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Understanding Private Law

*Felipe Jiménez**

I. Introduction

Theories of private law attempt to understand private law—to render private law intelligible.[1] This is true for descriptive, interpretive, and prescriptive theories.[2] It is true, in other words, whether the theory's concern is giving an accurate description of private law; offering a rational reconstruction of the values served by private law as it exists; or offering an argument for what values ought to underlie and guide private law.

In the case of descriptive theories, one cannot accurately describe the rules and institutions that fall within private law unless one has at least a working theory about the criteria that determine what counts as private law. One can draw the boundaries of the practice in myriad ways, including by merely stipulating what one will understand by 'private law'. But, to my mind, the least arbitrary way to draw the line would involve at least a presupposition about what private law 'is about'. In the case of prescriptive theories, at the other extreme, identifying the problems with an existing regime requires understanding the status quo. This understanding is the starting point for normative theorization—even if that theorization leads us to abandon or change the current practice.[3] Finally, interpretive theories attempt to provide an account that fits and justifies the central features of private law. They attempt to improve our understanding by identifying the values served by that area of law as it exists,[4]

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[1] See Ernest J Weinrib, *The Idea of Private Law* (OUP 2012) 1–21.

[2] For a canonical account of these distinctions in contract theory, see Stephen Smith, *Contract Theory* (OUP 2004).

[3] Liam Murphy, 'The Practice of Promise and Contract' in G Klass, P Saprai, and G Letsas (eds), *Philosophical Foundations of Contract Law* (OUP 2014) 151–52.

[4] Smith, *Contract Theory* (n 2) 5.

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by providing the best possible justification that fits the existing practice.[5] Thus understood, interpretive theories are centrally concerned with understanding private law.

But if most theories of private law are concerned, at least partially, with understanding private law, what does this mean? This question will take us, in Section II, into the philosophy of social practices. Section III then offers a brief reconstruction of *comparative jurisprudence* and an account of why we ought to take it seriously as a methodological model for understanding law. Given the diversity of approaches, questions, and styles within contemporary private law theory, in Section IV, I offer a simplified taxonomy of contemporary accounts in terms of three central types: instrumentalism, formalism, and the New Private Law. With this framework in hand, Section V moves on to the implications of comparative jurisprudence for private law theory.

II. Understanding Social Practices

Law is a social practice. Some social theorists argue that fully understanding social practices requires grasping the complex meanings and attitudes that form part of the practice as experienced by its participants.[6] This might be too strong[7]—sometimes, the best explanation of a social practice might be that those engaged in it are deceived,[8] or might diverge from the reasons the participants take themselves to have.[9] But, even in these situations, it seems reasonable to provisionally start from the perspective of participants. We cannot conclude that a social practice involves deception or alienation without first understanding what it looks like for those engaged in it.[10]

This idea is familiar in legal theory. It is connected, for instance, to Hart's adoption of a 'hermeneutic approach'[11] that incorporates the *internal point of*

[5] Regarding the desiderata of fit and justification, see Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 65–68.

[6] Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (Psychology Press 1990) 108.

[7] Which is why Winch ends up committed to—to my mind—a series of implausible views about the possibility of detached reconstruction of social practices. See Jeff Pojanowski, 'Reevaluating Legal Theory' (2021) 130 Yale LJ 1458, 1477–78.

[8] Alasdair MacIntyre and DR Bell, 'The Idea of a Social Science' (1967) 41 Proceedings of the Aristotelian Society, Supplementary Vols 95, 101.

[9] Notably, the opposite extreme might also be true: it could be that the reasons that participants in private law practice understand themselves to have are, from an external or objective standpoint, true reasons for action. See Jeffrey A Pojanowski and Paul B Miller, 'The Internal Point of View in Private Law' [2022] Am J Jurisprudence 10–11. Notably, Pojanowski and Miller go further and argue that the internal point of view cannot be a non-moralized position.

[10] See Dworkin (n 5) 14; Smith, *Contract Theory* (n 2) 13–14.

[11] HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 1, 13–14.

view of legal participants—and particularly their acceptance of legal norms as binding standards of conduct[12]—as necessary for the intelligibility of legal discourse.[13] It is also reflected in Dworkin's work—particularly, in his insistence that understanding law as an argumentative practice requires adopting the point of view of its participants.[14] Thus, even those who disagree about how to best characterize legal practice agree that understanding it involves starting from the commitments, attitudes, and actions of those involved in those practices.[15]

At a more general level, this idea is connected to Max Weber's notion of *Verstehen*, under which explaining social practices requires an interpretive grasp of their meaning.[16] For this purpose, 'thin description' in terms of brute observable data is insufficient. What is needed is a 'thick description' that alludes to thoughts, expectations, and intentions.[17]

Part of the reason for this is that the constituent elements of social practices are already pre-theoretically identified and defined by participants.[18] For example, the judge adjudicating a private law dispute is already acting on the basis of an understanding of private rights, duties, and the more specific concepts (like wrong, causation, breach, etc.) involved in private law reasoning. The theorist, then, must theorize an institution for which at least a partial account already exists in the very conceptual and linguistic practices of those involved in it. This internal understanding is something that the theorist needs to account for. Some would go further and claim that the theorist would need to mirror the internal understanding.[19] I do not think mirroring is required[20]—but we can ignore this for now. The relevant point is that understanding a social practice requires understanding its meaning, which is at

[12] HLA Hart, *The Concept of Law* (Clarendon Press 1994); Scott J Shapiro, 'What Is the Internal Point of View?' (2006) 75 Fordham L Rev 1157, 1159. For a recent account of the internal point of view in private law theory, see Pojanowski and Miller (n 9).

[13] Shapiro (n 12) 1166.

[14] Dworkin (n 5) 13.

[15] Grégoire Webber, 'Asking Why in the Study of Human Affairs' (2015) 60 Am J Jurisprudence 51, 53. In legal interpretation, see Friedrich Karl von Savigny, *System of the Modern Roman Law* (Asylum Press 1867) 171.

[16] Max Weber, *The Theory of Social and Economic Organization* (Free Press 1947) 87–98. See also Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture', *The Interpretation of Cultures* (Basic Books1973) 311.

[17] On the distinction between thin and thick description, see Gilbert Ryle, 'Thinking and Reflecting', *Collected Essays 1929–1968* (2009) 489–90; Gilbert Ryle, 'The Thinking of Thoughts: What Is "Le Penseur" Doing?', *Collected Essays 1929–1968* (2009) 501.

[18] Guy Oakes, 'The Verstehen Thesis and the Foundations of Max Weber's Methodology' (1977) 16 History and Theory 11, 20–21.

[19] ibid 21.

[20] See Felipe Jiménez, 'Two Questions for Private Law Theory' (2021) 12 Jurisprudence 391.

least partly constituted by the actions, commitments, and attitudes of those involved in it.[21]

This line of thought can be carried too far. It can assume a too radical distinction between the social world and the physical world.[22] It can deny the legitimacy of explanations that do not simply replicate or assume the same terms used by those involved in the relevant social practice,[23] but instead, attempt to provide general covering laws with predictive power.[24]

Thus, my claim here is limited: understanding what a social practice is—what the social facts that any theoretical explanation must be able to explain are—should start with understanding what the practice means to those involved in it. Adopting this internal perspective is required to understand what the object—in this case, private law—is.[25]

Merely reporting what the internal practices of the participants are, however, does not amount to a full theory. Private law theory seeks not just to report what private law reasoning looks like from the inside. It also seeks to clarify the point of the practice.[26] Arguably, such a clarification is what *fully* understanding private law entails.[27] But the provisional starting point for this understanding is the perspective of the participants,[28] a 'working out' of the concepts and frameworks embedded in the practice.[29]

Different notions of theorization from an internal point of view have been significant in private law theory.[30] These go from the strong internalism of Weinrib's *The Idea of Private Law*[31] to the weaker versions of Stephen Smith,[32]

[21] Oakes (n 18) 22. See also Brian Bix, 'H.L.A. Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 SMU L Rev 167, 186. For a version of this claim in anthropology, see Geertz (n 16) 314. A similar idea underlies Vico's conception of historical understanding, on Berlin's reconstruction in Isaiah Berlin, 'The Divorce between the Sciences and the Humanities' in Henry Hardy (ed), *Against the Current: Essays in the History of Ideas* (2nd edn, Princeton UP 2013) 133.

[22] For criticism, see Paul A Roth, 'Beyond Understanding: The Career of the Concept of Understanding in the Human Sciences' in S Turner and PA Roth (eds), *The Blackwell Guide to the Philosophy of the Social Sciences* (John Wiley 2003).

[23] See Charles L Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 Va L Rev 1203.

[24] See Carl G Hempel, 'The Function of General Laws in History' (1942) 39 Journal of Philosophy 35.

[25] The concern, then, is understanding the *explanandum* 'private law' rather than providing an explanation with predictive power in the scientific sense. Some critics of Hart's methodological positivism and his use of the internal point of view miss this. See, eg, Stephen R Perry, 'Hart's Methodological Positivism' (1998) 4 Legal Theory 427, 436–37.

[26] Gerald J Postema, 'Jurisprudence as Practical Philosophy' (1998) 4 Legal Theory 329, 332.

[27] On the distinction between mere knowledge and genuine understanding, see Neil Cooper, 'The Epistemology of Understanding' (1995) 38 Inquiry 205; Karsten R Stueber, 'The Ubiquity of Understanding: Dimensions of Understanding in the Social and Natural Sciences' (2019) 49 Philosophy of the Social Sciences 265, 266.

[28] MacIntyre and Bell (n 8) 110.

[29] Ernest J Weinrib, 'Can Law Survive Legal Education?' (2007) 60 Vand L Rev 401, 425.

[30] For an overview, see Pojanowski and Miller (n 9).

[31] Weinrib, *The Idea of Private Law* (n 1).

[32] Smith, *Contract Theory* (n 2).

John Goldberg,[33] and Benjamin Zipursky.[34] I think these versions can generate implausibly strong constraints on private law theory.[35] My argument here is weaker: if we want to understand private law, an important first step in the process of doing so is clarifying its meaning for those involved in it. This is entirely compatible with perspectives that seek an external or functional understanding of the practice—as long as those perspectives do not assume an imperialistic ambition.[36] Understanding private law from an internal perspective is necessary to theorize the object 'private law'—but it is not clear to me why, as many private law theorists sometimes seem to assume, this is also the end story of private law theory.

In order to flesh out what I take this notion of understanding to require from private law theorists, I will move away from private law theory for a while and instead borrow from the methodology of comparative law, and particularly from *comparative jurisprudence*.

III. Comparative Jurisprudence

Towards the end of the twentieth century, many scholars of comparative law argued for a focus on the cognitive structure, cultural traditions, and mentalities underlying legal systems.[37] One important contribution to this development was William Ewald's conception of comparative law as a philosophical undertaking, which he presented under the notion of *comparative jurisprudence*, in two influential articles published in 1995—*Comparative Jurisprudence (I)*[38] and *Comparative Jurisprudence (II)*.[39] Understanding a legal system, for Ewald, requires going beyond the surface level of legal texts, towards the shared understandings and philosophical assumptions that constitute the deep structure of the legal system.[40]

Ewald contrasts comparative jurisprudence to the two dominant strands in comparative law at the time he was writing: *contextualism* and *textualism*.

[33] John CP Goldberg, 'Pragmatism and Private Law' (2012) 125 Harvard LR 1640.
[34] Benjamin Zipursky, 'Pragmatic Conceptualism' (2000) 6 Legal Theory 457.
[35] See Jiménez, 'Two Questions for Private Law Theory' (n 20).
[36] My thinking on this point has been influenced by Barzun (n 23).
[37] See Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 ICLQ 496.
[38] William Ewald, 'Comparative Jurisprudence (I): What Was It like to Try a Rat?' (1995) 143 U Penn L Rev 1889.
[39] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 Am J Comp Law 489.
[40] Following Ewald, see Catherine Valcke, 'Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems' (2004) 52 Am J Comp Law 713; Van Hoecke and Warrington (n 37).

Those two strands, according to Ewald, see law from the outside, ignoring the specific position of the legal operator: the contextualist sees law as a product of social forces, while the textualist sees it purely as a matter of formal rules. According to Ewald, both of these approaches lose sight of the fact that neither economic and social phenomena, nor legal texts, can reveal how legal systems think about legal problems.[41] In order to understand this, one has to grasp the underlying ideas that animate and differentiate legal systems.[42] Understanding law is not a matter of accumulating data, but rather of mastering abilities of reasoning: a matter of *learning how* rather than *learning that*.[43] Law, for Ewald, is not just a heap of rules, but 'a social practice that both reflects and constitutes a community's commitment to governing itself in accordance with certain shared ideals'.[44]

The following sections develop the idea of comparative jurisprudence.

1. Against Naïve Universalism

Law is a culturally embedded practice.[45] Because of this, it is reasonable to expect different legal systems to manifest the same plurality that can be observed across cultures. As a consequence, we should be suspicious of a naïve form of universalism that presupposes that all legal systems are fundamentally alike or based on the same normative foundations just because they are legal systems.

Comparative jurisprudence's rejection of naïve universalism is not at odds with a more nuanced universalism. For instance, comparative jurisprudence is open to the possibility of deep-level similarities in underlying principles despite surface differences.[46] But this can only be the end of the inquiry, not the starting assumption. The method of inquiry has to be, according to comparative jurisprudence, one that tries to understand the philosophical and cultural outlook that underlies the surface level of legal systems, the processes of reasoning by jurists over time in each specific legal culture that ultimately lead

[41] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 46 Am J Comp Law 701, 703–04.

[42] Valcke, 'Comparative Law as Comparative Jurisprudence' (n 40) 717.

[43] Ewald, 'Comparative Jurisprudence (I)' (n 38) 1896.

[44] Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* (CUP 2018) 10.

[45] Van Hoecke and Warrington (n 37) 498.

[46] James Gordley, *Foundations of Private Law* (OUP 2007) 32–42; James Gordley, 'The Universalist Heritage' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2011); Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 37. In the case of contract law, see Felipe Jiménez, 'Against Parochialism in Contract Theory: A Response to Brian Bix' (2019) 32 Ratio Juris 233.

to specific legal rules.[47] Whether these philosophical and cultural commitments are constant across different jurisdictions is a contingent question.

This requires focusing on the jurisprudential commitments of the participants in specific legal systems.[48] In this aspect, comparative jurisprudence echoes Charles Taylor's critique of cross-societal comparisons that ignore the specificity of meanings in the practices of different societies.[49] Law is a social practice embedded within specific patterns of social activity, in specific political communities, with specific traditions and histories. Grasping law requires taking those patterns and traditions seriously and letting them, in their specificity, guide inquiry.

2. Beneath the Surface of Legal Systems

One potential response to this cautious attitude towards universalist claims would be that such an attitude would make sense in a world of widespread divergence across legal systems. However, if legal systems tend towards convergence in rules and institutions—at least at a broad level—then perhaps starting from a universalistic assumption makes sense.

It is an open and complex question to what degree the legal rules and institutions of different legal systems converge or tend towards convergence.[50] Independently of that question, comparative jurisprudence argues that understanding a legal system is a matter of understanding the conscious ideas at work in it: the 'principles, concepts, beliefs, and reasoning that underlie… legal rules and institutions.'[51] Convergence at the level of rules is not sufficient to ground the conclusion that entire legal systems converge.[52]

The reason for this is that a legal system is a complex web of historical, cultural, and intellectual traditions.[53] Even the conclusion that a certain legal system has a certain rule is mediated by these historical and intellectual

[47] Ewald, 'Comparative Jurisprudence (I)' (n 38) 1949.
[48] ibid 1958–59.
[49] Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25 The Review of Metaphysics 3, 34.
[50] Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52; John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' (1981) 17 Stan J Int L 357.
[51] Ewald, 'The Jurisprudential Approach to Comparative Law' (n 41) 705. See also John Bell, 'English Law and French Law—Not so Different?' (1995) 48 Current Legal Problems 63, 69–70.
[52] Incidentally, the opposite is true too: the fact that surface-level rules diverge does not entail that the legal systems as such diverge.
[53] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232, 236. See also Felipe Jiménez, 'Legal Principles, Law, and Tradition' (2022) 33 YJLH 59; Martin Krygier, 'Law as Tradition' (1986) 5 Law and Philosophy 237.

practices. A legal rule is, thus, much more than a canonical set of inscribed words.[54] As Ewald explains, a rule is an accretion of cultural elements, a single part of a complex world of meanings.[55]

We cannot understand a legal system without understanding these underlying substantive norms and habits that legal participants adopt as their own.[56] Legal practitioners, scholars, and judges are subject to the history of legal institutions and practices.[57] Legal concepts are historical artifacts,[58] and legal rules are a product of the law's institutional tradition. A grasp of legal rules is, thus, just the beginning of the process of understanding a legal system.

For comparative jurisprudence, then, the law is not just a set of posited rules with formal authority but also a set of discursive practices, normative commitments, and convergent attitudes. Consider the treatment of certain acts of Parliament in the United Kingdom as 'constitutional'. As John Gardner argued, the constitutional effect of those acts is not determined by their enactment but rather by how they are treated by legal officials, and particularly courts.[59] Gardner thought this was peculiar to the UK's constitutional regime—although he was somewhat tempted by the view that this could be true even of written constitutions.[60] He still noted that, while at the moment of enactment a written constitution might be wholly written, as soon as it needs to be applied it begins to be filled out by lawyers and judges. As time passes, more and more of the constitutional law will depend on more than its text.[61]

This is precisely what the familiar distinction between interpretation and construction captures.[62] There is always a potential gap between the communicative content of a legal enactment and the legal content for which it will stand once applied by courts and other legal officials. This gap between communicative and legal content depends, at least in part, on the underlying phenomena comparative jurisprudence recommends focusing on: the legal culture's underlying commitments, attitudes, and values.

[54] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 111, 115.
[55] ibid 116.
[56] Krygier (n 53) 244. See also EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane 1975) 263.
[57] Hans Georg Gadamer, *Truth and Method* (Crossroad 1989) 280. See also Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard UP 1990) 6.
[58] Niklas Luhmann, *Law as a Social System* (F Kastner and R Nobles eds, Klaus Ziegert tr, OUP 2004) 340.
[59] John Gardner, 'Can There Be a Written Constitution?' in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (OUP 2011) 165.
[60] ibid 169–70.
[61] ibid 189.
[62] See Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 Constitutional Commentary 95; Peter M Tiersma, 'The Ambiguity of Interpretation: Distinguishing Interpretation from Construction' (1995) 73 Washington U L Rev 1095.

I am thinking, for instance, about commitments and attitudes regarding: (i) the relative prevalence or relevance of formal reasoning as compared to substantive reasoning;[63] (ii) the significance of more formal and even deductive practices of reasoning versus the use of imaginative techniques;[64] (iii) the openness to arguments from comparative law;[65] (iv) the relative receptivity to arguments from other disciplines, such as economics;[66] (v) the willingness to consider academic legal scholarship as a legitimate source for judicial decisions;[67] (vi) the role of law in fostering and allowing for political and social change; (vii) the significance and management of the problems generated by legal norms' over- and under-inclusiveness (for instance, by resorting to equity); etc.

3. An Internal Point of View

Comparative jurisprudence, thus, sees law as a complex social practice. And, as we have seen, understanding social practices requires starting from their internal dimension. In the case of law, from the inside, legal practice is an intellectual phenomenon: a set of conceptual activities[68] and cognitive practices through which legal operators interpret and organize the social world.[69] Law is thus not a set of rules but a world of meaning;[70] legal relations not just the upshot of rules but the expression of a cognitive structure.[71]

The methodology of comparative jurisprudence can be used for studying multiple legal issues, such as the concept contract,[72] legal reasoning,[73] and

[63] See PS Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1991).

[64] On imagination in the common law tradition, Maksymilian Del Mar, 'Exemplarity and Narrativity in the Common Law Tradition' (2013) 25 Law and Literature 390, 392.

[65] Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 Harvard LR 129.

[66] Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 31 Hastings Int and Comp L Rev 295; Ronald J Scalise Jr, 'Why No Efficient Breach in the Civil Law: A Comparative Assessment of the Doctrine of Efficient Breach of Contract' (2007) 55 Am J Comp Law 721.

[67] Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001); Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (OUP 2010); Frederick Schauer, 'The Authority of Legal Scholarship' (1991) 139 U Penn L Rev 1003; Fábio P Shecaira, 'Legal Arguments from Scholarly Authority' (2017) 30 Ratio Juris 305.

[68] Ewald, 'The Jurisprudential Approach to Comparative Law' (n 41) 704.

[69] Ewald, 'Comparative Jurisprudence (I)' (n 38) 1940.

[70] See Robert M Cover, 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative' (1983) 97 Harvard LR 4.

[71] See, at a more general level, Winch (n 6) 23.

[72] Catherine Valcke, 'Convergence and Divergence of the English, French, and German Conceptions of Contract' (2008) 16 ERPL 29; Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in R Bronaugh, JW Neyers and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009).

[73] Atiyah and Summers (n 63).

statutory,[74] and contract interpretation.[75] In each of these domains, understanding the relevant issue requires understanding what it looks like for those engaged in the practice—what a French judge would think about contracts and the conditions for their enforcement, how a German lawyer would characterize legal reasoning, and how a Supreme Court justice in the United States would define the task of statutory interpretation. Understanding legal reasoning and legal practice is, in this regard, just like understanding Balinese cockfights: we cannot understand either without understanding the cultural web of meanings that make sense for those who take part in the relevant practices.[76]

This means those engaging in comparative jurisprudence need a certain cultural familiarity with the legal practice they are theorizing. This does not mean that we can only engage in comparative jurisprudential analysis of our own legal systems. It does suggest, however, that we should be careful and appropriately humble about the scope of application of our theoretical views and attempt to engage other legal systems with an awareness that knowledge of their surface rules is insufficient for understanding them as legal systems.

3. The Truth in Comparative Jurisprudence

There is still a question looming here. I have given a basic and skeletal account of the claims of comparative jurisprudence. But if the question about the relationship between this approach and private law theory is to have substantive relevance, then comparative jurisprudence ought to be true or at least plausible.

Here, I cannot do justice to the debates regarding the methodology of comparative law. But I believe comparative jurisprudence—whatever its merits or demerits as a methodological approach in comparative research—captures a series of critical substantive truths about the nature of domestic legal systems. Those truths are:

(i) The content of the law in any jurisdiction depends on more than its surface rules and doctrines;

[74] Neil MacCormick and Robert Summers, *Interpreting Statutes: A Comparative Study* (Routledge 2016).

[75] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing 2004).

[76] See Clifford Geertz, 'Deep Play: Notes on the Balinese Cockfight' (2005) 134 Daedalus 56.

(ii) Understanding the law of a jurisdiction requires a deep understanding of the values, commitments, and shared frameworks of legal agents; and
(iii) This deep understanding can only be achieved if one starts from an internal perspective.

Regarding (i), one does not have to look too far to see its plausibility. Independently of its jurisprudential implications, Dworkin's early critique of Hart's legal positivism[77] captured something important: legal reasoning does not exclusively rely on posited rules with a canonical formulation. Instead, legal reasoning is characterized by constant references to norms (which he called *principles*) without canonical formulation or a clear enactment.[78] Moreover, legal reasoning is something that has to be learned: being a lawyer is not so much a matter of knowing certain rules but rather of knowing how to 'think like a lawyer'.[79] Instead of (just) accumulating knowledge about rules and doctrines, law students become lawyers by learning how to reason in certain distinctive ways, how to adopt certain commitments internal to the practice of law, etc.

Precisely because of this reason, (ii) is true: if one wants to understand the law of a certain jurisdiction, one has to understand the values, commitments, and shared intellectual practices of legal agents. Law is a way of making sense of the social world, of institutionally labelling and conceptualizing certain facts and behaviours, etc.

Because of this, empirical knowledge about behavioural regularities and an understanding of the causal mechanisms that lead to certain outcomes are different from understanding law. As point (iii) posits, understanding law requires starting from an internal perspective.

The upshot of this is that the central questions one should ask about a legal culture or a specific area of legal culture go well beyond legal texts. The central questions of comparative jurisprudence are concerned with the values of lawyers and judges, their implicit commitments, the intellectual styles and forms of reasoning they value and adopt, etc. In this aspect, comparative jurisprudence is committed to a picture of law as more than a set of rules, a mechanism for governance, or a coercive apparatus that claims authority. It sees law as an intellectual and cultural phenomenon.

[77] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).
[78] ibid 1.
[79] Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009) 1–2. *But* see Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (CUP 2008).

IV. Three Views of Private Law Theory

What are the implications for private law theory? For this purpose, let me distinguish—somewhat simplistically—between three approaches towards private law theory: instrumentalism, formalism, and the 'New Private Law'. As is the case for any simplified categorization, there is much that this distinction distorts. However, I think these three ideal types characterize three distinct types of contemporary views about private law theory.

1. Instrumentalism

Instrumentalist views see private law as a means for achieving public goals that we can identify independently of private law institutions. For an instrumentalist theory, private law is just a tool that we can use to maximize the achievement of collective goals. The best account of private law as a social practice, for these views, lies in society-wide consequences[80] such as the maximization of overall welfare.[81]

An instrumentalist theory of contract law, for instance, understands it as an institutional device that produces good overall social consequences (such as the maximization of social welfare).[82] The view rejects the claim that contract law is best understood from the perspective of the rights and obligations of the contractual parties, and instead sees the point of contract law in overall social consequences.[83] A conspicuous example of such a view, at least in the United States, is the economic analysis of contract law. Importantly, though, instrumentalists might also be committed to other end goals beyond welfare (understood in the sense of contemporary economics).[84] For instance, one could see the law of contracts as an institution that maximizes the existence of valuable choices for individuals to pursue their goals and life projects.[85]

Instrumentalism can refer to different levels of private law: it can refer to an entire institution and specific rules.[86] It can also refer to specific behaviours. Instrumentalist theories—and particularly, economic theories—have

[80] Murphy (n 3) 154.
[81] Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard UP 2006).
[82] In this characterization, I follow Murphy (n 3) 153.
[83] ibid 154.
[84] ibid 162.
[85] See Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (CUP 2017).
[86] See Lewis Kornhauser, 'Three Roles for a Theory of Behavior in a Theory of Law' (2000) 31 Rechtstheorie 197.

been subject to the criticism that they are not able to transparently account for the practice of private law reasoning.[87] I have addressed these critiques in my previous work by referring to the distinctions between types of instrumentalism, and I will not be concerned with them here.[88] The only point to bear in mind here is that nuanced and moderate versions of instrumentalism are perfectly capable of fitting and transparently explaining the internal practice of private law reasoning. But, admittedly, the most influential instrumentalist claims in the American literature—developed by the first wave of law and economics scholars, such as Posner and Calabresi—are not much like this type of moderate or nuanced view. Instead, the most influential instrumentalist claims have been characterized precisely by their readiness to replace or at least reduce private law reasoning to questions about efficiency, costs, benefits, and incentives.[89]

2. Formalism

Formalist theories are the polar opposite of instrumentalism. They attempt to disclose a specifically legal or juristic perspective towards private law institutions.[90] For formalists, the point of legal theory is to unearth the justificatory structures internal to, and implicit in, legal thought.[91]

Formalist accounts, thus, claim that the theorization of private law does not turn on the identification of the valuable social effects it produces but on the norms and practices internal to private law. Private law, on this view, is—as the conceptual and inferential practices of lawyers and judges suggest—concerned with interactions between private parties and their juridical upshots.[92] For formalist theories, the key to understanding contract law, for instance, is to elucidate the abstract conceptual structure immanent in the materials of contract doctrine.[93]

[87] See, eg, Smith, *Contract Theory* (n 2) 151; Zipursky (n 34) 459.
[88] See Jiménez, 'Two Questions for Private Law Theory' (n 20).
[89] Weinrib, 'Can Law Survive Legal Education?' (n 29) 410.
[90] See Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33 Osgoode Hall LJ 273, 306.
[91] See Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale LJ 949; Weinrib, *The Idea of Private Law* (n 1).
[92] Allan Beever, *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (OUP 2013) 158.
[93] For a recent example, see Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard UP 2019).

One clear advantage of formalist views like these is that they fit with multiple aspects of the discursive practices of private lawyers and judges, who routinely talk about rights, wrongs, and their normative consequences.[94] This is an important difference with regards to instrumentalist views, which are almost necessarily, given their aggregative and *ex ante* perspective, less consistent with the individualized, *ex post* features of private law adjudication.[95] On the contrary, formalists focus on the correlative structure of the bilateral private law relationship.[96]

Thus, private law formalists tend to take private law reasoning quite seriously. However, the formalist view is not entirely practice-driven. Even though formalists like Benson, Ripstein, and Weinrib start from legal materials, they do not see the systematic reconstruction of legal materials as the end point of their theories. Instead, in each case, the account of private law institutions leads to, or is cabined within (depending on where it starts), a comprehensive philosophical theory about the normative structure of private law. The end product of the theorization is not a contingent reconstruction of the legal institutions that we happen to have, but rather an explanation about why those legal institutions are authoritative determinations that are intelligible without, and can serve to evaluate, legal institutions.[97] While the idea of corrective justice, for instance, is partly indeterminate, and legal institutions can accordingly vary across time and space, it is still *the* idea that must be instantiated in private law institutions.[98]

Because of this, we should not understand formalism as equivalent to the traditional work of doctrinal reconstruction.[99] Doctrinal reconstruction starts from legal materials from which general principles are derived—but it is consistent with the view that the posited legal materials always have the last word. Formalism also takes law seriously—but because it sees law as the instantiation of an abstract notion of right or reason.[100]

[94] See Jiménez, 'Two Questions for Private Law Theory' (n 20) 408.

[95] On these differences, see Jody Kraus, 'Philosophy of Contract Law' in JL Coleman, KE Himma, and SJ Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004).

[96] Ernest J Weinrib, 'Private Law and Public Right' (2011) 61 U Toronto LJ 191, 192. See also Benson (n 93) 8, 21.

[97] See, eg, Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard UP 2009) 86; Weinrib, *The Idea of Private Law* (n 1) 225–26.

[98] Weinrib, *The Idea of Private Law* (n 1) 222–29.

[99] This paragraph expresses an idea I developed in Felipe Jiménez, 'Contracts, Markets, and Justice' (2021) 71 U Toronto LJ 144, 152–54.

[100] Dan Priel, 'Two Forms of Formalism' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 168.

3. The New Private Law

Is there a middle ground between the instrumentalist and the formalist? For some time, in North American private law theory, the answer seemed to be negative. However, recently, many private law theorists—including Paul Miller, Benjamin Zipursky, John Goldberg, and Andrew Gold—have adopted a more intermediate view (following their own usage, I will use the 'New Private Law').

According to the New Private Law, we should take the structure of private law seriously. However, this is compatible with asking functional questions about legal doctrines and concepts.[101] As Goldberg explains, the approach is thus pragmatic while embracing the conceptual complexity of private law and its theorization.[102] Under this type of view, private law theory must appreciate the 'nuances in the conceptual structure of the law'.[103] Because the New Private Law takes law seriously, it also takes legal doctrine as a legitimate starting point for analysis and a structure that deserves serious explication.[104] But legal doctrine, in this picture, is the beginning of the inquiry—an inquiry that can easily lead to more instrumentalist and functionalist analyses.

One central feature of the New Private Law is that it is relatively consistent with what Kevin Tobia has dubbed 'the folk law thesis': the idea that ordinary concepts are at the basis of many important legal concepts.[105] As Goldberg argues, for the New Private Law there is commonly at least a 'family resemblance' between legal and ordinary concepts.[106]

Paul Miller has characterized the New Private Law as a new and distinctive type of formalism in private law, according to which private law provides practically reasonable normative guidance to its addressees.[107] From this perspective, the New Private Law argues that understanding private law requires understanding its attempt to provide normative guidance.[108] As such, as Andrew Gold explains, the New Private Law is committed to adopting an internal point of view.[109] Importantly, the New Private Law sees private law

[101] Andrew S Gold, 'Internal and External Perspectives: On Methodology in the New Private Law' in AS Gold and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 4; Henry E Smith, 'Intellectual Property and the New Private Law' (2017) 30 Harvard JOLT 1, 6.

[102] Goldberg (n 33) 1650.

[103] ibid 1652.

[104] ibid 1655.

[105] Kevin Tobia, 'Law and the Cognitive Science of Ordinary Concepts' in B Brozek, J Hage, and N Vincent (eds), *Law and Mind: A Survey of Law and the Cognitive Sciences* (CUP 2021).

[106] Goldberg (n 33) 1656.

[107] Paul B Miller, 'The New Formalism in Private Law' (2021) 66 Am J Jurisprudence 175, 178.

[108] ibid 198.

[109] Gold (n 101) 3–4.

as a mutable, ongoing practice, which is historically contingent and changes as a consequence of human activity.[110] However, and precisely because private law practices embody traditions that extend over time, the New Private Law starts from a default assumption that, while there might be pockets of practical unreasonableness in private law, it would be surprising if it were pervasively deficient.[111]

V. Private Law Theory as Comparative Jurisprudence

So far, I have offered a brief account of what understanding private law as a social practice requires (Section I); an overview of comparative jurisprudence, its central commitments, and its plausibility as a methodology for understanding private law (Section III); and a brief outline of contemporary North American private law theory (Section IV). With these ingredients, we can move on to discuss how comparative jurisprudence bears on private law theory.

1. Private Law as a Cultural Phenomenon

An instrumentalist view of private law need not be thoroughgoing in its instrumentalism. For instance, in other work I have argued that an instrumentalist view about contract law's foundations is compatible with a formalist approach towards the adjudication of contractual disputes.[112] Earlier, Henry Smith had argued that the formal conceptual structure of property is compatible with—and contributes to—property law's instrumental efficacy.[113] And Liam Murphy has similarly argued for the significance of a public culture that takes the duties of contract law seriously, within an instrumentalist framework.[114]

To the extent that instrumentalism adopts this more nuanced, two- or multi-level structure that makes space for the distinctive character of private law reasoning, it looks a lot like the New Private Law, and particularly like the forms of New Private Law that incorporate functionalist elements.[115]

However, this type of instrumentalism is the exception rather than the rule, at least in American legal culture, where the most influential form of

[110] Miller (n 107) 216.
[111] ibid 219.
[112] Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2020) 2020 Utah L Rev 1121.
[113] Henry E Smith, 'On the Economy of Concepts in Property' (2012) 160 U Penn L Rev 2097.
[114] Murphy (n 3).
[115] Similarly, Gold (n 101) 4–5.

instrumentalism is the instrumentalism of law and economics: a thorough instrumentalist view about foundations, legal concepts, and duties. I will focus on this thoroughgoing instrumentalist view—although I am aware of, and, in fact, would agree with, more nuanced versions of instrumentalism. I do so both because of its influence, particularly in American legal theory, and because its pitfalls are instructive of the direction in which theorization about private law should go if, as I have argued, comparative jurisprudence captures an important set of truths about law.

The thoroughgoing instrumentalism that I have in mind is well captured by Kaplow and Shavell's normative argument in *Fairness versus Welfare*.[116] According to that argument, social decisions—including all the institutional decisions adopted within private law regimes—should be based exclusively on maximizing individuals' welfare, while ignoring notions of fairness, justice, and rights.[117] If one takes this view seriously, the obvious implication for private law adjudication is that judges should try to maximize social welfare—that is, that they should be what Posner would characterize as a pragmatist judge.[118] Unsurprisingly, an important part of the project of law and economics has been to offer an interpretive theory of the central areas of the common law in terms of efficiency, wealth maximization, and so on.[119]

However, most judges do not seem to act as pragmatists—they use the deontic language of private law as carrying genuine normative implications. Faced with this fact, the instrumentalist appears to need to claim that the actual reasons underlying the practice are hidden from sight in the everyday practice of private law. The critiques to this view are by now familiar.[120] In synthesis, according to the critics, this type of thoroughgoing instrumentalism fails to take law seriously and treats private law reasoning as a duplicitous or alienated form of practical reasoning.[121]

I have some doubts about the ultimate force of this objection.[122] Here, however, I want to focus on specific problems of thoroughgoing instrumentalism that comparative jurisprudence is particularly well-suited to illuminate its tendency to ignore legal culture and its universalist perspective towards the value of private law institutions.

[116] Kaplow and Shavell (n 81).
[117] ibid xvii, 3.
[118] See Richard Posner, 'Pragmatic Adjudication' in M Dickstein (ed), *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke UP 1998).
[119] See, eg, Richard Posner, *Economic Analysis of Law* (Aspen Publishers 2011).
[120] See Zipursky (n 34). But see Jody Kraus, 'Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis' (2007) 93 Va L Rev 287.
[121] Smith, *Contract Theory* (n 2) 132–36.
[122] Jiménez, 'Two Questions for Private Law Theory' (n 20).

Human beings are 'animals suspended in webs of significance', which we have spun ourselves and which constitute our culture.[123] Legal systems are, in this sense, cultural artifacts: they are structures of meaning that organize social life.[124] Variations across legal systems, from this perspective, are not just variations in rules but also in the structures of meaning that different legal systems constitute and are part of. When a French judge makes a legal decision or announces an interpretation of a legal rule, they are also acting as French lawyers, doing things that only make sense within the mentality of the French legal culture, etc.[125] Understanding this interpretation requires situating it against the backdrop of, and within, a specific historical and cultural practice.[126]

If that is the case, the thoroughgoing instrumentalist faces a problem. They must treat as epiphenomenal[127] something that, if comparative jurisprudence is right, is quite central to what private law is. The problem is not—or not just—that a too blunt economic characterization of behaviour might end up ignoring its legal meaning.[128] The deeper problem is that, in its quest for a single external goal that can fully explain and justify the intricacies of legal doctrine, the thoroughgoing instrumentalist must ignore otherwise important factors about the meanings and expectations that characterize legal reasoning from the inside. The issue is not so much the instrumentalist's justification or interpretation of the goals of legal practice but their deliberately superficial understanding of the legal practice itself.

This is not to deny that instrumentalist explanations of areas of private law can convey something important about it. On the contrary, my view is that instrumentalism expresses significant truths about the functions played by private law and about its value for democratic and pluralistic societies. In fact, they might be adequate theories to justify private law—to connect the internal understanding of private law I have alluded to with the values and concerns of those not directly involved in the practice.[129] The issue is that these truths that instrumentalism conveys can only coexist with the cultural distinctiveness of different private law regimes if it refuses to be thoroughgoing—if it makes

[123] Geertz (n 16) 5.

[124] Gunter Bierbrauer, 'Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans Cultural Differences and Legal Consciousness' (1994) 28 Law & Society Rev 243, 243.

[125] Legrand, 'The Impossibility of Legal Transplants' (n 54) 115.

[126] ibid 116. See also Van Hoecke and Warrington (n 37) 498.

[127] Nathan B Oman, 'Private Law and Local Custom' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 160–161.

[128] See, eg, Dan M Kahan, 'Social Meaning and the Economic Analysis of Crime' (1998) 27 J Legal Studies 609.

[129] See Felipe Jiménez, 'Justifying Private Law' in P Miller and J Oberdiek (eds), *Oxford Studies in Private Law Theory* 2 (forthcoming, 2023).

space, in other words, for the meaning that private law reasoning has for those involved in the practice. The reason for this is that one cannot fully understand the object 'private law' without understanding this internal dimension. For instance, the claim that tort law is best understood as an instrument for optimizing the reduction of accident and accident-avoidance costs[130] seems to capture something important about the law of torts. But this perspective can only fully understand tort law if it makes space for the actual conceptual and inferential practices of tort lawyers and judges.

If, instead, the instrumentalist refuses to limit the scope and ambitions of their theory, if—to continue with the example—the claim that the law of torts is an instrument for reducing the total costs of accidents is understood as a claim not just about the institution, but also about the meaning of its specific doctrines and concepts—such as duty, wrong, and causation—then instrumentalism must erase the distinctiveness of the internal culture of (in this case) American tort law. At this point, the thoroughgoing instrumentalist might want to bite the bullet. They might want to argue that the cultural aspect of private law is something that we are better off ignoring. I think this is a mistaken path. As comparative jurisprudence suggests, ignoring the cultural practices and understandings that underlie legal rules and institutions leads to misunderstanding those rules and institutions. It is unlikely that the instrumentalist will be able to provide an adequate account of the object if it refuses to take the object—and its internal dimension—seriously.

There is yet another issue with instrumentalist views—an issue that is particularly significant for thoroughgoing instrumentalists but that even the more limited versions of instrumentalism can face. That issue is a naïve form of universalism that tends to see every instantiation of a legal institution in different jurisdictions as explained by, justified by reference to, or evaluated by, the same value or set of values.[131] There is, again, a modest version of universalism, according to which—given the history and actual evolution of legal institutions—an approach that transcends parochial legal systems to theorize areas of law might be contingently justified.[132] But the instrumentalist is typically not *modestly* universalist. They tend to see all practices of private law everywhere as explainable and measurable by the same criterion—efficiency, wealth maximization, or some such.

[130] Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale UP 2008).

[131] See Brian Bix, 'The Promise and Problems of Universal, General Theories of Contract Law' (2017) 30 Ratio Juris 391, 392.

[132] As I argue in Jiménez, 'Against Parochialism in Contract Theory: A Response to Brian Bix' (n 46).

This might seem too quick. After all, couldn't the instrumentalist argue that an instrumentalist theory is just a plausible theory of *our* private law or some specific private law regime? I think this alternative is actually open to the instrumentalist. But it is one that most instrumentalists have not been particularly keen on adopting. The reason is, again, that most instrumentalists tend to treat doctrinal language, conceptual practices, and legal culture—precisely what distinguishes one national practice of private law from another—as data of second-order relevance. The real explanatory work is done by the underlying instrumental goals. From this perspective, the linguistic and conceptual divergences between legal practices do not matter much for theorizing private law. What matters is the underlying goal. That goal must be the same because, after all, where would any differences between the goals pursued by different practices be if we deliberately treat the differences in legal discourse as epiphenomenal or of secondary importance? There is, thus, a strong tendency in some forms of instrumentalism to see every practice of private law as guided by the same normative commitment—and that normative commitment as the benchmark for evaluating every legal practice.[133]

What is the explanation for this tendency to treat every instance of, for example, property law as understandable and justifiable in terms of the same goal? I believe the explanation has to do with instrumentalism's conception of law and its relationship to the goals it pursues. Under that conception, the relevant goals pursued by legal institutions—such as maximizing social welfare—can be specified independently of those institutions.[134] The institutions are contingent instruments to achieve those goals. If that is the case, then variability across legal institutions shouldn't have any bearing on characterizing the underlying goals. But if comparative jurisprudence is right, this approach will distort the object we are trying to justify.

To avoid any misunderstanding, I think it is plausible that the moral point of a certain type of legal institution or practice might be the same across different jurisdictions. And I do not think it is necessarily mistaken to believe that we can specify the moral values served by a legal institution independently of the internal structure of that institution. What I do take as a mistake is the naïve assumption of universalism—the idea that private law serves or ought to serve efficiency anywhere it exists, independently of what each private law practice is concerned with from an internal perspective. That assumption is

[133] See, eg, Rafael La Porta and others, 'Law and Finance' (1998) 106 J Political Economy 1113.

[134] This is an idea I take from Martin Stone, 'Legal Positivism as an Idea about Morality' (2011) 61 U Toronto LJ 313.

partly explained by the instrumentalist insistence on seeing legal institutions as a mere contingent instrument of goals that are valuable *qua* independent goals, not *qua* the goals that are significant for—and therefore partly constitute—any specific legal culture.

A better version of instrumentalism—one more compatible with comparative jurisprudence—would instead take its cue from Isaiah Berlin. It would expect different societies and different legal systems to adopt different ideals, aim at different goals, and reflect different commitments.[135] It would see different regimes of private law as characterized by different intellectual styles and cognitive practices that embody different sets of values.[136] That is the instrumentalism we should have, but not the one that the most influential instrumentalism on offer—law and economics—has provided so far.

2. The Contingency of Private Law

While many instrumentalists seem happy to discount the significance of legal discourse, formalists tend to start from the opposite claim: the claim to take law's internal rationality seriously.[137] This certainly seems to bring formalism closer to comparative jurisprudence. In fact, Catherine Valcke has linked formalism to Ewald's account of comparative jurisprudence.[138] However, formalism is at odds with comparative jurisprudence in at least two ways. First, while formalism treats domestic private law seriously, it still sees it as an attempt to approximate an abstract and indeterminate blueprint that can be brought to bear on the evaluation of private law and that determines what it is with at least some independence from the contingent variations across legal cultures. Second, formalism is committed to a specific philosophical framework to understand private law regimes—a philosophical framework that can be quite different from those derived from the more variable, contingent history of the specific legal tradition. In both respects, formalism—while closer in some ways to comparative jurisprudence than instrumentalism—is not sufficiently committed to the intellectual specificity derived from the path dependence and the contingent historical routes followed by each distinct legal

[135] Ella Myers, 'From Pluralism to Liberalism: Rereading Isaiah Berlin' (2010) 72 The Review of Politics 599, 612.

[136] George Kateb, 'Can Cultures Be Judged? Two Defenses of Cultural Pluralism in Isaiah Berlin's Work' (1999) 66 Social Research 1009, 1023–24.

[137] See, eg, Weinrib, *The Idea of Private Law* (n 1).

[138] Valcke, 'Comparative Law as Comparative Jurisprudence' (n 40) 716 fn 22.

system. In other words, formalism tends to obscure the contingency of private law.

Private law formalists are aware of this critique. Arthur Ripstein, for instance, writes:

> A number of people have asked… about the viability of 'turning Kant into a common lawyer.' Students of the history of the common law often note its antitheoretical orientation, its practice of developing one case at a time, and some writers have thought it important to point out the great common law judges of earlier centuries did not read Kant. No doubt they did not, but any felt need to point this out betrays a misconception of Kant's, and indeed any, philosophical project of understanding an area of legal doctrine… I do not put forward a historical hypothesis… I take seriously Kant's own insistence that he would not presume to invent a new moral principle. The point of providing an account of the form of thought in an area of legal doctrine is not to invent that area, or give someone else credit for inventing it. Instead, it is to make it intelligible, to show how the characteristic modes of reasoning, the questions asked, and the inferences permitted or refused fit into an integrated pattern. That pattern is composed of conceptual and normative structures.[139]

Thus, the formalist response to this type of critique is that it misunderstands what it means to render a social practice like private law intelligible. Such a project requires, according to Ripstein, showing 'how the characteristic modes of reasoning, the questions asked, and the inferences permitted or refused [by an area of private law] fit into an integrated pattern.'[140]

The problem with this response is that the characteristic modes of reasoning, the inferential moves allowed, and so on, have a specific and contingent history—a specific genealogy that diverges from system to system at different points in time.[141] While there is certainly a distinction between understanding an area of private law and describing its historical path, the internal dimension of the relevant practices is impacted by, and depends on historical contingency. The problem, from this perspective, is not that common-law judges did not read Kant, but that the intellectual sources from which their practices derived and that give those practices their specific features and make them what they are were quite specific to the common-law tradition.

[139] Arthur Ripstein, *Private Wrongs* (Harvard UP 2016) xi.
[140] ibid.
[141] Making this claim from the perspective of common law theory, Oman (n 127) 174.

Formalists can accommodate variability and contingency, to some extent. In the Kantian account, for instance, the rights protected by private law are not, at the most fundamental level, artificial or fully dependent on legal practices. They are intelligible before conventional institutions and civil society. However, these private rights are—in the absence of legal institutions—provisional because they are unilaterally asserted, and therefore, their status as valid rights-claims is unsettled in the absence of—and until there is—positive law.[142] Private rights in a civil condition are the full realization of the *idea* of rights that, in the state of nature, are merely provisional.[143] Under this view, our private rights are authoritatively determined by the public legal institutions of each specific society.[144] The determinations of these institutions are constitutively required to make each person's rights consistent with the rights of others.[145] The general norms of abstract right that, according to the Kantian formalist, underlie private law, can receive different specific instantiations in different legal cultures.

The limitation, however, is that for formalists the specific questions answered by legal institutions are all derived from a more general, distinctive question that morality demands an answer to, and which explains the need for legal institutions.[146] On this account, there is a straight line—a coherent unity—between the Kantian idea of a will, abstract right, corrective justice, and public legal order.[147] The notion of right 'is comprehensive, unifying, and systematic, encompassing everything from the operation of the will to substantive legal doctrines and institutions'.[148]

Thus, formalism makes space for variation across legal cultures. The notion of right is, after all, *abstract*. However, the formalist sees private law in different societies as aiming to answer a universal moral question. As such, private law theory is, in the eyes of the formalist, primarily a philosophical elucidation of that universal moral question.

In this aspect, comparative jurisprudence is quite different. It sees philosophy as relevant to understand the intellectual underpinnings of specific legal systems, as necessary because we want to understand the intellectual foundations of the legal system and the underlying phenomena that make a specific legal

[142] Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (2nd edn, University of California Press 2017) 70.
[143] Martin Stone and Rafeeq Hasan, 'What Is Provisional Right?' (2022) 131 Philosophical Review 51.
[144] Brudner (n 142) 76.
[145] Ripstein (n 97) 9.
[146] See Martin Stone, 'Kant's Apparent Positivism' in M Stone (ed), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart 2017) 174.
[147] Weinrib, *The Idea of Private Law* (n 1) 100–09.
[148] ibid 109.

practice what it is.[149] What the formalist sees as multiple attempts to answer a universal moral question, then, is to the comparative jurisprude the actual variation that we should expect to observe across different social practices that reflect different cultures, commitments, and histories. What we need, in order to understand private law, is not to connect each specific instance of it to Kant's or Hegel's legal philosophy but rather to see how those different practices represent the offshoots of the philosophical ideas of Ulpian, Coke, Blackstone, Cajetan, Savigny, Ihering, Cardozo, or Pothier. This requires putting the contingent intellectual histories of each legal practice in the driving seat rather than at the service of a general, abstract, and universal legal philosophy.

3. Professional Private Law

The New Private Law seems to be in a better position to capture private law's contingency than formalism. And, unlike thoroughgoing instrumentalism, the New Private Law is more oriented towards capturing how the internal dimension of private law is compatible with its functional analysis.[150]

I think the New Private Law is, thus, a step in the right direction. But some of its commitments (or, at least, some of the commitments of some theorists who see themselves as members of the New Private Law) can be somewhat in tension with comparative jurisprudence and the truths about the law that, as I have argued, it captures.

One of the truths that comparative jurisprudence captures is that law is a cognitive practice in which judges, lawyers, and legal academics engage. Law is the living record of the intellectual activities of legal actors.[151] Thus, the culture that we should try to understand is, primarily, the culture of legal practitioners—the *internal* legal culture, that is, the practices and ideas of legal officials, lawyers, and legal academics.[152]

The New Private Law puts great emphasis on the law's guidance of citizens. Paul Miller, for instance, argues that the law's central role is providing 'practically reasonable guidance' to its addressees, which includes citizens,[153] through

[149] Ewald, 'Comparative Jurisprudence (I)' (n 38) 1960.
[150] Andrew S Gold and others, 'Introduction' in AS Gold and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) xv.
[151] Ewald, 'Comparative Jurisprudence (I)' (n 38) 1948–49.
[152] On internal legal culture, see Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 223; Sally Engle Merry, 'What Is Legal Culture? An Anthropological Perspective' (2010) 5 J Comp Law 40, 43.
[153] Miller (n 107) 196–97.

the provision of practical reasons.[154] In similar terms, Gold and Smith write that 'implicit in law's claim of authority is the possibility that citizens have the capacity to follow the law's guidance'.[155] Because of this, private law ought to be understandable by ordinary citizens, knowable by parties subject to its rules, etc.[156] John Goldberg argues, in a relatively similar vein, that according to the New Private Law, there is often at least a family resemblance between legal and lay concepts and norms, and this explains private law's authority.[157] This overlap, Goldberg argues, is not a coincidence. Private law is partly designed to make that overlap possible (for instance, through the institution of the jury, standards of reasonableness, trade usages, and interpretive techniques that attempt to align legal and ordinary meaning).[158] Goldberg recognizes there is no perfect fit here between legal and social norms.[159] The point is just that private law strives, in general, to a certain degree of consistency with lay moral intuitions, a fact that should be acknowledged by private law theory.[160] The project of private law adjudication, expressed in the very idea of the 'common law', according to Goldberg and Zipursky, involves drawing the wrongs that the law recognizes from everyday life.[161]

This general orientation towards private law's guidance of ordinary citizens through predictable, scalable, and recognizable standards of conduct that characterize the New Private Law has been recognized by scholars beyond this group. Kevin Tobia, for instance, has noted how—from the perspective of experimental jurisprudence—many legal concepts share features of ordinary concepts and how this overlap is compatible with the New Private Law's commitment to a defeasible preference for this overlap.[162] For both movements, Tobia writes, laypeople are not objects but central members of 'our' legal community, 'poised to contribute meaningfully to legal theory'.[163]

I would certainly accept that there are connections between legal and ordinary concepts. And I agree that an important point of legal institutions is to guide the behaviour of ordinary people. Nevertheless, this should not lead us to downplay something centrally important about private law in contemporary

[154] ibid 199.
[155] Andrew S Gold and Henry E Smith, 'Sizing up Private Law' (2019) 70 U Toronto LJ 489, 511.
[156] ibid 512.
[157] Goldberg (n 33) 1656.
[158] ibid 1657.
[159] ibid 1658.
[160] John CP Goldberg and Benjamin C Zipursky, *Recognizing Wrongs* (Harvard UP 2020) 79.
[161] ibid 208.
[162] Kevin Tobia, 'Experimental Jurisprudence' (2022) 89 U Chicago L Rev 735.
[163] ibid.

Western legal systems—namely, that private law is a peculiarly and particularly *professional* area of law.

As I have argued elsewhere,[164] law is an institutional structure that becomes operational once it is populated by specific agents in charge of interpreting, applying, and enforcing legal norms, operating against a specific social and physical background. A legal system is a social apparatus populated by actual human beings, such as lawyers and judges. Because of this, how any legal system operates depends partly on who populates it and fills out specific institutional positions within it.

This general claim is particularly salient in private law. Private law lawmaking is characteristically driven by professional elites—by judges, lawyers, and law professors—even when it takes place, formally, in democratic venues.[165] The interpretation of private law is characteristically developed by judges in judicial venues. Moreover, unlike other areas of law, in private law doctrinal reasoning seems to drive outcomes much more than 'external' factors. This might explain why formalism—which sees law and politics as radically separated and law as a self-standing and autonomous justificatory structure—found its home in private law theory.

Many of private law's central categories in common-law jurisdictions are creations of professionals—specifically, judges. There is a long tradition that theorizes the common law as following and building upon local social customs.[166] Whether that theory was consistent with reality in the eighteenth and nineteenth centuries is an important question. However, while certainly sensitive to lay practice, common-law reasoning is very much driven by judges—so much so that the way in which common-law standards are ascertained and determined by lawyers does not involve empirical investigation into social practices, but rather legal research involving judicial decisions and legal authorities.

The contribution of law professors is less commonly mentioned, but also significant and important—not just in civil law systems.[167] Features as central to American law as the distinction between the reliance and expectation interests[168] or the right to privacy[169] cannot be understood without reference to law professors' contribution.

[164] Felipe Jiménez, 'Some Doubts About Folk Jurisprudence: The Case of Proximate Cause' [2021] U Chicago L Rev Online <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/>.

[165] See Jansen (n 67) 45–49; Arie Rosen, 'The Role of Democracy in Private Law' (2022).

[166] See generally Oman (n 127).

[167] James Gordley, 'The State's Private Law and Legal Academia' (2008) 56 Am J Comp Law 639, 641.

[168] Lon Fuller and William R Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 Yale LJ 52.

[169] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard LR 193.

Private law's professional characteristics might be troublesome from a variety of normative perspectives, including concerns about fair notice, predictability, and democratic legitimacy. But we cannot fully understand private law, its virtues and its potential risks if we ignore this trait.[170] Private law in the Western legal tradition is characterized by the presence of technical terms and terms with specialized meanings.[171] Because of this, there is always a potential tension between the layperson and the lawyer, between ordinary and legal language. This explains why lawyers need to engage in a certain translation to communicate across these two languages.[172]

What all of this entails is that understanding private law requires understanding its specific features, including the professional and technical character of its discourse. The New Private Law's focus on guidance and the provision of practical reasons for ordinary citizens is warranted, but it has to be combined with a deep awareness of the fact that these tasks are mediated by legal professionals and legal culture. New Private Law theorists already recognize the potential divergences between legal and lay views.[173] Yet if it wanted to follow the lead of comparative jurisprudence—and, for the reasons I have alluded to, I think it should—the New Private Law should put the inferential, linguistic, cognitive, and cultural practices of private law professionals (judges, lawyers, and legal scholars) front and centre, and see law's role in supplying practical guidance in connection with the mediation of these legal experts.

VI. Conclusion

Understanding private law requires understanding not just the rules and doctrines of private law but the underlying cultural, ideological, and philosophical ideas that characterize it. Understanding private law, in other words, is a matter of interpreting the cognitive structure that characterizes the practice for those actively engaged in it.

This understanding is necessary for interpretive, normative, and descriptive projects in private law theory. But if it is necessary, then the question is what type of methodology is best suited for understanding private law theory.

[170] This paragraph builds upon Jiménez (n 131).

[171] Frederick Schauer, 'Is Law a Technical Language?' (2015) 52 San Diego L Rev 501, 501–502. See *also* Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harvard LR 625, 652; Lon Fuller, *Legal Fictions* (Stanford UP 1967) 12.

[172] James Boyd White, 'An Old-Fashioned View of the Nature of Law' (2011) 12 Theoretical Inquiries in Law 381, 388–89.

[173] Goldberg (n 33) 1658.

My view, as I have argued, is that comparative jurisprudence is an attractive model for that methodology. Comparative jurisprudence highlights, precisely, that the content of private law depends on more than its surface rules and doctrines, understanding private requires understanding the values and commitments of legal agents, and this requires the adoption of an internal perspective.

As I have explained, instrumentalism—particularly, the thoroughgoing instrumentalism characteristic of some forms of law and economics—is not well-suited to adopt this perspective. It basically ignores that law is a cultural phenomenon characterized by modes of thought and talk that are not merely epiphenomenal or instrumental. Formalism, while better in this specific aspect, tends to downplay the contingency of private law and the fact that philosophical ideas are made relevant by social practices—not the other way around. The New Private Law is in a better position than both instrumentalism and formalism. But, as I argue, it should move towards a greater insistence on the professional character of private law.