Is there such a thing as private law?

David Campbell[*]

In Justice in Private Law, Professor Jaffey seeks to give a comprehensive and unified "interpretively" adequate account of the "traditional private law", the main areas of which are property, contract, and tort. Jaffey argues that both "corrective justice" and "distributive justice" theories of private law are seriously inadequate, and puts forward a "reconciliation" of them. Jaffey's new theory gives supremacy to distributive justice, but seeks to avoid annihilating corrective justice through the concept of the "standpoint limitation". Whereas legislation can reset rights on the basis of a wide knowledge of distributive concerns, adjudication should give effect to what the individual parties to disputes could reasonably know and expect on the basis of existing rights, though when adjudication itself requires the development of the law, this should be informed by distributive principle. This theory of the private law fundamentally based on the collective judgements of distributive justice cannot sustain the inviolability of the private which is necessary for the economic and legal freedoms of the market economy, and Jaffey's concept of traditional private law embraces a very great deal of state intervention.

INTRODUCTION

In this important book,[1] a comprehensive statement of the views of one of our leading commentators formed after a quarter century of reflection on its subject, Professor Jaffey makes a both interestingly distinctive and simultaneously even more interestingly characteristic contribution to the now very large legal academic literature on private law theory. Basing his discussion on the distinction between corrective and distributive justice, Jaffey argues that both are "interpretively" inadequate because both fail to accommodate essential features of the "traditional private law", and so in use their distinction breaks down. Though the principal idiom of private law theory is corrective justice, accounts of the positive

[*] Professor of Law, Lancaster University Law School. I am grateful to Allan Beever, Peter Jaffey, and to the Editor and his referees for their comments.

[1] JUSTICE IN PRIVATE LAW. *Peter Jaffey, Professor of Law, Leicester Law School, University of Leicester, UK, Hart, Oxford*. (2023) xii + 179 pp plus 3 p Index. ISBN 978-1-5099-5388-2. Hardback £80, Paperback £45. Unattributed references are to this book.

law, particularly of negligence, are shot through with distributive justice considerations. Jaffey advances an alternative "general account of private law" in which distributive justice, reworked to respect what he calls the "standpoint limitation" essential to common law reasoning, is to subsume but simultaneously preserve corrective justice. Jaffey's arguments should command attention from all concerned with private law theory, and with the possible impact of this theory on private law's conventionally understood constituent parts: property, contract, and tort.

Justice in Private Law continuously stimulates thought about the abiding controversies within private law theory, but its overall significance is that it inadvertently but pointedly calls into question the very idea that there is a private law in some way unifying property, contract, and tort. The grave problem is that, though property and contract are the common laws making possible private economic action, negligence is an imposition by the state based on judicial legislation, and attempting to integrate the three into "traditional private law" must undermine the very concept of the "private". It is of particular concern that, though the economic analysis of law plays an important part in Jaffey's book, the market economics of private economic action have no role. This is expressive of the way in which the legal academic theory of private law is so confused about individual autonomy and state imposition that the *private* law it describes does not exist.

TRADITIONAL PRIVATE LAW

There is a very considerable burden borne by Jaffey's definition of his subject matter as "traditional private law", the "main areas [of which] are contract, tort and private property".[2] The first thing that strikes one is that this law can be called traditional because it does not include a "main area" of unjust enrichment, the claim for the existence of which can be traced

[2] At 1.

back only to 1966, if not to 1985. Jaffey's reputation was initially made by taking a dissonant view of restitution,[3] but, far from taking up the important arguments about unjust enrichment he has since made,[4] Jaffey summarises the burden of those arguments only in the briefest way,[5] and makes very limited reference to restitutionary claims.[6] Jaffey would seem now to be of the opinion that the Birksian unjust enrichment project no longer merits serious intellectual consideration.[7]

The nature of the domain thus delimited is defined thus: "Private law is the law applicable as between individuals, by which one person enforces a legal right against another through civil proceedings".[8] This definition has to distinguish private from public, in this sense including criminal, law, and though no sustained attempt to do this is made, relevant distinctions are drawn in the course of Jaffey's discussions of "characteristic features of traditional private law".[9]

The first such feature, an amplification of the place of "individuals" in Jaffey's definition, is "bilateralism":

> "Private law establishes bilateral legal relations between two parties, C and D. As conventionally understood, these bilateral relations consist of a right of C against D, and a correlative duty owed by D to C. The relation is correlative in the sense that C's right and D's duty are the same thing expressed from opposite viewpoints; one can describe the law equivalently in terms of C's right and D's duty".[10]

[3] P Jaffey, *The Nature and Scope of Restitution* (Hart, Oxford, 2000).
[4] P Jaffey, "The Unjust Enrichment Fallacy and Private Law" (2013) 26 *Canadian Journal of Law and Jurisprudence* 115.
[5] At 171.
[6] At 133-35, 146-48.
[7] P Jaffey, "The Way Forward" in W Swain and S Peari (eds), *Rethinking Unjust Enrichment* (Oxford, OUP, 2023).
[8] At 1.
[9] At 1.
[10] At 2.

The contrast initially driven at here is between "interpersonal moral rights"[11] and "rights against and duties to the state, given effect in law as public rights and duties, most obviously in the form of rights to public services and benefits and duties to pay tax".[12]

The second feature of private law, an amplification of "legal right [enforced] through civil proceedings", is that the law is given by effect by the provision of a "remedy" seeking to achieve "interpersonal justice",[13] in contrast to the application of a "sanction" in "the public interest":

> "Any measure ordered by the court at the conclusion of proceedings may be described as a remedy, but it is helpful to distinguish between remedies in the strict sense, and non-remedial responses, including sanctions. A remedy in the strict sense is a measure that serves to protect C's primary right by mitigating or reversing so far as possible the effects of the infringement of C's right, typically by compensating C for the harm C has suffered. By contrast, a sanction serves the public interest by protecting not C's primary right but the rights of others in the same position as C in the future, through the effect of the sanction on D in deterring other people in a comparable position to D from committing a similar wrong".[14]

Jaffey begins to describe his approach to this private law by drawing what he describes as "The most fundamental distinction with respect to theories of law … between social scientific or socio-legal theories of law ["STLs"] and moral theories of law ["MTLs"]".[15] Social scientific theories of "the social world" in general, and socio-legal theories of "the actions of people and courts and other legal institutions" in particular, are "empirical and causal"; they purport "to explain and predict the actions of people in society in causal terms".[16] A moral theory of law "is a theory about what the law ought to be, that is to say a theory of that part of morality or justice that it is justified to require by law".[17] At a first blush, this is, of course, the distinction between "positive" and "normative", the most important statement of which in modern legal theory is Austin's staunch separation of

[11] At 1.
[12] At 45.
[13] At 4.
[14] At 4.
[15] At 11.
[16] At 11.
[17] At 12.

"jurisprudence" and "legislation".[18] But Jaffey's argument, representatively of private law theory, is based on departing from this distinction.

The very purpose of Austin's conception of jurisprudence was to withhold approval, or disapproval, from the positive law. Jurisprudence might be the study of the law as it is, and not as it ought to be, but that did not mean that the law as it is was the law as it ought to be. If Austin's wife was obliged to describe his life as a failure, the failure stemmed from a profound regret that his teachings did not have the reforming effect sought by a Benthamite radical (albeit one whose initial "ardour" was diminished by abrasion with "indifference and neglect").[19] But Jaffey is, in contrast, fundamentally approving of his subject. As we shall see, Jaffey's views of legal reasoning are an adaptation of the "interpretivism" of Ronald Dworkin,[20] and in Jaffey's case, unlike in other influential versions of interpretivism in private law theory, the adaptation of Dworkin is a close one in which the dimensions of fit with past cases and consistency of principle are to be "harmonised" in "holistic" private law adjudication. The normative and the positive comingle. And so the "moral theory of how courts ought to develop the common law" which Jaffey puts forward is "also" claimed to have "guided the development of the common law," and so "shows why traditional private law is broadly justified"[21] as a "largely coherent body of law [giving] effect to a genuine form of justice".[22]

Though beginning by distinguishing positive STLs and normative MTLs, Jaffey's approach collapses their distinction in order to confer normative approval upon the

[18] J Austin, *The Province of Jurisprudence Determined* (CUP, Cambridge, 1995), 112-13.

[19] S Austin, "Preface" in J Austin, *Lectures on Jurisprudence*, vol 1, rev 5th edn (John Murray, London, 1911). 2.

[20] R Dworkin, *Law's Empire* (Fontana, London, 1986), 228:
"When a judge declares that a particular principle is instinct in law, he reports … an interpretive proposal: that the principle both fits and justifies some complex part of legal practice [providing] the consistency of principle that integrity requires".

[21] At 18.

[22] At 44-45. See also at 61.

"traditional private law". This approach is very thought-provoking, but its questionability as both jurisprudence and legislation emerges pointedly when it becomes clear that Jaffey's conception of private law is itself highly questionable.

THE SHORTCOMINGS OF CORRECTIVE AND DISTRIBUTIVE JUSTICE

Jaffey develops his interpretively adequate theory through criticism of the "two rival schools of thought in the literature on private law … the corrective justice and distributive justice approaches".[23] Jaffey is perfectly well aware that the identification of these schools involves including within each of them numerous differing, or even conflicting, positions, and the time he spends on some of these differences is so generous as to risk obscuring his basic argument. That argument is that corrective justice and distributive justice are "mutually exclusive comprehensive theories of private law"[24] which "seem to be in competition with each other",[25] but as neither can seriously be considered actually to be comprehensive, we must recognise the necessity of "a new approach"[26] which will be a "reconciliation"[27] of both.

Jaffey tells us that:

> "On the corrective justice approach, private law is based on individual moral rights against other people … these are moral rights protecting personal liberty, encompassing not only freedom of action with respect to the body and property, but also the power to acquire property and make contracts. The bilateral legal relations of private law are based directly on these moral rights of one person against another. This is why private law is intrinsically a matter of interpersonal rights … Only these basic liberty rights are relevant to private law."[28]

By contrast:

> "Distributive justice is concerned with how the interests of individuals across society with respect to benefits and harms should be advanced and accommodated in the way that society is organised and operates. Each person's entitlement in distributive justice depends on that person's circumstances relative to everyone else's across society, all considered together because of their interdependence. It would seem that one cannot feasibly understand

[23] At 1.
[24] At 80, See also at 17, 83.
[25] At 11.
[26] At 1.
[27] At 9.
[28] At 62.

distributive justice in terms of the moral rights of each person against every other person. In practice, distributive justice depends on the operations of societal institutions to mediate between individuals, and so it has to be understood in terms of individual rights against and duties to the state."[29]

If we first compare corrective and distributive justice in terms of the interpretive dimension of fit, then surely there is no contest between them. Jaffey understates the position when he says that the corrective justice approach "appears to accord with traditional common law legal reasoning",[30] and "does better than the distributive justice approach in explaining traditional private law".[31] On Jaffey's descriptions of traditional private law and corrective justice, corrective justice showing "why private law has … characteristic features [following from being] focused on the parties' relationship and not on wider consequences for society",[32] is *the* "internal"[33] theory of traditional private law, and it is misleading to say that distributive justice is a "rival", "comprehensive" theory in this sense. Distributive justice is an "external" approach "employed to evaluate the law and recommend reform".[34] From the standpoint of "society", distributive justice passes a verdict on all existing and proposed ways in which "society is organised and operates", one of which is traditional private law:

"According to the distributive justice approach, when judges develop private law or the legislature legislates for the interactions of private law, it is distributive justice that they should draw on. Private law is concerned with interactions that generate benefits and harms, and private law stipulates whether the parties ought to engage in the interaction, or what of liability they should bear in doing so, and what the legal consequences should be. The rules on these issues contribute to determining the distribution of benefits and harms across society and do seem to be in principle a matter for distributive justice".[35]

From a distributive justice perspective, adjudication (and legislation) cannot and should not regard "interpersonal rights" as inviolate and should recommend change to or defiance of such rights if this would yield a superior social outcome: "The distributive justice approach

[29] At 45.
[30] At 7.
[31] At 40.
[32] At 63.
[33] At 10.
[34] *Ibid*.
[35] At 40.

… rejects the idea that the bilateral relations of private law are based on interpersonal moral rights and … accepts the possibility that justice might be better achieved in some other way that does not conform to traditional private law and may not even involve bilateral relations".[36] One can confidently expect this "possibility" of criticism to be realised, for, Jaffey tells us, "private law, as it has developed, often seems to depart from what any plausible theory of distributive justice could possibly prescribe". [37] "Private law does not give effect to distributive justice or to public purposes",[38] and "In particular … takes no account of the societal distribution of wealth".[39]

Jaffey is, of course, taking up the way that corrective and distributive justice characteristically feature in "the literature on private law" as rival deontological and consequentialist theories of that law. Corrective justice is a theory of individual "rights" which trump consequentialist considerations so that "policy analysis of the effects of possible rules governing the interaction of harms and benefits across the society is not relevant to private law".[40] Distributive justice is a social consequentialism which is prepared to trump such claimed individual rights so that "any part of private law that is not justifiable in terms of distributive justice should be reformed or abolished".[41] This way of looking at the issues immediately poses the question of which rival should be superior and which should be subordinate:

> "According to the corrective justice approach, the law governing interactions *should* give effect to a distinct form of interpersonal justice applicable to interactions, which gives effect to bilateral duties, wrongs and remedies … According to the distributive justice approach, the law governing interactions *should* give effect to justice in the distribution of harms and benefits and harms across society as a whole".[42]

[36] At 7.
[37] At 44.
[38] At 62.
[39] At 44.
[40] At 63.
[41] At 83.
[42] At 12 (emphases added).

Jaffey answers the question of superiority emphatically in favour of distributive justice, but in a way which tries to avoid annihilating corrective justice, and we shall, of course, look closely at this answer, which is based on his concept of standpoint limitation. Preparatory to doing so, it is necessary to explore a further dimension of Jaffey's treatment of deontological and consequentialist approaches which emerges from his treatment, not of "law", but of "economics".

LAW AND ECONOMICS

EAL

Jaffey accords "economics" a very important role in the development of private law theory. He tells us that: "The standard though not the only version of the distributive justice approach is the 'economic analysis of law' (EAL), which holds that private law should serve to maximise the aggregate welfare or net benefit associated with interactions",[43] and that "the theoretical controversy over private law seems to have begun with the emergence of EAL, which prompted the development of modern corrective justice theory by way of a response, broadly with the aim of vindicating the traditional understanding of private law".[44] By EAL Jaffey is, of course, referring principally to the huge body of work stimulated by Richard Posner, whose *Economic Analysis of Law*, first published in 1972 and still being updated in electronic format, is, for good or ill, after *The Concept of Law* and *Taking Rights Seriously*, the most influential work of legal scholarship in the postwar common law world, and it certainly is the case that EAL was a major stimulus to the foundational statements of corrective justice, such as those by Weinrib and Coleman emphasised by Jaffey.[45]

[43] At 1.
[44] At 7.
[45] At 45. The crux of this aspect of Weinrib's and Coleman's arguments is expressed in EJ Weinrib, *The Idea of Private Law*, rev edn (OUP, Oxford, 2012), 130-33 and JL Coleman, *Risks and Wrongs* (CUP, Cambridge, 1992), 380-82.

Jaffey actually makes little reference to Posner or to the arguments characteristic of the Posnerian school, and the distributional principle of Posnerian EAL, wealth maximisation, is mentioned only in a footnote.[46] Jaffey is concerned only with EAL as an exemplar of the consequentialism of distributive justice. He is perfectly right to regard EAL in this way, but this is not the case with regard to "economics" *in toto*. Though welfare maximisation is a principle of right-wing cast,[47] EAL is a form of the welfare economics first given systematic expression by AC Pigou which has become one of the basic economic policies of the left-wing interventionist state. Posner saw his views as an adaptation of the important refinement of Pigou eponymously known as Kaldor-Hicks efficiency after Lord Kaldor and Sir John Hicks.[48]

In welfare economics a sum of the welfare yielded by voluntary choices on the market is evaluated and interventions proposed to increase that sum in what is of its nature a collective decision-making process. Jaffey, with respect, seems not to appreciate that EAL therefore is the antithesis of liberal or market economics in the tradition of Adam Smith,[49] of which he makes no mention at all.[50] In principle, market economics eschew the collective evaluation of the results of voluntary choice. Economic efficiency is not a matter of the achievement of collectively identified sums of welfare, but of the extent to which goods are allocated by voluntary choice.[51] The statement in economic theory of efficiency as the claim that a general competitive equilibrium will be Pareto optimal is one of the most important claims in all of European humanities, but, rather than address this directly, it is better for our

[46] At 41 n.3.

[47] CE Baker, "The Ideology of the Economic Analysis of Law" (1975) 5 *Philosophy and Public Affairs* 3.

[48] D Campbell, "Welfare Economics for Capitalists: The Economic Consequences of Judge Posner" (2012) 33 *Cardozo Law Review* 2233.

[49] RP Malloy, "Invisible Hand or Sleight of Hand: Adam Smith, Richard Posner, and the Philosophy of Law and Economics" (1988) 36 *University of Kansas Law Review* 209

[50] Hume's theory of property is *en passant* described as the "standard account" at 161 n.31.

[51] The issues are set out as they apply to the law of contract in D Campbell, *Contractual Relations* (OUP, Oxford, 2022), 12-27.

purposes to address its foundations in the social thought of Smith and other figures of the Scottish Enlightenment.[52]

Market economics

Far from being derived from juridical reasoning, in the theory of the market economy justice is derived from a specific "philosophical anthropology" of human being. In Hume's foundational statement, "property … and obligation … are altogether unintelligible"[53] without the existence of justice, "the convention entered into by all the members of … society … for the distinction of property … the stability of possession [and] the transference of property by consent".[54] But though the secure maintenance of justice "in large and polished societies"[55] requires government, the principles of justice are "antecedent to government"[56] because they are given as a necessary response to two of "the circumstances of human nature".[57] It is an "avidity … of acquiring goods [which] is insatiable, perpetual, universal, and directly destructive of society",[58] and the "scarcity" of those goods in the sense that nature does not provide "a sufficient quantity of them to supply everyone's desires",[59] that make justice "absolutely necessary to human society".[60] The "stability of possession … is of all circumstances the most necessary to the establishment of human society"[61] because it will replace unrelieved conflict, and so "leave everyone in the peaceable enjoyment of what he may acquire by his fortune and his industry".[62]

[52] Quotation from Enlightenment figures has sometimes silently been brought into conformity with modern usage.
[53] D Hume, *A Treatise of Human Nature* in *The Clarendon Edition of the Works*, vol 1 (Clarendon Press, Oxford, 2007), 315.
[54] *Ibid*, 315, 316, 330.
[55] *Ibid*, 348.
[56] *Ibid*, 347.
[57] *Ibid*, 312.
[58] *Ibid*, 316.
[59] *Ibid*, 313.
[60] *Ibid*, 322.
[61] *Ibid*, 315.
[62] *Ibid*, 314.

Hume went on to claim that "After the agreement and fixing and observing of [the rule of stability of possession], there remains little or nothing to be done towards settling a perfect harmony and concord".[63] This view of the nature of a good society is, of course, that which Smith described as the "obvious and simple system of natural liberty [which] establishes itself of its own accord".[64] Within that system:

> "Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage indeed, and not that of society which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to society … every individual necessarily labours to render the annual revenue as great as he can. He generally indeed neither intends to promote the public interest, nor knows how much he is promoting it … he intends only his own gain and he is … led by an invisible hand to promote an end which was no part of his intention".[65]

An essential condition of the system of natural liberty is the adoption of the policy which has come down to us as "*laissez faire*":

> "it requires no more than to *leave [Nature] alone* and give her fair play in the pursuit of her own ends that she may establish her own designs … Little else is required to carry a state to the highest degree of affluence … brought about by the natural course of things".[66]

There is, however, no more profound an error in social thought than to regard *laissez faire* as an absence of regulation by law. *Laissez faire* is a specific form of regulation, justice, which creates the legal framework of property and contract within which, by "an alteration of its direction",[67] the insatiable impulse to acquisitiveness, destructive in itself, is transformed from rapacity into the "co-operation and assistance of great multitudes"[68] "from which public and national, as well as private, opulence is originally derived".[69] In a passage omitted from the famous statement of *laissez faire* quoted above, Smith specified that the "Little else … required

[63] *Ibid*, 315-16.

[64] A Smith, *The Wealth of Nations* in *The Glasgow Edition of the Works and Correspondence*, vol 2 (Clarendon Press, Oxford, 1976), 687.

[65] *Ibid*, 454, 456.

[66] D Stewart, "Account of the Life and Writings of Adam Smith LLD", in A Smith, *Essays on Philosophical Subjects* in *The Glasgow Edition of the Works and Correspondence*, vol 3 (Clarendon Press, Oxford, 1980), 322 (emphasis added).

[67] Hume, *Treatise* (*supra* n.53), 316.

[68] Smith, *Wealth of Nations* (*supra* n.64), 26.

[69] *Ibid*, 343.

to carry a state to the highest degree of affluence" was the not inconsiderable task, which must be performed by a government enjoying the monopoly of violence,[70] of maintaining "peace, easy taxes, and a tolerable administration of justice".[71] The condition which must obtain for the invisible hand to establish the system of natural liberty is that:

"Every man, *as long as he does not violate the laws of justice*, is left perfectly free to pursue his own interest in his own way".[72]

It is therefore:

"The first and chief design of every system of government is to maintain justice; to prevent the members of a society from encroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property … we may call [this end] internal peace".[73]

This is the foundation of the idea of private law in market society, for *privacy* is the necessary and normally sufficient condition of optimal social welfare. The individual freedom to choose one's goals places the identification and pursuit of those goals in the hands normally best placed and best motivated to do so. The alternative, of extensive conscious collective goal-setting culminating in general planning, enjoys neither of these qualities, and indeed, in proportion to the extent of its ambition, places a difficult or impossible burden on the collective decision-maker. Smith was very conscious that that a government which in its "folly and presumption" "should attempt to direct private people in what manner they ought to employ their capitals" when "every individual … can, in his local situation, judge much better than any statesman or lawgiver can do for him", would be bound to be despotic,[74] and to invite corruption and waste.[75] But these possibilities arise from the more important, indeed

[70] *Ibid*, 710.
[71] Stewart, "Life and Writings of Smith" (*supra* n.66), 322.
[72] Smith, *Wealth of Nations* (*supra* n.64), 687 (emphasis added).
[73] A Smith, *Lectures on Jurisprudence* in *The Glasgow Edition of the Works and Correspondence*, vol 5 (Clarendon Press, Oxford, 1978), 5.
[74] Smith, *Wealth of Nations* (*supra* n.64), 456.
[75] *Ibid*, 356.

fundamental, point that extensive collective direction runs up against the extreme complexity of the division of labour in a developed market economy:

"Observe the accommodation of the most common artificer or day-labourer in a civilised and thriving country and you will perceive that the number of people in whose industry a part, though but a small part, has been employed in procuring him this accommodation, exceeds all computation. The woollen coat, for example, which covers the day-labourer, as coarse and rough as it may appear, is the produce of a great multitude of workmen … without the assistance and co-operation of many thousands, the very meanest person in a civilised country could not be provided, even according to, what we very falsely imagine, the easy and simple manner in which he is commonly accommodated".[76]

The fundamental virtue of the market economy of justice, property and contract is, then, that as it is governed by *private* action:

"The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interests of that society".[77]

In sum, the laws of property and contract establish private action which, though it does not, indeed *because* it does not, comprehend collective goals, generally leads, not to chaos, but to an order spontaneously coordinated by the invisible hand yielding optimal welfare. That legal regulation is necessary for private action to work in this way absolutely does not entail or require what is unavailable to us: an ability to generally plan detailed outcomes. Regulation must be devised in the recognition that market order is, to adapt Ferguson's famous words, "indeed the result of human action, but not the execution of any human design".[78]

[76] *Ibid*, 22-23.
[77] Smith, *Wealth of Nations* (*supra* n.64), 687.
[78] A Ferguson, *An Essay on the History of Civil Society* (CUP, Cambridge, 1995), 119.

Hamlet Without the Prince

By treating of "economics" only in a form fundamentally opposed to market economics, the welfare economics of the economic analysis of law, and saying nothing about market economic theory as such, Jaffey, who certainly has not gone off on a frolic of his own, highlights the way that the legal theory of private law has almost completely been developed in ignorance or disregard of the most important intellectual foundations of the private sphere of liberal democracy.[79] This is Hamlet without the prince indeed! *Justice in Private Law* is an, in both senses, acute example of the abstract, juridical nature of private law legal theory, and this leaves Jaffey's concepts of both "private" and "justice" somewhat rootless.

It is difficult to see in what sense a private law is integrally private when, as we have seen Jaffey have it, the parameters of property and contract in the interpersonal relations of corrective justice are in principle subject to potentially unlimited alteration in light of distributive justice considerations. It should not be denied that the temptation to make such alteration exists, and indeed may be said to be universal. Hume was at pains to acknowledge that a very wide range of circumstances may be "easily conceived" in which "a single act of justice" may have regrettable consequences, and we may "have reason to wish that, with regard to that single act, the laws of justice were for that moment suspended in the universe'.[80] But this is outweighed by the necessity of the stability of property, which "must be fixed by general rules"[81] that "must extend to the whole society, and be inflexible",[82] so that any "momentary ill is amply compensated by the steady prosecution of the rule, and by

[79] An attempt to develop a "new private law" based on an affirmation of "deregulation, decentralisation, privatisation, and contractualisation" which was the basis of a 1995 Symposium held at the University of Denver Law School was a completely different animal borne out of the "new public management" restructuring of formerly directly provided public services, and I may have caused only confusion by raising it from the obscurity into which it immediately fell: JA Nice, "The New Private Law: An Introduction" (1996) 73 *Denver University Law Review* 993, 995.

[80] Hume, *Treatise* (*supra* n.53), 319.

[81] *Ibid*.

[82] *Ibid*, 322.

the peace and order which it establishes in society".[83] In a way which cuts across the distinction between deontology and consequentialism as Jaffey has it, Hume insists upon justice as the according of deontological priority to property and contract rights because this will have the best possible consequences, though this can be known only in the most general sense.

Now, as the legal framework of justice is furnished by government, private law must and does rest on, and in this sense is subordinate to, public law,[84] and this was recognised by Smith in two ways of theoretical relevance here. A government necessarily will have the capacity to suspend justice in order to act on the basis of *salus populi suprema lex*, and Smith allowed of even the most blatant peacetime "sacrifice [of] the ordinary laws of justice to an idea of public utility" were it justified by "the most urgent necessity".[85] More generally, Smith clearly anticipated what would now be called the externality argument for the existence of social costs, and regarded the provision of public goods such as the education of poor children at public expense[86] as part of the "erecting and maintaining certain public works and public institutions" which was another proper function of government,[87] albeit of a much "inferior" kind to the function of establishing justice.[88]

Though the private sphere is dependent upon the public sphere and its ultimate justification is consequentialist, *laissez faire* is, then, the deontological establishment of the priority of the private relations of corrective justice over the collective determinations of distributive justice, and this is the core of the common private law. Legislation and

[83] *Ibid*, 319.

[84] The confusions caused by a failure fully to acknowledge this run throughout our entire understanding of economic action and institutions. The main point of difficulty registered within the legal theory of private law is coming to terms with the aspects of the theory of property in Locke and other writers of his period which are claimed to be "pre-political" and so in a sense outwith the reach of state action. Jaffey discusses this, rejecting the limitation upon state action in a way in line with his general argument, at 153-55, 163.

[85] Smith, *Wealth of Nations* (*supra* n.64), 539.

[86] *Ibid*, 784-85.

[87] *Ibid*, 687-88.

[88] Smith, *Lectures on Jurisprudence* (*supra* n.73), 486.

adjudication which do not pursue specific socially endorsed purposes but seek to furnish a framework of general principles of justice within which individuals identify and pursue their own purposes must be the "paramount public policy",[89] for "The public good is in nothing more essentially interested than in every individual's private rights".[90] The common law works itself pure,[91] but in the sense of addressing the specific facts of disputes identified as being worth resolving by individual parties themselves. It thereby gives guidance for an accumulating number of analogous situations, but does not address other situations, including general ones, which are merely hypothetical to the common law. Of its nature, reasoning from precedent involves a generalisation from specific circumstances; but this is not the same as reasoning from general principle.[92] This justification of deontological commitment to private rights and individuated resolution of disputes arising from them is a consequentialist one: it generates greater overall welfare than can be achieved by extensive intervention.

This justification of private rights runs counter to Jaffey's consequentialism, which makes detailed intervention on distributive grounds the principle of private law: the deontology of corrective justice cannot ultimately be supported because it would frustrate the general possibility of taking distributive considerations into account. Now, one must, of course, allow that extensive intervention could be the best policy. But this assumes that we can have the knowledge and capacity to undertake such intervention, and market economics rest on a principled denial that we can have such knowledge; or on a principled insistence upon the ineluctability of ignorance, to put it this way around.

It cannot be right to formulate a concept of private law without any reference, even a wholly critical one, to market economics, and I am afraid doing this undermines Jaffey's

[89] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (Ch) 465 (Sir George Jessell MR).

[90] W Blackstone, *Commentaries on the Laws of England*, vol 1 (OUP, Oxford, 2016), 94.

[91] *Omychund v Barker* (1744) 1 Atk 22, 34; 26 ER 15, 23 (Mr Solicitor-General Murray, later Lord Mansfield).

[92] Austin, *Lectures* (*supra* n.19), 621-22.

argument in another important way. As we have seen, he maintains that as corrective justice "does not give effect to distributive justice or social purposes", it in particular "takes no account of the societal distribution of wealth". But when Hume and Smith told us that establishing justice will "leave everyone in the peaceable enjoyment of what he may acquire by his fortune and his industry" so that by "the study of his own advantage … every individual necessarily labours to render the annual revenue as great as he can", they described the operation of by far the most important principle of a just "societal distribution of wealth": desert. The Scottish Enlightenment view of the distribution of wealth and welfare in "commercial society" was very far from uncritical, but certainly for Smith the overall enormous advantages of that society vitally depended on the extent to which it made real the possibility of pursuing "that great purpose of human life which we call bettering our condition".[93] Whilst regulation can and must seek to improve the equality of opportunity to pursue this purpose, intervention which would alter the resultant unequal but efficient inequality of outcome, and so undermine it, whilst it might be justified on (sometimes highly important) occasions, must be seen in light of reward by desert being a paramount policy of *laissez faire*. Jaffey was obliged to relate his subsumption of corrective to distributive justice to the argument for the justice of desert.

A full explanation of Jaffey's position would have to locate it within the readiness to undertake state intervention in pursuit of collectively determined distributive justice goals that now very influentially works against the very idea of the private in liberal democratic political culture. But at this point no more need be said about this other than to note a peculiarity of Jaffey's position. Legislative state intervention is a public matter open to democratic debate. But the adjudicative refashioning of corrective justice in terms of

[93] A Smith, *The Theory of Moral Sentiments*, in *The Glasgow Edition of the Works and Correspondence*, vol 1, corr edn (Clarendon Press, Oxford, 1979), 50.

distributive justice is conceived of as a private matter not open in this way. To take the discussion further, let us focus on the aspect of Jaffey's concern that his theory is interpretively adequate to the "traditional private law" which, in a paradox representative of private law theory, makes that theory most inimical to the truly private. When in ch 5 Jaffey gives his principal account of "The Corrective Justice Approach", that account is by no means confined to "freedom of action with respect to … the power to acquire property and to make contracts",[94] but is principally occupied with a different issue, one which would be unintelligible to Hume and Smith: *Donoghue v Stevenson* negligence.[95]

NEGLIGENCE

For a concept the name of which gives rise to thoughts of Coke, Jaffey's "traditional private law" is of surprisingly recent provenance. Even if we put aside the significance of the House of Lords judgment in *Home Office v Dorset Yacht Co Ltd*,[96] and so allow that its history is longer than that of a private law which would include restitution, "traditional private law" can be traced back only to 1932,[97] when, of course, Lord Atkin created negligence as a general principle decoupled from "traditional categories" in *Donoghue v Stevenson*.[98] Showing that there is a coherent legal domain of "tort" is itself a major challenge, and Jaffey does not take it up, spending little or no time on the nominate torts other than nuisance, which he briefly considers in the context of real property.[99] He effectively equates tort with negligence. Those who believe that there is a principle unifying (most of) the torts will think that Jaffey has

[94] At 62.

[95] Smith's views on delict are criticised in terms which are remarkably akin to Jaffey's views on negligence in KAB MacKinnon, "Adam Smith on Delictual Liability" in RP Malloy and J Evensky (eds), *Adam Smith and the Philosophy of Law and Economics* (Springer Verlag, Dordrecht, 1994), 109.

[96] [1970] AC 1004.

[97] *Palsgraf v Long Island Railroad Co* 248 NY 339; 162 NE 99 (Court of Appeals of New York 1928) was decided in 1928.

[98] [1932] AC 532 (HL).

[99] At 161-63.

avoided important issues, but in your reviewer's opinion what he has done is justifiable, not only because as a matter of practical importance negligence indeed largely is tort, nor because as a matter of theoretical importance the statement of corrective justice in private law theory has focused on negligence, but because the law of negligence pointedly expresses the relationship of corrective and distributive justice which is Jaffey's real concern.

Jaffey begins by identifying "The traditional understanding [of negligence] (reflecting the corrective justice approach) that the law is based on what is fair and just between the parties; compensation is a remedy, not a sanction, and the relevant facts are those between the two parties and their relationship, not about society as a whole".[100] Jaffey is hardly alone in finding, and indeed cites some of those who have found,[101] it difficult to know where to begin when reviewing the multitude of criticisms of this understanding which have widely been given considerable weight. Though it will be argued that, even so, Jaffey does not go far enough, let us begin by boiling these criticisms down to three.

First, to maintain that "D is liable to pay compensation because D was morally responsible for a wrongful action and the consequences … implies that D must be morally blameworthy or morally at fault. In other words, there should be a legal requirement of subjective fault".[102] But "'fault-based liability' [in negligence] means [the] so-called 'objective fault' [of] conduct falling sort of the prescribed standard",[103] and saying that objective fault is "appropriate in order to secure a fair balance between the rights and interests of the two parties" is irreconcilable with maintaining that liability "arises from D's moral responsibility for a breach of duty".[104] Strict[105] and vicarious liability[106] exacerbate the

[100] At 46.
[101] Eg at 51 n.30 J Steele, "Scepticism and the Law of Negligence" [1993] CLJ 437 is cited.
[102] At 22.
[103] *Ibid*.
[104] At 65.
[105] At 99-100.
[106] At 100-101.

problem, but they cannot be put to one side as "anomalous" because the problem "applies equally for objective fault".[107] Your reviewer himself places little weight on the difficulties of objective fault, but the point is that they are widely acknowledged by those who nevertheless defend negligence.

Secondly, the remedy for negligence which corrective justice requires is compensation, but it is undeniable that duty of care,[108] causation,[109] and quantification[110] in negligence are in substantial part shaped by a sanction function aimed at deterrence in which "C's power to take proceedings is not to enable C to protect C's interest but to empower C to promote the public interest … in effect acting as an agent for the state [when] C just happens to be a convenient person to play this role".[111]

Thirdly, whatever one's ultimate view of the issues, it cannot be denied that the decided cases are replete, and very arguably the most important cases are co-extensive, with policy considerations which have had a "strong influence" on determining the so-called interpersonal relationship which creates the "possibility of liability in the circumstances",[112] and this has caused "a problem of incoherence [because] liability depends on issues incidental to and only contingently related to the relationship between the parties".[113]

In your reviewer's opinion, this litany of woes has led to many having been able to hang on to negligence only by all but giving up on requiring doctrinal or policy coherence of it. But this, one would have thought, dispiriting state of affairs is, to be perfectly frank, heaven sent for Jaffey as he can justifiably argue that it shows what is claimed to be a system of corrective justice is inexplicable unless one acknowledges that it is shot through with

[107] At 65.
[108] At 46, 97-99, 103-106.
[109] At 106-110.
[110] At 46.
[111] *Ibid*.
[112] At 71.
[113] At 50.

distributive justice considerations, to the point where "negligence should really be understood as a sort of public law imposing penalties, operating in conjunction with the criminal law to reduce the incidence of the infliction of harm".[114] And the logic of this is that, as it is so bad at achieving its social tasks, "negligence should be replaced" with public schemes that accomplish those tasks "more comprehensively"[115] and "more fairly and effectively".[116]

It is initially startling, then, that Jaffey concludes his discussion of negligence thus: "it does not follow that negligence at common law is incoherent or unjust. Negligence … is a coherent body of law with a sound basis in justice".[117] How can he possibly say this? We have seen that he does not simply ignore the shortcomings of the operation of negligence, which is common in tort scholarship, nor sought to decouple the justification of negligence from the very issue of the effectiveness of the operation of law, which is common in private law theory. Indeed, as we also have seen, Jaffey's account of negligence effectively culminates in posing the question which has haunted informed concern about the utility of negligence since Green first described tort as "public law in disguise": why not remove the disguise and carry out the public law goal unencumbered by it?[118] But even so, Jaffey's critical attitude is, in your reviewer's opinion, insufficiently critical because he does not really engage with the "compensation debate". He does not address negligence predominantly being a system for the payment of small sums for non-pecuniary loss which have little or no bearing on considerations of income distribution.[119] Nor does he address the quantification of non-pecuniary loss unavoidably being an arbitrary process made tolerable by convention.[120]

[114] At 46.
[115] At 113.
[116] At 47.
[117] At 113.
[118] L Green, "Tort Law Public Law in Disguise" (1959) 38 Texas Law Review 1; (1960) 39 *Texas Law Review* 257.
[119] R Lewis and A Morris, "Tort Law Culture: Image and Reality" (2012) 39 *Journal of Law and Society* 562, 576-7.
[120] D Campbell, "The *Heil v Rankin* Approach to Law-making: Who Needs a Legislature?" (2016) 45 *Common Law World Review* 340, 347-50.

The empirical law of negligence can be portrayed as providing a compensatory corrective justice remedy only at the most nebulous level. But negligence as Jaffey has it is a defective but ultimately defensible system, which he himself defends as a "fair allocation of the risk of loss from the accident as between the people involved in it".[121] By "fair" Jaffey means distributively fair "on the basis of ordinary common knowledge, that is to say, what the parties to an interaction can reasonably be expected to know".[122] It is as "distributive justice subject to the standpoint limitation"[123] that negligence is "a coherent body of law with a sound basis in justice", the standpoint limitation being the crux of *Justice in Private Law*. Let us turn to the general theory of the standpoint limitation before returning to negligence.

THE STANDPOINT LIMITATION AND THE COMMON LAW

Though Jaffey's subject is private law, the key to his argument is the way he looks at legislation: "It is a crucial fact that when the legislature legislates for interactions governed by private law, it takes the distributive justice approach".[124] Jaffey is of course aware that there are statutes with a basically codifying purpose (including in this sense the correction of what are perceived to be outright errors in the common law). But though one might raise difficulties with the way he briefly handles these statutes,[125] this is of much less significance than that his focus is on the type of legislation which seeks to change what he maintains proponents, and *a fortiori* libertarian proponents,[126] of corrective justice would insist should be left to corrective justice. He has in mind such things as "statutory reform of contract law to protect consumers or employees or tenants, or …of negligence law to protect introduce compulsory insurance or strict product liability or accident compensation funds [which] are

[121] At 96.
[122] *Ibid*.
[123] At 113.
[124] At 14.
[125] At 94-95, 175.
[126] At 79.

understood to be justified in terms of the distribution of harms and benefits across the population".[127] Such legislation is, of course, itself part of the great range of public intervention that seeks to "use taxation and public benefits to adjust the benefits and harms resulting from the operation of private law".[128]

Against this background, Jaffey repeatedly puts the "crucial"[129] question: "why [is it that] the courts do not or should not follow the distributive justice approach … if the legislature should do so";[130] for "what is the argument against it, if it is the right approach for the legislature?"[131] He does not think there is an answer to this question, and so argues that the courts should in principle take on distributive considerations. There are, of course, practical difficulties with this, and in a section on 'Institutional Constraints" Jaffey notes some of the reasons that courts do not have the competence to do legislative work.[132] But Jaffey does not see these constraints as obstacles to his argument because the way he wants the courts to take distributive justice considerations into account is, not by trying to ape legislative procedures, but by reaching their decisions on the non-legislative basis of the "standpoint limitation". One measure of the competence of a legislature is the extent of the policy material about the social consequences of legislation which it takes into account. A court, however, should take decisions by reference to the parties' "evidence base", which is the much more constrained body of information consisting of "what both parties know or ought to know", ie "their common knowledge".[133] This standpoint limitation will of its nature not encompass the policy material potentially available to a legislature.[134] Rather, it:

[127] *Ibid.*
[128] At 80.
[129] At 80.
[130] At 17.
[131] At 14
[132] At 92.
[133] At 85.
[134] At 88.

"Encompasses …knowledge of what the parties can reasonably be expected to do in the circumstances [which] is the knowledge accessible to people generally with respect to … interactions".[135]

If it considered certain circumstances under the aspect of a general problem they may pose, a legislature, which precisely is "free of the standpoint limitation"[136] and so not confined to common law reasoning,[137] might pass a law mandating an outcome quite different to the decision a court would reach if presented with those circumstances, for a court "must apply justice as between the parties with respect to the interaction, at the time of interaction".[138] Jaffey gives a hypothetical illustration of a legislature finding that certain circumstances gave rise to a good reason to introduce a requirement of formality for certain types of contract. A court should not, of course, decide a dispute arising under those circumstances by introducing the requirement, or on any grounds other than the existing expectations of the parties formed in light of the current law: "Though there may be a good reason to introduce such a requirement … it is not possible to do so in adjudication under the standpoint limitation".[139]

Having opened all issues of bilateral relations to distributive justice considerations, Jaffey would seem to have annihilated corrective justice. His approach "leaves no room and has no need for a concept of corrective justice in the substantive sense" that "private law is based on a distinct realm of justice, autonomous from distributive justice".[140] But it certainly is not Jaffey's intention to give to the question "what's private about private law?"[141] the answer "nothing!" In contrast to others' views of distributive which he depicts as indeed

[135] *Ibid*.
[136] At 179.
[137] At 6.
[138] At 85.
[139] At 87.
[140] At 91.
[141] W Lucy, "What's Private About Private Law?" in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart, Oxford, 2009).

having no room for corrective justice at all,[142] Jaffey argues that "The standpoint limitation offers a middle way"[143] between a complete system of distributive justice and corrective justice as an "entirely distinct" "'form of justice'".[144] For though Jaffey believes that all is distributive justice, he believes he can maintain corrective justice within a system of "Private Law *as* Distributive Justice Under the Standpoint Limitation".[145]

Jaffey does not shy away from the clear implication of his argument that the traditional law is a poor relation to legislation. Though we shall return to the significance of this, it is unarguable that the legislature does have superior competence to the courts when it comes to making law on the collectivist basis of distributive justice, and though it is because the courts have been able to develop the law only in the highly "constrained way that gives rise to traditional private law"[146] that "private law represents genuine distributive justice in the absence of legislation", [147] one wonders why, practical issues aside, the legislature that "can do much that is beyond judges"[148] would not get round, in the fullness of time, to eradicating this "sub-optimal"[149] state of affairs.

The answer Jaffey gives to this is that:

> "The standpoint limitation can be understood as an aspect of the rule of law. According to the standard understanding of the rule of law, people are entitled to be subject only to rules that have been previously announced, and not to new rules applied retrospectively".[150]

This is of course right, and it may explain why a court decides within the constraint of the standpoint limitation on a given occasion. The view that "Private law in its traditional form … appears to have arisen through common law legal reasoning by precedent and analogy and

[142] At 79-83.
[143] At 89.
[144] At 61.
[145] At 90 (emphasis added).
[146] At 91.
[147] At 92.
[148] At 127.
[149] At 92.
[150] At 89.

to be distinctive of the common law"[151] is central to Jaffey's argument because it establishes traditional rights which, in the form they exist at any one time, must be respected as the standpoint limitation. But it is of fundamental importance that respect for the standpoint limitation sustains only "the *illusion* of [the] distinct type of justice [that] the corrective justice approach claims".[152] That a court should not act retrospectively regarding settled existing rights does not mean that prospectively it should not continuously and in principle unlimitedly refashion those rights in accord with distributive principle, and indeed why it is not obliged to do so. If one knows what is right, one surely is under a general *prima facie* duty to do right.

But, leaving the courts aside for the moment, no *legislature* does or can know what is right in the sense of having knowledge of the type Jaffey envisions. The system of natural liberty based on private right is, we recall, justified because under it "The sovereign is completely discharged from a duty … for the proper performance of which no human wisdom or knowledge could *ever* be sufficient".[153] The limitations of its capacity mean that there are a great many things a legislature should not attempt to do. And to return to the courts, their more limited capacity means that *a fortiori* they should not attempt to do these things. Jaffey is far too sensible to be unaware that there are limits to legislative competence,[154] and we have seen that he insists upon further limits to courts' competence. The argument of *Justice in Private Law* turns, however, on giving these limits no weight in principle in a private law in which privacy is always open to collectively determined distributive justice. It is as if the legislature having greater competence than the courts over distributive justice removes the limits to the legislature's competence. But without an

[151] At 6.
[152] At 174 (emphasis added).
[153] Emphasis added.
[154] Eg at 94.

acknowledgment in principle of ineluctable ignorance as the limit to judicial *and* legislative competence, the standpoint limitation is, though Jaffey absolutely does not see it this way, only a friction[155] impeding the courts' "coherent"[156] development of principles of collective distributive justice. Jaffey after all sees the standpoint limitation as, precisely, a limitation.

As a jurisprudential matter, Jaffey is restating previously published views on common law reasoning[157] which underpin the concern we have seen him display that courts avoid "policy" reasoning. But his greater concern is that courts should not purport to give effect to the "straightforward" understanding of "the authority of precedent" which Jaffey calls "the individual rule approach".[158] This approach has "a binary character": fact situations either fall under a binding rule or fall into a gap which calls for new rule to be devised; judicial creativity is therefore thought to be confined to "interstitial" situations. Jaffey registers the various objections that indisputably can be raised against the individual rule approach depending on just how straightforwardly, ie naively formalistically, it is understood, which make that approach "very difficult to reconcile … with what are usually taken to be characteristic features of common law legal reasoning".[159] He proposes instead that common law reasoning be seen as "a matter of principle and not policy",[160] though, of course, the scope for actual development of the principle will differ depending on the extent to which a particular situation exposes the law as "unsettled".[161]

Jaffey does not deny that this "holistic approach"[162] is akin to Dworkin,[163] and *Justice in Private Law's* readers will have to decide how far Jaffey realises his intention that the

[155] At 15-16, 51.
[156] At 171-73.
[157] P Jaffey, "Authority in the Common Law" (2011) 36 *Journal of Legal Philosophy* 1; P Jaffey, "Two Ways of Understanding the Common Law" (2017) 8 *Jurisprudence* 435; and P Jaffey, "Policy and Principle and the Character of Private Law" (2020) 11 *Jurisprudence* 387.
[158] At 164-68.
[159] At 168.
[160] At 91.
[161] At 164-68.
[162] At 168-71.
[163] At 168 n.18, 171 n.25.

"harmonisation"[164] of all the issues allowing "coherence" in the application of principle under the standpoint limitation should be importantly different from the Dworkinian "theoretical ascent" to "integrity".[165] Your reviewer's opinion is that he fails: the holistic approach is the jurisprudential means of effecting the subjection of private law to general distributive justice, and "the bilateral rights of private law" are no more effective trumps for Jaffey than such rights were, despite all his commodious "rights" language, for Dworkin, who regarded it as "a silly proposition that true liberals must respect economic … liberty".[166] A review in this journal is not the place to go further into this, but before returning to negligence in order to judge the proof of the pudding, one point must be stressed.

Unless my reading is faulty, the phrase "judicial legislation" never appears in *Justice in Private Law*, and this is because, of its nature, the holistic approach, like all theories of legal reasoning of the Dworkinian type based on the identification and realisation of principle which run counter to Austin's confinement of inevitable judicial law-making to "proper judging" strongly demarcated from "proper legislating",[167] will iron judicial legislation out of an account of adjudication. Jaffey is opposed to courts adopting a truly "legislative mindset",[168] and he sees it as a virtue of the holistic approach that it fills in all gaps, for this leaves no gaps encouraging that mindset.[169] But this does not to rule out judicial legislation; it is to subsume it within the holistic "adjudicative mindset" in which all is, in principle, principle.

But what if, as is your reviewer's opinion, a descriptively accurate, if for that reason not interpretively adequate, account of the positive law of what has passed for private law since,

[164] At 170.
[165] At 170 n.21 and 173 n.36.
[166] RM Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge MA, 1977), 264.
[167] Austin, *Lectures* (*supra* n.19), 621.
[168] At 90.
[169] At 174.

to use Atiyah's periodisation,[170] 1870, must give a very significantly expanding role to judicial legislation? Would Jaffey's interpretivism therefore be a mere rationalisation of "traditional private law" which it is wrong to think is private common law? Let us return to the central issue: negligence.

NEGLIGENCE UNDER THE STANDPOINT LIMITATION

Your reviewer should make it clear that he believes that the law of negligence when judged as part of the social response to incapacity is so poor that its abolition is very highly desirable.[171] We have seen that Jaffey adds to the list of distinguished commentators who, with personal injury largely at the back of their minds, concede some force to this, but find negligence defensible anyway because they believe that to judge it as a part of the social response to incapacity is to largely miss the point. Jaffey argues that negligence cannot be explained as a system of corrective justice because it is shot through with distributive justice considerations. But he also argues that it can neither be explained as a system of distributive justice because under the standpoint limitation it must respect certain of the individual rights of corrective justice in a way that constrains distributive justice. So the very existence of vicarious liability is a "puzzle" for the corrective justice approach, and it is "versions of the distributive justice approach" that "provide the rationale" for it. But, on the other hand, requiring losses to be "reasonably incidental to" or "characteristic" of the defendant's business, though it can run counter to a socially optimal distribution of benefits and burdens, is to be explained as a form of proximity giving some effect to the requirement of individual responsibility in corrective justice which the standpoint limitation must respect.[172] In this way

[170] PS Atiyah, *The Rise and Fall of Freedom of Contract*, pbk edn (Clarendon Press, Oxford, 1985).

[171] D Harris, D Campbell and R Halson, *Remedies in Contract and Tort* (Butterworths, London, 2002), ch 24.

[172] At 100-102.

negligence, precisely because of all its jumble, is, as has been claimed, heaven sent for Jaffey's argument.

It is unarguable that any descriptively accurate account of the positive law of negligence has to be a "mixed conception" of corrective and distributive justice considerations.[173] But though Jaffey's account of negligence is of course penetrating, your reviewer is obliged to say that he finds that account to be mixed, not in the sense of balancing or blending connoted by "harmonised" or "coherent", but in the sense of unprincipled toggling between corrective and distributive justice considerations as occasion makes necessary, and his claims that various doctrines of negligence are as they are because they represent the "fair allocation of risk" of negligence under the standpoint limitation are circular arguments conferring overall approval of whatever particular toggle obtains at a particular instant by describing it as fair. It would deflect from this review's focus on the idea of private law to dwell further on these matters as they apply to negligence. The point is that that Jaffey makes one of the key assumptions on which private law theory turns: negligence, and therefore tort, are "main areas" of the "traditional private law". One will, given this assumption, think an interpretively adequate, ie ultimately "harmonised", "coherent", and "comprehensive", account of negligence within private law must be possible, and will accept a lot of strain in what one says in order to do so. But the law of negligence has no place in a truly private law, to which it is inimical, and Jaffey's accounts of negligence and private law run up against this.

Let us focus on insurance. Jaffey summarises the "controversy" "which goes to the heart of the law" whether the ability to insure against negligence undermines the personal responsibility required by corrective justice (and also therefore, but let us put this aside, the

[173] At 98 n.8 Jaffey cites JL Coleman, "The Mixed Conception of Corrective Justice" (1992) 77 *Iowa Law Review* 428, but in another connection.

deterrent sanction function required by distributive justice).[174] Though he says that "The practical effect of liability insurance is pervasive", Jaffey endorses the position so influentially stated by Professor Stapleton[175] that "whether D is or ought to be insured is not relevant to liability".[176] This latter is true in the sense that it is the position generally[177] stated in judicial *dicta*,[178] but this is of very small significance by comparison to the doctrinal and theoretical problem posed for private law theory by a "practical effect" which it is insufficient to describe even by such a word as "pervasive". Whether a claim is ever made, much less an action ever brought, is all but completely[179] a function of whether the tortfeasor is insured,[180] the outcome of the doctrinally "staggering march of negligence"[181] having been made possible only by the expansion of third party insurance in a reciprocally stimulating "binary" relationship with liability.[182]

Jaffey goes some way to showing how contributors of the highest integrity and intelligence can reconcile the ubiquity of insurance with a commitment to tort when tort must connote some concept, however modified and attenuated, of individual responsibility. He tells us that insurance is "consistent" with his fair allocation of risk principle:

> "There is no reason why someone who bears the risk of loss under a fair allocation of risk should not anticipate a liability by taking out insurance. Indeed, this is generally how someone ought reasonably to respond to a primary liability. The [fair allocation of risk]

[174] At 102.

[175] J Stapleton, "Tort, Insurance and Ideology" (1995) 58 MLR 820, cited at 102 n.20 (and 68 n.27).

[176] At 102, 103.

[177] At 103 n.23 Jaffey cites, but with respect does not give sufficient weight to, the discussion of authority to the opposite effect in J Morgan, "Tort, Insurance and Incoherence" (2004) 67 MLR 384.

[178] *Hunt v Severs* [1994] 2 AC 350 (HL) 363 (Lord Bridge); cited 102 n.20 (and 68 n.27).

[179] The widespread bringing of a negligence claim against the uninsured assets of private citizens is so repugnant that instances of it are rare to the point of being anomalous: T Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35 *Law and Society Review* 275. P Jaffey, "Remedial Consistency in Private Law" (2022) 72 *University of Toronto Law Journal* 216, 222 n.16 notes the moral paradox for tort practice described by Baker, but not the empirical consequences of the paradox for that practice.

[180] At 102 n.22, 103 nn.24-25 Jaffey cites, but with respect does not give sufficient weight to, the description of the positive law in RM Merkin, "Tort, Insurance and Ideology: Further Thoughts" (2012) 75 MLR 301 and RM Merkin and J Steele, *Insurance and the Law of Obligations* (OUP, Oxford, 2013). In these pieces, Weinrib's treatment of insurance in order to purify negligence of distributional considerations is said to involve the "exclusion of reality": Merkin, *ibid*, 301 n.3 and Merkin and Steele, *ibid*, 255.

[181] T Weir, "The Staggering March of Negligence" in P Cane and J Stapleton (eds), *The Law of Obligations* (Clarendon Press, Oxford, 1998).

[182] KS Abraham, *The Liability Century* (Harvard UP, Cambridge MA, 2008), ch 6.

approach is consistent with the way in which insurance operates in tandem with the law of negligence".[183]

This passage implies that insurance against negligence is the result of choice. It isn't. The implication arises because the use of "primary liability" elides the fundamental issue. That one is liable to be injured in an accident is in one sense a natural fact of life, and private citizens may well choose to take out first party insurance of their own and their family's income and property against liability of this nature. But third party insurance of the lives and property of strangers, even if they are called neighbours, is a very different thing; it is insurance against liability imposed by state intervention, albeit that the intervention has principally been devised judicially. As Jackson LJ put it in an unusually clear judicial statement of the position:

"Contractual obligations spring from the consent of the parties and the common law principle that contracts should be enforced. Tortious duties are imposed by law, as a matter of policy, in specific situations".[184]

If your reviewer may be allowed to try to make the point by reference to his own work, Professor Hedley, who had of course independently considered the arguments, acknowledged that your reviewer's evaluation of the personal injury system stated a case for the system's abolition,[185] but has gone on to say:

"What, indeed, would be better? Arguments against tort have no political traction unless its opponents can unite around an alternative. Suggestions that those who desire tort-like coverage should buy it for themselves seem impractical, and read more as thought experiments designed to show that tort is poor value for money, rather than as serious schemes for law reform".[186]

Hedley is asking Green's question about removing the tort disguise and carrying out the public law goal of negligence unencumbered by it. The very problem, however, is the conception of the goal as being to provide "tort-like coverage". This is not, in your reviewer's

[183] At 103.
[184] *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2011] 3 WLR 815 [75].
[185] S Hedley, "Making Sense of Negligence" (2016) 36 *Legal Studies* 491, 513.
[186] S Hedley, "The Unacknowledged Revolution in Liability for Negligence" in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law* (Hart, Oxford, 2018), 115.

opinion, a rational goal, for "full compensation" would never, or on only a vanishingly small number of occasions which could not sustain a market, be the goal of consumers' voluntary choices. Let us leave aside the differences between first as opposed to third party insurance against loss of income, and between insurance of full loss of income as opposed to insurance against want, and focus on insurance against non-pecuniary loss, noting that, whilst this is to focus upon the most questionable part of the law of negligence, it is equally to focus upon the largest component of awards for personal injury, and therefore for negligence, and therefore for tort. As is clearly acknowledged in the judicial guidance on quantum,[187] an award for non-pecuniary loss is not compensatory because it does not speak to and therefore cannot remedy the loss sustained, and as an inevitable result its quantification is arbitrary, save as governed by convention. The non-compensatory, non-remedial nature of damages for non-pecuniary loss is very awkward indeed for Jaffey.

It is at least rational to conceive of insurance against non-pecuniary loss as the purchase of a solatium for "consolatory" affect.[188] But it is highly questionable that consumers would normally choose to incur the opportunity costs of spending their finite incomes on a solatium: "However severe the pain, a larger bank account is an imperfect anaesthetic. As a consequence, there is no market for pain and suffering insurance in any society in the world".[189] There is all the difference in the world in accepting non-pecuniary loss damages when the issue of paying for them has been made remote to the point they come as

[187] As Lord Donaldson wrote in his foreword to the 1992 first edition of the then Judicial Studies Board's *Guidelines* on the award of non-pecuniary loss (now Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (OUP, Oxford, 2024), xi):

> "Paradoxical as it may seem, one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering, or loss of the amenities of life. Since no monetary award can compensate in any real sense, these damages cannot be assessed by a process of calculation. Yet whilst no two cases are ever precisely the same, justice requires that there be consistency between awards".

[188] CK Hsee, "The Affection Affect in Insurance Decisions" (2000) 20 *Journal of Risk and Uncertainty* 141, 148.

[189] G Priest, "The Current Insurance Crisis and Modern Tort Law" (1987) 96 *Yale Law Journal* 1521, 1546.

tantamount to a windfall (when not the result of an effort of fraud), as opposed to consciously paying for them on a first-party market.[190] But even allowing that (some) consumers would pay, it is inconceivable that the further choice would be made to buy a solatium quantified in the expensively futile way that non-pecuniary loss is quantified.[191] That the positive law of negligence is not the result of choice is emphatically driven home in the UK by the fact that from the point of view of the consumer who must have motor insurance[192] and who is the ultimate source of funds for private and public organisations mandatorily insuring against clinical negligence, employers' liability, and other risks, liability insurance, and therefore the law of negligence, overwhelmingly is *literally*[193] compulsory.[194]

In order to interpretively construct "traditional private law", Jaffey, as with private law theory generally, is obliged to elide the system of choice in a market economy based on property and contract with a system of state imposition of third party liability. Far from achieving "coherence", the resultant concept of "private" is contradictory in a way that fundamentally undermines the moral impulse that drives *Justice in Private Law*, and behind this what it says of adjudicative and legislative reasoning.

[190] *Ibid*, 1546-47, 1553.

[191] Even Avraham's strenuous defence of non-pecuniary loss on Posnerian law and economics grounds is possible only because he rests it on the "aim of [establishing] a simple, administratively cheap system of dealing with [ie by not "compensating"] the problem of pain-and-suffering damages", which is to win the argument by giving it up: R Avraham, "Should Pain-and-suffering Damages Be Abolished in Tort Law" (2005) 55 *University of Toronto Law Journal* 941, 977-79.

[192] Which itself must support the Motor Insurers' Bureau: R Merkin and J Steele, "Policing Tort and Crime with the MIB" in M Dyson (ed), *Unravelling Tort and Crime* (Cambridge, CUP, 2014). The MIB acutely focuses the issues posed for tort by the existence of the Criminal Injuries Compensation Schemes.

[193] Though there are a mixture of good and bad reasons why this bundling takes place, it nevertheless is also the case that liability insurance obtained by consumers when not literally compelled to do so is very largely purchased bundled with actually desired home insurance in a way of which homeowners "would be surprised to learn": JM Feinman, "Fragmented Risk: An Introduction" (2013) 11 *Rutgers Journal of Law and Public Policy* 1.

[194] It is incidental to our concerns here, but it is almost as implausible that a conscious collective decision would be made to generally incur the opportunity costs of providing solatium payments from finite public funds, and of course such payments play no part in the Beveridgean prevention of want. It is very significant that the payments, including to relatives and dependants, that are now made in "special" cases, such as injury caused by infected blood transfusions, are understood to be compensation.

We have seen that Jaffey acknowledges that much of the case law of negligence is very poor, and he is able to find negligence to be overall coherent only by distinguishing between "traditional core cases of negligence [which] concern personal injury and property damage caused by positive action by private individuals" and:

> "more controversial types of case … beyond this core, for example … claims for 'pure economic loss' and claims against a public authority for failure to carry out its duty to provide a benefit [which are] addressed in terms whether there is a 'duty of care' [which depends, at least in some circumstances, on whether the balance of 'policy factors' favours liability".[195]

Let us for the moment accept Jaffey's confinement of policy factors to a controversial penumbra and consider that penumbra it in terms of his account of common law reasoning. Jaffey seems to just give up on a number of cases of *Caparo v Dickman*[196] quality,[197] and your reviewer must say he is not clear what status Jaffey gives these cases. Jaffey would not be the first to defend negligence by regarding very many of the cases since *Home Office v Dorset Yacht* as aberrant whilst simultaneously accepting the amorphous law of liability they in fact establish, regardless of the difficulty of saying what it is. It is, however, unarguable that Jaffey's controversial cases would be at best an awkward fit within an interpretive account of negligence from the standpoint limitation, because deciding on the basis of policy and avoiding the legislative mindset is just what is meant to be excluded by that limitation, and this is the last thing that it can be said that these cases do.

If we approach the issues from the other direction, let us, on the assumption that it comes within the core, consider *Donoghue v Stevenson*. Unless my reading is again faulty Jaffey himself does not do this, but it would have been interesting to see how he handled the case. *Donoghue v Stevenson* proceeded on the basis of an assumed set of facts, and the presence of the snail, the responsibility of the defender for it being there if it ever was, and

[195] At 48.
[196] [1990] 2 AC 605 (HL).
[197] At 66.

the nature and extent of the injury, if any, it caused to Mrs Donoghue, were never established; if prior authority is viewed other than in retrospect, it overwhelmingly required the existence of a contract for relevant liability to arise; the quantum awarded was unclear, and no justification whatever was given for it whatever it was; and it is impossible to construct a *ratio* for the basic decision on liability which includes the neighbour principle.[198] One can readily explain what Lord Atkin did on the basis of contemporaneous opinion within the highest legal circles being very critical of what Denning LJ was later to call the privity of contract "fallacy which was … exploded by *Donoghue v Stevenson*",[199] but what has that got to do with common law reasoning? One looks for the frankness of Diplock LJ: "No lawyer really supposes that such decisions as … *Donoghue v Stevenson* … did not change the law";[200] even though that frankness did not, of course, itself seek to undo the mischief, but proved to be the forerunner of a general inversion of the issues within tort and private law scholarship the maxim of which is: as what is done in *Donoghue v Stevenson* was very good law, we should have more of its "creativity" in tort judgments.[201]

Perhaps with some inkling that his distinction of core and penumbra does not do all he asks of it, in a very interesting passage Jaffey pursues the implications of allowing that an argument based on seeing tort as disguised public law could be made for the courts to actually adopt the legislative mindset, especially if the legislature has failed to act when it should have done. He sees the attraction, but he was bound to be disquieted because a court adopting the correct legislative course could do so only "at the expense of justice in the particular case",[202] ie at the expense of justice from the standpoint limitation. Courts acting in this legislative way, Jaffey tells us, would have to adopt a two-stage procedure; first deciding

[198] M Chapman, *The Snail and the Ginger Beer* (London, Wildy, Simmonds and Hill, 2010), chs 1-3, 8.
[199] *Candler v Crane, Christmas and Co* [1951] 2 KB 165 (CA), 179.
[200] Sir Kenneth Diplock, *The Courts as Legislators* (Holdsworth Club, Birmingham, 1965), 2.
[201] J Stapleton, "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 *Australian Bar Review* 135, 138; cited in a related connection at 51 n.30.
[202] At 93.

the instant dispute between the parties from within the standpoint limitation, and then determining, with "the assistance of other parties to represent the wider interests, including the public interest",[203] a different rule for the future.

Jaffey rejects this idea because it requires courts to have a legislative competence they do not have, and would have no democratic legitimacy to exercise even if they had it.[204] The strong implication is that rejecting the possibility of the two-stage court drives it home that unacceptable judicial legislation can in principle be excluded from an interpretively adequate account of negligence. But this unfortunately runs completely against the fact that the law of non-pecuniary loss now rests on two cases which, save in one respect, could be instantiations of what Jaffey advanced as mere speculation about the two stages. In *Heil v Rankin*[205] and *Simonds v Castle*,[206] the actual interests of the nominal parties were completely subsumed by what must be described as a policy debate stimulated by the Law Commission which involved numerous interveners such as the government, insurers, and legal special interest groups.[207] In these constitutionally "impertinent"[208] exercises in "surrogate legislation",[209] "the bipolar, adversarial nature of the lawsuit [was] demolished," and replaced by "procedures … reminiscent of Parliamentary Private Bill procedure".[210] The impression that this was some anticipation of Jaffey's thought is dispelled, however, because these cases absolutely were not two-stage affairs. Their entire nature is that they were of one stage, in which judicial legislation was passed off as "normal decision-making"[211] by the courts with "no change in the law involved",[212] after it had been concluded that the actual legislature

[203] *Ibid*.
[204] *Ibid*.
[205] [2001] QB 272 (CA).
[206] [2012] EWCA Civ 1039; [2013] 1 WLR 1239.
[207] Campbell, "The *Heil v Rankin* Approach to Law-making" (supra n.120).
[208] T Weir, *A Casebook on Tort*, 9th edn (Sweet and Maxwell, London, 2000), 636. This verdict was repeated in the 10th edn and last edition of 2004, 638.
[209] C Harlow, "Public Law and Popular Justice" (2002) 65 MLR 1, 11.
[210] *Ibid*.
[211] Law Commission, *Damages for Personal Injury: Non-pecuniary Loss* [1998] EWLC 257, para 3.140.
[212] *Heil v Rankin*, [46]-[47].

would not act in the way the Law Commission and the senior judiciary desired. Jaffey's two-stage procedure would follow from approaching the issues with something like his understanding of the proper roles of the adjudicative and legislative mindsets. But the crucial point is that his understanding unfortunately fails to grasp that the positive law of negligence is based on a quite different, indeed opposed, understanding which embraces judicial legislation in a way subversive of all three constituent parts of the "common", "private", "law".[213]

CONCLUSION: IS IT DESIRABLE THAT PRIVATE LAW DOES NOT EXIST?

This review has closely focused on the "private" aspect of *Justice in Private Law*, and in doing so it fails to capture the whole of Jaffey's argument. The standpoint limitation is but one of two pivots on which that argument turns, the other being "remedial consistency". [214] Coherence within the holistically understood principles of private law requires that rights are formulated in such a way that the commission of a wrong leads to a remedy that effectively enforces the correlate right. A contract cannot, for example, be thought to place a defendant under a "primary duty" to perform, generating a "performance interest" in the claimant, for specific performance, far from being normal, is exceptional; the defendant's right must, therefore, be conceived along the lines of a "primary liability" to compensate "loss from non-performance".[215]

But though omitting discussion of remedial consistency is in an undeniable sense unfair to Jaffey, the omission is not entirely unwelcome. It should now go without saying that your reviewer would be obliged to make serious criticisms of what Jaffey says of remedies, not to

[213] A Burrows, "Alternatives to Legislation: Restatements and Judicial Reform" L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law* (Hart, Oxford, 2014).

[214] At ch 3. See also P Jaffey, "Remedial Consistency in Private Law" (2022) 72 *University of Toronto Law Journal* 216.

[215] At 20-21.

speak of their consistency, in negligence, and so in tort, and there is not much to be served by effectively repeating what has gone before. Discussion of what Jaffey says of remedial consistency throughout the private law overall[216] would take a similar form. But if we now approach the three "main areas" of "traditional private law" by putting aside tort and considering just property and contract, then your reviewer, though handicapped by limits of his knowledge of the former, believes that the treatment of both considered, so far as is possible, as separate "main areas", merits close attention. Jaffey makes a number of interesting suggestions about specific forms of property. The most ambitious of these is that "remedial consistency [based on a clear] distinction in principle between property and contract" now requires that the "archaic language" of "conscience" and "unconscionability", "a product of the ancient division" through which trust duties and rights "were developed in equity", should be "jettisoned".[217] Your reviewer believes himself to be fully qualified to comment on Jaffey's views about the juridical relationship of duty, liability, remedy, sanction, performance, and compensation in contract damages, which underpin Jaffey's comments on the performance interest mentioned above, and in his opinion they are of real interest.[218]

Introducing the argument of his book, Jaffey distinguishes his work from the "'new private law' school" because, if that school is to be "understood to be attempting to combine the corrective justice and distributive justice approaches", then he rejects its particular "attempt to accommodate a wide range of theoretical positions".[219] We have seen that Jaffey maintains that the corrective and distributive justice approaches are each intendedly "comprehensive theories of private law", and as they are therefore "mutually exclusive", "it

[216] At ch 3.
[217] At 145.
[218] At 33-38, 121-24.
[219] At 17.

is not clear that" cherry-picking from them (your reviewer's phrase) "is a coherent position".[220] Jaffey is certainly right that his own subordination of corrective to distributive justice is not syncretic in this way, but it is nevertheless submitted that the best way to assess his book is as an unconventional contribution of undoubted quality to new private law theory.

Jaffey in effect provides an answer to Hedley's question "Is Private Law Meaningless?" If private law is "the law between private individuals … contrasted with the [public] law involving organs of the state", then, Hedley observes, "almost none" of private law is "really just between individuals".[221] "In its origins, and throughout its history, so-called private law has never *simply* been about resolving private interests [but has] also been about resolving them in a way that suits the public interest".[222] And today "The common law … been mounded and re-moulded by the legislature" to the point where "Lack of legislation … signifies merely that common law principle is currently thought to satisfy the public interest, or at least that it was so thought the last time the area was looked at", so that "many of the areas of the common law live on borrowed time, as their continued right to exist is debated".[223] Hedley did not think that there was any "real risk" of the private law being acknowledged to be meaningless, for, indeed, the various contributors to private law theory "see meaning everywhere".[224] *Justice in Private Law* certainly stakes a claim to be one of the leading answers to "the problem of managing these various meanings as part of a single system", and, in your reviewer's opinion, is now the most sophisticated statement by a Commonwealth scholar of the primacy of the "public" over the "private" which Hedley would insist is a minimum requirement of a plausible response to the "embarrassingly large"

[220] *Ibid*.
[221] S Hedley, 'Is Private Law Meaningless?' [2011] *Current Legal Problems* 89, 90; cited at 10 n.3.
[222] *Ibid*.
[223] *Ibid*, 91
[224] *Ibid*, 116.

"list of features of the modern law" that the idea of private law as corrective justice must oblige us "to ignore".[225]

But *Justice in Private Law* does this by displaying the essential characteristic of new private law theory: it is an attempt to rationalise, not the private law of property and contract, but what Jaffey calls "traditional private law", which is, to speak frankly, disastrous when the "main area" of negligence is inimical to contract, and so inimical to the private, because it is an imposition by the state which arises from judicial legislation inimical to the common law, and so is again inimical to the private. In a famous phrase, Weinrib stated that "the sole purpose of private law is to be private law",[226] which is itself right, but as Weinrib's private law turns on negligence, his attempt to express that purpose had to give rise to the incoherence and implausibility of corrective justice's claim to be an adequate account of the private law to which *Justice in Private Law* is a far-reaching and impressively sustained response.

Your reviewer is of the opinion that the most important political issue the liberal democracies face is, after acknowledging that the private sphere of justice must rest on public regulation (and therefore that *salus populi suprema lex* and intervention in non-emergency circumstances are perfectly possible), to (re-)establish a biting sense of the private in the face of the now indisputably grave difficulty of preventing the "minimal" welfare state transmogrifying into the "maximalist" welfare state.[227] The minimal welfare state integrally recognises that to do "more than is needed" to prevent want "is an unnecessary interference with individual responsibilities" by "adopting instead the principle of regulating the lives of individuals by law".[228] *Justice in Private Law* is one of the leading attempts within private

[225] *Ibid*, 115.
[226] Weinrib, *Idea* (*supra* n.45), 8.
[227] N Barry, *Welfare* (Open University Press, Milton Keynes, 1990), 104-107.
[228] Sir William Beveridge, *Social Insurance and Allied Services* (Cmd. 6404, 1942), para 294.

law theory to adopt this principle, not by consciously shifting the balance of the private and public spheres, but by refashioning the private in a way which, despite its author's intention, subsumes it to the public in a way which annihilates it.