

# “The New Private Law”

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## SYMPOSIUM INTRODUCTION: THE NEW PRIVATE LAW

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Like many legal concepts, “private law” has recognizable referents yet eludes precise definition. Private law defines the rights and duties of individuals and private entities as they relate to one another.<sup>1</sup> It stands in contrast to public law, which establishes the powers and responsibilities of governments, defines the rights and duties of individuals in relation to governments, and governs relations between and among nations.<sup>2</sup>

Private law includes the common law subjects that have long been central to U.S. legal education — contracts, property, and torts. But it is not limited to those subjects, nor to common law. Statutory fields such as intellectual property and commercial law fall within private law. So too do areas of law now mostly neglected in U.S. law schools, such as agency, unjust enrichment, and remedies.

At a broader level, the phrase “private law” gestures toward an elusive set of distinctions between what is public and what is private. Private law is law, so government is involved, albeit in a particular way. Typically it makes available institutions and procedures that enable individuals and entities to define their relationships, and to assert and demand the resolution of claims against others. Courts are central to this framework, but so too are arbitral panels. In turn, this institutional framework builds on and partly incorporates customs and social norms pertaining to interpersonal interaction.

Whereas scholars in commonwealth and civilian jurisdictions generally are comfortable with the category of private law, the disposition among U.S. legal academics is skeptical.<sup>3</sup> The idea that “all law is public

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<sup>1</sup> This capsule definition is rough, in part because private law also governs the rights and duties of public entities insofar as they act in a private capacity — e.g., as owners of property. As used here, the phrase “the new private law” refers to emerging *perspectives* on (or approaches to) private law, not to new developments in substantive law. It is shorthand for new thinking in private law. Cf. Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 994–95 (1996) (using the phrase to refer to the privatization of functions traditionally performed by governments, such as the provision of benefits payments or environmental protection).

<sup>2</sup> See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1795 (2009).

<sup>3</sup> See Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884–87 (1991) (reviewing—in a contri-

law” is no less taken for granted than the idea that “we are all realists now.”<sup>4</sup> The simultaneous embrace of these two mantras is no coincidence. Legal Realism is one important instantiation of a broader view of law that has contributed to the rise of private law skepticism.

In what follows I will first briefly discuss three canonical statements of this broader view, which I dub “brass-tacks pragmatism.” They are Holmes’s *The Path of the Law*,<sup>5</sup> Llewellyn’s *Some Realism about Realism*,<sup>6</sup> and Kennedy’s *Form and Substance in Private Law Adjudication*.<sup>7</sup> I focus on these essays because (by academic standards) they are famous, because they appeared in the pages of this journal, and because they demonstrate that the view I am describing crosses methodological, political, and generational lines. After outlining the connection between brass-tacks pragmatism and private law skepticism, I will invoke a different variant of pragmatism — “inclusive pragmatism” — in support of the less skeptical “new” private law.

#### BRASS-TACKS PRAGMATISM

The label “brass-tacks pragmatism” derives from the idiom “getting down to brass tacks.” The latter imports a notion of moving past idle chatter to what is genuine and important.<sup>8</sup> Brass-tacks pragmatism offers a comparable view of what it means to be pragmatic in one’s thinking. Pragmatic thinking, it supposes, is hard-headed in the particular sense of pushing past the surface to get to what is “really” at stake.<sup>9</sup>

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bution to a symposium on “the new public law”—sources of skepticism about distinctions between private and public law).

<sup>4</sup> George P. Fletcher, *Remembering Gary—And Tort Theory*, 50 UCLA L. REV. 279, 289 (2002) (invoking the “all law is public law” slogan and lamenting that, in the United States, it reflects the dominant academic view); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) (observing the phrase “we are all realists now” is so familiar that it is now cliché to refer to it as a cliché).

<sup>5</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>6</sup> Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

<sup>7</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>8</sup> The origins of the phrase are uncertain. See JOHN CIARDI, A BROWSER’S DICTIONARY AND NATIVE’S GUIDE TO THE UNKNOWN AMERICAN LANGUAGE 41 (1980) (suggesting that it might derive from the use of concealed brass tacks to hold together upholstery, or from dry goods stores’ use of brass tacks embedded in their counters to provide precise measures of fabric lengths).

<sup>9</sup> Brass-tacks pragmatism bears some resemblance to what William James once described as the “tough-minded” temperament. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 12–13 (1907). On James’s view, however, tough-minded thinking (along with its “tender-minded” counterpart) was *unpragmatic* — hence he offered pragmatism as a way of reconciling the two. *Id.* at 32–33. Moreover, certain attributes that he assigned to tough-minded thinking (for example, pessimism) are not ones that I attribute to brass-tacks pragmatism. *Id.* at

More than a century after its publication, *The Path of the Law* remains a leading statement of brass-tacks pragmatism. Ever the provocateur,<sup>10</sup> Justice Holmes took the occasion of a law school ceremony to tweak his hosts for providing students with a gauzy depiction of law. Law in the classroom, he supposed, was portrayed as an exercise in practical reason — it was said to reside in judicial opinions that abstract away from particular disputes to general ‘issues,’ and that reason through those issues by appeals to precedent, principle, and common sense.<sup>11</sup> This portrayal failed to get down to brass tacks. Law is not disembodied reason. It is, rather, a set of tolls imposed by the state on individuals as they go about their business. And it is judges who build and staff the tollbooths. Courts should not be mistaken for salons; judges are state actors.<sup>12</sup> A lawyer’s role — his path — is to mediate between state power and citizen liberty by mapping the tolls and thereby enabling his clients to navigate their own paths.<sup>13</sup>

Getting down to brass tacks not only meant attending to the place of power in law, it also meant understanding law through a demoralized lens.<sup>14</sup> To be a good lawyer, Holmes famously insisted, requires distinguishing legal concepts (e.g., “malice”) from moral concepts that often go by the same name.<sup>15</sup> Law solves practical problems on terms that reflect the state’s needs and ambitions. It embeds policy judgments, not moral judgments per se.<sup>16</sup> This is why courts are prepared to excuse conduct that morality would condemn, and to impose severe tolls even on the morally blameless.<sup>17</sup> Governing is a serious and often harsh business, not an occasion for adherence to the rarified ethical teachings of a religion or a philosophy.

Holmes also tied his brass-tacks pragmatism to anti-formalism in adjudication. The presence of a dissenting opinion is not an indication that someone has done his sums incorrectly, it is an expression of a dif-

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14. Likewise, the alternative form of pragmatism mentioned here — “inclusive” pragmatism — does not partake of several of the qualities that James assigned to the tender-minded disposition.

<sup>10</sup> David J. Seipp, *Holmes’s Path*, 77 B.U. L. REV. 515, 530 (1997).

<sup>11</sup> Holmes, *supra* note 5, at 465. Although he spoke of law generally, Holmes’s focus was private law — overwhelmingly, he drew on examples from contracts, torts, and property.

<sup>12</sup> *Id.* at 457 (the “command of the public force is intrusted to judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.”).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* at 458 (“The primary rights and duties with which jurisprudence busies itself . . . are nothing but prophecies.”).

<sup>15</sup> *See id.* at 463 (“It is enough to take malice as it is used in the law of civil liability for wrongs . . . to show you that it means something different in law from what it means in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name.”).

<sup>16</sup> *Id.* at 474.

<sup>17</sup> *See id.* at 459.

ference of judgment on a policy question.<sup>18</sup> Holmes saw in history a similar lesson. Legal rules change when the times change, because when the times change so do views on large questions of social and economic policy.<sup>19</sup> If legal reasoning really were driven by the interpretation of concepts and induction from precedents, we would not see disagreement or change. Yet students, by virtue of how they are educated, tended to treat rules as inexorable.<sup>20</sup>

Holmes's was an early articulation of brass-tacks pragmatism in American legal scholarship, but it was hardly the last. Indeed, this genre has taken on the cast of a permanent revolution. Each new generation of leaders pays obeisance to prior leaders, then faults them for failing to see things through. Certainly this was Llewellyn's view of Holmes's work.<sup>21</sup>

Like *The Path of the Law*, *Some Realism about Realism* focused on law schools' tendency to present law merely as a matter of judges teasing rules from precedents.<sup>22</sup> In 'reality,' judicial decisions are the product of the fact pressures of particular disputes, the psychological makeup of individual judges, and the larger considerations of policy that judges bring to bear in making their decisions.<sup>23</sup> For Llewellyn, getting down to brass tacks thus meant studying conduct — what officials and citizens do, not the reasons they give for doing what they do.<sup>24</sup>

Llewellyn's insistence on the insignificance of doctrine marked a departure from Holmes. Holmes had supposed that, any given time, there would be a dominant ideology among members of a dominant class, and that a lawyer suitably attuned to the "sibylline leaves" of doctrine could tease out the implication of that ideology for particular situations.<sup>25</sup> Llewellyn regarded cases and statutes as oracles so Delphic as to be of little use. One had to go into the field for close observation — to look for patterns in who actually pays which tolls under what circumstances.<sup>26</sup> Getting down to brass tacks, in other words, meant recognizing

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<sup>18</sup> *Id.* at 465.

<sup>19</sup> *Id.* at 466 (policies "embody the preference for a given body in a given time and place."); *id.* ("We do not realize how large a part of our law is upon to reconsideration upon a slight change in the habit of the public mind").

<sup>20</sup> *See id.* at 472 (describing the requirement of consideration as "merely historical"). *Cf.* Seipp, *supra* note 10, at 541.

<sup>21</sup> *See* Llewellyn, *supra* note 6, at 1227 n.18 (identifying Holmes as a realist pioneer); *id.* at 1235 n.36; *see also* K. N. Llewellyn, *Holmes*, 35 COLUM. L. REV. 485, 487-89 (1935) (crediting Holmes with having pointed the way to a realistic understanding of law while also noting ways in which he partook of anti-realism, including his disinterest in economics and sociology).

<sup>22</sup> *See* Llewellyn, *supra* note 6, at 1222-23.

<sup>23</sup> *Id.* at 1242-44.

<sup>24</sup> *Id.* at 1248-50.

<sup>25</sup> Holmes, *supra* note 5, at 457, 469.

<sup>26</sup> *See* Llewellyn, *supra* note 6, at 1242.

that law is nothing other than particular officials resolving particular kinds of disputes in particular settings on particular terms.<sup>27</sup>

Soon enough, Llewellyn would face the indictment he had leveled at Holmes. In *Form and Substance in Private Law Adjudication*, Duncan Kennedy suggested that Llewellyn, too, had failed to get down to brass tacks. While Llewellyn and his Realist brethren had recognized that judicial decisions are not driven by doctrine,<sup>28</sup> at a crucial moment in their analysis, they blinked.<sup>29</sup> Llewellyn's last great work was devoted to reassuring lawyers that common law decisionmaking could be predictable and objective.<sup>30</sup> Judicial opinions written in the "Grand Style," he had argued, would give freer rein to the judge's "situation sense," in turn permitting decisions better attuned to the shared understandings and norms of a particular industry, or those that were emerging with respect to a given mode of social interaction.<sup>31</sup> To Kennedy, this was bad faith. Llewellyn in private law, like the Legal Process School in public law, were offering false comfort in pieties about lawyerly craft and judgment — the supposedly shared professional sense for when different sorts of considerations and different techniques of decision are to be deployed.<sup>32</sup> These pieties were in turn tied to an unwarranted faith in the existence of a consensus about the values that private law ought to serve.

From Kennedy's perspective, Llewellyn's work marked in one respect a step backwards from Holmes's. Holmes had supposed that getting down to brass tacks was a matter of seeing particular arguments and decisions as expressions of the worldview inhabited by judges. Where Holmes had gone wrong was in his supposition that history consisted of an orderly sequence in which one dominant worldview occludes another.<sup>33</sup> Modernity, Kennedy insisted, harbors two fully conflicting visions: the "individualistic" and the "altruistic."<sup>34</sup> Although the former has dominated, the latter persists. And their conflict is all-

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<sup>27</sup> Holmes had dismissed this sort of microscopic exercise. Holmes, *supra* note 5, at 474–75 (deriding as unhelpful the value of organizing legal analysis around particular objects (the law of the butter churn) or activities).

<sup>28</sup> Kennedy, *supra* note 7, at 1758–60 (arguing that private law adjudication had been exposed by Realists such as Professor Robert L. Hale to be no less political and discretionary than constitutional adjudication).

<sup>29</sup> According to Kennedy, some Realists willingly acceded to a falsely formalistic conception of private law to secure the support of pro-business formalists in the fight against regressive constitutional law. *See id.* at 1758.

<sup>30</sup> *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 266–67 (1973) (outlining the argument of Llewellyn's *THE COMMON LAW TRADITION*).

<sup>31</sup> *See id.* at 210–12, 216–17.

<sup>32</sup> *See* Kennedy, *supra* note 7, at 1764 & n.151 (connecting Llewellyn's work to that of Professors Hart and Sacks, among others).

<sup>33</sup> *See supra* TAN 19.

<sup>34</sup> *See* Kennedy, *supra* note 7, at 1766.

encompassing. To get down to brass tacks requires recognizing that on any given issue — whether a “technical” issue of legal form (for example, rules versus standards), or an issue of substance (for example, how to define unconscionability) — there is only a side to be taken in an irresolvable ideological conflict.<sup>35</sup>

#### PRIVATE LAW SKEPTICISM

Obviously I have not offered anything resembling a systematic intellectual history. Still, I have not focused on obscure works or obscure figures. At a minimum, these prominent works offer support for the hypothesis that brass-tacks pragmatism — the notion that being pragmatic in one’s thinking involves getting past mere appearances to what is “really” going on in the law — has been a prominent current in our academic thinking about law. Probably it has been dominant.

To be sure, one key to the success of brass-tacks pragmatism is its indeterminacy. Any approach that can be shared by Holmes, Llewellyn, and Kennedy is a view with room. To adopt a hard-headed conception of what law is, and what is involved in judges deciding cases, is not to commit, for example, to a particular conception of the role of the courts in our legal system, or of the proper framing and resolution of particular doctrinal questions.

And yet the view is not so indeterminate as to lack any entailments. In fact, it has been consistently aligned with skepticism about the intelligibility and usefulness of the category of private law.<sup>36</sup> Holmes once again provided the model in treating all law as an undifferentiated interaction between government and citizen, and in emphasizing the degree to which judicial decisions in private law are no less a reflection of “policy” than decisions about public law or legislation.<sup>37</sup> Llewellyn also connected ‘getting real’ to the idea of looking past the surface of private

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<sup>35</sup> See *id.* at 1776–78.

<sup>36</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 3 (1995) (emphasizing the longstanding suspicion of the idea of private law in American legal scholarship). I happily acknowledge that there are overlaps between, on the one hand, my diagnosis of the state of private law theory and my account of some of the tenets of the new private law and, on the other hand, Professor Weinrib’s critique of functionalist accounts of private law and his defense of an “internal” approach. See *id.* at 6–14. Nonetheless, important differences remain. Most obviously — and most saliently for mainstream legal scholars in the United States — I am claiming for private law the mantle of pragmatism, rather than what Weinrib describes as “formalism.” *Id.* at 24–46.

<sup>37</sup> Contract disputes, for example, would tend to be resolved based on the judge’s sense of what a sensible agreement would be, not because the parties actually entered into that precise agreement. See Holmes, *supra* note 5, at 464. Tort law in the end determines to what extent manufacturers and service providers are to build the cost of liability into the prices they charge. See Holmes, *supra* note 5, at 467 (“[T]he question of liability, if pressed far enough, is really the question of how far it is desirable that the public should insure the safety of those whose work it uses.”).

law. In the modern world, Llewellyn argued, contract, property, and tort law primarily provide occasions for courts to consider how they might contribute to efforts to reduce and fairly allocate risks, such as the risk of bodily injury or economic loss.<sup>38</sup> In *The Path of the Law* and ever since, brass-tacks pragmatism has been strongly correlated with a call for lawyers, law students, and law professors to jettison or fundamentally redefine concepts central to private law — most notably concepts of right and duty — and to reject the notion that there is something distinctive about the state's role when it provides private law.

To appreciate fully the breadth of the legal academy's embrace of both brass-tacks pragmatism and private law skepticism, it is important to appreciate that skepticism about the intelligibility of private law need *not* entail, and often has not entailed, a dismal assessment of the bodies of law traditionally housed within that category. Indeed, in the middle of the twentieth century, one was at least as likely to encounter *cheerful* rather than critical variants of private law skepticism. These variants ran parallel to a set of equally cheerful skepticisms in public law.

In public law, skepticism about the concept of rights and the place of conceptual analysis in adjudication was taken to have exposed and discredited the incorporation of laissez-faire principles into constitutional law, thereby clearing a path for progressive *legislation*. In private law the same skepticism about rights and duties discredited the incorporation of laissez-faire into common law, thereby clearing a path for progressive *judicial decisions*.<sup>39</sup> With the scales removed from their eyes, self-aware judges could be relied upon in constitutional law to adopt a posture of judicial restraint. In private law, the same enlightened judges could be trusted to function as adept policy makers. Encouraged by the examples of Judges Cardozo, Hand, and Traynor, private law scholars could thus simultaneously be skeptical about the idea of private law and cheerful about the prospects for a new “public law” of contracts, property and torts.<sup>40</sup>

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<sup>38</sup> See Llewellyn, *supra* note 6, at 1255 (“[M]ost legal problems [are] problems in allocations of risks.”).

<sup>39</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1752–1812 (1998) (elaborating on this parallelism).

<sup>40</sup> The cheerful skeptics stand as counterexamples to Kennedy's claim that Realists self-consciously gave the game away in private law in order to build support for their public law agenda. See *supra* note 29. In torts, at least, mid-century Realists such as Deans Leon Green and William Prosser were generally cheerful about the prospects for a new tort law. John C.P. Goldberg, *William L. Prosser*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 439, 440–41 (Roger K. Newman, ed. 2009) (noting that Prosser's scholarship embraced extant tort doctrine notwithstanding his strongly skeptical views of law and legal concepts); Leon Green, *Tort Law Public Law in Disguise II*, 38 TEX. L. REV. 257, 267 (1960) (arguing that appellate courts are relatively well-situated to implement new policies through their decisions in tort cases).

The cheerfully skeptical tradition has carried forward. And like the brass-tacks pragmatism on which it is built, it crosses standard legal and political divides. For example, Judges Richard Posner (from the political “right”) and Jack Weinstein (from the political “left”) have both offered cheerfully skeptical assessments of tort law.<sup>41</sup> Since about 1970, however, private law skepticism has increasingly taken on a critical cast. To critical skeptics — Judge Guido Calabresi, for example<sup>42</sup> — exploding the “myth” of private law provides reasons to look for alternative systems for regulating conduct and allocating risk. This critical sentiment, though often not stated in so many words, is today shared widely across the legal academy. One sees it, for example, in standard faculty attitudes toward the first-year curriculum. If any rationale for maintaining the curriculum is acknowledged, it is one extrinsic to the substance of the courses being taught.<sup>43</sup> At most, classes like Contracts, Property and Torts are opportunities to teach “method” understood on skeptical terms of the sort articulated by a Holmes, Llewellyn, or Kennedy. That is, they are occasions to teach judicial policymaking, or to apply other disciplines as a substitute for the unedifying exercise of teaching law or legal reasoning.

#### INCLUSIVE PRAGMATISM

Despite the prominence if not dominance of brass-tacks pragmatism in the modern U.S. legal academy, there are reasons to question it. Its grip has never been monopolistic, not even in the pages of the *Harvard Law Review*. Indeed, one can find within it counterparts to the

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<sup>41</sup> For Judge Posner, judges, by virtue of their relative political insulation, are well situated to pursue the primary (social) good of efficient resource allocation. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 18–19 (1987). For Judge Weinstein, judges can harness the power conferred by tort law to provide assistance to individuals whose needs have been unjustly neglected by the political branches. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 5 (1995); see also *id.* at 1–14 (articulating how judges can harness the apparatus of mass torts to provide in part for the needs of persons whose interests are not adequately taken into account by the political branches).

<sup>42</sup> GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 244–85 (1970) (arguing that negligence law is ill suited to minimize the costs of accidents); *id.* at 134–43, 174–78 (advocating for a mixed scheme of “general,” *id.* at 135, and “specific deterrence,” *id.* at 174, that combines imposition of strict liability on “best cost avoider[s],” *id.* at 175, with selective prohibitions).

<sup>43</sup> Here it may be illuminating to contrast Ernest Weinrib’s description of the place of private law in the first-year curriculum. See WEINRIB, *supra* note 36, at 1 (“Private law is . . . 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.”).

writings of Holmes, Llewellyn, and Kennedy in the work of Fuller,<sup>44</sup> the Harts,<sup>45</sup> and Fried.<sup>46</sup> These and other works discussed below have identified serious deficiencies in the brass-tacks approach that warrant consideration of alternative approaches.<sup>47</sup>

Another reason to question brass-tacks pragmatism is that it has failed on its own terms. Each generation's claim to have "hit bottom" has been rejected by the next.<sup>48</sup> Perhaps one can still hope actually to get down to brass tacks. But it is at least as rational to suppose that the project is doomed to play out as an endless succession of efforts to isolate what is 'really' going on in law. Relatedly, although the hard-headed disposition of brass-tacks pragmatism can surely claim credit for prompting salutary developments in law, the most ambitious skeptical efforts to deconstruct private law's basic categories have not succeeded. For example, the effort to reduce contract to tort, or to treat tort as a scheme of efficient deterrence, have not succeeded on their own terms.<sup>49</sup>

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<sup>44</sup> Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 392 (1946) (criticizing as deficient Holmes's conception of private law as merely "state fiat").

<sup>45</sup> Henry M. Hart, Jr., *Holmes's Positivism — An Addendum*, 64 HARV. L. REV. 929, 932 (1951) (criticizing parts of Holmes's thought for its "behaviorism"); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) (defending legal positivism against realist-inspired skepticism).

<sup>46</sup> Charles Fried, Book Review, 93 HARV. L. REV. 1858, 1860, 1867 (1980) (reviewing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)) (defending a traditional concept of contract law as against the skeptical critiques of Kennedy, Professor P.S. Atiyah and others).

<sup>47</sup> Some of these criticisms have carried intellectual baggage of a sort that members of the U.S. legal academy are understandably reluctant to take on. Natural law theory, for example, has long stood in opposition to brass-tacks pragmatism. And although it comes in many variants, it is usually tied to acceptance of a demanding set of claims about human nature and human flourishing. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1, 28–29 (Jules Coleman & Scott Shapiro eds., 2002). Likewise, rights-based views inspired by Kant and Locke have long been fertile sources of arguments against brass-tacks pragmatism, but have also required the embrace of controversial foundational assumptions about the rights individuals have *qua* individuals.

<sup>48</sup> Of course my impressionistic intellectual-historical romp concluded with an article published thirty-five years ago. I think it is fair to say that Kennedy's particular rendition of the bottom line in law has not gained widespread acceptance. Indeed, he later abandoned some of its core claims. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 15 (1984) (recanting "the whole idea of individualism and altruism"). I mean this last observation not as criticism, but merely to demonstrate that there is no reason to think that legal thought "hit brass" in 1976. I likewise see little evidence that, in the ensuing years, a theory has emerged that is immune from being second guessed on the same metric of hard headedness that Kennedy invoked against Llewellyn and Llewellyn invoked against Holmes.

<sup>49</sup> Contract law seems alive and well notwithstanding Grant Gilmore's obituary. See GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). The deficiencies of efforts simply to reduce tort law to a system of efficient accident deterrence are profound. See, e.g., Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 69–75 (2010) (arguing that accounts of tort as a scheme of efficient deterrence arbitrarily exclude consideration of a wide range of potential costs and benefits). In noting the deficiencies of this sort of effort at large-scale reductionism, I do not mean to denigrate the capacity of microeconomic analysis to illuminate private law.

Lastly, one can today point to an array of works in contemporary jurisprudence that challenge basic features of brass-tacks pragmatism. Against conceptions of law as first and foremost about the exercise of government power stands H.L.A. Hart's emphasis on the rules and practices that underwrite that power, and law's normativity or "oughtness."<sup>50</sup> Against conceptions of judicial decisionmaking as unvarnished policy analysis stand Ronald Dworkin's portrayal of common law adjudication as a form of rights-based reasoning,<sup>51</sup> as well as Ernest Weinrib's articulation of corrective justice as a distinctive mode of coherentist reasoning appropriate to interpersonal interaction.<sup>52</sup> Against simplistic right- and duty-skepticism stands a tradition of carefully explicating what these terms mean, and what they do or do not entail. This tradition extends back to the work of Wesley Hohfeld,<sup>53</sup> and forward, for example, to Jules Coleman's explication of rights-infringements as a special kind of wrong, and John Gardner's exploration of "obligations to succeed" as a special kind of duty in private law.<sup>54</sup> Against the notion that law boils down to the problem of managing risk stands John Finnis's exemplarily anti-reductive analysis of the concept of intent.<sup>55</sup> Against the supposition that the state's involvement in private law entails that private law reduces to public law stands Arthur Ripstein's argument that the private right is conceptually, rather than contingently, connected to the existence of rightfully constituted public authority.<sup>56</sup>

In sum, there is plenty of reason to consider alternative approaches to brass-tacks pragmatism. And this is true even for those who tend to be attracted to the idea that law must be understood pragmatically. Much of the enduring appeal for law professors of brass-tacks pragmatism is its pragmatism. But there is more than one way to be pragmatic in one's thinking — the idea need not be cashed out in terms of getting down to brass tacks. Indeed, a distinct way to be pragmatic is to stick close to everyday practices and to be wary of concepts, categories,

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As noted below, one of the distinctive features of the new private law is its methodological catholicism.

<sup>50</sup> H.L.A. HART, *THE CONCEPT OF LAW* 56–57, 75–76 (2d ed. 1994).

<sup>51</sup> See generally RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81–130 (1977).

<sup>52</sup> WEINRIB, *supra* note 36, at 75–76 (articulating corrective justice as the conception of justice appropriate to interpersonal interaction).

<sup>53</sup> Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

<sup>54</sup> JULES L. COLEMAN, *RISKS AND WRONGS* 296–302 (1992); John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY* 111, 134–43 (Peter Cane & John Gardner eds., 2001) (distinguishing, inter alia, between obligations to try and obligations to succeed).

<sup>55</sup> John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229, 233–37, 242–44 (David G. Owen ed., 1995).

<sup>56</sup> ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 190–98 (2009).

or methods that claim for themselves a certain kind of essential validity or primacy. Pragmatism of this latter sort — call it *inclusive pragmatism* — supposes that reality is complex, and that it will not advance the cause of knowledge to assume that one comes to understand reality by stripping away superstructure to get to base. Whereas the brass-tacks pragmatist impatiently demands that we cut to the chase, the inclusive pragmatist calls for a patient exploration of the many facets of a phenomenon or problem.<sup>57</sup>

These abstractly stated differences between two kinds of pragmatism can be brought down to earth by returning to the troika with whom we started. Holmes urged law students and lawyers to jettison the concepts of “right” and “duty” as unhelpful and conclusory. An inclusive pragmatist sees no reason to suppose that these concepts have a lesser claim to authenticity than the concepts of “policy” or “preference.” Llewellyn starkly contrasted legal concepts (mere words) with real law (conduct). An inclusive pragmatist supposes that law is a matter of both concepts and action. For Kennedy, getting down to brass tacks meant recognizing that the law is a locus for an irresolvable conflict between two fundamentally opposed worldviews. An inclusive pragmatist sees no reason to conclude that the complexity of law boils down to a simple dyadic opposition between individualism and altruism.

Likewise, from an inclusively pragmatic perspective, the insistence that “all law is public law” is a dogmatic effort to squeeze “government” and “law” into a single mold — to deny, for example, plain differences between how citizens interact with government as litigants in a civil suit, and how they interact with it as criminal defendants or beneficiaries of public-assistance programs. The same can be said of the brass-tacks pragmatist’s inclination to treat as identical a damages payment, a fine, and a tax. And of the supposition that property just is contract, that contract just is tort, or that tort just is a scheme for allocating costs or risks. Whereas brass-tacks pragmatism is an effort to flatten discourse, inclusive pragmatism is anti-reductionist. Of course, the brass-tacks pragmatist will be inclined to equate anti-reductionism with soft-mindedness. But this judgment is itself a manifestation of the narrowness of brass-tacks pragmatism. What reason is there to equate the recognition of complexity with the rejection of critical thinking?

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<sup>57</sup> The idea that pragmatism in thinking about law (and morality) comes in a more inclusive, less hard-headed guise is hardly new to me. For recent thoughtful articulations, see DON HERZOG, CUNNING 12 (2006) (identifying a pragmatist sensibility with an anti-reductionist approach to practical reason); JULES COLEMAN, THE PRACTICE OF PRINCIPLE 6 (2001) (outlining a pragmatist approach to legal theory); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 474–78 (2000) (arguing that conceptual analysis can figure centrally in pragmatist analysis of law).

Applied to law, inclusive pragmatism builds on and adds to the repertoire of criticisms brought to bear on brass-tacks pragmatism by adherents to these schools of thought. At the same time, it shares with brass-tacks pragmatism the aspiration to be grounded in practice and metaphysically thin.<sup>58</sup>

#### THE NEW PRIVATE LAW

The recognition of inclusive pragmatism as an alternative to brass-tacks pragmatism permits a new — or renewed — approach to private law. In this final section, I will outline what I take to be some of the core elements of the new thinking in private law, using the papers presented at the symposium to help illustrate these elements.<sup>59</sup>

*Conceptualism.* — Inclusive pragmatism departs from brass-tacks pragmatism in its belief in the intelligibility of a broad range of concepts. Correspondingly, a hallmark of the new private law is its appreciation of nuances in the conceptual structure of the law. As used in the law, words like “right,” “duty,” “power,” “liability,” “privilege,” “immunity” have distinct (and often multiple) meanings. And there is much to be gained from approaching them from a perspective that is charitable — in the sense of not starting from the presumption that they are fictions, or nonsense, or weasel-words — yet analytical. The point in doing so is not to celebrate nuance for its own sake. Rather, it is that being nuanced about legal concepts can help us think through practical problems. In this supposition, the new private law shares the view of Hohfeld, who long ago recognized that a subtle appreciation of legal concepts is important to the task of understanding and reforming law.<sup>60</sup>

In calling careful attention to legal concepts, the new private law is not committed to supposing that all are salvageable. Some may prove to be irredeemably confused or unnecessary. Nor does it suppose that concepts are never in conflict, or that achieving clarity will somehow avoid disputes over the application of concepts in particular settings, or that conceptual analysis eliminates the need for normative argument. Instead, the point is that doing the interpretive work of try-

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<sup>58</sup> It thus carries with it the same deflationary spirit one finds in coherentist approaches to political theory and practical reason. See, e.g., T.M. Scanlon, *Rawls on Justification*, in *THE CAMBRIDGE COMPANION TO RAWLS* 139 (S. Freeman ed., 2003); MICHAEL WALZER, *SPHERES OF JUSTICE* xiv (1983); Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77 (1973).

<sup>59</sup> The ensuing discussion is somewhat tort-centric, which reflects both the author’s limitations and the extent to which tort, even more so than contracts and property, has been the victim of private law skepticism.

<sup>60</sup> Hohfeld, *supra* note 53; TWINING, *supra* note 30, at 35–36 (noting that Hohfeld considered himself and was considered by his colleagues to be an anti-formalist).

ing to make sense of a given concept or set of concepts is a necessary and fruitful aspect of legal reasoning.

Professor Stephen Smith's symposium paper provides a useful illustration of the importance of taking care to distinguish legal concepts from one another, in parsing notions of duty and liability.<sup>61</sup> Corrective justice theorists have tended to maintain that a court order to pay damages in the context of a civil suit is a recognition or affirmation of a "duty of repair" owed by wrongdoer to victim. Such an order, on this account, is analogous to parents ordering their child to fulfill an already-existing duty to apologize to someone whom the child has wronged. On Smith's view, the law of civil remedies — in a manner structurally similar to criminal sentencing laws — instead authorizes courts to impose a liability on defendants. It does not set for them a genuine duty — an obligation to conduct themselves in a certain way — but instead renders them vulnerable to a demand from the victorious plaintiff. Smith argues that this conception of remedies as liability-imposing rather than duty-affirming helps to explain and justify the availability to civil litigants of remedies beyond "make-whole" compensation, and the discretion that judges and jurors enjoy in fashioning remedies in particular cases.

*Complex Coherence.* — Brass-tacks pragmatism equates analysis with simplification. Inclusive pragmatism does not. The world is complicated. So too is law. In the eyes of the inclusive pragmatist, much of what legal analysis is about, or should be about, is grasping law's complexity. This is not to suggest that complexity is to be celebrated for its own sake, or that substantive rules should always or typically be complex. Nor is it to presume — as Blackstone is sometimes thought to have presumed — that one will find in law's complexity an ultimate glorious harmoniousness, or the best possible system of law. Inclusive pragmatism does not reject the aspiration to clarify and simplify law in the name of values such as notice, predictability, and consistency. It merely acknowledges that advanced legal systems are highly complex and unlikely to admit of reduction down to a handful of ideas or principles.

Our laws work through an abundance of categories and concepts. There is public law and private law. Within private law, there are the categories of tort, contract, unjust enrichment, among others. Within tort, there are intentional torts and unintentional torts. Within intentional torts there is battery, assault, and false imprisonment.

A category such as "torts" is at once unitary and pluralistic. It is unitary in that it purports to isolate a non-vacuous notion of what it

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<sup>61</sup> Stephen A. Smith, *Duties, Liabilities and Damages*, 125 HARV. L. REV. \_\_ (2012).

means, in our law, for something to be a tort, as opposed to a breach of contract, a crime, or a regulatory offense. (This supposition might prove false, or might become false depending on how judges and legislatures develop and apply it.) The word “tort” refers to a distinctive kind of wrong.<sup>62</sup> Although U.S. legal systems thus operate with a relatively unitary concept of what a tort is, that concept admits of diverse instantiations. Given the many ways in which humans interact, there are many ways of wrongfully injuring another, and hence there are a variety of torts that do not boil down to a single recipe. One can defraud another, defame another, or injure another by marketing a defective product. One can commit negligence or cause a nuisance. Each wrong has different component parts. Some, such as negligence, turn on a lack of prudence or care. Others, such as false imprisonment, have nothing to do with imprudence. Tort law is a gallery of wrongs.<sup>63</sup> The individual torts are united in being members of the same family, not in being the same wrong. And the composition of the gallery has changed, and will continue to change, over time.

Each area of private law also has direct or indirect connections to others. The law of property informs the law of torts because one of the ways in which one person can wrong another is by interfering with the ownership, or use and enjoyment, of land and chattels. It follows that one will sometimes need to know the rules of property in order to know whether a tort has been committed. One will also need to take into account changing conceptions of property to make sense of tort law. A number of tort doctrines once hinged on the idea that a wife’s services counted as something in which her husband had a property interest. This patriarchal notion was the source of the actions for loss of consortium and alienation of affections.<sup>64</sup> The eventual abandonment of this application of the concept of property had direct implications for tort law, though it did not have singular entailments. Courts and legislatures were faced with the question of whether to scrap these torts, or to re-conceptualize them as claims for interferences with spousal relations.<sup>65</sup>

Even though tort is to some degree dependent on property, tort is not beholden to property any more than it is beholden to contract, or

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<sup>62</sup> A tort is a civil wrong, as opposed to a criminal wrong. It is also a relational wrong, as opposed to a simple wrong. And it is a wrong involving the breach of a duty not to injure another, rather than a breach of a duty not to risk injury. Finally, it is a wrong that involves the breach of a legally defined duty, rather than a duty determined by agreement. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 1–5 (2010).

<sup>63</sup> *Id.* at 27.

<sup>64</sup> W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 124, at 916–19 (5th ed. 1984).

<sup>65</sup> They did some of each. The loss of consortium action was retained, whereas the heartbalm torts have largely been eliminated. DAN B. DOBBS, *THE LAW OF TORTS* § 310, at 841–42 (2000) (retention); *id.* § 442, at 1247 (abolition).

any more than they are beholden to tort. Some tort claims vindicate rights or interests that the law of property and contract refuse to treat as possessory or contractual rights — for example, tortious interference with commercial advantage.<sup>66</sup> Sometimes courts applying tort law reserve the right not to recognize what are, so far as the law of contract is concerned, valid waivers of liability for tortious conduct.<sup>67</sup> Again, the departments and concepts of private law interact in complicated ways, and a lot of what legal reasoning should involve is thinking through these connections, and what they entail for particular cases.

Complexity is relevant to legal analysis in another way. Above, I offered the trite observation that the world is a complex place, and that law is therefore also complex. But it is also true that a lot of what law does is to reduce the unmanageable complexity of the world into a manageable form. This is perhaps the central point of Henry Smith's symposium paper.<sup>68</sup> It offers an "architectural" view of property law, which understands the categories and rules of that body of law as a means of managing informational complexity through structures consisting of components that only interact in limited ways (modularity).<sup>69</sup> In a world of limited information, according to Smith, property law structures interpersonal relationships in terms of *in rem* rights so as to enable individuals to interact constructively.

*Law's Normativity.* — Holmes was keen to stress the gap between legal concepts and their nonlegal counterparts. "Fault" as defined in law, he maintained, is so distinctive a creature from "fault" as used in ordinary discourse that lawyers need to be taught to think of "legal fault" as an entirely different concept.<sup>70</sup> This aspect of his thinking went hand in hand with the notion of law as commands issued by government to citizens: one who sees no connection between law and social norms will also be inclined to conceive of law as an external imposition.

By contrast, the new private law posits that there is often at least a family resemblance between legal and extralegal concepts and norms that bear on questions of personal interaction. Hence the law's author-

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<sup>66</sup> DOBBS, *supra* note 65, § 450, at 1275–76.

<sup>67</sup> See generally *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (articulating public policy limits on the enforceability of otherwise valid waivers of liability).

<sup>68</sup> Henry E. Smith, *Property as a Law of Things*, 125 HARV. L. REV. \_\_ (2012) [at ms. p. 3].

<sup>69</sup> See, e.g., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009).

<sup>70</sup> OLIVER W. HOLMES, JR., *THE COMMON LAW* 108 (45th prt. 1923) (suggesting that legal fault is defined so as to permit liability to attach even to those who lack the capacity to consistently act with sufficient care to avoid being deemed legally at fault).

ity resides as much in its ability to articulate recognizable norms of conduct as in the state's enforcement power. Part of what it means to say that law tracks social norms is that private law is itself a set of norms or guidance rules, not merely a system of tolls.<sup>71</sup> At the same time, it is important to recognize, as Professor Stephen Smith's paper does, that there is variation within law as to its normativity. Some legal rules recognize or impose genuine duties, such as the duty to perform a contract. Others, including certain remedial rules, do not.<sup>72</sup>

The overlap between private law and social norms is no accident. Our private-law institutions are in some respects designed to foster that connection. Most obviously, our legal systems reserve an important role for juries, not only as factfinders, but also as norm articulators.<sup>73</sup> Jurors, for example, are often charged with interpreting ambiguous agreements,<sup>74</sup> and with determining what, under various circumstances, counts as "reasonable" or "unreasonable" conduct.<sup>75</sup> Because jury awards of compensatory damages likewise tend to be highly discretionary,<sup>76</sup> jurors have the opportunity to introduce an element of equity into legal proceedings.

Even apart from matters of institutional design, private law is filled with legal concepts that invite the incorporation of social norms. Contract law routinely calls for attention to business or industry custom.<sup>77</sup> It also sets boundaries on parties' freedom to shape agreements through recognizably moral concepts such as duress and unconscionability.<sup>78</sup> At the center of negligence law is the idea of the ordinarily prudent person — the person who demonstrates the sort of competence in taking care that people ordinarily are expected to demonstrate.<sup>79</sup> The tort of intentional infliction of emotional distress requires a judgment regarding when conduct would be condemned by ordinary

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<sup>71</sup> For background on law and social norms, see generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (2000); Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, in *2 Handbook of Law and Economics 1573* (A. Mitchell Polinsky & Steven Shavell eds., 2007). The sketch of law's interaction with social norms offered in this Introduction is artificially unilateral in focusing on ways in which private law's rules track social norms. A fuller account would need to consider the reciprocal impact of law on social norms.

<sup>72</sup> See Smith, *supra* note 61, at --.

<sup>73</sup> Of course civil jury trials are a rarity relative to the number of civil complaints filed.

<sup>74</sup> See 2 E. ALLAN FARNSWORTH, *CONTRACTS* § 7.14, at 476–79 (3d ed. 2004) (discussing circumstances in which questions of contract interpretation are left to the court or to jurors).

<sup>75</sup> See RESTATEMENT (SECOND) OF TORTS § 285(d) (1965).

<sup>76</sup> See, e.g., Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 373–74 (2006) (noting jurors' "relatively unlimited" discretion to determine reasonable compensation for any given tort victim's intangible losses).

<sup>77</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 220 (1981).

<sup>78</sup> See *id.* §§ 174–76 (addressing the doctrine of duress); *id.* § 208 (allowing courts to refuse to enforce unconscionable contract terms).

<sup>79</sup> Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2033–40 (2007) (outlining a competency-based conception of ordinary prudence).

persons as “outrageous.”<sup>80</sup> Finally, because law aims to avoid ambushing citizens, and to prevent opportunistic manipulation of its rules, judges can and do interpret ambiguities in line with ordinary notions of reasonable conduct and fair play.<sup>81</sup>

Attention to the interaction of law’s rules and social norms comes with its own complexities. Legal norms do not slavishly follow social norms, and there are times at which law will catch citizens by surprise. A person who has every reason to believe that he is building a shed on his own property, only to discover that it is in fact located on his neighbor’s, commits a trespass and will not be excused despite having acted diligently.<sup>82</sup> Analysts must also be sensitive to context in applying norms. In many settings, the parties to litigation will be disputing which norms the law ought to track, and a debatable choice will need to be made.<sup>83</sup> Social norms themselves are hardly immune from critique, and on some occasions courts rightly refuse to recognize or enforce them, or deliberately aspire to change them.<sup>84</sup>

*Private Law and The State.* — Legal scholars inspired by brass-tacks pragmatism are wont to treat private law as but an instance of regulatory law. The role played by the state in private law, they insist, is no different from the role it plays with respect to public law. The new private law readily acknowledges the central role of the state. Private law is inherently political, not in the sense of being partisan, but in the sense of being overseen by and realized through the state. Although private law is concerned to address the interactions of individuals and entities, it does so as part of a political system in which government is the bearer of powers over, and duties owed to, those individuals and entities.<sup>85</sup>

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<sup>80</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>81</sup> See CHARLES FRIED, *CONTRACT AS PROMISE* 85–91 (1981) (citing approvingly courts’ application of the doctrine of good faith so as not to reward opportunistic behavior).

<sup>82</sup> See RESTATEMENT (SECOND) OF TORTS § 164 (1965). The law does, however, ameliorate some of the potential harshness of such torts through its standards for issuing injunctions. Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 3 J. TORT L. (forthcoming 2012) (reviewing decisions declining to issue injunctions that inflict undue hardship on the defendant).

<sup>83</sup> See, e.g., *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 424–25 (7th Cir. 1989) (Easterbrook, J.) (rejecting a prospective buyer’s request for a temporary restraining order against a seller that would have rendered a letter of intent as an enforceable contract in light of the claimed parties’ intent to be bound).

<sup>84</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948) (deeming judicial enforcement of racially restrictive covenants to violate principles of equal protection and thus denying to state and federal courts the power to enforce such covenants).

<sup>85</sup> Professor Stephen Smith’s claim that damages awards involve penalty-like impositions highlights that the law of remedies, and indeed the entire edifice of private law, is a state-driven response to private interaction, not merely the state providing a forum in which individuals work out

The special role played by the state in private law is at the center of Professor Zipursky's symposium paper.<sup>86</sup> It critiques the now-familiar view that a tort plaintiff acts as a private attorney general who sues on behalf of and vindicates the public's interest in safety or loss-spreading.<sup>87</sup> In fact, he argues, when the U.S. Supreme Court has taken up the question of whether an award of punitive damages is constitutionally excessive, the Justices, without fully realizing it, have found themselves trying to draw the line between damages that further the state's regulatory purposes (public law) and damages that vindicate the plaintiff's own rights as against the defendant's invasion of them (private law).<sup>88</sup> In other words, even while supposedly embracing the collapse of private into public law, the Justices have been busy attempting to locate the very distinction they purport to have dissolved.

A related implication of attending to the state's role in private law concerns the knotty problem of state action. On several occasions — including in its punitive-damage decisions — the Supreme Court has simply glossed over the distinctive role of the state in private law, again partaking of the skeptic's supposition that all law is public law.<sup>89</sup> But of course that supposition, taken to its logical extreme, would call for the death of the state action doctrine, and the Court has been reluctant to go that far. Attending to the distinctiveness of private law can point the way forward in this difficult area. Zipursky's analysis, for example, not only suggests a basis for making sense of the Court's tangled excessiveness jurisprudence, it also explains how findings of excessiveness tie directly into a conception of state action. It is because punitive damages become excessive *when they become regulatory* rather than vindictory that defendants who can establish excessiveness can also satisfy the state action requirement.<sup>90</sup>

It is erroneous to treat private law as just a species of public regulation. But it is also the case that the state's involvement in private law brings to bear a special set of interests that may need to be accounted for in the shaping of private law and the resolution of particular private law disputes. A basic question of private law concerns the extent to

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their issues with one another in accordance with the dictates of social norms or morality. See Smith, *supra* note 61, at --.

<sup>86</sup> Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. \_\_ (2012).

<sup>87</sup> *Id.* at \_\_.

<sup>88</sup> See *id.* at \_\_.

<sup>89</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

<sup>90</sup> Something very similar can be said of the Court's state action analysis in *Sullivan*. There was state action in that case not because all liability is state action, but because the suit in question, brought by a government official alleging a libel pertaining to the performance of his public duties, amounted to a de facto criminal proceeding. See GOLDBERG & ZIPURSKY, *supra* note 62, at 322.

which courts can legitimately invoke state interests as grounds for shaping the rights and duties we owe one another. Courts sometimes shape doctrine with an eye toward ensuring that the disputes that will come before them are manageable.<sup>91</sup> Courts also routinely invoke variations on the idea of sovereign immunity to protect against the risk that private lawsuits will be resolved on terms that interfere with the policy-making prerogatives of the other branches.<sup>92</sup> Courts further claim, at least implicitly, the authority to exempt certain actors from otherwise applicable obligations in the name of the public good.<sup>93</sup> The new private law theory invites critical consideration of these and related facets of judicial decisionmaking.

Attention to the role of the state in private law also raises important questions about the interaction of rights and duties as between individuals and entities, and rights and duties as between government and citizens. To assert a private law claim against another is to direct a demand toward that other *through the state*. Implicit in this scheme is the idea that the state stands ready to assist citizens in making and enforcing such demands. Do a citizen's political or constitutional rights include a right to look to the state for the provision of private law as law that enables certain kinds of private interactions, and that provides certain avenues of response or recourse against wrongdoers?

*Justice and Civil Society.* — "Justice is the first virtue of social institutions, as truth is of systems of thought."<sup>94</sup> So stated John Rawls at the outset of A Theory of Justice. For legal scholars of the time, understandably interesting in thinking through the implications of the civil rights movement and the ideal of the Great Society, Rawls's remark carried an obvious public-law valence. To focus on justice was to focus on issues pertaining to the design of public institutions, the articulation of the constitutional ground-rules under which they operate, and the public policies that ought to be adopted, whether by legislation or judicial decision.<sup>95</sup> Institutions and law pertaining to private interactions were in

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<sup>91</sup> James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1538-39 (1973)(discussing how doctrine reflects judicial concerns for justiciability).

<sup>92</sup> See, e.g., *Riss v. City of New York*, 240 N.E.2d 860, 860-61 (N.Y. 1968) (citing deference to departmental decisionmaking as a ground for exempting a police department from liability for negligence in failing to take steps to protect the victim of a third party's attack even though the victim had presented credible evidence to the police of being at risk of imminent attack by the eventual attacker).

<sup>93</sup> See, e.g., *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985)(citing public policy considerations as reasons to impose a 'privity' limitation on liability for injuries caused by a utility's carelessness).

<sup>94</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

<sup>95</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131, 149 (1978) (arguing for a "fusion" of constitutional law and moral theory and suggesting that Rawls' work points the way forward for

turn to be assessed on public-law terms – that is, with regard to whether they comport or could be made to comport with principles of distributive and political justice.<sup>96</sup>

Yet if justice really is to be regarded as the first virtue of social institutions, it must encompass not only rights against the state, whether ‘negative’ or ‘positive’. It must also feature institutions and practices that support, for example, the maintenance of civil order, the observance of obligations to others, and the empowering of persons to vindicate their interests. In comparison to the aspiration of achieving a just distribution of wealth, these sorts of values might seem pedestrian. But to accept this judgment is to unjustifiably assign lexical priority to political and distributive justice over justice in other senses. To reflect on the number of societies, past and present, for which these ‘pedestrian’ values have been aspirations, is to begin to appreciate the sense in which they are equally fundamental.

Justice may well require a polity to take steps to protect its worse off, and even to ensure that wealth inequalities operate within a certain range. It equally demands that there be in place institutions and rules that enable rightful ownership, provide personal security against mistreatment by others, and promote free and reliable exchange. And it demands that individuals be provided with an avenue of response against those who have wronged them. These desiderata are central features of a just social order, and they are very much the business of private law.

The new private law is thus in part an effort to recapture the normative dimensions of private interactions (that is, interactions within civil society). In doing so, it rejects the supposition that the normativity of private law reduces down to principles of distributive justice. It also rejects the contrary supposition that private interaction is a ‘Hobbesian’ domain in which self-interest is given free-reign, or in which persons interact atomistically. Contracting, for example, is a distinctively normative practice. It is governed by legal concepts that include, most basically, the idea of a bargained-for exchange (as opposed to a gift or a sham exchange) and good faith in performance. The basic challenge for courts in applying contract law is to determine in a given case the particular ways in which parties have or have not obligated themselves to one another,

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that endeavor); Frank I. Michelman, *Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14-15 (1969) (invoking Rawls’s concept of justice as fairness in support of an argument for recognition of a constitutional right to governmental assistance to protect against deprivations associated with poverty).

<sup>96</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 301-09 (1986) (identifying a moral foundation for a cost-benefit conception of negligence and nuisance in the distributive-justice principle of equality of resources); Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (arguing for an inversion of a claimed historical tendency among courts to treat common law distributions of entitlements as setting a neutral baseline against which to measure the constitutionality of legislation).

within the terms permitted by law. Property, too, is as much about obligations as it is about rights.

As Professor Balganesh's symposium paper emphasizes, copyright law is not adequately understood as a scheme for the distribution of certain kinds of wealth, any more than it is fully captured as a piece of economic policy or social engineering. In setting norms for the use of certain property it demands that we *acknowledge* others by acknowledging certain of their accomplishments.<sup>97</sup> Finally, taken as a whole, private law is normatively distinct precisely in its commitment to arming individuals with a legal power to demand and hold others accountable to them.<sup>98</sup>

*Qualified Agnosticism.* — Academic debates in private law theory over the last forty years have tended overwhelmingly to focus on, or presume the existence of, a fundamental divide between welfarist or efficiency theories, on the one hand, and deontological or rights-based theories, on the other.<sup>99</sup> Indeed, anyone who writes in private law fields is sooner or later asked to declare loyalty to one or another of these camps. The new private law theory operates on the assumption that there is a good deal to talk about even across this divide. Its qualified theoretical agnosticism goes hand in hand with attending carefully to legal concepts — a virtuous consequence of taking law seriously. By focusing on law, the new private law permits a bracketing of highly abstract and difficult-to-resolve questions of moral and political theory. New private law theorists have theoretical allegiances and join sides on basic questions concerning how one ought to think about law. Nonetheless, they tend to approach law on terms analogous to the interaction of citizens envisioned in Rawls's conception of political liberalism.<sup>100</sup> Private law can constructively be addressed in its own right by analysts who hold very different conceptions of the (intellectual) good.

Professor Balganesh's symposium paper evinces this catholicism. It argues that academic treatments of copyright law have suffered from

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<sup>97</sup> Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. \_\_ (2012). Tort law also attends to basic social virtues that do not reduce down to questions of distributive justice. One of its main points is to identify, articulate, and reinforce certain responsibilities that we owe to one another, responsibilities that are sensitive to distinct social roles and relationships, and the myriad ways in which persons interact with one another. In doing so, it helps achieve various goods, including the good of holding people accountable to one another. See John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 388-92, 404-07 (2005); Jason Solomon, *Equal Accountability through Tort Law*, 103 NW. L. REV. 1766, 1794-97 (2009).

<sup>98</sup> Benjamin C. Zipursky, *The Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 624 (Jules Coleman & Scott Shapiro, eds. 2002).

<sup>99</sup> LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 3 (2002)(positing a fundamental conflict between welfarist and fairness-based approaches to legal analysis, and arguing for the superiority of the former).

<sup>100</sup> JOHN RAWLS, POLITICAL LIBERALISM 145-48 (1996).

failing to recognize that, as a species of private law, copyright not only recognizes rights but also correlative duties not to copy.<sup>101</sup> Copyright, in other words, is as much a law of wrongs as rights. And attention to the sense in which copying is a wrong, he argues, permits us to better make sense of the scope of, and limits on, protections against copying, regardless of whether one approaches copyright as an economist or a deontologist.<sup>102</sup> Henry Smith's paper is likewise illustrative. It suggests with respect to property law that there may be an overlapping consensus — that economic and deontological theories of property might well converge on basic features of property law.<sup>103</sup>

#### CONCLUSION: WHAT'S NEW?

Viewed from the perspective of inclusive pragmatism, law is distinct from politics and morality, but not disconnected from them. Inclusive pragmatism also makes room for conceptual legal analysis without equating the study of law with logic or botany. It takes law seriously while drawing on other disciplines, including philosophy, economics, history, and cognitive science. It recognizes that legal concepts and rules operate in a context-dependent manner, and that law is a human creation administered by fallible persons who approach their jobs from various perspectives. The new private law is an all of these respects inclusively pragmatic.

Some symposium participants fairly pressed the question of whether there is really anything “new” that warrants use of the phrase the “new private law.” It is not coincidental that the question came most frequently from Canadian scholars. In Canada, as in Britain, private law is more robust, having never been put on the defensive to the degree it has been in the United States. My own judgment is that there is something new afoot in private law scholarship. Or perhaps it is a *renewal* of attention to problems and methods that for too long have been disparaged in orthodox legal-academic thinking. Insofar as academic analysis is cyclical — insofar as ideas come, go, and then come back — the time is ripe for revisiting the dogmas of the last century, and for the new private law.

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<sup>101</sup> Balganes, *supra* note 97, at\_ (2012).

<sup>102</sup> *See id.* at \_.

<sup>103</sup> *See* Smith, *supra* note 68, at --.