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Keeping It Private

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Keeping It Private

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Public law adjudication has grown dramatically in recent decades in many English-speaking countries. In the United States, intensely controversial questions of public policy—on race relations, abortion, sexuality, the place of religion in public life, and much else—have been tried as constitutional questions and decided by court order. In other English-speaking countries, where it was rare until recently for public questions to be decided in court, judges are increasingly making public law—influenced perhaps by America, and encouraged by the adoption of international treaties, especially on human rights, whose provisions are often general and leave much, if not virtually everything, open to interpretation.[1]

In other areas of law, by contrast—in everyday tort, contract, and property cases—court decisions are typically much less dramatic and seldom, if ever, announce controversial innovations in public policy. Yet in these cases, too, there lurk implicit questions of social justice. What force, if any, should existing social baselines and expectations have? What account should a court take of whether a litigant is rich or poor, manager or worker, corporation or individual, landlord or tenant? Is freedom of contract just or unjust? Does justice not require promoting equality? And if so, how and in what sense?

In common law countries, perhaps not surprisingly, tort, contract, and other private law cases are often decided on common law principles—

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1. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (substantially incorporated as domestic law in the United Kingdom, Human Rights Act, 1998, c. 42 (Eng.)).

principles developed by courts incrementally over time rather than laid down by statute. Common law has a style and ethos of its own.[2] It is based on precedent and, although precedent is open to modification, the common law style is anything but impetuous. With roots in the nineteenth century and earlier, common law often reflects classically liberal ideas, more or less consciously and more or less robustly.

Instead of approaching private law cases with a common law mindset, should judges not treat these cases the way they might treat public law cases? Should courts not promote a vision of justice and human rights through private law adjudication, just as they might do—or might wish to do—in notable public law decisions, whether or not the vision might be controversial and whether or not it might mark a break with common law tradition?

This Article suggests several reasons why they should not. Turning private law more public in such a way would have considerable costs in legal stability, transparency, legitimacy, and in judicial habits of neutrality and impartiality. Each of these considerations, in turn, is associated with what is generally thought of as the Rule of Law. The classically liberal ideas in the common law bloodstream themselves have at least some association with political freedom and the Rule of Law, as well as with economic prosperity. And even if one is sceptical about classical liberalism, one might reflect that, to the extent that there is public acceptance of ambitious public law adjudication, it might depend at least in part on the credit that courts build up through morally and politically unambitious day-to-day common law adjudication.

I.

There is a sharp distinction between public and private law in continental civil law, and in the legal systems around the world more or less modeled on the Napoleonic codification—or misapprehension—of Roman law.[3] In civil law countries, public and private law are typically adjudicated in separate court systems, under separate legal codes; public and private law are taught as separate subjects to law students, and the distinction is a basic piece of mental furniture for civil lawyers. In English-speaking common law countries, by contrast, the distinction between public and

2. *See generally* David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, *in* LEGAL THEORY AND COMMON LAW 26 (William Twining ed., 1986) (examining the history of teaching common law, and why common law predominates today in legal education).

3. *See* Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1595 (1992) (reflecting on the civil law distinction between public and private law, and the uncertain links between Roman law and Napoleonic civil law).

private law, and even the terms, are alien and seldom used by lawmakers, judges, or practising lawyers. Legal academics in common law countries sometimes take up the idea, but with an awareness—gratifying or otherwise—that it has a foreign flavor.

Private law in a civil law country means the law governing individuals and private organizations and their relations with each other, as opposed to the public law governing the government and its relations to its citizens. In a common law country, private law would translate, more or less, to the law of tort, contract, property, inheritance, as well as many aspects of family and commercial law.

In common law countries, private law has mostly been a matter of common law, and to a considerable extent it still is. This is not quite the truism, or the tautology, that it sounds. Most English-speaking countries are common law countries, in the sense that their legal systems are derived from England, home of the common law. But not all law in a common law country is common law. In England itself, law and equity have long coexisted. And common law more narrowly means non-statutory, judge-made law, developed in case decisions which follow or modify the precedents of earlier decisions. Statutory law is not common law in this sense, although common law countries certainly have statutes, enacted at an accelerating clip in the last century.[4] Actually, the distinction between statutory law and common law is clouded by the fact that statutes in a common law country—and for that matter constitutions, regulations, and other legal instruments—are interpreted and applied by judges with a common law training and cast of mind, thus, in something of a common law style. How strictly or freely common law judges interpret statutes may vary from time to time and place to place. English courts in the twentieth century read statutes very literally, whereas American courts had a freer, more common law style, which is to say they exercised more lawmaking power even in statutory cases.[5] Still, in

4. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (arguing that courts should have more power to update today's plethora of statutes); GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (noting a twentieth-century "orgy of statute making").

5. P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 96, 100–01 (1987). *See also* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 206–12 (1994) (arguing that the unrepresentative upper-class character of the English Bar and judiciary impelled twentieth-century English judges to interpret

principle, statutes are not common law; and in practice, even if judges have some freedom to interpret statutes, they have less freedom to make law in cases controlled by statutes than in cases where there is no statute. Hence the distinction between common law and statutory law, even in common law countries—or rather, only in common law countries, since under civil law there is, at least in principle, nothing but statutory law.

For many centuries in England, and well into the twentieth century there and in other English-speaking jurisdictions, the law of tort and contract—the heart of private law—was mostly judge-made common law, with statutes few and far between. Even today, much of the law of tort is common law, and although contract law in the United States is substantially governed by the Uniform Commercial Code, the UCC itself is largely a codification or restatement of common law doctrines and rules.[6]

This has had significant policy implications for private law in common law countries. Common law rules and precedents are not random in their public policy tilt. Common law is strongly associated with liberal ideas. Among these ideas are:

- Private autonomy;
- Private property;
- Neutrality or abstraction of legal rules: equality before the law;
- Legal stability and predictability.

Private autonomy and private property are implicit to some extent in any contract law, but common law contract doctrines particularly lean toward freedom of contract and enforcing the expressed will of the parties—a practical way of respecting autonomy. Tort responsibility also implies at least a degree of moral responsibility and autonomy. Moreover, common law tends toward general or abstract rules which do not respect persons; contract law does not typically ask, "What kind of commodity is the contract about?," or "Who are the parties?" Nor does the outcome of a common law tort case typically depend on who is the tortfeasor or what kind of person is the victim. Finally, common law puts a premium on stability and predictability; these are implicit in the notion of precedent, which is fundamental to common law.

Hence the close link between common law and classical liberalism. Individual autonomy, of course, is the core idea of liberalism[7]. Private

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statutes literally rather than to risk public revolt by being seen to make policy through a broader style of interpretation).

6. Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 18 n.22 (1997).

7. *See* JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003).

property and voluntary exchange, at least in some measure, are practical prerequisites to individual autonomy. They ensure a degree of moral independence from other people; they are also an indispensable counterweight to government power and the force of social conformity. In the nature of private property, some people will have more of it than others; but in a society without property rights, there would be little or no climate of individual autonomy at all.[8] Neutral rules and equality before the law—rather than equality of condition or of outcome—are likewise associated with classical liberalism. Legal stability and predictability mean that the citizen can know what the law requires, without which autonomy would be difficult or impossible.

The common law's liberal ethos should hardly be surprising. Common law as we know it came into its own in the eighteenth and especially nineteenth century, the heyday of laissez-faire liberalism. In the twentieth century—the age of statutes—by contrast, a variety of doctrines and political forces challenged free market liberalism and denigrated it as retrograde, sometimes with great political success.

The liberal values of the common law, like liberal ideas themselves, continue to be controversial. Private property and free markets are controversial; certainly the degree to which they should be regulated is controversial. Equality before the law is easily mocked: "[T]he majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[9] So likewise for legal stability and predictability:

> It is a Maxim among these lawyers that whatever hath been done before may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the Name of *Precedents*, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of decreeing accordingly.[10]

Still, although controversial, the common law values are closely associated with what people—not only in common law countries, but around the world—call the Rule of Law. In fact, whatever else people may mean by the Rule of Law, at a minimum they usually mean respect for the

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8. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944) (providing a classic twentieth-century restatement of this view).

9. ANATOLE FRANCE, THE RED LILY 75 (Modern Library 1917) (1894).

10. JONATHAN SWIFT, GULLIVER'S TRAVELS 217 (Oxford Univ. Press 1986) (1735).

autonomy of the individual; property rights; neutral principles and equality before the law; and predictability and fair notice about what the law requires.[11]

II.

A standard academic objection to private law in the English-speaking world, especially private common law, is that it fails to give enough place to public policy. Of course, all law, and every legal decision, reflects and promotes a policy of some kind. And common law precedents are not randomly scattered from a policy point of view. Common law was traditionally predisposed to the classically liberal policies of individual autonomy, private property, free exchange, and so forth. Common law has evolved over the years, to be sure, and precedents have been modified; that is what is meant by the common law process. Thus, classic laissez-faire policy has been softened: unconscionable contracts are not enforced,[12] contracts of adhesion are sometimes not enforced,[13] and privity is no longer required for a products liability action.[14] More radically, causation and other standard elements of a tort suit are sometimes—justly or otherwise—elided or ignored in mass tort cases and other class actions.[15] Still, private common law adjudication on the whole reflects and promotes a bundle of public policies which might be described as modified liberalism, or a spirit of welfare capitalism.

In principle, a public policy objection to private law could be made from the political right, along the lines that there ought to be a stronger or more consistent commitment to economic freedom, or to wealth-maximizing efficiency, as guiding legal principles. A very few academic critics do propose this sort of view.[16]

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11. *See generally* Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.–Apr. 1998, at 95 (discussing the Rule of Law and reform initiatives in various countries to strengthen it).

12. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding unconscionable contracts unenforceable at common law). For a wry assessment of the unconscionability clause in the Uniform Commercial Code, see Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

13. *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 769–71 (2002).

14. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

15. Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 859–63 (2005) (arguing that it may violate due process to relax or ignore the causation requirement, and other elements of a conventional tort case, in class actions).

16. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

But overwhelmingly, the public policy objection comes from the political left. The trouble with private law, so the objection goes, is that it fails to promote redistribution and egalitarianism and other goals of the political left.[17] It takes for granted and fails to transform existing baselines of possession and power in society.[18] What private law ought to do is to strengthen plaintiffs as against corporate defendants, labor unions as against management, the poor as against the rich, and minority groups as against the majority, either by general rules likely to foster these outcomes, or explicitly by taking into account who the parties are to a given case and bending the rulings accordingly. It is no surprise that the "public policy" criticism of private law tends to be along these lines, given the classical liberal policies that are in the common law bloodstream, and given that legal academia is heavily tilted to the political left.[19]

At one level, the objection is a curious one. After all, private law can certainly be changed in the name of left-leaning public policy, and it frequently has been by legislation. Statutory enactments have created entire new areas of law, greatly modifying what had been private common law. For example, landlord-tenant law and consumer protection law are more favorable to tenants and consumers respectively than the common law of property and contract would have been. Civil rights laws which extend to private employment and housing are yet another example, prohibiting

17. *See, e.g.*, Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993) (offering enthusiastic and uncritical citations to many articles and books urging change in tort law along feminist lines); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638 (1982) (urging "ad hoc paternalism" by judges in tort and contract cases); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (urging that rules of contract law should be used to achieve egalitarian redistributionist goals); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000) (urging that egalitarian redistribution should be promoted by common law rules as well as by tax laws).

18. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (criticizing common law rules that perpetuate inegalitarian social "baselines").

19. John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005) (providing an empirical study of the leftward tilt of U.S. law professors). *See also* Peter H. Schuck, *Leftward Leaning*, AM. LAW., Dec. 1, 2005, at 77, 77 ("[R]ecent studies reveal what the insiders have known all along: Professors at top U.S. law schools are predominantly liberal . . . .").

private discrimination which would mostly have been lawful at common law.[20]

Other areas of statutory law present a more mixed picture in terms of their political and ideological leanings. Labor law as enacted in the United States in the 1930s gave workers and labor unions rights and protections that they did not have under common law.[21] But new federal laws in the late 1940s and 1950s were tougher on labor unions, forbidding secondary boycotts, providing for federal oversight of union elections, permitting states to enact right-to-work laws, and so forth.[22] These statutes were still much more favorable to unions than the traditional common law, but less favorable than the first wave of New Deal legislation. Family law is another area of partly private law whose ideological leanings vary over time. Divorce has steadily been liberalized in recent decades—whether to the advantage of women might be debatable—but along lines generally thought to be emancipatory. Alimony, support, and community property laws vary from state to state. Women's groups and men's groups alike sometimes protest that they are ill used by these laws, which is no guarantee, of course, that the laws have achieved a golden mean. Gay marriage has been enacted by several countries around the world and judicially decreed in Massachusetts; gay civil union or domestic partnership statutes have been adopted in a few American states. But many American states have enacted laws rejecting gay marriage, and the federal Defense of Marriage Act explicitly authorizes states to refuse to recognize it.[23]

Commercial law is yet another area where the statutes lean now one way, now another. To some extent, commercial law is the common law of contract. But a lot of corporate law, with its fiduciary dimension, has roots in equity rather than law, and is mostly statutory.[24] The tilt of corporate law, whether towards shareholders, managers, directors, consumers, or others, varies somewhat from state to state and from time to time. What the tilt actually is can itself sometimes be debatable. There is some academic dispute, for example, whether the state of Delaware attracts

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20. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000) (prohibiting employment discrimination); Civil Rights (Fair Housing) Act of 1968, 42 U.S.C. §§ 3601–3619 (2000) (prohibiting housing discrimination).

21. *See, e.g.*, National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

22. *See, e.g.*, Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

23. Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

24. *See* Guar. Trust Co. v. York, 326 U.S. 99, 104 (1945) ("[R]ights at law were usually declared by State courts . . . while rights in equity were frequently defined by legislative enactment . . . .").

firms because its laws favor managers and directors, or whether the laws do not particularly do so but merely have the virtue of being more clear and certain than those of other states.[25]

The ebb and flow of legislation, in short, tends to follow the election returns. Within constitutional limits, this is democracy, and generally accepted.

What is more controversial, and implicitly raised by the question of public policy in private law is whether judge-made common law should be more self-consciously guided by ideas about public policy. Or, in what might amount to much the same thing, whether the legislature should enact vague, general statutes in private law areas whose interpretation might encourage courts to decide tort, contract, or property cases with more of an eye toward public policy. Since common law has always had a policy tilt—mostly, and still, a modified liberal tilt—the question is really whether common law judges should shake off their common law policies and decide private law cases in accord with different policies, perhaps more in the way they might decide constitutional or other public law cases. In short, should private law, especially common law, be more public?

III.

It seems to me that there are several reasons why this would not be a good idea: why we should keep it private.

A. Stability

Turning private law more public would tend to undermine legal stability and predictability in two ways. First, ideas about public policy change with the political and cultural currents—sometimes gradually, sometimes abruptly with the shifts of fashion. During the course of the twentieth century, to take a long-term example, free market or laissez-faire ideas were largely ascendant in the early decades of the century, social democratic ideas at mid-century, and there was a resurgence of free market thinking towards the end of the century. Common law adjudication reflected these currents, but perhaps in a paler or less robust

25. *See* Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005) (reviewing debates about Delaware company law, and assessing the politics of state and federal corporate regulation).

way than it might have done, inasmuch as it was restrained by common law precedent and the common law mindset. To say that private law should be more public is to say that it should dissolve or at least loosen those restraints. But that would mean less continuity, stability, and predictability in private law.

Moreover, it is not just that public policy ideas change over time. They are also contested, more or less intensely, at any given time. There were powerful socialist and social democratic counterforces in the early twentieth century, economic liberalism did not disappear at midcentury, and today's world is not precisely a nirvana of non-contention. If courts are to decide private law more in accordance with public policy, which public policy would apply? It would vary, perhaps to some extent by geography since different policy ideas tend to be ascendant in different regions of a given country. But inevitably it would vary with the individual judge, which is no recipe for stability.

Of course, legal stability and predictability are not virtues that are supreme over all others. Change is sometimes good. Common law has always made room for change by modifying, distinguishing, or reversing precedents, and by a variety of other techniques and tropes familiar to lawyers and law students. But predictability ranks fairly high among the legal virtues. It is part of what people mean by the Rule of Law. When the law is uncertain, human autonomy itself suffers, since without knowing what is permitted and what is forbidden it is less safe to act at all. Common law lends an element of stability to private law, without being hopelessly—or perhaps even sufficiently—rigid. More "public policy" would mean more variability, less stability, and less certainty about the law.

B. Transparency

More public policy through adjudication, rather than through legislation, would mean less transparency in policy making. The barriers would be higher to public knowledge about how, why, and even when and whether policy decisions were made. Judicial policymaking is apt to be obscure to the public in various ways. Adjudication is particular to its facts, at least in the first instance; it is technical, and understanding it often requires professional sophistication. An occasional Supreme Court decision attracts broad publicity, but most court cases do not and cannot. Of course, legislation, too, can be mysterious. It is a staple of political science and of daily journalism how legislatures sometimes hide what they are up to. But making policy by legislation is surely more transparent than doing it by adjudication. It is easier for the press and the public to follow legislative debates and decisions than judicial action. There are fewer legislatures to watch than courts and judges—just one legislature

for each jurisdiction or sub-jurisdiction, instead of numerous courts and courtrooms. Legislative policymaking is not cloaked in as much technicality and professional obscurity as the law. One can be a legislator, after all, but not a lawyer, without a professional degree. Legislative sessions and hearings can even be broadcast, while courts usually ban television cameras and radio microphones.

At least one advocate of redistribution through private law is forthright, or ingenuous, enough to cite lack of transparency as a virtue for leftish policy making through private adjudication:

> In fact, it may at times be less obvious that legal rules are aiming at redistribution at all. Progressive taxation and transfer payments are extremely transparent methods of transferring income from the wealthy to the poor. In contrast, redistributive legal rules may have various aims and can be rationalized in different ways. For this reason as well, they are not in direct tension with prevailing individualistic beliefs.[26]

Stealth policymaking is antithetical to the Rule of Law, however, in various ways. Transparency and public accountability are often thought essential, in and of themselves, to the Rule of Law. There are also consequential implications. Stealth may make it easier to ignore the public's retrograde individualistic beliefs, for example, but it may also facilitate outright corruption. Special interests have been known to want to influence public policy, and if courts are untethered to make such policy out of the public eye, it is imaginable that influence might be brought to bear, even that favors or cash might change hands. Moreover, the public can no doubt be imposed upon for a time, but sooner or later it will be realized that public policy is being made—and "rationalized in different ways"—on an ambitious scale, cloaked from public scrutiny. The risk is considerable that public faith in the courts will be corroded or lost, and once lost, not easily restored.

C. Legitimacy

The problem of judges as lawmakers in a democratic society is a familiar one. Judges are not readily answerable to the electorate. Hence, judicial lawmaking is in tension with democratic legitimacy, if not at odds with it. Judicial review of legislation—the power of courts to strike down statutory laws as unconstitutional—is the best known aspect of the problem.

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26. Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 369 (2006) (citation omitted).

In a sense, it might seem less of a problem for unelected judges to shake off common law constraints and make private law in accordance with public policy—at least in the absence of contrary statutes—than striking down laws duly enacted by the people's elected representatives through judicial review. If a statute is struck down as unconstitutional, it cannot be reenacted, in principle, short of a constitutional amendment.[27] A judicial innovation in private law, by contrast, can presumably be modified or reversed by statute, in other words by simple majority. Of course, enacting legislation is not really so simple, but the private law innovation still seems less at odds with democratic self-government, hence less a problem of legitimacy, than striking down statutes as unconstitutional. But in another sense, it might seem even more problematic. After all, most citizens support and believe in their country's constitution. If a law really does conflict with the constitution, it is plausible to think that the court is carrying out the popular will by striking it down. But there is far less reason to think there is broad public support, or even majority support, for any particular policy idea about private law. On the contrary, if judges have to introduce the policy, it can only be because the elected legislature has not done so.

Still, if common law is legitimate—and common law is judge-made law by definition—why should a more public style of judge-made private law, more in tune with public policy ideas, be any less legitimate?

It is partly a question of degree, and of public expectations. Common law has been part of the American institutional landscape since the beginning. Thus, there has been plenty of time and opportunity to jettison it if the voting public had wished to do so. At least, common law is familiar enough not to frustrate public expectations in any acute way.

Moreover, common law rules—both traditional principles and modifications arrived at through the common law process—tend not to be sharply controversial, or at least not to be the points on which society is most divided politically. Contributory negligence or comparative negligence, privity or not as a requirement of products' liability, the standard of care owed to a trespasser or to an invitee: people, if confronted with these questions, might disagree about them, but these are not (and never have been) the burning questions of the age. And there is general acceptance that they are legal questions, properly settled by courts in accordance

27. In practice, new Supreme Court Justices, or a change of heart by sitting Justices, can render what was unconstitutional yesterday constitutional today, and vice versa. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (declaring anti-sodomy statutes unconstitutional and reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986)); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage laws, overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), and implicitly reversing the laissez-faire doctrine of *Lochner v. New York*, 198 U.S. 45 (1905)).

with common law principles and methods that may be understood dimly by the public but which have the sanction of time and long usage.

The questions of public policy to which a more publicly-minded private law would presumably attend are, by contrast, intensely controversial even if academics are sometimes nearly unanimous about them.[28] Questions of distribution and redistribution, of regulation and freedom, of labor and capital, of the claims of minorities and majorities: these are the great political issues about which the public is divided. It is not clear that judges have any special expertise about them. No doubt the common law "baseline" takes an implicit view about some of these issues, a modified liberal view, on the whole. But if established social baselines are to be changed, surely it should be by democratic decision, not by judicial fiat. For judges to introduce new and contested policies about these questions, on an ambitious scale beyond the bounds—themselves elastic enough—of what might generally be accepted as common law decisionmaking, would certainly raise serious questions of democratic legitimacy.

D. Habits of Neutrality

Neutrality and impartiality are ideals with deep roots in the idea of justice. Aristotle says, "[I]t is evident that in seeking for justice men seek for the mean or neutral."[29] And Leviticus commands: "[T]hou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour."[30] Of course, impartiality is notoriously difficult to define. If justice is treating likes alike, the question remains: what, and who, is relevantly alike?

At a minimum, impartiality surely means that adjudication should not be driven by corruption—a litigant is not relevantly different from an opponent by virtue of having bribed the judge. It is only a slightly more subtle form of corruption for judges to favor litigants of their own faction or political party. Even sympathy can be a kind of corruption, especially since there is no assurance that sympathy will always gravitate toward those who most deserve it. Knowing the ethical temperament of the Bible, one might have expected the Bible to urge judges to put a thumb

28. *See supra* note 19 (on legal academia's leftward tilt).
29. ARISTOTLE, *Politics, Bk. III, ch. 16*, *in* THE BASIC WORKS OF ARISTOTLE 1202 (Richard McKeon ed., 1941).
30. *Leviticus* 19:15 (King James).

on the scale in favor of the poor. Instead, Leviticus categorically forbids favoritism towards the poor or the rich.

Under common law, most private law rules and principles are, at least, general and abstract. Common law tort and contract cases do not typically turn on who the litigants are, what business they are in, what commodity they are disputing over, or what interests or factions they might represent. This is the sense in which common law does not respect persons. The law is meant to be impartial as between rich and poor, as between Republicans and Democrats, and as among a wide range of transactions and transactors. This is the meaning, or at least one crucial meaning, of the inscription chiseled over the portico of the United States Supreme Court Building: Equal Justice Under Law. And, hence, George Orwell's backhanded tribute to English law:

> Here one comes upon an all-important English trait: the respect for constitutionalism and legality, the belief in "the law" as something above the State and above the individual, something which is cruel and stupid, of course, but at any rate *incorruptible*.
>
> It is not that anyone imagines the law to be just. Everyone knows that there is one law for the rich and another for the poor. But no one accepts the implications of this, everyone takes it for granted that the law, such as it is, will be respected, and feels a sense of outrage when it is not. . . . Everyone believes in his heart that the law can be, ought to be, and, on the whole, will be impartially administered. The totalitarian idea that there is no such thing as law, there is only power, has never taken root. Even the intelligentsia have only accepted it in theory.[31]

Common law judges adjudicating private law disputes, therefore, develop, or have cause to develop, habits of impartiality and neutrality. The common law style of private law fosters judicial values that sit well with Aristotle's and Leviticus's idea of justice, and with a widely held view of the Rule of Law.

Public law, inevitably, is different. When a legislature enacts public policy—beyond forbidding force and fraud—it is not neutral. Deciding what and whom to tax, and how much; what and on whom to spend; whether and how to regulate commerce; whether to expand or restrict foreign trade; whether to build a highway *here* or *there*—public enactments usually if not invariably favor one interest or faction over another. This is politics, and in democratic countries this is why legislation is a political process.

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31. GEORGE ORWELL, *The Lion and the Unicorn: Socialism and the English Genius*, *in* 2 COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL 56, 62–63 (Sonia Orwell & Ian Angus eds., 1968). Orwell goes on to say:

> The hanging judge, that evil old man in scarlet robe and horse-hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is one of the symbolic figures of England.

Id. at 63.

When courts make public policy, they too are not neutral. In the United States, courts make policy through constitutional adjudication, through interpreting public statutes that are more or less vague, and through public law litigation of various kinds. Whether adjudicating divisive questions such as racial policy, prisoners' rights, abortion, gay marriage, or disputes over the place of religion in public life, the judge chooses sides, and advances some values and interests at the expense of others.

There has always been a certain amount of public law adjudication; and in the past half century, especially in the United States, there has been more than there used to be. One danger is judges might not merely choose sides on various public issues, but come to see themselves—and to be seen—as political partisans, with a natural bent toward helping the cause and its friends, whatever the cause might be, and frustrating the opposing cause and its friends. Professor Larry Solum warns of a downward spiral of politicization,[32] leading ultimately to judges deciding even routine nonpolitical tort or contract cases on the basis of whether a litigant is friend or foe, Democrat or Republican, One of Us or Not One of Us. This is not far from how courts behave, or are widely believed to behave, in many countries around the world.

In common law countries, however, there is a countervailing influence on judges' behavior and character. Day-to-day adjudication of private law cases, in accordance with common law principles that do not respect persons, fosters habits of neutrality and impartiality. No doubt this neutrality is not perfect. Common law is not neutral toward tortfeasors or toward parties who unjustifiably fail to perform their contracts. But the private law style of adjudication is appreciably more impartial than public law adjudication, which overtly promotes controversial public policies favoring the interests and values of some at the expense of others.

Courts and judges in common law countries have a centuries' old reputation for impartiality and independence, one that is virtually unique in the world.[33] The common law style of private law is at least one source of that reputation. There is reason to believe or to hope that common

32. Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 661 (2005); *see also* A Neoformalist Manifesto, Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2003/05/a_neoformalist_.html (May 18, 2003, 17:00 CST).

33. *See, e.g.*, Michael Wallace Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl*, 38 U. OF MIAMI INTER-AM. L. REV. 141, 146 n.22 (2006) (stating that foreign litigants are "choosing English courts because of their reputation for fairness" and that Latin American litigants are flocking to United States courts for the same reason, as well as in hopes of windfall judgments).

law judges' habits of impartiality and independence carry over even into their adjudication of overtly public law cases.

To make private law more public, to shake off the common law style in favor of a more political style of adjudication, would dilute if not dissolve the common law influences fostering habits of judicial neutrality and impartiality, habits closely associated with the Rule of Law. This would be a high price to pay for public policy victories won through the courts, even or especially for public policies that require judicial imposition because they cannot attract enough public support to prevail through the democratic process.

IV.

There is ample scope in today's English-speaking democracies for legislating public policy, including policy about property, contract, tort, and other areas of private law. This was not always true. In past centuries, there were common law doctrines that statutes should be construed narrowly, especially statutes that derogated from the common law. By means of such doctrines, common law judges could—and frequently enough did—fail to give full effect to statutes whose provisions, and whose policy goals or tendencies, diverged from common law precedents.[34] But these doctrines, and the judicial practice or judicial chicanery that went with them, effectively disappeared in the twentieth century.[35] If courts indulge in some degree of creative interpretation or misinterpretation of statutes today, there is no reason to believe it is with a tilt toward traditional common law values or policies. If anything, as courts become habituated to broad construction of treaty, constitutional, or statutory public law provisions, the style and policy tilt of those public law decisions are apt to influence how courts construe private law statutes. But on the whole, legislatures can usually expect the courts to enforce private law statutes essentially as written, especially if statutes are drafted clearly.

What should be the content of private law laid down by the legislature? This question merges with the great debates of public policy and political philosophy. How much economic freedom should there be? How much government power, exercised in the name of fairness, equality, environmental

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34. *See, e.g.*, Shaw v. R.R. Co., 101 U.S. 557, 565 (1880); *see also* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 450–51 (1950) (citing cases in which courts ignored statutes instructing them not to construe statutes narrowly). *See generally* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (providing an overview of modern statutory interpretation methods).

35. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RESERVE L. REV. 179 (1987) (examining nineteenth- and twentieth-century legal reasoning).

conservation, or otherwise? At some higher level of theory, does the political community have a goal or philosophy, whether utilitarian, deontic, aretaic, theological or otherwise, some combination of these, or none of them, and what if any are the implications for the law of property, contract, tort, and so on?

In a democracy, these questions are up to the people and are refracted through the delights and imperfections of representative government, itself beheld with enthusiasm in varying degrees. Two or more cheers for democracy; the worst form of government, except for all the others.

In practice, legislatures in common law countries do typically try to draft private law statutes clearly. Broad, vague, aspirational private law provisions, by contrast, would invite courts to fill in the details, and to make the policy choices that the legislature would have evaded. This would have many or all of the drawbacks, suggested above in this Article, of a more public law style of private law adjudication. Worse, legislatures and courts might both try to escape public responsibility for bad or unpopular decisions by pointing the finger at each other. In the end, dissembling and evasion of responsibility by the legislature would only invite dissembling and evasion by the courts as well.

As for private law adjudication generally, there is no clear boundary between the common law style and a more public law style, just as there is no clear boundary—at least in common law countries—between private law and public law. The common law process allows for development and change, taking public policy into account. Done aggressively enough, such common law adjudication could easily shade over into a more public law style of judicial lawmaking. Likewise, private law and public law themselves can be difficult to distinguish. Many aspects of family law, for example, might be characterized either way.[36]

Yet, there is a difference, in degree if not in kind, between the common law style of private law adjudication, and public law. There are distinctive values and principles in the common law bloodstream, a kind of modified classical liberalism, in turn associated with both political freedom and economic prosperity. There is the characteristic common law deference to precedent, without rigid adhesion to it. There is the common law reluctance to adjudicate public questions that are fundamentally

36. Marriage, for example, is a private relationship whose public implications emerge dramatically in the debate over gay marriage. *See generally* Editor's Symposium, *The Meaning of Marriage*, 42 SAN DIEGO L. REV. 821 (2005) (providing articles and comments on the public and private implications of marriage).

contentious. This common law style of private law has links with what are generally thought of as Rule of Law values.

Private law adjudication might easily be made more public, more overtly politicized. But the drawbacks, in stability, transparency, legitimacy, and habits of judicial impartiality would be considerable. The values that would suffer are themselves closely associated with the Rule of Law. Corroding the Rule of Law in this way—or in any way—would have ill consequences, public as well as private.