The Idea of Private Law

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Harvard University Press
Cambridge, Massachusetts
London, England
1995

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1 Understanding Private Law

1.1. Introduction

In this book I address a single question: How are we to understand private law?

Private law is a pervasive phenomenon of our social life, a silent but ubiquitous participant in our most common transactions. It regulates the property we own and use, the injuries we inflict or avoid inflicting, the contracts we make or break. It is the public repository of our most deeply embedded intuitions about justice and personal responsibility. Private law is also among the first subjects that prospective lawyers study. Its position in law school curricula indicates the consensus of law teachers that private law is the most elementary manifestation of law, its reasoning paradigmatic of legal thinking, and its concepts presupposed in more complex forms of legal organization.

Consequently, an inquiry into how we are to understand private law opens onto the broadest vistas of legal theory and practice. At issue are the nature of legal justification, the limits of the judicial role and judicial competence, the difference between private law and other kinds of legal ordering, the relationship of juridical to ethical considerations, and the viability of our most basic legal arrangements. Indeed, if private law is as fundamental as law teachers suppose, misconceptions about it will affect our understanding of the entire field of law.

The most striking feature of private law is that it directly connects two particular parties through the phenomenon of liability. Both procedure and doctrine express this connection. Procedurally, litigation in private law takes the form of a claim that a particular plaintiff presses against a particular defendant. Doctrinally, requirements such

as the causation of harm attest to the dependence of the plaintiff's claim on a wrong suffered at the defendant's hand. In singling out these two parties and bringing them together in this way, private law looks neither to the litigants individually nor to the interests of the community as a whole, but to a bipolar relationship of liability.

My concern here is with liability as the locus of a special morality that has its own structure and its own repertoire of arguments. Among the questions I shall consider are the following: What is the framework for understanding this morality? What kind of justifications constitute this morality? What is its structure and its normative grounding? And how does the operation of private law conform to its requirements? In these inquiries, my focus is on liability rather than on property. Of course private property is basic to private law, and this book includes a certain conception of property. But my principal aim is to consider the private law relationship not statically through what the parties own, but dynamically through the norms that govern their interaction.

The idea that private law constitutes a normatively distinct mode of interaction is not currently in favor. According to the standard view in contemporary scholarship, private law does not differ from other law: like all law, private law is normative only to the extent that it serves socially desirable purposes; and one understands private law by first identifying these purposes and then evaluating its success in serving them.

In this chapter I wish to introduce the themes of this book by contrasting the standard view with the approach I will be developing. My claim is that by focusing on the purposes that law might serve, the standard view regards private law from an external perspective that fails to take seriously the features expressive of private law's inner character. I suggest instead that one must understand private law from a perspective internal to it.

I orient us toward this internal perspective through the following steps. First I outline the role of purposes as independent grounds of justification in the standard approach. Recourse to such purposes reflects a set of widely held assumptions about law: that law is not an autonomous body of learning, that law cannot be separated from politics, that the law's concepts are not to be taken seriously in their own right, and that private law is not distinct from other modes of legal ordering. Then I delineate an alternative approach that challenges these assumptions. The alternative approach treats private law as an internally intelligible phenomenon by drawing on what is salient in

juristic experience and by trying to make sense of legal thinking and discourse in their own terms. Crucial to this approach is the role of coherence both as an internal characteristic of private law and, more generally, as an idea that has no external referent. Attention to private law's internal features leads to a reconsideration of the standard view that law cannot be an autonomous discipline. Finally, I sketch the components of the theory that elucidates the internal perspective for understanding private law. This is the theory developed in the rest of the book.

1.2. Purpose in Private Law

The usual view of legal scholars is that one understands law through its purposes. To understand tort law, for instance, we must determine the goal or goals that tort law serves or ought to serve. Tort scholars accordingly examine tort law with the following questions in mind. Is the goal of tort law to compensate accident victims? Or is the goal to deter behavior that might produce injuries? If compensation is the goal, should the costs of compensation be spread as broadly as possible, or should they be allocated to the people wealthy enough to bear them easily? If deterrence is the goal, does this require the collective specification of the activities whose potential for injury makes them socially undesirable, or does it require the funneling of incentives through the market and its price structure? Or, alternately, is tort law a system of mixed goals that includes all these goals as well as others, in an elaborate network of mutual adjustments and trade-offs?

That one comprehends law through its goals—a notion we may call functionalism—is particularly well entrenched in American legal scholarship. A concern with the goals of law appears in an unbroken succession from the jurisprudence of Oliver Wendell Holmes to the realist revolt against Christopher Columbus Langdell's legacy to the current preoccupation with policy and with the weighing of social interests. Its most prominent contemporary manifestation is the economic approach, which has produced complex and sophisticated analyses of the incentive effects of different liability rules. The economic approach, however, provides only the most notable example of the current understanding of private law in terms of goals. Even those who disagree with the economic elaboration of those goals rarely regard goals as irrelevant in principle. Instead of emphasizing goals

such as wealth maximization[1] or market deterrence,[2] they champion liberty[3] or community.[4] Their quarrel with the economists concerns the choice of goals, not the search for goals.

The functional approach to private law has an understandable appeal. The proposed goals specify aspects of human welfare—the compensation of injury, for instance, or the minimizing of the frequency and seriousness of accidents—that it is desirable to promote. The goal-oriented understanding of private law follows from the seemingly axiomatic proposition that "the object of law is to serve human needs."[5] The task for scholars is then to specify the goals relevant to the incidents regulated by a particular branch of private law, to indicate how different goals are to be balanced, to assess the success of current legal doctrine in achieving the specified goals, and to recommend changes that might improve that success.

Under this functionalism, the justificatory worth of the goals is independent of and external to the law that they justify. To continue with the tort example, deterring accidents and compensating accident victims are socially desirable quite apart from tort law. Indeed, tort law may be modified or even abolished should it be an unsuitable means of accomplishing these goals. If tort law forwards them, so much the better. The goals, however, are independently justifiable and do not derive their validity from tort law.

A consequence of the current focus on independently justifiable goals is that private law is only indirectly implicated in the functionalist inquiry. The functionalist starts by looking past private law to a catalogue of favored social goals. Private law matters only to the extent that it forwards or frustrates these goals. What the functionalist proposes is not so much a theory of private law as a theory of social goals into which private law may or may not fit.

Because they are preoccupied with independently justifiable goals rather than with private law directly, functionalist approaches to private law are radically incomplete. The functionalist is concerned with whether the results of cases promote the postulated goals. Private law,

1. Richard A. Posner, *Economic Analysis of Law* (3rd ed., 1986).
2. Guido Calabresi, *The Costs of Accidents* (1970).
3. Richard A. Epstein, "A Theory of Strict Liability," 2 *Journal of Legal Studies* 151 (1973).
4. Robert A. Bush, "Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury," 33 *University of California at Los Angeles Law Review* 1473 (1986).
5. Guido Calabresi, "Concerning Cause and the Law of Torts," 69 *University of Chicago Law Review* 105 (1975).

however, is more than the sum of its results. It also includes a set of concepts, a distinctive institutional setting, and a characteristic mode of reasoning. These aspects are components of the internal structure of private law and do not readily map onto the functionalist's extrinsic goals. To the extent that functionalism ignores or dismisses these aspects, it fails to account for what is most characteristic of private law as a legal phenomenon.

Moreover, the favored goals of the functionalists are independent not only of private law but also of one another. For example, compensation and deterrence, the two standard goals ascribed to tort law, have no intrinsic connection: nothing about compensation as such justifies its limitation to those who are the victims of deterrable harms, just as nothing about deterrence as such justifies its limitation to acts that produce compensable injury. Understood from the standpoint of mutually independent goals, private law is a congeries of unharmonized and competing purposes.

In this book, I will argue that, despite its current popularity, the functionalist understanding of private law is mistaken. Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.

So ingrained is the functionalism of contemporary legal scholarship that ascribing to private law the purpose of being itself is dismissed out of hand as a hopelessly unilluminating tautology.[6] In the dominant contemporary view, private law is—and can be nothing but—the legal manifestation of independently justifiable goals.

Nonetheless, this dismissal of the internal intelligibility of private law is surprising. It cannot be (one hopes) that the very idea of a phenomenon intelligible only in terms of itself is unfamiliar. Some of the most significant phenomena of human life—love or our most meaningful friendships, for instance—are intelligible in this way. We immediately recognize the absurdity of the suggestion that the point of love is to maximize efficiency by allowing for the experience of certain satisfactions while at the same time avoiding the transactions costs of repeated negotiation among the parties to the relationship.[7]

6. Richard A. Posner, *The Problems of Jurisprudence*, 447 (1990); Richard A. Epstein, "The Utilitarian Foundations of Natural Law," 12 *Harvard Journal of Legal and Public Policy* 713 (1989); Owen Fiss, "Coda," 38 *University of Toronto Law Journal* 229 (1988).
7. Posner, *Economic Analysis of Law*, 238–239.

The very terms of the analysis belie the nature of what is being analyzed. Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love.

Moreover, it is only to contemporary ears (especially contemporary American ears) that the idea of the internal intelligibility of private law sounds strange. This idea has been standard in Western legal theory ever since the distinctive character of private law was first noticed by Aristotle. Among its subsequent proponents were Aquinas, Grotius, Kant, and Hegel. Indeed, so dominant has the idea of the private law's internal intelligibility been in the history of legal theory that one can fairly regard it as the classical understanding of private law. My intention in this book is to recall this understanding and to argue for its continuing significance.

1.3. The Assumptions of Functionalism

The functional approach to private law goes hand in hand with a number of widespread assumptions concerning law's place among the intellectual disciplines and its status as a justificatory enterprise. For my argument to be persuasive, these assumptions too will have to be reconsidered.

The first assumption is the denial that law is an autonomous body of learning.[8] Because the functionalist goals are justifiable independently and the law's purpose is to reflect them, the study of the law becomes parasitic on the study of the nonlegal disciplines (economics, political theory, and moral philosophy are currently the most popular) that might validate those goals. Hence the proliferation among academic lawyers of rich interdisciplinary interests in "Law and . . . ," with the vital element in the pairing being invariably the nonlegal one. Law provides only the authoritative form into which the conclusions of nonlegal thinking are translated. The governing presupposition is that the content of law cannot be comprehended in and of itself, simply as law. Law is considered to have no meaning except that which it manages to leach from other disciplines and inquiries. Indeed, the capacity to funnel insights about law through alien concepts and

8. For a description of the factors that have undermined the idea of legal autonomy in recent years, see Richard A. Posner, "The Decline of Law as an Autonomous Discipline: 1962–1987," 100 *Harvard Law Review* 761 (1987).

terminology is considered the mark of scholarly detachment and sophistication.

The second assumption underlying the current functionalism is that law and politics are inextricably mixed. Recourse to independently valid goals implies the nonexistence of a distinctively legal mode of justification. On this view, the considerations that count as reasons in the forum of law are no different from the considerations that count as reasons in the arena of politics. Controversy exists regarding the desirability or the feasibility of the various goals that might be proposed, but none of those goals or the arguments supporting them can claim a privileged position by being in some sense inherently legal. Justifications that affect the terms of social interaction can be good or bad, but they cannot be legal as opposed to political.

Of course, functionalists recognize that law contains its own terms and concepts. These, however, are regarded merely as the vehicles of the consequences they carry. One understands the law by discerning these consequences and assessing their desirability. The law's invocation of these concepts is a ritual,[9] a veil to be pierced by clear-headed analysis,[10] a practice encoded with functionalist principles,[11] or even a salutary obfuscation that itself has functional value.[12] The third assumption of the current functionalism, then, is that law's conceptualism is not to be taken seriously in its own right.

The fourth assumption is that no distinction exists between private and public law.[13] All law is public, in that the legal authorities of the state select the favored goals and inscribe them into a schedule of collectively approved aims. The various methods for elaborating the community's purposes—legislation, adjudication, administrative regulation, and so on—are merely different species of the generically single activity of translating goals into a legal reality. The assumption denies that private law is private in any significant sense. At most, private law is public law in disguise.[14]

These four assumptions are intertwined and mutually supporting.

9. Jerome Frank, "What Courts Do In Fact," 26 *Illinois Law Review* 653 (1931).

10. Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia Law Review* 809 (1935).

11. Richard A. Posner, *The Economic Structure of Tort Law*, 23 (1987).

12. Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," 43 *University of Chicago Law Review* 107 (1975).

13. For discussion see Symposium on the Private/Public Distinction, 130 *University of Pennsylvania Law Review* 1289 (1982).

14. Leon Green, "Tort Law Public Law in Disguise," 38 *Texas Law Review* 1, 258 (1959).

The study of law cannot be an autonomous discipline if its subject matter is not a distinctive normative enterprise. Similarly, the discounting of the law's characteristic concepts dissolves law both as an enterprise and as a discipline into whatever pertains to the formulation and assessment of independently justifiable purposes. This flattening of law in turn precludes the hiving off of private law from the collective pursuit of public goals.

In asserting that the sole purpose of private law is to be private law, I aim to undermine all these assumptions. I will argue that private law construes the litigating parties as immediately connected to each other. Interaction so conceived is categorically distinct from that of public law, which relates persons only indirectly through the collective goals determined by state authority. The different mechanisms for enunciating legal norms—adjudication and legislation—broadly reflect the different contours of these two modes of interaction. The autonomy of private law as a body of learning is a consequence of the distinctiveness of private law as a mode of interaction. To understand private law, we must take seriously its fundamental concepts, which, far from being surrogates for the operation of independently justifiable collective purposes, are the juridical markers of the immediate connection between the parties. Understood in this way, private law is a juridical, not a political, phenomenon. By thus jettisoning the functionalist assumptions we can return to the idea that private law is to be understood from within.

1.4. Understanding Private Law from Within

How can private law be understood from within? This question subdivides into two. What is private law? And how is its intelligibility internal?

1.4.1. What Is Private Law?

In one sense, the initial question "What is private law?" is premature. Because our aim is to understand what private law is, answering the question is the end—the telos, both the aspiration and the conclusion—of our exposition. The question thus invites us to look back over territory traversed.

In another sense, however, the question points to a journey anticipated. It goes to the identity of what we are attempting to understand.

Unless we have some answer—however blurred, dim, or inchoate—to this question, we will be unable to proceed.

In asking the question "What is private law?" I do not mean to suggest that private law is arcane. On the contrary, the question is meaningful only because private law is within the intellectual experience of any serious student of law. An inquiry into the nature of private law is not an exploration of uncharted territory, but a visit to the familiar landmarks of our legal world. Because we know, however inarticulately or provisionally, what private law is even before we explicitly confront the question, we can insist that the response be true to that knowledge.

The point of departure for theorizing about private law—as well as about anything else—is experience.[15] We can understand only that which is familiar to us. I raise the question "What is private law?" not to short-circuit the inquiry by stipulating a favored definition, but to direct us to our experience of the law, especially the experience of those who are lawyers. This experience allows us to recognize issues of private law and to participate in its characteristic discourse and reasoning. Whatever our difficulty in defining private law or resolving particular issues within it, we are aware of a body of law possessing such characteristics as an allegation of wrongdoing, a claim by one person against another, an injury, a demand for redress, a system of adjudication, a set of liability rules, a corpus of case law, and so on.

Within private law's massive complex of cases, doctrines, principles, concepts, procedures, policies, and standards, certain features have a special significance. These are the ones that are salient in our conception of private law, in the sense that their systematic absence would mean the disappearance of private law as a recognizable mode of ordering. So central are they that any plausible discussion of private law presupposes them or invokes them. At the level of practice, they are inescapably basic to the continuing elaboration of legal doctrine. At the level of theory, they are the features that must be explained or explained away, because an exposition that ignores them or does them violence runs the risk of being regarded as contrived or artificial or somehow amiss. These features characterize private law in the literal sense of providing the indicia of its distinctive character.

Both institutional and conceptual features have this special status. On the institutional side, private law involves an action by plaintiff

15. Georg W. F. Hegel, *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences,* sect. 12 (1830) (William Wallace, trans., 3rd ed., 1975).

against defendant, a process of adjudication, a culmination of that process in a judgment that retroactively affirms the rights and duties of the parties, and an entitlement to specific relief or to damages for the violation of those rights or the breach of those duties. On the conceptual side, private law embodies a regime of correlative rights and duties that highlights, among other things, the centrality of the causation of harm and of the distinction between misfeasance and nonfeasance. For lawyers working within this system, these institutional and conceptual features are the stable points within which their thinking moves when engaged in the consideration of private law.

The apparent centrality of these features does not mean that they escape controversy. Legal argument or legal scholarship may call any of them into question. For instance, a court decision may disregard the convention of retroactive judgment by restricting its holding to its prospective effect, or economic analysis may assert the insignificance of the requirement of causation. Nonetheless, a lawyer confronted by these developments may well feel—even if unable to articulate the theoretical reasons for so feeling—that these are not normal (or even mistaken) elaborations of private law, but instead are fundamentally at odds with the nature of the entire enterprise. And private law may reflect this feeling by incorporating them, if at all, only for special occasions and with special justifications.

The ensemble of institutional and conceptual features I have listed serves to identify, at least in a preliminary way, the phenomenon of private law. They form, as it were, the skeleton of private law, the minimal characteristics without which lawyers would begin to lose their sense of private law as a distinctive mode of legal ordering. Unlike the functionalism of independent goals, the account offered in this book arises out of these features and makes them its focus. It thereby purports to contribute to an understanding of private law rather than of independent goals that private law may or may not forward.

Moreover, the features I have mentioned appear to be aspects of, and thus to point toward, the master feature characterizing private law: the direct connection between the particular plaintiff and the particular defendant. The institutional features elaborate the process of litigation and adjudication through which the plaintiff vindicates a claim directly against the defendant. The conceptual features, such as the requirement that the defendant have caused the plaintiff's injury, base that claim on what the defendant has done to the plaintiff. The presence of these features suggests that the central task of private law

theory is to illuminate the directness of the connection between the parties.

When we put these two points together—functionalism's attention to independent goals rather than to the features of private law, and the directness of the connection between the parties to the private law relationship—we see why functionalism does not illuminate private law. Instead of relating the parties directly to each other, functionalism inquires into the goals that assessing damages against the defendant and awarding damages to the plaintiff might separately serve. Having bifurcated the parties' relationship, functionalist approaches cannot treat seriously the features that express the plaintiff's direct connection to the defendant.

A consequence of functionalism's academic dominance is that the very idea of direct connection has become unfamiliar. For if one assumes that law must promote independent purposes, what connections can there be except those that operate through such purposes? The apparatus of legal scholarship thus denies what our legal experience affirms. If we are to make sense of private law, we shall have to explore—indeed, resurrect from nonfunctionalist legal theory—the notion of direct connection. The structure of the parties' relationship is therefore a major theme of the chapters that follow.

1.4.2. Internal Intelligibility

The second question to be considered is "How is the intelligibility of private law internal?" To a certain extent, I already engaged this question when I identified private law by referring to its salient characteristics. I made this identification by ascertaining what is presupposed in the practice and discourse of private law. The standpoint for identifying private law was already internal to private law.

Furthermore, not only does an internal account orient itself to the features salient in legal experience, but it also understands those (and other) features as they are understood from within the law. This can be contrasted with functionalist analyses. For instance, a functionalist might construe the plaintiff's right of action as a mechanism for bribing someone to vindicate the collective interest in deterring the defendant's inefficient behavior. An internal account, by contrast, interprets that right of action simply as what it purports to be: the assertion of a right by the plaintiff in response to a wrong suffered at the hands of the defendant. Similarly, while a functionalist might regard causation as an indirect way of achieving market deterrence or

some other extrinsic goal, an internal account treats causation as causation, that is, as a concept that represents the unidirectional sequence from action to effect. Whereas the functionalist might regard adjudication as a stylized process of legislative policy making, an internal account adheres to the lawyer's—indeed, the ordinary—sense that adjudication, unlike legislation, declares the rights of the parties, that considerations relevant to the public welfare can be inappropriate to a judicial setting, that in adjudication the substance of argument is intimately related to the process of presenting argument, that, in short, adjudication is not merely a more cramped form of legislation.

Moreover, an internal account respects the dynamism of private law, as understood from the standpoint of those who think about the law in its own terms. Several aspects of this dynamism are particularly significant. First, private law is a justificatory enterprise that articulates normative connections between controversies and their resolutions. Private law is not merely a compilation of the decisions that the legal authorities enforce on the litigants. Rather, for those who take the task of legal thinking upon themselves, the process of justification is at least as important as the results of individual adjudications. In any sophisticated legal system, private law is a collective wisdom—"fined and refined by an infinite number of Grave and Learned Men"[16]—that elaborates the grounds for regarding certain results as justified. The common law, where reasons for judgment are routinely attached to judicial decisions, provides a familiar example of the internal significance of justification.[17]

Second, private law values and tends toward its own coherence. In sophisticated legal systems, private law is not an aggregate of isolated and unrelated emanations of official power. Rather, private law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules, and standards. The value that private law places on coherence indicates that the institutional and conceptual features I have listed, understood as lawyers understand them, are the interconnected aspects of a single complex of ideas that illuminates the continuing elaboration of legal doctrine.

16. Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England,* 55 (Joseph Cropsey, ed., 1971).

17. The point is equally if not more valid in the civil law tradition, where juristic activity in the form of scholarship or the *responsa jurisprudentium* is regarded as integral to legal enterprise, although separated from the exercise of official power and, consequently, from the direct production of legal results. See John H. Merryman, *The Civil Law Tradition,* 59–64 (1969); Fritz Schulz, *History of Roman Legal Science,* 49–59 (1946).

Third, coherence is an aspiration, not a permanent or inevitable achievement. 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. The law itself announces the possibility of its own erroneous resolution of particular controversies through dissents and overrulings. Moreover, the very presence in the common law of reasons for judgment is an invitation to take those reasons seriously *as* reasons, and therefore to entertain the possibility that they may be right or wrong, sound or unsound, adequate or inadequate. Thus to understand private law from the inside does not entail the acceptance of the entire corpus of holdings as if they were facts of nature. Internal to the process of law is the incremental transformation or reinterpretation or even the repudiation of specific decisions so as to make them conform to a wider pattern of coherence. In the classic phrase of common law lawyers, the law can work itself pure.[18]

An internal account deals with private law on the basis of the juristic understandings that shape it from within. Jurists share, if only implicitly, assumptions about the institutional and conceptual features that their activity presupposes, about the function these features play in their reasoning, and about the significance of coherence for the elaboration of a legal order. Shared understandings on such basic matters are indispensable to effective participation in juristic activity. Indeed, to participate in that activity is to be animated by those understandings.

The idea of coherence suggests a further aspect of internal intelligibility. 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.

The notion of coherence, therefore, has a twofold significance for the internal intelligibility of private law. First, the striving for coherence is a characteristic of private law and is thus internal to it. Consequently, those who think about private law in its own terms must

18. Omychund v. Barker, 26 Eng. Rep. 15, 23 (1744).

include the law's pervasive impulse toward coherence within their purview. Second, 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. The understanding is internal with respect to its mode of operation, as well as with respect to the concepts and institutions of private law.

1.5. Private Law as a Self-Understanding Enterprise

This twofold conception of internal intelligibility—of an understanding that is internal both to private law and to itself—suggests that private law is simultaneously explanandum and explanans, both an object and a mode of understanding. As an object of understanding, private law presents a set of features that are the focus of intellectual effort. As a mode of understanding, private law is an internal ordering of the features that compose it. To sum up this integration of the activity of understanding with the matter to be understood, we may say that private law is a self-understanding enterprise. The concepts of private law are both the products and the channels of this self-understanding. Similarly, the issuing of reasons for judgment is private law's announcement of the terms of its understanding of itself in the context of particular controversies.

Private law's self-understanding has several aspects. First, as an *understanding,* private law is an engagement of thought. Law is in the first instance an exhibition of intelligence rather than a set of observed regularities or a display of monopolized power.[19] To grasp private law is to come to terms not merely with a series of results that arrange and rearrange the legal landscape in response to pressures operative within the organism of social life, but with the way in which a conceptual structure finds expression in the arguments of those who take the task of legal thinking upon themselves. To regard law in this light is to take seriously the ancient commitment of natural law theorizing to the possibility that law resides in the reason.

Second, as a *self*-understanding, private law is an exhibition of intelligence that operates through reflection on its own intelligibility. In

19. On exhibitions of intelligence see Michael Oakeshott, *On Human Conduct,* 13 (1975).

resolving controversy private law refers to its own ensemble of concepts, doctrines, and institutions, determines the meaning of that ensemble in specific situations, and attempts to maintain the mutual coherence of the ensemble's components.

Third, as a self-understand*ing,* private law embodies a dynamic process. The law's aggregate of specific determinations does not permanently freeze the intelligibility of law to their contours. Being an exhibition of human intelligence rather than of divine omniscience, private law includes a self-critical dimension that manifests itself in overrulings, dissents, juristic commentary, and other indicia of controversy. Moreover, because private law develops over time and in the context of contingent situations, subsequent occurrences or the thinking of subsequent jurists may lead to fresh nuances in doctrine or to a reevaluation of the coherence or plausibility of previously settled law.

Fourth, as the *law*'s self-understanding, this internal intelligibility is systemic to the legal order rather than personal to individual jurists. The point is not to ascribe to the law a super-intellect distinct from the intellect of individual human beings. Rather, the attribution of self-understanding to the law draws attention to the personal self-effacement of those who participate in the elucidation of law from within. What matters is the law as something to be understood, not the lawyer or scholar or judge as a freelancing intellectual adventurer. This is why at common law the reasons for judgment are not seen as expressing the adjudicator's subjective intent, but are accorded an objective and impersonal status that yields their author no privilege with respect to their interpretation.[20] Of course, all understandings are the activities of the individual minds that understand. But in orienting their efforts to the law, these minds are themselves possessed by the idea of that which they are trying to understand,[21] 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. The understandings of jurists

20. For a dramatic instance, see Mutual Life v. Evatt, [1971] 1 All Eng. Rep. 150 (P.C.), where the Judicial Committee of the Privy Council, in the face of dissents by Lord Reid and Lord Morris of Borth-y-Gest, adopted a restrictive interpretation of the opinions that Lord Reid and Lord Morris had given in the leading case of Hedley, Byrne v. Heller, [1963] 2 All Eng. Rep. 575 (H. L.).

21. Samuel Taylor Coleridge, *On the Constitution of the Church and State according to the Idea of Each,* 5 (John Barrell, ed., 1972).

count to the extent that they are not personal opinions but are expressions of what is demanded of law if it is to remain true to its own nature.

The idea that private law is a self-understanding enterprise directs our attention away from the supposed external purposes of private law to the internal conditions of this self-understanding. Thence arise the issues to be discussed in this book: By what method does one explicate the perspective that animates private law from within? What conceptual structure is presupposed when private law is regarded as a self-reflective and systemic engagement of thought? And having abandoned the standpoint of external purpose, what normative grounding, if any, can we claim for private law?

A satisfactory answer to these questions results in an account of private law that has the following advantages over its functionalist rivals. First, such an account is comprehensive because, unlike the functionalist approaches, it includes the self-understanding that regulates private law from within. Functionalist approaches have limited scope. They align external purposes merely with the results of cases and are indifferent to the specific juristic reasoning, doctrinal structure, and institutional process from which these results emerge. An internal approach, in contrast, considers this reasoning, structure, and process to be crucial indicia of the law's self-understanding. The account is as much an account of these as of the results of particular cases.

Moreover, an account that explicates the self-understanding of private law is decisively critical. Of course, any evaluative theory of private law, including a functionalist one, contains criteria by which it judges certain ideas to be mistaken. However, because functionalist criticism is based on external purposes, jurists working within private law can regard such criticism as irrelevant to their particular enterprise. In contrast, an account that flows from and captures the law's self-understanding assumes the perspective internal to juristic activity. Its strictures, therefore, cannot be evaded.

Finally, an internal account is nonreductive. Because legal concepts and institutions are indicia of the law's self-understanding, an internal account attempts to make sense of them on their own terms by allowing them to have the meaning they have in juristic thought. In contrast to functionalist approaches, it illuminates private law without effacing its juridical character or reducing legal thinking to an alien discipline or technique.

1.6. Law and . . .

A nonreductive understanding of private law does not imply that other disciplines cannot yield helpful insights. It is of course true that work in other disciplines might show that a particular legal development reflects the presence of specific historical factors, or has certain economic consequences, or fits into a particular pattern of social relationships. But these nonlegal perspectives assume theoretical interest only at the point of reductionism, when they become more ambitious and more exclusive, when their invocation implies the denial that legal material can be juridically understood, when one or another of these views of the cathedral claims primacy in the interpretation of what a cathedral is.[22] Then the presuppositions of invoking the other discipline become firm, specific, and open to analysis and objection.

The assertion that law is to be understood in terms of some other discipline seems to embody two premises, one about the nature of the chosen discipline and the other about the nature of explanation. The premise about the chosen discipline posits that the qualities of a specific discipline entitle it to rank as the primary or exclusive vehicle for the understanding of law. The premise about the nature of explanation, in contrast, posits that an explanation of something is and must always be in terms of something else. Under this premise a thing cannot be grasped except by an intellectual operation that transforms it into something different, so that understanding is conceived as a kind of intellectual digestion in which the juices and acids of the mind work the object presented to it into a matter of different composition and appearance.

The difficulty is that these premises cannot stand together. If explanation of something can only be in terms of something else, the explanation of law in terms of, say, economics or history might be justified, but economics or history could not claim primacy or exclusivity because, under the explanatory premise, their content would itself have to be explained in terms of something else. And so on, in infinite regress. The premise concerned with explanation cannot concede to any other discipline the self-sufficiency that it denies to law.

The other possibility is that the alien discipline, by the sheer force of its own illuminating power and without the aid of the explanatory

22. For the image of the cathedral, see Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972).

premise, can account for what is significant in private law. There is, however, little reason for confidence in such an enterprise. The reduction of law to something else involves the sacrifice or the transformation of some element that is salient in the law's self-understanding. The consequent depreciation of the law and its self-understanding decreases the explanatory power of the substituted discipline and renders suspect the claim that the discipline is entitled to primacy by virtue of its sheer illuminating force.

In dismissing the autonomy of private law the methodology of contemporary legal scholarship is, accordingly, confronted with a dilemma. One understands something either through itself or through something else. If one understands something through something else, the self-understanding of private law is denied, but the infinite regress occasioned by this notion of understanding equally undermines every nonlegal mode of understanding private law. If, however, one understands something through itself, the law's self-understanding is possible, and it is sheer dogmatism to insist that other disciplines have, when applied to law, an intelligibility that law lacks on its own. The result is that one must either accede to the possibility that law can be understood through itself or deny the possibility that law can be understood at all. Perhaps it is hardly surprising that dissatisfaction with contemporary scholarship has caused exponents of "critical legal studies" to explore this latter skeptical alternative.

1.7. The Theory of Private Law

So far I have been emphasizing the internal character of private law in order to orient us toward an understanding that reflects that character. Before explicating this understanding in detail, I propose to introduce the three mutually reinforcing theses that constitute it and to indicate the conception of theory that it postulates.

The first thesis concerns the theoretical framework. An internal account of private law sets in opposition to contemporary functionalism the thesis that private law is immanently intelligible. Building on the jurist's understanding of private law as a distinctive and coherent ensemble of characteristic features, the thesis integrates the distinctiveness, the coherence, and the character of private law into a single theoretical approach. Underlying this integration is the notion that one understands a legal relationship through its unifying structure, or "form." Applied to private law, the thesis of immanent intelligibility is a version of legal formalism.

The second thesis identifies Aristotle's conception of corrective justice as the unifying structure that renders private law relationships immanently intelligible. Corrective justice is the pattern of justificatory coherence latent in the bipolar private law relationship of plaintiff to defendant. By abstractly schematizing this pattern, Aristotle made manifest the distinctive rationality of private law. And by decisively distinguishing corrective from distributive justice, Aristotle established the categorical difference between private law and other legal orderings.

The third thesis concerns the normativeness of corrective justice. Corrective justice is the justificatory structure that pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea for relationships between free beings. For Kant, freedom itself implies juridical obligation. On this view, the doctrines, concepts, and institutions of private law are normative inasmuch as they make a legal reality out of relations of corrective justice.

The idea of private law lies in the synthesis of these three theses. Each of them highlights a different aspect of the possible coherence of private law. Coherence bespeaks a unifying structure. Formalism goes to the relevance of understanding the private law relationship through its structure; corrective justice is the specification of its structure; and Kantian right supplies the moral standpoint immanent in its structure.

The theory of private law presented through the elaboration of these three theses is intimately related to private law itself. An internal understanding of private law reaches corrective justice and the Kantian concept of right by reflecting on the juristic experience of private law and on the presuppositions of that experience. 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. Thus corrective justice and Kantian right are the archconcepts by which one must conceptualize the features of private law if they are to constitute a coherent normative ensemble.

The relationship between private law and its theory can be formulated as a difference between what is explicit and what is implicit. In

one sense, the theory is implicit in the functioning of private law. Because they are categories of legal theory rather than ingredients of positive law, corrective justice and Kantian right are not themselves on the lips of judges. But even though these theoretical categories do not figure explicitly in the discourse of private law, they are implicit in it as a coherent justificatory enterprise, in that they provide its unifying structure and its normative idea. They are as present to private law as the principles of logic are to intelligible speech. Private law makes corrective justice and Kantian right explicit by actualizing them in doctrines, concepts, and institutions that coherently fit together.

In another sense, legal theory renders explicit the philosophical categories that are implicit in private law. Legal theory takes these categories as the specific materials of its investigation. It seeks to elucidate their morphology, their interconnection, and the extent to which they represent viable notions of moral rationality. Whereas private law makes corrective justice and Kantian right explicit as determinants of legal ordering, legal theory makes them explicit as objects of philosophical inquiry.

Of course the closeness of the connection between the theory of private law and private law as a legal reality must be more than a theoretical postulate. Readers are entitled to wonder how this closeness manifests itself in legal doctrine. It is one thing to claim that corrective justice and Kantian right are implicit in a sophisticated system of private law. It is another thing to show how this relationship of implicit to explicit bears on specific legal controversies.

Although my approach applies to the entire domain of liability (tort, contract, and unjust enrichment), my most extended discussion will be of the treatment of accidental injuries in the common law of torts.[23] Because the negligent defendant's culpability seems morally detachable from the fortuity of injury, liability for negligence poses a particularly severe challenge to the stringent notion of coherence that I shall be developing. If formalism illuminates negligence law, it presumably illuminates less problematic bases of liability as well. At any rate, the prevalent academic assumption that crucial doctrines of negligence law—the standard of care and proximate cause, for instance—are explicable only in functionalist terms should dispel the suspicion that I have chosen to defend the internal approach on the legal terrain that contemporary scholars would initially regard as most favorable to it.

23. See below, Chapters 6 and 7.

Thus the argument of this book proceeds from law to theory and back to law. At issue are two broad questions: What theoretical ideas must be implicit in the legal materials, if those materials are to be coherent? And how do the doctrines of private law reflect those ideas? The movement is a circle of thought that feeds upon its own unfolding theoretical explicitness: from the salient features of private law, to the immediate juristic understanding of those features, to the unifying justificatory structure implicit in that understanding, to the explicit elucidation of that structure and of its normative standpoint, to the consideration of the conformity to that structure of a particular set of private law relationships.

My basic contention, then, is that private law relationships have a unifying structure. This structure is internal in the two senses suggested above, that it is implicit in the salient features of private law and that it is intelligible without external referent as a harmony of parts making up a coherent whole. Because private law attempts to elaborate doctrines expressive of its own potential coherence, the structure is also a regulative idea. This is why the purpose of private law is simply to be private law.