Justifying Private Law

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INTRODUCTION

As recent work suggests,[1] a central concern in contemporary private law theory is the justification of private law. Private law, as all exercises of state coercion do, "calls for a justification."[2] Part of what private law theory ought to do, from this perspective, is to provide reasons in favor of private law and the institutions, practices, and norms associated to it.

The answer to this justificatory question could be, as Weinrib once argued, that the justification of private law is to be found within it. Perhaps, in other words, private law's justifying values or ends are not values that we can justify or identify separately from private law, but are rather constitutively structured and instantiated by private law itself.[3] I will have more to say about this approach toward the justification of private law below. For now, note that even this answer presupposes that there is an important, and perhaps central, question about private law's justification that the structure of private law itself—in Weinrib's case, through the idea

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[1] *See*, *e.g.*, JUSTIFYING PRIVATE RIGHTS, (Simone Degeling, Michael Crawford, & Nicholas Tiverios eds., 2020). I note that, while this collection (with the exception of one chapter by James Penner) focuses on the more specific question about the justification of private rights, in this paper I focus on the more general question about the justification of private law, as a legal institution which includes, among other things, specific legal rights.

[2] Christopher Essert, *Thinking like a private lawyer*, 68 UNIVERSITY OF TORONTO LAW JOURNAL 166–185, 176 (2018).

[3] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 4 (2012).

of corrective justice—can answer.[4]

The search for private law's justification seems inevitable even for theorists who see their project as one of rational explanation rather than justification. After all, as the late John Gardner wrote, "[a]nyone who tries to explain anything in terms of reasons for it cannot but be concerned with the justification of that thing."[5] Private law theory seems to be an "unavoidably justificatory enterprise."[6]

In this paper, I want to interrogate what it means to offer a justification of private law.[7] In this sense, the paper is methodological. It is concerned with questions about how private law theorists ought to understand and fulfill their justificatory aspirations. There is a way, however, in which the argument offered here is substantive. While the argument does not present a specific substantive theory about the aims, ends, or values that justify private law, it offers at least the beginnings of a distinctive view about the process of justification of private law institutions that might have important implications for private law theory and the ongoing debates between private law theorists. That distinctive view, as will become clear below, is one that puts ordinary individuals and their concerns at the center of justification. Yet the view also treats the internal

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[4] See Gregory C. Keating, Corrective Justice: Sovereign or Subordinate?, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW , 43 (Andrew S Gold et al. eds., 2020).

[5] John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW AND PHILOSOPHY 1–50, 3 (2011). *But see* JULES COLEMAN, THE PRACTICE OF PRINCIPLE 5–6 (2003).

[6] Gardner, *supra* note 5 at 3.

[7] Paul Miller makes an important distinction between foundational, mid-level, and juridical justifications. While I agree with Miller's observations about juridical justifications and their crucial role within internal interpretive perspectives, here I focus particularly on foundational justifications, i.e. justifications that see private law in terms of its manifestation, enforcement, or maximization of one or more foundational values. *See* Paul Miller, *Juridical Justification of Private Rights*, *in* JUSTIFYING PRIVATE RIGHTS 105–128, 121–124 (Simone Degeling, Michael Crawford, & Nicholas Tiverios eds., 2020).

conceptual structure of private law seriously. The view, in other words, rejects both the tendency towards isolating private law that sometimes characterizes certain types of Kantian formalism and the tendency to reduce law to the language of economics that characterizes certain forms of law and economics.[8]

The idea underlying this view is that private law theory ought to incorporate both the burdens of justifying private law not just to private lawyers, but to reasonable citizens in general, *and* the distinctiveness of private law reasoning as a characteristic set of practices, habits, and patterns of practical reasoning. This requires both a deep understanding of, and serious engagement with, the internal discourse of private law reasoning, *and* an ability to see its connection to—and, as I will argue below, its translation to—wider human values and concerns.

1. Two Perspectives

Imagine that Mary plays tennis. She is committed to playing at least four times a week. If we asked Mary why she plays tennis, Mary might give several answers. She might answer that she wants to stay in good shape, or that engaging in physical activity is a good way for her to relax and protect her mental health. If Mary gave us any of these answers, the *yogi* amongst us could answer: "If that is the case, then you should try yoga." And, if she were persuaded that yoga makes a greater contribution to her physical or mental health than tennis, then Mary would have at least one reason to switch from tennis to yoga.

But Mary could have given us a different answer. She might have said "Well, I just love tennis. There is this set of virtues, abilities, and values that only tennis expresses. If you've seen Roger Federer or Serena Williams play,

[8] Similarly, John Gardner, From Personal Life to Private Law 9 (2018).

you understand what I mean. It is a near-religious experience.[9] Tennis, for me, is valuable for its own sake. I wouldn't give it up for any other sport or physical activity. Tennis has great consequences for my physical and mental health, but to be honest those are not the reasons why I play tennis. I play tennis for its own sake."

If Mary gave the latter answer, we might think that she is a peculiar character. But the answer is surely not unintelligible. Tennis commentators sometimes refer to players' excellence as being at least partly constituted by their devotion to "tennis for its own sake."[10] Of course, the first type of answer, which emphasizes an instrumental perspective towards sports, which sees them as means to ends and as therefore perfectly replaceable activities, is also intelligible. Gabriel Batistuta and Mario Ballotelli, for instance, were two successful and talented soccer players—yet they also disliked soccer and saw it just as a means to make money.[11]

Legal theorists provide similar types of responses to justificatory questions about legal institutions. If we wanted to know what makes tort law valuable, some theorists, like Calabresi, would answer that it maximizes social welfare by reducing the overall costs of accidents.[12] Under this view, if a feasible alternative achieves the same goal more effectively, we have at least one reason to switch from tort law to the alternative. Yet other theorists would answer that tort law is valuable for its own sake: it instantiates and embodies a specific value, corrective justice. All the other good things tort law produces might be valuable, but they are not the reason why we have

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[9] See David Foster Wallace, Roger Federer as Religious Experience (Published 2006), THE NEW YORK TIMES, August 20, 2006, https://www.nytimes.com/2006/08/20/sports/playmagazine/20federer.html (last visited Feb 21, 2021).

[10] https://www.tennis.com/pro-game/2008/05/the-blue-flame-professional/43790/

[11] https://www.marca.com/buzz/2017/04/28/5902284aca47416a398b4622.html

[12] GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (2008).

tort law.[13]

Lawyers, and particularly lawyers who take law seriously, who enjoyed learning about law and think they are involved in a practice that has its own value, might be tempted by Weinrib's answer. Something similar might happen with tennis. Many lovers of tennis would understand and agree with Mary's answer if she said that she loves tennis and plays tennis for its own sake.

But imagine you lived in a country where tennis tournaments are a massive institutional, financial, and organizational undertaking, arranged by the state and funded with public resources. Imagine, too, that those who lose or who fail to follow the rules of the game are coerced in some way—for instance, for each match a player loses they have to pay a certain amount of money, or get part of their assets seized, etc. This, of course, would be a silly way to organize tennis in any normal society. But the hypothetical example shows that, if we arranged tennis in this way, then justifying tennis as an activity would bring in additional considerations and concerns.[14] More specifically, we would want to show that tennis is valuable, not just to tennis players like Mary, but to all the individuals whose taxes are used to pay for tennis tournaments and who contribute to sustain the state institutions engaged in coercion for the purposes of tennis. At the extreme, our most urgent concern would be to justify tennis to those who never play tennis, to those who are always on the losing end of tennis matches—and therefore end up subject to its coercive apparatus—or to those who contribute to funding tennis but do not get anything out of tennis tournaments.

Importantly, the answer need not be like Calabresi's. A tennis

[13] WEINRIB, *supra* note 3.

[14] Making a similar argument (using opera as an example), Jeremy Waldron, *Property, Justification and Need*, 6 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 185–215, 191–192 (1993).

enthusiast might persuade us that the values instantiated by tennis are so important that we have good reasons to have a publicly funded and coercively enforced institution of tennis, whatever its other consequences might be. Regarding private law, similarly, one might argue that corrective justice or personal independence is a value that can only be fully instantiated in private law, a value that justifies why private law is important for its own sake, and why we have good reason to publicly fund its operation and allow for its coercive enforcement.

Weinrib's and Calabresi's are two very different types of answers to the question of why we should engage in, publicly fund, and coercively enforce private law.[15] Weinrib's is a *non-instrumentalist* view. It sees the value of private law in terms of its own self-sufficient justificatory structure of juridical relationships[16] or its recognition and instantiation of private rights.[17] *Instrumentalist* views (such as Calabresi's), on the other hand, see the value of private law in society-wide morally significant consequences,[18] such as the maximization of overall welfare.[19]

There is a very uncontroversial way in which private law is an instrument.[20] Even non-instrumentalists would agree that law exists to achieve something. While Weinrib famously claimed that private law is like

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[15] This is only one possible way of characterizing the differences between Calabresi and Weinrib.

[16] WEINRIB, *supra* note 3.

[17] On contract law, *see* Peter Benson, *Contract*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 29–63, 33 (Dennis Patterson ed., 1996).

[18] Liam Murphy, *The Practice of Promise and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151–170, 154 (Gregory Klass, Prince Saprai, & George Letsas eds., 2014).

[19] LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006).

[20] I develop this view in Felipe Jiménez, *The Pluralism of Contract: A Theory of Contract* Law (NYU, JSD Dissertation, May 2018). For a defense of this uncontroversial form of instrumentalism, *see* Leslie Green, *Law as a Means*, *in* THE HART-FULLER DEBATE IN THE 21ST CENTURY 169–188 (Peter Cane ed., 2010).

love, in that it is its own end that should not be reduced to extrinsic considerations,[21] this claim ought to be read against the general backdrop of Weinrib's claims regarding private law's realization of Kantian notions of right and Aristotelian corrective justice. Taking this into account, the *intrinsic* value of any specific system of private law, for Weinrib, depends on its ability to effectively embody these substantive values—i.e., its ability to act as an effective instrument of conformity with the norms of corrective justice and private right that it partly constitutes.[22]

Nevertheless, the distinction between instrumentalist and non-instrumentalist views is not trivial. For while both instrumentalists and non-instrumentalists see private law as an instrument in this uncontroversial way, instrumentalists also see private law as an instrument of ends that are perfectly intelligible and ascertainable without the aid of private law. Non-instrumentalists, on the contrary, see private law as an instrument of values and norms that can *only* be ascertained from within private law.[23] More importantly for the purposes of this paper, these two different types of substantive views about what justifies private law reflect two different underlying views about the way in which private law institutions ought to be justified.[24]

This might seem like a logical place for me to declare my allegiance to one side or the other, both in substance and in method. Instead of doing so, however, I want to focus with some more detail on what it means to

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[21] WEINRIB, *supra* note 3 at 6.

[22] Gardner, *supra* note 5 at 19. For further discussion, *see* James Penner, *Justifying Private Law: 'Reasons Fundamentalist' Instrumentalism and the Kantian Account*, *in* JUSTIFYING PRIVATE RIGHTS 45–62, 54–62 (Simone Degeling, Michael Crawford, & Nicholas Tiverios eds., 2020).

[23] See generally Martin Stone, Legal Positivism as an Idea about Morality, 61 UNIVERSITY OF TORONTO LAW JOURNAL 313–341 (2011).

[24] See Jacob Weinrib, Book Review: Why Law Matters by Alon Harel, 29 CAN. J. L. & JURISPRUDENCE 267, 267 (2016).

justify private law—on how, exactly, we should understand and evaluate instrumentalists' and non-instrumentalists' claims when they argue that the justification of private law is its contribution to the maximization of social welfare, its instantiation of corrective justice, or some such.

2. WHO AND WHAT

i. Justification: Public and Juridical?

There are two traits of private law institutions that I mentioned in the previous section which are worth keeping in mind. First, the operation of private law requires, at least sometimes, the exercise of state coercion against individuals, and coercion is *prima facie* an interference with people's autonomy and personal prerogatives—and therefore something we ought to justify.[25] Second, private law requires publicly funded institutions, such as courts and other enforcement structures, in order to operate.[26] We could use those funds for other relevant public endeavors and goals. These two traits raise an immediate question of why it is morally justified to coerce people and to use scarce resources for the purposes of private law.

In answering these questions, we must remind ourselves that all citizens, and not just lawyers, contribute to sustaining the practice of private law and to funding its operation. And all citizens, and not just lawyers, might end up being subject to its coercive enforcement. The reasons that explain why justification is necessary also explain to whom the justification is owed. Coercion and public expenditure require justification to those who are coerced and those who contribute to fund that

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[25] Jules L. Coleman, *The Grounds of Welfare*, 112 YALE LAW JOURNAL 1511, 1515 (2003). In a similar vein, *see* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 58 (2002).

[26] STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 221 (1999).

expenditure. As a consequence, the justification of private law is owed to all citizens, not just to lawyers.

There is an important upshot of this. The stakes of justification are not merely theoretical. When we engage in the practice of offering and assessing justifications of coercive institutions, we are not just interested in contributing to a purely philosophical project. Rather, we are interested in contributing to an intellectual project with practical—and political—upshots.

The demand for the justification of legal institutions is particularly central in liberal democratic societies.[27] One of the foundational principles of liberalism is that all aspects of the basic social structure should be made acceptable to reasonable individuals.[28] This demand is based on the fundamental moral notion of equal respect for persons,[29] and obviously applies to private law.

It is thus unsurprising that these liberal principles have had a strong influence on private law theory. Many private law theorists see themselves as engaged in a project of justification within liberal democratic parameters.[30] Peter Benson, for instance, has argued that contract theory

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[27] JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 3 (2010).

[28] Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 THE PHILOSOPHICAL QUARTERLY 127–150, 128 (1987).

[29] Charles Larmore, *The Moral Basis of Political Liberalism*, 96 THE JOURNAL OF PHILOSOPHY 599–625, 602–607 (1999). Similarly, David Miller, *In What Sense Must Political Philosophy Be Political?*, 33 SOCIAL PHILOSOPHY AND POLICY 155–174, 174 (2016).

[30] *See*, *e.g.*, PETER BENSON, JUSTICE IN TRANSACTIONS (2019); HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017); JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016); PRINCE SAPRAI, CONTRACT LAW WITHOUT FOUNDATIONS: TOWARD A REPUBLICAN THEORY OF CONTRACT LAW (2019).

should attempt to provide a *public justification* of contract law.[31] By a public justification, Benson means a justification "framed to be acceptable, as a matter of reason and principle, to individuals considered as legal or political *personae*."[32] There are two *desiderata* for an adequate justification of contract law, according to Benson. First, the justification needs to be *public*: it needs to be acceptable to all the individuals affected by contract law. For Benson, however, the justification also needs to be *juridical*. This means that it should address individuals as parties in contractual interactions, with correlative rights and duties, as they are portrayed by legal discourse.[33] For a justification to count as public and juridical, Benson claims, it must draw "on basic normative ideas that are explicitly or implicitly present in the public legal culture, and more specifically, in its principles and doctrines of contract law."[34] The articulation of the public justification needs to "disclose a legal point of view… remaining internal to the law."[35] The public justification of contract is, in this way, different from a justification of political—as opposed to contractual—relations. Benson proposes "a public basis of justification that is specifically worked out for contract law."[36]

There is a tension here between the public and juridical aspects of justification. A juridical justification starts from law and its internal discourse. It attempts to articulate normative ideas that are present in the principles and doctrines of private law.[37] Yet this raises the question of how

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[31] Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L. J. 273 (1995). *See also* Felipe Jiménez, *Contracts, Markets, and Justice*, 71 UNIVERSITY OF TORONTO LAW JOURNAL 144–164, 154–157 (2021).

[32] Benson, *supra* note 30 at 305.

[33] *Id.* at 305.

[34] *Id.* at 305.

[35] *Id.* at 306.

[36] BENSON, *supra* note 29 at 367.

[37] Here, the notion that the justification of private law ought to be juridical resembles the notion of transparency. On transparency, *see* STEPHEN SMITH, CONTRACT THEORY 24–32

we can persuade individuals without legal training or expertise, for whom the language of law is alien, arcane, and even bizarre, that the value and justification of the institution is found in its own technical, conceptual, and linguistic apparatus. This is relevant especially because the justification of legal institutions should be particularly responsive to the perspective of those agents who are less benefitted by them[38]—arguably, the same agents who will find the conceptual and linguistic apparatus of private law alien and strange.[39]

If we wanted to justify private law to private lawyers—or to lawyers, more generally—a juridical approach would be perfectly reasonable. But if a justification ought to be public, in Benson's terms, it ought to connect the internal discourse of private law with broader moral and political principles which can be understood and shared by reasonable citizens in general. For the liberal perspective that Benson assumes, public justification is not merely a search for justification in the abstract, but a search for justification that can be accepted as reasonable by the citizens of liberal democratic societies.[40] The practical point of view from which legal institutions are to be justified, from a liberal perspective, is that of *all* reasonable citizens.[41]

(2004). *See also* Felipe Jiménez, *Two Questions for Private Law Theory* (2019), https://papers.ssrn.com/abstract=3452909; Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007).

[38] Waldron, *supra* note 14 at 215.

[39] I return to this point below.

[40] Fred D'Agostino, *The Idea and the Ideal of Public Justification*, 18 SOCIAL THEORY AND PRACTICE 143–164 (1992); Stephen Macedo, *The Politics of Justification*, 18 POLITICAL THEORY 280–304, 281 (1990).

[41] A note on reasonableness: there is plenty of philosophical discussion about the legitimacy and limits of idealization in public justification, whether reasonableness entails an endorsement of the values of political liberalism, etc. *See*, *e.g.*, David Enoch, *Why Idealize?*, 115 ETHICS 759–787 (2005); Jürgen Habermas, *"Reasonable" versus "True," or the Morality of Worldviews*, *in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 75–101 (Ciaran Cronin & Pablo De Greiff eds., 1998); Charles Larmore,

The arguments we make about the moral value and justification of private law should appeal to those citizens, and thus should go beyond the technical language of the practice's insiders. The liberal tradition within which Benson argues is based on a "demand for a justification of the social world," and "insists that intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind."[42] A public justification ought to honor these commitments.

ii. Beyond Liberalism: The Practice of Justification

By now you could be thinking: "fair enough, but not everyone agrees with public reason liberalism." This is a plausible rejoinder, and it allows me to clarify why I focus on Benson and his use of the idea of public justification. I do not think that all private law theorists are committed to public reason. And I do not think they should be. But I do think this idea of public justification—whether we want to adopt a Rawlsian public reason

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Pluralism and Reasonable Disagreement, 11 SOCIAL PHILOSOPHY AND POLICY 61–79 (1994); David Sobel, *Subjectivism and Idealization*, 119 ETHICS 336–352 (2009). There are parallel discussions about reasonableness in legal doctrine, about whether it is a purely statistical or a normative notion, etc. *See*, *e.g.*, John Gardner, *The Mysterious Case of the Reasonable Person*, 51 THE UNIVERSITY OF TORONTO LAW JOURNAL 273–308 (2001); MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD (2003); Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293–360 (2018). Here, I use the term in a relatively unambitious, yet still normative sense: a reasonable person is someone who deliberates in good faith, possesses sound judgment, and accepts what Rawls termed "the burdens of judgment." The burdens of judgment allude to the notion that reasonable citizens might disagree even if they are in good faith and deliberate soundly, given the complexity involved in assessing evidence; the complexity of assigning weight to different relevant consideration; the difficulty in applying vague concepts; the impact of personal experience on our own assessments; the plurality of relevant normative concerns for any legal institution; and the fact that legal institutions cannot recognize every value. JOHN RAWLS, POLITICAL LIBERALISM 54–58 (2013). I return to the point of sound deliberation below.

[42] Waldron, *supra* note 27 at 135.

perspective or not—captures something important about justification as such, something that should concern private law theorists whether they are Rawlsians, perfectionists, etc.

Thus, the notion I am referring to is not just an elaboration of the specifically liberal publicity requirement that Benson, influenced by Rawls, poses for the justification of contract and private law. The notion can also be understood in a non-Rawlsian manner, as a more general requirement of the social practice of justification on the basis of reasons. It can be interpreted, in other words, as a general demand of justification as such—not a specific demand of public or liberal justification. While I am sympathetic to the liberal commitment to public justification, I also want to explain why this commitment is the specifically liberal instantiation of a more general demand of justification. I want to explain, in other words, why seeing ordinary citizens as the addressees of the justification of legal institutions and providing that justification in terms that they can potentially accept is not a specific demand of political liberalism but of the practice of justifying legal institutions like private law, whether we are Rawlsian liberals or not.

When we want to justify an aspect of the social structure to an individual, we want to appeal to reasons and considerations that the recipient of the justification can understand, appreciate, and endorse.[43] For a justification to be as a minimum potentially successful, the justification must appeal—at least indirectly—to concerns, attitudes, or values that the individual already holds or accepts. In our case, if we wanted to show ordinary people why they have reason to value private law, to see it (and the expenses and coercion associated with it) as justified, to support it, and so on, we would want to appeal to considerations that militate in favor of such

[43] Kevin Vallier, *In Defense of Idealization in Public Reason*, 85 ERKENNTNIS 1–20, 1112 (2020).

attitudes,[44] and that are able to persuade them after careful deliberation.[45] In very simple terms, for an individual to have a reason to believe that private law is justified, to support its existence, and to reject—say—political reforms for its abolition or curtailment, it ought to be the case that private law's justification is, in one way or another, connected to some of the antecedent desires, commitments, or values of that individual.[46] Otherwise we will be providing a justification that fails in its purpose. As Bernard Williams wrote, the idea here is that:

> "A could reach the conclusion that he should φ (or a conclusion to φ) by a sound deliberative route from the motivations that he has in his actual motivational set—that is, the set of his desires, evaluations, attitudes, projects, and so on… A has a reason to φ only if he could reach the conclusion to φ by a sound deliberative route from the motivations he already has."[47]

Admittedly, not everyone agrees with this *internalist* account of what it means to have a reason to φ.[48] Some externalists argue, for instance, that

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[44] Kate Manne, *Internalism about reasons: sad but true?*, 167 PHILOSOPHICAL STUDIES 89–117, 97 (2014).

[45] *Id.* at 97.

[46] This a loose reconstruction of Williams' simplified version of internalism about reasons. See Bernard Williams, Internal and External Reasons, in MORAL LUCK 101–113, 101 (1982).

[47] Bernard Williams, *Internal Reasons and the Obscurity of Blame*, *in* MAKING SENSE OF HUMANITY: AND OTHER PHILOSOPHICAL PAPERS 1982–1993 35–45, 35 (1995).

[48] The literature is endless. See Stephen Finlay, The reasons that matter, 84 AUSTRALASIAN JOURNAL OF PHILOSOPHY 1–20 (2006); Stephen Finlay & Mark Schroeder, Reasons for Action: Internal vs. External, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2017 ed. 2017), https://plato.stanford.edu/archives/fall2017/entries/reasons-internal-external/ (last visited Feb 2, 2021); Julia Markovits, Why be an Internalist about Reasons?, in OXFORD STUDIES IN METAETHICS: VOLUME 6 (Russ Shafer-Landau ed., 2011); Manne, supra note

we can have reasons to act and think in certain ways independently of our antecedent set of desires, attitudes, projects, values, etc.[49] Even outside of the more specific dispute between internalists and externalists, one could simply think that a justificatory argument is either sound or not, and its conclusions valid or not—whatever the addressees of that argument might think about it. However, again we must recall that the reasons that call for the justification of private law also explain to whom the justification is owed. We might ultimately fail as an empirical matter to connect our justifications to the aims and concerns of ordinary individuals, but the orientation—given the reasons that explain why the justification is required—must be towards those aims and concerns.

Thus, I do not want to reject outright that externalism about reasons might be true. By referring to Williams's internalist conception of reasons I am only articulating an intuitively plausible idea about the process of justification of legal institutions, one that is agnostic regarding what it means to have a reason—even though it is particularly well captured by internalism. That is the idea that, while there might be reasons in favor of a coercive and publicly funded institution that exist independently of their connection to agents' preexisting set of values, attitudes, and desires, those reasons cannot be efficacious as justifications for that coercive and publicly funded institution if what we want to achieve is to justify it to the specific

43; Hille Paakkunainen, Internalism and Externalism about Reasons, in THE OXFORD HANDBOOK OF REASONS AND NORMATIVITY (Daniel Star ed., 2018); DEREK PARFIT, ON WHAT MATTERS: VOLUME ONE Ch. 3, section 10, and Ch. 24, section 84 (2011); Kieran Setiya, Against internalism, 38 NOÛS 266–298 (2004); David Sobel, Explanation, Internalism, and Reasons for Action, 18 SOCIAL PHILOSOPHY AND POLICY 218–235 (2001); Alan Thomas, Internal Reasons and Contractualist Impartiality, 14 UTILITAS 135–154 (2002).

[49] *See*, *e.g.*, Derek Parfit, *Reasons and Motivation*, 71 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 99–130 (1997).

agents that are subject to the institution.[50] Even if there is such a thing as an external reason, these reasons are only appropriate as justifications for its addressees as long as they are in some way connected to the agent's already existing values, views, commitments, and desires. In the context of private law theory, the justification of private law to all reasonable citizens ought to appeal to the rational capacities of *those* citizens, and therefore to the set of antecedent beliefs, values, attitudes, and motivations that they already possess. The reasons invoked to justify private law only perform their justificatory role vis-à-vis an agent affected by private law to the extent that agent can get to the conclusion, after good faith and careful deliberation, that the reasons have justificatory force. Stephen Smith puts the point concisely when he discusses comprehensive and intermediate justifications of legal rules:

> "[T]o justify legal rules—rules that the state will coercively enforce—the justification must be one that those subject to the law could in principle endorse. The law should be justifiable to those subject to its coercive powers. This requirement does not mean, of course, that the law must be justifiable to every person. However, at a minimum, it should be justifiable to reasonable people. And whatever the boundaries of this category, in a pluralist society, it must encompass individuals who hold different comprehensive views… Reasonable people hold utilitarian comprehensive views, Kantian comprehensive views, and comprehensive views that reject comprehensive theories generally… [A] good

[50] Again, and to be clear, actual agents might not in fact accept a justification—which is why I add the qualifier "even in principle"—even though the justification is connected to some set of their pre-existing values, principles, and attitudes. The issue is one of orientation.

> justification for a legal rule should be acceptable to all of these people."[51]

From this perspective, the focus of justification is really on the practice and process of justification and its success conditions more than on a purely theoretical, sound, justification that is ultimately unsuccessful as an account that can be accepted by its addressees. The orientation of the project is practical, not purely epistemic. Private law theorists, from this perspective, are participants in the practice of justifying private law.[52] That practice is addressed at those found in the position of being coerced by, and contributing financially to, private law adjudication.[53]

There are two relevant points I should note here. First, I have talked about *ordinary individuals*, but at times I have added the qualifier of *reasonable*. Ordinary individuals stand in opposition to lawyers and legal theorists; the qualifier *reasonable* suggests that some idealization is legitimate. Generally, this is a question of overall orientation. Thus, what I have said so far does not mean that private law theorists ought to collect empirical evidence about laypeople's actual views or be beholden to those actual views. Ordinary individuals' actual views might be tainted by errors of fact, biases, prejudices, and mistaken forms of reasoning—this is true of lawyers and legal theorists too, of course. This is what Williams tried to capture and exclude with the notion of a "sound deliberative route."[54] So the idea is not that our justifications of private law ought to ideally reach universal consensus or actual assent. Not all of individuals' motivational

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[51] Stephen Smith, *Intermediate and Comprehensive Justifications for Legal Rules*, *in* JUSTIFYING PRIVATE RIGHTS , 75 (Simone Degeling, Michael Crawford, & Nicholas Tiverios eds., 2020).

[52] *See* Erin Kelly, *Habermas on Moral Justification*, 26 SOCIAL THEORY AND PRACTICE 223–249, 223 (2000).

[53] On the relevance of normative justifications being addressed at agents, *see* CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 16 (1996).

[54] Williams, *supra* note 46 at 36.

sets and judgments are on a par. Individuals' actual views can be based on intransigence, egoism, laziness, perversity, and confusion.[55] Still, the orientation ought to be towards individuals, in general, not just lawyers, judges, and legal theorists. Supposing otherwise leads to a closed circle of justification where we are, mostly, preaching to the choir, and failing at the task of proposing a justification that, at least in principle, could be successfully offered to its addressees.

This does not preclude the possibility that the moral principles and values that justify private law might end up being something like the moral correlatives of the legal values and concepts of private law,[56] or that the values that justify private law might be transparently present in its internal discourse. The only claim here is that there is no reason to suppose that the justification *must be* found in the moral correlatives of legal values or the internal language of private law, particularly given that the addressees of our justifications are not exclusively private lawyers.

iii. The Object of Justification

This leads me to a different question, which is what it is that we ought to justify. In some sense, the answer seems evident: private law. By this, I mean the legal rules and institutions that govern horizontal relationships between private parties. The point is not that *every* doctrine or rule that belongs to any given regime of private law has to be accounted for by the justification. Instead, the justification has to account for private law at a skeletal level, with a focus on the "salient features of a modern municipal legal system"[57] of private law law. The subject of analysis need not be private law in a particular jurisdiction, and even if is, it does not have to be the private law of a jurisdiction in all of its specific constituent parts. The focus is private

[55] GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 130–131 (1996).

[56] *See* Gardner, *supra* note 5.

[57] HART, *supra* note 4 at 100; 240.

law as a general type of institutional system of norms, rules, and practices that lead to the coercive enforcement of interpersonal legal obligations. Importantly, the justification also has to include the central implicit norms, linguistic, and argumentative practices of private law doctrine. The reason for this is that these norms and argumentative practices are a central part of the overall coercive apparatus.

In this aspect, I agree in a way with Posner's claim that, for instance, the principles of corrective justice which seem central to the structure of tort law are part of what needs to be justified by an adequate theory.[58] This does not mean that the justification for private law's internal principles must be external to it. In other words, it could be the case that the practice is relatively transparent vis-à-vis its normative foundations, that the norm of corrective justice that is part of the practice of private law is also its justification.[59] It could be that judicial talk about individuals' rights, duties, compensation, justice, and wrongs, simply reflects the underlying moral foundations of the practice. All I want to say, *pace* Weinrib and Benson, is that whether that is the case is an open question, a question that—as I have argued—depends on whether such moral foundations would be a compelling justification of the practice, not just for its insiders, but for reasonable citizens in general. For all we know, such a justification might look—and probably does look—very different from the maximization of wealth, overall welfare, or utility. The justification might in fact look a lot like the internal norms of corrective justice, private right, mutual independence, and so on. Seeing private law doctrine and its language as

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[58] Richard Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 THE JOURNAL OF LEGAL STUDIES 187–206 (1981). On Posner's view and its relationship to Weinrib's and Coleman's, *see* Keating, *supra* note 4.

[59] It could also be non-transparent in this regard. See Lewis Kornhauser, Three Roles for a Theory of Behavior in a Theory of Law, 31 RECHTSTHEORIE 197–252 (2000); John Rawls, Two Concepts of Rules, 64 THE PHILOSOPHICAL REVIEW 3 (1955). See also Jiménez, supra note [_].

part of what ought to be justified does not prejudge anything about the substance of the justification.

After this clarification, instead of delving more into what private law is and trying to provide a full-fledged characterization of it, I will rely on the relatively intuitive, pre-interpretive, and commonsensical understanding of private law as the area of law that deals with the legal rights and obligations arising out of interpersonal transactions and horizontal relationships between private individuals and private entities.[60] Again, this intuitive understanding needs to be supplemented with my observation above: private law is not just coercively enforced blackletter rules and doctrines, but a whole conceptual apparatus and complex set of discursive and intellectual practices. Assuming this view of private law, and—as I have argued above—that it ought to be justified to all reasonable citizens, how should we go about this task?

3. FIT AND VALUE

A justification of private law should fit the main features of the practice.[61] Ideally, we would try to provide reasons for supporting a practice with the core characteristics that private law actually has.[62] Again, the identification of the central structural aspects of the practice can operate at a relatively high level of abstraction (in this sense, justification is compatible with certain forms of critique).[63] The point is to justify private law as a general

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[60] *See*, *e.g.*, John C. P. Goldberg, *Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

[61] RONALD DWORKIN, LAW'S EMPIRE 65–68 (1986). *See also* Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, *in* PHILOSOPHY AND THE LAW OF TORTS , 193 (Gerald Postema ed., 2001).

[62] Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 238 (2011).

[63] The line separating a justificatory yet reformist view from an abolitionist or purely prescriptive view is of course blurry. See Liam Murphy, Contract and Promise, 120 HARV. L. REV. F. 10, 10 (2007).

type of institution, rather than justifying it at its most detailed level, fitting the practice exactly as it exists in a particular jurisdiction at a specific point in time.[64]

Assuming we have identified private law at this general level, its justification requires providing a reason or set of reasons that explain why the practice has value and why its social and moral costs are justified. This is basically a matter of normative argument.[65] In other words, the task is connecting the core traits of the institutions of private law with broadly shared or shareable principles, reasons, values, and considerations.

It could be tempting to think that the justifying principles of private law must be extracted, in Rawlsian fashion, from the public political culture of liberal democracies and the history of liberal and democratic political philosophy.[66] The widespread tendency of private law theorists to frame their justificatory theories of private law in terms of liberal values[67] suggests as much. However, while I am sympathetic to liberal values, I do not see why we must restrict *a priori* our justificatory universe to those values.

I am still saying something slightly Rawlsian. Like Rawls and those who build upon his work, I believe the justification of private law institutions ought to achieve a form of reflective equilibrium: we should attempt to find reasonably acceptable principles and considerations that may explain, justify, and account for most of the central features of private

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[64] There is a connection—though not identity—between this idea and Dworkin's account of mistakes in legal adjudication. *See* Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1096–1099 (1975).

[65] John Gardner, *Backwards and Forwards with Tort Law*, *in* LAW AND SOCIAL JUSTICE , 9 (2005).

[66] RAWLS, *supra* note 40 at 13.

[67] *See supra* note [_].

law.[68] Yet I do not think that the principles must necessarily be political in nature, or liberal democratic in a narrow sense. Yes, the principles and considerations might be liberal-democratic political values, such as autonomy, equality, and so on. But they might also be values about interpersonal private relationships (such as good faith, sincerity, or collaboration), rather than specifically political values.[69] They might also be political values that are not peculiar to the liberal-democratic tradition: stability, order, virtue, community, human flourishing, and so on. With this I do not mean to deny that many aspects of modern private law are resemblant of, and influenced by, liberal values. I only want to highlight that private law might also be plausibly understood and justified in terms of more "ecumenical" values compatible with a larger set of philosophical and political traditions.[70]

The argument that the justification of private law ought to fit the main features of private law and connect them to reasons, considerations, and values that reasonable citizens could endorse has an obvious affinity with some aspects of Dworkin's interpretivist methodology in *Law's Empire*.[71] But Dworkin's was a method for determining the content of law.[72] Under this method, the truth or correctness of legal propositions turns on their compatibility with the best interpretation of the legal practice. The

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[68] John Rawls, *Outline of a Decision Procedure for Ethics*, 60 THE PHILOSOPHICAL REVIEW 177–197, 184 (1951); JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).

[69] *See* GARDNER, *supra* note 8.

[70] Here, I follow *Id.* at 198.

[71] This paragraph builds upon Jiménez, *supra* note [_].

[72] For Dworkin, a fully interpretive attitude requires not just conceiving of the normative foundations that could best justify the practice, but also modifying our understanding of the content of the practice in light of the justification. This second part of the interpretive attitude requires "the further assumption that the requirements... [of the practice] are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point." DWORKIN, *supra* note 60 at 47.

considerations of political morality that constitute the interpretation of the legal practice are also part of the moral facts that ground legal facts.[73] I do not want to follow Dworkin in this regard. Of course, Dworkin's method is entirely acceptable if one believes that moral facts ground legal facts and that they do so in a way that is directly transparent in legal discourse. But both premises could be denied, and my view here is agnostic as to their correctness. We could perfectly accept what I have claimed regarding the relevance of certain moral considerations to the justification of private law, without making those values and principles constitutively or epistemically determinative of the content of the private law in force.[74]

If what I have said so far is right, the justification of private law requires a certain connection between the main structural features of the practice of private law and values, reasons, and considerations that might justify it to most reasonable citizens. There is still a looming question, which I have ignored so far, about the path from the conceptual and linguistic practices that characterize private law institutions to the general values, reasons, and considerations that justify them. On one view, as we have seen above regarding Weinrib's and Benson's accounts,[75] there is no path to travel: the concepts, language, and inferential practices of private law are the key to its justification—even if that justification is situated within a larger institutional framework.[76] For the reasons I have given, I do not think this is quite right. Yet this raises the question of whether the concepts, language, and inferential practices of private law are something

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[73] LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 46–47 (2014).

[74] Dworkin recognized the possibility of distinguishing between identifying the justification of a practice and using such justification as a criterion for determining the content of the practice, even though he thought that law, like all other interpretive practices, required the latter. DWORKIN, *supra* note 60 at 48.

[75] Benjamin Zipursky can be seen as defending a weaker version of this view. See Benjamin Zipursky, Pragmatic Conceptualism, 6 LEGAL THEORY 457–485 (2000).

[76] See BENSON, supra note 29.

we can take for granted, as just an object to be justified by completely independent principles—such as the maximization of utility or social welfare. The usual thought is that we have to go with one or the other of these views: either the justification is found within private law, and therefore ought to be supplied by theorists who not only understand the doctrinal language but also take it seriously and at face value, or it is an entirely external account, better supplied by the economist, the moral philosopher, or the "man of statistics,"[77] who is unencumbered by the legalistic habits and internalized values of the doctrinal lawyer and is able to see clearly where the institution fits within the social structure and what makes it valuable. In the next section, I want to suggest a third possibility.

4. An Exercise in Translation

Law is inundated with obscure technical terms, with terms with nothing but specialized legal meanings, and with terms that while existing in ordinary language have a divergent technical and specific meaning in law.[78] Legal language is plausibly understood as a specialized language,[79] a language that therefore can diverge significantly from ordinary language. While writing in a different context and with different aims, Sally Merry puts the divergences between ordinary and legal language nicely:

> "The law consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law. The law looks different, for example, to law

[77] Oliver Wendell Holmes, *The Path of the Law*, 10 Harvard Law Review 991, 1001 (1997).
[78] Frederick Schauer, *Is Law a Technical Language?*, 52 San Diego L. Rev. 501–514, 501–502 (2015). *See also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harvard Law Review 625–677, 652 (1984); Lon Fuller, Legal Fictions 12 (1967).
[79] Schauer, *supra* note 77 at 502.

> professors, tax evaders, welfare recipients, blue-collar homeowners, and burglars."[80]

This divergence is not an accidental feature of particularly illegitimate or dysfunctional legal systems. It is, in a way, an inevitable upshot of the introduction of a differentiated and sophisticated legal system that governs behavior through what Hart called primary and secondary rules.[81] Legal governance in complex legal systems inevitably requires the emergence of technocrats or professionals in law, who are able to figure out what the sources of law are and how to interpret them.[82] Understanding law in these complex societies requires special training,[83] a training that allows lawyers to understand the intricate patterns that constitute the rule of recognition in their legal system.

In contemporary American legal culture, the Langdellian project of transforming law into a university discipline[84] also generated a transformation of law into a form of technical or professional discourse.[85] Law schools were supposed to become a cradle of technique, dedicated to the business of mass-producing technocrats who were experts in the legal

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[80] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 5 (1990).

[81] H.L.A. HART, THE CONCEPT OF LAW 117 (1994).

[82] JEREMY WALDRON, LAW AND DISAGREEMENT 36 (1999).

[83] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 75 (Fatima Kastner & Richard Nobles eds., Klaus Ziegert tran., 2004).

[84] This effort coincided in important ways with an older continental European tradition. See John Henry Merryman, Legal Education There and Here: A Comparison, 27 STAN L. REV. 859–878 (1975).

[85] Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323–398, 345 (2004).

system.[86] Law in contemporary Western societies is, at least to some extent, a form of what Coke called "artificial reason."[87]

The ideas of technique and expertise should not lead us astray. Law is not just a set of words, rules, and expert terms, but a language that generates habits, values, expectations, etc.[88] Knowledge of law is a type of cultural competence, an ability to read, speak, and learn in this sometimes impenetrable language.[89] Law is characterized not just by the authoritative presence of enacted rules and formal authorities, but also by the authoritative presence of a historical tradition[90] and a social practice constituted by the activities of jurists in and around legal doctrines and institutions.[91]

The divergences between ordinary language and legal language, and between the wider social sphere and the narrower sphere of legal activity, entail that there is always a potential tension between the layperson and the lawyer, between ordinary and legal language. Because of this, lawyers need to engage in a certain translation to communicate across these two languages.[92] This is relatively evident in legal practice. The dialogue

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[86] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 41–42 (1983).

[87] See Charles Fried, Artificial Reason of the Law or: What Lawyers Know, 60 TEX. L. REV. 35 (1981); FREDERICK SCHAUER, THINKING LIKE A LAWYER 2 (2009). For an early critique of this idea, see THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND Ch. 1 (Joseph Cropsey ed., 1971).

[88] JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM xiii (1994).

[89] JAMES BOYD WHITE, THE LEGAL IMAGINATION xiii, 5 (1985). *See also* James R. Elkins, *Thinking like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511–542, 519 (1996).

[90] See Martin Krygier, Law as Tradition, 5 LAW PHILOS 237–262 (1986).

[91] Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401–438, 404 (2007).

[92] James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES IN LAW 381–402, 388–389 (2011).

between lawyers and clients requires moving back and forth from legal to ordinary language.[93]

There is a potentially negative side to this. The divergence between the languages and values of lawyers and laypeople can sometimes generate a sense of alienation. At the extreme, it can lead to a stark separation between the concerns of ordinary people and those enshrined and reflected in legal language,[94] as well as a distressing lay suspicion that, as Pound writes, "nothing can be too absurd, too mechanical, too out of accord with everyday life to be the law of the land."[95] The law can seem increasingly remote and absent from everyday life,[96] and there can be a genuine disconnect between the internal language and discourse of law and the concerns of individuals who operate outside of its professional and academic settings.[97] The artificial reason of law might appear, in the most extreme cases, as a set of arbitrary and dishonest technicalities.[98] Moreover, this risk of legal alienation increases with the rise of what Weber called legal formality. The more the law follows a strictly professional and technical logic, the more ordinary people will feel a sense of disaffection. Even if we attempt to bring technical legal discourse into greater coherence with lay expectations and aspirations, as long as law operates as a formal regime of rules and doctrines with certain autonomy from their underlying goals and

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[93] James Boyd White, *Establishing Relations between Law and Other Forms of Thought and Language*, 1 ERASMUS L. REV. 3–22, 4–5 (2008).

[94] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814–854, 828–829 (1987); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035–1058, 1057 (2008); MARC HERTOGH, NOBODY'S LAW: LEGAL CONSCIOUSNESS AND LEGAL ALIENATION IN EVERYDAY LIFE v–vi (2018).

[95] Roscoe Pound, *Lay Tradition as to the Lawyer*, 12 MICH. L. REV. 627–638, 627 (1914).

[96] DAVID ENGEL & JARUWAN ENGEL, TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND 161 (2010).

[97] HERTOGH, *supra* note 93 at 55.

[98] Jeremy Bentham tended to take this view towards classical common law jurisprudence. *See* GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 265 (2019).

justifications, the possibility of alienation and of divergence between lay expectations and legal outcomes will always exist.[99]

This does not mean that we should despair or abandon legal formality, that we should try to simplify law's rich and intricate conceptual apparatus, or that we should do without the distinctiveness of legal language. Instead, as I have argued, we should start from the notion that we ought to attempt to connect the internal discourse of legal institutions with the concerns of ordinary individuals. This means that there is a necessary step of translating legal language into the normative concerns of lay citizens. The analyses and justifications of private law that theorists provide can certainly be complex, sophisticated, and ambitious. But they must be able to connect, even if indirectly and through relatively demanding routes, with notions that are intelligible and transparent to ordinary people.

This raises some doubts about the formalist project of scholars like Weinrib and Benson. For instance, in his most recent book,[100] Benson begins setting out his project by arguing why economic and promissory theories of contract law, while valuable and insightful, assume as central premises in their analyses elements that are simply absent from, and are irrelevant for, the legal point of view.[101] An adequate justification, Benson agues, begins and ends with law: it starts from legal materials and it builds upon the legal materials and refuses to impose upon them some external moral or philosophical conception.[102] Yet this is a justification that, by its nature, runs the risk of only being intelligible and ringing true to legal ears. We instead need to connect the language of legal materials with the concerns and motivations of ordinary people. The justification begins from

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[99] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 885 (1978).

[100] BENSON, *supra* note 29.

[101] *Id.* at x.

[102] *Id.* at xi.

the legal materials but cannot end there. It requires a certain translation from the norms embedded in those materials to norms that might be intelligible to reasonable ordinary people. Translation, of course, is only a first step. It is necessary but not sufficient for a successful justification. A successful justification has to be not only intelligible but also provide reasons that can show the value of private law in terms that can be connected with the motivations, commitments, and values of reasonable ordinary citizens. But the justificatory exercise cannot get off the ground if we remain within the technicalities of legal language.

Still, the justificatory exercise requires translation, not obliteration.[103] The task of justifying private law does not require ignoring legal language or dissolving its technicalities into ordinary language—and much less into the technicalities of other technical domains, such as economics or moral philosophy. The justification of private law requires both a deep understanding of private law's immanent logic and justificatory structure[104] *and* an effort to connect these with the concerns of ordinary individuals.

I use the term "effort" advisedly. Lawyers' moral reflection is shaped, aided, and structured by law. Law is not just a technical language but also a tradition with its own values, attitudes, and ways of inhabiting the world.[105] This means that the justification of private law is also a sustained attempt at connecting our parochial concerns, values, and frameworks as lawyers with the concerns, interests, and values of human beings in general. This is what it means to see all reasonable citizens, and not just lawyers, as the addressees of our justificatory projects as private law theorists.

[103] See Miller, supra note 7 at 122–123.

[104] WEINRIB, *supra* note 3 at 18–55.

[105] See Felipe Jiménez, Legal Principles, Law, and Tradition (2020).

Conclusion

In many of his writings, Weinrib attributes significant weight to the idea that law embodies a distinctive mode of thinking.[106] I agree with Weinrib. We should take the forms of law and legal reasoning seriously.[107] At the same time, if we want to justify private law not just to legal theorists and law professors, but to those who actually stand as the addressees of the justification of legal institutions, we cannot limit our justificatory resources to those of legal language and legal reasoning.

It would be a mistake, however, to conclude from this that the justification of private law ought to be purely external, supplied by normative economics or some other disciplinary perspective. In fact, there is a sense in which both the private law formalist and the legal economist make the mistake of insulating the justification of private law from the wider concerns of ordinary human beings.[108] The justification of private law requires, instead, a translation that goes back and forth between the arcane language of private law and the vernacular concerns, values, and attitudes of ordinary people. This requires both a deep understanding of, and serious engagement with, the internal discourse of private law reasoning, *and* an ability to see its connection to wider human values and concerns. It does not require, as some legal economists have supposed, entirely reducing private law reasoning to a disguised pursuit of economic efficiency or to an opaque mechanism for controlling the levers of economic incentives. Still, legal economists get at least one thing about the justification of private law

[106] Weinrib, *supra* note 90 at 437.

[107] See Jiménez, supra note 30 at 148–152.

[108] *See*, *similarly*, Gardner, *supra* note 8 at 9; Alon Harel, Why Law Matters 4–5 (2014).

right.[109] Justifying private law requires asking what the point of private law—with its own internal norms, concepts and practices—is.[110]

Put in terms of the tennis example above, the claim here is ultimately that justifying the value of our publicly organized version of tennis requires (i) appealing to reasons that go beyond those that only tennis players and enthusiasts find compelling; (ii) without losing sight of what is distinctive about tennis as a human activity. Instrumentalist private law theorists, like legal economists, typically get the first aspect right; they understand that justifying a legal institution requires appealing to reasons that not just lawyers, but potentially everyone, can endorse. But instrumentalists tend to get the second aspect, regarding private law's distinctiveness, wrong. For instance, when applied to tennis, the instrumentalist argument would argue that tennis is valuable because it maximizes health and increases the expected or actual utility or welfare of those who practice it, or something along those lines. All of this might be true, but it is also wildly uninformative about tennis as a specific human activity. The same is true regarding private law. Yet while non-instrumentalists, and particularly Toronto formalists, get the distinctiveness of private law basically right,[111] they can overlook what it means to justify private law to ordinary individuals in general. The formalist perspective ignores, in a somewhat strange way, that the distinctiveness of private law as a form of human activity is also a limit on our ability to justify it in its own terms.

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[109] Of course, they get a lot of things *outside* of the justification of private law right. Nothing I have said here should be read as a critique of the use of the tools of economics to understand the incentive effects of legal rules and institutions or the impact of different doctrines on the behavior of individuals and firms.

[110] Gardner, *supra* note 5 at 17. *See also* Posner, *supra* note 57 at 206.

[111] Whether the substance of each of their specific accounts of private law institutions is compelling is, naturally, a separate question.