

CHAPTER 45

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PUBLIC AND PRIVATE LAW

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I. INTRODUCTION TO PUBLIC AND PRIVATE LAW

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THE concepts of public and private law are characterized by conceptual chaos and confusion. Further, the use of these terms is also characterized by ideological and political disagreements: libertarians, liberals, Marxists feminists, and others struggle either to defend the use of these concepts and to preserve the distinct values governing each of these spheres as necessary for protecting freedom or expose the fact that the use of these terms is incoherent, manipulative, and harmful. In light of this chaotic order, I hope to provide a survey of some of the primary debates and raise several normative and historical speculations.¹

There are two primary political debates relevant to the differentiation between public and private law. The primary (and earlier) debate has been the debate concerning the status of private law and, in particular, the concern of libertarian and liberal legal and political theorists to protect the “autonomy of private law” and resist the “instrumentalization” of private law, namely using private law to promote

¹ While the distinction between private and public law is much more prominent in European legal systems which are characterized, e.g., by separate public and private courts, this chapter focuses exclusively on the distinction as understood in the Anglo-American world.

public ends. The second debate is a more recent debate and it concerns the desirability of privatizing public services, such as prisons, security, education, etc. While these two debates are perceived to be independent of each other there are connections between the two debates.²

Liberal/libertarian theorists defend the autonomy of private law on principled grounds; they believe that the autonomy of private law is necessary for protecting a sphere of individual autonomy. In contrast, the opposition to privatization is typically (although not invariably) grounded in instrumental collectivist concerns to promote public ends. I wish to establish in this chapter (particularly in Section IV) the claim that what needs special protection is not the autonomy of private law but the autonomy of public law and that such protection is needed for principled rather than pragmatic or instrumental reasons.³

Section II examines some of the ways to differentiate between public and private law and also provides a brief explanation of the relations between political theory and legal doctrine. Section III examines the debates concerning the autonomy of private law. Section IV examines and establishes the need for maintaining the autonomy of public law. It also argues that the real nature of public law is misunderstood. And it seeks to remedy this misunderstanding. Section V provides a short summary.

II. PUBLIC AND PRIVATE LAW: DEFINITIONS AND PRELIMINARIES

In examining the nature of public and private law, one inevitably has to start with a crude characterization—one which later will be subjected to criticisms, revisions, and modifications. This is not merely the byproduct of the inherent imprecision and characteristic confusion of these terms, but also because the dichotomy between public and private law has been transformed and the boundaries between the categories have become less rigid, more fluid, and nuanced. This also implies that what is being said in this section is highly general and abstract and is vulnerable to challenges and criticisms.

² See Michel Rosenfeld, “Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction,” (2011) 11 *I-CON* 125, 126.

³ To do so I use the analysis developed in Alon Harel and Ariel Porat, “Commensurability and Agency: Yet Two Unmet Challenges to Law and Economics,” (2011) 96 *Cornell LR* 749; Avihay Dorfman and Alon Harel, “The Case Against Privatization,” (2013) 41 *Philosophy & Public Affairs* 67.

Public law governs relationships between the government to itself and between the government and individuals. It consists of constitutional law, administrative law, criminal law, and tax law. It contains both norms governing horizontal relations between different branches of the government and norms governing vertical relations between the government and individuals or private entities. In contrast, private law contains norms governing the horizontal relationships among private entities. The fields of law that are most paradigmatically classified as private law are contract law, property law, and tort law. This classification is valuable because allegedly it has normative (or even political or ideological) consequences. It is believed that public law is a sphere designed to promote the public good or the common good of the community while private law protects individual freedom, typically negative freedom—the freedom to follow one’s objectives without intrusion.⁴ Let me elaborate on these differences.

Sometimes public law is designed to promote collective interests such as public welfare or distributive justice. Yet, often public law is designed to protect the private sphere from private intrusions.⁵ Criminal law is a clear example; it is designed to protect individuals from the intrusions of other private individuals. At other times public law objectives require modification of private law in order to promote the public good, creating an altruistic order, bringing about distributive justice, or solving coordination problems.⁶ In contrast, private law protects the freedom of individuals to pursue their own objectives.⁷ Contract law is designed to enable individuals to pursue their projects and promote their ends by providing assurances that their commitments (and the commitments of others) be enforced. Tort law protects individual interests from the wrongdoings of others. Under one prominent view, property law is designed to create a protected sphere within which the person could pursue her objectives free of intrusion. The protection of such a private sphere is sometimes justified on the grounds that the private sphere is “natural” and exists prior to the state. Under this view, the state does not create property; it simply protects property that preexisted the state.⁸ It also follows from this description that

⁴ This view has been, of course, highly controversial. For a recent attack on the claim that private law protects primarily negative freedom, see Hanoch Dagan, “Pluralism and Perfectionism in Private Law,” (2012) 112 *Columbia LR* 1409, 1413–1421.

⁵ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (2009), 32–34; Rosenfeld (n. 2) 126.

⁶ Bruce Ackerman, “Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy,” (1973) 80 *Yale LJ* 1093; John Finnis, *Natural Law and Natural Rights* (1980); Duncan Kennedy, “Form and Substance in Private Law Adjudication,” (1976) 89 *Harvard LR* 1685; Anthony T. Kronman, “Contract Law and Distributive Justice,” (1980) 89 *Yale LJ* 472.

⁷ Ernest J. Weinrib, *The Idea of Private Law* (2012).
⁸ Famously this view influenced U.S. courts in the early part of the twentieth century. A characteristic example can be found in *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271 (1911) in which the judge declared a provision forcing employers to pay compensation for accidents as void on the grounds that: “One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law.”

economic and social inequality within the private sphere is not attributable to the political state. It is merely the byproduct of a natural state of affairs (and therefore need not and ought not to be redressed by the state).

The dichotomy between public and private law involves two dimensions: a descriptive dimension and a normative one.⁹ The discourse concerning public and private law requires first classifying a certain entity or a certain activity as “private” or as “public” and then it requires drawing normative consequences from this classification.

The first stage requires identifying whether the entity or activity is public or private. The classification of an entity, an activity, or a sphere as public or private changes in accordance with the context. Thus, for instance, in Marxist theory the public is identified with the political state while civil society and the market are classified as private. In contrast, feminists have used the term private to denote the family and contrasted it with the market and civil society that are classified as public.¹⁰

The second stage requires identifying the implications of classifying an entity, activity, or sphere as public or private. Thus for instance, some liberal theorists believe that the fact that a contract is private implies that its provisions ought to be interpreted in accordance with the intention or the will of the parties rather than in ways that promote the public good.¹¹ Similarly if tort law is private, the considerations which ought to bear on the wrongfulness of an action or on the remedies are designed to protect the equality and freedom among the parties rather than to serve collective ends such as efficiency or deterrence.¹² The classification of an entity or an activity as public or private dictates, under this view, the types of reasons and considerations applying to it, and consequently such a classification may dictate the outcome of the litigation.

The differentiation between public and private law has become highly significant because of the strong affiliations between political values and ideology and legal doctrine. Most typically (but not invariably), libertarians and some liberals have been keen to protect the autonomy of private law, to insulate it from public intrusion and, at times, to expand its boundaries. Left-wingers, Marxists feminists, and also advocates of law and economics challenge the autonomy of private law. It has been argued that the protection of private law serves to promote a sectarian ideology—militant privatism—that cherishes individualism at the expense of solidarity and community.¹³ Legal realists and critical theorists also maintain that the distinction between the public and the private is not used consistently by

⁹ Ruth Gavison, “Feminism and the Public/Private Distinction,” (1992–93) 45 *Stanford LR* 1, 4.

¹⁰ Frances E. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform,” (1983) 96 *Harvard LR* 1497.

¹¹ Richard Epstein, “Unconscionability: A Critical Reappraisal,” (1975) 18 *Journal of Law & Economics* 293.

¹² Weinrib (n. 7).
¹³ Karl Marx, “On the Jewish Question” (1843); Alan Freeman and Elizabeth Mensch, “The Public-Private Distinction in American Law and Life,” (1987) 36 *Buffalo LR* 237.

courts and does not or even cannot guide courts in their decisions. The incongruence between libertarian or liberal legal theory (defending a sharp dichotomy between public and private law) and the incoherent legal realities is a challenge for the defenders of the dichotomy.¹⁴ Generally speaking (but not invariably), the more individualistic the political ideology is, the greater scope it provides to private law at the expense of public law and vice versa.

III. THE AUTONOMY OF PRIVATE LAW: A POLITICAL PHILOSOPHY PERSPECTIVE

The last section established that there is a strong link between one's political philosophy and ideology, on the one hand, and one's views concerning the autonomy of private law. This section examines the relations between different traditions of political theory and the way they treat the dichotomy. I examine here seven traditions: the libertarian/liberal tradition, the Marxist tradition, legal realism, the critical legal studies movement, the feminist movement, utilitarianism and the law and economics movement, and, last neo-Kantian and neo-Hegelian theories.

1. The libertarian/liberal tradition

The source of the concern for the autonomy of private law is ultimately normative not doctrinal and it is often grounded in the conviction that there are some rights that are pre-political and which the establishment of a state must take account of. The classical advocates of this view are John Locke and his later prominent follower Robert Nozick.¹⁵

Locke believed that "every man has property in his own person: this nobody has a right to but himself. The labor of his body, and the work of his hands, he may say, are properly his."¹⁶ The right to property is therefore a natural pre-political

¹⁴ Often, in order to maintain the coherence of the dichotomy, legal theorists speak of a continuum such that the relevant entities are not "absolutely one thing or another." See Gavison (n. 9) 15; Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction," (1982) 130 *University of Pennsylvania LR* 1349, 1351.

¹⁵ John Locke, *Two Treatises of Government: Second Treatise* (ed. Peter Laslett, 1960); Robert Nozick *Anarchy, State and Utopia* (1974).

¹⁶ Locke (n. 15) ch. V, section 27.

right which governs individuals in the state of nature and its normative force does not depend on the establishment of a state. Robert Nozick developed this famous Lockean insight and proposed a Lockean entitlement theory of distributive justice. This theory relies on three basic principles: (a) a principle of initial distribution; (b) a principle of transfer of resources; and (c) a principle of rectification. A distribution is just if it is done in conformity with these three principles.¹⁷

Nozick's three principles have their equivalents in private law. The principle of initial distribution is part of property law; it specifies the ways in which individuals become owners of previously unowned objects. The principle of transfer consists (at least partly) of contract law (and also consists of the law governing presents and other legitimate means of transferring property).¹⁸ The principle of rectification consists primarily of tort law and the provisions of contract law which regulate remedies. The principle of rectification specifies the normative consequences in cases in which either the principle of initial distribution or the principle of transfer are violated.

The state ought to protect entitlements acquired in accordance with these principles of distribution. The autonomy of private law is a natural implication of the view that these principles ought to be honored by the state. The state cannot deprive individuals of their pre-political entitlements just in order to promote the public good, to help the needy, or to promote equality, as its rules are designed in the first place to protect the rights individuals have pre-politically, that is, in the state of nature. As a matter of fact, Nozick's theory does not protect merely the autonomy of private law; it protects the normative priority of private law over public law. Taken seriously his view implies that public law consists merely in designing public institutions in ways that promote and protect private law.

Richard Epstein explored the implications of this view to private law. Epstein argued that:

One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world.¹⁹

This view has broad influence much beyond the narrow confines of the libertarian movement. Some non-libertarian philosophers regarded private law as a paradigm to help to understand the nature of rights as such. Most famously H. L. A. Hart developed his choice theory of rights on the basis of the private law paradigm. He concluded that rights consist of three elements: (a) the rightholder may waive or

¹⁷ Nozick (n. 15) 150–153.

¹⁸ Under some views, the law governing presents is part of the law of contracts.

¹⁹ Epstein (n. 11) 293–294.

extinguish the duty owed to him by others; (b) the rightholder can leave the duty unenforced, or alternatively, enforce it; and (c) the rightholder may waive or extinguish the obligation to pay compensation.²⁰ Legal theorists often develop doctrines designed to protect distinctive private law values. Dagan described this view as resting on the conviction that: “private law . . . is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms.”²¹

2. The Marxist tradition

The most influential critique of the distinction between the public and the private can be found in Marx’s essay “On the Jewish Question.”²² Marx establishes the existence of two spheres of existence of the person: the political and the communal or societal. In the political realm, individuals are free and equal: property, religion, or race are no more prerequisites for being a citizen or for voting. But, Marx argues, true emancipation requires not merely cutting the link between religion, wealth, or race and citizenship (or more generally participation in the political life) but abolishing these distinctions altogether, namely abolishing them in the civil society. In his characteristically powerful rhetoric Marx says:

Nevertheless, the political annulment of private property not only fails to abolish private property but even presupposes it. The state abolishes, in its own ways, distinctions of social rank, education, occupation when it declares that birth, social rank, education, occupation, are non-political distinctions, when it proclaims without regard to these distinctions, that every member in the nation is an *equal* participant in national sovereignty, when it treats all elements of the real life of the nation from the standpoint of the state. Nevertheless the state allows private property, education, occupation to *act*, in their *way*, i.e., as private property, education and to exert the influence of their *special* nature. Far from abolishing these real distinctions, the state only exists on the presupposition of their existence.²³

Marx describes persons in modern capitalist societies as leading a dual life: the lives in the political community are lives of complete equality and freedom and the lives in the civil society are lives of oppression and inequality. In his view: “In the *political community* he regards himself as a *communal being*, but in *civil society* he is active as a *private individual*, treats other men as means . . . and becomes the plaything of alien powers.”²⁴ Further Marx believed that it is the life of the “private man” which describes the “immediate reality” for people, while in the political state the persons are “deprived of real individual lives and endowed with unreal universality.” Lives in the civil society are more significant immediate and concrete than the lives of

²⁰ H. L. A. Hart, “Legal Rights,” in H. L. A. Hart, *Essays on Bentham, Jurisprudence and Political Theory* (1982), 162–193.

²¹ Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (2013), 4.

²² Marx (n. 13).

²³ Marx (n. 13).

²⁴ Marx (n. 13).

the citizen, and it is there that individuals are un-free and unequal. It follows from Marx's observations that full emancipation requires complete subjugation of the private sphere to the public sphere.²⁵ As will be shown later, this view has greatly influenced the Critical Legal Studies and the feminist movements.

3. The legal realist tradition

As Duncan Kennedy said “The history of legal thought since the turn of the [twentieth] century is the history of the decline of a particular set of distinctions—those that, taken together, constitute the liberal way of thinking about the social world.”²⁶ Those who contributed more than anybody to the erosion of these legal distinctions (including the distinction between public and private law) were the legal realists.

In two highly influential articles Morris Cohen tried to establish the public nature of private law. In “The Basis of Contract,” Cohen argued that contracts are public because they are defined and regulated by the law. The law confers the “private powers” to make a contract. Arguably if the state recognizes contracts and enforces them, then contracts must be designed also to promote the public interest.²⁷ The law of contracts is not based on an unselective mechanical enforcement of whatever the parties want. Instead, “enforcement... puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy.”²⁸ Cohen points out that a contract “confers sovereignty on one party over another”²⁹ and “the question naturally arises: For what purposes and under what circumstances shall that power be conferred?”³⁰ Interestingly, Cohen also believes that to realize the traditional values for the sake of which private law is perceived to be autonomous, the law must interfere in the contracts to promote security and other values that are cherished by the parties to a contract. The parties to a contract would benefit from intervention designed to promote their interests.³¹

Cohen pursued the same theme in “Property and Sovereignty.”³² In contrast to the liberal or libertarian conviction that property law protects autonomy, Cohen argued that property law is coercive as it grants one person—the property owner—a right to exclude others. To the extent that a property owner excludes others from things that are necessary to their well-being, the law confers power on the property

²⁵ For a more detailed discussion of Marx's views and their implications for contemporary theorists of law, see Gerald Turkel, “The Public/Private Distinction Approaches to the Critique of Legal Ideology,” (1988) 22 *Law & Society Review* 801, 805–809. ²⁶ Kennedy (n. 14) 1349.

²⁷ Morris R. Cohen, “The Basis of Contract,” (1933) XLVI *Harvard LR* 553, 562.

²⁸ Cohen (n. 27) 562. ²⁹ Cohen (n. 27) 587. ³⁰ Cohen (n. 27) 587.

³¹ Cohen (n. 27) 588.

³² Morris R. Cohen, “Property and Sovereignty,” in Morris R. Cohen, *Law and the Social Order* (1933).

owner. Property should therefore be regarded as a form of sovereignty—economic sovereignty.

A similar argument was made by Richard Hale who maintained that:

To take this control from the owner of the plant and to vest in a public official or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of government. It would merely transfer the constraining power to a different set of persons. Consequently, property is not a sphere of freedom; it is merely a private form of coercion and therefore it ought to be regulated for the sake of promoting the public interest.³³

There are two distinct arguments raised by Cohen, Hale, and other legal realists. First, they argue that the fact that the law creates, protects, and enforces property rights and contracts implies that the creation and enforcement of contracts and property rights should be informed by public concerns. Secondly, their argument rests on the belief that the protection of contracts and property grant powers given to one person against another, and such powers can often be very extensive given the economic dependence of some people on others. Hence it is false to regard contracts (and other fields of private law) as a sphere of autonomy as the autonomy of one person entails the denial of autonomy to another. The legal doctrines governing property and contract are not protective of freedom; they are merely one form of distributing freedom—granting freedom to some at the expense of others.

I believe both arguments fail. The mere fact that the law protects property or enforces contracts does not imply that the creation or enforcement of contractual rights ought to promote public ends. It could instead be designed to protect the preexisting autonomy and equality of the parties to the contract.³⁴ Similarly, the mere fact that the government sides with one party against another does not imply that the state's intervention does not protect or promote freedom or autonomy. To the extent that one believes that autonomy requires enabling individuals to commit themselves and to benefit from the commitments of others in order to realize their ends, it follows that legal enforcement of contracts promotes or protects autonomy. Other arguments raised by legal realists were also endorsed by the Critical Legal Studies movement and will be explored in the next section.

4. Critical Legal Studies movement

The Critical Legal Studies movement combined and extended the insights of legal realism and Marxism and developed the following two arguments: (a) *the*

³³ Richard Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," (1923) 38 *Political Science Quarterly* 470, 478.

³⁴ Gavison (n. 9) 16; Eyal Zamir "The Inverted Hierarchy of Contract Interpretation and Supplementation," (1997) 97 *Columbia LR* 1777–1778.

indeterminacy argument—the distinction between the public and the private is not (and also cannot be) consistently sustained and used by courts or guide their decisions; and (b) *the sectarian* argument—the dichotomy between public and private law serves various sectarian ideological and political interests and concerns, in particular the concern to protect and legitimize inequality and oppression.

a) *The indeterminacy objection*

One primary accusation made by the Critical Legal Studies movement, following the legal realists, is the accusation of indeterminacy. The use of the terms is nothing but a rationalization of decisions rather than an independently valid justification. As Gavison pointed out, this accusation can rest on two arguments: (a) there is no rational way to identify what is private and what is public and therefore the decision to classify something as public or private is arbitrary and conclusory and (b) while there is a way to identify what is private and what is public, such an identification does not imply clear normative consequences.³⁵

In “An Essay in the Deconstruction of Contract Doctrine,” Clare Dalton defended the first claim, namely the claim that there is no rational way to identify what is private and what is public. For instance, she argued that drawing the lines between real autonomy-enhancing consent and duress or unconscionability cannot rest on the public–private divide.³⁶ Other fields of law have become notorious for mixing private and public concerns in ways which fail to provide useful guidance to the decision-maker. Labor law is a good example. Karl Klare asserted that:

it is seriously mistaken to imagine that legal discourse or liberal political theory contains a core conception of the public/private distinction capable of being filled with determinate content or applied in a determinate manner to concrete cases. *There is no public/private distinction.* What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement.³⁷

The indeterminacy challenge often led legal theorists and judges to speak of intermediate entities or activities—ones that have public and private dimension. But, as Duncan Kennedy argues, developing an intermediate category of entities or activities may itself contribute to indeterminacy for the second reason mentioned by Gavison, namely that it is often difficult to draw normative conclusions from such a classification. If an entity or an activity is partly public and partly private, it is more difficult to determine whether in a particular context it ought to be treated as a public or as a private entity.³⁸

³⁵ Gavison (n. 9) 11–12.

³⁶ Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine,” (1985) 94 *Yale LJ* 997, 1024–1039.

³⁷ Karl Klare, “The Public-Private Distinction in Labor Law,” (1982) 130 *University of Pennsylvania LR* 1358, 1361.

³⁸ Kennedy (n. 14) 1352–1353.

The difficulties of classifying an entity or an activity as public or private raise doubts concerning the value of the distinction and its potential to guide judges and dictate decisions. But the defenders of the classification argue that all that can reasonably be established is that the use of the classification is difficult and must be more nuanced than previously thought. Such a conclusion does not undermine the distinction as such.³⁹

b) *The sectarian ideology objection*

Some theorists argue that preserving the autonomy of private law is an ideological tool designed to create illusions which legitimize inequality and injustice. Under this view, the so-called protected private sphere facilitates distancing the sense of injustice, paralyzing any political attempt to undo it, and legitimizing the status quo. What happens in the so-called private sphere is natural; it is not our choice and is therefore not attributable to us. For instance, protecting the autonomy of private law: “allows us to experience the social reality of minorities trapped in ghettos as a fact, however regrettable of private rather than public life. Therefore it is something outside the range of our direct concern, something about which we do not have to feel utterly outraged.”⁴⁰ More generally, the sense of legitimacy is based on the false belief that the private sphere protects a neutral and apolitical sphere which overcomes the fear of tyranny of the majority.⁴¹

This objection has limited force for several reasons. The sophisticated advocates of protecting the autonomy of private law do not deny that by doing so the legal system promotes certain values that they cherish, such as negative freedom.⁴² As a matter of fact it would be a powerful argument against sustaining the distinction between public and private law if it were entirely neutral, namely if it did not serve any moral, political, or ideological purposes. Further, some of the advocates of the autonomy of private law are advocates of progressive changes including distributive justice; they simply deny that private law ought to be used to realize this purpose.

5. Utilitarianism and law and economics

Both utilitarianism and law and economics theorists deny the significance of a principled distinction between public law and private law. Although the observations I make in this section apply both to utilitarianism and to the law and economics movement, I will focus here on the law and economics movement.

³⁹ Gavison (n. 9) 13–14.

⁴⁰ Freeman and Mensch (n. 13) 244.

⁴¹ Morton J. Horwitz, “The History of the Public/Private Distinction,” (1982) 130 *University of Pennsylvania LR* 1423, 1425.

⁴² Epstein (n. 11).

Morris Cohen captured best the law and economics position toward the autonomy of private law when he argued that:

Certain things have to be done in community and the question whether they should be left to private enterprise dominated by the profit motive, or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work.⁴³

This paragraph conveys total indifference (and even impatience) towards the theoretical and doctrinal effort to differentiate between private and public law and protect the autonomy of the former. There is work to be done and it ought to be done in the best possible way irrespective of whether it is done by private or public agents or through public or private law. The work to be done is often understood in the law and economics tradition in terms of efficiency. The assumption is always that the choice of agent (private or public) is a contingent matter that depends on the agent's motivations and abilities.⁴⁴ For instance, if we wish to deter individuals from harming others, we can assign public officials to inflict criminal sanctions or we can attribute civil liability and thereby "assign" the task to private individuals—plaintiffs. The choice between the two is a pragmatic choice that depends on a comparison between the expected efficacy of public officials and plaintiffs in performing the job.

Let us illustrate this approach by looking at the boundaries between criminal law and tort law. Law students learn that criminal law is a branch of public law designed to promote the public interest. Public law is contrasted with private law (e.g. contract and tort law) which is designed to promote private interests.⁴⁵ Under the view held most famously by Blackstone, crimes "affect the whole community, considered as a community in its social aggregate capacity."⁴⁶ But this distinction between public and private harm is considered to be unintelligible to law and economics theorists. Public harm is nothing but the aggregation of private harms.

To decide what field of law should be used to deter wrongful behavior, law and economics theorists identify two major differences between criminal and tort law. One difference is that criminal sanctions are often nonmonetary (e.g. imprisonment, capital punishment, or, in ancient legal systems, exile or torture). Further, criminal sanctions are typically much more severe than the harms resulting from the wrong. In contrast, tort law sanctions are characteristically monetary and are based on the size of the harm. The second primary difference is the identity of the agent in charge of imposing the sanction. Typically, victims of a tort sue the wrongdoer (and control the process) while criminal sanctions are initiated and controlled by agents of the state—public officials. The primary concern of theorists of law and

⁴³ Cohen (n. 32) 64. ⁴⁴ Harel and Poart (n. 3) 767–768.

⁴⁵ Jerome Hall, *General Principles of Criminal Law* (2nd ed., 2005), 241–246.

⁴⁶ William Blackstone, *Commentaries on the Laws of England*, Vol. 4 (1769), ch. 1.

economics is to examine which mechanism is superior to the other in terms of its costs and benefits.

Monetary sanctions (characterizing tort law) have two advantages over nonmonetary ones. First, monetary sanctions involve nothing but transferring money from one person (the wrongdoer) to another (the victim).⁴⁷ In contrast, the typical criminal sanction such as imprisonment imposes costs on the criminal but (excluding satisfying sentiments of revenge and hatred) does not promote the well-being of the victim. Secondly, there is an advantage in victims' greater participation in the private law process (resulting from the compensation they expect to receive), as victims often have information concerning the nature of the act committed and the size of the harm. The greater willingness of plaintiffs to actively participate in the private law proceedings contributes to the quality of decision-making. This analysis implies that as a general rule it is better to use tort law than criminal law as a means of deterring wrongdoing.

But as Polinsky and Shavell have shown, despite the advantages of tort law, private law sanctions are not always effective for several reasons. First, the wrongdoer may be insolvent.⁴⁸ If the wrongdoer cannot compensate the victim, tort law provides no incentives, as the effectiveness of monetary sanctions hinge on the solvency of the wrongdoer. This is particularly a serious concern when the probability of detection of the wrongdoer is small, and consequently the sanction necessary to deter is particularly large. To deter a person from stealing when only one in a hundred thieves is caught requires a particularly harsh sanction and, to the extent that the sanction is monetary, the prospects of insolvency are high. Furthermore, private law sanctions may require an overly lengthy and expensive process and therefore may fail to incentivize victims to seek remedy. Sometimes the wrongdoer harms many victims and the harms caused to each victim are too small to incentivize any one victim to seek remedy. At other times victims do not have the relevant information necessary to seek remedy. In such cases, tort law fails to reach optimal deterrence and consequently it is necessary to resort to criminal sanctions.

Yet, despite the dismissal of a principled distinction between public and private law, economists have provided some economic arguments supporting the view that private law ought not to be used to promote distributive justice concerns. In a series of articles Kaplow and Shavell argued that it is always more efficient to promote just distribution (or any other social ideals) by using tax law rather than by using private law. If a poor person is not required to compensate a rich person to promote distributive justice, the poor will not have an incentive to act optimally. If, on the other hand, tax law is used to promote distributive justice there will be no such distortion and the distributive justice concerns could be promoted without undermining the

⁴⁷ Richard Posner, *Economic Analysis of Law* (7th ed., 2007), 223.

⁴⁸ Mitchell A. Polinsky and Steven Shavell, "The Theory of Public Enforcement of the Law," in *Handbook of Law and Economics*, Vol. 1 (2007), 403–454; Posner (n. 47) 192.

incentives to take optimal precautions.⁴⁹ Note, however, that this argument applies not only to private law but also to fields of public law. Regulation designed to promote distributive justice concerns is also likely to distort optimal incentives. It is only tax law that avoids such a distortion.

This analysis is far from being complete. It is only meant as a short illustration of the approach of law and economics.⁵⁰ It is sufficient, however, to illustrate that law and economics regards the difference between public and private law in pragmatic terms. In the language of Cohen, there is work to be done—detering wrongdoers—and the methods for doing it need to be evaluated in accordance with their costs and benefits.

6. Feminist legal theory

Many feminists regard the relationship between the public and the private as central to feminist theory.⁵¹ Some feminists regard the private sphere as an enemy of women and call for its total abolition. Traditionally women have been relegated to the private sphere (understood here as the family or home rather than the market) and the discrimination of women has often been the byproduct of the relegation of women to the private sphere. One of the proponents of this view is Catherine MacKinnon who argued: “For women the measure of intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political.”⁵² Many of the challenges and concerns raised by feminists against the private sphere have been taken from Marxism, from the realist movement, and from the Critical Legal Studies movement. The feminist movement has had, however, several distinctive contributions to the controversy.

First, the feminist discussion has naturally focused upon a different dimension of the private, namely the family rather than the market or civil society. As a matter of fact, some feminists have argued that the dichotomy between public (understood as political) and private (understood as consisting of civil society) has been replicated in the contrast between the market (understood as public) and the family (understood to be private).⁵³ Furthermore, it was shown that very often attempts at

⁴⁹ Louis Kaplow and Steven Shavell, “Why The Legal System is Less Efficient than the Income Tax in Redistributing Income,” (1994) 23 *Journal of Legal Studies* 667; Louis Kaplow and Steven Shavell, “Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income,” (2000) 29 *Journal of Legal Studies* 821. For a critique, see Daphna Lewinsohn Zamir, “In Defense of Redistribution Through Private Law,” (2006) 91 *Minnesota LR* 326–397.

⁵⁰ For a more complete account, see Alon Harel, “Economic Analysis of Criminal Law: A Survey,” in Alon Harel and Keith Hylton (eds.), *Research Handbook on the Economics of Criminal Law* (2012), 10–50.

⁵² Catharine A. MacKinnon, *Towards a Feminist Theory of the State* (1989), 191.

⁵³ Olsen (n. 10) 1501.

⁵¹ Gavison (n. 9) 1.

reforming the market involve importing doctrines and values that apply in the family and vice versa.⁵⁴ One similarity between the Marxist and the feminist views is particularly important. The worry discussed earlier that social and economic inequality is being legitimated by describing (or classifying) it as “private” (and therefore not the state’s concern) has been used also to attack the autonomy of the family.⁵⁵ More specifically, it was argued that failing to regulate the family for the reason that it is “private” protects and preserves the hierarchical structures in the family and, in particular, gender hierarchy.⁵⁶

Another major distinctive contribution of the feminist movement has been in identifying the strong connections between the private and the public. Many feminists argue that nothing is really private as citizens are socialized in families and the socialization in families affect the public sphere.⁵⁷ Whatever happens in the family deeply influences social and political structures, as habits of thoughts, stereotypes, and beliefs concerning gender and sexuality are developed in the family. To the extent that the family is unequal, the protection of the family inevitably reinforces public inequality, as it protects and reinforces the gender hierarchy in the family. Michel Foucault’s work has added an important dimension as it showed also how mechanisms of power in the public sphere influence the private sphere and attempted to undermine the very existence of a free “private sphere.” The private sphere is as oppressive as the public.⁵⁸

One famous example illustrating the interrelations between the private and the public is the treatment of pornography. MacKinnon believes that the consumption of pornography influences the ways in which individuals perceive maleness and femaleness. More specifically, she believes that pornography constructs maleness as dominance and femaleness as subordination. The images that develop in the private sphere due to the influence of pornography are crucial in sustaining and reinforcing inequality not only in the family but also in the social and in the political spheres.⁵⁹ Similarly, the values of the political sphere may penetrate the market and the family. No sphere is therefore really autonomous and, consequently, it is wrong to protect the autonomy of the private sphere as such a protection has repercussions in the public sphere and vice versa.

Despite the power of this argument, it does not necessarily undermine the distinction between the public and the private. To address the interdependence between the different spheres, Ruth Gavison suggests to speak not in terms of private self-regarding or public other-regarding activities but in terms of the degree to which an activity is self-regarding or other-regarding. Drawing more nuanced

⁵⁴ Olsen (n. 10) 1529–1560. ⁵⁵ Gavison (n. 9) 30. ⁵⁶ Olsen (n. 10) 1509–1513.

⁵⁷ Susan Moller Okin, *Justice, Gender, and the Family* (1989), 131–133.

⁵⁸ Michel Foucault, *The History of Sexuality* (1978).

⁵⁹ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), 148.

distinctions and using intermediate concepts can perhaps overcome this feminist challenge.⁶⁰

7. Neo-Kantian formalism/neo-Hegelian theory

A highly sophisticated liberal attempt to defend the dichotomy between public and private law can be found in the work of neo-Kantian and neo-Hegelian liberals. In an influential neo-Kantian book, *The Idea of Private Law*, Ernest Weinrib defends the autonomy of private law.⁶¹ Kant's own view of private law has been analyzed by Arthur Ripstein in *Force and Freedom: Kant's Legal and Political Philosophy*.⁶² Brudner's *The Unity of the Common Law* defends the autonomy of private law from a Hegelian perspective.⁶³ Weinrib's, Ripstein's, and Brudner's ambition (the "Toronto School") is similar to the traditional ambition of liberal and libertarian thinkers (discussed in Section I), namely to protect private law from being subjected to collective or public ends.

In Weinrib's view, what is distinctive to private law is the relations between the parties—the defendant and the plaintiff.⁶⁴ The reasons that can be used to determine liability must be reasons that apply to the relationships between these parties. Neither reasons that apply to one of the parties (e.g. the subjective incompetence of the defendant), nor reasons that rest on concerns for promoting societal welfare (deterrence or efficiency) can be used in determining liability (or in determining the scope and the nature of the remedy). Weinrib believes that this observation explains many of the existing doctrines of tort law. It explains, for instance, why it is not sufficient that the defendant pays a fine to the state or that the plaintiff receives compensation from the state. The defendant is entitled to get a remedy *from the plaintiff* and the plaintiff has to compensate *the defendant*.

The concept of justice which takes seriously the correlativity of the parties is corrective justice—justice that aims to restore and maintain the notional equality between the parties, namely to guarantee that they have what lawfully belongs to them. The law corrects the injustice when it re-establishes the equality between the parties by taking from the defendant what is not his and giving what is due to the plaintiff. Weinrib further argues that corrective justice is linked with the concept of rights as understood by Kant. The autonomy of private law protects the freedom of individuals by insisting that they need not exercise their rights in a way that promotes the societal good, or even in a way that promotes their own good.

⁶⁰ Gavison (n. 9) 17–18.

⁶¹ Weinrib (n. 7).

⁶² Ripstein (n. 5).

⁶³ Alan Brudner, *The Unity of Common Law: Studies in Hegelian Jurisprudence* (1995).

⁶⁴ Weinrib (n. 7); Ernest J. Weinrib, "Corrective Justice in a Nutshell," (2002) 52 *University of Toronto LJ* 349, 350.

Despite the abstractness of Weinrib's theory, the underlying intuition is clear. A plaintiff needs to establish not only that he was harmed but also that he is entitled to be compensated by the defendant. To use considerations which are external to the relations between the parties in order to establish liability violates the rights of the defendant. The defendant can ask why it is *she* who ought to bear the costs inflicted on the plaintiff just in order to promote societal ends. Arguably those costs ought to be taken care by the community as a whole. Similarly, to use considerations which are external to the relations between the parties in order to deny liability violates the rights of the plaintiff who could ask why it is *he* who ought to bear the costs of an accident negligently caused by the defendant just in order to promote societal ends. Similar considerations also apply to the type and the size of the remedy.

Yet, the autonomy of private law does not imply that public law is irrelevant in contexts where private law applies. In a recent article Weinrib recognizes the impact of public right on private law.⁶⁵ Weinrib argues that in the absence of public institutions assigned to interpret and enforce the law, the interpretation and enforcement are left to the unilateral will of the stronger party. To overcome this problem, public institutions (such as courts) are necessary. Once these public institutions are established two normative ideas come into being: publicness and systematicity. Publicness is satisfied when courts use justifications that are accessible to citizens. Systematicity implies that courts operate within the boundaries of their jurisdiction and that their decisions apply to all individuals rather than merely to the litigants.

Weinrib's corrective justice theory hinges on a very particular view of what autonomy and equality consist of. Weinrib's Kantian foundations of liberalism are currently hotly debated.⁶⁶ The fact that the soundness of Weinrib's theory depends on its Kantian foundations exposes it to the objections raised against Kant's moral and political philosophy.

The Kantian view of private law was also developed and defended by Ripstein.⁶⁷ Ripstein develops the view that private right protects a right to external objects. Protecting such a right is necessary to enable individuals to realize their objectives. Under the interpretation given by Ripstein, public right is necessary only because public authority is necessary for the efficacious protection of private rights.⁶⁸

Brudner's *The Unity of Common Law* also defends a robust private law jurisprudence which is separate from public law. Brudner believes that the system of common law has traditionally been: "an ordering of human interactions independent of the political order directed to common ends."⁶⁹ To do so Brudner uses Hegelian philosophy and tries both to describe the common law and to justify it.⁷⁰ In doing

⁶⁵ Ernest J. Weinrib, "Private Law and Public Right," (2011) 61 *University of Toronto LJ* 191.

⁶⁶ Joseph Raz, *The Morality of Freedom* (1986).

⁶⁷ Ripstein (n. 5).

⁶⁸ Ripstein (n. 5) 23.

⁶⁹ Brudner (n. 63) 1.

⁷⁰ Brudner (n. 63) 9.

so, Brudner defends the view that private law ought to provide a place to the atomistic self.⁷¹ In analyzing property law, Brudner argues that private law orders “interactions between persons considered to be otherwise dissociated.” He also adds that property law must do justice “to those institutional features of the common law that suit it to its role as a law for atomistic people and that render it notoriously ill-suited as an instrument of collective action.”⁷² The core of private law is therefore apolitical; it is intelligible apart from the ends of political association.

Some legal theorists working in the field of private law endorse a weaker position and advocate protecting a limited autonomy to private law. Hanoch Dagan defends the position that private law is indeed grounded in the bipolar relationship between the parties, but insists that these relationships rely on our public values. Like autonomists, Dagan argues that in general only considerations that touch upon the relationship between the parties can be used to affect the legal doctrines governing it. Thus, for instance, demographic concerns to increase or decrease the population cannot be used in designing the rules concerning marital property. But Dagan further claims that because the values that inform the parties’ entitlements inter se are necessarily public, these social ideals of interpersonal relationships play a crucial role in private law. Thus, our shared ideals concerning the marital relationship and what makes them valuable can and ought to be used in designing marital property law.⁷³

8. Summary

This chapter examined the ways in which different political theorists treated the alleged autonomy of private law. Libertarians and liberals care deeply about the autonomy of private law while Marxists, legal realists, feminists, theorists of the Critical

⁷¹ Brudner (n. 63) 14.

⁷² Brudner (n. 63) 22.

⁷³ Dagan (n. 21) 104–128. Another contemporary influential attempt to capture what is distinctive about private law emphasizes “the principle of civil recourse” as characteristic of private law. Under this view, what characterizes private law is the standing that the plaintiff has to resort to the courts or to the judicial system. Benjamin Zipursky writes:

I shall argue that our institution of private rights of action embodies a “principle of civil recourse.” According to this principle, an individual is entitled to an avenue of civil recourse—or redress—against one who has committed a legal wrong against her. This principle is a civilized transformation of what is often considered a quite primitive “instinct” of retributive justice, the instinct that I am entitled to “settle a score” or to “get even” with one who has wronged me . . . A private right of action against other person is essentially a response to having been legally wronged by that person, and therefore exists only where the defendant has committed a legal wrong against the plaintiff and thus violated her legal right.

See Benjamin C. Zipursky, “Rights Wrongs, and Recourse in the Law of Torts,” (1998) 51 *Vanderbilt LR* 1. For a recent more developed exposition of this theory, see John C. P. Goldberg and Benjamin C. Zipursky, “Torts as Wrongs,” (2010) 88 *Texas LR* 917.

Legal Studies movement, and theorists of the law and economics movement question and challenge the autonomy of private law. Without getting into the intricacies of legal doctrine, it is fair to say that public ends have gradually become part of private law jurisprudence. Even those who believe in the autonomy of private law theory lament the fact that private law has been subjected to social ends.⁷⁴

Yet what may seem as the victory of the left in this battle was a pyrrhic victory. Public ends are recognized now as part of private law but it is not necessarily the public ends favored by progressives; the law and economics movement has greatly influenced the social ends that have become part of private law jurisprudence and typically its ends are not the ones favored by the left.

I would argue in the next section that the contemporary debates concerning privatization of public services require focusing attention on the autonomy of public law (rather than the autonomy of private law). Understanding the significance of preserving the autonomy of public law could shed light on the contemporary debates concerning privatization. In particular I will argue that privatization rests on a misconceived understanding of what public law is about.

IV. THE AUTONOMY OF PUBLIC LAW

As shown earlier, the main concern of libertarian and liberal legal theorists was to protect the autonomy of private law. Left-wing theorists were critical of the attempt to protect the autonomy of private law and argued that such an attempt is both incoherent and undesirable. Somewhat ironically, I wish in this section to borrow the strategies used by libertarian and liberal theorists (aiming to maintain the autonomy of *private law*) in order to defend the autonomy of *public law*.

To do so let us examine the justifiability of privatization of services. As discussed previously, the opposition of legal realists and left-wing theorists to the “autonomy of private law” has been based on instrumental concerns. Private law ought to be used to promote public ends because there is a job to be done (e.g. promoting equality and justice) and one ought to think about the best ways of performing successfully this job. The same type of arguments is used by opponents of privatization. Under the prevalent view of opponents of privatization, privatizing public services undermines “accountability.”⁷⁵ Private agents are less likely than public officials to

⁷⁴ Brudner (n. 63) ch. 1.

⁷⁵ Martha Minow, “Public and Private Partnerships: Accounting for the New Religion,” (2003) 116 *Harvard LR* 1229.

pursue the public good. Instead I suggest that principled autonomy-based concerns (of the type used by libertarians and liberals in defending the autonomy of private law) can justify the autonomy of public law and, most importantly, can justify the opposition to privatization.

This flaw of opponents of privatization is grounded in another premise underlying the discussion concerning public law, namely the conviction that public law is ultimately defined by the ends it promotes and not by the agents who bring about these ends.⁷⁶ Under this view, the agents are mere instruments to promote the public law ends. To the extent that privatization is wrong, it is only because private agents are less likely to promote the public good than private agents.⁷⁷

In the rest of this section I will develop a principled rather than an instrumental objection against privatization. More specifically, I will argue that the artificial separation between the public ends and the agents which bring them about is flawed and that some goods can only be provided by public agents. If this is so, privatization is wrong not because of the empirical conjecture that private individuals are less likely to promote public ends but because private individuals cannot bring about some public ends. Let me defend this claim.

It is here that I believe that the leftist opponents of privatization can learn from the principled non-instrumental thinking of libertarian and liberal thinkers aiming to sustain the autonomy of private law. Libertarians and liberal thinkers did not ask whether protection of private law promotes any desirable ends; instead, they regarded the protection of private law as a component of freedom. Similarly, I believe that principled reasons ought to justify the protection of public law. To establish the necessity of public provision of certain goods I shall first establish that there are goods that are agent-dependent goods, namely that they can only be provided by particular agents. Then it will be argued that some agent-dependent goods are *intrinsically public*; they cannot as a logical matter be provided by private agents. The public provision of *intrinsically public goods* is a prerequisite for the successful provision of these goods.⁷⁸

Some agents are chosen to execute an enterprise because of their expected excellence in doing so, when excellence in executing an enterprise is understood and evaluated independently of the agent's identity or status. At other times, however, excellence (or even competence) in executing an enterprise is inseparable from the

⁷⁶ A paradigmatic example of the view that identifies public law purely on the basis of the ends it promotes, rather than on the basis of the actors engaged in promoting those ends, is the view that equates privatization with "publicization." Jody Freeman develops the view that privatization is "a means of publicization through which private actors increasingly commit themselves to traditionally public goals.... So rather than compromising democratic norms of accountability, due process, equality, and rationality—as some critics of privatization fear it will—privatization might extend these norms to private actors..." See Jody Freeman, "Extending Public Law Norms Through Privatization," (2003) 116 *Harvard LR* 1285.

⁷⁷ Dorfman and Harel (n. 3) 67–68.

⁷⁸ The argument is developed more carefully in Harel and Porat (n. 3); Dorfman and Harel (n. 3).

identity or status of the agent. In the latter cases, the quality of the execution of the enterprise cannot be measured independently of the agent's identity.

The case of blood feuds is a good example of an agent-dependent good.⁷⁹ Blood feuds are ritualized ways of seeking vengeance for a wrong by killing or punishing a person belonging to a tribe or clan of the original perpetrator who committed the wrong. Although the reader most probably shares my dislike of this practice, it deserves attention, and the institutional norms governing it provide us with a paradigmatic case of an agent-dependent practice. Most significantly, anthropologists say it is only a male relative of the deceased who is capable of performing a blood feud. A killing by the “wrong agent” is not merely an inappropriate or an impermissible blood feud; it does not even count as a blood feud, and it cannot redress the injustice.

To apply this observation to our context, one needs to establish that at times the performance of a task by a public agent is crucial for the successful provision of the good. In other words, some governmental tasks simply cannot be successfully executed by private entities since the goods resulting from these *inherently public goods* can be realized only if the right agent performs these tasks and the right agent is a public agent.⁸⁰

Prisons and security can be used as an example of an *inherently public good*. Most of the arguments of opponents of privatizing prisons are grounded in concerns about accountability of private individuals. Yet such arguments fail to capture a prevalent intuition, namely that the involvement of the state in the infliction of punishment is not a mere contingency hinging on the (alleged) ability or inability of an agent to “get it right.”

Such intuitions can easily be detected in the discussions of punishment which emphasize the significance of the agents inflicting the sanctions. David Lyons, for instance, argued that “it is not generally accepted that I have the right simply to hurt another who has done something wrong, just because he has done

⁷⁹ Alon Harel, “Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions,” (2008) 14 *Legal Theory* 113.

⁸⁰ Some support for the conviction that some goods are inherently public can be provided by examining legal doctrine. Let me provide here two examples. The term “inherently governmental functions” is defined in the United States in the Federal Activities Inventory Reform (FAIR) Act of 1998. This Act describes an inherently governmental function as “a function that is so intimately related to the public interest as to require performance by Federal Government employees.” It seems that there is a strong sense that some functions must be performed by the government.

Another indication is a recent decision of the Israeli Supreme Court in which the Court decided to strike down the establishment of a private prison on principled grounds. HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* <http://www.privateci.org/private_pics/Israel_Ruling.pdf>.

Chief Justice Beinisch argued that: “The power of imprisonment and the other invasive powers that derive from it are therefore some of the state’s most distinctive powers as the embodiment of government, and they reflect the constitutional principle that the state has a monopoly upon exercising organized force in order to advance the general public interest...” (HCJ 2605/05 68–69).

it, where there is no special relation between us.”⁸¹ Further, “neither one’s general level of virtue nor one’s particular talents in the area of punishing...are normally taken to establish any special claim to be the one who should punish others.”⁸² The view emerging from these texts is that one ought to separate two questions: (a) whether an agent “deserves” to be punished or ought to be punished and (b) whether a particular agent is the “appropriate agent” to inflict the sanction.⁸³

The rationale underlying this view is related to an understanding of what punishment is about. Punishment is a public manifestation of condemnation and disapprobation of the criminal deeds.⁸⁴ Unlike deterrence or even certain forms of retribution, public condemnation is possible in the first place only if it emanates from the appropriate agent. Condemnation is ineffective unless done by an agent who is in a privileged status to that of the one subjected to the condemnation, one whose judgments concerning the appropriateness of the behavior is worthy of attention or respect.⁸⁵ Otherwise, an infliction of “a sanction” amounts to an act of violence which cannot express or communicate censure for the culpable and wrongful acts done. Arguably in a liberal society, it is only the state that can make such judgments and as the privatized activities are not the doings of the state, private entities vested with formal authority to execute the activities in question cannot speak and act in the name of the state.

The private provision of “punishment” in fact amounts to the mere imposition of pain and suffering by one private person on another, necessarily failing to realize punishment’s intrinsic good of expressing, not to mention conveying, condemnation for public wrongs. If this is so, it follows that the goods of punishment cannot be provided privately. The alleged separation between the good (punishment) and the agent providing the good (public official or a private individual) collapses. Public law is not only about public ends but also about public means and in particular about the agents who are assigned with providing these goods.

⁸¹ David Lyons, “Rights Against Humanity,” (1976) 85 *Philosophical Review* 208, 210.

⁸² John A. Simmons, “Locke and the Right to Punish,” (1991) 20 *Philosophy & Public Affairs* 311–349.

⁸³ Thomas Hill, “Kant on Wrongdoing, Desert, and Punishment,” (1999) 18 *Law & Philosophy* 407, 425.

⁸⁴ An early articulation of this claim was developed by Robert Nozick who believes that “Retributive punishment is an act of communicative behaviour.” Robert Nozick, *Philosophical Explanations* (1981), 370. Joel Feinberg believes that: “Punishment is a conventional device for the expression of attitudes of resentment and indignation and, of judgments of disapproval and reprobation.” See Joel Feinberg, “The Expressive Function of Punishment,” in Joel Feinberg, *Doing and Deserving* (1970), 95, 98.

⁸⁵ This observation has practical implications, e.g., implications concerning the debate concerning the privatization of prisons. It suggests that the authorization granted to private wardens to lock a person in solitary confinement, to conduct body searches, and to perform other disciplinary measures is illegitimate, as it grants one citizen power over another. The concern that private entities are in charge of making such decisions was in fact what led the Israeli Supreme Court to strike down the establishment of a private prison. See HCJ 2605/05 (n. 81).

V. CONCLUSION

This chapter examined two historical battles: the historical battle to preserve the autonomy of private law and the contemporary battle for and against privatization. The progressive camp has won the first war but seems to be losing the second war. I also argued that there are principled rather than pragmatic arguments against privatization and the failure to use principled arguments reflects a misunderstanding of what is at stake.

Let me end this discussion with a speculation. Ironically it is the victory of the left in undermining the autonomy of private law that made privatization possible. The erosion of the autonomy of private law implied that private individuals who sign a contract or who commit a tort can be used to promote public ends such as efficiency or distributive justice. If this is so, there is no principled reason why private agents should not be used to provide or facilitate the provision of other public services. I mentioned earlier that the victory of the left in eroding the autonomy of private law was a pyrrhic victory because, while it has been recognized that private law can be used to promote public ends, the ends that judges choose to promote are not the ones that are favored by the left. I should add now that it is a pyrrhic victory for another reason: the use of private agents to promote public ends in the context of contract or tort law legitimized the use of private agents to provide public services, that is, legitimized the privatization of public services.

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