constitute the practice as experienced by the participants in the practice themselves.

Further, the aim of interpretation is to "bring to light an underlying coherence or sense"[21] of an object which "is confused, incomplete, cloudy, seemingly contradictory—in one way or another, unclear."[22] The evaluation of an interpretation cannot be made by a criterion of verification which is external to the practice which is being interpreted. As Taylor argues, "[o]ur conviction that the account makes sense is contingent on our reading of action and situation. But these readings cannot be explained or justified except by reference to other such readings, and their relation to the whole."[23] In the face of one interpretation, all we can offer are competing interpretations which make better sense of the practice as a whole – what Taylor describes as the "hermeneutical circle".[24]

To simplify, we can take an interpretivist approach to explaining social phenomena to have two core commitments. First, that an explanation of a social practice proceeds by taking up the perspective of participants in the practice and interpreting their experience and self-understanding of the meaning, values, norms, etc. which are constitutive of that practice. Second, that the criterion with which we evaluate interpretive theories of a social practice is coherence. We judge a candidate interpretation by its ability to render the practice more or less coherent than a rival interpretation.

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[21] ibid 3.
[22] ibid.
[23] ibid 14.
[24] ibid 6. This line of thought in Taylor draws on Hans-Georg Gadamer. See, e.g., Hans-Georg Gadamer, *Reason in the Age of Science* (Frederick G Lawrence tr, MIT Press 1981). Taylor notes this history of the idea of hermeneutics: see Taylor (n 9) 3. I follow Taylor's articulation of the idea for its clarity.

There are, however, several challenges and difficulties with this approach to explaining social phenomena that have been raised in the social science and philosophical literature. Here, I focus on one central problem. The worry is that the aim of providing a single coherent interpretation of the practice fails to take seriously the fact that self-understandings of different participants in the practice may conflict or perhaps be contradictory. There may be different and rival interpretive understandings of a particular social practice depending on *whose experience* of the practice the theorist points to. And to vindicate a particular interpretation of a social practice as being more coherent than another has the effect of undermining the experience of those participants of the practice who do not share that same self-understanding. Here is how Mark Risjord articulates this worry:

> There is a strong tendency in interpretive social science to understand the beliefs, values, meanings, symbols, norms, and actions of a group as a single coherent system. Against this, one might point out that social groups are typically riven by conflict and contradictions. Different people do not find the same meaning in a social event or symbol; they do not understand the demands of a rule or norm in the same way. Moreover, differences in interpretation can be closely tied to social relationships of power and domination. By presenting a single narrative of "the" culture, the interpretation not only misrepresents the social reality, it takes up a position within the power structures of the society. One group's common sense is highlighted as the true account, while other, dissenting voices are eclipsed.[25]

Because interpretive social science requires taking the experience of a particular participant in the practice as reflecting the "common understanding" and rendering it coherent, the very process of theorization necessarily excludes the experience of others and undercuts their self-understanding as incoherent with the common understanding. To provide any interpretation requires taking a normative position on whose experience of the practice ought to be taken to reflect the common

[25] Risjord (n 10) 47–48.

understanding. Accordingly, where we are left is a place where it is difficult to claim or assert that there is a single "correct" interpretive theory of a social practice; there are only competing interpretations that take up the viewpoint of different participants within the practice and translate their experience and self-understanding.

My aim here is not to take a side on the debate between naturalists and interpretivists. I raise the distinction to highlight and emphasize the divergent methodological commitments of the two approaches. I have highlighted the distinctive commitments of humanist interpretation because I believe this is the approach that several prominent private law theorists adopt. In Part III, I point to the writings of some prominent thinkers in the field of private law to show that they adopt an interpretivist approach to explaining social phenomena and reject naturalist explanations. In Part IV, I argue that these theorists fail to take seriously the methodological commitments of this approach which I have outlined here. I show that philosophers of law in general jurisprudence have been alert to these issues, but that private law theorists have not.

III. Interpreting the Practice of Private Law

The literature in general jurisprudence reflects a deep and critical engagement with questions of methodology in legal philosophy. While there has been some interest in similar questions in special jurisprudence, private law theorists have not taken on board the insights from these debates in general jurisprudence. Much of the academic literature in private law is concerned with doctrinal analysis. But there has not been as much reflection on what it is that a private law theorist is doing when they do doctrinal analysis. That is, there has been less reflection on whether and how such methods are (or are not) justified as a matter of theoretical inquiry. Here I focus on the work of three prominent scholars in the field who do discuss their methods and

justify their approach to theorizing about private law: Ernest Weinrib, Arthur Ripstein, and Stephen Smith. What I argue in this section is that all of these theorists adopt an interpretivist approach to social phenomena that tracks the commitments of interpretivism as set out in Part II. As I will show, each theorist's stated goal is to offer a theory of the practice of private law which renders it 'intelligible' from a perspective which is internal to the practice. Further, each is committed to coherence as a criterion for evaluating a good interpretive theory of private law.

In his work on contract theory, Stephen Smith distinguishes between four different kinds of theories of contract. Descriptive theories involve compiling and detailing a collection of legal materials and practices as they exist at a particular time; Smith dismisses *purely* descriptive accounts, saying that they would "amount to little more than a randomly collated list of data"[26] about contract law. However, he notes that descriptive theorists rarely limit themselves to simple description because they seek to "impose an order or schema" on the data.[27] Historical theories aim to provide a "causal" account of "how and why the law has developed the way it has".[28] This might include examining the motivations and beliefs of judges and other lawmakers.[29] Prescriptive theories "are accounts of what the law should be: of the ideal law."[30] This might involve deriving the ideal law from a set of abstract normative moral or political principles.

As opposed to descriptive, historical, or prescriptive, Smith identifies his own theory as being "interpretive". Interpretive theories are those theories which "aim to

[26] Smith (n 5) 6.
[27] ibid.
[28] ibid 4.
[29] ibid 5–6.
[30] ibid 4.

enhance understanding" [31] or make sense of the institution of contract on its own terms "by highlighting its significance or meaning."[32] Smith argues that the aim of a theory of contract is not, as with historical approaches, to explain the beliefs and motivations of individual judges, rather it is an explanation of, as Smith puts it, "the law".[33] The aim of an interpretive theory is to reveal "an *intelligible order* in the law, so far as such an order exists."[34] But, Smith tells us, "nearly all interpretive theories include historical, prescriptive, and descriptive elements."[35] So, on Smith's view, the interpretive method is an approach which is, in part, comprised of several theoretical approaches towards private law. Historical theory "provide[s] valuable clues as to how the present law should be understood."[36] Prescriptive theory informs the interpretive enterprise because "views about whether proposed legal rules are morally justified"[37] influence judges and other lawmakers when they make law. But interpretivism takes priority, because in order to be in a position to prescribe reforms to a particular area of law, "reformers must understand the law that they are planning to reform."[38]

Smith does not incorporate questions about the correctness of those moral views into his theory – a judge's "views may, of course, be wrong"[39] – but he asserts that "it seems likely that in most cases they are at least related to whether the rules are, in fact, morally justified."[40] Smith is, I believe, interested in the moral beliefs of

[31] Smith (n 5) 5.
[32] ibid.
[33] ibid 6.
[34] ibid 5. (emphasis in original.)
[35] ibid.
[36] ibid.
[37] ibid 6.
[38] ibid.
[39] ibid.
[40] ibid.

judges as a descriptive matter. Precisely *how* a descriptive account of the moral views of a judge are 'related' to whether the rules are morally justified is not clear. I provide a closer examination of the relationship between explanation and moral justification in Smith's methodology in the next chapter, when I consider how interpretive theories account for the normativity of the law.

Smith discusses the importance of coherence as a criterion for evaluating a theory of contract.[41] He distinguishes between two different more and less demanding forms of it, but argues that "both versions of the coherence criterion regard consistency as a virtue of a good theory. A theory that reveals the law as inconsistent is less successful at achieving what was described earlier as the basic goal of interpretation: that of revealing an intelligible order in the law."[42] Smith adopts the less demanding version of coherence understood as consistency, but still treats coherence as important.[43]

In his recent work on tort theory, Arthur Ripstein also addresses the question of methodology. After referring to Smith's taxonomy and stating that he "do[es] not purport to be offering a historical account",[44] he says: "Given the choice between the other three classes – is the account descriptive, prescriptive, or interpretive? – I am inclined to answer 'yes.'"[45] His account is not historical insofar as the aim of a historical account is understood as "identify[ing] the origins of particular features of

[41] ibid 11–13.
[42] ibid 11.
[43] "Taken together, the above considerations suggest that coherence in the sense of unity is an appropriate criterion for contract theories only if it is applied in a relatively undemanding form. More specifically, to explain why contract law merits the title of 'contract law', a good theory must show that most of the core elements of contract law can be traced to, or are closely related to, a single principle. Consistency aside, nothing further is demanded by the coherence criterion." ibid 13.
[44] Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 19.
[45] ibid.

tort doctrine".[46] But his "account is not inconsistent with such a historical treatment, provided it allows for the possibility that the product of history is not just a heap of accidental results."[47] His account is also not purely descriptive. He aims to illuminate "law's organizing principles"[48] although these "may not be explicitly stated"[49] in existing legal materials and practices. He acknowledges that there may be cases that do not fit his analysis – e.g. cases in which judges explicitly adopt the language of policy or "deny that juridical concepts can be taken at face value"[50] – but argues that such cases are mistaken. To the extent that his theory is prescriptive, the prescriptions that he makes "are not from a standpoint outside of what is presupposed in the legal materials [he] seek[s] to render *intelligible*."[51] His project is to articulate the moral ideas which render the practice of tort law an intelligible practice. On Ripstein's view, we do not take up a moral standpoint outside of the law to justify, evaluate or illuminate the legal practice. Quite the opposite: "the law will appear as an exporter rather than importer of those ideas".[52] Finally, he states that "the combination of descriptive and prescriptive elements might be thought to make this an interpretive account".[53] But he clarifies that it is not interpretive in the Dworkinian sense:

> …my aim is not exclusively interpretive either, at least if interpretation is taken in the way in which it has figured in legal philosophy through the work of Ronald Dworkin. For Dworkin, to interpret is to bring "convictions about the point – the justifying purpose or goal or principle – of legal practice as a whole" to bear on the particular legal question at issue, and determine a judgment based on the account that best fits and justifies the settled law. My account is not interpretive in that ambitious sense, because unlike Dworkin's enterprise,

[46] ibid.
[47] ibid.
[48] ibid 20.
[49] ibid.
[50] ibid.
[51] ibid. (emphasis added.)
[52] ibid 21.
[53] ibid.

> I do not suppose that the ideal case of this exercise would be a complete Herculean determination of every actual or possible case. Instead, I hope to identify a set of relevant norms and concepts, and a way of reasoning with them, which govern the interactions between private persons. Courts are essential for their role in making these ideas apply to particulars.[54]

Ripstein doesn't speak explicitly in terms of coherence, but his work reflects a commitment to seeing tort law as "organised" around a central principle: that tort law protects what one already has, that is, one's body and property.[55] Ripstein aims to articulate "a system of private rights as a system of constraints on each person's use of his or her means."[56] This language of systematicity gets at a similar idea to that of coherence.[57]

In *The Idea of Private Law*, Ernest Weinrib formulates the question he seeks to answer this way: "How are we to understand private law?"[58] Weinrib argues that the only way to answer this question is from within private law itself. Law, he argues, is an intelligible human social practice, it reflects human thought and intelligence and

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[54] ibid 21–22. (internal citation to Dworkin omitted.) One might worry that there is not much light between what Ripstein and Dworkin are doing. But Ripstein's description of what he is doing does not contain any language of moral justification. He purports to be elucidating norms and concepts that *explain* how private relationships are governed. Any norms that play a justificatory role come from within the law; he is concerned with the law's organizing principles. Dworkin, on the other hand, could be said to be engaged in normative questions all the way down. Interpretation of Dworkin is of course its own complex project, and I don't intend to engage in Dworkin exegesis here, beyond simply saying that Dworkin's form of interpretation does seem to demand genuine *moral* justification of the exercise of coercive force, justification that comes from outside the law itself. Dworkin says: "A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state". Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 190.

[55] Ripstein (n 44) 30.

[56] ibid.

[57] Ripstein puts it this way elsewhere: "Rather than working backward from a tort action, my account moves in the opposite direction, starting from the moral idea that no person is in charge of another. I develop an account of that idea, and use it to generate distinctions between the different types of private wrongs, each of which, except for defamation, is organized in terms of the use of means." ibid 6. In other words, Ripstein seeks to show that the law is coherent with this core moral idea.

[58] Weinrib (n 7) 1.

not simply "a set of observed regularities or a display of monopolized power."[59] Further, law is also a reflective practice: "private law is an exhibition of intelligence that operates through reflection on its own intelligibility."[60] Accordingly, private law is simultaneously the "object and a mode of understanding"[61]; it is what Weinrib calls a "self-understanding enterprise."[62] The self-understanding of the law reflects the internal intelligibility of the practice as a whole and not of individual jurists.[63] At the same time, Weinrib recognizes that "all understandings are the activities of the individual minds that understand."[64] Weinrib's aim is to illuminate "the idea of that which [the participants in the practice] are trying to understand, so that this idea is not only the object of their attentions but the subject that animates them to work toward its realization and to subordinate their personalities to its intelligible requirements."[65]

Further, Weinrib claims the "normative force"[66] of law is also found within the practice. We begin our normative theorizing with the "ensemble of institutional and conceptual features"[67] of the practice of private law and, through the process of regression, identify "the moral standpoint immanent in its structure."[68] For Weinrib, this moral standpoint is Kantian and he identifies "Kant's concept of right as the governing idea for relationships between free beings."[69] Again, this idea may not be

[59] ibid 14.
[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid 15.
[64] ibid.
[65] ibid. The participants he refers to are "those who participate in the elucidation of law from within", ibid., in other words, "the lawyer or scholar or judge" ibid.
[66] Weinrib (n 7) 19. Issues to do with the normative aspect of the theory will be discussed in the next chapter.
[67] ibid.
[68] ibid.
[69] ibid.

explicitly articulated: while notions of "Kantian right are not themselves on the lips of judges"[70] they are "implicit" in the enterprise and supply its "normative idea".[71]

Weinrib, too, places great importance on coherence as a criterion of success for an interpretive theory private law:

> Coherence implies integration within a unified structure. In such a structure the whole is greater than the sum of its parts, and the parts are intelligible through their mutual interconnectedness in the whole that they together constitute. If private law has the potential for coherence (as is assumed in its practice), its various features should be understandable through their relationship with one another and, thus, through the roles that each plays in the larger whole.[72]

The idea of coherence reflects the commitment that an interpretive understanding of a social practice can only be understood from a perspective internal to the practice. As Weinrib puts it,

> …coherence has no external referent. Coherence signifies a mode of intelligibility that is internal to the relationship between the parts of an integrated whole. Thus not only does an internal approach to private law reflect the features of private law as comprehended from within, but it also regards those features from the standpoint of their mutual relationship within the integrated whole that they constitute.[73]

While there are differences in approach between these theorists, we can summarize two broad methodological commitments which they share. First, these theorists adopt an interpretive approach to explaining the practice of private law that aims to understand the practice from a perspective internal to the practice itself. This internal understanding of the practice proceeds by taking up the "legal" perspective—

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[70] ibid 20.
[71] ibid.
[72] ibid 13.
[73] ibid 14.

sometimes called the "juristic" perspective—to reflect the "self-understanding" of law. None of these theorists are interested in naturalistic explanations of private law. For example, Smith suggests that a sociological theory of contract law "typically provides a theory or account of the *behaviour of contracting parties* rather than a theory or account of *contract law*…. But an explanation of contacting practices is not contract theory because the facts it seeks to explain are not contract *law* facts."[74] A good interpretive theory of contract, Smith claims, "reveals an intelligible order in the law – it helps to 'make sense' of the law – and thereby helps us better understand it."[75] Similarly, the aim of both Weinrib and Ripstein is to provide an 'understanding' of tort law.[76]

Second, for all three theorists, coherence is the normative criterion for measuring the success of one interpretive theory against another.[77] They reject any normative criterion which is external to the practice. Such an approach would impose a perspective external to the practice and therefore fail as an interpretation because it fails to render the practice intelligible from the perspective of participants within the practice.

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[74] Smith (n 5) 8. (emphasis in original.)

[75] ibid 5.

[76] Weinrib (n 7) 1.; Ripstein (n 44) 18. The subheading for Section 4 in Ripstein's Introduction is "Understanding Wrongdoing".

[77] A third commitment these theorists share is that they believe that an interpretive theory can at the same time both explain and justify the practice of private law. With respect to justification, these theorists claim that the normative force of private law is also derived from within the practice. While there are some important differences in how each answers the question of how private law is normatively justified – particularly Smith's approach – they all argue against taking up a moral or political standpoint external to the practice from which to normatively justify or evaluate private law. I discuss issues around the normative justification of private law in the next chapter.

IV. Critiques of Interpretive Explanations of Private Law

In this Part, I critically evaluate the work of these three private law theorists on their own interpretivist terms. I argue that they fail to take seriously the commitments of their own interpretive methodology on two important scores. First, I raise the perspectival critique: interpretivism is committed to elucidating the self-understanding of the participants of the practice as to the meaning and value embedded in the practice; but private law theorists limit the candidate meanings to those which are understood by a narrow subset of participants in the practice, typically, judges. They fail to take seriously the perspective of other participants in the practice and what the common meaning of the practice is to them.

Second, I raise the coherence critique: the demandingness of the coherence criterion depends on the how the theorist defines the boundaries of the practice they are interpreting. The broader the scope of the practice, the more demanding coherence becomes and vice versa. Further, when making sense of a particular practice like private law, an interpretation must be coherent with respect to other overlapping practices which constitute the system or institution of which the private law is one part. Private law theorists such as Weinrib, Ripstein, and Smith fail to do this because they fail to show how their particular interpretation of a particular area of private law practice (e.g. contract) coheres with other overlapping legal practices (e.g. bankruptcy) which constitute the legal system as a whole. To the extent that they achieve coherence it is by setting the boundaries of the phenomenon according to features that they consider core or essential, such that their account achieves coherence with those features. But which features of the practice count as core or essential is a contested normative claim.

A. Perspectival Critique: Whose Perspective?

According to the interpretivist approach to explaining social phenomena, the aim of the theorist is to examine the experience of participants in a social practice and translate the meaning which is embedded in and constitutive of those practices. This is in keeping with the fundamental argument against naturalism and its empiricist commitments: there is no neutral brute data about social reality, social reality is constituted by practices and expressed in language and the aim of the theorist is to translate the meaning embedded in and norms which constitute the practice as experienced by the participants in the practice themselves.

This helps explain the underlying commitment to taking an "internal" approach to understanding private law, which is adopted by all the theorists we are considering here. Weinrib explicitly adopts this approach to his theory of private law. He notes that the "[t]he point of departure for theorizing about private law—as well as about anything else—is experience. We can understand only that which is familiar to us."[78] It is experience which "allows us to recognize issues of private law and to participate in its characteristic discourse and reasoning."[79] Further, by uncovering the meaning and intelligibility embedded in the experience of private law, he does not refer to the beliefs of particular agents: "this internal intelligibility is systemic to the legal order rather than personal to individual jurists."[80]

Private law theorists take seriously the experience of participants in the practice and aim to render the practice intelligible by endeavouring to uncover or translate the meaning and values which are implicit in the practice. The

[78] Weinrib (n 7) 9. (internal footnote omitted.)
[79] ibid.
[80] ibid 15.

interpretivist's goal of translating rather than explaining also helps us understand how a particular theoretical understanding of private law may not be "on the lips of judges." Interpretivism recognizes a conceptual space between linguistic expressions of meaning and the meaning itself. On this view it is possible that the meaning which is embedded in the practice is not explicitly expressed by the participants themselves.

Unlike some disciplines, e.g., anthropology or sociology, where the theorist might directly observe the practice or interview the participants as part of collecting the data with which to understand the practice, private law theorists focus almost exclusively on interpreting the texts of judicial decisions. But this is perfectly consistent with interpretive methodology. As Taylor notes, "[i]nterpretation, in the sense relevant to hermeneutics, is an attempt to make clear, to make sense of an object of study. This object must, therefore, be a text, or a text-analogue, which in some way is confused, incomplete, cloudy, seemingly contradictory—in one way or another, unclear."[81] One could argue that a better understanding of private law practices would require other methods of gathering experiential data such as observing the courtroom or interviewing judges. In other words, one might say that there are better tools and techniques for understanding a practice. But it is plausible for the object of interpretive inquiry to be the text of the large body of judicial decisions.

So far so good. Problems arise, however, when we think about *whose* experiences matter when interpreting the meaning of the practice of private law. One difficulty with the approaches taken by these theorists (in particular, Weinrib and Smith) is that they claim to be providing an interpretation of the 'law's self-understanding'. Smith and Weinrib are both explicit in this regard.[82] But this way of

[81] Taylor (n 9) 3.
[82] Smith (n 5) 13–15.; Weinrib (n 7) 15.

framing the inquiry is problematic because, as Priel has argued, "the law is not an agent, so to ascribe 'self-understanding' to it seems to obscure matters instead of clarifying them."[83] However, Weinrib and Smith are alert to this difficulty. Weinrib notes that "the point is not to ascribe to the law a super-intellect distinct from the intellect of individual human beings"[84]. Similarly, Smith acknowledges that "law's self-understanding" is simply a "shorthand" referring to the self-understanding of "those who participate officially in making and applying the law… in particular, judges and legislators, but also lawyers and others."[85] These theorists are interested in the experiences of actual agents who participate in the practice of private law. So, we might think of the language of 'law's self-understanding' as more of a rhetorical move than a methodological claim because, as a matter of method, we must point to the experience of some agent or agents. But this way of framing the inquiry is not innocuous, because there is a risk "that all references to 'the law's self-understanding' are a way for different theorists to smuggle in their personal views on the law, but present it in the impersonal voice of the law itself."[86]

So, what private law theorists are really doing when they interpret the self-understanding of the law or the legal system is focusing on the experience of a set of participants in the practice of private law. And the participants whose experience matters for this purpose are, invariably, those agents who administer the law. When Weinrib notes that we should begin with our experience of the law, he adds "especially the experience of those who are lawyers."[87] Similarly, Smith asserts that "[c]ontract law—pre-interpretation—is rightly regarded as that which people familiar

[83] Priel (n 2) 45.
[84] Weinrib (n 7) 15.
[85] Smith (n 5) 14.
[86] Priel (n 2) 45.
[87] Weinrib (n 7) 9.

with the law (lawyers, judges, legal scholars) take to be contract law."[88] Ripstein's aim is to "identify a set of relevant norms and concepts, and a way of reasoning with them, which govern the interactions between private persons."[89] To do this, he focuses on the reasoning of judges: "Courts are essential for their role in making these ideas apply to particulars."[90] His discussion of cases throughout the book bears out the general approach of focusing on judicial reasoning.

But if we take the commitments of interpretive social sciences seriously, it is not at all obvious why we should look only to the experience and understanding of judges or other legally trained agents when trying to uncover or illuminate the meaning of the practice of private law. We may be interested in the experience of a judge, lawyer or legal scholar in order to understand the meaning of the practice of contract, property or tort law. But by the interpretivist's own lights, the meaning is embedded in the practice, and there are other agents participating in the practice whose experience is relevant in illuminating our understanding of the practice. This point has been acknowledged and developed in general jurisprudence when it comes to interpretive understandings of the practice of law in general. For example, as Priel forcefully argues:

> It is not that there is a correct account of the 'nature' of law, which some people (for example, legal positivists) get right and others (say, natural lawyers) get wrong. Rather, there is a complex array of very many different views which are based on different judgments of importance. Any theorist who wishes to engage in this disagreement, to argue that a particular view is correct and another incorrect, will have to either take sides on the matter by arguing for

[88] Smith (n 5) 9.
[89] Ripstein (n 44) 22.
[90] ibid.

> the *preferability* of one view over another; or she will have to report the differences and leave it at that.[91]

As Priel rightly argues, "once it is recognized that those who 'create', 'administer', and 'are subject' to law may have very different 'self-understandings' of it",[92] it is far from obvious why we should privilege one internal perspective of the practice over another. What is needed is a normative argument for why that particular perspective is more important or why its articulation is more worthwhile.

Let's bring the discussion back to private law. Suppose we are interested in an interpretation of the meaning and value which is embedded in and constitutive of the practice of contract law. We might look to the self-understanding of judges, lawyers and scholars to try to "make sense" of the practice of contract. But it is not obvious why the self-understanding of lawyers, judges and scholars would yield any more insight into the meaning embedded in the practice of contract than the experiences of those who enter dozens of contracts in their day-to-day lives and have never set foot in a courtroom, read the text of a judgment, or opened a casebook.

A private law theorist might respond that, while there are many perspectives, that does not undermine their project, because they focus on a perspective or perspectives that have particular significance or importance for the practice. But this simply reintroduces the objection that was raised by Priel above: what is needed is a normative argument for why a particular perspective ought to be privileged when interpreting the meaning of a practice. In other words, what are the reasons for privileging a particular self-understanding of a practice over another? And, as I noted in Part I above, this was precisely the worry that was raised about interpretive social

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[91] Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 Law and Philosophy 633, 650. (emphasis in original.)
[92] ibid 651.

sciences more generally and pushed critical social theorists to the position that interpretive theory is necessarily political.

One might argue that the reason we ought to focus on the experience of those who administer and apply the law is because they occupy positions of power and therefore their self-understanding of the practice has great consequences for the rest of us.[93] Imagine any social practice involving the exercise of power by one set of participants over another. It is certainly true that the self-understanding of those exercising power is consequential; they do, after all wield power over others. But it is not obvious why we shouldn't be equally concerned about the self-understanding of those in the practice who are the subjects of that power. I don't think we would say that the self-understanding of the oppressors is more important than the oppressed because the actions and understandings of the former are more consequential than the latter. So, it can't be quite right to say that the perspective of a set of participants within the practice is more important than another because their actions are more consequential, and therefore their self-understanding of the meaning of those actions ought to be prioritized over others.

Philosophers of law working in general jurisprudence have been alert to this issue when it comes to our interpretation of the practice of law in general. Legal theorists have acknowledged that the methodology of interpretivist social sciences opens up the possibility of multiple, conflicting self-understandings of the law.[94] What is needed is a normative argument that shows why a particular perspective sheds

[93] I thank Emmanuel Voyiakis for suggesting this possibility.

[94] See Gerald J Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 Legal Theory 329, 335–341.; Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis', *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007) 132–133.; Stephen R Perry, 'The Varieties of Legal Positivism' (1996) 9 Canadian Journal of Law and Jurisprudence 361, 373.; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 14–15.

light on law as a distinctive social practice. Typically, this has been framed as a perspective which explains the normativity of the practice of law.[95] For example, John Finnis acknowledges that a social practice like the law may be understood from competing perspectives which produce different interpretations. However, Finnis makes a further normative argument for why we should prioritize the perspective of the participant who understands the practice of law as morally binding.[96] On this view of interpretive methodology about law, what is of most theoretical interest is an interpretation of the practice of law which reflects a self-understanding of law as a genuinely normative practice. Because of this, interpretive explanation of the law requires normative theorizing.[97] But even here, there are competing interpretations of the kinds of practical reasons that law generates; that is, there are conflicting self-understandings of the normativity of the law within the practice itself.[98] This has led legal philosophers to argue that what is needed is a moral or political argument in favour of one particular interpretation of what explains law's normativity over another.[99] This conclusion should not be surprising because it is a consequence of the commitments of the interpretivist understanding of human practices: there are no neutral brute data which make up the social world; social reality is constituted by practices which have embedded meaning; and to translate this embedded meaning requires engaging in questions and disputes about values.

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[95] There is a significant literature on the question of the normativity of the law. See, e.g., the recent collection by David Plunkett, Scott J Shapiro and Kevin Toh, *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019). What I want to flag here is that that question has particular interest for theorists of the law who take an interpretive approach to explaining the practice of law. See, e.g., Stephen R Perry, 'Hart's Methodological Positivism' (1998) 4 Legal Theory 427.

[96] Finnis (n 94) 14–15.

[97] Perry argues against what he calls 'methodological positivism', and says that purely descriptive approaches to jurisprudence are unsuccessful. Perry (n 95) 466.

[98] Postema (n 94) 335–341.

[99] See Perry (n 95) 449, 466. See also Leiter's discussion of Perry in Leiter (n 94) 131–134.

What is missing in the accounts of private law theorists which I have outlined above is a normative argument about the importance of a particular perspective for the interpretation of a particular practice. Perhaps a normative argument along those lines could be provided. But what is problematic about private law theorists who claim to take a purely internal perspective is that they rule out appeal to moral or political argument. So, they offer us no normative resources with which to ground an argument that a particular self-understanding of the practice of, e.g., tort law should be privileged over another.

I think this blind spot of private law theorists is particularly glaring. The practices of property, contract and tort are significant in the day-to-day material reality of those who are subject to the law. The experiential perspectives we take up also reflect different positions of power in existing institutional practices. To simply assume without argument that we ought to take up the perspective of those with power who administer these areas of law reflects an implicit moral or political view. The meaning and values that are constitutive of property law may be very different from the perspective of the unhoused than they are from the perspective of a high court judge. And what I want to argue is that the perspective of the unhoused may be just as valuable, just as illuminating, as that of the judge, when it comes to understanding the practice of private property. In trying to understand practices that involve the exercise of power by one group over another, we can focus on understanding the perspective of those who wield power. We might think their understandings are the most consequential *because* they wield power. But is that more important than taking up the perspective of those who are subject to the power? This depends on what the point of one's interpretive theory is. There is no fact of the matter—just contested interpretations of the same practice. A normative argument is always needed for why a particular perspective is to be taken up. We might value the

perspectives of lawyers and judges, but to focus *only* on those to the exclusion of those subject to the law is to put forward an incomplete understanding of the practice.

Where private law theorists such as Smith, Weinrib and Ripstein go wrong is that they don't take seriously the commitments of the methodology that they adopt. This leaves private law theorists with a dilemma. Either they accept that there are competing interpretations of a practice and that no single one can claim to provide a complete account of property, contract or tort; they are just competing interpretations based on different self-understandings. Or, in the face of these conflicting interpretations, they must engage in moral and political argument to justify why one particular account should be privileged over another. But, crucially, to take this latter route, they cannot simply rely on resources internal to the practice. They must draw on some moral or political perspective.

A different possible response by private law theorists might be that the object of their inquiry is the practice of private law *adjudication* and not private law as a whole. This would make the case for focusing on the experience and self-understanding of judges and lawyers more plausible. The difficulty with this response is that it runs against their stated claims: Weinrib, Smith and Ripstein all claim to be providing interpretive understandings of private *law*, not private law *adjudication*. Their ambitions go beyond providing a theory of adjudication: they purport to be providing a theory of *tort law* or *contract law* as a whole. So, this path doesn't seem open to them. Either they would need to revise their claim to be more modest, or the perspectival critique stands.

There is one additional way I'd like to press the perspectival critique. I have focused so far on the difficulty of providing a single interpretation of a social practice given the different perspectives and self-understandings of individuals within the

practice. But private law theory in common law traditions claims to provide an interpretation of the practice of private law *today*, by rendering intelligible the text of judgments rendered in the *past*. So, for example, when Smith develops his interpretive theory of contract law, he considers the "core" elements of the practice of contract. This might include the text of a judgment written over a hundred years ago which articulates, e.g., the requirement for consideration for the legal enforceability of a promise.[100] So interpretive theory as it is done by private law theorists like Smith, Weinrib and Ripstein also reflects the self-understanding of participants in the practice over the course of time. But, again, there is a worry about the possibility of a *single* interpretation of a practice like private law which persists over time, and is constructed out of multiple perspectives at different historical moments. Smith is alert to this possible challenge:

> Contemporary contract law is the product of innumerable individuals acting over hundreds of years. How could such a creation possibly possess an intelligible order of the kind required to satisfy the above criteria? This objection would indeed be fatal if one were to reject contract theories unless they satisfied perfectly the criteria of fit, coherence, morality, and transparency. But these criteria are not thresholds. Instead, they are standards against which a theory may be assessed as better or worse than the alternatives.[101]

Smith correctly identifies the worry. But the question is not whether a particular interpretive theory of contract is better or worse than an alternative when measured against these criteria. The question is whether a practice like contract which is "the product of innumerable individuals acting over hundreds of years"[102] can be rendered intelligible by a *single* interpretation. In order to provide a response to this, the theorist must adopt a theory or philosophy of history. I believe that Ripstein and

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[100] See, e.g. *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847.
[101] Smith (n 5) 37.
[102] ibid.

Weinrib are alert to this issue and they provide hints as to the particular philosophy or theory of history which they adopt. For example, as mentioned above, while Ripstein does not purport to provide a historical account of tort law, he does say that his "account is not inconsistent with such a historical treatment, provided it allows for the possibility that the product of history is not just a heap of accidental results."[103] Weinrib also seems to adopt a similar position insofar as he describes the practice of the common law as working itself pure.[104] These statements seem to reflect a particular view of history, one in which a single animating idea explains the actions of agents in the practice over the course of history. But no attempt is made to defend the view of history adopted.

I take no position here on whether these are plausible or attractive views of history.[105] I raise this point only to show that a theory that claims to provide a single interpretation of a practice which spans a stretch of history requires some theory of history. Otherwise we are left again with a worry about whether there can be a single interpretive theory of a practice like private law which can make sense of the self-understanding of different people participating in a practice over time. Thus, the perspectival critique of interpretive theories of private law operates at two levels: the first is the possibility of a single interpretation among different participants in a practice at a given moment in time, and the second is the possibility of a single interpretation among different participants in a practice over the course of history.

[103] Ripstein (n 44) 19.
[104] Weinrib (n 7) 13.
[105] But I will note that historians often emphasize the inherent contingency of social practices like the law. See, e.g., Jim Phillips, 'Why Legal History Matters' (2010) 41 Victoria University of Wellington Law Review 293, 295–302.

B. Coherence Critique: Coherence with what?

Interpretive theories of private law practices face challenges on their own terms. In this section I argue that the demandingness of the coherence criterion depends on the scope of the practice which the theorist is interpreting. What I argue is that theorists of private law can meet the demand of coherence only if they discard parts of the practice which are inconsistent with their interpretation. But the question of what is "in" or "out" when drawing boundaries around the object of inquiry is itself controversial. For example, if we include statutory instruments that regulate the legal relationships between private persons within the scope of the practice of "private law," this puts pressure on certain interpretations that focus almost exclusively on common law doctrine. But whether the statutory law "counts" as private law is itself subject to conflicting self-understandings of the practice of private law.

What I want to show is that the coherence criterion is either too easy a standard to meet, because the theorist simply excludes certain elements from the scope of the practice of private law, or coherence can become more demanding the more elements we include in within the scope of the practice. Arguments around "coherence" are often simply arguments around what the "core" or "essential" elements of private law are. But this project simply reintroduces the same worries that were outlined in the perspectival critique. The argument proceeds as follows. Focusing on Weinrib's account of private law, I first demonstrate how different elements of legal practice may be inconsistent with Weinrib's interpretation of private law as an instantiation of corrective justice. To make this argument I point to the decisions of apex courts which are inconsistent with his theory; statutory instruments which are inconsistent with his theory; and other legal practices and institutions which overlap with private law which render his account inconsistent. Second, I show that interpretivists will respond in one of two ways. First, with respect to particular judicial decisions that are

inconsistent with their theory, they will simply say that the court got it wrong, because the reasoning of the court is itself inconsistent with the nature of private law. Second, with respect to statutory instruments, they will respond that such instruments fall outside the scope of private law properly understood; once we realize this and exclude them from the object of inquiry, we will see that corrective justice is perfectly coherent. That is, coherence is preserved by setting the boundaries of the core or essential features of private law. But, this strategy simply reintroduces the difficulties identified in the perspectival critique: there will be different self-understandings of what the scope of private law is.

As set out in Part III above, a commitment to coherence is reflected in the work of all three private law scholars discussed here. The way the criterion of coherence is applied is by taking structure, concepts, norms, and reasons found in the practice of contract, property and tort and providing an understanding which "makes sense" of that practice by showing how these elements can be rendered part of a coherent whole.

There are a number of possible objections to this approach. The first is simply to reject coherence as a valid criterion for assessing the truth of a theory.[106] But I wish to put this objection to the side, because I want to proceed by accepting the commitments of these theorists on their own terms and providing a critique which is internal to their approach. I will show that there are arguments these theorists are vulnerable to even if we grant them that coherence is the right standard with which to evaluate an interpretive theory.

[106] For a critique of coherence in the context of law, see Joseph Raz, 'The Relevance of Coherence' (1992) 72 Boston University Law Review 273.

The second objection, then, is about how the coherence criterion applies to evaluate a candidate theory. The way that coherence is typically understood to apply in the context of private law theory is by showing how the structure, concepts and doctrine of a particular doctrinal area can be organized and rendered intelligible as a coherent whole. For example, as Smith puts it, a good theoretical interpretation of contract law "must show that *most* of the core elements of contract law can be traced to, or are closely related to, a single principle."[107] Accordingly, Smith takes the project of an interpretive theory of contract to be rendering intelligible and coherent the "core" elements of contract including the doctrines of offer and acceptance, consideration, expectation damages, etc.[108]

But as Andrea Sangiovanni has argued, "[a] successful interpretation of a particular social practice *that is a component of the institutional system should fit the system as a whole*; if it does not, then the interpretation fails."[109] Applying this to contract law, we could say that an interpretation of contract must show not only how contract doctrine hangs together in a coherent manner, but it must also show how it coheres with other features of the *system* of which it is a part.

So, the demands of coherence apply at a number of different levels when it comes to interpreting an area of private law such as, e.g., tort or contract. Coherence is required with respect to doctrine as reflected in the decisions of courts. And we might think that an interpretive theory of, e.g., contract must offer an understanding of contract which is coherent with statutory instruments that regulate the practice of contract. Further, we should also expect an interpretation of contract to be coherent

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[107] Smith (n 5) 13. (emphasis in original.)
[108] ibid 11–13.
[109] Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 Journal of Political Philosophy 137, 143. (emphasis added.)

with other institutions within the same legal system that overlap with contract law. I will discuss each of these in turn.

Let's start with coherence in common law doctrine. Private law theorists are selective about the parts of the practice that they aim to render coherent. For example, they select certain cases and exclude others. Ripstein and Weinrib focus on "core" cases and exclude others as either misguided or not central.[110] For example, let's consider the Supreme Court of Canada's test for the existence of a duty of care for negligence in tort law.[111] The Supreme Court of Canada has articulated a two-part test which explicitly incorporates a consideration of policy reasons for the legal determination of whether or not a defendant owes a plaintiff a duty of care. Now, one might think that a theorist of private law who attempts to illuminate our understanding of the practice of tort law by rendering it intelligible would have to offer an interpretation that reflects the self-understanding of the members of the Supreme Court intelligible. And that this would include the Supreme Court's own reasoning, which includes considerations of policy for determining whether to limit the scope of a duty. But Weinrib does not offer an interpretation of tort law which renders the Supreme Court's reasoning here coherent. Instead, Weinrib argues that

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[110] Ripstein is quite explicit that he excludes certain cases from his analysis, particularly those that engage in policy argument: "I do not pretend that these cases do not exist, but I do argue that they are inconsistent with the law's organizing principles". Ripstein (n 44) 20. Weinrib similarly states that some decisions can be excluded: "Not every decision is a felicitous expression of the system's coherence. Particular holdings—even those that have spawned an extensive and ramified jurisprudence—may be mistaken to the extent that they do not adequately reflect the whole ensemble of institutional and conceptual features that must cohere if the law is truly to make sense." Weinrib (n 7) 13. Smith also says that the theorist can treat some cases as mistakes: "In those cases in which the theorist's internal explanation differs from the judicial explanation, the explanation for this difference…is simply that those offering the judicial explanation are mistaken." Smith (n 5) 29.

[111] The test is set out in *Kamloops v. Nielsen* [1984] 2 SCR 2, at pages 10-11; later cases explicitly refer to the second limb as dealing with policy considerations: *Childs v. Desormeaux* [2006] 1 SCR 643, at para 11: "are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?"

the Supreme Court's own test is inconsistent with the practice of tort law. Weinrib's argument is subtle and complex. But in short, Weinrib argues that the Supreme Court's reasoning is itself inconsistent with the structure of tort law liability. Weinrib observes that "the introduction of the two-stage test has transformed Canadian negligence law into an enquiry into one-sided policy considerations at the ultimate stage that are extrinsic to justice between the parties".[112] This is not a difficulty for Weinrib's theory, he argues, but rather is a problem with the Supreme Court's reasoning, because policy reasons are the wrong sort of thing to appeal to. "Coherence requires that the injustice relate act to injury and vice versa. Precluded are definitions of the injustice between the parties in terms that pertain to one of them alone."[113] Essentially, Weinrib argues that the Supreme Court's introduction of policy reasoning is incoherent because it fails to reflect the relational structure of liability in tort law. Because "the notions of right and correlative duty together form a unified general conception of the duty of care",[114] a legal test based on considerations that are external to that relationship (such as policy considerations) is incoherent because it fails to reflect the relational and correlative structure of right and duty in tort law.

So, here we have the leading decision of the apex court in Canada articulating a test for the duty of care in negligence. As Weinrib himself notes, it "transforms this relational reasoning into a policy-based restriction on liability."[115] We might think that this would then require us to revise our interpretation of the practice to reflect the Supreme Court's new self-understanding of the practice of tort. But Weinrib rejects this. He retains his interpretation of tort law and argues that the decision is incoherent with the nature of liability in tort. But, as I will show below, this kind of approach

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[112] Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012) 63.
[113] ibid 43.
[114] ibid 50.
[115] ibid 65.

suffers from the same challenges that were raised as part of the perspectival critique. Arguments for coherence depend on what a particular theorist takes to be the "core" or "essential" nature of tort law. But this in turn depends on what perspective we take up to determine the meaning or purpose of the practice. For present purposes, the important point is to show that interpretivist private law theorists preserve coherence by dismissing certain datapoints that appear to be important features of the practice.

Another legal practice we might think is relevant to private law is statutory law. For example, many jurisdictions, including provinces within Canada, have adopted some form of human rights legislation which prevents discrimination against individuals on certain enumerated grounds in the context of private obligations such as contract.[116] So, for example, employers cannot discriminate when they enter into a contract with their employees on the basis of gender or race.[117] Human rights legislation governs private obligations. We would expect a coherent interpretation of private obligations to reflect this practice. Weinrib argues that the best interpretation of private law reflects individuals' right to *formal* freedom and equality. This means that the particular characteristics of individuals and the differences between them should have no bearing on the recognition of the rights and obligations they owe each other. On this view, the law recognises formal equality. But human rights legislation orients us towards a substantive view of equality where we do attend to differences between individuals.

So here we have a widespread practice of determining private law rights and obligations on the basis of their effects on a substantive conception of equality. The point of raising this is not to normatively evaluate these developments, but to ask

[116] Alberta Human Rights Act (A-255 RSA 2000).
[117] ibid s 7.

whether an interpretive account of our existing practice of private law must be rendered coherent with legislation such as this. Weinrib and Ripstein do not incorporate legislation of this sort in their accounts. How could statutory instruments which incorporate substantive notions of equality in private obligations be rendered coherent with an interpretation of private law as reflecting only formal equality? I want to suggest that they cannot: an interpretation of private law as respecting formal freedom and equality is simply inconsistent with legal practices like statutory prohibitions of discrimination in private contractual relationships. So rather than incorporating them into their theories, theorists simply exclude them from the practice.

Finally, we should look to a third level of coherence: an interpretation of a private law practice must be coherent with other parts of the system of which it is a part. In other words, in order to be successful, an interpretation of contract must also be coherent with other legal practices within the same legal system which determine rights in contract law. Take for example a contract between two parties. Suppose the promisor fails to fulfill their end of the bargain. We then need to determine what their respective rights and obligations are. What are the rights of the promisee? On Weinrib's corrective justice theory of contract, the promisee has a right to performance against the promisor, and the promisor has a correlative duty to perform, owed to the promisee.[118] On Weinrib's account, if the promisor fails to discharge their obligation, the duty persists, and they have to restore the right.[119] Weinrib would argue that the right to performance explains why the promisee is awarded the remedy of expectation damages. This places the individual in the position they would have been in had the

[118] See Weinrib (n 112) Chapter 5.

[119] ibid 149.: "So far as corrective justice is concerned, the remedy is merely the continuation at the remedial stage of the correlativity of right and duty that defines the parties' relationship."

contract been performed.[120] But Weinrib's interpretation of contract stops here. What would we say if the promisor cannot pay the required damages? Our existing legal practice provides an answer to this question. We look to bankruptcy law to determine the order of priority that the promisee has as against other creditors of the promisor. One would expect, then, if we are to take the demand of coherence seriously, that a theory of contract would have to be made coherent with bankruptcy law. But private law theorists generally make no effort to render their theory coherent with other institutions within the system.

As I have just shown, one could argue that some private law theorists don't take the commitment to the coherence of private law seriously enough. A theorist such as Weinrib fails to provide an account of private law that is coherent because his account is inconsistent with some features of the existing practice of private law. Rather than revising their interpretation of the practice to fit the judicial decisions of high courts, they dismiss such decisions as being wrongly decided insofar as they are inconsistent with the theorist's own interpretation of the practice. Rather than reflect the aims of legislation in their interpretation of private law practices, the statutory regulation of private relationships is simply ignored. And rather than interpret private law practices in a way that renders them coherent with other overlapping legal practices and institutions which determine private rights and obligations, those practices are not addressed. We might say that a theory of this kind fails to meet the standard of coherence demanded by the theorist's own interpretive approach.

But the interpretive theorist of private law has another response available to them here. They might respond at this point that their theory does successfully achieve coherence, because is it coherent with everything that is *essential* to private

[120] ibid 153–154.

law: everything that is properly called private law. But if the practice being rendered coherent can be defined as the theorist wishes, we might at this point question the value of coherence as normative criterion. Coherence might be a relatively easy standard to meet if the theorist limits the bounds of the object of inquiry from the outset. The stringency of the coherence demand will depend on how the theorist demarcates the bounds of the data they are rendering coherent.[121] For example, if we want to render tort law coherent, we might select certain central features of the practice of tort law to the exclusion of others. The more selective we are about those core features, the easier it will be to exclude others as incoherent. The more features which fall within the boundaries of the practice, the more demanding coherence becomes.

This is where the coherence criterion simply reproduces the difficulties associated with the perspectival critique. If we argue that a particular interpretation of a practice is coherent by grounding such a claim on those features of the practice which are "core" or "essential" or which go to the "nature" of the practice, we are then placed right back in the position of asking: essential according to whose self-understanding? And, as we've seen, legal philosophers have acknowledged this difficulty in general jurisprudence. If we have these difficulties about demarcating the boundaries of the practice of law in general, it should come as no surprise that we will

[121] Khaitan and Steel address a similar point in the context of the classification of legal norms. They ask: "to what extent, for example, is it acceptable to dismiss a particular norm as not really belonging to an area of law in order to argue that one's theory fits the data?" Khaitan and Steel (n 2) 2. They go on to say that "[t]his depends on what makes it the case that a norm belongs to an area." ibid. They argue that what makes it the case that a norm belongs to an area of law is that it is "intersubjectively recognised by the legal complex in that system". ibid 3. Here, I am discussing theorists who adopt an interpretive approach to explaining the practice of private law which requires appealing to the purpose or meaning of the practice; this is distinct from the project that Khaitan and Steel are engaged in. I discuss their argument about the classification of legal norms into areas of law when I discuss classification in private law adjudication in Chapter 3.

have similar difficulties when it comes to a subset of that practice which we call private law. Here's how Priel puts the point in the context of tort law:

> Since tort law is a complex and multifaceted practice, and since there is no obvious way of determining its essential features, each side can focus on certain features of the law that fit its story and declare those to be the "essence" or "core" of tort law, and argue that their account is superior because it explains those features better.[122]

Take the example of the Supreme Court of Canada decision I raised earlier. Suppose a theorist provides an interpretation of tort law reflecting the self-understanding of participants who don't take the relational structure of tort law to be core, but rather make sense of the practice of tort law in terms of how the practice secures certain policy aims such as deterrence.[123] It is important to note that this interpretation is still "internal" in the sense that it reflects the point of view and self-understanding of some participants in the practice. Such an interpretation would not have the same difficulty with rendering the Supreme Court's reasoning coherent with their understanding of the practice. If the point of the practice of permitting a plaintiff to bring a claim against a defendant for breach of duty is to achieve policy aims, then Supreme Court's test is perfectly coherent with this understanding.

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[122] Priel (n 2) 44.

[123] One way of talking about this is in functional terms. See Priel (n 2). Priel classifies "functional" theories of private law to differentiate them from what he calls "structural" theories. The theorists I have been discussing in this chapter are those who Priel calls "structural" theorists. Priel classifies structural theorists of private law as those who argue "that it is only by paying attention to the law's structure we can 'make sense' of, or 'understand' it. Structural accounts are thus said to capture, if not every aspect of a varied and complex practice, the 'nature,' 'essence,' or 'core' of tort law. Among the features said to illustrate tort law's structural essence are the law's case-by-case adjudication, its backward-looking orientation (its focus on repairing past harms, rather than preventing future harms), and its focus on the two parties involved in the tort (and not on others). These structural features are embedded in the legal concepts used in tort law, duty of care, carelessness, causation, and so on. The nature of tort law is thus captured by its structure, and the law's structure is captured by its concepts." ibid 32. By contrast, Priel identifies 'functional' theories of private law as those "that seek to explain it in terms of certain functions it seeks to promote." ibid 33.

My point here is not to take a stand on whether one interpretation is better than another. Rather, it is that whether one is more coherent than the other will depend on what features of the practice of tort law are taken to be important or essential. This, in turn, will depend on whose self-understanding grounds our interpretation. That is, just like in the case of law, there will be conflicting interpretations of the practice of private law; coherence may provide some normative guidance if we agree on what the core features of the practice are. But coherence is of no assistance if there is a conflict between the self-understandings of the participants in the practice.

V. Conclusion

I have argued here that interpretive private law theorists fail to take seriously the methodological commitments of their approach. They adopt interpretivism, but the way in which they theorize about private law leaves them open to two critiques: the perspectival critique and the coherence critique. The perspectival critique says that they neglect the perspective of some agents while prioritizing the perspective of judges. The coherence critique says that they fail to make their views coherent with several aspects of the practice that ought to be relevant: some cases, statutes, and other areas of law. And they draw the boundaries around what elements of the practice are included or excluded in ways that preserve their theoretical commitments, making 'coherence' an easy goal to meet.

A second distinctive element of interpretive theories of private law is that they purport to explain and justify private law practices at the same time. In this chapter I've focused on the explanatory dimension. The next chapter takes up questions to do with the justificatory dimension.

Chapter 2: Justification in the Practice of Private Law

I. Introduction

In Chapter 1, I discussed theoretical explanations of the practice of private law. I focused specifically on the methodological commitments associated with interpretive theory. I argued that private law theorists who purport to provide an interpretive explanation of the social practice of contract, tort or property fail to take seriously the methodological commitments of their own interpretive approach. Interpretivism as an approach to the explanation of general phenomena in the social sciences focuses on the self-understanding of participants. Its aim is to interpret participants' self-understanding of the meaning and purpose of the practice in a way that renders it intelligible and coherent. However, private law theorists fail to take seriously the possibility that this approach admits of multiple and possibly conflicting self-understandings. Further, the coherence criterion which they rely on only has bite if there is agreement about the "core" or "essential" features of the practice; but what is "core" or "essential" again depends on potentially conflicting self-understandings about the meaning and purpose of the practice.

In this Chapter, I turn my focus to methodological issues related to normative theories of private law practices. I begin by differentiating between two approaches to normative theorizing about private law. First, ideal normative theory begins with abstract normative principles that are practice-independent, and prescribes a set of ideal private law institutions and practices. While the question of what an ideal contract, tort or property law would look like is a perfectly acceptable line of normative inquiry, private law theorists typically dismiss this as pure normative political theory which fails to take existing legal practice seriously.

A second kind of normative theorizing about private law is one that is practice-based. A practice-based normative theory takes the existing set of private law practices as a starting point and then asks one or more normative questions about the existing practice. Here again I spend some time discussing interpretive theories of private law. These theorists claim that an interpretive theory of private law can at the same time explain the practice and justify it. So interpretivists about private law reflect one approach to practice-based normative theorizing about private law practices. However, I put pressure on the claim made by interpretivists that a legal practice can be justified by drawing solely on normative resources which are "internal" to the practice. I argue that the private law interpretivists' approach to practice-based normative theorizing is subject to three possible objections. First, that it might imply relativism about morality, which none of the theorists I examine would accept. Second, that it is question-begging when it comes to normative questions about justifying the practice. Third, that it requires accepting a transcendental form of justification that leads to normatively questionable conclusions or precludes us from engaging in moral debate about the values the practice ought to reflect.

This doesn't mean, however, that we must give up on an approach to normative inquiry about private law practices which is practice-based. I argue that there is an alternative approach. We can instead begin with our existing legal practices and then take up the position of an agent within the practice and ask the practical question: What ought to be done? This approach takes existing practice seriously because it begins with our actually existing private law practice. It is also thoroughly normative because it is a practical inquiry not an explanatory theory; we ask what an agent in the practice ought to do, given the existing legal practice. But it is not purely "internal" in the interpretivist's sense, because, when asking the

practical question of what an agent ought to do, we may draw on practice-independent normative principles. So, the question is not about how the existing practice of contract, property or tort is justified from within, as interpretivists would have it. Rather, it is about how the decision of an agent occupying a position within the existing practice of contract, property or tort is justified.

This Chapter is organized into three parts. In Part I, I clarify what I mean by a "normative" theory of private law practices. In Part II, I summarize the ideal normative theory approach to private law and objections raised against it. In Part III, I consider practice-based approaches to normative private law theory. Here I argue against the interpretivist's version and show why an approach which takes up the practical perspective of an agent situated in the practice should be preferred.

II. "Normative" Private Law Theory

To begin, let me clarify what I mean by a normative theory and how it differs from an explanatory one. There is a sense in which there is a normative dimension to all theorizing: we require some normative criterion (or criteria) of success for evaluating any theory; we need a marker with which to measure a particular theory as being better or worse than another.[1] For example, a criterion for assessing a good scientific theory may be the extent to which it corresponds to reality or allows us to predict observable phenomena. As we saw in the last chapter, coherence might be the criteria with which we evaluate interpretive social science. In this sense

[1] These are often referred to as 'epistemic values'. See, e.g., Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2002) 30–31. These include coherence, plausibility, reasonableness, and simplicity. ibid 31. See also Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007) 168.: "Epistemic values specify (what we hope are) the truth-conducive desiderata we aspire to in theory construction and theory choice: evidentiary adequacy ("saving the phenomena"), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth."

explanatory theories also have a normative dimension. But this is normativity in an epistemic sense: it is a question about what justifies or warrants the holding of beliefs about particular phenomena.[2]

When I talk about normative legal theory, I use "normative" in a different sense. I mean a theory whose *content* is normative. That is, the content of the theory includes prescriptions about what one ought to do.[3] Another way this is expressed is that a normative theory prescribes practical norms: norms for the assessment of action. A normative theory is a set of statements which include explicitly normative content through the expression of predicates such as, e.g., 'ought,' 'justified,' etc. They are statements about what an agent ought to do or why a particular action or set of actions might be justified. So, explanatory theories are concerned with explanation and/or understanding of a particular social phenomenon; we still require norms to justify our beliefs about these explanations or understandings. Whereas normative theories are concerned with what one ought to do and the norms which regulate the justification of action.

Further, we can ask several different normative questions about a particular practice. Each of these questions might require a different normative theory. For example, one normative question of central concern in normative political philosophy is when the exercise of coercive power by the state is justified. So we might ask whether a particular legal official is justified in wielding the power of the state in a particular context. A second normative question might be whether individuals subject to the power of the state have any reason to comply with it. This is sometimes framed in terms of the authority of the state or the duty to obey the

[2] See Brian Leiter, 'Normativity for Naturalists' (2015) 25 Philosophical Issues 64.
[3] ibid 65.

law.[4] Further, we might ask whether the distribution of benefits and burdens resulting from a particular configuration of state institutions is justified. This is one way of framing the question of distributive justice in political philosophy.[5] The point is that there are several possible normative questions that might be asked about a particular practice such as, e.g., the use of coercive power by the state.

So, one way to think about normative private law theory is that theorists are providing a response to one or more normative questions that we might ask about private law practices. For example, we might observe that contractual obligations are enforceable by the state and therefore some justification of contractual obligation must be offered to show when this would be legitimate. A theorist might offer some normative justification for the use of state power to enforce contractual obligations. Or we begin with the observation that duties in tort appear to be genuinely obligatory. Here a theorist would try to provide some normative account of why we have reason to comply with our obligations in the practice of tort law. Further, we can observe that legal entitlements in property which are allocated through legal

[4] For discussion of different conceptual accounts of legitimate authority, see Tom Christiano, 'Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/sum2020/entries/authority/> accessed 8 November 2022. See also Massimo Renzo and Leslie Green, 'Legal Obligation and Authority' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall 2022, Metaphysics Research Lab, Stanford University 2022) <https://plato.stanford.edu/archives/fall2022/entries/legal-obligation/> accessed 8 November 2022. The concepts of authority, legitimacy, duty to obey, and justified coercion are complex and interconnected and different theorists take different positions on the relationship between them. For example, on some views, a legitimate political authority necessarily implies a duty to obey, while on others it doesn't. My point in raising this here is just to highlight the range of different questions that can be discussed in this area.

[5] See Julian Lamont and Christi Favor, 'Distributive Justice' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2017, Metaphysics Research Lab, Stanford University 2017) <https://plato.stanford.edu/archives/win2017/entries/justice-distributive/> accessed 8 November 2022.

institutions have distributive effects and that some normative justification has to be offered for a particular pattern of distribution.

I raise these points here because the differences between these questions are often elided. For example, here is how Peter Benson frames the aims of a theory of contract:

> I believe that a first task of contract theory is, or at least should be, to see whether modern contract law—as specified by its main doctrines, principles, and values—can be accounted for in its own terms on a basis that is morally acceptable from the standpoint of a liberal conception of justice. For contractual obligation is always coercively enforceable obligation, and this, if it is to be legitimate, ought to be justified as a matter of justice and shown to be consistent with the freedom and equality of the parties. But what must be emphasized is that the subject requiring justification is the actual law of contract that regulates their interactions.[6]

So, for Benson, a theory of contract must supply an answer to several normative questions all at once. It must show how existing practice of contract is legitimate, morally acceptable, and reflects a conception of justice. But, as I noted above, political philosophers have identified each as a distinct normative question. It is, of course, in principle open for a theorist to argue that a single theory must provide an answer to all these normative questions about contract law. But a further argument must be provided for why that ought to be the case.

The purpose of my discussion so far has been to emphasize the point that calling a particular theory of private law normative is, in some sense, underspecified. We would do better to be clear about the specific normative questions that we are asking about the practice of private law and, if necessary, how

[6] Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019) 1–2.

they might be connected to other important normative questions. The focus of the remainder of this Chapter is to examine two different approaches to answering normative questions about the practice of private law. The first proceeds by specifying normative principles and making certain prescriptive claims about what the practice of contract, property and tort ought to look like. The second begins with the existing practice and asks a set of normative questions about that practice.

III. Ideal Normative Theories of Private Law

So, how do we go about normative theorizing about the practice of private law? One way to proceed is to ask: what kind of private law practices ought we to have? Put another way: what would be an ideal practice of tort, contract or property? This approach begins by theorizing about a set of practice-independent normative principles from which a prescription for an ideal set of legal institutions and practices is entailed. Call this *ideal normative private law theory*.[7] Ideal normative theorists of private law appeal to our intuitions to support one or more set of normative principles. With these normative principles in hand, the theorist then shows how certain prescriptions for the design of our legal practices are entailed. Importantly, on this characterization, an ideal normative theory is unconstrained by existing practices.

[7] I use term 'ideal' here in a stipulative sense and with some caution. There is a current methodological debate in political philosophy around 'ideal' vs. 'non-ideal' theorizing. In that debate, the distinction between ideal and non-ideal can refer to a number of different distinctions. See Laura Valentini, 'Ideal vs. Non-Ideal Theory: A Conceptual Map' (2012) 7 Philosophy Compass 654. Valentini identifies at least three different ways that the difference between ideal and non-ideal theory may be drawn: full compliance as opposed to partial compliance (ibid 655–656.), utopian as opposed to realistic theory (ibid 656–660.), and end-state as opposed to transitional theory (ibid 660–662.) Here I use it in a more general sense to mean that our existing private law practices have no normative significance when it comes to the question of what private law practices we ought to have.

One of the clearest examples of this approach is reflected in the welfare economic approach to normative private law theory. In their book *Fairness vs. Welfare*, Kaplow and Shavell have argued that welfare ought to be the *sole* normative criterion which should guide the design of our legal institutions.[8] That is, that our legal practices of contract, property and tort law are only justified on the basis that they promote overall social welfare. They begin with the master normative ideal of welfare, understood as subjective preference-satisfaction, and show what this entails for the design of the rules and institutions of contract, property, and tort.[9] On this view, the enforcement of obligations in private law through state coercion is justified on the basis of the welfare-maximizing effects of doing so. Further, they might say that the reason that individuals have to comply with legal directives in private law is because such compliance promotes welfare-maximization.[10]

In the private law theory literature, this kind of approach has been dismissed as being purely "prescriptive". But I think this label is unhelpful. The objection is not so much that ideal normative theorists make prescriptions about private law – as we will see below, interpretive theories also make prescriptive claims. Rather, what is being objected to is the particular way of going about making prescriptive claims. For example, recall Weinrib's claim that a judge ought not to consider policy reasons to determine private legal liability because to do so would be incoherent

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[8] Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press 2002).

[9] ibid. See especially chapters III. and IV. on Torts and Contracts. Kaplow and Shavell argue that non-welfarist concerns such as justice and fairness can be incorporated into social welfare. ibid 21, 431–436. For some doubts on how successful this strategy is, see Lewis A Kornhauser, 'Preference, Well-Being, and Morality in Social Decisions' (2003) 32 The Journal of Legal Studies 303.

[10] This is not necessarily how Kaplow and Shavell address this normative question of what reason individuals have to comply with the law. But it is one approach available to them. Another might be to take a "rule consequentialist" type approach. For a discussion of this approach in a different context, see Sina Akbari, 'From Personal Life to Private Law: Review of John Gardner' (2020) 83 Modern Law Review 917.

with the practice of private law.[11] This is still to make a prescriptive claim. The objection that is levelled against economic theorists is in *how* their prescriptions are formulated.

Characterizing the economist's approach as an 'ideal' normative theory clarifies the objection: it is not that economists make normative claims, but that their normative claim is made without regard to existing legal practice.[12] It is on this basis that ideal theorizing might be characterized as moral or political theory and not *legal* theory. The objection levelled by theorists of private law is that ideal normative theory fails to take our existing practices seriously: what good is a theory of an ideal contract law if it doesn't help us answer normative questions about contract law as it currently stands? Because it takes as its starting point the formulation of abstract principles as a matter of moral or political philosophy, ideal normative theory doesn't explain the normative significance of *existing legal* practices, or so the argument goes.[13]

IV. Practice-Based Normative Theories of Private Law

In this Part I consider approaches to normative theorizing about private law that takes seriously our existing legal practices. Call these approaches, *practice-based*

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[11] See my discussion of Weinrib in Chapter 1, Part IV. B.

[12] Arthur Ripstein says "Recent work in the economic analysis of tort law has moved away from its earlier ambition of explaining the law, and put itself forward as proposing improvements to the law." Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 109 fn 68. See also Stephen A Smith, *Contract Theory* (Oxford University Press 2004). Smith says that "Prescriptive accounts of the law are accounts of what the law should be: of the ideal law. An argument that contract law should promote economic efficiency is a prescriptive account". ibid 4–5.

[13] Another way of understanding the objection is simply that the ideal normative theorist is asking different normative questions, not that they are the wrong questions. But I think there is something to the claim that ideal normative theorizing doesn't have much to say about our existing legal practice. However, in Part IV. (B.), I show that there can be an approach to normative theorizing about existing legal practice which can accommodate appeal to practice-independent normative principles of the sort we see in moral and political philosophy.

normative theory. A practice-based normative theory of private law begins with a set of existing practices and asks one or more normative questions about them. Very generally, practice-based normative theories proceed in two steps. First, the theorist identifies the set of doings and sayings that are part of the practice, and which are the object of normative inquiry.[14] We look to materials such as the texts of statutory instruments, the reports of judicial decisions (including both the outcome of the judgement and the reasons given in support of that outcome), the text of administrative regulations, etc. We also look to practices including the practice of adjudication (e.g. the practice of following precedent, the practice of lower-level courts deferring to higher-level courts in a given system, techniques for making determinations of fact, practices of appealing the decision of one court, etc.), the practice of enacting statutory instruments, the practice of delegating authority to administrative decision-makers, etc.[15]

The second step of a practice-based normative theory is to take this specified set of practices and ask one or more normative questions about them. As I noted above, there are several possible questions that might be asked about a set of private law practices. In this Part I proceed on the basis that a central question that

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[14] One might think that this first step is problematic, but many theorists take it as a given that there is broad agreement about what legal practices consist of. See, e.g., Finnis: "…the differences in description derive from differences of opinion…about what is *important* and *significant* in *the field of data and experience with which they are all equally and thoroughly familiar*." (first and second emphases in original, third emphasis added) John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011). See also Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 91., referring to our general 'preinterpretive agreement'. Dworkin says "we have no difficulty identifying collectively the practices that count as legal practices in our own culture." See also HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 3. As I will argue in the next chapter, the exercise of boundary-drawing around particular doctrinal areas is itself a normative one. But typically there is substantial agreement about the materials and practices with which we start.

[15] Further, theorists may specify the jurisdictional scope of the practice that they are theorizing about. For example, a normative theory of Canadian private law practice might be limited to the practices of agents in Canada. Alternatively, a theory may be about all common law jurisdictions, in which case the scope of practices would be expanded.

normative private law theorists seek to answer is how private law obligations are justifiably enforceable by the state and what reason we have for complying with those obligations. What I want to focus on here is a methodological point: *how* a practice-based theory of private law provides answers to these normative questions. I begin by returning to the interpretive theories of private law that I discussed in Chapter 1 as one possible approach.

A. Interpretive Theory: Justifying a Practice from Within

Here I return to interpretive theorists of private law with a particular focus on Weinrib, Ripstein, Benson and Smith. These interpretive theorists claim that an interpretive theory of a practice explains *and justifies* the practice. So, it is clearly a practice-based normative theory of private law; the normative inquiry begins with our actually existing legal practices. But what is distinctive about the interpretivist theory is that it claims that the practice of contract, property and tort can be justified by reference to normative resources *internal* to the practice.

Each of these theorists proceeds on the basis that private law practices can be justified by reference to normative principles which are internal to the practice itself. Weinrib clearly articulates this point when he levels a critique against "the standard view [which] regards private law from an external perspective that fails to take seriously the features expressive of private law's inner character."[16] The problem with these theorists, which Weinrib calls "functionalist," is that they justify private law by reference to values or "goals" which are "independent of and external to the law that they justify."[17] Ripstein similarly claims that he is offering, in part, a prescriptive theory of private wrongs, but says: "The prescriptions that I make are

[16] Ernest J Weinrib, *The Idea of Private Law* (Revised edition, Oxford University Press 2012) 2.
[17] ibid 4.

not from a standpoint outside of what is presupposed in the legal materials I seek to render intelligible."[18] Similarly, Benson argues that a good theory of contract law eschews the distinction between descriptive and normative; by interpreting the practice of contract we simultaneously draw out the moral principles which justify the practice itself.[19] Smith, too, claims that an interpretive theory of contract law can also justify the practice from within. But, as I will argue below, Smith's approach is slightly different than the others. Smith attempts to stay true to the interpretivist aim of providing an *explanatory* theory of a social practice like contract. But he complicates matters by introducing what he calls the 'moderate' morality criterion.

The distinctive methodological claim of these theorists is that the normative force of legal practices is internal to the practice itself. To justify the use of state coercion to enforce, e.g., contractual obligations we draw only on resources which are internal to the practice of contract itself. This view is motivated by a stringent adherence to the commitment that we can only understand the law 'on its own terms'. To draw on resources which are external to the practice would be to impose an extra-juridical point of view on the practice and, as a result, fail to take seriously the commitments of the interpretive methodology.

But how does this work? This raises methodological questions about the source of normativity of private law practices on the interpretive method. The puzzle for the interpretivist is to show how the 'self-justification' of the practice works: how do existing private law practices supply the normative resources to justify the practice of private law? As I discussed in Chapter 1, interpretivism as an

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[18] Ripstein (n 12) 20.

[19] Benson (n 6) 2.: "The crucial point is that ideally this conception of contract should be drawn from a concrete analysis of *contract law itself* and, in turn, the law's main doctrines should be explicable in light of this conception. This is what contract theory should aim to do." (emphasis added.)

approach to the social sciences is a claim about how to understand social phenomena: we can only truly understand or explain human practices by reference to the meaning, value or norms which are constitutive of the practice. But an interpretive explanation can be provided, in principle, for any social practice, even those that we agree are clearly either morally neutral or morally wrong. For example, it is perfectly consistent with this methodological approach to provide an interpretation of the practices of gift-giving or the practices of racism.

In each case, we seek to provide an interpretation of the principles, norms or values which are constitutive of the practice as reflected in the self-understanding in the practice of the participants. An interpretation of, say, the social practice of racialization or of gift-giving is "normative" in a purely descriptive or explanatory sense: once a theorist identifies the abstract values, principles or norms which are constitutive of the practice we can evaluate a course of action within the practice according to those norms.[20] For example, we can evaluate whether or not someone should or shouldn't bring a wedding gift according to the norms which are constitutive of gift-giving, or whether a person who is identified according to category of ascriptive difference such as skin color should or shouldn't be permitted to live in a particular neighbourhood. And we can do this, of course, without endorsing the idea that racial categories are in any real way relevant to where someone should live. So, if the interpretive methodology explains social practices by reference to the meaning, norms and values constitutive of that practice but does not evaluate or justify those practices from an external moral perspective, how can an internal understanding of private law practices generate the normative claims which

[20] See also Julie Dickson, *Evaluation and Legal Theory* (1st edition, Hart Publishing 2001) 68–69. Dickson raises a similar example of understanding a Catholic mass, and engaging in what she calls 'indirect' evaluation.

these interpretivist theorists of private law accept as central to the task of an adequate theory of private law?

The most straightforward response and the one which is least likely to be accepted by the theorists I am discussing here is to accept a kind of moral relativism. For the moral relativist, "the truth or justification of moral judgments is not absolute, but relative to the moral standard of some person or group of persons."[21] The moral relativist rejects the idea that there is single morality or a single correct answer to a moral question. So, if one were to argue that tort law reflects its own "special morality"[22] or that a particular practice is morally justified by virtue of its constitutive norms and values, it is a straight line from an explanation or description of those norms and values to the claim that they are morally justified. On a relativist view, moral norms are conventional, and once a norm has been identified, there is no further question about whether it is the right moral norm. But, of course, Weinrib, Ripstein, and Benson do not claim to be relativists, so this approach cannot do the work of enabling us to understand their theories.

The theorist who comes closest to this position is Smith. In his theory of contract law, Smith outlines several criteria for a evaluating an interpretive theory of contract. One of these is the criterion of morality.[23] According to Smith, a "fundamental feature of law's self-understanding is that… laws are understood, from the inside, as providing morally good or justified reasons to do what the law requires."[24] Accordingly, an interpretive theory of contract law must capture, from

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[21] Chris Gowans, 'Moral Relativism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/moral-relativism/> accessed 5 November 2022.
[22] Ernest Weinrib, 'The Special Morality of Tort Law' (1989) 34 McGill Law Journal 403.
[23] Smith (n 12) 13.
[24] ibid 15.

an internal perspective, the reasons that justify the practice of contract. Smith is clear that by this he does *not* mean that "a good theory of law ought to show that the law *is*, in fact, morally justified."[25] Smith explicitly rejects this more demanding "strong" version of the morality criterion.[26] If a theorist's aim is to provide an interpretive explanation of a practice, then it makes sense to say that the theorist is not engaged in a thoroughgoing moral justification of the practice. And Smith is clear about this: the strong version "conflates accounts of what the law *should be* (the goal of a *prescriptive* theory) with accounts of what the law *is* (the goal of an *interpretive* theory)."[27]

Where things go wrong is when Smith introduces the distinction between "weak" and moderate" forms of the morality criterion and endorses the latter. Smith argues that a weak version of the morality criterion "holds that a legal theory must explain why law claims authority but it regards any kind of explanation as, in principle, sufficient."[28] Smith uses the "idea that contract law is a tool for systematically exploiting the poor for the benefit of the rich"[29] as an example of a theory which meets the weak version of the morality criterion. He dismisses these kinds of theories as "conspiracy theories" and says that they are highly implausible.[30] However, here Smith himself confuses explanation and justification. According to his own formulation, the weak morality criterion regards any kind of explanation of the authority of law as sufficient. But an explanation of authority is not the same thing as a justification of it. The example he offers as a "conspiracy theory" is not a justification of the practice of contract, but reflects a particular

[25] ibid 17.
[26] ibid 18.
[27] ibid.
[28] ibid 16.
[29] ibid.
[30] ibid.

methodological approach to explanation. Materialist theories purport to explain social practices by showing how the ideas, values and norms expressed by the participants in the practice are determined by the underlying and historically contingent material conditions in which those participants are situated; the materialist gives causal *explanatory* priority to the material factors and not ideas.[31] The Marxist example he points to is no justification of contract at all, but simply an explanation of why the practice exists as it does. There is nothing conspiratorial or "insincere" about this form of explanation. It simply gives explanatory priority to the material conditions in which individuals act. This is not a claim about a group of wealthy and high-powered individuals conspiring to hold that property and contract are justified in a particular way because it serves their interests. Rather, it is a claim about the role of material conditions and interests in the process of belief formation; it is an explanation for why individuals come to hold the beliefs they do.

A better way to understand the weak version of the moral criterion is in a straightforwardly descriptive manner: by simply referring to the reasons that are in fact given by participants in the practice to justify their actions. This is both justificatory and internal and involves no prescriptive or moral appraisal: we simply report the justifications that participants in the practice give for why they believe the practice is legitimate. Here 'moral' is employed in a purely descriptive sense and not in the normative sense. But Smith does not take this route. Instead, he endorses a 'moderate' version of the morality criterion. According to the moderate version, "a good legal theory should explain the law in a way that shows how the law *might be thought to be* justified even if it is not justified."[32] The participants might be wrong,

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[31] Peter Railton, 'Explanatory Asymmetry in Historical Materialism' (1986) 97 Ethics 233. Similar materialist explanations are given in the case of race. See, e.g., Vanessa Wills, 'What Could It Mean to Say, "Capitalism Causes Sexism and Racism?"' (2018) 46 Philosophical Topics 229.
[32] Smith (n 12) 18.

but we should at least be able to see that they "are not incoherent or insincere"[33] in thinking that the law is justified. To satisfy this moderate version of the moral criteria the theorist must identify a "moral principle" but not necessarily "a good or justified moral principle."[34]

This of course leads to the question of how a moral principle can be evaluated from any standpoint other than a moral one. Smith seems to be trying to find a middle ground, but it is not clear that such ground is stable. It is difficult to make sense of the claim that a theory must identify "recognizably moral foundations as opposed to … the best possible moral foundations."[35] Either the practice is morally justified or it is not. If the theorist is not interested in actual moral justifications of the practice, then it is a purely explanatory exercise which requires only the weak version of the moral criterion as I've reconstructed it. On the other hand, if Smith is claiming that we can justify the practice by a moral principle but not "a good or justified" moral principle, we might understand his claim as a relativistic one: that there are a variety of possible moralities, and the theorist is just picking out one from the many. This reading is consistent with his claim that "a moral principle is one that is regarded as moral by the consensus of those familiar with the practice of making moral arguments."[36]

Although there is some ambiguity, I think the better way to understand Smith's project is as a purely explanatory theory of the practice of contract and not a normative one. I think this is in keeping with interpretivism as an approach to explaining social practice. Further, as I argued in Chapter 1, this way of

[33] ibid 19.
[34] ibid 21.
[35] ibid 24.
[36] ibid 22.

understanding interpretive theories opens up the possibility that there will be different and possibly conflicting self-understandings of the point or purpose of a practice and different or conflicting moralities.

Unlike Smith, theorists like Weinrib, Benson and Ripstein clearly claim that their theories of private law are normative in the sense of offering a moral justification of private law practices. For example, Weinrib has referred to tort liability as being constitutive of a "special morality";[37] he has argued that "Kantian right supplies the moral standpoint immanent in its structure";[38] and he has stated "that private law constitutes a normatively distinct mode of interaction" [39] or a "distinctive normative enterprise."[40] Similarly, Benson argues that a theory of contract ought to show how coercively enforceable contractual obligations are legitimate.[41] And Ripstein claims that his theory of private wrongs reflects "the moral idea that no person is in charge of another",[42] and that tort law "gives effect" to a distinctive "morality of interaction."[43] Each of these theorists take one of their tasks to be articulating the moral or normative basis of the practice of private law they are theorizing.

However, as noted above, each proceeds on the footing that this normative basis is internal to the practice itself. Ripstein argues that the law is "an exporter rather than importer of …[moral] ideas".[44] Benson claims that his project is "to see whether modern contract law… can be accounted for *in its own terms* on a basis that

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[37] Weinrib, *The Idea of Private Law* (n 16) 2.
[38] ibid 19.
[39] ibid 2.
[40] ibid 8.
[41] Benson (n 6) 1.
[42] Ripstein (n 12) 6.
[43] ibid 8.
[44] ibid 21.

is morally acceptable".[45] And Weinrib similarly argues that private law cannot be explained by appeal to "independently justifiable purposes"[46] which are extrinsic to private law. Further, he clearly identifies what is the key question that I examine here: "having abandoned the standpoint of external purpose, what normative grounding, if any, can we claim for private law?"[47] Weinrib goes on to claim that private law's "normative force derives from Kant's concept of right";[48] "Kantian right supplies the moral standpoint immanent in its structure."[49] Just as "[e]xplaining love in terms of extrinsic ends is necessarily a mistake",[50] so too would it be an error to explain private law by reference to values which are extrinsic to private law. As Weinrib says, private law, like love, is its own end.[51]

But how precisely does this kind of internal normative grounding work? Here I'd like to focus on Weinrib's approach, because he explicitly acknowledges this question head-on. To begin, I pick up on the analogy that Weinrib draws between love and private law, not because I think that Weinrib's argument rests on this analogy, but because it helps sharpen our analysis and understanding of what an internal justification of a practice might look like.[52] The first thing to observe is that Weinrib's claim demonstrates the difficulty with arguments by analogy. We can accept that the purpose or value of loving relationships cannot be explained by reference to extrinsic ends and still wonder what this has to do with legal practices. One important difference between love and private law is that, unlike love (one

[45] Benson (n 6) 1. (emphasis added.)
[46] Weinrib, *The Idea of Private Law* (n 16) 5.
[47] ibid.
[48] ibid 19.
[49] ibid.
[50] ibid 6.
[51] ibid.
[52] Further, others have discussed this analogy. See John Gardner, 'The Purity and Priority of Private Law' (1996) 46 The University of Toronto Law Journal 459.

hopes), law is a normative practice that involves the use of the coercive apparatus of the state. The rights and obligations constitutive of a loving relationship do not necessarily justify the exercise of state power.[53] If one of the tasks of a practice-based normative theory of private law is to show how state coercion is justified, it is of little help to point to a normative relationship which involves no such coercion to support the claim that it can be justified on its own terms.

Of course, Weinrib's argument is more complex, and doesn't proceed by analogy alone. But the analogy is meant to serve a purpose. The point is that, like love, the law can be understood and justified on its own terms—internally to the practice. What I am suggesting is that while that might be plausible in a context of interpersonal relationships that are widely held to be valuable, this is question-begging when it comes to private law: the precise thing we are trying to determine is whether private law has such value.

But there is a second and more general problem with the structure of any argument that purports to normatively ground a social practice by appeal only to the resources internal to it. To demonstrate this problem, we can use look consider how this approach would apply in general, to any social practice. For example, let's return to the example of the practice of racialization. On one description, "Race is a taxonomy of ascriptive difference, that is, an ideology that constructs populations as groups and sorts them into hierarchies of capacity, civic worth, and desert based on "natural" or essential characteristics attributed to them."[54] This practice of sorting individuals into social hierarchies generates a normative social order which

[53] One might respond that that is precisely what is going on when we explain family law. But this assumes that the point of family law is the enforcement of the norms of loving relationships and not the use of a legal institution for some other purpose.

[54] Adolph Reed, Jr., 'Marx, Race, and Neoliberalism' (2013) 22 New Labor Forum 49, 49.

regulates the relationships between individuals. Ascriptive racial categories structure a hierarchal system of interpersonal relations within which members of particular categories have certain rights, privileges and duties against members from other categories. Participants in the racial normative order will have particular self-understandings of the practice of racialization. Some might understand the practice as a way of rendering 'intelligible' or 'making sense' of the different material circumstances of those who fall in these categories. Some might offer interpretations of the practice which demonstrate not only why such relations are justified but also how the rights, privileges and duties that are constitutive of the practice may be enforced through state coercion. If we try to provide a theoretical understanding or explanation of racist practices by identifying the values, norms, and ideas which are constitutive of the practice and reflected in the self-understanding of the participants, are we also, at the same time, justifying it?

When we evaluate a particular normative social practice such as racism, we do so from a moral or political standpoint. We ask: is this a good practice to have? And to take this moral standpoint we necessarily draw on resources which are external to the practice. To ground the justification of the practice in the norms and values which are constitutive of the practice is question-begging. It is question-begging because the argument assumes that the norms that are constitutive of the practice are moral norms without offering a reason for why we ought to think that. This seems obvious when we think of practices which everyone agrees to be morally bad, such as normative practices which create social hierarchies based on race, gender, etc. It may seem less obvious when we inquire into a practice that we have already judged to be valuable such as, e.g., love. But that is why the example of love is misleading: it seems plausible to claim that the way we understand the value, meaning or purpose of love is to explicate the norms which are constitutive of a

loving relationship because we begin with the assumption that loving relationships are valuable. But why should we say the same about legal practices?

Perhaps we could say the same about legal practices, but it seems to me that fewer people will share that intuition when it comes to law than when it comes to love. However, let's consider the path of simply starting from the presumption that law is valuable. We might say that it is simply good to have private law of some sort, as opposed to not having private law. It provides stability and order and solves coordination problems. And if there is a fair amount of leeway as to the shape such law should take, then why not presume that what we have—our existing practices—is acceptable as a starting point?[55]

First, we might note that the fact that such practices exist and have been followed doesn't give us good reason to follow them. The fact that we need some sort of legal practice might give us that reason, if the system's good outweighs its bad. But that requires specifying what makes the system good. And that leads to the second objection to this argument: this sort of argument is not open to Weinrib. If we can identify a purpose external to the law which the law serves, then we have a way of evaluating whether it is good law, or bad law, or good enough law. But that approach isn't available to Weinrib, because he looks internally to law. He is arguing that our inquiry about the value of private law is one about private law's own internal purpose. He doesn't look to external justifications or functions of the law. It might be plausible to say that it is better to have private law than not have it, but this kind of argument demands an answer for why we have law, and that cannot come internally from law the way that Weinrib argues it can.

[55] As Smith says, "It is a reasonable starting assumption (but no more) that the actual law bears some relation to good law." Smith (n 12) 6.

But I think the structure of Weinrib's argument is not, ultimately, one which simply begs the question. Weinrib does not simply assume the conclusion that he is attempting to argue for; that is, that existing private law practices are morally justified. Instead, Weinrib's theory reflects a transcendental approach to normative justification. Through the process of regression, the theorist uncovers the normative foundations of a social practice which are implicit or immanent in it:

> One starts with the ensemble of institutional and conceptual features salient in juristic experience. One then works back to the justificatory framework presupposed in that ensemble, all the while preserving the tendency toward coherence that characterizes both theorizing in general and private law in particular. This process of regression leads to the category of corrective justice, which represents the structure of the relationship between parties at private law. A further regression to the normative presuppositions of this structure leads to the Kantian concept of right.[56]

Through this process of regression, Weinrib argues, we can identify a normative idea which coheres with the self-understanding of the participants in the practice of private law: "Kant's concept of right as the governing idea for relationships between free beings."[57] This idea is implicit and not expressed by the participants in the practice, as Weinrib himself acknowledges: "corrective justice and Kantian right are not themselves on the lips of judges."[58] The normative idea is tacit or implicit in the practice, in the sense that it provides the normative conditions that make the existing practice of private law possible.

I make no comment here on the viability of transcendental approaches to justifying social practices in general. But I do think that, even if we accept this approach to normative theorizing about private law practices, there is reason to

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[56] Weinrib, *The Idea of Private Law* (n 16) 19.
[57] ibid.
[58] ibid 20.

think that it leads to substantive claims that are not normatively attractive. To take just one example, consider how persuasive Weinrib's normative account of private law is, on its own terms, in the context of artificial persons. Suppose that, through the process of regression, we conclude that the normative foundation of the practice of private law is each person's innate right to formal freedom and equality. We accept that private law reflects the interaction of "free beings", grounded in an idea of "personality" which "signifies the capacity for purposive action without regard for particular purposes. This capacity is implicit in the rights and duties of private law."[59] Or, if we take Ripstein's formulation, we accept that private law reflects "the moral idea that no person is in charge of another."[60] Is this a good substantive normative argument in the context of artificial persons such as corporations?[61]

Here I am not questioning the descriptive point. We can accept that our existing legal practices *treat* corporations as if they have legally enforceable rights and duties and treat them as if they are purposive agents with a right to non-interference. But do we accept the transcendental normative justification of these legal rights and obligations: are the private law rights and obligations of corporations *justified* because a corporation has an innate right to freedom as non-interference or because of the moral idea that no person is in charge of another?

It does not seem plausible to me that they are. To begin with, there is a straight-forward conceptual argument: the right Weinrib articulates is an "innate" right associated with personhood. Corporations are creations of statute, and by definition are *artificial* persons, and therefore cannot have innate rights. A

[59] Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012) 29.
[60] Ripstein (n 12) 6.
[61] This question has been raised in the context of rights and obligations of states in tort law. See Paul B Miller and Jeffrey A Pojanowski, 'Torts Against the State' in Paul B Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford University Press 2020).

corporation is a legal construct that is generated by our practices; we get to decide how it functions and what 'rights' it has, but they are not innate.[62] We might decide to treat artificial persons as having the same rights and obligations in private law as a natural person. But that treatment requires some normative justification. And a justification that is grounded in the corporation's innate right to freedom seems like a normatively implausible one.

One strategy might be to say that the norms that regulate the interactions and relationships between artificial persons are conceptually derivative of those that regulate the interactions between natural persons. But what is at issue is not the conceptual extension, it is the normative grounding. We might accept that the norms that regulate the private interactions between natural persons are grounded in their innate right to freedom as non-interference. And we might accept that, as a conceptual matter, we derive the rights and obligations of artificial persons from the rights and obligations of natural persons. But even if the concept of artificial persons is derivative of natural persons, there remains a question about the treatment artificial persons are entitled to. It seems implausible that artificial persons should be thought to have the same innate right to freedom as natural persons. They may be entitled to the same treatment, but for different reasons (e.g., because of the social benefits of extending that treatment to them or because they have different interests

[62] As Miller and Pojanowski say about Kantian versions of corrective justice such as those endorsed by Ripstein and Weinrib: "Equal freedom may well be *a* value that underlies *some* primary rights in private law. But the claim that it underlies all primary rights enjoyed by natural persons is implausible, and more to the point, it does not and cannot support the extension of primary rights to artificial persons, including the state. Equal freedom has no traction here for the simple reason that the attribution of personality to artificial persons is not premised on recognition of their natural moral status and/or capacities, including those upon which Kant was fixated. Artificial persons have no innate capacity for reason and, far from being self-determining, exist to serve the ends of others. Nor do artificial persons have many of the endowments that Ripstein attributes to "private persons" (e.g., bodies, and personal reputations)." ibid 330.

which the law ought to protect[63]), or they may not be entitled to the same treatment as natural persons at all. The transcendental argument precludes us from asking important normative questions about what private law rights and obligations an artificial entity like a corporation ought to have.

Another possible response is that the norms that regulate the interactions between artificial persons belong to a normative order which is separate from the one which regulates interactions between natural persons. That is, there is contract, tort and property law for natural persons and then there is contract, tort and property law for artificial persons. But such a position is inconsistent with the approach taken by Weinrib. The "ensemble of institutional and conceptual features"[64] which Weinrib relies on when offering his account of private law includes judicial decisions adjudicating private disputes between artificial persons such as corporations – so that response is not open to him.

In this Part, I have argued that practice-based theorists who justify a practice by drawing only on the normative resources internal to the practice – such as the interpretivists I have discussed here – appear to have three options available to them. First, they can embrace relativism about morality: there are a range of possible moralities and the norms which are constitutive of existing private law practices reflect one of those moralities. Second, they risk begging the question. If the process of theoretical explanation of the norms and values which are constitutive of private law practices simultaneously morally justifies the practice, then the theorist simply assumes the conclusion they purport to argue for. Finally, the theorist may adopt a

[63] For example, Miller and Pojanowski argue "that theorists should consider the kinds of moral interests that the law may attribute to artificial persons and the values that might give these interests their moral salience." ibid 346. In other words, this requires us to engage in moral argument about what those interests and values are: they are not given.

[64] Weinrib, *The Idea of Private Law* (n 16) 10.

transcendental approach to normative justification. Here the theorist doesn't assume that private law practices of holding persons accountable for wrongs through the coercive apparatus of the state is morally justified. Instead, the theorist's task is to make explicit the moral ideas which are tacit in the existing legal practice of holding people accountable for the wrongs they commit and which make that practice possible. In the context of private law, I have suggested such approaches lead to some normatively unattractive conclusions. Or, at the very least, this approach precludes the discussion of some normative questions that we might want to keep open, such as, e.g., what rights and obligations artificial entities such as corporations ought to have in private law.

B. Situated Practical Theory: Justifying Within a Practice

In the previous section I argued that we should be skeptical of practice-based normative theories which claim to both explain and justify a practice on the basis that the normative resources with which we can normatively justify a practice are internal to the practice. In the next section, I want to suggest that there is another approach to practice-based normative theorizing about private law which takes seriously our existing practices, avoids straying into the territory of ideal theory, and doesn't require us to adopt the interpretivist's approach of relying only on the normative resources internal to the practice. I argue that we don't need to give up on a practice-based normative theory of private law.

On this alternative approach we take up the position of an agent situated within the existing practice of private law and ask the practical question of what ought to be done.[65] Through this approach, we are still able to take existing practices

[65] Felipe Jiménez has argued that we should distinguish between "questions *about* and *within* legal institutions." Felipe Jiménez, 'Two Questions for Private Law Theory' (2021) 12 Jurisprudence 391,

seriously by taking up the position of an agent within the existing practice and asking how such existing practice ought to figure in the agent's practical deliberations. It remains a thoroughly normative inquiry; we are concerned with the practical question of what that agent ought to do. We do not need to draw only on normative resources within the practice; we can argue that the question of what the agent ought to do is guided by practice-independent principles. Finally, it is not an ideal theory in the sense of failing to take existing practices seriously; we ask what the normative significance of existing practice is for the purposes of answering the practical question of what the agent ought to do.

This approach to normative theorizing about private law practice is, in very general terms, similar to certain views that have been advanced in general jurisprudence about law in general. For example, Gerald Postema has argued against an approach to legal philosophy which aims to provide a theoretical explanation of the practice of law by providing an interpretive or "hermeneutic" approach which aims to reflect the self-understanding of actual committed participants in the practice. Instead, Postema argues, we should understand jurisprudence as a "practical philosophy."[66] On Postema's view we take up a logical point of view within the practice, not the personal perspectives of participants in the practice;[67] the aim is not to interpret the self-understanding of actual participants in the practice. Further, this approach doesn't aim to provide a theoretical explanation of the practice but instead asks "practical questions – questions for rational agents

412. (emphasis in original.) In other words, "There is a central difference between questions about the value, justification, or optimal structure of private law institutions, and questions answered within the complex set of doctrines and materials that constitute those institutions." ibid 413. Here I am focused on questions of the latter sort.

[66] Gerald J Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 Legal Theory 329.

[67] ibid 342.

about what is to be done (what they are to do)";[68] it is a practical inquiry about what ought to be done, not a theoretical explanation of what is being done. Finally, the logical point of view is situated in "practices and institutions…that are already in place and functioning";[69] we are not taking the ideal normative theory approach of asking what the best practices would be to have.

The approach I am suggesting for the practice-based approach to private law theory has much in common with Postema's arguments in general jurisprudence. However, Postema offers this argument for a better way to get at the nature of law.[70] But accepting the practice-based approach I am advancing here doesn't require signing on to a particular view about the nature of law. Indeed, this approach also has much in common with a view in general jurisprudence that has come to be known as eliminativism.[71] The eliminativist argues that we can eliminate the question of what law is,[72] and says that this question is unanswerable or spurious.[73]

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[68] ibid 345.

[69] ibid.

[70] ibid 350.

[71] See, e.g., Lewis A Kornhauser, 'Doing Without the Concept of Law' [2015] NYU School of Law, Public Law Research Paper No. 15-33 <https://papers.ssrn.com/abstract=2640605> accessed 5 November 2022.; Hillary Nye, 'Does Law "Exist"? Eliminativism in Legal Philosophy' (2022) 15 (Forthcoming) Washington University Jurisprudence Review.; Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale Law Journal 1160. Liam Murphy discusses eliminativism but argues against it, see: Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (1st Edition, Cambridge University Press 2014).

[72] Kornhauser says that "judges have no need for a concept of law [and]… neither other public officials nor citizens require one either." Kornhauser (n 71) 3. "How can we do without a doctrinal concept of law? The answer is straightforward. In the standard model, every decision maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision maker need only undertake an one-step decision procedure: weigh all reasons one has at that step." ibid 15.

[73] Nye argues "that the accounts we give of the grounds of law are not responsive to experience, but rather, to our intuitions about the nature of law. As a result, the theories generated by this method also have no experiential upshot. On either outcome—whether nonpositivists are right that morality is part of the grounds of law, or positivists are right that it can never be—there is no functional difference for the legal subject. The two descriptions differ, but the reality is the same. Thus, the claim that one is right is spurious." Nye (n 71) 23.

Instead, the eliminativist argues, we should ask normative or practical questions about what different agents situated in the practice ought to do.[74] Providing an answer to these practical questions doesn't require taking a stand on the nature of law question.

So, for example when we take up the perspective of a judge and ask what they ought to do, what we require is a normative theory of adjudication. This will require a normative account of what kinds of considerations are relevant in the judge's decision-making process, including, e.g., the way that similar decisions have been decided in the past, statutory instruments that have been enacted by legislatures, etc. One could endorse a theory of adjudication similar to Dworkin's interpretivism and say that the judge ought to interpret the institutional history of the legal system according to a normative principle or principles which justifies the judge's use of the coercive power of the state.[75] But this doesn't require endorsing Dworkin's view about the grounds of law – it is not a project in specifying the truth conditions for legal propositions[76] or "the fundamental or constitutive explanation of legal rights and obligations".[77] It is an answer to the practical question of what a judge ought to do.[78]

Importantly, this approach is not limited to the standpoint of judges, nor is it limited to the practical question of how judges ought to decide cases. We can take

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[74] Kornhauser (n 71) 17–19.
[75] Dworkin (n 14) 190.
[76] ibid 4.
[77] Nicos Stavropoulos, 'Legal Interpretivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/> accessed 31 October 2022.
[78] See Leiter, noting that Dworkin conflates a theory of law with a theory of adjudication: Brian Leiter, 'Review of Justice in Robes; Exploring Law's Empire: The Jurisprudence of Ronald Dworkin' (2006) 56 Journal of Legal Education 675, 677. We might accept Dworkin's interpretivism as a plausible normative theory of adjudication but reject it as a theory of the law.

this approach from the perspective of any agent in the practice. For example, we could take up the standpoint of an agent that is a member of the legislature in a particular jurisdiction. Or we might take up the standpoint of a person who is subject of the law. For each of these agents, we can ask the practical question of what ought to be done given existing legal practices.[79] And by taking up a different perspective, we ask different normative questions about the practice. An answer to the normative question of what a legislator ought to do would likely look quite different from the answer that we give about a judge. But, like a judge, a legislator is a legal official that occupies a role in an institution that exercises state power, so, as with a judge, we need some normative principle which justifies the power that is exercised by agents in that role.

My aim here is to show that a position like this could be taken in the context of private law. And, further, I aim to offer a practice-based approach to normative theorizing about private law practice which avoids the problematic approach to normative theory adopted by the interpretivists I discussed above. To help illustrate this point, consider the example of a particular area of legal practice such as, e.g., contract. Suppose we take up the position of a judge tasked with adjudicating a contractual dispute between two parties. The practical question for the judge is: How should I resolve this dispute? Because this is a practical question, it must be grounded in a normative argument. Further, because the judge occupies a role in the public institution of the court, the resolution of the contractual dispute is backed by the coercive apparatus of the state. So, some normative principle which justifies that use of state power must figure in the argument. We might say, then, that a judge is not justified in resolving the dispute in a way that is inconsistent with past decisions

[79] Each agent requires a decision protocol tailored to their role. See Kornhauser (n 71) 17.

of courts that have addressed similar disputes, because this kind of power exercised by a court is not justified. Instead, a judge ought to give normative consideration to, e.g., the way that judges have decided cases with similar facts in the past, or whether the legislature has passed a particular statutory instrument that addresses an issue that is relevant to the particular contractual dispute which is the subject of litigation.[80] Importantly, however, the normative principle that grounds the argument for how a judge ought to decide the particular contract law dispute need not be 'internal' to the practice itself; instead, it can be a practice-independent principle of political morality.

V. Conclusion

In this Chapter, I have examined different approaches to normative theorizing about private law practices. I drew a distinction between ideal normative theory and practice-based theory. I showed how the practice-based approach taken by interpretivist theories of private law which claim to justify private law practice 'internally' are problematic. However, I suggested that another approach to practice-based normative theorizing is available which is not subject to the same worries. We take up the perspective of agents in the existing practice and ask the practical question of what they ought to do. An answer to this practical question requires engagement with normative principles that justify that agent's decision-making. But these normative principles need not be internal to the practice.

In the next two Chapters I examine two further questions that might be raised with this approach. First, specifically with respect to the role of a judge in private law: does a normative theory of adjudication still require us to first identify and

[80] For a discussion of stare decisis and some of its justifications, see Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Michigan Law Review 1.

classify a subset of legal norms as contract, tort, or property norms? In Chapter 3, I show why this way of framing the question simply reproduces disagreement about the grounds of law. Drawing on recent developments in general jurisprudence, I argue that identification of a subset of legal norms is not necessary. What is needed is an argument about how the materials and practices that comprise the institutional history of a legal system ought to figure in to a judge's practical deliberations. Second, what if there is irresolvable disagreement about the principles of political morality that ground the justification of the decision of an agent situated in the practice like a judge adjudicating a contract, tort, or property dispute? In Chapter 4, I show what normative private law theory would look like if, rather than trying to resolve this disagreement, we proceed with this disagreement in mind.

Chapter 3: Description & Classification in Private Law Adjudication

I. Introduction

The previous chapter highlighted an agent-focused approach to normative theorizing about private law practices: we take up the perspective of an agent who occupies a particular position within the practice of private law and ask, 'What ought to be done?'. One possible objection to this approach is that it simply reintroduces the problem which agent-focused theorizing attempts to avoid. The worry is that, to provide an answer to this practical question, we still need to first identify what the law is. To provide an account of how a judge ought to adjudicate, say, a contract dispute, one first needs an account of what contract law is.

In this chapter I provide a way of responding to this objection. In doing so I defend an intuitive and simple argument. Legal officials are agents faced with practical questions about what ought to be done. However, a legal official's practical reasoning is not unconstrained. As an agent situated in an institutional practice, a judge ought not to take anything and everything into account when deciding what to do. The standard view is that the legal official's deliberations are constrained by existing *law*. Accordingly, this requires us to first identify what the law is and how it ought to figure in the agent's practical reasoning. But the difficulty with this approach is that it simply reproduces disagreement at the level of general jurisprudence about what the law is. What is needed for the kind of question I am interested in here (i.e. what a judge ought to do) is a substantive normative argument about which considerations ought (or ought not) to carry normative weight in the agent's practical deliberations and how. When a judge adjudicates a particular dispute, what should be 'in' and what should be 'out' in the judge's deliberations? I will show that this approach does not require us to first resolve the descriptive step

of identifying valid legal norms; it is a thoroughly normative argument about which facts ought to figure in an agent's practical deliberations, and the way in which they do so.

I begin by setting out what is arguably one of the prevailing views in the private law theory literature: that we first need a descriptive account of what contract (or tort, or property) law is before we move on to the question of how a judge ought to resolve a contract (or tort, or property) dispute. The general idea which motivates this view is that a description and classification of the law is logically prior to any question of what the agent ought to do about it. Using the example of contract law and the issue of third-party beneficiaries, I show that both of these arguments are problematic. I argue that not only is classification of legal norms into doctrinal areas unnecessary, but that this way of framing the issue raises the question in general jurisprudence of what the law is. What is necessary is a thorough-going normative argument about how a range of materials and practices might figure in the practical reasoning of judge adjudicating that dispute. Here I do not defend a particular position on what materials and practices are normatively significant, I simply argue that the question is thoroughly normative one: what is required is an argument for why a particular fact should or should not have any weight in an agent's reasoning. I conclude by showing that what is required by this approach is one or more normative principles grounded in a normative political theory which justify the legal official's use of state power.

II. The Priority of Description Argument

The approach to private law theory that I outlined in the previous Chapter is both practice-based and thoroughly normative. It is practice-based because it takes up the perspective of a participant situated within the existing practice. It is a

thoroughly normative inquiry because the question it seeks to answer is a practical one: what ought to be done. But unlike the interpretive theories of private law discussed in Chapter 1, this approach does not purport to both explain and justify the practice; it makes no descriptive or explanatory claim about what the law is. However, it takes existing practice seriously because it asks what an agent situated within the practice ought to do, and this normative question requires some account of how existing and historical institutional practice bears on the agent's practical deliberations.

But one might object that this agent-centered approach can't avoid the priority of descriptive questions about the law over normative ones. One might say that identification of the law is a necessary precondition to asking any practical questions about what an agent ought to do about it. Take the example of a legal official such as a judge.[1] There are several practical questions that confront a judge tasked with adjudicating a dispute. The judge must decide whether or not to apply the existing law in the particular case. If the judge concludes that existing law does apply, there is a question of how it ought to apply on the facts before them. Alternatively, the judge might conclude that existing law does not apply. Or the judge might conclude that existing law would normally apply on the facts of the particular case before them but that the time is right to evaluate and reform the law. Each one of these practical avenues cannot be pursued before first identifying what the law is. Identification and description of the law is therefore necessarily prior to

[1] The approach I am defending here takes up the perspective of a legal official occupying a particular institutional role and asks: What ought to be done? Throughout most of the chapter I focus on judges, but it is important to note that related questions can be asked about a variety of different agents in the existing practice.

moving on to practical questions about what an agent ought to do. Call this the *priority of description argument*.

The priority of description argument is not the same as the argument against ideal normative theorizing about the law that was discussed in Chapter 2. Recall that there the objection was that by starting with a clean slate and formulating the moral principles of an ideal contract (or tort, or property) law, ideal theory fails to take existing legal practice seriously. The agent-centered approach I am defending avoids this objection; it takes existing legal practice as its starting point. However, while the agent-centered approach starts with existing practice, the priority of description argument says that we still cannot sidestep descriptive questions about what the law is. That is, it rejects the possibility of a thorough-going normative theory of law, even one which focuses solely on the practical question of what an institutionally-situated agent ought to do. Even if we accept the agent-centered approach to practical normative inquiry, the priority of description argument goes, the agent must identify what the law is before providing an argument for why the law ought to be applied (or not) or why the law ought to be reformed (or not).[2] This is different from the argument against ideal normative theory.

To illustrate this argument in the context of private law, suppose there is an agreement between A and B where A expressly promises to confer a benefit on C in exchange for B conferring a benefit to A. Suppose there is now a dispute between the parties and the issue is this: can C enforce B's promise through the coercive apparatus of the state? In order to ask this question, is it necessary for us to first

[2] Liam Murphy makes a similar argument in the context of general jurisprudence. He says: "Each of us needs to take a stance on the dispute about the grounds of law if we want to be able to offer answers to legal questions." Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (1st Edition, Cambridge University Press 2014) 16. Murphy's argument is in the context of responding to the 'eliminativist' view which I discuss in more depth below.

describe what contract law is? The priority of description argument says yes. We need first to identify the prevailing legal norm. We must establish the truth or falsity of a proposition such as: 'Third party beneficiaries have no legally enforceable rights under a contract.' In other words, we must identify whether a norm which denies rights to third party beneficiaries is a valid contract law norm. It is only once we get clear on this point, the argument goes, that we can then proceed to ask the normative question of whether a judge adjudicating a dispute between A and C ought to apply the law as it is or whether the law ought to be reformed.

On this view, the question that guides our normative inquiry is framed differently. Instead of asking the more general question: 'What should a judge do?', we ask: 'Given that the law of contract is X, what should a judge do?' or 'Given that X is a valid contract law norm, what should a judge do?' Practical normative theorizing about what an agent ought to do can't even get off the ground until we've come to a view about the nature of contract law. This approach requires us to engage in the exercise of drawing conceptual boundaries. What counts as contract, tort, and property law? Or what subset of valid legal norms count as the valid legal norms of contract, tort, or property?[3]

III. Responding to the Argument: Does Description and Classification Matter?

We regularly see disagreement in the scholarly literature about whether a particular legal rule or norm regulating the legal relationship between private persons is properly classified as a valid legal norm of property, contract or unjust enrichment. The classification of legal rules, norms, doctrines, etc. into doctrinal

[3] For discussion of the issues around identifying areas of law, see Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2022) Forthcoming Oxford Journal of Legal Studies 1. I discuss their views in more depth below.

categories is taken to have substantial importance when theorizing about private law.[4] One of the significant debates in private law theory of the last decade has been over the correct classification of claims of unjust enrichment.[5] For example, there is vigorous disagreement over whether, e.g., a mistaken payment gives the payor a claim against the payee under property, contract or under a conceptually distinct doctrinal area called unjust enrichment.

Here, as an entry point to this substantial body of literature on the topic of classification in private law, I focus on one recent discussion about how to understand the role and importance of classification, from Fred Wilmot-Smith. In his review of Charlie Webb's *Reason and Restitution*,[6] Wilmot-Smith provides a helpful summary and taxonomy of different methods of classification in the private law theory literature.[7] According to Wilmot-Smith, private law theorists may classify legal norms according to their "normative shape";[8] that is, "group[ing] legal norms according to the type of act they require"[9] or "according to the form of the legal relation instantiated".[10] Alternatively, a theorist may classify legal norms according to the "formal structure"[11] of rights and duties regardless of the underlying substantive justification of those rights and duties. Finally, a reasons-based approach classifies claims "according to the reasons which justify the

[4] See, e.g., Peter Birks (ed), *The Classification of Obligations* (Oxford University Press 1998).
[5] See e.g., Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press 2016); Charlie Webb, 'What Is Unjust Enrichment?' (2009) 29 Oxford Journal of Legal Studies 215; Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 The Cambridge Law Journal 521; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 Law Quarterly Review 574; Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009).
[6] Webb (n 5).
[7] Frederick Wilmot-Smith, 'Reasons? For Restitution?' (2016) 79 The Modern Law Review 1116.
[8] ibid 1117.
[9] ibid.
[10] ibid.
[11] ibid 1118.

claims";[12] claims that "are justified by the same reason or sufficiently similar reasons"[13] are grouped together. According to Wilmot-Smith, these different methods of classification are "mutually consistent ways in which legal norms can be grouped together. Each will highlight different features of the law."[14]

What I am interested in is the relationship between this classificatory project in private law and normative questions about private law. Does description and classification of legal norms as properly belonging to contract, property, tort, unjust enrichment, etc. matter when it comes to normative or practical questions about the practice of private law? Here I consider this relationship with respect to two different normative questions. First, whether description and classification matters for the purposes of normative questions about legal reform. Second, whether description and classification matters for the normative question of how a judge ought to resolve a private law dispute.

A. *Does classification matter for the normative question of how private law ought to be reformed?*

How, if at all, does the project of classification of law assist in answering normative questions about the law? In his examination of the project of legal classification in private law, Wilmot-Smith "join[s] Webb in rejecting classificatory categories as tools of legal reform".[15] The problem with this approach is that any prescription for reform which is based on the classification of legal norms into doctrinal categories can simply be redescribed as a prescription for the reclassification of those same legal norms into different doctrinal categories. As

[12] ibid.
[13] ibid.
[14] ibid 1117.
[15] ibid.

Wilmot-Smith puts it, "any reformist suggestion can be taken as a flaw not of the law but of the classification *of* that law."[16] An argument for reform of existing legal rules is a normative one and is based on a reason or reasons for why the law ought to be changed. A proposal for reform must therefore be based on the underlying reason or reasons that justify the legal norm or norms that are the subject of reform. Accordingly, prescriptions for reform are made by direct appeal to the reasons which justify the legal norm and are not mediated by any kind of classificatory schema. Here's how Wilmot-Smith reconstructs the argument:

> We have two rules, R1 and R2; both rules are justified (on the close knit model) by some reason, r. Suppose that some defence, D, should be available to resist any claim justified by r. If R2 does not have the particular defence, the defence should be made available. Classification of R1 and R2 is unnecessary for this argument; indeed, classification itself can do no work.[17]

I am in full agreement that classification plays no role when it comes to normative questions of how the law ought to be reformed. An argument for changing the law cannot be grounded in classification without a further normative premise, and it is that normative premise that does all the work. However, there are difficulties with the way that Wilmot-Smith frames the argument.

First, it reflects a narrow understanding of what a normative theory of private law practice is. Normative theorizing is characterized as "prescrib[ing] what the law ought to be".[18] The analysis is framed only in terms of how classification bears on normative theory understood as prescriptive claims about the reform of the law; that is, normative claims about how existing law should be modified. We can either describe what the law is or provide an argument about how it ought to be changed.

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[16] ibid 1122.
[17] ibid 1124.
[18] ibid 1123.

But this formulation elides the distinction between different normative questions that can be asked about the practice of private law. One question might be how the law ought to be reformed. But another is the kind of question I have focused on here: what should an agent situated in the practice do? This question is also normative, but it is not properly understood as being about reform of existing legal rules. It is a practical question of what an agent occupying a role in an institutional practice ought to do. Webb clearly highlights this distinction between different types of normative theorizing about private law:

> Much private law scholarship displays a failure to appreciate that (1) practical questions are always, in this way, normative; (2) an account that seeks to answer these questions must be normative too; and (3) normative inquiry is not limited to the questions 'How ought the law be reformed?' and 'What would be ideal law?'[19]

It is unsurprising that some theorists might view normative theory in this narrow way. The framing of the question invites this kind of analysis. If we draw strict methodological lines between descriptive theory understood as 'what the law is' and normative theory understood as 'what the law ought to be,' it would be natural to think not only that the two projects are distinct but that the former is a necessary precondition to the latter: we must first identify what the law is before we can motivate any normative argument for how it ought to be changed. But if we take up the position of a participant in the practice such as a judge and ask the practical question of what they ought to do, we recognize that this way of framing the problem is incomplete. Even if we accept that we can positively identify what the law is, what is still required is a further normative argument (or reason(s)) for why a judge ought to apply it and, if so, how.

[19] Webb (n 5) 30, fn 41.

So, I agree that classification of legal norms or rules is not necessary for the project of legal reform. But legal reform is not the only kind of normative question that we might ask about private law practices. What I want to show here is that classification is also not necessary for answering the normative question of what an agent in the practice ought to do.

B. Does classification matter for the normative question of what a judge ought to do?

Let's return to the hypothetical introduced above. There is an agreement between A and B where A expressly promises to confer a benefit to C in exchange for B conferring a benefit to A. C would like to enforce B's promise and brings an action before the court. The issue here is that the original agreement was between A and B. Does C have an enforceable claim against B? What should a judge to do in this case? Do we first need to come to a view about the nature of contract law or to identify the subset of valid legal norms that are classified as contract law norms?

Now, consider two candidate legal norms that you might think are relevant for the resolution of this dispute. The first is the norm reflected in the common law doctrine of privity. The doctrine of privity states that "a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it."[20] As it was put by Viscount Haldane: "…in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a [right of a third party to recover] arising by way of contract."[21] The second is the norm set out in the Contracts (Rights of Third Parties) Act 1999 (the "Act"). The Act provides that, subject to certain

[20] Edwin Peel, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) section 14-004.
[21] *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co Ltd*. [1915] UKHL 1

conditions, "a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract".[22]

So, how should a judge resolve the dispute between C and B? If we thought that the order of operations required us to first classify legal norms into doctrinal areas, how would we go about classifying these two norms? Theorists of different stripes might be in broad agreement that the doctrine of privity is a contract law norm. This might be true regardless of the method of classification or a theorist's jurisprudential commitments. For example, a non-positivist might argue that contract law (like all private law) reflects the correlative relationship between right and duty and is justified only insofar as it restores a plaintiff's right which has been violated as a result of the defendant's wrongful act.[23] On this view the bipolar structure of the normative relationship means that a stranger to the relationship, such as a third-party to a contractual relationship would have neither a legal right nor a legal duty under contract law. A positivist theorist of private law may reach the same conclusion but by a different route. They might argue that it is in the nature of contract that "contractual terms are those propositions which embrace only the contracting parties (or their assignees): A and B must stand at each end of a proposition if it is to be a contractual term."[24] Both theorists would agree that the doctrine of privity is appropriately classified as a legal norm of contract, despite the fact that one grounds their classification on the normative structure of abstract right and the other on the basis of conceptual necessity or social fact.

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[22] Contracts (Rights of Third Parties) Act 1999, s.1(1)

[23] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 349–350.

[24] Frederick Wilmot-Smith, 'Term Limits: What Is a Term?' (2019) 39 Oxford Journal of Legal Studies 705, 710.

But how do we classify the legal rule(s) set out in the Contracts (Rights of Third Parties) Act 1999? Because the Act promotes the interests of a party which is external to the bilateral relationship of right and duty that obtains between the parties to the contract, a corrective justice theorist like Weinrib would have to say that such a legal rule could not be a rule of contract law properly understood. Similarly, a positivist theorist of contract law, who claims that the nature of a contract is "dyadic", would reach the same conclusion. As Wilmot-Smith argues: "On my own definition, any rights C has will not be contract rights: C is not one of the contracting parties, so the proposition in question is not dyadic…. They are not, in other words, part of the common law of contract."[25] Both theorists would agree that third party rights under the Act are not contract rights at all. But they do so for different reasons. The corrective justice theorist arrives at this conclusion on the basis of the distinctive normative relationship which is constitutive of private law, while the positivist might do so on a basis of a conceptual claim about what the nature of a contract term is.

Are they correct about this? I'm not sure – different theorists may have different intuitions about the nature of contract and what counts as a contractual term. One response might be to engage in the argument about classification—to say: 'No, third party rights *are* contract rights, properly understood,' and to ground that classificatory claim either on the nature of the normative relationship in contract or on the basis of an intuition about the concept of contract. So, we might enter the fray and argue about the correct way to draw boundaries around the subset of legal norms which are correctly classified as contract law norms and the nature of contract law rights and obligations. Similarly, we might argue against Weinrib's

[25] ibid 710–711.

understanding of private law rights and duties. We might argue not that the structure of the bipolar relationship between parties to a contract is the core feature of contract, but that, instead, the practice of contract law serves a valuable social function that we ought to promote.[26]

This kind of argument invites a back and forth between competing intuitions. Different theorists will have different intuitions about what counts as contract and what doesn't. As Wilmot-Smith says about his own position: "Perhaps this is counterintuitive. Yet the nature of third party rights is controversial and they only exist because a statute created them."[27] But what I want to argue is not that a given classification is correct or incorrect. Rather, I want to ask whether it is relevant to the practical question of what a judge ought to do. So even if we were to grant to one side that they are correct, does the classification of the doctrine of privity as a rule of contract law and the classification of third-party rights under the Contracts (Rights of Third Parties) Act 1999 as non-contractual and, perhaps, sui generis, have any normative significance for the practical deliberations of the judge adjudicating this dispute? I argue that the answer is no. This classification or inquiry into the nature of 'contract terms' has no practical upshot for the ultimate question of what a judge ought to do. Both theorists would, I believe, agree that the judge should apply this 'non-contractual' legal norm. Their claims go to how to describe or classify the norm, but not whether a judge should apply it.

It would seem that the proponent of the classificatory project is faced with a dilemma. Either the correct classification of third-party rights matters, and our judge

[26] For example, an economic analyst of contract law might claim that the normative basis of the practice of contract is its ability to promote overall social welfare, and attempt to show that recognizing the legal rights of third-party beneficiaries under contract would promote more welfare than not granting such a right, and that therefore we should classify such rights as *contractual* rights.
[27] Wilmot-Smith (n 24) 710–711.

ought to conclude that C does not have an enforceable legal claim. But this approach seems unpalatable, since it requires saying that a judge should ignore a statute. Or the classification of third-party rights under the Act has no bearing whatsoever on the judge's practical deliberations. The proponent of the classificatory project will likely resist this, as they argue that the classificatory step is necessary and important. One might attempt to further argue there is a third possibility: classification matters, but that the judge ought to apply the Act and conclude that C has a legally enforceable right. But this simply concedes the point: the classification of the legal rule granting third parties rights under a contract as not "contract law" has no practical significance for the judge's deliberations. It is not clear in what sense the proponent of this move can truly insist that classification 'matters', if it has no bearing on what a judge should do.[28]

This example is meant to demonstrate a more general point: classification of legal norms into doctrinal areas is not necessary to answer the practical question of what an agent situated in the practice (e.g. a judge) ought to do.[29] But one might object that the status of statutory instruments in private law is unique and that this argument doesn't go through when we focus solely on non-statutory law. Perhaps

[28] Some theorists might argue that it matters simply in the sense of getting right the correct description of the way things are. I won't engage in that debate here, except to say that the sense in which I am using the term 'matters' is the intuitive sense of having a practical upshot. The onus is on those theorists who think classification is important to demonstrate how it bears on practical questions for agents in the practice.

[29] I have focused here on judges, but we might wonder if things look different if we turn to legislatures. Does a legislator need to know what contract law is in order to introduce a statute designed to modify existing law? I don't think they do. What they need to do is to be able to predict how the courts will address the question of whether a third party beneficiary has a legally enforceable right. They look at the facts of how decisions have been made in the past and decide that they would like them to be made differently, and pass a statute to reform the practice. All of this can be done without identifying the boundaries of contract law. I discuss this in more depth below in Part V when I talk about the eliminativist view in more depth.

classification is still a necessary exercise for a judge's practical deliberations if we focus squarely on common law and equity.

The first thing to note is that, even if this true, you might think that statutory law is an important part of the practice of private law. To ignore how statutory law affects the rights and obligations governing the interactions between private individuals would miss a significant part of the legal practice. For example, most individuals will enter into an employment contract at some point in their lives; the contract between employee and employer is a ubiquitous private law relationship. However, the rights and obligations of the parties to an employment contract are not only regulated by common law rules and norms, they may be regulated by minimum wage legislation, human rights legislation, workers' compensation legislation, tax legislation, etc. I would suggest that a failure to take statutory law seriously would amount to not taking the practice of private law seriously.[30]

Second, even if we do exclude statutory law, we can see examples of when judges themselves are untroubled by the classification of a particular legal right or obligation when they resolve a dispute. For example, consider the issue of 'past consideration' in contract. The general common law rule is that a promise is only enforceable if it has been given in exchange for something of value.[31] An issue arises when a promise is made in exchange for some act that has already been performed in the past. The general view is that past consideration is no consideration at all.[32] However, an exception to this rule was introduced in *Lampleigh v. Brathwait*.[33] In that

[30] Recall my discussion of this point as part of the Coherence Critique in Chapter 1, Part IV. B.
[31] John D McCamus, *The Law of Contracts* (Third edition, Irwin Law 2020) 233.: "The basic principle is that promises will be enforced only if they form part of a bargain. The doctrine of consideration holds that to be enforceable, a promise must be purchased in the sense of being given in return for something of value provided by the promisee or, as is said, for 'good consideration.'"
[32] ibid 255. See also *Eastwood v. Kenyon* (1840), 11 Ad. & E. 438, 113 E.R. 482 (Q.B.)
[33] *Lampleigh v. Brathwait* (1615), Hobart 105, 80 E.R. 255 (K.B.)

case the court held that if the act was requested by the promisor, the promise that follows attaches to the prior request.[34] The reasoning in this ruling has been described as "not illuminating."[35] In interpreting and applying the rule from *Lampleigh*, the Privy Council in *Pao On v. Lau Yiu Long*[36] articulated the exception to the general rule against past consideration as follows:

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisors' request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit…[37]

The approach by the Privy Council has been criticized by some commentators.[38] I don't raise it here to debate the merits of the substantive conclusion reached by the Privy Council. What is interesting about this judgment is that the court considers whether a situation that falls within the exception gives the promisee a legal claim under contract law or unjust enrichment. A subsequent promise made for services that are rendered at the promisor's request and understood to be remunerated may be characterized either (i) "as the best evidence of the benefit intended to be conferred"[39] for the services, or (ii) "as the positive bargain which fixes the benefit on the faith of which the promise was given".[40] The former interprets the promise as evidence of the reasonable amount of compensation

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[34] *Lampleigh* (n 33)
[35] McCamus (n 31) 256.
[36] [1980] A.C. 614 (P.C.)
[37] *Pao On* (n36), 629.
[38] McCamus, for example, says that "It is unfortunate…that Lord Scarman, in articulating the first branch of the test, placed emphasis on the requirement of a request. Although this view is certainly consistent with earlier authority, there may well be cases where services are rendered in circumstances giving rise to liability for an unjust enrichment, even though they were not provided at the request of the subsequent promisor." McCamus (n 31) 258.
[39] *Pao On* (n36), 631.
[40] *Pao On* (n36), 631.

that would be expected as part of a claim in restitution for services rendered whereas the latter interprets the promise as crystallizing an enforceable claim in contract. But Lord Scarman states that the classification of the legal claim as restitutionary or contractual "matters not"[41] for the resolution of the practical dispute.

My point here is not to ask whether the Privy Council's decision in *Pao On* is a good one or not, or whether it is consistent with the law in force. I raise it here only as an example to demonstrate that the classification of the legal rule is not necessary for the resolution of the practical problem that the judge is faced with, and that judges themselves (at least in some instances) see it this way. But one might again object that this example involves the still-developing area of unjust enrichment and the complicated interaction between common law and equitable principles. That is, if we consider an example of a dispute which involves established areas of common law doctrine, such as tort and contract, perhaps we will see that doctrinal classification has some part to play. But even if we take more established doctrinal areas like tort and contract, what I want to show is that it is not the classification of the legal norm that is determinative, but rather the substantive argument for the normative significance of different legal rules and norms in the practical deliberations of a judge when resolving a dispute.

Let's revisit the example of contract rights of third-party beneficiaries. This time, consider Canada, a common law jurisdiction which has not addressed the issue statutorily. In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*[42] the plaintiffs, London Drugs ("P"), entered into a contract with the corporate defendants, Kuehne & Nagel International Ltd. ("D"), pursuant to which P would store a piece of

[41] *Pao On* (n36), 631.
[42] [1992] 3 S.C.R. 299.

equipment in D's warehouse. The contract between P and D included a limitation of liability clause limiting the liability of "a warehouseman".[43] Two individual employees of D ("3rd Party Employees") negligently damaged P's equipment.[44] The practical question was: what ought a judge do in this case? Should a judge conclude that the 3rd Party Employees can enforce the limitation of liability clause in the contract between P and D?

One approach might be to identify the doctrine of privity and apply it to the circumstances here. Doing this, we would conclude that the 3rd Party Employees have no legal right under the contract, cannot benefit from the limitation of liability clause, and therefore would be liable for negligence in tort. However, this is not how the Supreme Court of Canada resolved this dispute. Justice Iacobucci, for the majority, concluded that applying the doctrine of privity "so as to prevent a third party from relying on a limitation of liability clause which was intended to benefit him or her frustrates sound commercial practice and justice."[45] In his practical deliberations about how to resolve this dispute, Iacobucci weighed the "modern commercial practice"[46] of commercial enterprise being owned by corporations with limited liability but carried out through individual employees and also the potential liability of employees under tort law for negligent acts carried out in the course of their employment. The operation of corporate law and the legal recognition of the separate legal personhood of the corporation limits the liability of the shareholders of the corporation; the owners of the corporation are insulated from any tort claims that may arise in connection with the commercial enterprise. Further, the intersection of corporate law and tort law also limits the liability of individual

[43] *London Drugs* (n 42), p 393.
[44] *London Drugs* (n 42), p 393.
[45] *London Drugs* (n 42), p 423.
[46] *London Drugs* (n 42), p 446.

directors and officers of a corporation for ordinary negligence.[47] So, in deliberating about how the case ought to be resolved, Justice Iacobucci considered the pervasive commercial practice of operating a business through a corporation. He also weighed the normative significance of the limited tort liability that employer corporation would have. Is it just for the corporation to be insulated from liability for ordinary negligence in tort law while ordinary employees – who are necessary for carrying out the day-to-day operations of the commercial enterprise – can never be, even when the parties have turned their minds to it and have allocated such risk of liability through contract? No. Iacobucci weighed the normative significance of all these considerations in concluding that employees may, under certain conditions, rely on limitation of liability clauses in contracts between their employer and another party despite the fact that they are not party to that contract.[48]

So, while the practical issue relates to the enforceability of a contractual term by a third party to the contract, the resolution of the dispute involved weighing the normative significance of the rules of contract law, but also the legal rules relating to corporate law and tort law. The classification of these rules is not determinative for the resolution of the issue. Rather, how different legal rules allocate legal rights and obligations between the parties involved in a practical social problem is considered and their normative significance is weighed in deliberating about how to make a practical decision to resolve the dispute.

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[47] The personal liability of directors and officers for negligence in tort is an evolving area of law in Canada. For a discussion, see Shannon O'Byrne and Cindy Schipani, 'Personal Liability of Directors and Officers in Tort: Searching for Coherence and Accountability' (2019) 22 University of Pennsylvania Journal of Business Law 81.

[48] He concludes "that it is entirely appropriate in the circumstances of this case to call for a relaxation of the doctrine of privity." *London Drugs* (n 42), p P446

Now, one might respond that this example does nothing to support my argument. It may be that Justice Iacobucci ought only to have applied the relevant rule of contract law and failed to do so. This example is an outlier, it might be argued, because in most cases a judge would simply not consider how, e.g., the practice of tort and corporate law, bear on the resolution of a contractual dispute. But these objections assume a narrow view of the practical question that judges are faced with. It may be that a judge ought only to consider the relevant contract law and apply it, ignoring other considerations, but this is a normative claim and not a descriptive one. To make it, one must provide an argument for why a judge ought to decide a case in this way, and also provide an answer to those who provide a normative argument for why these other considerations ought to figure in the judge's practical deliberations. This requires engaging with the *normative* arguments about why this kind of justification by a judge is or is not acceptable. So, it is not enough to say that Justice Iacobucci is mistaken in considering the operation of tort law and the allocation of liability for negligence among participants in a commercial practice run through a corporation when adjudicating a contract dispute. We need an argument for why these considerations ought not to figure in his reasoning for the resolution of a particular practical question.

One might further argue that there are cases in which classification *is* dispositive of a particular legal question. For example, Khaitan and Steel say that "[j]udges rely upon the classification of a norm as a norm of tort law *as a doctrinal matter* to generate further legal conclusions, for instance, as to the availability of certain remedies, applicable proof rules or applicable defences."[49] But it is not the fact of classification that is dispositive. A normative argument or premise is required

[49] Khaitan and Steel (n 3) 11. (emphasis in original.)

for any claim that that particular fact generates a further normative conclusion. That is, it is the *normative* weight of the fact that a particular social or practical problem has been resolved in the past by another court in a particular way that gives us reason to do the same thing now. It is not just the fact that it has been resolved that way or been classified in a particular way. It is not that classification of legal responses to particular social or practical problems as such ought to guide the judge's practical reasoning. Rather, we begin with a particular practical or social problem as our starting point, we then look to how legal officials have responded to and resolved that problem. But we need a further normative claim about the normative significance of how that problem has been addressed in the past for the purposes of how a decision ought to be made today.

Even if classification is not dispositive, we might say that classification serves a purpose: it is a manner of organizing the past decisions of legal officials and institutional history according to how particular practical or social problems have been addressed.[50] This might include specifying the particular concepts or modes of analysis that were employed by those legal officials. Classification in this sense enables us to organize materials in a helpful way. There may be common sense reasons why people have classified things in a certain way in the past, and it might be worth paying attention to this to see how particular practical problems have been addressed in the past. When a judge is making a decision about resolving a practical problem today, it might help to see how similar problems have been addressed in the past, either by other judges or by legislators. So there is a sense in which

[50] Priel has made this point about tort law: "There is no denying that for the sake of providing assistance to others, lawyers must develop ways of organizing legal materials. And as sociologists of knowledge have shown, the organization of information into categories involves normative decisions about the prioritization of certain features while ignoring others." Dan Priel, 'Structure, Function, and Tort Law' (2020) 13 Journal of Tort Law 31, 60.

classification is helpful because it assists judges in this task. But, on its own, it cannot be dispositive of a particular issue without a further normative proposition such as: 'the legal resolution of a practical problem today *ought to be* consistent with how it has been resolved in the past'. So, even if we accept this point that classification might be valuable in this sense, it is critical to emphasize that the enterprise of classification itself requires the exercise of some normative judgement of what 'counts' as the core elements of a particular doctrinal area. This leads us back to the objections that I raised against interpretive theories which purport to provide a *single* interpretive explanation of what contract or tort law is in Chapter 1. Here's how Priel has made this argument:

> What tort law is is, to a considerable extent, a product of prior normative commitments. For example, a scholar who thinks that vicarious liability for actions forbidden by the employer is mistaken, will not treat cases in which such liability was recognized as part of what he needs to explain, and will not be troubled by the fact that his account cannot explain them. Another scholar, adopting a different normative stance, will include such cases, and provide an account that can explain them. In doing so, the two scholars do not provide a different explanation of the same body of law, but rather presuppose a somewhat different body of law in need of explanation. The determination of what belongs to the object to be explained is thus not a conceptual preliminary, but an element of the argument that is inseparable from their normative view. Different thinkers who disagree in this way can still have a meaningful discussion about the appropriate limits of vicarious liability.[51]

Priel's example demonstrates how classificatory categories are contested. Disagreement about the classification of vicarious liability as properly belonging to tort law or some other category of liability reflects some normative judgment. But this classificatory point does not preclude us from engaging in straightforward normative argument about the practical problem at hand. If a judge is being asked

[51] ibid 77–78. (internal footnotes omitted.)

to address the question of if and when an employer ought to be liable for the negligence of their employees, we have an interest in how this question has been resolved in the past, but we have this interest because we think that institutional history is normatively significant for the purposes of the judge's practical deliberations for answering this question today. The fact of its classification assists us in answering this normative question, but it does not, on its own, resolve it.[52]

The argument for the priority of description and classification fails to appreciate that the practical question faced by judges is thoroughly normative: what is needed is an argument for what considerations are normatively significant (or not) for resolving the dispute, and how they ought (or ought not) to figure in the agent's practical deliberations. For this purpose, the classification of the rule as one of contract, tort, unjust enrichment, etc. is not, on its own, determinative. What is relevant is how different rules which allocate legal rights and obligations, regardless of the classification, have any normative bearing on the resolution of a particular social problem, which is the practical question faced by a judge.

To recap, I agree with Wilmot-Smith's argument above that the description and classification of norms into doctrinal areas has no relevance for the normative question of reform. But asking 'How ought the law be changed?' is not the only normative question we might ask. We can also take up the perspective of an agent in the practice and ask 'What ought to be done?'. This, too, is a thoroughly normative question. Here I've tried to show that the fact of classification itself is not of

[52] This is not to say that the exercise of classification does not have effects or consequences that we ought to attend to. The classification of law into doctrinal areas may have an effect on how judges interpret the institutional history. But this is consistent with the idea that the boundary-drawing exercise is itself a normative one. As I will discuss in the next section, others have cautioned that the purportedly 'neutral' exercise of drawing boundaries around doctrinal areas in fact masks the normative commitments of those who set those boundaries.

normative significance in an agent's practical deliberations. What is needed is a normative claim for why the fact that a particular dispute has been resolved in a particular way in the past has bearing on the practical deliberations of a judge making a decision today. Here we might think that classification provides some assistance: it helps direct us to the relevant institutional history; that is, the legal materials that demonstrate how a particular practical or social problem has been resolved by the law in the past – but that only matters if there is a further normative proposition: the way that a particular practical or social problem has been legally resolved in the past ought to figure into our deliberations about how a similar dispute is resolved today.

IV. The Problem of Disagreement about the Grounds of Law

There is another and more serious challenge with the priority of classification argument. Asking whether classification of the law is a necessary step prior to asking any normative questions – whether about legal reform or about what an agent ought to do – presupposes that there is agreement about how to identify valid legal rules and norms to begin with. This formulation of the question raises one of the central questions in jurisprudence. The question of reform presumes that the positive law can be identified prior to questions about how it ought to be changed or how it ought to figure in a judge's practical deliberations. But one of the central disagreements in legal philosophy is the grounds of law problem: what are the truth conditions for propositions of law, or how do we know that a particular rule or norm is a valid *legal* rule or norm.[53]

To pick up on Wilmot-Smith's discussion of the classificatory project above, his analysis proceeds by classifying different legal rules, i.e. "R1 and R2". But how

[53] See Ronald Dworkin, *Law's Empire* (1986), at 4.

do we identify R1 and R2 as valid legal rules to begin with? It appears that Wilmot-Smith is aware of this. After proposing three possible methods of classification: "according to their shape, their structure and their justifying reasons",[54] Wilmot-Smith goes on to acknowledge that matters may not be so straightforward. He says: "I have spoken … as if there is a clear distinction between what the law on some question is, and the reasons in favour of the law being that way. Perhaps that is a mistake."[55] There is substantial debate in general jurisprudence over whether or not description of what the law is necessarily requires appeal to moral reasons. One of the central disagreements is the possibility of identifying a legal rule without identifying the value or reasons which justify it.[56] This suggests that we shouldn't be so quick to draw the distinction that Wilmot-Smith draws.

This is not a difference in mutually consistent ways of classifying different aspects of the law, it is a disagreement about the step which is logically prior to classification – identifying what the law is. It is difficult to see how the project of classification as it has been framed can even get off the ground unless we adopt a view about the law in general—that is, unless we simply assume positivism or nonpositivism to be correct before proceeding to identify the law. The importance placed on classification seems to cut across positivist and non-positivist lines. We see theorists of both stripes making claims about the boundaries of a particular doctrinal area of law. And a theorist's commitments about the law in general should

[54] Wilmot-Smith (n 7) 1121.

[55] ibid 1123.

[56] The literature on this is vast. But as an example of the exclusive positivist view that the grounds of law are purely a matter of social fact, see Joseph Raz, 'Authority, Law and Morality' (1985) 68 The Monist 295. For the inclusive positivist view that the grounds of law can include moral principles but are ultimately grounded in social fact, see WJ Waluchow, *Inclusive Legal Positivism* (Oxford University Press 1994). And for different versions of the nonpositivist view that answering the grounds of law question always involves appeal to morality, see John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

result in a difference in how we go about the exercise of classification of doctrinal areas of law.

Some theorists have suggested that the project of classification does not require taking a position on the disagreement between positivists and nonpositivists over the nature of law. For example, Khaitan and Steel have argued that "'an area of law' is a set of legal norms that are intersubjectively recognized by the legal complex in a given jurisdiction as a subset of legal norms in that jurisdiction."[57] This suggests that we must begin with the general set of the legal norms in the legal system as a whole and draw a boundary around a subset which we can then classify as a particular area of law. On their view, the identification of an area is a matter of social fact; that is, it "will depend on the intersubjective recognition of this area as an area of law by a critical mass of actors in the relevant legal complex."[58] This approach to classification appears to assume positivism about the law. But Khaitan and Steel argue that it doesn't. They argue that the debate between positivists and nonpositivists is a debate "about legal validity" and not about "the identification of subsets of legal norms that constitute legal areas."[59] Further, referring to Dworkin as an example, they argue that "rejection of a positivist view of *legal validity* does not itself logically determine an answer to the question of what makes something an area of law."[60] Finally, they argue that "the view that the existence of an area of law is an interpretive phenomenon seems implausible."[61]

I think Khaitan and Steel's arguments here may be too quick. If the identification of an area of law involves the identification of "a subset of the legal

[57] Khaitan and Steel (n 3) 3.
[58] ibid 5.
[59] ibid 9.
[60] ibid.
[61] ibid.

norms in the system",[62] I find it difficult to see how the disagreement between positivists and nonpositivists at the general level of what counts as a valid legal norm in the legal system would not simply be reproduced in a subset of those norms. There are two possibilities. Either the two views start with two different accounts of general legal norms, and therefore carve out different accounts of an area of law. Or, although positivists and nonpositivists have different accounts of what counts as a valid legal norm, there is some shared area within both views, and areas of law fall within that shared area. But there seems to me to be no guarantee that the latter will be the case.

Further, it is not obvious that an area of law ought not to be identified by reference to an interpretation of the meaning or purpose of that particular area of law. For example, Webb argues that:

> contract is presented and understood as a category identifying a distinct *ground* of rights and duties, its unity not simply the unity provided by a common subject matter but a unity of principle or rationale. So viewed, the classification of a rule as a rule of contract law tells us not simply where the rule applies but also something about what idea it expresses, what considerations underpin it.[63]

As noted above in Wilmot-Smith's taxonomy, one project is to classify legal rules according to the practical reasons which justify them. This is an entirely different and plausible way of thinking about the classification of legal norms into areas of law. But it goes beyond intersubjective recognition and requires inquiry into the normative grounds which render an area distinctive.

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[62] ibid 3.
[63] Webb (n 5) 2.

So, I have doubts about whether Khaitan and Steel's approach to classification of an area of law can successfully avoid disagreement about the grounds of law. Because the inquiry is framed in terms of identifying a subset of valid legal norms that constitute an area of law, disagreement about the grounds of law will not necessarily be avoided by appealing to social fact to identify a particular area of law.

Attempts at classification therefore seem to cause problems. I propose an alternative approach to the problem in the next section. By drawing on the literature in legal interpretivism and eliminativism about the law I show that there is a possible strategy for avoiding talk of identifying or classifying valid legal norms at all. When thinking about what a judge ought to do, we side-step the identification and classification of legal norms and instead proceed by way of normative argument about the significance of institutional facts.

V. Valid Legal Norms vs. Observable Legal Materials and Practices

How can we proceed with the question of what a judge ought to do without first identifying the law? Drawing on recent positions developed in general jurisprudence, I will argue that we can change the framing of our inquiry from talk of legal rules or legal norms to institutional acts, utterances and materials. On this approach, the question of what a judge ought to do is not split into two steps: first the identification of institutional rules and norms, and second the interpretation of those rules and norms. Instead the practical inquiry proceeds with a single question

of what a judge ought to do, by interpreting past acts, utterances and materials associated with an institutional practice.[64]

To help motivate this view, we can draw on the scholarship in legal interpretivism. Legal interpretivism is a particular view about the grounds of law – but I discuss it here solely for the purpose of assisting us in highlighting the distinction between institutional norms and institutional facts. To help draw this distinction we can look to the distinction that has been made between two kinds of legal interpretivism: 'Hybrid Interpretivism' and 'Pure, Non-Hybrid Interpretivism.'[65]

'Hybrid Interpretivism' is a view which has been attributed to Dworkin. For a Hybrid Interpretivist, legal rights and obligations are determined through a two-step process. First, the Hybrid Interpretivist identifies "the set of institutionally valid norms".[66] But this set of valid norms "does not alone yield the final, complete set of legally valid norms."[67] What is required is a second step, in which institutional norms are interpreted through a moral filter to yield the ultimate set of valid legal norms.[68]

Some of the criticisms that have been levelled at Hybrid Interpretivism parallel the priority of description argument which I have been exploring here. One

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[64] Recall from Chapter 2 the discussion of Kornhauser's view that adopting eliminativism about the doctrinal concept of law means that we reject this two-stage view of adjudication. Lewis A Kornhauser, 'Doing Without the Concept of Law' [2015] NYU School of Law, Public Law Research Paper No. 15-33 15 <https://papers.ssrn.com/abstract=2640605> accessed 5 November 2022.

[65] This is Nicos Stavropoulos's way of labelling the views. See Nicos Stavropoulos, 'Legal Interpretivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/> accessed 31 October 2022.

[66] ibid.

[67] ibid.

[68] ibid.

charge that has been levelled against Hybrid Interpretivism is that it "gives us no reason to abandon a sharp distinction between the pre-interpretively given corpus of institutionally valid norms constituted by communication alone, on which interpretation operates, and the final set of norms that interpretation yields."[69] In other words, Hybrid Interpretivism assumes the possibility of identifying institutionally valid norms before moving on to interpreting them through a moral filter. The objection, very generally, is that if interpretivism requires us to first identify valid institutional norms, then the interpretivist has conceded the argument to the positivists that the identification of such valid institutional norms is conceptually possible prior to their moral interpretation. This view, then, is subject to the same worry discussed above.

But there is another form of legal interpretivism which approaches the question differently. 'Pure, Non-Hybrid Interpretivism' is the view that institutional practice, "*conceived in terms of actions and attitudes, not norms or communication of norms*"[70] is a factor in the explanation of the content of legal norms. But it is "moral principles [that] determine how the practice may determine such content".[71] Pure, Non-Hybrid Interpretivism "does not take the practice already to contribute norms, obligations, or any other kind of normative content, whether outright or from a point of view, or to consist in communication that conveys or is intended to constitute normative content."[72] For the Pure, Non-Hybrid Interpretivist, the starting point is not the identification of institutional norms, but the observation of *facts* about institutional practices. Moral principles are then required to show how such

[69] ibid.
[70] ibid. (emphasis added.)
[71] ibid.
[72] ibid.

institutional facts such as, e.g., the actions and utterances of participants in the practice constitute legal norms, rights, and obligations.

Put another way, the Pure, Non-Hybrid approach is one where observable *facts* about institutional practice are morally interpreted in order to determine the content of legal norms whereas the Hybrid is one where *norms* generated by institutional practice are morally interpreted in order to determine the true content of legal norms. So one way to avoid the claim that a theory of adjudication requires us to first identify institutional legal norms is to adopt an approach similar to Pure, Non-Hybrid Interpretivism. In particular, when we are asking what a judge ought to do given the institutional history of the legal practice, the starting point of the inquiry is the acts and utterances of participants in the practice, not the norms, rights, and obligations.

Again, both Hybrid and Pure Interpretivism are theories about the grounds of law. That is, they are theories which explain how institutional practices determine, modify or constitute the law. But that is not my concern here. I raise and highlight this distinction between the two forms of legal interpretivism to emphasize their different starting points: one begins by identifying institutional norms which are then interpreted, while the other starts with institutional facts that are subject to interpretation. My focus in this chapter is not on the grounds of law – it is on the normative question of what a judge ought to do. And the distinction between institutional norms and institutional facts helps motivate a particular approach to this normative question which doesn't require taking a position in the debate between positivists and interpretivists about the grounds of law.

In this way, my approach shares much in common with the eliminativist perspective on the grounds of law question mentioned in the previous chapter.[73] Eliminativists eschew the project of describing what the law is. Instead, the eliminativist holds that the question of 'what is law?' is reducible to a number of practical questions about what agents ought to do.[74] The eliminativist rejects the aim of answering the grounds of law question, and instead asks practical questions that take up the perspective of agents situated in the practice. But both the eliminativist and the Pure Interpretivist share the same starting point, which is certain observable facts about the institutional practice and not institutional norms. Further, even though the Pure Interpretivist might also make a further claim about the grounds of law and the eliminativist might reject that view, they might both accept the same normative theory of adjudication.

So, what does this mean for private law theory? On this approach, not only do we not need to know what the law of contract is before providing an argument for how a contractual dispute ought to be adjudicated, we don't need to take a stand on the question of how to identify the law in general. There is no preliminary step of identifying the institutionally-created norms of contract and then asking a practical question of whether and how they ought to be applied by a judge adjudicating a contract dispute.[75] What is needed is an argument for why and how

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[73] See, Kornhauser (n 64).; Hillary Nye, 'Does Law "Exist"? Eliminativism in Legal Philosophy' (2022) 15 (Forthcoming) Washington University Jurisprudence Review.; Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale Law Journal 1160. Mark Greenberg's view shares some features with the eliminativist view. See Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 The Yale Law Journal 1288. Dan Priel, though he does not identify as an eliminativist, also makes arguments congenial to the eliminativist view. See, e.g., Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 Law and Philosophy 633.

[74] Kornhauser (n 64) 17–19.

[75] ibid 15. See also Greenberg (n 73). On Greenberg's view, a conclusion about what the law is is the *upshot* of a moral inquiry, and not the first step in it. "Legal institutions—legislatures, courts, administrative agencies—take actions that change our moral obligations. They do so by changing the

certain observable institutionally produced materials and practices are normatively significant for the purpose of resolving a practical question involving a contractual dispute. "Legal materials" might include the text of statutory instruments, the texts which report a record of judgments delivered by courts, the text of regulations published by administrative bodies, etc.[76] Legal practices might include the specific practices involved in adjudication, those practices involved in producing legislation, the practice of recognizing the respective hierarchy of different courts, etc. So, the question that was framed earlier as 'Given that the law is X, what should I do?' is reformulated as 'Given the existence of X, Y, or Z institutional materials and practices, what should I do?'

To go back to our example, it is not necessary to take a position on whether 'third party beneficiaries have no legally enforceable rights under a contract' is a true proposition of law (or valid legal norm), let alone a valid norm of contract law. Instead, we look to materials produced by the institutional practice and provide an argument about the normative significance of those materials for answering the practical question of how a dispute ought to be resolved. So, we can observe that it was reported that on the 26th day of April, 1915, Lord Viscount Haldane L.C., adjudicating a dispute between Dunlop Pneumatic Tyre Co. Ltd. and Selfridge & Co. Ltd, stated "…in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a [right of a third party to recover] arising by way of contract…"[77] What is needed

morally relevant facts and circumstances, for example by changing people's expectations, providing new options, or bestowing the blessing of the people's representatives on particular schemes. My theory holds, very roughly, that the resulting moral obligations are legal obligations. I call this view the Moral Impact Theory because it holds that the law is the moral impact of the relevant actions of legal institutions." ibid 1290.

[76] Kornhauser (n 64) 16.

[77] *Dunlop* (n 22)

is an interpretation of the normative significance of that text. Here we engage directly with arguments around following precedent: why should the current dispute be resolved in a manner that is similar to one decided in the past? Is it because the practice of treating like cases alike reflects the political ideal of equality, or because such an approach promotes predictability, a rule of law virtue?[78] Or for some other reason? Further, we might ask what elements of the reported decision are significant: the outcome, or the reasoning provided in support of the outcome, or both? Relatedly, when considering the report of a collegial court, what is the significance of reports of concurring and dissenting opinions? These are all familiar questions in legal theory, and are all normative questions that go to whether and how reports of past judgements are normatively relevant for the resolution of a dispute today – but none of these questions require us to identify what the law is.

Similarly, we can consider the text of statutory instruments and the practices that produce them. Very generally, statutory instruments are produced through a series of acts such as, e.g., the publication of consultation papers and the production of a draft bill which is then read, debated and subject to a voting procedure by individuals occupying particular roles in an institutional practice (i.e. members of parliament) and, ultimately, formal approval through royal assent. The output of these acts is a text which is made publicly available like the Contracts (Rights of Third Parties) Act 1999. The text of the Act reads, in part:

[78] For discussion of the value of following precedent, see Larry Alexander, 'Constrained by Precedent' (1989) 63 Southern California Law Review 1; Frederick Schauer, 'Precedent' (1987) 39 Stanford Law Review 571; Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Michigan Law Review 1.

1 Right of third party to enforce contractual term.

> (1)Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> > (a)the contract expressly provides that he may, or
> >
> > (b)subject to subsection (2), the term purports to confer a benefit on him.

And, like the question of practice of following precedents, the practice of statutory interpretation is an important area of practical and theoretical interest. It is practical because a judge requires some account of how the text of a statutory instrument ought to figure in their practical reasoning, but it is also theoretical in the sense that such an account requires a normative argument for how and why such texts are significant for the exercise of the judge's institutional power. Should the text of the statute be interpreted strictly or purposively?[79] These are familiar questions for legal theorists.

This is the kind of inquiry that the agent-centered practical approach directs us to. But it directs us to think this way about all institutional practices and the materials that are produced by them, not just statutes. We take these institutional materials and practices – the statutory instruments and reports of past decisions – and ask whether and how they ought to be interpreted for the purpose of resolving a dispute that is currently before a judge. But the fact that a text or practice requires interpretation does not require signing on to legal interpretivism as a theory of the

[79] There is a large literature on legal interpretation. See, e.g., Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Revised ed, Princeton University Press 1998).

grounds of law. Here interpretation is being used in a general sense; all texts and practices must be interpreted in order for them to be given meaning.[80]

So, the picture that we are left with is one where an agent situated in an existing, on-going practice (i.e. a judge) is faced with a practical question of how to resolve a particular practical or social problem. In order to provide an answer to this practical question, we need an argument about how the agent ought to interpret and give normative weight to certain institutional materials and practices such as reports of how this particular practical or social problem has been addressed in the past. We reject what Waldron has called the "dual task" view of adjudication: "that judges have two kinds of task to perform: *(a)* they must be alert to and familiar with existing legal sources and able to interpret and apply those materials to the cases that come before them; and *(b)* they must be capable of engaging in moral reasoning about some or all of the issues posed in these cases."[81] Instead, we adopt a picture of adjudication in which a judge's practical reasoning reflects an entanglement of moral considerations and deference to and interpretation of existing legal practice reflected in the text of precedents and statutory instruments.[82]

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[80] As Simon Blackburn puts it: "The positivist forgets that those meanings, being meanings for us, do not lie on the page or in the record. Here 'the record' plays the role of the buzzing causal flux, which comes into consciousness only when interpreted or understood in one way or another. The positivist forgets that you cannot read a case or a statute without, well, reading it, which means taking it into your mind in the form of judgements." Simon Blackburn, *Truth: A Guide for the Perplexed* (Penguin Books 2006) 162.

[81] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2, 9–10.

[82] As Waldron puts it: "What we have is a mélange of reasoning — across the board — which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine." ibid 12. This way of putting it has echoes of Kornhauser's one-step view of legal reasoning discussed above. Kornhauser (n 64) 15.

Further, recognizing this as a thoroughly normative enterprise makes us attentive to the way that the project of classification is never normatively neutral. By explicitly engaging in the normative stakes involved in boundary drawing we are better equipped to identify the ways in which purportedly 'neutral' projects of classifications smuggle in the normative priors of the classifier. As Khaitan and Steel acknowledge, one consequence of drawing boundaries around doctrinal areas of law is that it lends them legitimacy, but it also has the effect of "mask[ing] normative choices as if they were technical and value-neutral."[83] I think this is right, but I think this insight should push us to question the claim that the exercise of boundary-drawing is simply a matter of social fact. We can, as I have argued, get by without drawing boundaries and by attending directly to the normative questions. And to the extent that we do need to carve out an area of law, for, say, framing a further research question, we can do so explicitly on normative grounds. This should direct our attention to the normative stakes in boundary-drawing and how they should be the subject of substantive normative debate and not simply be taken as observed fact.

VI. Conclusion

I have argued against the view that description and classification is a necessary precondition to answering normative questions about the practice of private law. It does not help us settle the practical question of what it is that a legal official, such as a judge, ought to do. Not only that, but we can also side-step the problem of identifying valid legal rules/norms. Instead, we should direct our inquiry towards the thoroughly normative question of what institutional practices and materials produced by those practices are normatively significant for resolving the

[83] Khaitan and Steel (n 3) 14.

practical dispute with which the judge is confronted, and how they ought to figure in the judge's practical reasoning when resolving the dispute. Any fact *may* be relevant for an agent's practical deliberations; what is required is a normative argument for what is and isn't relevant and, if it is relevant, how it ought to figure in the agent's deliberations.

To make out this argument I have used the example of contract and the status of legal claims by third party beneficiaries. I have argued that the claim that the nature of contract is a bilateral exchange of promises between two parties, and only those two parties, as reflected by the doctrine of privity of contract, provides no practical guidance about what a judge ought to do given the existence of legal materials such as, e.g., the Contracts (Rights of Third Parties) Act 1999. The salient question for the judge is: what is the normative significance of existing legal materials and practices for the resolution of a particular dispute?

This raises other important questions. The view presented here, where a judge doesn't start by classifying something as law, might make it appear that the judge is unconstrained, and ought to simply seek justice. But that may seem problematic in a society in which we disagree about what justice is. The next chapter discusses further the way in which questions about the system's legitimacy constrain the actions of those operating within it.

Chapter 4: Political Moralism & Realism in Private Law Theory

I. Introduction

In the previous Chapter I argued for a practice-based approach to normative theorizing about private law which frames the inquiry in terms of taking up the perspective of an agent who occupies an institutional role in the legal system and asking the practical question of what they ought to do. When we apply this approach to the role of a judge we ask: what ought a judge to do when adjudicating a dispute between two private parties? I argued that this question should be framed not in terms of identifying and classifying legal rules and then applying them, but instead by providing a normative argument for how the materials and practices of the legal system ought to be interpreted by the judge in resolving the dispute that is presently before them.

What I focus on in this chapter is one important way in which the resolution of practical questions by legal officials is different from those confronted by individuals in their everyday lives: the exercise of a judge's agency in their institutional role involves the exercise of the coercive power of the state. To underscore this difference, consider the following examples. Suppose I promised to drive a friend to the airport on Friday morning but have just learned that the tickets for a concert I desperately want to attend will be released that same morning at the precise moment I have promised to pick them up. I am now confronted by a series of practical questions. Should I keep my promise? If I break my promise, do I owe anything to my friend? If so, what do I owe them? Now, consider a dispute between two parties, a seller who has promised to deliver some goods to a purchaser in exchange for an agreed-upon sum of money, but has failed to do so. The purchaser has paid for the goods but not received them, so they bring an action to court to

compel the purchaser to deliver on their promise. The judge is similarly faced with a series of practical questions. Can the seller be compelled to keep their promise? If so, given that the seller has broken their promise, what, if anything does the seller owe to the purchaser?

Each agent is confronted with practical questions and must deliberate about what they ought to do. But when I deliberate about whether I ought to keep my promise or not and, if I fail to, what I owe to my friend, I am engaged in the everyday practice of morality which doesn't involve any kind of exercise of state power. If I fail to do what is morally required of me, perhaps I owe my disappointed friend something in return such as, say, an apology, or to make it up to them in some other way. By contrast, the judge resolving the dispute between the seller and purchaser does so by determining whether or not the seller's promise is enforceable through the coercive apparatus of the state. Further, if the seller's promise is enforceable, the judge must consider what kind of remedy the state can compel the seller to provide to the innocent purchaser who has not received their goods. Accordingly, I take it to be an uncontroversial claim that one important way that the practical questions faced by agents occupying institutional roles in a legal system are different from those confronted by agents in their everyday interactions is that they involve the use of state power.[1]

[1] One might argue that another difference is that in the case of the everyday moral practice of promising we take up the position of the promisor or promisee, whereas the judge is a stranger to the dispute they are adjudicating. But in everyday moral practice we may also seek the advice of those who are strangers to the interaction: I might ask another friend for counsel about whether I ought to keep my promise. They may then say that I have reason to keep it (or not), much like a judge might. In any event, the important distinction for my purposes is how everyday moral practice, unlike the institution of adjudication, does not involve the use of state coercion (although it might involve the use of other forms of pressure, e.g., my friend may try to persuade me that I ought to keep my promise, or even threaten to withhold some other benefit they might otherwise provide to me). I take it that most would accept this.

Accordingly, one task for normative theorists of private law is to supply an answer to the question of when a judge's exercise of the coercive apparatus of the state is justified. This, in turn, requires engagement with normative *political* philosophy. Law involves the coercive use of state power; there is a general normative presumption against coercion; therefore any state coercion through the law must be justified. This connection between legal and political philosophy has been well-recognized in general jurisprudence. Dworkin famously argued that law is a branch of political morality.[2] Further, even theorists who aim to provide non-evaluative and purely descriptive theories of the law recognize that there are important related normative questions in political theory about justifying the use of state power through law.[3] On this view the question of what the law is can be separated from the question of when one has a duty to obey the law or when state coercion through law is justified. And, as I argued in the previous chapter, the question of what the law is can be separated from the question of what a judge ought to do. While positivists and non-positivists may disagree on the former, they agree that the latter requires engagement with normative political theory about the justification of state power.

In this Chapter I examine the relationship between questions in normative political theory and questions in normative private law theory. In particular, I focus on how different projects in political theory will bear on the way we ask and answer different normative questions about the practice of private law. Following Jeremy Waldron, we can distinguish between the tasks of "theorizing about justice, rights,

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[2] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 405. See generally Chapter 19, 'Law'.

[3] Raz, for example, has written extensively on the justification of political authority, independent of his positivist theory of law. See, e.g., Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988).

and the common good"[4] and "theorizing about the ways in which communities act when their members disagree."[5] I argue that many of the normative questions asked about private law have been focused on the former; that is, private law theorists focus on providing normative accounts of rights and justice in property, tort and contract. Here, I'd like to shift our focus to the latter question. What can theorizing about the way in which legal institutions make it possible for communities to act when they disagree about rights and justice in property, contract, and tort tell us about the practice of private law? I show that, by focusing on this question, our attention is shifted from questions about the moral basis of private law practice towards the legitimacy of institutions which make it possible for us to act in the face of disagreements over the moral basis of private law.

To develop this argument, I draw on the distinction that has made between "moralism" and "realism" in the normative political theory literature. Very generally, political moralists seek to provide an answer to the question of what justice demands or what rights we have or ought to have. By contrast, political realists[6] proceed on the basis that there is irresolvable disagreement about such questions, and that disagreement and contestation about what justice demands or what rights we have is the practice of politics. Realists argue that our focus should be directed at normative questions about the way in which legal and political institutions permit us to act and live with each other in the face of this disagreement, not at resolving that disagreement with a particular theory of justice or rights. I do not provide a defence of the realist approach to normative political philosophy or an argument about why moralism is the wrong way to go. It is beyond the scope of

[4] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 4.
[5] ibid.
[6] Note that this is distinct from legal realism. I discuss the difference between political realism and legal realism in Part III.

the paper to seek to convince the reader of the truth of realism. Rather, my aim is to take up the realist perspective and to show how it might bear on normative questions about the practice of private law. In bringing this different perspective to bear, I aim to highlight a different set of questions that are worth exploring.

So, I believe that private law theorists have correctly recognised that one task of private law theory is to show how the use of state power to enforce private law rights and obligations must be justified as a matter of political theory. But I show that the way this question has been approached in the private law literature is to adopt a moralist approach to politics. Private law theorists develop and defend principles of political morality which justify rights and obligations in property, tort, and contract. It is these moral principles that justify the role of the judge in exercising state power to adjudicate a contract, property or tort dispute.

By contrast, I argue that by adopting a realist approach to political philosophy, our attention is directed towards normative questions about the legitimacy of the legal institutions which allow us to act in the face of disagreement over those very moral principles. Political realism pushes us to focus on normative questions about the role of courts, legislatures and administrative bodies as legitimate means for addressing disagreement over questions of private law rights and obligations. Importantly, questions about the legitimacy of these institutions directs us to consider the different *ways* these institutions function to enable us to act in the face of disagreements over private law rights and obligations. The way that legislatures permit us to act in the face of disagreement will be different from the way in which courts do. As I will argue, when it comes to courts, a realist approach suggests that the legitimacy of the role of courts in addressing disagreement might require judges to be constrained by past decisions. One consequence of this is that the interpretation of past decisions will remain an important exercise. But, crucially,

on the realist approach the legitimacy of the court is not grounded in arriving at the right answer to moral disagreement over private rights and obligations, it is based on the particular way in which courts as an institution address this disagreement. So, we may have reason to attend to, examine, and interpret past decisions as part of the practice of resolving disagreement through courts because that is the particular way in which the institution of the court allows us to continue to live in the face of disagreement. But this is *not* because of the correctness of moral principles underlying those past decisions.

II. Moralism in Political Philosophy and Private Law Theory

In this Part I describe the approach to normative political philosophy which Bernard Williams has called "political moralism"[7] and Raymond Geuss has called "applied ethics"[8]. Political moralism, Williams argued, is a view about the "*basic* relation of morality to politics"[9] which "claims the priority of the moral over the political".[10] Political moralism as an approach to political philosophy begins with the formulation of pre-political moral principles which are then used to guide us in the political domain. Williams identifies two models of political moralism: the enactment model and the structural model.[11] According to "the enactment model, politics is (very roughly) the instrument of the moral".[12] This approach to political theory is one in which we first formulate pre-political moral values and principles and then argue that our legal and political institutions are a means for promoting

[7] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton University Press 2008) 2.
[8] Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008) 6. Geuss critiques this approach: ""Politics is applied ethics" in the sense I find objectionable means that we *start* thinking about the human social world by trying to get what is sometimes called an "ideal theory" of ethics."
[9] Williams (n 7) 8.
[10] ibid.
[11] ibid 1.
[12] ibid 2.

these values and principles. Williams highlights Utilitarianism as the paradigmatic example of this approach to political philosophy.[13] The concept of utility is formulated as a pre-political moral value and is used to justify, evaluate and guide the design of our political and legal institutions.

The "structural model" is one in which the theorist "lays down moral conditions of co-existence under power, conditions in which power can be justly exercised."[14] On this view, we formulate pre-political moral values and principles which place constraints on the justified use of power through political and legal institutions. Williams points to Rawls's theory of justice as a paradigmatic example of the structural model.[15] But for one of the clearest and most explicit articulations of this approach to normative political philosophy, we can look to Robert Nozick. In developing his libertarian political theory, Nozick claims:

> Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.[16]

Political moralism is reflected in most dominant strands in the private law theory literature. We can see examples of private law theorists who justify legal practices such as contract, property, tort, etc. by formulating abstract pre-political moral principles that are then applied to the institutional domain of private law. These principles are typically developed and defended by appeal to our intuitions; we refine these principles by posing hypothetical scenarios which frame a practical problem and prompt our intuitions about what principle or value explains our

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[13] ibid 1.
[14] ibid.
[15] ibid.
[16] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 6.

solution to the problem.[17] As I will outline in this Part, we can find examples of both the structural and enactment models of political moralism in the private law theory literature.

A prominent example of the structural model of moralism can be found in Arthur Ripstein's theory of tort law. Ripstein defends an account of tort law "starting from the moral idea that no person is in charge of another."[18] On Ripstein's view, the "moral basis of the law of private wrongs"[19] or "[t]he morality of interaction to which tort law gives effect"[20] reflects a principle which regulates the interaction of "free beings"[21]. The law protects your "entitlement to set and pursue your own purposes, to use your body and property as you see fit"[22]. In other words, Ripstein's moral idea of formal freedom and equality sets the moral boundaries on the justifiable use of state power through private law.[23] State coercion through law which regulates the private interactions between individuals is justified only insofar as it protects an individual's freedom or repairs it when it has been wronged by another. This leaves open the possibility of pursuing other ends outside of private law through, e.g. taxation and redistribution. But Ripstein's moral idea of freedom structures the justified use of legal and political institutions in private law.

Whether or not you accept this view will depend on whether or not you share Ripstein's intuition which grounds his moral idea of freedom. You might not. You might believe that individuals have an innate right to freedom, but your intuition is

[17] The model of appeal to intuition can be seen too in Robert Nozick's famous "Wilt Chamberlain" hypothetical, which was designed to test our intuitions about the priority of the value of liberty over 'patterned' accounts of distributive justice. ibid 160–164.
[18] Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 6.
[19] ibid 16.
[20] ibid 8.
[21] ibid.
[22] ibid.
[23] Ripstein (n 18).

that freedom ought to be understood in a positive sense rather than a negative one.[24] Or you might believe that, in the realm of private law, "people's responsibilities ought to depend on the opportunities that they have to affect how things will go for them."[25] Alternatively, a theorist might have the intuition that legal institutions should be justified solely on the basis of their effects on individual well-being and overall welfare.[26] This is the moral principle endorsed by legal economists. In defending this approach, the economist may present hypothetical scenarios that violate the Pareto principle in order to pump our intuitions and demonstrate that considerations other than welfare (such as, e.g., "rights" or "fairness") are intuitively unattractive.[27] Another private law theorist might ground their theory of private law by reflecting on moral questions in our everyday lives like "why apologize?" to determine what matters in private law.[28] Private law, on such a view, is justified insofar as it "assists" us in conforming to our pre-political obligations. This approach explicitly adopts a moralistic view of politics; the aim of law and politics is to make us conform to our pre-political moral obligations.

These approaches all reflect the enactment model. Each view will require us to take substantive positions on complex matters about which reasonable people disagree: What account of liberty is right? How should we understand choice and

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[24] For the distinction between positive and negative liberty, see Isaiah Berlin, 'Two Concepts of Liberty', *Four Essays on Liberty* (Oxford University Press 1969). For other, thicker conceptions of freedom, see, e.g., Elizabeth Anderson, *Private Government: How Employers Rule Our Lives* (Princeton University Press 2017); Alex Gourevitch and Corey Robin, 'Freedom Now' (2020) 52 Polity 384; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997).

[25] Emmanuel Voyiakis, *Private Law and the Value of Choice* (Hart Publishing 2017) 39. The view that Voyiakis develops over the course of the book is complex and I cannot do justice to it here. My point is simply to show that there are a range of views one could hold about private law that would fall under the 'moralist' umbrella.

[26] See, e.g., Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press 2002).

[27] ibid 52–58.

[28] John Gardner, *From Personal Life to Private Law* (First edition, Oxford University Press 2018) 145. See Chapters 3 and 4 generally in Gardner's book for discussion of this question.

how is it related to responsibility? What is the right account of welfare, and what role should it play in private law? And disagreement about these matters ultimately comes down to the theorist's moral intuitions. On Gardner's view, for example, our intuitions about what we owe to each other in our personal lives outside of law provide the normative foundation of what legal obligations we have. So, our conclusions about private law obligations will depend on whether or not we share intuitions about the morality of everyday practices like promising, harming, etc. Similarly, endorsement of welfarism will depend on our intuitions. There is a rich literature in moral philosophy critically examining welfare or well-being understood as desire-satisfaction. For example, Amartya Sen has criticized the idea that welfarism ought to be the sole normative principle for guiding our institutional design.[29]

All these approaches to private law reflect a moralism about political philosophy because moral ideas are "assigned a foundational role insofar as they have antecedent authority over the political and determine or exhaust the appropriate ends and limits of politics."[30] But, as the foregoing demonstrates, one feature of the moralistic approach to private law theory is that it is hostage to our moral intuitions. Theorists offer arguments in support of their substantive positions in order to persuade us to adopt their view. And each of these views may have some plausibility, in the sense that they are not obviously wrong. But, at the end of the day, there will be disagreements that rest on conflicting intuitions.

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[29] Amartya Sen, 'Utilitarianism and Welfarism' (1979) 76 The Journal of Philosophy 463. He develops his argument by showing how the idea of welfare is too limited, because it fails to incorporate or conflicts with certain non-welfarist intuitions, such as the importance of personal liberty, or the idea that it matters how utility comes about, and not just the utility of the resulting state of affairs. ibid 480–483., on liberty, and ibid 477–478., on the sources of utility.

[30] Enzo Rossi and Matt Sleat, 'Realism in Normative Political Theory' (2014) 9 Philosophy Compass 689, 689.

What I want to do here is examine what these normative questions about private law would look like if we reject political moralism in favour of what Williams and others have called "political realism" about normative political philosophy. That is, what would private law theory look like if we accept that a judge ought to interpret the institutional history in a way that justifies the use of state power to resolve a dispute, but reject the idea that this requires us to settle on a single true or correct answer to questions about political morality? What, if anything, can we say about the practice-based normative theory of private law if we reject the idea that this requires us to first formulate moral principles which we then apply to our political and legal institutions?

Obviously, not everyone will agree with this approach. They might think that the right way to respond to this disagreement is to engage in moral argument about which of these views is better. But there are questions that are important given the presence of this disagreement.[31] As Waldron has argued, our approach to political and legal theory ought to acknowledge the inescapable fact of wide-spread disagreement about moral questions.[32] I agree with Waldron that this disagreement is deep and intractable. When we look at the ongoing debates in moral and political theory, or disagreements that we see being carried on in the real world, this becomes clear: debates tend not to get resolved, but continue to persist. Therefore, in my view, political philosophy, rather than trying to resolve this disagreement, ought to proceed with this disagreement in mind. The opposition between moralism and

[31] This doesn't mean people shouldn't continue to argue about these matters. They can. But politics allows us to proceed in the meantime in a way that acknowledges that these issues have not yet been resolved. Again, it is important to recall that I am not arguing for the truth of realism, but rather taking it up as a perspective in political philosophy. Even if the reader believes these disputes can and will be resolved, they may still benefit from the realist perspective, which aims to show us how to live, right now, when the resolution is not yet forthcoming.

[32] See Waldron (n 4).

realism in politics reflects two different ways of understanding the practice of politics. On the moralist view, politics is the process by which we identify moral ideals and values that we have reason to accept; the aim is to achieve some kind of consensus on these questions of political morality. On the realist view, we proceed by accepting that there may never be agreement about these moral ideals and values; disagreement and conflict is inherent in the practice of politics, and normative political theory must reflect that. Politics enables us to act in the face of this disagreement.[33]

So, my aim is to examine what kind of implications a realist approach to normative political philosophy would have for private law theory and how this would differ from the typical moralist approach. What I will show is that adopting a realist approach directs us to focus on different questions about private law practices. In particular, it shifts our focus away from substantive answers to questions about how to justify the decision of an agent occupying a particular institutional role. A realist political philosophy cannot provide a precise answer to the question of how to justify the decision of a judge resolving a contract or tort or property dispute. Rather it directs us towards questions about the *institutions* (and the offices which are held within those institutions) that play a role in the practice of private law. For example, we might ask which institutions allow us to act in the face of disagreements about the allocation of private rights and obligations. And, for a given institution, we might ask whether and to what extent institutional history ought to constrain a particular agent's decision-making with respect to the allocation of private rights and obligations. As we will see, realism provides a thinner, more

[33] Waldron introduces the related idea of "the circumstances of politics," that is, "the felt need among members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be". ibid 102.

minimalist answer to the practical question of what a judge ought to do than moralism, but it still provides some normative guidance.

III. Realism in Political Philosophy

The term "realism" as I use it here refers to a particular approach to normative political philosophy. Because realism is used to refer to several different ideas in related areas of inquiry, it is helpful to do a bit of ground-clearing to clarify the distinction between political realism and other realisms. By realism I do not mean the general philosophical sense of a metaphysical claim about the mind-independent existence of objects.[34] I also do not use it to refer to moral realism; the view that moral claims refer to facts and are truth-apt.[35] Importantly, I do not use the term to refer to a position in legal theory known as "legal realism". While legal realism is a big tent encompassing several divergent views, one of the core commitments of legal realism is that its aim is to describe or explain law and legal practice.[36] Legal realists are generally not interested in the normative questions about legal practice. [37] For example, a realist theory of adjudication is a theory which aims to provide an

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[34] Alexander Miller, 'Realism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/win2021/entries/realism/> accessed 17 October 2022.

[35] Geoff Sayre-McCord, 'Moral Realism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/sum2021/entries/moral-realism/> accessed 17 October 2022.

[36] Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia Law Review 1138, 1149.: "Realists like Oliphant—who were, to repeat, the vast majority—thought that the task of legal theory was to identify and describe—*not* justify—the patterns of decision".

[37] Some realists at least recognise that questions about how a judge ought to have decided a case are viable questions. See Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809, 824. Cohen says: "Fundamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind ?' The other is, 'How ought they to decide cases of a given kind ?'" However, Cohen goes on to say "Consider the elementary legal question: 'Is there a contract?' When the realist asks this question, he is concerned with the actual behavior of courts. For the realist, the contractual relationship, like law in general, is a function of legal decisions. The question of what courts ought to do is irrelevant here." ibid 839.

explanation of why a judge, in fact, decided a case the way they did.[38] Realists may differ on the best methods to use to provide such explanations, but they are typically not interested in normative questions about adjudication. At any rate, the realism I mean to refer to is not legal realism.

But there is a sense in which the account I am developing here has some affinities with legal realism. For example, when it comes to adjudication, "legal realists emphasize the inevitable indeterminacy of "legal reasoning.""[39] As Brian Leiter argues:

> There are various possible grounds of legal indeterminacy: H.L.A. Hart emphasized the "open texture" of natural languages, while the American and Italian Realists have emphasized the interpretive latitude judges enjoy in how they construe statutory provisions and precedents. The idea that judges have interpretive latitude is a claim about the legitimate interpretations of legal sources (such as statutes or prior court decisions) a judge can offer. The notion of "legitimacy" at issue here is a thoroughly naturalized one, to be understood in terms of the attitudes of legal actors: differing interpretations are "legitimate" insofar as they are accepted in fact by other legal actors, especially other judges, as permissible interpretations. This is often called a "sociological" conception of legitimacy… in contrast to the "philosophical" conception which asks whether the interpretations are really justified by reference to some normative standard.[40]

The argument I am developing also reflects the idea that adjudication is underdetermined, but does so with respect to normative theories of adjudication. To recap, I have argued that a practice-based normative theory of private law asks how a judge ought to resolve the dispute that is before them. This requires some

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[38] Leiter, 'Positivism, Formalism, Realism' (n 36) 1147–1149.

[39] Brian Leiter, 'Some Realism about Political and Legal Philosophy' [2022] 30th IVR World Congress of Social and Legal Philosophy in Bucharest, Forthcoming <https://papers.ssrn.com/abstract=4137804> accessed 17 October 2022.

[40] ibid 8., citing his own work: Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007) 9–12.

normative argument about how the institutional history of the legal system ought to be interpreted to justify the use of state power. But I take as given that there is radical disagreement about the moral values or principles that justify state power and which therefore ground a judge's interpretation of legal sources in a particular private law case: we see a number of candidate normative principles in the literature and there is irresolvable disagreement about them, because they ultimately rest on the conflicting intuitions of theorists. This is the sense in which such a normative theory of adjudication is underdetermined. But that doesn't mean that we give up on all normative questions in, as Leiter puts it, the "philosophical" sense, about the practice of private law. This is where political realism as a position in normative political theory comes in. As we will see, the focus of inquiry for political realists is legitimacy, but legitimacy in a normative sense, not a descriptive one. So, I am still interested in normative theorizing about private law adjudication in the "philosophical" sense.

It is difficult to provide a single definition of political realism because it is an approach to political philosophy that is primarily defined in the negative. Realists identify as such because they reject the approach to political philosophy espoused by moralists. One way of thinking of political realism "is as a family of theories of politics, one which competes with those of other political traditions only when they are too idealistic or moralistic, and in the context of which any sufficiently realistic substantive approach to politics (e.g. liberalism, socialism, conservatism) must situate itself."[41] One core commitment of realism is about, as Williams put it, the "*basic* relation of morality to politics."[42] Realists argue that there is a distinctively

[41] See Rossi and Sleat (n 30) 696.
[42] Williams (n 7) 8.

political normativity.[43] But even here, there is a disagreement among realists about how to understand this claim.[44] The "stronger version" of this claim is that there is a separate nonmoral domain of political normativity.[45] The "weaker version" of this claim doesn't reject the role that moral values may play in political normativity, but says that "politics remains a distinct sphere of human activity, with its own concerns, pressures, ends and constraints which cannot be reduced to ethics (nor law, economics, religion, etc.)"[46] What both the stronger and weaker versions agree on is that political normativity is not *reducible* to moral normativity.[47] Realists reject the idea that the values and principles endorsed by moralists are "independent of or prior to political practice"[48] and argue that such values are historically contingent and are "entwined with the politics that they seek to speak to."[49] As Matt Sleat has put it, "what is wrong with political moralism is not that it represents a form of political theory that 'starts' outside of politics, but that it *thinks* it does."[50] So, one core commitment of the realist approach is that any claim about political normativity is not reducible to morality and must reflect the distinctive nature of the practice of politics.

This leads to a second commitment in the realist literature, which is the priority of legitimacy as a political value. As noted above, political realism begins with a particular understanding of the practice of politics which differs from moralism. The starting point for the realist is an explanation of what is really going

[43] Matt Sleat, 'Realism and Political Normativity' (2022) 25 Ethical Theory and Moral Practice 465, 465.
[44] See Rossi and Sleat (n 30).
[45] ibid 690.
[46] ibid.
[47] Sleat (n 43) 471.
[48] ibid 473.
[49] ibid.
[50] ibid.

on when we do politics. The realist takes conflict and disagreement over values such as justice and individual rights as a "mere fact" of the practice of politics.[51] Moralism, by contrast, "naturally construes conflictual political thought in society in terms of rival elaborations of a moral text"[52] with the aim of achieving a "consensus".[53] Under the realist approach to political theory one of the central purposes of politics is to "settle through authority and law what cannot be settled through reason or morality."[54] The realist argues that the focus of inquiry in normative political philosophy ought to be on the justification of coercion through law to allow us to act in the face of the inherent disagreement over questions of value; not arrive at some agreement about those questions.[55] This still leaves room for an argument about which forms of coercion are justified or not; there is still a line to be drawn between the exercise of power and the exercise of *legitimate* power.

Realists therefore place a justificatory priority on legitimacy before other political values.[56] One of the central accounts of legitimacy under the realist approach has been articulated by Bernard Williams. Williams argued that "[i]t is a

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[51] Williams (n 7) 13.

[52] ibid 12.

[53] See ibid 2. Williams refers to Rawls's idea of an overlapping consensus (Rawls being a core case of a moralist view.)

[54] Rossi and Sleat (n 30) 692.

[55] Of course, realists are not the first or the only theorists in political philosophy to recognize the importance of disagreement. For example, Prince Saprai interprets Dworkin as addressing "the age-old problem of the legitimacy of the state in circumstances of deep disagreement between members of a political community about the good and the requirements of justice." Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press 2019) 42. Saprai goes on to develop a republican contract theory that draws on Dworkin. See ibid Chapter 4. While disagreement plays an important role in Saprai's theory as well as in realism, they adopt different approaches; a Dworkinian view is committed to certain rights, such as the "right to equal concern and respect" ibid 69., whereas the realist maintains that there is disagreement about such rights. Nevertheless, the views may have similar upshots in certain regards, such as the respect judges should show for stare decisis. ibid 44. I discuss this further below; see Part IV.A.

[56] Rossi and Sleat (n 30) 690.

necessary condition of legitimacy (LEG) that the state solve the first question".[57] He understood "the 'first' political question in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation."[58] It is only once we provide a solution to the first question that we can even pose (let alone attempt to solve) other political questions; a solution to the first question is a necessary precondition to the contestation and pursuit of other political values.[59]

But a solution to the first question, while necessary, is not sufficient for a legitimate state.[60] Legitimacy also requires that any solution to the first question must also be "acceptable"; this is what Williams called the *basic legitimation demand*.[61] In addition to providing a solution to the first political question, the basic legitimation demand requires "the state… to offer a justification of its power *to each subject*."[62] The basic legitimation demand is not a normative standard imposed from an external perspective but rather "implicit in the very idea of a legitimate state, and so is inherent in any politics."[63] On the realist view, coercion is an inescapable feature of social life, but politics is a distinctive mediated form of coercion. Put another way, "all politics is coercive, but not all coercion is political."[64] Legitimacy is the concept we use to draw a line between these different understandings of coercion.[65] Further, another realist commitment is the idea that legitimacy is historically contingent. What counts as a legitimate coercive order will depend on the specific historical

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[57] Williams (n 7) 3.
[58] ibid.
[59] ibid.
[60] ibid.
[61] ibid 4.
[62] ibid. (emphasis in original.)
[63] ibid 8.
[64] Enzo Rossi, 'Being Realistic and Demanding the Impossible' (2019) 26 Constellations 638, 642.
[65] The line need not be a clear one: Williams says that "[w]e can accept that the considerations that support [legitimacy] are scalar, and the binary cut [legitimacy/illegitimacy] is artificial and needed only for certain purposes." Williams (n 7) 10.

conditions, and whether an answer to the basic legitimation demand is acceptable depends on whether it is acceptable for us "now and around here."[66]

Legitimacy is clearly a normative concept: what justification of coercive power to solve the first political question is acceptable to those subject to it? But, as noted above, because realists have different understandings of the distinctive sources of political normativity, they differ in how this normative question ought to be answered. For Williams, a justification is acceptable if it "makes sense…to us".[67] That is, Williams adopts a practice-dependent or "hermeneutical"[68] understanding of political normativity; we interpret our political practices in a way that renders a particular structure of authority "intelligible".[69] As I will discuss below, there are other strategies for arguing for a distinctively political normativity. We need not accept Williams's particular approach to political normativity.

So far, I have been providing in general terms a broad outline of the core commitments that realists share primarily to contrast it with the moralism we see in the private law theory literature. To repeat, the core commitment shared by all realists is one about the basic relationship between morality and politics;[70] realists reject that political normativity is reducible to morality. Further, for realists, legitimacy is prioritized over other political values because the establishment of order is a necessary precondition before other questions are posed. With these core commitments on the table, I want to now identify two different directions in the

[66] ibid 8.
[67] ibid 10.
[68] ibid 11.
[69] ibid 10.
[70] ibid 8.

realist political theory literature associated with Bernard Williams and Raymond Geuss, before moving on to show how they might apply to private law theory.

A. Ordorealism & Radical Realism

There is a rich literature developing some of the realist ideas first articulated by Williams and Geuss. Both thinkers clearly reject the moralist approach to politics. But they also represent two different strands in realist thought which each place greater emphasis on some realist commitments than others. Here I follow the taxonomy introduced by Enzo Rossi to distinguish between "ordorealism" which focuses on "the prioritization of peace and stability"[71] and "radical realism" which is "a form of ideology critique".[72]

For ordorealists, the inquiry into legitimacy centres on answering Williams's "first question",[73] that is, the project of ensuring that the state creates stability and order in the face of disagreement.[74] This approach emphasizes the distinctiveness of political normativity from moral normativity on several scores. First, based on the observation that the need for politics arises because morality and ethics alone are not able to resolve conflict. If the domain of moral normativity was sufficient for guiding our behaviour, there would be no need for the political.[75] Second, the ordorealist stresses the claim that order and stability are necessary preconditions for the pursuit of other goods.[76] Political normativity for the ordorealist is instrumental and historically contingent.[77] It is instrumental because political coercion is justified

[71] Rossi (n 64) 639.
[72] ibid.
[73] ibid 640.
[74] Williams (n 7) 3.
[75] Rossi and Sleat (n 30) 691.
[76] Rossi (n 64) 640., citing Williams (n 7) 3.
[77] Rossi (n 64) 640.

insofar as it secures order and stability and not because of "some moral commitment to the desirability of political association, but simply because it is a precondition for the enjoyment of most of what we happen to take to be valuable, morally or otherwise."[78] It is empirically grounded because the question of how political coercion is institutionally configured and exercised in order to secure order and stability will depend on facts that are historically contingent.

The ordorealist approach is often associated with "relatively conservative defenses of liberalism"[79] from a realist perspective. Their central point is that the exercise of coercion by the state through law is justified insofar as it provides a means for authoritatively addressing questions concerning how we ought to live together about which there is inescapable disagreement. What one must show is that the institutional arrangements established for the contestation and settlement of these disagreements are genuinely political in the sense that they don't simply reflect the exercise of raw power—that is, they can meet the basic legitimation demand—but also are not moralistic in the sense of their legitimacy being grounded in the promotion of a particular vision of the right answer to these contested questions.

Radical realists focus their analysis on the critical evaluation of legitimation stories that are offered to justify political coercion.[80] The radical realist project is to "establish criteria for making qualitative distinctions between the moral (and other) beliefs that support political authority"[81] while keeping in front of mind the important ways in which "power and knowledge" are intertwined.[82] Recall that, on Williams's view, providing a solution to the first political question is necessary but

[78] ibid. (internal footnote omitted.)
[79] ibid 642.
[80] ibid.
[81] ibid 641.
[82] ibid.

not sufficient for legitimacy. What is also needed is some justification of state power which is "acceptable" to those who are subject to power. But, as Williams himself acknowledges, this introduces further questions about what counts as an acceptable justification. As noted above, for Williams, this involves a hermeneutic inquiry into whether a particular justification of legitimate authority as opposed to the raw exercise of power "makes sense" to us.

But there is a worry here that those subject to power will fall victim to a sort of false consciousness; that those in power can manipulate subjects into acceptance of a particular legitimation story. In response to this, Williams introduces the "critical theory principle" according to which "the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified".[83] One difficulty with the formulation of this principle is that it appears to rest on moralized conceptions of coercion which the realist eschews; the critical theory principle might "take Williams too close to the mainstream approach he wants to reject insofar as it may implicitly invoke a moralised ideal of political consensus".[84]

But there is another strategy available for the radical realist project of ideology critique to ground a distinctively political normativity. This approach is informed by the realist perspective on the relationship between morality and politics. Moral beliefs are formed within existing political structures. But such political structures reflect an already-existing set of relations of power. As such, there is reason to worry that reliance on such moral beliefs to legitimate a coercive political power simply reflects and reproduces power relations that already exist in

[83] Williams (n 7) 6.
[84] Rossi and Sleat (n 30) 692., citing Matt Sleat, 'Bernard Williams and the Possibility of a Realist Political Theory' (2010) 9 European Journal of Political Theory 485.

society. As Raymond Geuss puts it: "[e]thics is usually dead politics: the hand of a victor in some past conflict reaching out to try to extend its grip to the present and the future."[85]

Rossi says "[t]he radical approach…acquires its normativity by contesting what one may call legitimation stories."[86] So, the task of the realist project is to draw "the distinction between acceptable and unacceptable legitimation stories."[87] This requires "establish[ing] criteria for making qualitative distinctions between the moral (and other) beliefs that support political authority"[88] while at the same time being alert to the fact that individual beliefs and attitudes may be "distorted as a result of the operation of specific relations of power".[89] But how can we ground a distinctive political normativity that gives us reason to reject certain legitimation stories without falling back on the moral perspective which realists reject? One approach that has been developed in the realist literature is to ground a distinctively political (and non-moral) normativity through a combination of instrumental and epistemic normativity.[90]

Instrumental normativity generates practical reasons to adopt the means we believe will achieve our ends.[91] But this requires reliable beliefs about the world. This is where epistemic normativity comes in. Epistemic normativity relates to

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[85] Raymond Geuss, *Politics and the Imagination* (Princeton University Press 2010) 42.
[86] Rossi (n 64) 642.
[87] ibid.
[88] ibid 641.
[89] Geuss (n 8) 52. This comes from Geuss's definition of ideology: "An ideology, then, is a set of beliefs, attitudes, preferences that are distorted as a result of the operation of specific relations of power; the distortion will characteristically take the form of presenting these beliefs, desires, etc., as inherently connected with some universal interest, when in fact they are subservient to particular interests."
[90] See Carlo Burelli and Chiara Destri, 'The Sources of Political Normativity: The Case for Instrumental and Epistemic Normativity in Political Realism' (2022) 25 Ethical Theory and Moral Practice 397.
[91] ibid 401–405.

justifiability or warrant of our beliefs; the ways in which we evaluate our formation of beliefs about the world.[92] This is critical for realists because the starting point of realist political philosophy is an understanding of what is really going on in politics.

IV. Realist Political Philosophy and Private Law

What is the upshot of adopting realism about political philosophy for philosophy of law and, more specifically, philosophy of private law? As noted in the introduction, Waldron says that there are two main tasks in political philosophy as it overlaps with philosophy of law: "theorizing about justice, rights, and the common good"[93] and "theorizing about the ways in which communities act when their members disagree."[94] Realism directs us to shift our focus from the former to the latter. As I noted above, philosophers of private law have largely been focused on the former. Private law theorists ask the 'moralist question' about private law:

> *What rights and obligations structure the legal relationship between private persons?*

But the realist proceeds on the basis that there is irresolvable disagreement over the answer to the moralist question. The starting point for the realist is that "the point of law is to enable us to act *in the face of disagreement*".[95] When it comes to private law, the 'realist question' might be reframed, following Waldron, as follows:

> *How do we act together in the face of disagreement over the question of what rights and obligations structure the legal relationship between private persons?*

The realist question directs our normative inquiry towards whether we accept existing legal practices and institutions as a way to live together in a

[92] ibid 405–408.
[93] Waldron (n 4) 4.
[94] ibid.
[95] ibid 7.

community despite our disagreement about private rights and obligations. When we frame our inquiry this way, there are two important ways in which realist private law theory differs from the moralist kind. First is an emphasis on the justification of legal institutions and roles which agents occupy within those institutions. Second, on this view, the scope of a normative theory of private law is much broader than is typically thought.

As with the moralist approach, the realist would, of course, consider the role of judges in adjudicating disputes between private persons. But the analysis proceeds in a different way. In previous chapters I argued that one question for private law theorists is the practical question of what an agent occupying an institutional role such as, e.g., a judge ought to do. What the realist rejects as incoherent is an answer which says 'the judge ought to protect the private rights that we actually have' or 'the judge ought to enforce the correct account of private obligations' because the point of the institutional practice of adjudication is to allow us to act in the face of disagreement about what private rights and obligations we have. Our analysis shifts from the justification of a particular agent's decision, to the justification of the institutional role which that agent occupies.[96] So, realism directs us to normative questions about the justification of the institution of courts and the judges who occupy roles within them as an authoritative and coercive practice for settling certain disagreements about private rights and obligations.

[96] In thinking about the judicial role, we should note that part of how we understand the judicial role is as a constrained one. We don't choose judges for their expertise in deciding what ought to be done. See Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2. Waldron argues that judges are not necessarily better moral reasoners than other agents. Rather, we appoint people to the role with the understanding that they ought to do things in a particular way: that is, we expect them to pay attention to past decisions.

However, we don't stop at courts and adjudication. Realism directs us to consider the legitimacy of *all* of the legal practices and institutions that we establish in answer to the realist question. This means an adequate realist theory of private law would also include the justification of the institution of the legislature, the role of legislators within that institution and the practices of enacting statutory instruments. The charge that a theory of private law must take existing legal practice 'seriously' on the realist view would mean that, at a minimum, it must account for all legal practices which address questions about the structure of the legal relationship between private actors. One way we do this is through the courts, but another is through the legislature.

There are many examples of how legislatures, through statute, do this. In previous chapters, I noted the human rights legislation which regulates the basis on which private persons are prohibited from discriminating on the basis of specified grounds when entering into a contract with a counterparty.[97] Similarly, in several countries, including common law jurisdictions, legislatures have addressed product liability through statutory reform.[98] To ignore the role of such institutions in providing us a means for acting in the face of disagreement over the question of private rights and obligations would fail to account for a significant segment of our existing legal practice. But in turning our minds to the legislature, the task of the realist legal theorist is not to provide a justification of the particular decisions of legislators, but to justify the role of the institution of the legislature in addressing disagreement over particular questions about private rights and obligations.

[97] In Canada, these statutes are provincial. See, e.g., Alberta Human Rights Act (A-25.5 RSA 2000).
[98] See, e.g., the United Kingdom Consumer Rights Act 2015 c. 15.

The realist question would also direct us to consider the legitimacy of regulatory practices and administrative decision-making. Take for instance the extensive municipal zoning regulations which place restrictions on the rights of an owner to use and develop their real property.[99] Further to this point, consider the administrative body responsible for the review and approval of applications for variances to zoning regulations and perhaps the role of the court in hearing appeals from applications which have been refused.[100] These are all institutional practices that are established to authoritatively settle the scope of the rights of owners of real property. In the context of contract law, consider securities regulation, which creates a detailed framework which imposes requirements and places restrictions on the formation of certain contracts between private parties: investors and those raising capital.[101] There are countless other examples. The point I am making is that the realist question directs us to all legal institutional practices which establish ways for us to live together given our disagreement over the scope, allocation, etc. of private rights and obligations.

Further, the point is not just that courts, legislatures and administrative bodies are each legal institutions that allow us to act in the face of disagreements about the rights and obligations which structure private relationships. The point is that these institutions each reflect *distinctive* institutional practices for addressing disagreement on such matters. Each institution reflects a legal practice that answers the realist question in different settings, with different constraints, occupied by agents that are selected by different processes. For example, we can take the court as one institution which allows us to act in the face of disagreement over private rights

[99] See, e.g., City of Edmonton, by-law 12800, *Zoning Bylaw* (22 February 2001)

[100] See, e.g., The City of Edmonton Subdivision and Development Appeal Board, created by Municipal Government Act, RSA 2000, c M-26, s 627

[101] See, e.g., Securities Act (Alberta), RSA 2000 cS-4 and the regulations promulgated under that act.

in contract. But, in our actually existing practice, courts are only engaged when a disagreement has been brought before the court; under current practice, a judge could not simply issue an opinion on whether there are exceptions to the doctrine of privity of contract unless and until there is a dispute regarding a matter brought before them.[102] This is not the case when it comes to the current practice of legislatures. It is acceptable for legislatures to change the rights and obligations of parties under contract law by enacting statutes without waiting for a particular issue to arise through litigation. So, while both institutions provide a political means for acting in the face of disagreement over rights, they do so in distinctive ways.

Further, the decision-making of agents occupying roles in these different institutions is constrained in different ways.[103] We might think that when making a judgment about what to do, a judge must give greater weight to matters of institutional history than a legislator does. That is, a judge's practical reasoning is constrained by the past decisions of other courts and of legislators; when addressing disagreement about matters of private rights and obligations they must do so by providing an interpretation of that institutional history instead of simply announcing what they believe the ideal law ought to be.[104] A legislator need not be

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[102] I note that in some jurisdictions courts may issue opinions on matters of constitutional law before there is a live legal dispute. For example, in Canada a government may seek a reference opinion on the constitutionality of a proposed piece of legislation before it has actually been enacted. But there are two important points to note here. First, the reference procedure itself may be the product of legislation. Second, even reference questions must be brought before a court; the court cannot, of its own initiative, issue opinions on matters of constitutionality absent a reference question being brought before it.

[103] On the topic of role obligations, see Michael O Hardimon, 'Role Obligations' (1994) 91 The Journal of Philosophy 333. For a related point in the context of private law, see Felipe Jiménez, 'Two Questions for Private Law Theory' (2021) 12 Jurisprudence 391, 407–408.

[104] We might think that this would push us in the direction of a formalist theory of judicial decision-making. For a defense of a formalist theory of contract law adjudication, see Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2020) 5 Utah Law Review 1121. I do not take a position here on the particular view of adjudication that a realist theory would endorse; indeed, I don't think there is a single answer to that question. The crucial point for my purposes is that we

constrained in the same way.[105] For example, the fact that courts have, in the past, held that third party beneficiaries to contracts have no enforceable contractual rights places no constraint on a legislature simply deciding that they now ought to have such a right.

Finally, the way particular individuals are selected to occupy roles in these institutions also differs in important ways. Members of legislatures are elected. The specific voting system used to elect legislators may differ by jurisdiction and by legislative body. Members of the judiciary are generally appointed. There are some jurisdictions, most notably the United States, where judges are selected through the electoral process. But the norm is political appointment. Similarly, the method of selecting administrative decision-makers is also generally by appointment and not through competitive elections.

We can observe that, in our existing legal practice, there are these different legal institutions and they are occupied by decision-makers who are tasked with providing us with a way to move forward and act in the face of disagreement about the rights and obligations which structure the legal relationships between private persons. The focus of moralist private law theory is typically the courts. Theories of tort, contract or property are often developed on the basis of interpreting the formal structure of adjudication and common law doctrine in a way that renders it intelligible or coherent. Further, the underlying assumption is that common law

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must pay attention to the legitimation story that leads us to adopt a particular view of adjudication. So, if the realist did think the formalist approach was the right one, this would not be because it gets private law rights right, or because it brings about good instrumental effects (see ibid 1124.), but because it is consistent with the legitimate use of state power through the institution of the court. I discuss some concrete implications for adjudication below, in Part IV. A., but I do not defend a particular theory of adjudication.

[105] This is not to say that legislators are not constrained at all. Their decision-making is also constrained by interpretations of the text of the constitution.

doctrine reflects one or more moral ideas which animate or justify private law. The thought is that through common law reasoning "the law can work itself pure"[106]; the successive decisions of courts reflect a refinement of or further articulation of that moral idea.

But the realist's approach reflects a different understanding of the institutional role of courts and the normative significance of past decisions and doctrine for how a judge ought to make a decision today. It is *not* that past decisions carry normative weight because of the correctness of the moral idea that they reflect. It is the fact that that decision was made by a particular agent occupying a particular institutional role. For example, suppose a judge is adjudicating a dispute over whether a third-party beneficiary to a contract has a legally enforceable right today. In doing so, the judge ought to give normative weight to the past decisions of courts on the matter. Any statutory instrument produced by the legislature which addresses this practical problem also ought to be a consideration in the judge's decision-making. However, for the realist, the reason why these past decisions and statutory instruments carry any normative significance for the judge is not because the judge agrees or ought to agree with the moral correctness of the view. It is because they are the outputs of institutional processes that an agent occupying the role of judge in the institution of a particular court ought to give due consideration to. These legal materials and practices constrain a judge's decision-making because of the institutional role of the courts and judges. Here's how Waldron differentiates between how the moralist and realist understand the normative significance of common law doctrine:

> Some may understand this use of existing doctrine as a kind of 'reflective equilibrium': we argue for a new view by showing that it is both attractive in

[106] Ernest J Weinrib, *The Idea of Private Law* (Revised edition, Oxford University Press 2012) 13.

> its own right and not incongruent with considered judgements that we are reluctant to give up. In jurisprudence, however, the standing of a previous decision as one of the fixed points that a legal theory ought to fit is seldom a matter of the individual theorist's being wedded to it as a 'considered judgment' of his own, something that he in particular is loath to abandon. Instead it is seen as something which he is not at liberty to give up, given that he is offering an account of *the law* (albeit a normative and reforming account), rather than simply an announcement of his own view.[107]

That is, when making a judgement of what they ought to do, a judge should give weight to the institutional history reflected in the past decisions of courts and statutory instruments not because the judge agrees with how a particular practical dispute has been settled, but because that particular practical dispute has been settled pursuant to an authoritative institutional process. For example, the reason why a judge ought to give normative weight to the past decisions of a particular judge—say, Justice Easterbrook—is not because they agree with the economic reasoning which is characteristic of how Easterbrook justified his decisions.[108] A judge deciding a contract law dispute today may disagree entirely with the economic efficiency-based reasoning Easterbrook used to justify a particular outcome. The normative significance of Easterbrook's past decision is that he occupied a particular institutional role which exercised political power to authoritatively address a matter about which there is disagreement.

By adopting the realist approach, we reframe our question from the moralist one about what rights and obligations we have, to the realist one. In private law, this directs us to focus on our institutional practices which authoritatively address disagreements about the rights and obligations which structure the legal relationship between private persons. This approach recognizes that there is

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[107] Waldron (n 4) 5.

[108] See, e.g., *ProCD, Inc v Zeidenberg* 86 F3d 1447 (7th Cir 1996).

disagreement about matters of private right and obligations. A socialist may have a particular moral understanding of the value of property that is entirely different from a libertarian. But they also acknowledge that we still have a need to act under a "common framework"[109] despite our disagreement. The focus of normative inquiry here is not about justifying private rights and obligations but on justifying the institutions that enable us to act in the face of disagreement about private rights and obligations. This directs us to questions about the legitimacy of those institutions, rather than the justice of a particular account of private rights and obligations.

A. Legitimacy & Ordorealism in Private Law

If we take up the ordorealist perspective, our normative inquiry begins by asking whether our existing institutions provide an answer to the "first question" of politics. That is: do our existing institutional arrangements secure "order, protection, safety, trust, and the conditions of cooperation"?[110] We can reframe the question with respect to private law. We can ask whether our current institutional arrangements secure order and stability in matters of disagreement over private rights and obligations. At first blush, this appears to be a relatively undemanding normative analysis. It might be straightforward to say that, as things stand, our institutions do a good job of providing stability and order in the face of disagreement over what rights and obligations should structure the legal relationships of private persons. This requires us to observe and make empirical assessments about whether the institutions that regulate contract, property and tort are effective in securing order and stability.

[109] Waldron (n 4) 7.
[110] Williams (n 7) 3.

But even an ordorealist approach to normative political theory demands more than simply surveying the field and satisfying ourselves that our existing institutions are legitimate because society is not in a state of disorder and conflict. While an answer to the first question is necessary, it is not sufficient. What is also required is an answer to the basic legitimation demand: a justification of coercive use of state power through these existing institutions which is acceptable to those who are subject to that power. Further, recall that realism adopts a contextual and historical approach to assessing this. We look at whether the actually existing institutions we have 'here and now' are legitimate by asking whether an interpretation of the use of that power 'makes sense' to those who are subject to it as form of justified political power rather than the mere exercise of raw power.

One might raise the objection that there can be disagreement at this level, too. We might disagree about whether the exercise of power 'makes sense' as legitimate. The realist response is that thinking of legitimacy in terms of agreement or consensus is misguided; requiring 'agreement' or 'consent' reintroduces a moralist point of view. We are not interested in an ideal-world account of what would make a society legitimate. Rather, we are interested in an understanding of the character of the relation of power between those in power and those subject to it. A legitimation story is either acceptable or unacceptable to each individual that is subject to power. It is, of course, plausible that some might say that the state they live under is illegitimate. An Indigenous person might deny the legitimacy of the Canadian state and say that it is no different from the exercise of raw power. Williams talks about this:

> Suppose a group of subjects of the state—within its borders, required to obey its officials, and so forth—who are radically disadvantaged relative to others. At the limit, they have virtually no protection at all, from the operations of either officials or other subjects. They are no better off than enemies of the

> state. There may be something that counts as a local legitimation of this. But is it [legitimate]? Is the [basic legitimation demand] satisfied? Well, there is nothing to be said to this group to explain why they shouldn't revolt. We are supposing that they are not seen as a group of alien people captured within the boundaries of the state.[111]

For a group such as this, it is open for them to say that even the basic legitimation demand has not been met. They would be in a state of, essentially, war against the state. It is possible for groups of this sort to exist within the bounds of a state where the legitimation demand is met for some groups and not others. For example, Raff Donelson argues that black people in the United States are essentially in a state of nature with respect to the police.[112] There is no legitimation story that is compelling to people in their circumstances. What is at stake here is not disagreement about legitimacy, but an assessment that the person or group is *outside of the community*. If you cannot make sense of the power exercised against you as a form of mediated legitimate power which is different from the exercise of raw power as domination, you are in a relationship with the state that is akin to the state of nature. This doesn't take the form of philosophical or ideal world disagreement about what would constitute legitimacy that we need to reach agreement or consensus about. It is, rather, a question each individual has to answer about their experience of power. And it is possible for the answer to be that there is no plausible legitimation story.

So far, this approach to political theory is one which has been developed at a very general level of abstraction. It is an approach to thinking about the whole set of legal and political institutions of a given society. But we can think about how this approach would work in the specific context of private law. First, we can identify

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[111] ibid 5.

[112] Raff Donelson, 'Blacks, Cops, and the State of Nature' (2017) 15 Ohio State Journal of Criminal Law 183.

the currently existing legal institutions which enable us to coexist in the face of disagreement about private rights and obligations. Next, we ask whether we can make sense of the use of coercive power through these institutions as acceptable to us in this current historical moment. That is, can our existing legal institutions be interpreted by us, 'here and now', in such a way that we can say that they are intelligible as an exercise of justified political power and not the unmediated exercise of raw power?

Such an interpretation must take into account the particular institutional configuration as it stands now. This includes reflecting the differences between the relevant institutions that have been identified above (i.e. courts, legislatures, administrative bodies). But it must also show how these institutions relate to each other with respect to the realist question that they provide an answer to. This is a very different project than the moralistic one that seeks an answer to what rights we really have.

I don't have the room here to provide a full account of what this might look like. And, indeed, my interpretation may be contested by others. But I want to suggest that the principle of democracy is one of the values that allow us to make sense of how state power is exercised to allow us to act in the face of disagreement over private rights and obligations. That is, the value of democracy is a central source of the legitimacy of the current set of institutional arrangements which employ the use of coercive power to allow us to act and live together in the face of disagreements among, e.g. socialists, conservatives, liberals, etc. over the rights and obligations that structure private relationships.

If we look to the current practice of courts, legislatures and administrative bodies and the difference between how power is exercised by each, we see that these

differences demonstrate that we place a priority on the value of democracy when addressing disagreement over private law rights and obligations. Courts are reactive and not proactive institutions; roles within them are occupied by unelected individuals, and the exercise of judicial power requires consideration of how things have been settled in the past and how things have been settled by the legislature. The current legal practice in Canada and the United Kingdom is that the legislature can always modify common law doctrine in contract, property and tort. Legislatures are not constrained by institutional history in the same way that courts are; they may completely rewrite legal rights and obligations between private persons. This includes the legal rights and obligations between parties to a contract, the ways we deal with involuntary harms, and our approach to property rights. They can reform any of these without being constrained by how the issue has been settled by courts.[113]

Indeed, even proponents of moralistic theories of private law such as Arthur Ripstein acknowledge that it is perfectly acceptable for a democratic legislature to decide to abolish the current common law scheme of negligence in tort, and institute a scheme of public insurance.[114] Here, Ripstein says that this might be a legitimate goal, but it isn't tort law, properly understood.[115] But realist private law theory is focused on the realist question: how do we act in the face of disagreements about private rights and obligations? The common law of the tort of negligence is one way, a statutory scheme of no-fault insurance enacted through a democratic legislature is another; both are ways of providing an answer to the same practical question. Their status as 'true' tort law is not germane to the analysis. What is salient is whether the replacement of the common law by a statutory scheme of insurance would be a

[113] Of course, legislatures may be constrained in other ways, for example, by the constitution.
[114] Ripstein (n 18) 292–295.
[115] ibid 294, fn 8.

legitimate exercise of state power. And, on this count, even Ripstein would agree that it would. The value that underwrites the legitimacy of such a scheme of public insurance has nothing to do with formal freedom and equality. Rather, it depends on the authority of the legislature. The best way to make sense of this is that we seem to be committed to a democratic legitimation story when it comes to the use of state power to answer the realist question about private rights and obligations.

How prescriptive can an ordorealist theory of private law be? Does it have the resources to provide normative guidance at the level of doctrine? There is not a clear answer to this question, partly because realism as an approach to normative political theory is defined in part by what it is not, which is a moralist approach. This may strike some private law theorists as disappointing. But I believe that there is something that the ordorealist approach to private law can say about doctrine, and about the constraints on the decision-making of judges and the role of courts.

Some private law theorists have developed arguments that suggest that the themes and commitments of realism can be marshalled to advance normative arguments at the level of doctrine. For example, in the context of contract law, Paul MacMahon has argued that "self-interested exchange relationships often contain the seeds of conflict, and that the best hope for legal and social institutions is to manage conflict, rather than try to eliminate it."[116] One of the aims of contract law, MacMahon argues, is to minimize conflict. Interestingly, MacMahon argues that such an aim can result in certain substantive prescriptions at the level of contract doctrine. He argues that when thinking about when a court ought to award equitable remedies such as specific performance, we must be attuned to the facts of

[116] Paul MacMahon, 'Conflict and Contract Law' (2018) 38 Oxford Journal of Legal Studies 270, 272–273. (Internal citation omitted.)

the case and consider whether and how such a remedy would prolong conflict rather than resolve it. While MacMahon doesn't adopt a political realist approach to the question,[117] his argument reflects the priority that ordorealists place on law as a method for allowing us to act in the face of disagreement and the priority of establishing order and minimizing conflict. What is important to note here is that we can interpret MacMahon's argument about whether and when judges ought to award the remedy of specific performance as a realist one because it is not grounded in a moral intuition about the rightness or wrongness of such remedy. Rather it is grounded in a claim about the empirical effects of using a particular rule: whether it would prolong conflict or resolve it.[118]

An ordorealist interpretation of democratic legitimacy in private law can also be brought to bear on debates about constraints on the decision-making of judges and the role and justification of the institution of the court. For example, Richard Posner has argued that judges make decisions with their sights set firmly forwards, looking backwards for guidance but not holding themselves constrained by the institutional history reflected in past decisions.[119] That is, the institutions of courts and adjudication should be focused on how the resolution of a particular dispute

[117] MacMahon argues that the minimization of conflict is "part of what it means for a court to do justice." ibid 298. In other words, reduction of conflict for MacMahon serves the goal of justice, whereas for the realist, it serves legitimacy.

[118] If we broaden our scope beyond common law doctrine, we can find a similar kind of justification being offered in support of legislation. For example, one consequence of the introduction Consumer Protection Act 1987 was a reduction in frequency of product liability litigation in the UK. Thanks to Emmanuel Voyiakis for this point.

[119] Richard A Posner, 'Pragmatic Adjudication' (1996) 18 Cardozo Law Review 21, 5.: "The pragmatist judge … wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case. The pragmatist is not uninterested in past decisions, in statutes, and so forth. …[but]… the pragmatist judge sees these "authorities" merely as sources of information and as limited constraints on his freedom of decision".

will affect the future behaviour of individuals. For Posner, adjudication should promote efficient behaviour.[120]

But an ordorealist theory of the sort just sketched above might reject this as illegitimate. As Waldron puts it, judges are not "at liberty"[121] to disregard how decisions have been made in the past when deciding how to resolve a dispute today. But notice that the ordorealist argument here is not made out on moralist grounds. The argument is not that we should reject Posner's approach because economic efficiency, or welfare promotion, or wealth maximisation, is an impoverished political value,[122] or fails to capture all that matters politically, by failing to appeal to other salient moral intuitions. The ordorealist rejects it on institutional grounds. That is, the approach to adjudication endorsed by Posner fails to meet the ordorealist demand for democratic legitimacy in addressing these matters of disagreement. The authority of an unelected legal official like a judge who occupies a role in the court is restricted by institutional history in a way that, e.g., a legislator's decision making would not be.

We can see how this argument would run against a moralist theory of private law of a different stripe. For example, in Chapter 1, I discussed the views of some interpretive theorists of private law who claim that some decisions made by courts are wrong because they fail to reflect the moral ideal underpinning private law. One example I noted was Weinrib's argument that the Supreme Court of Canada's test for a duty of care should be rejected as incoherent with the moral grounds of liability

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[120] Richard A Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 Hofstra Law Review 487.
[121] Waldron (n 4) 5.
[122] See, e.g., Ronald M Dworkin, 'Is Wealth a Value?' (1980) 9 The Journal of Legal Studies 191. Dworkin questions whether "social wealth is a worthy goal." ibid 194.

in negligence understood in terms of corrective justice.[123] Weinrib argues against the approach to negligence which has been adopted by the Supreme Court. Like Posner, Weinrib argues on moralist grounds: that a test for the duty of care based on weighing public policy considerations is inconsistent with the moral and correlative relationship of right and duty which is the core of private law. Here, an ordorealist would respond to Weinrib the same way they would respond to Posner: claims for the reform of doctrine on moralist grounds should be rejected. If a lower court ignored the Supreme Courts test and adopted Weinrib's approach to the duty of care, on the basis that the current test reflects the wrong moral account of private law, the ordorealist would say that this is illegitimate. Subsequent courts ought to follow the test developed by the Supreme Court of Canada not because it does or does not accurately reflect the correct moral view of tort law, but because that institutional history ought to constrain the decision-making of lower courts.

It is possible, of course, that an ordorealist could critique the Supreme Court's formulation of the test on other grounds. For example, they might say that by incorporating public policy into the test for negligence, the court has conferred on itself too much discretion, and that this is illegitimate. But note that this is an ordorealist critique: it points to the legitimacy of the institution, and not to the justice of the outcome. People accept courts in part with their limited role in mind: because judges are not democratically elected, what they are permitted to do is more limited. That acceptance might break down if they move too far towards exercising broad powers that are inconsistent with the story that legitimates them.

What becomes clear is that, on this ordorealist approach, much of the work of analyzing and interpreting past decisions, which is characteristic of private law

[123] See Chapter 1, Part IV. B.

scholarship, remains in place. The difference is that the normative basis for such doctrinal analysis is different; it proceeds on political realist grounds of legitimacy, and not on moralist grounds. To take an example, when adjudicating a contractual dispute, courts must engage in analysis and interpretation of the doctrine of consideration. But they do so because consideration is a longstanding part of our practice, and the legitimacy of the court demands that judges exercising their authority are constrained by institutional history. They do not do so because the doctrine of consideration reflects a deep, correct and controlling moral idea. So, we would expect courts to take the doctrine of consideration into account because democratically legitimate judicial decision making is constrained in this way. On the other hand, it would be acceptable on the ordorealist's approach for a democratically elected legislature to do away with the requirement of consideration as it sees fit. And it would be no answer to say that to do so would be wrong because it is contrary to the correct moral principle underlying contract and reflected in contract doctrine. But this is because of the legitimacy of the authority of the legislature. When we think about courts as another institution which enable us to act in the face of disagreement about the rights, obligations, and justice in contract, property, and tort, existing doctrine will still have a significant part to play on the ordorealist picture, but on different grounds than the moralist.

B. Legitimacy & Radical Realism in Private Law

We have seen what implications an ordorealist view might have for theorizing about private law. In this final section, I consider what a radical realist approach to private law theory might look like. Recall that the focus of the radical realist analysis is a critical evaluation of legitimation stories that are offered to justify political power. The radical realist approach is in this sense a negative project. It does not offer or construct a legitimation story. In the context of private law, then,

the radical realist would critique the legitimation stories offered with respect to private law. Here I explore two different upshots of the radical realist view for private law.

The first upshot is that we should ask: what reasons do those subject to the law have for rejecting a particular legitimation story? The aim of the radical realist is to provide the tools to critique the beliefs that we hold without collapsing into moral argument about those beliefs. One reason why one might question certain legitimation stories is because the reliability of the beliefs that underpin them is epistemically suspect in some way such that we might question whether we are warranted or justified in believing them.[124] Here the radical realists engage in the method of genealogical debunking: we show that the way that beliefs came to be held renders them epistemically suspect.[125] In other words, we ask whether a particular process of belief formation is reliable.

Legitimation stories rely on moral intuitions. But where do moral intuitions come from? The realist takes seriously that we are born and brought up in existing political structures. Those structures may affect the beliefs we hold and the attitudes we have. The point is that radical realism pushes us to be on guard for the effects that existing political structures and the relations of power they entrench have on our moral intuitions.

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[124] See Ugur Aytac and Enzo Rossi, 'Ideology Critique without Morality: A Radical Realist Approach' [2021] American Political Science Review, Forthcoming <https://papers.ssrn.com/abstract=3945741> accessed 18 November 2022.

[125] For an argument that this does not commit the genetic fallacy, see ibid 11–12. The point here is not that the way they come to be held means they are necessarily false. Rather, realism simply pushes us to critically examine a belief with knowledge of how it came to be held. One may end up retaining it.

One example of this type of critique, which takes aim specifically at the idea of property rights, comes from Rossi and Argenton.[126] The target of their critique is Nozick's entitlement theory of justice.[127] Nozick argues that individual "[r]ights do not determine a social ordering but instead set the constraints within which a social choice is to be made".[128] On Nozick's view, individuals have a right to private property.[129] Individuals' rights place side constraints on the legitimate use of state power.[130] The state is not justified in attempting to achieve distributive or "patterned" holdings of property rights.[131]

Nozick's moralist approach is to draw on intuitions about property rights to set boundaries on the legitimate use of state power. What Rossi and Argenton show is that the concept of private property rights historically arose as a result of the state.[132] So Nozick gets the story backwards. Nozick develops a libertarian theory where a just state is one which reflects "justice in acquisition",[133] "justice in transfer,"[134] and "the principle of rectification".[135] Nozick's theory rests on the justification of individuals' rights in private property. But, according to Rossi and Argenton, the empirical record shows that the idea of private property arose as a result of the existence of the state. And so, we might ask: should you believe that a

[126] Enzo Rossi and Carlo Argenton, 'Property, Legitimacy, Ideology: A Reality Check' (2021) 83 The Journal of Politics 1046.
[127] See Nozick (n 16) 150–153.
[128] ibid 166.
[129] ibid 174–182.
[130] ibid 28–33.
[131] ibid 167–174.
[132] Rossi and Argenton (n 126) 1054.
[133] Nozick (n 16) 150.
[134] ibid.
[135] ibid 152.

legitimate state is one that doesn't infringe on private property rights if the very idea of private property rights came about due to the existence of the state?

Note that the kind of argument being made here is not an argument on moral grounds about what rights individuals have to private property.[136] Rather, the critique is an epistemic one about whether we should believe in a legitimation story about state power as being justified only if it does not infringe on property rights, if that story is grounded in a conception of rights which itself arose out of the state. Rossi and Argenton provide an example of what a radical realist critique of the legitimacy of the state in relation to private property looks like.

In the context of private law, another belief that can be subject to critique is the belief about the boundary between private law and other areas of law. If we hold certain beliefs about what properly constitutes private law and what properly constitutes public law, are those beliefs warranted? Moralist theorists of private law draw these boundaries on the basis of some normative or moral idea. But the realist approach pushes us to critically reflect on how these boundaries are drawn. The worry is that beliefs about how such boundaries are drawn are perceived as neutral, but in fact smuggle in normative commitments that reproduce existing relationships of power.[137] Recall that the realist takes a skeptical posture about claims which are grounded in intuitions; the worry is those moral intuitions reflect the interests of the victors in past political battles. Further, such beliefs, which have a moralized under-

[136] For an example of that kind of critique, see Thomas Nagel, 'Libertarianism without Foundations' (1975) 85 The Yale Law Journal 136.

[137] Khaitan and Steel highlight this point in their discussion of drawing boundaries around areas of law. See Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2022) Forthcoming Oxford Journal of Legal Studies 1, 14.

pinning, can become reified in a way that precludes or pre-empts political contestation.

We see this kind of concern raised in feminist critiques of the public/private distinction.[138] Rossi, in discussing this feminist critique, says that "the slogan [the personal is political] reminds us to look with suspicion at any established, ossified way of drawing the line between the personal and the political."[139] In other words, we should beware of treating as natural a line that is not natural, and look critically at where boundaries are drawn. This point can be extended to the area of private law: we might be suspicious that the line drawn between private and public law really obscures some other power relation that drives the drawing of that line.

For example, consider the heated debates in private law theory between economic analysts of the law and corrective justice theorists.[140] There is great disagreement about whether an instrumental understanding of contract, property, and tort justified on the basis of its effects on overall welfare is morally preferable to one that justifies private law non-instrumentally as being constitutive of a particular kind of formal freedom and equality. What is striking to the disinterested observer is that, despite the disagreement, theorists on both sides are in general agreement that private law is justified in a way that is amenable to a market-based economy. That is, they agree, for very different reasons, on where the line between private and public law ought to be drawn in a way that justifies a market-based economy.

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[138] For a general overview of the scholarship critiquing the public/private divide, including the feminist perspective and others, see Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 Columbia Law Review 1395, 1406–1410.

[139] Rossi (n 64) 641.

[140] See Arthur Ripstein, 'Critical Notice: Too Much Invested to Quit: Fairness Versus Welfare, by Louis Kaplow and Steven Shavell' (2004) 20 Economics and Philosophy 185; Louis Kaplow and Steven Shavell, 'Reply to Ripstein: Notes on Welfarist Versus Deontological Principles' (2004) 20 Economics & Philosophy 209; Jules L Coleman, 'The Grounds of Welfare' (2003) 112 The Yale Law Journal 1511.

On the corrective justice view, private law reflects a distinctive normative relationship between formally free and equal persons. For economists, private law is justified insofar as it promotes social welfare. So, you might think the latter reflects a public view of private law. However, economists go on to provide a further argument about why private law in particular is justified only insofar as it maximizes wealth, whereas other welfarist aims (such as, e.g., distribution) should be achieved through other legal institutions. Both draw the lines between public and private law in the same place, albeit for different reasons. But they both do so in a way that provides a justification of the market. I am not arguing here that the way those lines are drawn is necessarily wrong. Rather, I am suggesting that the radical realist would direct us to be attentive to those lines, and to ask questions about why those lines are drawn where they are, and whose interests are served by the drawing of those lines in those places.

V. Conclusion

I have argued here that taking a realist view helps shed light on debates in private law theory in new ways. I outlined two realist views: the ordorealist and the radical realist. I then examined what implications might flow from accepting one or the other realist view. Again, I did not attempt to argue for the realist view, but rather to use it as a lens and see what it might tell us about the practice of private law. Broadly, the realist commitment is that we have to acknowledge the unavoidable fact of conflict about moral values. Specifically, with respect to private law, people disagree about the rights and obligations which ought to regulate the relationships between private persons. The realist view proceeds on the basis that there is disagreement about private law rights and obligations. So, we shift our discussion from debate about what rights we have, to debate about how to move

past that disagreement and what institutions we use to do so—that is, from rights to legitimacy.

I argued that one upshot of the ordorealist view might be that a democratic legitimation story makes sense to people as a way of securing order and stability in matters of disagreement over private rights and obligations. Judges and other decision-makers, then, should be attentive to the value of democracy in the way they make their decisions. I argued that this kind of approach leaves room for doctrinal analysis, but does so on thoroughly political and not moralist grounds. I then turned to radical realism, and argued that the radical realist pushes us to question how we came to hold the beliefs we do which form part of the legitimation story that may be offered to justify the exercise of state power through legal institutions. Further, the radical realist pushes us to interrogate the way that lines are drawn between doctrinal areas to ensure that we are aware of the possibility that relations of power animate the way those lines are drawn.

Realism tells us to shift from talking about rights to looking to legitimacy, and thinking about better and worse ways of managing conflict. 'Better', in this context, doesn't require us to answer the retail question of what should be done in a given case. Instead, it tells us how to go about things: how to structure institutions so that we can live together despite disagreement. But even that requires that individuals are motivated to support the establishment and maintenance of these institutions. These are institutions that allow us to act in the face of disagreement, and so we expect people to support these institutions even when the resolution does not go their way. We need institutional arrangements that people will be motivated to support. So, we need to ensure that such motivation exists, sufficient to support these institutions. This is an issue I will examine in the next chapter.

Chapter 5: Do No Harm: The Effects of Legal Practice on Moral Agency

I. Introduction

In the three previous Chapters I examined and discussed several normative questions about the practice of private law. I framed normative inquiry into private law as a project which aims to provide an answer to one or more normative questions about the practice of private law. So far, my focus has been on normative theory that we can call positive: theorists make positive claims for how a judge ought to decide a particular private law dispute or how a particular institutional arrangement that determines private law rights and obligations might be justified. In this Chapter, I focus on normative theorists who make normative arguments that we might characterize as negative: a normative claim about the limits or constraints on positive normative theories of private law practices.

Here I take as my starting point an argument that has been developed by Seana Shiffrin about contract law.[1] Shiffrin develops a normative argument for limiting or constraining the design and justification of our contract law practice. Very generally, Shiffrin's claim is that, whatever positive normative argument one might give for why contract law is justified, such a positive claim ought to be sensitive to the potentially negative effects that those legal practices, and the way they are justified, have on an agent's moral or ethical life outside the law. Shiffrin argues that the design and justification of our legal practices must not undermine the moral agency of individuals. That is, the law ought not to make things more difficult for "a reasonable moral agent with a coherent, stable, and unified

[1] See Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708.

personality."[2] Call this the *Do No Harm Principle*. Shiffrin makes this general claim in the context of contract. She argues that, whatever we think the right kind of justification is for the practice of contract law, we must be sensitive to the potentially negative effects that contract rules and practices might have on individuals' promissory morality. As I will show, similar worries about the effects of private law practice on the ethical lives of individuals have been articulated by John Gardner.

I believe Shiffrin's argument is an important one. It is at least plausible as a starting point that our legal practices ought not to make things more difficult for us in our moral lives outside the law. But there are different ways of understanding how the Do No Harm Principle ought to be interpreted and applied. First, there is a general question of what is meant by the claim that the law ought not to negatively affect a legal subject's moral agency. I consider and analyze two possible ways of interpreting this claim. The first focuses on the agent's normative reasons. On this view, the Do No Harm Principle means that the law ought not to have a negative effect on the agent's normative reasons for action. Put another way, the law ought not to make it more difficult for an agent to deliberate about what they morally ought to do. The second focuses on the agent's motivating reasons. Framed this way, the Do No Harm Principle is a claim about how the law ought not to have a negative effect on the agent's motivating reasons for action. That is, that the law ought not to make it more difficult for an agent to be motivated to actually do what they morally ought to do.

So, we can reconstruct Shiffrin's argument about the particular relationship between contract and promise in the following two ways. First, that contract law should not make it more difficult for an agent to *deliberate about* what they morally

[2] ibid 717.

ought to do when making and keeping a promise. Call this the 'normative reasons' interpretation. Second, that contract law should not make it more difficult for an agent to *do* what they morally ought to do when it comes to promissory morality. Call this the 'motivating reasons' interpretation.

I show that the 'normative reasons' interpretation of the Do No Harm Principle is simply another way of reformulating more general questions about legal normativity and, more specifically, the question of whether and why individuals have a moral duty to obey the law. On this interpretation, the Do No Harm Principle doesn't add anything to existing debates about the normativity of law, it simply reframes them in another way. By contrast, I show that the 'motivating reasons' interpretation of the Do No Harm Principle does push us to think about the relationship between legal and moral practice in a different way. It sharpens our focus on the potentially negative effects that legal practice might have on agents' motivations to do the morally right thing. However, here I make two further arguments against Shiffrin's way of framing the issue.

First, any argument about the negative effects that the practice of contract law may have on an agent's motivation to do what they morally ought to do when it comes to making and keeping promises depends on whether we agree about what an agent morally ought to do when it comes to making and keeping promises. That is, disagreement about what promissory morality requires will give rise to disagreement about whether contract law makes it more difficult for us to do it. So, any claim about the effects of legal practice, contract or otherwise, on our motivations to do what we morally ought to do is hostage to disagreement about what we morally ought to do. I think Shiffrin's focus on promissory morality obscures what is the core worry underlying her argument. The essential issue animating the Do No Harm Principle is a worry about the potentially negative

effects that law might have on agents' *motivation* to support and maintain just systems of cooperation. That is, Shiffrin's focus on the morality of promise-keeping is really an indirect way of articulating the real worry about the moral motivation of agents to support and comply with just systems of cooperation and coordination such as a just legal and political order. As I show, this worry is one that political philosophers are acutely aware of and address. What I think Shiffrin's argument does is press normative *legal* theorists to take this worry seriously, too.

Finally, I argue that this reconstruction of the Do No Harm Principle faces similar difficulties associated with moral disagreement. The principle that legal practice should not undermine the motivations of individuals to support and maintain *just* political and legal orders, will only have bite if we agree on what counts as a just political and legal order. Like disagreement over the demands of promissory morality, disagreement over what justice demands will also give rise to disagreements about whether a law has the effect of undermining agents' motivations to support and promote just institutions. Here I draw on the literature in political realism that I discussed in Chapter 4 to argue that the best way to understand the Do No Harm Principle is as a claim about the negative effects that legal practices might have on the motivations of agents to support and maintain *legitimate* (not just) political and legal orders. This requires an explanatory (not normative) theory of how legal practices might have this effect. I finish the Chapter by offering some examples from the existing private law literature to demonstrate how normative theorizing about private law might undermine agents' pro-social motivations.

The remainder of this Chapter is organized into three Parts. In Part II, I discuss Shiffrin's formulation of the Do No Harm Principle and similar worries articulated by other theorists of private law. In Part III, I interpret the Do No Harm

Principle as a claim about the law creating practical conflicts for an agent's normative reasons and argue that this way of understanding it adds nothing new to existing debates about the normativity of law. In Part IV, I interpret the Do No Harm Principle as a claim about the effects of contract law on an agent's motivations to do what they morally ought to do. Here I argue that this reconstruction of Shiffrin's argument seems plausible but is hostage to disagreement about what promissory morality demands. Instead, we should interpret it as a worry that has been identified by political philosophers about the effects of legal institutional practice on individuals' motivation to promote and sustain just systems of cooperation. I make the further argument that disagreement about what justice demands should shift our focus to normative concerns over the potentially corrosive effects that legal practice might have on the motivations of agents to support legitimate institutions. In Part V, I conclude by showing how the reconstructed Do No Harm Principle might inform certain normative questions about private law and the way it is justified.

II. 'Do No Harm': Placing limits on the practice of private law

Many private law theorists endorse the idea that the law is justified as a means for securing valuable aims independent of the law, even if they disagree substantively about what those ends ought to be. A theorist might argue that legal rules and practices of tort or contract law are justified insofar as they function as a way to assist us in discharging obligations that we already have as a matter of interpersonal morality.[3] By contrast, another theorist might argue that obligations in contract and tort law don't track independent pre-political interpersonal moral

[3] For a recent defence of a moralistic justification of private law, see John Gardner, *From Personal Life to Private Law* (First edition, Oxford University Press 2018). For an account of contract law justified on the basis of enforcing promissory morality, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 2015).

obligations at all; they are instead justified as formal means for achieving certain socially valuable goals.[4] While there is a disagreement between them about the justifiable aims of the law, both agree that the law can only be justifiably used as a means to secure something of value.[5]

It follows that normative theorists of private law acknowledge that the law can be used in better and worse ways. Whether the law is justified because it reflects pre-existing interpersonal obligations or because it induces socially valuable behavior, there will be further questions about what kind of legal institutional design would best realize those ends. This in turn gives rise to further empirical and normative considerations about how law is used; different ways of designing legal rules and institutions may have good and bad effects which are normatively significant when justifying a particular legal practice. One might argue that even though the law, in principle, ought to attend to all of our pre-existing interpersonal obligations, state enforcement of those obligations through law may have negative consequences that count against state interference. For example, legal enforcement of the moral obligations that two friends owe to each other because of their

[4] For a defence of the claim that all private law legal rules are justified on the basis of social welfare, see Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press 2002).

[5] Not all private law theorists agree with this. For example, Ernest Weinrib has argued that tort law is constitutive of a distinctive moral domain which is necessary in order for individuals to relate as free and formal equals. See, e.g., Ernest Weinrib, 'The Special Morality of Tort Law' (1989) 34 McGill Law Journal 403. On this view tort law is necessary in order to practically realize abstract notions of right; it is not, strictly speaking, a *means* for protecting abstract right. Weinrib's claim is that the law is never a means for achieving some end. In other words, the law is constitutive of certain moral rights and duties we have as free and equal persons, and as such, any *effects* that the law might have are irrelevant to any determination of what the law should be. But some have argued that even on this view the law could be seen as a means or as serving a function: "to reflect and effectuate corrective justice." Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2022) Forthcoming Oxford Journal of Legal Studies 1, 18. But, as I will argue in Part V, even if we accept Weinrib's claim that the law can never be understood as a means for achieving aims external to the law, the Do No Harm Principle would still press Weinrib to take seriously the effects that his theory of private law might have on the motivation of agents to support a legal order which secures both corrective justice and distributive justice.

friendship would arguably have the effect of undermining their relationship[6] and, as a result, we should be sensitive to the effects that the law might have on these relationships.[7] Similarly, a legal economist might argue that, say, existing remedies in the common law are not efficient because they do not elicit welfare-maximizing bargaining behavior between counterparties.[8]

Accordingly, such theorists would accept that it would be implausible to think that the effects of the law on agents are always good. Legal practices that are prima facie justifiable on the basis of the aims they seek to achieve may function in ways that have potentially negative effects on individuals. This has led some normative legal theorists to turn their attention to the ways that a legal practice can make things go wrong for individuals, morally speaking. This argument has been most forcefully made by Seana Shiffrin. Shiffrin argues that the rules and rationales of U.S. contract law, to the extent that they diverge from the rules of promissory morality, may run the risk of undermining individuals' promissory morality.[9]

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[6] Gardner (n 3) 43. "If one performed the duties [of friendship] for contractual reasons, one would be no friend."

[7] See discussion of this point at ibid 43–44. Gardner recognises that we can have overlapping contractual and interpersonal duties. We might want to have this overlap "to provide motivational reinforcement at the point of performance. But in many relationships, even in some commercial ones, such reinforcement is out of keeping with the original spirit of the relationship. While their non-contractual relationship subsists, the parties work with each other in the hope, and often in the reasonable expectation, that nobody will ever need to consult the contractual terms, let alone insist upon them, never mind call upon the support of the law to uphold them. They would regard resort to the contractual terms, even without the invocation of their legal effect, as already exposing a crack in their relationship. … In marriage and romantic relationships, even the suggestion of a need for such a fallback (a 'prenup') might sometimes be regarded as already an admission of defeat by the party suggesting it, verging on an anticipatory abandonment of the relationship."

[8] On the claim that legal remedies for contractual breach ought to be designed to maximize efficiency and questions about how tractable such a claim is, see Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99.

[9] Shiffrin (n 1). Shiffrin says "we should be concerned about law's assigning significantly different normative valences and expectations to practices that bear strong similarity to moral practices, especially if we expect both practices to occur frequently and often alongside each other. That is, we

A similar worry has been raised by John Gardner. Gardner warns that the law facilitates a shift towards the problematic "contractualization"[10] of relationships; by reducing obligations to the terms of legally enforceable contracts, contract law erodes other valuable non-legal duties and obligations that ought to regulate normatively significant relationships.[11]

The worry of both theorists, stated in general terms, is that while legal rules and institutions may be justified (whether they are a means for making us conform to our pre-existing duties or because they promote overall social aims or for some other reason) we ought to be sensitive to the potentially negative effects that legal practices may have on the moral lives of individuals. For Shiffrin, contract law makes things go wrong for our moral agency when it negatively affects our capacity to comply with our promissory duties, whereas for Gardner it is when the law corrodes our capacity to comply with the moral obligations that regulate our relationships, such as the moral obligations that an employer owes to an employee outside of contract law.[12]

This claim should not be mistaken for the positive argument that the promotion of good moral character and attitudes is itself a ground for the justification of legal practices. The argument is not that the law is justified if it promotes or cultivates a moral attitude or sensibility.[13] The argument I examine in

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should be concerned that the one will influence the other, making it more difficult to maintain those habits and reactions that are essential to the moral behavior." ibid 741.

[10] Gardner (n 3) 45.

[11] ibid 44–46.

[12] ibid 45.: "The law still needs to draw the distinction between employment relationships and others, for example, in its doctrines of vicarious liability, and for the purposes of various tax, insurance, and licensing regimes. But by giving succour to the idea that the employment relationship is merely a contractual one, it has invited erosion of the distinction between employment and its absence."

[13] This might be one way of understanding Prince Saprai's argument for a republican contract law. See Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law*

this chapter is neutral as to the particular positive account offered for why a legal practice such as contract or tort is justified. Instead, it interprets the claim as an articulation of a normative constraint on such accounts: whatever account a normative legal theorist offers to justify or explain private law rights and obligations, they ought to be, at least presumptively, limited by the extent to which they may have corrosive effects on individuals' moral agency. While a legal practice may be justified as a means for promoting valuable ends, we should be sensitive to the potentially negative effects that it may have on the ethical life of individuals. It is not that the law is justified because it ought to inculcate good character, but rather that, whatever else it is that the law is designed to achieve, it ought not to undermine individuals' moral agency.

On its face, this condition appears intuitively plausible. Certainly, no one would argue that the law ought to worsen agents' moral lives. Further, no theorist that I am aware of believes that the law has no effect on an individual's capacity to act. Some might deny that such effects are relevant when it comes to justifying or evaluating the law; they might believe that any effects that legal practices have on individuals are irrelevant for a normative justification of the legal practice.[14] However, any normative theory of law that justifies the law functionally as a means for achieving certain valuable ends necessarily assumes that the law guides the action of individuals in better and worse ways in achieving those ends.

But there is some ambiguity in the scope and application of this principle. What is meant by 'moral' agency? What aspects of moral agency should we be

(Oxford University Press 2019). Saprai argues "that the best conception of the rules and doctrine of English contract law is that they embrace or embody the promotion of trust-based cooperation between contracting parties as the constitutive or characteristic purpose of this area of law." ibid 64. That is, one function of contract is to "promote trust based cooperation." ibid 65.

[14] See discussion of Weinrib in (n 5).

concerned with? Is it the effects of a legal practice on agents' normative reasons for action? Or is it the effects of a legal practice on the moral motivations of the individual? In the next Part, I canvass different possible interpretations and rule out several options, leaving us with a more focused understanding of what potentially negative effects of the legal practice the Do Harm Principle directs us to be sensitive to.

III. Normative Reasons for Action: How Legal Practices Generate Practical Conflicts

One way to understand the Do No Harm Principle is as a concern about the effects of the law on individuals' reasons for action: when could a legal practice have bad effects on an agent's practical reasons? Legal philosophers take their project to be primarily in the domain of normative reasons; those reasons that justify or "count in favor of"[15] a particular action, policy, practice or institution. For example, they might look to the reasons that justify the legal institution of contract law, the reasons that count in favor of enforcing some contractual terms and not enforcing others, or the reasons that justify the imposition of a burden of repair for accidental harm on particular individuals.

From this perspective, the question is: what are the potentially bad effects that legal practices may have on an agent's normative reasons for action? To pursue this line of inquiry we first need an account of how law affects an agent's normative reasons. We can rely here on David Enoch's account of reason-giving. Enoch says practical reasons can be given in a range of ways: "Some such reason-givings are purely epistemic, they merely indicate the existence of an independently existing

[15] TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 17. "I will take the idea of a reason as primitive. Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favor of it."

practical reason. Some such givings are cases of merely triggering reason-givings, they merely manipulate the non-normative circumstances in a way that (roughly) triggers a pre-existing conditional reason. And some reason-givings are robust, and are themselves best understood as particular instances of triggering reason-giving, that are characterized by the special intentions and the two success conditions above."[16] We need not worry about the details of Enoch's account. What is important is that he argues that the law necessarily gives legal reasons.[17] But, as Enoch shows, "talk of legal reasons cannot do the substantive work of bridging the gap between the law and real reasons".[18] He argues against the view that, necessarily, the law gives *real* reasons.[19]

On this view of reason-giving, the law gives us legal reasons, but there is no guarantee that those legal reasons are real reasons. So we could say that the law affects our moral agency when it produces legal reasons that figure in our considerations about what we morally ought to do. But if they are merely legal reasons and not necessarily real ones, there is no guarantee that they will or should figure in our considerations about what to do. So we still need a way to evaluate whether the reasons that legal practices generate have *good or bad* effects on our moral agency. If they are merely legal reasons, this doesn't tell us anything yet about whether we have a real reason, and therefore whether we have a conflict with our real reasons.

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[16] David Enoch, 'Reason-Giving and the Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 1 (Oxford University Press 2011) 14.
[17] ibid 16–17.
[18] ibid 18.
[19] ibid 19–26.

So, the question arises: do legal reasons create a conflict for our real reasons, and if so, under what circumstances?[20] The normative reasons given by the law may undercut the ability of the agent to comply with other normative reasons. In order to make out this argument, we would require an account of the relationship between the reasons generated by the law and reasons generated by non-legal practices. Do normative (legal) reasons override normative (non-legal) reasons or do they carry a certain 'weight' relative to such reasons? Further, we would need to specify how to distinguish between legal and non-legal reasons, and the kind of non-legal norm we are interested in (e.g. prudential, moral, conventional, etc.).

A question of central importance for legal philosophers is the relationship between the normative reasons generated by law and those generated by morality. The debate between positivists and non-positivists is, in part, about whether the content of legal norms, properly understood, necessarily incorporates morality. For example, a nonpositivist might say that the normative reasons for action given by law *just are* the moral reasons for action that we have as a result of past institutional practices.[21] In other words, the identification of valid legal reasons for action depends on our moral reasons for action. But the claim we are examining here is framed differently from the traditional debate about the grounds of law. The question is not 'What are valid legal reasons?' Rather, the question is about how legal practices could make things go wrong for agents' normative reasons for action. We can frame Shiffrin's argument in these terms as follows: How could the

[20] Raz has examined the question of practical conflicts – situations where we have normative reasons for two or more actions. See Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011). See generally Chapter 9, 'Reasons in Conflict'.

[21] See, e.g., Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 The Yale Law Journal 1288.

normative reasons generated by contract law have a negative effect on the reasons that are prescribed by promissory morality?

Here I examine two possibilities. First, a direct practical conflict between the normative reasons generated by legal practice and those given by moral practice. Second, where a legal practice generates reasons that regulate a practice which is separate from but parallel to another practice regulated by a moral practice. I will show that, in order to say that the law has created a practical conflict for the agent's normative reasons, we need to take a *substantive* position on how the law ought to figure in our normative reasoning and, as a result, this simply restates the more general and much-discussed question of the normativity of law.

A. Legal Norm requiring one to φ & Non-Legal Norm requiring one to Not-φ

Suppose there is legal directive which requires A to φ if condition Y obtains. Further, assume that there is a non-legal practice which directs A to not-φ if condition Y obtains. Does the law have a negative effect on A's normative reasons? The law potentially presents a practical conflict: the reasons for action generated by legal practice directly conflict with the reasons generated by the non-legal practice. But the significance of the conflict will depend on how much weight is given to each set of normative reasons.

One possibility is to argue that the legal reason counts in favor of φ-ing, but that the non-legal reason to not-φ is stronger such that, all things considered, A ought not to φ. This might be plausible if we assume that the non-legal reasons are moral reasons. For example, if we believed that moral duties are categorical

requirements which trump all other valid considerations,[22] we would say that the moral reasons outweigh the legal reasons in our practical deliberations about what the agent ought to do. Consider for example a law that criminalizes homosexuality. A legal official may have normative (legal) reasons that count in favor of sanctioning individuals who are in a same-sex relationship but normative (moral) reasons that count in favor of not enforcing such a discriminatory legal directive. In deciding what to do, the legal official may weigh these competing normative reasons for action and conclude that the moral reasons trump the legal ones.

Alternatively, suppose that the non-legal reasons are prudential and not moral. Here, not-φing would be beneficial to A from a narrowly self-interested viewpoint. Take, for example, compliance with income tax laws. Given an assessment of the likelihood of audit and imposition of penalties, there may be prudential reasons for an agent to not comply with the legal directive to file and pay taxes on their income. The normative (prudential) reasons must be weighed against the normative (legal) reasons in order to determine whether or not A ought to φ. Here we might say that the legal reasons ought to outweigh the prudential reasons.

At this stage, we still have no criterion with which to evaluate the effect of the law on the moral agency of the legal subject. All we can say is that the law has an effect because it gives reasons. In order to evaluate whether the law has a good or bad effect on an agent's normative reasons, we require a substantive account of how the normative reasons given by the law *ought* to figure in an agent's reasons for action. We must further complicate the above example by taking a position on how reasons generated by legal practices and non-legal practices interact and relate to

[22] See, e.g., Gardner (n 3) 21.: "For a duty, also known as an obligation, is none other than whatever a norm … categorically requires the duty-bearer to do."

each other in our practical deliberations about what we ought to do. For example, one might argue that the only kinds of normative reasons for action that the legal practices generate are prudential. Alternatively, one might argue that there are non-prudential moral reasons for complying with the legal directives which override other considerations. It is only once we have an account of the weight that legal reasons carry in one's normative deliberations that we can then point to situations in which legal norms may present difficulties for the agent.

Suppose there is a legal directive which requires A to φ if condition Y obtains. Further, assume that A has a moral reason to not-φ if condition Y obtains. In addition, assume that A has a moral duty to obey the law. What effect does the legal practice have on A's normative reasons? Here one could argue that the law has a potentially negative effect on A's normative reasons to act because the law has created a practical conflict: there is a normative (moral) reason to not-φ (independent of the law) and a normative (moral) reason to φ (because A has a duty to obey the law). In such a case the law introduces an irresolvable practical conflict for the agent because they are presented with categorical requirements pulling in opposite directions; complying with one set of normative (moral) reasons makes it impossible to comply with the other. The law arguably has a negative effect on A's normative deliberations about whether they ought to φ. Here we might then say that legal practice would be unacceptable "to a reasonable moral agent with a coherent, stable, and unified personality."[23]

What becomes clear is that the force of this argument will depend on the particular account of the moral duty to obey the law. If one endorses a content-independent duty to obey the law such that legal norms prescribe what one morally

[23] Shiffrin (n 1) 717.

ought to do, then an agent will be presented with the above irresolvable conflict where a legal norm prescribes an action which contradicts a moral norm independent of the law. For example, one could argue that there is a prima facie duty to obey the law because the law is necessary for securing certain common goods and it "presents itself as a seamless web" such that one cannot pick and choose which laws to follow.[24] On this view, it is not difficult to see how the law could possibly make things go wrong for an individual's normative reasons for action by creating a practical conflict.

However, there is significant disagreement about the moral duty to obey the law. Arguably, the predominant view is that there is no content-independent duty to obey the law. Many theorists endorse views that justify compliance with the law either on procedural grounds (e.g. express/implied consent or democratically produced laws) or by evaluating the substantive content of the law. For example, Raz discusses a range of reasons one might have to obey a particular law, but says that none of these generalizes to a standing duty to obey the law.[25] He says that "the extent of the duty to obey the law in a relatively just country varies from person to person and from one range of cases to another."[26] A legal reason might count as a consideration in weighing the normative reasons for what one ought to do, but the fact of the reason being generated by legal practice is not, on its own, a decisive reason for action.

Accordingly, the claim that the law has a negative effect on the agent's normative reasons becomes more tenuous for those who hold this view than for

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[24] John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) 1 Notre Dame Journal of Law, Ethics and Public Policy 115, 120.
[25] Joseph Raz, 'The Obligation to Obey: Revision and Tradition' (1984) 1 Notre Dame Journal of Law, Ethics and Public Policy 139, 145–149.
[26] ibid 149.

those who believe there is a content-dependent duty to obey the law. The question of whether or not to comply with the practical reasons generated by legal practice directs us to engage in substantive reasoning about what we ought to do; it does not necessarily make it more difficult to do so. The reasons given by the law will figure in the normative reasons A weighs about whether they ought to φ, but whether or not it presents a difficulty for A's all things considered normative reason to act will depend on the particular account of the duty to obey the law that is assumed. This is a familiar problem and directs us to debates about the normativity of law and the question of what kinds of reasons for action are generated by legal practices.

One could argue that even assuming a content-dependent account of legal obligations, the law can still make things go wrong for an agent's normative reason because it creates situations in which some of the agent's normative reasons go unconformed to.[27] Take the example from above: suppose the value of complying with the legal system outweighs the value of doing the morally right thing in a particular instance such that, all things considered, A has more reason to comply with a legal directive (and φ) than she does to comply with the moral reasons (and not-φ). As a consequence, the law has arguably made it more difficult for the agent to conform with some of her normative reasons for action. This would be the case even where the practical conflict is "imperfect".[28] In some situations, compliance with the law may make it impossible to fully comply with the competing reasons that apply to the agent, but the agent may still be able to comply in part.

But this kind of argument (that some normative reasons are left unconformed to either in whole or in part) implicitly assumes a particular position in substantive

[27] Or, as Raz puts it, "there will be an unsatisfied reason left behind." Raz (n 20) 181.
[28] ibid 182.

moral theory (i.e. moral value pluralism). To see why, consider how a moral value monist would respond to the claim. Continuing with the example from above: the argument is that, because A has more reason, all things considered, to comply with the law, the agent fails to conform fully to her moral normative reasons. But a value monist such as, e.g., a utilitarian might offer the following response: (i) what A morally ought to do all things considered is whatever maximizes overall utility; (ii) if compliance with the law maximizes overall utility, then A morally ought to comply with the law; (iii) while some normative reasons may go unconformed to, such reasons are not, strictly speaking moral normative reasons; therefore (iv) the law creates no problems for the agent's conformity to moral reasons. For the value monist, there is no conflict between foundational moral values, so that what one morally ought to do all things considered is whatever promotes the single fundamental value.

Alternatively, one might reject monism and endorse the view that there are irreducibly plural moral values. So, one could simply reject the monist's response and continue to maintain that the law creates practical conflicts for an agent's choice because there will be situations in which the agent's action may not conform perfectly to the normative moral reasons she has. If compliance with a legal practice is morally valuable, then it may result in irresolvable conflict with other values; complying with the law may be the right thing to do all things considered but that doesn't change the fact that some moral reasons are left unconformed to. However, this position restates a general worry in value theory: "whether rational choices can be made between irreducibly plural values."[29] There is nothing uniquely

[29] Elinor Mason, 'Value Pluralism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018, Metaphysics Research Lab, Stanford University 2018) <https://plato.stanford.edu/archives/spr2018/entries/value-pluralism/> accessed 14 November 2022.

problematic about legal practices in this regard. Compliance with the law is just one possible source of value that must be weighed against others as we do in our moral practices generally; it may introduce complexity in an agent's choice, but it can't be said to have a negative effect on an agent's normative reasons any more than other moral values that present similar practical conflicts.

A more general difficulty with this argument is the problem of moral disagreement: the claim that the overlapping practices of law and morality create practical conflicts doesn't seem to get us very far unless we can agree on the content of the norms of morality. Theorists of different persuasions may agree that law should not create practical conflicts for an agent's normative reasons but will disagree on when there has been a problematic conflict of reasons between law and morality, because they disagree about what morality demands. One might agree with Shiffrin that contract law should not have negative effects on the norms of promissory morality but may disagree on the content of the norms of promissory morality and, as a result, disagree that law has made things go wrong for an agent's practical reasoning. For example, a theorist might believe that the moral value of promising is grounded in the overall social good that is produced by the practice of making and keeping promises.[30] They would accept that there is a moral obligation to keep one's promise, because it promotes a socially valuable practice, but may disagree that morality can provide any further guidance as to the content of promissory obligations such as, e.g., the appropriate remedy for breach. Accordingly, provided that the law requires agents to comply with their contractual obligations, the conventionalist will be untroubled by other features of contract law because they don't run afoul of the content of promissory morality. By contrast, a

[30] See, e.g., Liam Murphy, 'The Practice of Promise and Contract' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014).

theorist who believes that the value of promising is grounded in a power that is integral to the ability to engage in morally valuable relationships[31] may conclude that morality has a lot more to say about what promising entails. So, the theorists may disagree on the extent to which the law can have any effect on promissory morality because, aside from the moral obligation to keep one's promise, they disagree on the specific content of promissory norms in morality.

Accordingly, to say that the law has the potential to make things go wrong for our normative reasons for action simply restates well-known questions about the normativity of law or highlights an already recognized problem of how rational choice is possible in the face of incommensurable values. Further, even if we could agree on how the reasons given by the law ought to figure in our practical deliberations about what we ought to do, it doesn't seem to get us much further. Disagreement about the content of moral norms will lead to disagreement about when law presents a conflict with morality.

B. Parallel Practices

The discussion up to now has been based on an example in which legal and moral norms generate reasons relating to the same act. But what about the question of how legal norms affect non-legal norms when they regulate parallel practices such as promise and contract? Some private law theorists argue that, when reflecting on the justification and evaluation of the practice of contract law, a sensible place to begin is by testing our intuitions relating to the practice of promising.[32] Further, Shiffrin has observed that legal materials often explicitly invoke the language of

[31] See, e.g., Seana Valentine Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117 The Philosophical Review 481.
[32] See, e.g., Murphy, 'The Practice of Promise and Contract' (n 30).

promise (e.g., the Restatement of the Law (2nd) of Contracts).[33] Because of the similarities between the normative structures of contract and promise, the argument goes, we might consider how the normative reasons for action given by contract law may have negative effects on the normative reasons given by promissory norms in interpersonal morality.

The claim is not that contract law reflects or enforces promissory morality, nor that contract and law are completely separate practices, but that there is "simultaneous participation of moral agents in parallel legal and moral relationships".[34] An agreement between me and my internet service provider that is regulated by the legal practice of contract is at the same time a relationship which is regulated by the practice of promissory morality. Further, while the practices may overlap, they may also justifiably diverge because of considerations relating to the institutional nature of contract which are not relevant to the interpersonal moral practice of promise. For example, the 'mailbox rule'[35] is a substantive legal norm that doesn't seem to have an analogue in promissory morality but may nonetheless be justified for reasons of predictability and administrative efficiency. Nonetheless, the argument is that such divergences between the two become problematic and arguably unjustifiable if they make it more difficult for the agent to conform to the normative reasons relating to promissory morality.

The difficulty with this argument is that it, too, leads us back to the problems of moral disagreement and the normativity of law. To say that the law generates a

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[33] Shiffrin (n 1) 721.

[34] ibid 718. Shiffrin says further that: "No clear boundaries delineate the realm of activities in which contracts and contractual norms may be encountered from the realm of activities in which promises and compliance with promissory norms is expected." ibid 744.

[35] For the mailbox (or postal acceptance) rule, see *The Household Fire and Carriage Accident Insurance Company (Limited) v Grant* (1878–79) LR 4 Ex D 216.

practical conflict with moral norms will depend on whether or not there is agreement about what morality requires. Further, even if we could come to agreement on the requirements of promissory morality, any claim of practical conflict will depend on the particular substantive account of the kinds of reasons for action that legal practice generates. We can accept that the practices of contract law and promissory morality may overlap in a way that admits of justifiable divergences between the two. But it is difficult to see how the divergences could ever be problematic or unjustified from the perspective of the agent's normative reasons for action unless they create the kind of conflict discussed above: where legal practice directs A to φ and moral practice directs A to not-φ.

In cases where an overlap presents such a practical conflict, the law can only be said to make things 'go wrong' from the perspective of the agent's normative reasons if the legal and non-legal practices generate conflicting reasons in a way that cannot be reconciled by the agent. But, as I argued above, this will turn on the particular account of legal normativity that one assumes. For example, if contract law requires A to φ and there is agreement that promissory morality requires A to not-φ, one might still plausibly argue that, all things considered, A ought to comply with the law because of the value of maintaining and supporting the legal system; the normative reasons for complying with the law outweigh the normative reasons for not-φing in that case.

The claim that the law has bad effects on an agent's normative reasons for action is even less compelling if we consider a case in which the legal and moral practices are entirely separate and distinct practices with no overlap. For example, consider the case of an agent making a promise which is not legally enforceable. When considered strictly from the viewpoint of the agent's normative reasons for action, it is not obvious why legal norms would have any relevance at all on the

agent's practical deliberations about whether or not she ought to keep her promise. When I deliberate about whether or not I ought to keep my extra-legal promise, it's not clear why my legal obligations in contract law would have any bearing on my promissory obligations in morality. The normative reasons I have for compliance (or non-compliance) with the legal norms of contract have no bearing on the normative reasons I have for compliance (or non-compliance) with the norms relating to my promise. There is no sense in which the normative reasons generated by contract law ought to make any difference to my practical deliberations about the normative reasons I have to keep my promise.

In this Part I have examined an interpretation of the Do No Harm Principle as a claim about the potentially negative effects that legal practice might have on an agent's normative reasons for action. We can make a minimal claim that legal practices generate normative (legal) reasons for action. But this minimal claim doesn't provide us with a way to evaluate whether such reason-giving makes things go well or badly when an agent deliberates about their normative reasons. We might say that the law has made things go badly when the reasons for action given by a legal practice conflict, either in whole or in part, with the agent's other normative reasons. But the strength of this argument will depend on the particular account of the normativity of legal practices which is assumed and directs us to familiar debates about the normativity of law. It is plausible on some views to argue that the law potentially generates a practical conflict with an agent's other normative reasons; in such cases, the agent will fail to conform with some of her normative reasons for action.

However, such an argument is open to two responses. First, for a theorist who endorses the view that what the agent morally ought to do just is what she ought to do all-things-considered, the law creates no conflict for her normative moral reasons,

it is just one of many considerations that figure in the agent's deliberations about what she ought to do. Second, one could respond that such conflicts are a regular feature of our practical reasoning. An agent's deliberations about what she ought to do will necessarily leave some normative reasons unconformed to, and this reflects the complex reality of our everyday moral practices; there is nothing uniquely problematic about the effects of the law on our normative reasoning.

IV. Motivating Reasons: The Effects of Legal Practices on Agents' Motivations to Act Morally

In the previous Part, I examined a formulation of the Do No Harm Principle as a claim about the law's potentially negative effects on an agent's practical deliberations about their normative reasons for action. I argued that this way of understanding it simply reintroduces familiar debates about the normativity of law. A different way of understanding the principle is as a claim about the effects of legal practice on an agent's *motivating* reasons. On this view, the Do No Harm Principle directs us to be sensitive to the potentially negative effects that legal practices might have on an agent's motivations to do the morally right thing. Liam Murphy has provided an interpretation of Shiffrin's argument along these lines. Murphy argues that the Do No Harm Principle isn't a worry about the potentially negative effects of legal practice on an agent's ability to *deliberate* about what they morally ought to do. Rather, it is a concern about how legal practice makes it more difficult for an agent to *do* what they morally ought to do. Here's how Murphy puts it:

> Let me just say that I do not see why a conflict between (correct) ethical norms and (accepted) legal rules and their rationale need make the development of moral *agency* difficult. Even if the law makes it less likely that I will do the right thing, morally speaking, that does not seem to threaten my ability to understand the difference between right and wrong and to act accordingly. People who are brought up with a pernicious ethical view, say a racist one,

> might end up acting worse than they otherwise would, but they haven't necessarily had their moral agency compromised. It seems that Professor Shiffrin's demand is really that the law must accommodate *moral* moral agency — that is, the moral agency of a person who generally acts rightly, morally speaking…. So what seems salient is not so much a concern about agency as such, but rather the thought that accepting the law and its rationale should not make it hard for us also to do the right thing, ethically speaking.[36]

On this interpretation, the Do No Harm Principle is not a claim that the law should not make it more difficult for an agent to deliberate about what they morally ought to do. Neither is it a claim that the law ought not to make things more difficult by creating practical conflicts for an agent's normative reasons for action. On this reconstruction, the Do No Harm Principle is a claim that legal practices should not undermine the motivation of agents to do what they morally ought to do. It is a claim about how legal practices affect an agent's motivating reasons for action when it comes to practical moral questions.

On the motivating reasons interpretation of the Do No Harm Principle, the theorist must pursue two lines of inquiry. First, we require an explanatory account of how law actually affects agents' motivations. Crucially, this is different from an analysis of an agent's normative reasons for action, because what we are interested in is the actual effects of legal practice on individual behavior or action. We might accept that an agent has a normative reason to φ, but fails to do so because they are motivated to act differently; the Do No Harm Principle directs us to the concern that such failure might be attributable to the effects of legal practice. Once we have an explanatory account of the effects of legal practice on agents' motivations, we need a further normative argument for when such effects are good or bad. So, this formulation of the Do No Harm Principle requires both an explanatory account of

[36] Liam Murphy, 'Contract and Promise: Responding to Seana Valentine Shiffrin, The Divergence of Contract and Promise' (2007) 120 Harvard Law Review Forum 10, 11.

how law affects individual action and a normative argument for when such effects are bad.

Murphy frames the normative argument in more general terms: legal practices make things go badly when they undermine agents' motivations "to do the right thing, ethically speaking."[37] But we can reconstruct Shiffrin's claim about the relationship between contract and promise in motivational terms as follows: the practice of contract law makes things go badly when it undermines agents' motivations to do the right thing when it comes to the moral practice of promising.

One possible objection to the Do No Harm Principle understood in these terms goes to the explanatory element of the claim. One might argue that, while agents' motivation to act morally matters, legal rules and institutional structures have no effect on individual motivation. But it seems highly implausible to claim that institutional practices that are so pervasive in our day to day lives have no effect on individual action. Indeed, functional theories of law rest on the idea that the law can be designed to guide behavior to achieve certain ends. The worry is about the way law guides action; what kinds of motives does the law appeal to or generate? Further, this response is itself an empirical claim; in order to be successful, it must be supported by observations about how individuals and legal practices and institutional structures in fact interact.

A second way to object to the principle is to accept the explanatory limb but argue on normative grounds that any negative effects on the motivation of individuals to act morally are not normatively significant for legal theory. That is, one might grant that the law can have good and bad effects on the moral motivations

[37] ibid.

of individuals, but argue that such effects have no normative significance when it comes to justifying a legal practice. Here, the structure of the argument might take several different forms. For example, one might argue that the object of inquiry for normative legal theory is the justification of legal rules and institutions, not the justification of the particular actions of agents. Individual motivation is a matter for moral theory which directly regulates individual action, it is not the subject matter of legal theory which regulates the design of legal and political institutions. Even if a particular legal practice has the effect of undermining the motivation of agents to act morally, one might argue that such harm is irrelevant to the thoroughly normative question of what legal norms justice requires.[38]

Alternatively, one might accept a functionalist view of law and accept that one aim of law is to guide agents' action in order to achieve some aims, but argue that any negative effects on agents' motivations to do the right thing morally speaking are outweighed by other considerations that count in favor of that particular arrangement of legal institutions. For example, a theorist might say that, because moral motivations are so weak, it would be better to have an institutional framework which accommodates narrowly self-interested action. We ought to prefer a legal institutional structure within which people are motivated to act in a purely self-interested way. They might argue that the promotion of self-interested behavior is the best way to secure valuable social aims and we can guide self-

[38] I believe that this is how corrective justice theorists like Weinrib would respond to the Do No Harm principle. On Weinrib's view the law cannot be understood in functional terms. Behavioural effects are irrelevant to a normative account of private law. See discussion of Weinrib's view in (n 5). But in Part V, I discuss Weinrib's view in more depth and suggest that the Do No Harm Principle does have something to say to a view like his.

interested behavior towards those aims by changing their incentives through, e.g., increasing the costs of pursing a particular course of action.[39]

What is needed is a normative argument for why it would be bad for the law to "make it hard for us also to do the right thing, ethically speaking."[40] Here I think the best argument and the one that is actually at the root of Shiffrin's own claim is that the establishment and maintenance of a just legal and political order depends on individuals being motivated to support, promote and comply with those institutions. As Murphy puts it: "Just institutions, especially in a democracy, cannot simply be enforced on an amoral public. In other words, it is a mistake to reason about the law as if it is simply going to be imposed by an omnipotent Hobbesian sovereign."[41]

The motivations of agents matter on this view because they are necessary for the establishment and maintenance of the very legal and political order that normative legal theorists are justifying. I believe that this is the core idea motivating Shiffrin's arguments about the problematic divergence of the legal practice of contract and the moral practice of promise. It is not that we should worry that contract law will have the effect of making people act in morally wrong ways by, e.g., breaking their promise whenever it benefits them. For Shiffrin, an agent's compliance with promissory morality is necessary for the possibility of a just legal and political order. Here's how Shiffrin draws the connection between the two ideas:

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[39] I would expect that orthodox legal economists might endorse a view like this. That is, they are concerned with how law affects motivation in order to achieve the goal of overall welfare-maximization, so they might accept that it might have negative effects on individuals' motivations to do the right thing morally speaking so long as the law induces efficient behaviour.

[40] Murphy, 'Contract and Promise: Responding to Seana Valentine Shiffrin, The Divergence of Contract and Promise' (n 36) 11.

[41] ibid 12.

> Absent a culture of general mastery and appreciation of promissory norms and the moral habits and sensitivities that accompany them, I doubt that a large-scale, just social system could thrive and that its legal system could elicit general patterns of voluntary obedience. Further, I doubt that, absent a strong promissory culture, the individual relationships that give rise to and sustain moral agency and relationships of equality could flourish. Whether or not all norms and virtues of moral agency must be accommodated by the legal system, those associated with promissory norms seem quite central to the possibility of a flourishing system of justice.[42]

So, one way of understanding Shiffrin's concern about the potentially negative effects of contract law on the morality of promising is that undermining promissory morality will have the more general effect of undermining agents' motivations to support "large-scale, just social system[s]".[43] We should be on the lookout for how contract law might undermine agents' motivations to do the right thing when it comes to the moral practice of promise because fidelity to promissory morality "seem[s] quite central to the possibility of a flourishing system of justice."[44] I think the general normative argument is a sound one: just systems of social cooperation require agents to be motivated to support and maintain such systems and we should be sensitive to how legal practice might negatively affect those motivations. But I believe Shiffrin's claim about the role of promissory morality in this argument is less compelling. The idea that a culture of promissory morality is necessary for the possibility of a just legal and political order is potentially problematic on at least two scores.

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[42] Shiffrin (n 1) 714. As Shiffrin notes, her argument about the centrality of promise "is not to endorse the view that the duty to obey rests on a promise or contract" ibid 714, fn 7., but rather an argument about the necessity of a culture of adherence to the requirements of promissory morality for the possibility of just systems of social cooperation.

[43] Shiffrin (n 1) 714.

[44] ibid.

First, there is the problem of disagreement over what promissory morality requires. If the Do No Harm Principle is understood as a claim about how the legal practice of contract ought not to undermine the motivation of individuals do the right thing, morally speaking, when it comes to promising, then any disagreement about what promissory morality requires will result in disagreement about if and when the law has this negative effect. For example, Shiffrin argues that one of the ways in which contract law diverges from the moral requirements of promising in a way that undermines moral agency is the doctrine of mitigation of damages:

> Contract law requires the promisee to mitigate her damages. It fails to supply relief for those damages she could have avoided through self-help, including seeking another buyer or seller, advertising for a substitute, or finding a replacement. As a general rule, morality does not impose such requirements on disappointed promisees. True, morality does not look sympathetically upon promisees who stay idle while easily avoidable damages accumulate. But this is a far cry from what contract expects of the promisee and what it fails to demand of the breaching promisor.[45]

If you agree with Shiffrin that, as a general rule, morality doesn't impose a requirement on the innocent promisee to mitigate her losses arising from the promisor's failure to keep their promise, then you would likely agree that this is a case where legal practice has the effect of undermining the agents' motives to do the right thing when it comes to the moral practice of promising. But this argument will not cash out if you think that, as a general rule, the innocent promisee does have a moral obligation to mitigate their losses. Whether or not this is truly what morality requires is subject to reasonable disagreement. Your intuition might be that there is a general rule that promisees have a moral obligation to limit their losses.[46] Shiffrin's argument on this point is subtle; she does note that, in the moral case, it might be

[45] ibid 724.

[46] I'm grateful to Paul MacMahon for raising this point.

acceptable to request the innocent promisee to take steps to reduce her losses and that there may be cases where it would be morally wrong for the innocent promisee to reject this request.[47] But Shiffrin asserts that these are exceptions to the general rule. Further, even if we accept Shiffrin's intuitions on this point, we may disagree on when it would be wrong for the innocent promisee to refuse a request to limit their losses. The point here is that by focusing on the effects of contract law on promissory morality, the Do No Harm Principle loses its normative bite if there is disagreement about what promissory morality requires. The same argument could be made about other doctrines of contract law that Shiffrin argues diverge from promissory morality in ways that undermine the moral agency of individuals.

But there is a second and, I believe, more serious difficulty with the way Shiffrin connects promissory morality with the maintenance of a just social order. Some might argue that there are situations in which justice *requires* promises to be broken. If that is the case, the cultivation of a strong moral culture of fidelity to promises may actually have the effect of undermining the motivation of individuals in promoting just social orders. To take a current real-world example, consider the movement for the cancellation of student debt in the United States. Organizations like the Debt Collective[48] have engaged in grass-roots organization efforts to advocate for the cancellation of student debt on the grounds of economic and social justice. Very generally, the argument is that the current student debt crisis is the product of political choices relating to reduced public funding of post-secondary education resulting in increased tuition, the increased access to student debt, and

[47] Shiffrin (n 1) 725.

[48] See: 'Our History and Victories' (*Debt Collective*) <https://debtcollective.org/about-us/history-and-victories/> accessed 14 November 2022.

the increased demand by employers for post-secondary credentials.[49] On this view, social and economic justice demands the cancellation of part or all of the approximately $1.6 trillion in federal loan debt outstanding.[50]

But here we can see how an emphasis on promissory morality might serve to undermine the motivation of individuals to support these calls to justice. If you believed that morality requires one to keep one's commitments, then you might not be sympathetic to calls for the cancellation of these commitments. Here, emphasizing the motivations associated with the morality of promising would potentially serve to thwart a particular conception of a just social and economic order. It is worth noting that organizations like the Debt Collective use the terms debt 'cancellation' or 'abolition' and not debt 'forgiveness'; the latter invokes a moralized understanding of the call whereas the former reflect that the demand is a political one. My point here is that if the core concern of the Do No Harm Principle is the potentially negative effect of legal practices on the motivations of agents to promote and sustain just social orders, a focus on promissory morality misses the mark. Not only is promissory morality at best indirectly related to the motivation of individuals to promote just institutions, but it may also in practice serve to undermine those motivations depending on one's view of what a just legal and political order demands.

To take stock, I've argued that the better way to interpret Shiffrin's Do No Harm Principle is as a normative claim about how legal practices ought not to

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[49] See Marshall Steinbaum, 'The Case For Cancelling Student Debt' (*The Appeal*, 14 January 2021) <https://theappeal.org/the-lab/research/the-case-for-cancelling-student-debt/> accessed 14 November 2022.

[50] For statistics on the current levels of student debt, see: Melanie Hanson, 'Total Student Loan Debt [2022]: Federal vs Private (by Year)' (*Education Data Initiative*, 30 November 2021) <https://educationdata.org/total-student-loan-debt> accessed 14 November 2022.

undermine individuals' moral motivations; as Murphy puts it, "the law and its rationale should not make it hard for us also to do the right thing, ethically speaking."[51] But when it comes to the question of what we ought to do, morally speaking, our focus should be on agents' obligation or duty to promote and sustain just legal and political orders, not on their promissory obligations as Shiffrin would have it. So we can now reformulate the Do No Harm Principle as follows: the law ought not to make it more difficult for agents to perform their moral duty to promote and sustain just systems of cooperation through legal and political institutions.

Political philosophers have been alert to this concern. Theorists of distributive justice have acknowledged that any plausible account of justice must take account of the nature and limits of the motivational repertoires of individuals. Thomas Nagel develops the concept of the "moral division of labor" as a way of reconciling individual motivation with the demands of morality.[52] What the moral division of labor provides is an argument about how to create institutions that "externalize…the most impartial requirements of the impersonal standpoint".[53] Thus, the moral demands of justice on individuals are lessened.

Importantly, Nagel's argument is about why legal and political institutions ought to be designed in way that *does not rely* on the other-regarding or impartial motives of individuals. The division of moral labor is a justification offered for a particular set of legal institutional arrangements based on the argument that, as Liam Murphy puts it, institutions "take the business of securing justice off people's

[51] Murphy, 'Contract and Promise: Responding to Seana Valentine Shiffrin, The Divergence of Contract and Promise' (n 36) 11.
[52] Thomas Nagel, *Equality and Partiality* (Oxford University Press 1995) Chapter 6.
[53] ibid 53.

plates in their day-to-day lives."[54] The burden of bringing about justice should be borne by institutions instead of individuals.

But there is an important distinction between the problem of the motivation to comply with the rules of a system in making decisions within it, and the problem of accepting those institutions in the first place. As Nagel says:

> The motivational problems connected with acceptance of a general social framework as legitimate are different from the motivational problems that arise for individuals acting within it. Both types of problems concern the participants and their attitudes, but the basis of general acceptance ought to be much more impersonal than the basis of everyday conduct and personal choice. What we need is an institutional structure which will evoke the requisite partition of motives, allowing everyone to be publicly egalitarian and privately partial.[55]

Unfortunately, as Nagel points out, it may be a "pipe dream" to expect "the political and economic motives necessary to sustain" such institutions.[56]

The important point for the purposes of my argument is that the successful operation of legal institutions is contingent on the motivation of individuals to support them.[57] But the further point being made here is that normative theorizing about legal practices must also be sensitive to the impact that such practices have on the moral motivations of individuals that are necessary in order for them to succeed. This is not just an argument about how the individual is motivated to comply with legal norms, but about how legal practices affect the agent's motives to comply with

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[54] Liam B Murphy, 'Institutions and the Demands of Justice' (1999) 27 Philosophy & Public Affairs 251, 258.

[55] Nagel (n 52) 86.

[56] ibid.

[57] Nagel discusses the problem of motivation in the context of trying to design a society that lives up to egalitarian ideals. As he says, "While institutions must play an important role in creating social and economic equality, they cannot sustain it unless they come to express what enough people feel." ibid 96. See generally ibid Chapter 10, 'Equality and Motivation'.

non-legal norms; in this case, the non-legal norm is the duty to promote just institutions. Shiffrin's argument pushes normative legal theorists – particularly in private law – to take this normative claim seriously.

It is important to distinguish between the positive and negative formulations of this argument. The positive formulation of the argument says that institutions ought to promote the moral development of an individual's character. For example, in defending an institutions-first approach to justice, Samuel Scheffler has argued that "the basic structure helps to shape people's characters, desires, aims, and aspirations. … Since the basic structure inevitably has this function, and since the question of how people and their aspirations are to be shaped is a moral question, it is again essential that the basic structure should be regulated by norms of justice."[58] On this view, the establishment of just institutions serves as a means to shape an individual's motivations and preferences and bring them in line with the principles of justice.

The negative formulation of the argument says that it is not about what the law ought to do to individual moral agency, it is about what it ought *not to do*. This is an argument about constraints on prescriptions for how institutions are designed. This kind of argument is agnostic about the positive justifications offered for the law. For example, whether contract law is justified on the basis of enforcing promises or of maximizing welfare, the theorist must understand and evaluate how her legal prescriptions will have an impact on an agent's motives.

There is, however, one further amendment that I believe must be made to the Do No Harm Principle. As the foregoing discussion demonstrates, political

[58] Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press 2012) 115.

philosophers have been attuned to the problem of motivation when it comes to the establishment and promotion of just institutional orders. And the Do No Harm Principle directs legal theorists to consider the potentially negative effects that legal practice might have on those motivations. But the Do No Harm Principle cannot cash out unless we have some agreement about what a just legal and political order is. If, as I discussed in Chapter 4, there is radical disagreement about what justice demands, then there will be radical disagreement about if and when law undermines agents' motivation to promote just institutions. This is analogous to the argument I developed above over disagreement over promissory morality.

Take the example of student debt cancellation above. The members of the Debt Collective clearly believe that distributive justice demands large-scale cancellation of student debt. But others might disagree; they might argue that distributive justice demands that contracts be honoured and that individuals pursuing their own self-interest produces just distributive outcomes. If our normative concern is the potentially negative effects on agents' motivations to promote and maintain just institutions, disagreement over what a just legal and political order is will translate into a disagreement about what agents' moral duties are and whether the motivation to comply with those duties has been undermined. Like disagreements over what promissory morality requires, similar disagreements over what justice requires would seem to render the Do No Harm Principle toothless.

However, recall that realism as a view in normative political philosophy directs us to shift our focus from questions of justice to questions of legitimacy. On the realist view, we proceed on the basis that there is moral disagreement about, e.g., whether justice demands certain contractual obligations to be enforced or cancelled. Instead, the realist directs us to the legitimacy of institutional arrangements that

allow us to act in the face of this disagreement. So, realism shifts our focus to whether or not we ought to accept the legal and political institutions that have been established to assist us to continue to live together in the face of disagreement over matters such as student debt cancellation.

These legal and political institutions still require agents to be motivated to support and comply with them. I might disagree that student debt ought to be cancelled, but I ought to accept institutions which, through the exercise of state power, address this question in a way that I accept as legitimate. This might mean that I ultimately disagree with the outcome but accept the legitimacy of the outcome. So, agents must be motivated to support and comply with legitimate legal and political institutions even when those institutions produce outcomes they disagree with on moral or justice grounds. This doesn't require agents to be morally motivated to establish and maintain a just legal and political order, but rather that they have motivations to establish and maintain a *legitimate* legal and political order. So, on this view, the Do No Harm Principle would be further refined as follows: the law ought not to make it more difficult for agents to be motivated to establish and sustain legitimate systems of cooperation.

This is important because this interpretation of the Do No Harm Principle is not subject to the indeterminacy and disagreement that arises in versions that incorporate the idea of 'just' institutions. We might disagree about what it means for an institution to be just, but we would expect individuals to be motivated to support and sustain a legal and political order even if it didn't reflect their own ideal of justice, if it can be seen as an acceptable institutional arrangement for allowing us to act in the face of disagreements about justice. This connects to the discussion of legitimacy in political realist views in Chapter 4. There, I argued that turning to legitimacy helps us act in the face of disagreement. We should focus on what makes

our institutions legitimate, rather than just. Here, I want to examine one upshot of that: the way in which people's motivations to support those legitimate institutions matter. In the final Part, I show how this way of understanding the Do No Harm Principle can introduce new normative questions that we can ask about the practice of private law.

V. The Effects of Legal Practice on Agents' Motivations

In this Part I consider two different ways in which the Do No Harm Principle might have normative purchase in theorizing about private law. First, I'd like to consider how a particular rationale offered to justify a legal practice might have effects on the motivation of agents to establish and sustain the institutional order of which that practice is a part. Here I focus on Weinrib's corrective justice theory of private law. One reason I focus on Weinrib's theory is because it is resolutely non-instrumental. As I discussed in Chapter 1, Weinrib argues that the "purpose of private law is to be private law".[59] This means that the justification of private law must be internal to the practice itself.[60] Private law is not a means to secure any aim external to the law.[61] One upshot of this is that the effects of law on individual behaviour are normatively irrelevant for Weinrib's theory of private law. The point of private law is not to guide individuals to achieve some aim external to the law; the point is to explain and justify the normative relationship represented by private law.

As previously discussed, Weinrib has argued that private law is justified on the basis of an individual's innate right to freedom from interference. The task of private law is to secure corrective justice by protecting individual rights by enforcing

[59] Ernest J Weinrib, *The Idea of Private Law* (Revised edition, Oxford University Press 2012) 8.
[60] ibid 14.
[61] Ernest J Weinrib, *Corrective Justice* (Oxford University Press 2012) 13.

the duties that are correlative to those rights. This might lead one to think that corrective justice accounts of private law are essentially another version of a libertarian theory of private rights. But they are better understood as "liberal-egalitarian".[62] Corrective justice theorists don't reject the concerns of distributive justice, they argue that distributive justice ought to be secured through public law and has no place in private law. So, unlike the libertarian who rejects distributive justice altogether, "[l]iberals insist that justice requires that the state go beyond the libertarian normative commitments to independence (i.e., negative liberty) and formal equality. But they assign to the state the sole responsibility for any additional positive obligations to facilitate individual self-determination and ensure substantive equality."[63]

Weinrib has recently elaborated on how this integration of corrective justice and distributive justice might be justified in a single state through what he calls the "conceptual sequence":

> For this sequence, the idea of the reciprocal independence of all persons is thematic. In the correlatively structured relationships of corrective justice, independence refers to freedom from interference with one's innate right in bodily integrity and with one's acquired rights, such as rights in property and contractual performance. When, however, the state creates the possibility of accumulation by making the exclusivity of ownership legally effective, it also creates threats to the independence of those whose action is confined to what is unowned by others. In the civil condition, subjection to another's will is not identical to suffering of an injustice as a matter of corrective justice; and being able to make one's way as an independent person is not assured by private law alone. Through arrangements of distributive justice the state systemically addresses this consequence of the system of rights. The root idea of a system of rights, that action should be consistent with the reciprocal freedom of

[62] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 Columbia Law Review 1395, 1401.
[63] ibid.

everyone, thereby finds its place both in a state's private law and in its public law.[64]

Very generally, on Weinrib's view, private law reflects the normative relationship instantiated by corrective justice; one which reflects formal freedom and equality understood as an individual's innate right to freedom as independence. Whereas public law reflects a different kind of normative relationship instantiated by distributive justice; one which reflects the relationship between the individual and state and addresses the distributive consequences of the state's recognition of private rights. Through this conceptual sequence we can accommodate both an individual's innate right to independence reflected in private law and concerns of distributive justice reflected in public law through, e.g., taxation or other forms of public regulation. In this way, Weinrib provides a justification of the divide between public and private law on the basis of what has sometimes been called a "moral division of labor".[65]

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[64] Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford University Press, 2022) 116.

[65] See Dagan and Dorfman (n 62). Dagan and Dorfman use the division of labor idea as a way to understand and argue against traditional conceptions of the private law/public law divide which are reflected in "liberal" theories of private law. ibid 1402. The 'division of labour' idea has also been discussed by several theorists in political philosophy. For example, Liam Murphy draws on Rawls to endorse what he calls "the ideal of the division of labor" which is that justice is better realized through institutions because they "minimize the costs people must sustain to secure justice". Murphy, 'Institutions and the Demands of Justice' (n 54) 259. In other words, institutions alleviate the moral demands asked of individuals, and they are more effective in achieving justice than individuals acting in isolation. ibid 257–264. Scheffler has criticized this reading of Rawls. See Samuel Scheffler, 'The Division of Moral Labour' (2005) 79 Proceedings of the Aristotelian Society, Supplementary Volumes 229. Scheffler argues that the better interpretation of Rawls's use of the division-of-labor metaphor reflects two distinct concepts: (i) the "institutional division of labor" and (ii) the "division of moral labor". ibid 239–240. Scheffler argues that (ii) reflects a distinctive form of value pluralism in Rawls's liberal egalitarian theory of justice; the institutional division permits the coexistence of the impersonal and collective values of political morality and the diverse array of personal and individual values of personal life.

I discuss Weinrib's view here not to contest it on normative grounds. We can proceed on the basis that Weinrib's argument is normatively sound. The question I want to pose is whether this particular justification of private law and its place in the broader legal and political order is stable if we consider the effects that this kind of justification would have on the motivation of agents to support and maintain it. My suggestion here is that Weinrib's justification of private law rights on the basis of individuals' innate right to freedom would have the effect of undermining those same individuals' motivations to support and maintain the public law institutions necessary to secure distributive justice. To put it another way, although liberal theories of private law like Weinrib's are not libertarian, they may have the effect of cultivating what Liam Murphy and Nagel have called "everyday libertarianism".[66]

Everyday libertarianism, Murphy and Nagel argue, has distorted public debate around justice in taxation and redistribution.[67] Traditional criteria for assessing the fairness of redistributive policies like taxation have focused solely on the distribution of tax burdens rather than on the overall distribution of benefits and burdens across society. Framing debates around tax fairness in a way that assumes that individuals have a right to their pre-tax income reflects everyday libertarianism: "If people intuitively feel that they are in an absolute sense morally entitled to their net incomes, it is not surprising that politicians can get away with describing tax increases (which diminish net income) as taking from the people what belongs to them."[68]

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[66] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002) 31–37.
[67] ibid Chapter 2, 'Traditional Criteria of Tax Equity'.
[68] ibid 35.

That is, if we begin with the idea that individuals have "freedom from interference with [their] innate right in bodily integrity and with [their] acquired rights, such as rights in property and contractual performance",[69] then we shouldn't be surprised to see that this will affect the motivation of individuals when it comes to public law policies designed to secure distributive justice. If people believe that they have an innate right to private law entitlements, then any public law institution designed to achieve redistributive aims will be perceived as an infringement of those rights.

The Do No Harm Principle as I've reconstructed it here tells us that legal rules and the rationale offered to justify them should not undermine people's motivations to support legitimate institutions. That means that we should be concerned about how justifications of private law which are grounded on the moral idea of innate rights may have the effect of undermining support for institutions that are part of the same legal system. That is, when it comes to individuals' motivations to support institutions like taxation, such support might be undermined by an everyday libertarianism which ideas of innate right might cultivate. The point is not that Weinrib's justification of private law and public law is not normatively coherent, but that that kind of justificatory strategy is potentially unstable because the rationale offered for private law may have the effect of undermining the motivation of individuals to support and maintain a legal order which reflects both corrective and distributive justice. The rationale of innate right which justifies private law may undermine the motivations necessary to support distributive aims through public law. So, here the Do No Harm Principle directs the theorist of private law to think more systemically: a theory of private law must be sensitive to the effects that that

[69] Weinrib, *Reciprocal Freedom* (n 64) 116.

theory might have – in terms of motivating reasons – on the viability of other institutions in the system of which private law is one part.

My claim here is speculative in nature. What would be needed to make it out is an explanatory theory of how such theoretical justifications of private law might have this effect on agents' behaviour. But I note that social scientists are attuned to the reflexive nature of theorizing about social practices: "Social scientists need to be aware of the effects that their activities of data gathering, analysis, and theorizing (or interpretation) can and do have on the society under investigation."[70] An interpretive theorist who explains and justifies the social practice of private law on the basis of individuals' innate right to freedom must be alert to "the fact that their subjects may be aware of the theories used to explain their behaviour"[71] and that the theorist's interpretive intervention may, in turn, have a practical effect on their behaviour. Arguments of this kind have been made about the concept of law in general.[72]

A second way of thinking about the relationship between the practice of private law and effects on the motivations of agents in the practice is by looking at how formal design of legal norms may affect motivations. Rebecca Stone has offered one framework for thinking about this issue,[73] and has elaborated on the idea in the context of contract law.[74] For example, Stone has discussed the phenomenon of 'crowding-out' in the context of the choice between rules and standards in contract

[70] Mark Risjord, *Philosophy of Social Science: A Contemporary Introduction* (1st edition, Routledge 2014) 53.
[71] ibid 52.
[72] For example, Arie Rosen has argued that "the way we classify and think about law causally affects what law ends up being (and vice versa)." Arie Rosen, 'Law as an Interactive Kind: On the Concept and the Nature of Law' (2018) 31 Canadian Journal of Law & Jurisprudence 125, 125.
[73] Rebecca Stone, 'Legal Design for the "Good Man"' (2016) 102 Virginia Law Review 1767.
[74] Rebecca Stone, 'Economic Analysis of Contract Law from the Internal Point of View' (2016) 116 Columbia Law Review 2005.

law.[75] Beginning with the economic model of the rational agent, Stone posits two different ways of thinking about legal subjects. "Externalizers" are agents "who exhibit no preference to conform to the law for its own sake";[76] instead, they "[weigh] the costs and benefits of likely rewards and sanctions against the ordinary, nonlegal reasons—self-interested or otherwise—that count in favor of or against [their] available options."[77] By contrast, an "internalizer" is an agent that "believes that legal rules matter because they are the rules, rather than because of the consequences that result from defiance of them";[78] internalizers "treat legal rules as constraints on [their] decisionmaking— not simply as considerations to be weighed against others."[79]

Stone argues that this distinction is important for understanding the effect that contract law can have on the motivations of agents. By drawing on the empirical literature on the crowding-out of moral motivations, Stone argues that there may be situations in which broad value-laden standards may have the effect of eliciting the moral motivations of internalizers. Very generally, the basic idea is that "[a] standard wears its justification on its face and so requires a legal subject who is motivated to conform to the standard to exercise her moral judgment in figuring out how to do so."[80] Stone is careful to note that standards may pull in different directions depending on the subject population – externalizers may not have the same kind of motivational response as internalizers.

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[75] See section III. B. 'Rules, Standards, and Crowding Out' in ibid 2033–2039. On rules and standards more generally, see Stone (n 73) 1821–1823.
[76] Stone (n 74) 2008.
[77] ibid 2020.
[78] ibid.
[79] ibid 2021.
[80] ibid 2038.

Stone's work provides us with another way of thinking about the kinds of questions that the Do No Harm Principle directs us to be attentive too. For example, in doctrinal debates in contract law, standards such as good faith are sometimes dismissed as generating undesirable uncertainty. But the Do No Harm Principle adds an additional normative consideration to these debates: when thinking about the desirability of rules over broad value-laden standards we should also reflect on the effects that this choice will have on agents' motivations. Overreliance on prescriptive rules in contract law may have a crowding-out effect on the moral or other-regarding motivations of individuals. We ought to be attuned to this potentially negative effect that such a rule-focused approach to doctrine might have. In this way, the Do No Harm Principle provides an additional normative consideration in debates over the use of value-laden standards such as good faith or unconscionability in private law.

These are just two examples of how the Do No Harm Principle might have normative significance when it comes to questions around private law. Of course, as I noted above, to operationalize the principle we require an explanatory theory which explains how it is that legal rules and their rationales or justifications would have this effect on agents in the practice.[81] My aim in this Chapter was to take seriously the core normative claim made by Shiffrin about the potentially negative effects that legal practice may have on moral agency, understood as an agent's motivating reasons. As noted, the motivational worry has been raised and discussed by thinkers in political philosophy when discussing just institutional arrangements.

[81] For example, Stone's approach reflects a naturalist and empiricist approach to the explanation of how contract law rules affect agents' motivations. Her aim is to clarify the "possible psychological mechanisms that may underpin the larger empirical phenomenon" of crowding out. ibid 2033.

Shiffrin's intervention pushes legal theorists to also consider this as an important normative question about the practice of private law that we ought to be alert to.

As it has been developed in this Chapter, the Do No Harm Principle may have general application. That is, we ought to be sensitive to the potential effects of any legal practice on the motivations of agents. But I think it is particularly salient when it comes to private law. Private law practices like contract, property and tort are the basic ingredients with which we create our economic system. Other legal rules and institutions such as taxation and other legal regulatory frameworks are, in a sense, layered on top of or are parasitic on the practices of property, contract and tort. As a result, I believe that private law, and the exercise of providing a normative justification of the practice of private law, can have significant consequences for the viability and support of these other legal institutions which are built on top of it. My aim throughout this thesis has been to explore different normative questions that we might ask about the practice of private law. The question I've explored in this Chapter is one which pushes us to think about the ways in which theorizing about the practice of private law fits in the broader legal system of which it is a part and how theorizing about private law can have effects on the legal system as whole.

Conclusion

What I have tried to do in this thesis is to highlight different normative dimensions of the practice of private law. The arguments I have developed in the first three Chapters attempt to locate and clarify some normative questions that are important when theorizing about the practice of private law. I argued that interpretive explanations of the practice of private law require taking a normative stand. The interpretive theorist must provide an argument for why the self-understanding of particular participants in the practice ought to guide our interpretation of the meaning and the purpose of the practice. I argued that practice-based normative theory that takes existing legal practice seriously is not limited to interpretive methodology. A practice-based normative theorist need not draw only on the moral resources internal to the practice itself. We can take up the position of an agent in the practice and ask how the practice ought to figure in their practical deliberations about what they ought to do. Further, I argued that the question of what an agent such as a judge ought to do doesn't first require description and classification of legal norms into different areas of law. Again, what is required is a thoroughly normative argument about whether and how past decisions ought to have normative weight in the agent's practical deliberations. An answer to this question requires taking into account the public role of the judge and the court's exercise of state power. Accordingly, a normative account of how a judge ought to resolve a private law dispute must also show how that decision justifies the use of state power as a matter of political philosophy.

It is at this stage in the thesis that I part ways with the approach taken in much of the existing private law literature. I argued that many private law theorists adopt a 'moralist' approach to political philosophy. That is, as part of the answer to the

question of what a judge ought to do, they provide the morally correct or best account of private rights and obligations. But one risk with taking a moralist approach to private law is that such theories may end up providing rationalizations of the status quo. It is striking that most private law scholarship ends up endorsing some version of a liberal theory of property, contract and tort. Nevertheless, it may be unsurprising, since our moral intuitions about private law institutions such as property, contract, and tort might reflect the fact that many of us live in a social world that is dominated by the liberal point of view. As Geuss warns us: "[e]thics is usually dead politics: the hand of a victor in some past conflict reaching out to try to extend its grip to the present and the future."[1]

What I want to do is to take seriously that there may be genuine moral and political disagreement about the rights and obligations that structure private relationships. To do this, I adopt a 'realist' approach to political philosophy. The realist leaves open the space for genuine disagreement over substantive political views that endorse a different understanding of private rights and obligations. To the extent that there are individuals who morally endorse a socialist, conservative, or some other substantive political vision of property, contract, or tort law, realism provides us a way of thinking about the practice of private law without assuming or arguing for the correctness of those substantive political philosophies. I am not committed to a particular view, but I suggest that we should think about private law in a way that accommodates this possibility.

Despite the fact that I find realism compelling, in this thesis I have not aimed to argue for the truth of it as a view. Instead, I have aimed to use it as a lens in order to show how things might look different if we adopt it. What I have argued is that

[1] Raymond Geuss, *Politics and the Imagination* (Princeton University Press 2010) 42.

the realist approach to private law opens up questions about the normative dimensions of the practice of private law. Instead of focusing on constructing the correct moral account of private law rights and obligations as a matter of justice, we should pay attention to the legitimacy of the institutions that enable us to act in the face of disagreement about the correct moral account of private law rights and obligations as a matter of justice. This does not require us to ignore the many substantive questions about how our private rights and obligations should be structured. There is room for discussion of these questions. But they are understood in different terms. When it comes to adjudication, it may be the case that judges will operate much as they would under other views: judges should remain attentive to past decisions and their normative significance for how disagreement should be addressed today. But our horizons when thinking about private law are expanded: they are not limited to doctrinal questions answered within the context of the court. The realist directs our attention to the different ways in which disagreement over questions about private law are addressed by all of our institutions. We may morally disagree with the institutional resolution of a particular question; but we may still accept that institutional framework as a legitimate way of addressing moral disagreement. The viability of such institutions depends on agents accepting them as legitimate even when they morally disagree with the way an institution has addressed a particular question.

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