

JURIDICAL JUSTIFICATION OF PRIVATE RIGHTS

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INTRODUCTION

Private law theory is on the rise in the United States. A wave of theoreticians, myself included, have been developing “internal” theoretical perspectives on various facets of private law. As I have explained elsewhere, this group – gathered under the banner of the New Private Law (NPL) – tends to focus on interpretive theory.¹ And, while all legal interpretation of necessity blends conceptual and normative analysis, most NPL theorists prioritize fidelity in representations made by way of conceptual analysis of law over robust normative claims about the law’s moral content or aims.

I have just described certain *tendencies* of a new way of thinking about private law. And for good reason. There is, refreshingly, no orthodoxy in the NPL, and so it is not possible to speak of it univocally. But the upsides of heterodoxy come with a downside: the NPL is characterized by a conflux of methodologies the mutual compatibility and orientation of which are yet to be analyzed. NPL theorists have yet to debate what it means to interpret private law from an internal point of view, and why it might be necessary or important to engage in interpretation in this way.

I aim presently to frame and instigate debate over these and similar issues. I will do so by explaining the sense in which interpretive private law theory may be concerned with elucidation

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¹ Paul B. Miller, ‘Corporations’ in Andrew S. Gold, et al. (eds), *The Oxford Handbook of the New Private Law* (OUP 2020).

of the *juridical justification* of private rights, as reflected in *juridical reasons* for those rights. To some extent, this is a matter of elaborating and refining a methodology that informs my own work.² But it also, I think, offers one way in which to focus and defend methodological proclivities that characterize the New Private Law.³

I have said that this chapter will address interpretive analysis of the juridical justification of private rights. As I will explain, the goal of interpretation, so framed, is to elucidate the justification of private rights in a manner consistent with understanding law as, at once, a set of *public practices of practical reasoning*, and a *product* of these practices. In other words, interpretation treats law as a set of reflexive, interlocking practices; practices that are generative of norms and focused on situating these norms relative to one another and goods to be promoted

² See, for example, Paul B. Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill Law Journal 969; and Paul B. Miller, 'Justifying Fiduciary Remedies' (2013) 63 University of Toronto Law Journal 570.

³ The questions have been taken up sporadically in earlier writings. See especially Ernest J. Weinrib, 'The Jurisprudence of Legal Formalism,' (1993) 16 Harvard Journal of Law and Public Policy 583; Benjamin C. Zipursky, 'Pragmatic Conceptualism' (2000) 6 Legal Theory 457; and Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 American Journal of Comparative Law 809. For more recent perspectives, see Andrew S. Gold, 'Internal and External Perspectives: On Methodology in the New Private Law,' in Andrew S. Gold, et al. (eds), *The Oxford Handbook of the New Private Law* (OUP 2020); and Felipe Jiménez, 'Two Questions for Private Law Theory' (unpublished manuscript on file with author). See also Tarun Khaitan and Sandy Steel, 'Theorising Areas of Law' (unpublished manuscript) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3464432>

Some of the arguments that I advance here resonate with those of Stephen Smith in his chapter in this volume (Stephen A. Smith, 'Intermediate and Comprehensive Justifications'). Notably, we agree that interpretive private law theory ought to be oriented toward posited legal rules and reasons, and that the normativity of law as posited will rarely admit of persuasive foundationalist (in Smith's phraseology: "comprehensive") interpretation. We also agree that legal or juridical justification tends to be relatively thin ("shallow," as Smith puts it).

However, our accounts also differ significantly. *First*, unlike Smith, I recognize three levels of abstraction in interpretive analysis (Smith's "intermediate" category of justification runs together what are, in my account, "juridical" and "middle-level" justifications, the former being wide enough to encompass mere assertions of value offered as justification for a single legal rule or framework of rules, with the latter encompassing principles of wider – regional, rather than merely local – extension). *Second*, I relate the importance of engagement with juridical reasons to the general jurisprudential literature on the nature and normativity of law, whereas Smith seems primarily concerned with political conciliation in societies characterized by moral relativism and religious division. *Third*, Smith does not differentiate general (content-independent) and particular (content-dependent) juridical reasons for legal rules. *Fourth*, Smith suggests that foundationalist interpretation is illegitimate. I agree that it tends to be suspect as interpretation, but would not deny its potential legitimacy. In my view, the merits of interpretive theories turn on whether they provide faithful representation of legal rules and reasons. It is reasonable to infer that fidelity will falter in proportion to the complexity of the subject matter and the extent of abstraction in interpretation. But the failure of highly coherentist interpretation cannot be taken for granted. *Fifth*, and finally, Smith does not make much allowance for the value of critical theoretical analysis. He assumes that all theorists are, or should be, engaged in interpretation, and so bound by a norm of interpretive fidelity. But there is no reason to assume this. Critical theoretical analysis is a legitimate and important undertaking.

or secured by law in a given political community. Interpretive analysis of the juridical justification of private rights articulates practical reasons given in law for rights recognized at law. As I shall explain, it is important that one distinguish interpretation, so understood, from that which analyzes private rights in terms of non-juridical practical reasons. It is also important that one differentiate interpretive theory *tout court* from critical theory.

The argument will be developed as follows. Part I registers some stipulations about interpretive theory, contrasting interpretation with critique while emphasizing that legal interpretation is inevitably concerned with law's normativity. Part II explains juridical justification, clarifying the nature of juridical reasons and their significance for practical reason, and distinguishing juridical from non-juridical practical reasons. Part III extends the analysis to private rights, showing that and how juridical reasons supply public justification for private rights, and contrasting characteristic features of juridical reasons for private rights embedded in legal forms from those that define isolated conduct rules. Part IV closes the loop by distinguishing interpretive theory oriented toward juridical justification of rights from that which articulates mid-level and foundational justifications. Part V comments on the value and limitations of juridical justification as an element of the public practices of practical reasoning that are central to law-making, adjudication, and legal argument. It also explains the compatibility of respect for reason-giving as a focal point of these practices with postures of critique.

I – INTERPRETING PRIVATE RIGHTS

I begin by registering several stipulations made here *arguendo*. They go to the nature of private rights, the nature of law, and the differences between interpretive and critical legal theory.

A) Private Rights

This chapter, like the volume of which it is part, is focused on “private rights.” But reference to private rights is potentially ambiguous given debate over what, if anything, makes rights “private.” I will not here canvass points in debate or argue a position. Instead, I offer the following four comments in clarification of what I mean by “private rights.”

First, an analytically robust basis for differentiating “private” from “public” rights has yet to found. For that reason, I lay no emphasis on the “private” quality of the rights that I shall discuss. By “private rights” I mean to refer to personal rights that obtain interpersonally and are enforced civilly. These rights are personal in that they protect an interest personal to the right-holder. They are interpersonal in that they establish terms of interpersonal interaction. And they are rights in respect of which the right-holder presumptively enjoys personal standing to seek vindication by civil suit.

Second, “private rights” are held by, and regulate the interpersonal interactions of, all manner of persons, whether acquired or invoked in a personal or representative capacity. Private rights are, of course, held by natural persons acting in their own stead, and govern interactions between such persons in which each acts on their own rights. But private rights can also be held by artificial persons and govern interpersonal interactions between two or more of them, or between natural and artificial persons. Furthermore, as experience with artificial persons makes plain, private rights can be held by natural persons acting in a representative capacity for others. The fact that groups or institutions may be treated in law as persons for public rather than private purposes gives further reason for ambivalence about the analytical significance of the “private-ness” of “private rights.”⁴

⁴ As discussed in Paul B. Miller and Jeffrey Pojanowski, ‘Torts Against the State’ in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020).

Third, while all “private rights” establish terms of interpersonal interaction, they are structured differently. These differences appear to be rooted in the source of private rights: namely, in the exercise of personal powers by individuals (e.g., in the acquisition, transfer, or variation of rights) or in the exercise of prerogative powers by the state (e.g., the power to make law, including fixing the specification of rights). Some private rights (those originating partly in an exercise of personal power(s)) are bilaterally structured, while others (those originating wholly in an exercise of prerogative power(s)) are held omnilaterally.⁵ Rights held bilaterally govern the interaction of two individuals and define the normative contours of (part of) their relationship; the right-holder enjoys her right relative to the duty-holder and no one else, and likewise the duty-holder is obliged by virtue of her duty to the right-holder and no one else.⁶ Private rights that have this quality – e.g., those recognized in contract and fiduciary law – arise partly by virtue of the exercise of normative powers by or for a right- and/or duty-holder and presume privity in conditions requisite to the incidence of the right. By contrast, omnilateral rights are held by the right-holder relative to all other persons; the duties correlative to these rights are general and assume nothing about preexisting mutual involvements or interactions of the right- and duty-holder.⁷ These rights – e.g., as realized in tort law – are prescribed by the state and specify how each must treat others as a matter of general, reciprocal right and duty. Individuals will only ever enter into a relationship of direct interpersonal accountability if a duty-holder acts, or threatens to act, in breach of duty to a right-holder.

⁵ Arguably, a third category of rights is structured multilaterally. Consider rights that obtain in associations and mediate relationships between members *inter se*, and between them and the entity.

⁶ On bilaterality, see Ernest J. Weinrib, ‘Correlativity, Personality and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 107.

⁷ As Keating explains, “[p]rimary responsibilities in tort are omnilateral and standing.” Gregory C. Keating, ‘Is the Role of Tort to Repair Wrongful Losses?’ in Donal Nolan and Andrew Roberston (eds.), *Rights and Private Law* (Hart 2012) 367, 382.

Fourth and finally, by “private rights” I mean to denote primary but not secondary (or remedial) rights. I also mean to refer to rights as such, rather than all manner of legal entitlements (rights, privileges, and powers). Primary rights specify how a right-holder may insist upon being treated by a duty-holder. In turn, their content provides normative guidance. It might be hoped that the guidance will be abided by the duty-holder. But where it is not, the right-holder will have a cause of action for breach that may be asserted personally against the duty-holder. In pleading her case, she may assert a secondary “right” to a particular remedy. But the relationship of rights and remedies is complex.⁸ In some cases, remedies are available, doctrinally, effectively as of right on proof of a certain kind of wrong, and seem grounded normatively in their responsiveness to practical reasons that underlie a primary right. However, in other cases they appear also or instead to be responsive to contingent features of the wrongful violation of the primary right, or to general considerations relating to the administration of justice.⁹ However interesting, these puzzles are an unnecessary distraction and so I shall set them aside.

B) Law as Public Practical Reasoning

Given that this chapter is addressed to questions of methodology in interpretive legal theory, I ought to clarify how I understand law. As intimated earlier, I think that law is best understood as a set of interconnected practices of practical reasoning and as a product of a subset of these practices. More specifically, law encompasses reflexive public practices of practical reasoning that involve, most prominently, positing, arguing about, deciphering, deciding on, deliberating with, and determining how to comport with rules of general application in a political community, as well as the products of a subset of these practices (the official practices of

⁸ Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019).

⁹ As emphasized by Nicolas Cornell, ‘What Do We Remedy’ in Paul B. Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (OUP 2020); and Charlie Webb, ‘Duties and Damages’ in Paul B. Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory, Vol. 1* (OUP 2020).

lawmakers in giving, interpreting, or otherwise pronouncing law).¹⁰ This implies what leading general jurisprudes, notwithstanding their other differences, accept; namely, that law is inextricably bound up with practical reason and the exercise of that capacity (a) institutionally, in the governance of political communities and (b) personally, by individuals reflecting on what we owe to each other and/or our communities, and about how to act in light of same.¹¹ One could, of course, say much, much more about the relationship between law and practical reason. Here, I must content myself with registering two assumptions that are reflected in the argument to follow.

The first is that law may be understood as a reflexive set of public practices of practical reasoning insofar as posited law is the *product* of public practical reasoning (i.e., public deliberation and debate over, settled by public declaration of, law) and insofar as posited law, in turn, *structures* - by *enabling* and *focusing* - public practical reasoning (i.e., it guides and directs those engaged in practical reasoning, whether in official or personal capacities). The reflexive quality of these practices is evident in reasoned engagement with law that accepts it as properly settled as well as in that which critiques it as poorly or wrongly settled. To see the law in this way is to view it as a dynamic enterprise whereby a community subjects itself to rules in order to settle and thus enable, but not foreclose, effective practical reasoning.

The second assumption - also the subject of broad agreement - is that the primary function of law is that of providing normative guidance to those to whom it is addressed.¹² The guidance

¹⁰ In thinking of law as a set of public practices of practical reasoning, I have been influenced by Gerald J. Postema, 'Public Practical Reason: Political Practice' (1995) 37 *Nomos* 345; and Gerald J. Postema, 'Public Practical Reason: An Archeology' (1995) 12 *Social Philosophy and Policy* 43.

¹¹ A sampling: John Finnis, *Natural Law and Natural Rights* (OUP 1980); John Finnis, 'Foundations of Practical Reason Revisited' (2005) 50 *American Journal of Jurisprudence* 109; John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002); John Gardner, 'Nearly Natural Law' (2007) 52 *American Journal of Jurisprudence* 1; Joseph Raz, *Practical Reason and Norms* (OUP 1999); and Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1.

¹² Law's addressees being individuals acting in a personal capacity as well as legal officials acting in an official capacity. The modern *locus classicus* of analysis of the guidance function of law is H.L.A. Hart, *The Concept of Law*

function of law is primary in that the law's other functions are contingent on its effectiveness in supplying guidance. Setting to one side, for now, the relationship between law and other kinds of practical reason, I take it that law supplies normative guidance by practical reasons, and that it does so in issuing rules and in articulating reasons for these rules.¹³ Finally, I share the view that the law will generally be suitable for (and thus, usually, more effective in) supplying normative guidance to the extent that the rules and reasons it articulates are practically reasonable.¹⁴

C) Interpretation and Critique

This chapter is, again, addressed to questions of methodology in interpretive legal theory. But, given the inherent normativity of law, and given that the normativity of law and its claim to authority are such as to invite reasoned assessment of the soundness as well as the nature of what the law permits or demands, it is important to distinguish interpretation from critique, or *interpretive legal theory* from *critical legal theory*.¹⁵

The task of *interpretive legal theory* is one of offering a simplified but faithful rendering of posited law that aims to make it more amenable to understanding. The rendering involves descriptive and normative elements but the latter are supplied not by the theorist but by law. The

(OUP 1961). See also Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law* (Clarendon 1979); and Scott Shapiro, 'Law, Morality and the Guidance of Conduct' (2000) 6 *Legal Theory* 127.

¹³ In this, I depart from those legal philosophers (most of whom identify as hard positivists) who believe that the law gives practical reasons only by issuing rules – i.e., directives – that figure in our practical reasoning by excluding our giving consideration or weight to other kinds of practical reason, including moral or prudential reasons that favor or disfavor a rule or an act in compliance with or contravention of a rule. I ally myself with those (many, but not all of whom, identify as natural law theorists) who think that the law can only be an exercise in public justification to the extent that it traffics in reasons as well as directives, and that law can generally serve as a (morally) suitable source of normative guidance on this basis. I say this while acknowledging that in some cases reasons may not be put for a rule on the basis of obviousness or in the belief that the justification for a rule is both patent and over-determined (perhaps even patently overdetermined), and that in other cases – as discussed in Part V.B, below – our lawmakers might fail to give reasons – or to give good ones – for rules. I am grateful to Stephen Smith for encouraging me to clarify my views on these points.

¹⁴ See generally Mark C. Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241.

¹⁵ It is unfortunate – because obfuscating of law, and our collective interest in reasoned scrutiny of what the law permits or demands, and whether its permissions and demands are justified – that interpretation and critique are so often run together in private law theory.

theorist aims at description of the posited law and elucidation of its *posited* normativity, the latter being a record of settled judgment reached for a political community on a normative issue.¹⁶ The theorist might also point out gaps, discordant elements, or open questions about posited law and legal reasons, and they retain an interpretive posture provided they do so without critique. Finally, to the extent that interpretation of legal texts varies by interpretive methodology – for example, in the manner of construction of text and weight to be accorded non-textual evidence of the law – the theorist should explain their methodology, enabling others to evaluate their handiwork.

By contrast, the task of *critical legal theory* is avowedly, and properly unapologetically,¹⁷ critical and, often, reformist in its orientation toward posited law.¹⁸ Where the critical theorist believes the law or reasons posited for it to be deficient, they may advance the common good through argument for reform. Their argument will be an invitation that the community develop or revise its settled judgment on a normative issue, or reframe it so as to provide better normative guidance.¹⁹

¹⁶ See Postema, ‘Public Practical Reason: An Archeology,’ *supra* note 10, at 70-71, explaining that the “point of justification is practical and public: it is to locate some form of common ground for action or assessment among rational agents who must live in close proximity to, and interact with, each other.” It is of no moment that the positing of law shows the issue to have been only contingently or imperfectly settled.

¹⁷ Contra Khaitan and Steel, who claim that “the main purpose of theorisation is understanding the phenomenon [theorised]” and suggest that it may only “incidentally have practical implications.” *Supra* note 3, at 2 and 3.

¹⁸ On the value of critique, and in exemplification of same, see Hanoch Dagan and Roy Kreitner, ‘The Character of Legal Theory’ (2011) 96 Cornell Law Review 671; and Hanoch Dagan and Avihay Dorfman, ‘Just Relationships’ (2016) 116 Columbia Law Review 1395.

¹⁹ It may be that the relative importance and prevalence of critique vis-à-vis interpretation varies depending on the level of stability of a community’s settlement of a given normative issue or set of issues. In periods of social, cultural, religious, or political tumult, the posited law might experience – and, indeed, be a site for – “paradigm shifts,” in which case critical theory will take on a special salience and interpretation is likely to become more fraught. I am grateful to Hanoch Dagan for emphasizing this point and the Kuhnian language in comments on an earlier draft of this chapter. See also his ‘Doctrinal Categories, Legal Realism, and the Rule of Law’ (2015) 163 University of Pennsylvania Law Review 1889.

II – JURIDICAL JUSTIFICATION GENERALLY

I have promised to outline a methodology for interpretive analysis of the juridical justification of private rights. The elements relating specifically to private rights are set forth in Part III. But I shall first explain how juridical justification and reasons, respectively, are to be understood from a general jurisprudential perspective.

A) Juridical Reasons as Legal Reasons

Contemporary use of the word “juridical” is sometimes thought an indulgence of the obscure. That may be because it is no longer in common use. But there isn’t any obscurity, nor does use of the word invite or imply mystical thinking. “Juridical” is a synonym for “legal,” but emphasizes that legal usage of language is technical, such that words and concepts – and actions and practices involving same – may not, in law, bear the meaning(s) that they have as a matter of general usage. So, for example, “right,” “duty,” “wrong,” “remedy,” “care,” “cause,” “claim” and so on have technical meanings in law that diverge from their other, more widely known, meanings. And law is laid down through, and taken up in, technical linguistic practices of lawyers, judges, and others. Practical mischief and distortion of thought can arise if one fails to distinguish the technical from non-technical semantics of language in which law is expressed. But adding the adjective “legal” to a word that has a technical meaning in law distinct from its other, more familiar, meanings may not be sufficient to denote its technical usage because “legal” is itself ambiguous (i.e., not reserved for, and so a reliable marker of, legal semantics). There is thus value in substituting the adjective “juridical” for “legal,” if only to clarify that one is invoking legal semantics and legal normativity.

In speaking of juridical reasons, then, I mean to denote *legal* reasons, in a technical sense. The sense is that implied by recognition of the authority of legal officials to posit, interpret and

enforce law, with juridical reasons being a matter of express or implied legal justification(s) for law, and for obedience²⁰ to law. I take juridical reasons to be of at least two kinds. *General juridical reasons* are content-independent reasons²¹ that obtain generally within legal systems and that call for obedience of legal rules as general matter (i.e., irrespective of their content, because they were validly posited by legal institutions with a good claim to authority²²). Content-independent reasons can be understood as reasons *for* obedience to law, and reasons given *by* law (i.e., by the pertinence of a validly posited legal rule), in which case content-independence may be thought to indicate something important about their bearing on practical reasoning (e.g., that one has a decisive reason to obey a legal rule, simply because it has been validly posited by an official or institution with a good claim to authority in relation to the rule). There is, unsurprisingly, considerable controversy over the normative significance of general juridical reasons.²³ I set this aside here. I take it that, whatever their significance, general juridical reasons are incomplete²⁴ in that they cannot account for the specificity of the normative guidance that the law provides; i.e., they are not reasons for doing what this or that legal rule or framework of legal rules permits or requires. Such specificity is found only in the content of, and reasons for, particular legal rules. I shall thus focus here on *particular juridical reasons*, by which I mean posited reasons for a particular legal rule or framework of legal rules.

²⁰ Obedience being a matter of reasoned deference to the authority of law and, by extension, of legal institutions; reasoned deference is usually shown in accepting and acting on the normative guidance supplied by law.

²¹ H.L.A. Hart, *Essays on Bentham* (OUP 1982); Joseph Raz, *The Morality of Freedom* (OUP 1988).

²² I will remain agnostic for present purposes on the conditions requisite to having a good claim to authority. On the relationship between the authority of law and legal officials or institutions, see Andrei Marmor, 'Authorities and Persons' (1995) 1 *Legal Theory* 337.

²³ See, for example, Paul Markwick, 'Law and Content-Independent Reasons' (2000) 20 *Oxford Journal of Legal Studies* 579; Laura Valentini, 'The Content-Independence of Political Obligation: What it is and How to Test It' (2018) 24 *Legal Theory* 135.

²⁴ In Markwick's framing, they are, at best, 'partial' rather than 'complete' reasons. *Ibid.*

Particular juridical reasons are content-dependent; they are reasons offered in support of a legal rule or framework of legal rules, given the content and intended impact of the rule(s). For a content-dependent reason to be *juridical* – i.e., one given in, and not merely for, law – it must be expressly articulated by a legal official with requisite authority, or be implied by law on the basis of the content or scheme of a rule or set of rules and/or objective evidence of purpose or design of the lawmaker.

Reasons figure in the justification of something that stands in need of justification; here, a legal rule or framework of legal rules, or a decision or action taken in the face of the law. It follows that juridical reasons are legal reasons that figure in the juridical justification of law and actions that are, or should have been, responsive to law.²⁵ While reasons figure in justifications, it should also be remembered that their sufficiency as a matter of justification is a function of their weight, not just their public pronouncement and pertinence. A given juridical reason may make but a partial contribution to cumulative justification. Thus, juridical justification is a matter of the overall normative upshot of pertinent juridical reasons.

Juridical reasons are surficial; they lie upon the surface of the law, in court opinions, transcripts, legislative records and statute books, and are usually relatively thin. In the common law tradition, they are thought to reflect the relative simplicity of conventional morality.²⁶ Juridical reasons are a kind of normative shorthand, offering the extent of justification that is apt for law

²⁵ Smith suggests, plausibly in my view, that lawmakers (he has courts in mind) will tend to explicitly articulate reasons for a legal rule where that rule is new or is unsettled generally or in its extension to a new set of circumstances. Judges applying settled law take the reasons for same to be settled, too, and so might say little about them. Smith, *supra* note 3, at [ms p.4]: “To justify the law, judges must explain the grounds on which it is justified. Judges rarely attempt to do this because they rarely need to justify the law to decide the case before them. In most cases, the only law they need to apply is settled law ... In some cases, however, courts ... also develop the law ... whenever courts develop the law they almost always provide justifications for those developments.”

²⁶ Wojciech Sadurski, ‘Conventional Morality and Judicial Standards’ (1987) 73 *Virginia Law Review* 339; Gerald J. Postema, ‘The Philosophy of Common Law’ in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002).

considering its status as *authoritative public settlement* of normative issues within a political community. Consistent with rule of law values and the guidance function of law, it is important that juridical reasons be comprehensible to a layperson; one shouldn't need to be expert in ethics, economics, or statecraft to be able to understand and make use of them. That is, one shouldn't need to be practiced in normative *longhand* to be able to understand the reasons that the law supplies for acting as the law permits or requires.

As I'll explain in Part V, juridical reasons are not merely thin; they are also predictably imperfect. Imperfection is endemic, partly owing to concessions of analyticity to comprehensibility, but also because juridical reasons are developed through diffuse and/or uncoordinated lawmaking processes that introduce various institutional contingencies and that are also, often, politically charged. While we may have reason to regret these imperfections we ought not to dismiss them. To do so is to miss the opportunity to discern whether the law is presently well suited to its guidance function.

B) Juridical Reasons as Practical Reasons

I have said that juridical reasons are legal reasons, and that they contribute importantly to the law's guidance function. But how ought we to understand the nature of legal rules and reasons, and the manner in which they provide guidance? Consistent with the convergence of views in general jurisprudence described in Part I.B, I take it that juridical reasons are a kind of practical reason, and thus fulcra for deliberative and discursive practices of practical reasoning, whether those practices relate to the positing, interpretation, civic utilization, or enforcement of law.

To say that juridical reasons are a kind of practical reason is to say that they figure in personal and public practical deliberations as reasons for the posited law to which they relate, and for or against action taken in the face of such law. Setting to one side their significance in, and to,

law, general jurisprudes remain divided on whether juridical reasons are normatively distinctive in a *substantive* sense. I agree with those who hold that they are not.²⁷ Substantively, legal reasons are just moral or prudential reasons given in, and for, law.

As noted in Part II.A, juridical reasons are characteristically thin. And, as adverted to earlier, this might be a necessary concession to the difficulty of building consensus and compromise within political communities and, relatedly, the challenge of providing effective normative guidance in communities characterized by significant diversity of opinion and belief on matters of value. And this is to say nothing of resource-related and other factors that favor economy in normative expression through law. But whatever might explain their characteristic thinness, it does not lend juridical reasons a substantively distinctive character.

To say that juridical reasons are *substantively* indistinguishable from moral and prudential reasons is not to say that there's no point in distinguishing them in *other respects* when engaging in practical reasoning. Indeed, one can and sometimes should take notice that reasons given in law are just that: posited as justification for what the law permits or requires. Analytically, there is value in recognizing rules and reasons by their source.²⁸ And, pragmatically, there is value in recognizing that reasons given in law are presented by legal officials as justifying rules subject to coercive enforcement, whether or not we think them sound or decisive.

III – JURIDICAL JUSTIFICATION OF PRIVATE RIGHTS

Thus far, I have said that juridical justification is a matter of the normative upshot of the *general* and *particular* juridical reasons for compliance with and/or reliance on a legal rule or

²⁷ John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of Jurisprudence 199; John Gardner, 'The Legality of Law' (2004) 17 Ratio Juris 168; Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035; Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 Yale Law Journal 1118; and Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale Law Journal 1160.

²⁸ Hershovitz, *ibid*.

framework of rules. Juridical reasons and justification are central to the discursive and deliberative practices that define law as a form of public practical reasoning and, likewise, to law's guidance function. It is partly through juridical reasons that the law supplies normative guidance. And it is primarily through reasoned engagement with juridical reasons that the law proves more and less fit in the provision of guidance.

Of private rights, I have noted that our focus will be on primary rights. I explained that these rights are an important means by which the law establishes terms of interaction for persons, whether natural or artificial. And I have noted that private rights are structured bilaterally or omnilaterally.²⁹

In what follows, I comment on the juridical justification of private rights that have been posited in either of two ways. I turn first to private rights that are constitutive elements of a legal form of interaction. As one might expect, juridical reasons for these rights reflect the formal situation of the right. I then turn to standalone private rights. Standalone rights are (a) omnilateral and not connected to a form of interaction and, so, not conditioned by privity³⁰ or (b) arise in relation to a form of interaction but are protective rather than constitutive of the form (e.g., rights against third party interference with the performance of a contract or fiduciary mandate). As we will see, it can be more difficult to identify juridical reasons for standalone rights because, absent formal context, one must seek direct indication of the interest(s) the right is meant to protect.

A) Juridical Reasons for Rights Embedded in Legal Forms

Private rights are often embedded within legal forms of interaction (hereinafter: legal forms). Legal forms are legally defined modes of interaction. The complex of rules that define

²⁹ With an exception for rights structured multilaterally. *Supra* note 5.

³⁰ One should, however, not assume that legal forms are generally characterized by bilateral rules while stand-alone conduct rules are omnilateral. Certain legal forms are constituted primarily by omnilateral rules, and supplemented by bilateral rules. Others are constituted primarily by multilateral rules. *Supra* note 5.

legal forms delineate how parties to an association or relationship of that type may and/or must relate within its parameters. These rules may be predominantly power-conferring, or primarily duty-imposing. Where a given form consists predominantly of power-conferring rules and so is broadly *enabling*, the duty-imposing rules attached to it operate to ensure its effectiveness as an enabling device and to secure the integrity of the form. By contrast, where a form consists predominantly of duty-imposing rules and so is broadly *constraining*, the power-conferring rules attached to it often provide limited scope for private ordering (e.g., for adjustment of the content, enforcement, or directionality of duties) so far as is consistent with the integrity of the form.

Where embedded in legal forms, private rights contribute to the law's definition of discrete modes of interaction. In some cases, the general gist of a legal form corresponds to social modes of interaction. Thus, for example, contract may be understood to resolve, in legal form, a subset of social practices of promising;³¹ similarly, wills and other donative transfers are legal forms that correspond to, focus, and enable, social practices of family provision and gift-giving.³² However, legal forms, where based on social practices, abstract from those practices and often thoroughly re-work their normativity. And, in any case, legal forms make it possible for persons to interact *in a particular way* (i.e., as adumbrated by rules constitutive of the form). Private rights contribute to legal forms by specifying what the right-holder may expect, and how the duty-holder must act, in relation to the subject matter of the right. But, in contrast with private rights that express

³¹ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, rev. ed. (OUP 2015). See also Seana Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 709 and Charles Fried, 'The Convergence of Contract and Promise' (2007) 120 Harvard Law Review Forum 1.

³² Jane Baron, 'Gifts, Bargains, and Form' (1988-1989) 64 Indiana Law Journal 155; and Eric A. Posner, 'Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises' (1997) Wisconsin Law Review 567.

standalone rules, the subject matter of a right embedded within a form must be understood in the context of other rules that constitute the form.³³

Having described private rights embedded in legal forms, we may turn our attention now to juridical reasons for such rights. It may first be noted that the juridical reasons for private rights embedded in legal forms often reflect juridical reasons for the form. Indeed, it may often be that the juridical reasons for the right are derivative of those that support the form. In any case, interpretive analysis will be intricate, with the level of intricacy depending on the complexity of the form and the concatenation of rules constitutive of it. The second thing to be noted is that legal forms are not fixed constructs and so should not be taken to establish closed normative contexts for the positing of private rights or reasons for same.

Our account thus far has been abstract. We may now turn to some examples. For the sake of clarity, I will focus on simpler forms and focal rights within these forms: the right to performance in a conventional arms-length contractual relationship (here, we'll assume a negotiated bargain between persons of equal bargaining power), and the right to loyalty in a fiduciary relationship (here, we'll focus on the relationship between directors and a widely-held corporation).

We may begin with the right to performance in contract. Reciprocal rights and duties of performance supply mandatory terms of interaction for parties to a contract. The mere fact of their having been posited and made subject to coercive enforcement gives parties general juridical reasons for compliance. But these reasons are relatively weak and indeterminate. We understandably look to contract law for justification of rules peculiar to it. What reasons are found

³³ And, in turn, legal forms must be understood in terms of the wider operation of private law as a normative system. See Gold and Smith, *supra* note 3; and Henry E. Smith, 'The Persistence of System in Property' (2015) 163 University of Pennsylvania Law Review 2055.

in contract law for the right to performance? Understandably, given the centrality of performance to contract, the reasons are complex and embed considerations of form, function, and value. For example, the right to performance has been said to be justified morally on the basis that a valid contract is an exchange of promises. Court opinions often also emphasize trust in, or reliance on, contractual undertakings. One sometimes also sees mention of reasons that underlie contract generally as a form of interaction (e.g., reasons rooted in the positive moral impact of contract law through its advancement of personal autonomy, interpersonal cooperation, or social utility).

Turning to corporate law, one finds something similar. A director looking to the law for normative guidance will find not just indication of what they are required to do by way of compliance with their duty of loyalty, but also particular juridical reasons for compliance. Fiduciary duties being a species of voluntary obligation, the director will be reminded that they are bound partly because they willingly entered a relationship to which fiduciary impositions attach. Other reasons emphasize other the relative positions of the parties and the centrality of the duty of loyalty to integrity of the form (e.g., those that advert to expectations of trustworthiness implied by the entrustment of discretionary powers, or to the other-regarding character of fiduciary mandates). Still others point to reasons for enabling fiduciary relationships generally, or of a particular type, including reasons rooted in autonomy, interpersonal dependence, and cooperation.

B) Juridical Reasons for Standalone Rights

Private rights are not invariably embedded in legal forms. Some are enjoyed by natural persons on the basis of status, and some artificial persons on the basis of attribution. This appears to be especially true of omnilateral rights that prescribe universal rules of conduct. We may call these rights “standalone rights” to emphasize their independence of specific legal forms of interaction.

Standalone rights are most prevalent in the law of torts. The standalone rights recognized in tort show their independence of form in their substantive plurality and resistance to unifying interpretation. One can catalogue rights in respect of which there are recognized civil wrongs (torts) as bases of liability, and one can perhaps group these rights in respect of their content (e.g., fault elements) or referents (e.g., personal or property interests) but it is difficult to convincingly arrange them as responsive to any one value or structured set of values.

The difficulty is, I think, a function of diversity in the interests that tort law protects. Tort law is remarkable for its breadth. Many rights recognized in tort are responsive to the interests of persons, including interests in reputation, privacy, freedom of movement, and physical security. Other tort rights protect interests in acquired rights, including property and contractual rights. Here, tort leaves it to fields that govern the acquisition of rights to define those rights. Tort law simply reinforces (i.e., secures) the legal forms that mediate the acquisition of property and contractual rights. And all of this is to say nothing of the complexities introduced by the recognition that tort law also protects certain interests of artificial persons.³⁴

As one might expect, diversity in the rights that tort law recognizes is reflected in a diversity of juridical reasons for its recognition of these rights. Sometimes the reasons given amount to assertions of the inherent moral value of human interests thought to underlie the right. In other cases, they reflect a rule-consequentialist logic, with the right being deemed rooted normatively in moral or policy considerations bearing on the social impact of behavior controlled by the right.

Where a tort right provides omnilateral protection for interests in acquired rights, juridical reasons will usually refer to the legal form that enables acquisition and reasons for the form. In

³⁴ Miller, *supra* note 1; Paul B. Miller and Jeffrey A. Pojanowski, 'Torts Against the State,' in Paul B. Miller and John Oberdiek, eds., *Civil Wrongs and Justice in Private Law* (OUP 2020).

this sense, juridical reasons for a right recognized in tort law may be derivative of those engaged by values at stake in legal institution(s) that tort law protects (e.g., many reasons for recognition of rights against interference with property are derivative of reasons for provision of forms of private property).

Furthermore, whether or not a given tort right secures interests in acquired rights, just like any other private right, the content of the tort right and/or its enforcement may be checked by other rights and limited by defenses, justifications or excuses. In such cases, to understand the normative force of juridical reasons for a tort right one must appreciate how those reasons are conditioned by others underlying rules or mechanisms that might adumbrate the right and/or the standing to enforce it.

In illustration, consider the torts of negligence and nuisance. Negligence provides omnilateral protection for interests in bodily integrity by recognizing a right against negligent infliction of injury; nuisance provides omnilateral protection for interests in peaceful enjoyment of real property by recognizing a right of quiet enjoyment. Lawmakers have posited a range of reasons for these rights. For example, the right at issue in negligence has been said to be grounded in the values of personal welfare and autonomy as well as a public policy of minimizing the social costs of accidents. In turn, the right at issue in nuisance has been justified by reference to the autonomy interests of owners in quiet enjoyment, the welfare interests of owners put in issue by the psychological harms of nuisance-causing activity, and a public policy of incentivizing owners to minimize externalities associated with their use of property.

Notice that that in respect of each of negligence and nuisance, one finds not just a plurality of juridical reasons for rights that tort law recognizes, but also illustration of the importance of situating these rights and reasons contextually. Thus, the right at issue in nuisance and the reasons

for that right are subject to a proportionality assessment that takes heed of the alleged tortfeasor's rights, including their right to use and enjoyment of their own property. Consider, too, the conditioning effect of reasons of public policy that support zoning laws, to say nothing of the effect of defenses (e.g., consent and necessity) and reasons for recognition of same.

IV – INTERPRETING PRIVATE RIGHTS, REVISITED

I have argued that private rights and juridical reasons ought to be understood in light of the nature of law as, at once, a set of public practices of practical reasoning, and the product of a subset of these practices. Reasons are given juridically for rights and other legal rules in order to more effectively guide the behavior of beings endowed with practical reason. Private rights are legally binding to the extent validly posited, but juridical reasons are only practically persuasive to the extent practically reasonable.

I have also argued that central tasks of interpretive private law theory are those of: (a) elucidating private rights (and other jural statuses or relations); (b) explaining the juridical situation of particular private rights (and other legal rules), including, as appropriate, their incorporation within legal forms; (c) identifying posited reasons for private rights (and other legal rules); (d) identifying ways in which a given private right (or other legal rule) and reasons for it are cabined by legal or equitable conditions or limitations, including conflicting rights; and (e) highlighting any gaps, contradictions, or inconsistencies in the content of a private right (or other legal rule) and the reasons posited for it.

It is in the nature of interpretive analysis of the juridical justification of private rights that it hews closely to posited law. It privileges the internal point of view in that it seeks to make the law more amenable to understanding. Again, this involves development of a simplified rendering of law. But, in contrast to those employing modalities of interpretation that abstract from the law

to a greater extent, the interpretive theorist focused on the juridical justification of private rights will be especially concerned about the risk of interpretive over-simplification.

The distinction between interpretive and critical theory is, I think, relatively sharp. I shall therefore not comment on it further. However, recognizing that (a) the law is inherently normative, and that interpretation therefore involves excavation of the law's normativity; and (b) the law is amenable of different levels of interpretation, depending how coherentist the interpreter is in isolating its practical reasonableness, I shall here contrast interpretive analysis focused on *juridical justification* from that which articulates *foundational* and *mid-level justification* of private rights.

A) Contrasts, I: Foundational Justification of Private Rights

Interpretive theories that make foundationalist claims about the justification of private rights interpret them as manifesting a single value or system of values. Foundationalist interpretation often begins with an assertion or argument in favor of a value or set of values and an explication of a way of modelling private law in light of these value(s). The theorist will proceed, by way of interpretive exegesis, to show how all or part of private law comports with the model. Usually, the exegesis focuses on the content, effect, and enforcement of private rights, and a selection of juridical reasons for them. Exegetical analysis of juridical reasons allows the theorist to claim that the normative foundations identified are those found in law (grounding the claim to engagement in interpretive theory) rather than a reflection of the values commitments of the theorist (which would require acknowledgement that the project is really one of critique).

Some of the most prominent theories of private rights articulate foundational justifications for them. Amongst these, notable is the work of Kantian theorists, Ernest Weinrib and Arthur Ripstein. Weinrib and Ripstein analyze the structure, content, effect, enforcement of private rights

as giving manifold expression of the value of equal freedom.³⁵ Systems of posited private law are modelled on Kant's abstract framework of private right.³⁶ Of course, the Kantians recognize gaps between abstract and posited rights; gaps implied in part by the fact that, as a normative matter, the entailments of equal freedom underdetermine the content of posited private rights. Nevertheless, they believe that Anglo-American private law can and should be interpreted in light of Kant's model and understood as responsive to the value of equal freedom, with discordant parts of law being held out for critique.³⁷

Theories such as these strike their critics as elaborate castles built at heady altitude. But they do aim at interpreting private law from an internal point of view. It is only that the perspective that they provide is shaped profoundly by model(s) of private rights associated with a particular value or system of value. Theorists who believe that it is possible and worthwhile to articulate foundational justifications of private law are strongly coherentist in their interpretation of private rights. The Kantians, for example, believe that private law manifests practical reasonableness in doctrine that coheres in its responsiveness to the value of equal freedom.

Our exemplar of foundationalism analyzes private rights in terms of a single value. But foundationalism and the strong coherentism it implies is not the preserve of normative monists preoccupied with analytic systematicity in practical affairs.³⁸ Foundationalism is, or could be, evident in interpretive analysis guided by any well-ordered theory of value. Thus, Lockean, Hegelian, consequentialist, and classical natural law theories of private rights might each be

³⁵ Ernest J. Weinrib, *The Idea of Private Law* (HUP 1995); Ernest J. Weinrib, *Corrective Justice* (OUP 2012); Arthur Ripstein, *Force and Freedom* (HUP 2009); Arthur Ripstein, *Private Wrongs* (HUP 2016).

³⁶ Immanuel Kant, 'Doctrine of Right' in *Metaphysics of Morals* (Mary Gregor, ed.) (CUP 1996).

³⁷ I am grateful to Avihay Dorfman for emphasizing the prevalence of what is framed as "internal" critique within foundationalist theory. It bears emphasis, though, that whether or not such critique is faithful to an internal point of view turns on the interpretive soundness of the normative story that the theorist tells about the pervasive immanence in the posited law of a particular foundational value or set of values.

³⁸ For critical assessment of monistic theories of private law, see Hanoch Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 Columbia Law Review 1409.

foundationalist in the interpretation they inspire, depending how they account for the relationship between posited law and the demands of morality on practical reasoning.

Whether they espouse a monistic or pluralistic theory of value, foundationalist theories of private rights are associated with two kinds of interpretive excess. Each reflects downsides of undue preoccupation with coherence.

The first variety of interpretive excess is that whereby private rights and juridical reasons are interpreted apologetically, with analysis aiming to suggest conceptual and normative coherence in posited law, coupled with an implication that the package deal – the set or system of rights, shown to be coherent – is practically reasonable.³⁹ Implied is that it would be a mistake to revise or eliminate a given right or system of rights, or to reconsider whether reasons given for the right(s) are good reasons.

Where interpretation slides into apologetics, it is problematic to the extent that it ignores the frailty of practical reason, which is such as to introduce a significant probability of moral error in collective practices of public practical reasoning. It also problematic in that it elides the distinction between interpretation and critique. Apologetics are appropriate where the law and reasons given for it merit reasoned defense, but this is an exercise in critical analysis of law.

The second sort of interpretive excess is that whereby a theorist overlooks or discounts rights or reasons not readily amenable of interpretation through their preferred model or theory of value. It is entirely proper as a matter of critique to examine the practical reasonableness of a right and/or the reasons given for it. However, it is improper as a matter of interpretation to neglect those rights or posited reasons that they defy one's normative priors. This kind of excess, where

³⁹ That is, that rights and juridical reasons for compliance supply sound normative guidance, insofar as they provide subjects with correct indication of what they ought, morally, to do. For critical perspective on apologetics in interpretive theory, see Dagan and Kreitner, *supra* note 18; and Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (OUP 2013).

indulged, produces interpretive infelicity in the form of partial or distorted representations of the law.

Whether or not these excesses can be avoided in foundationalist interpretive theory is an open question. They might well mark common tendencies rather than inherent biases of thought. But they are most readily avoided if one gives up on foundationalism in *interpretive* theory, reserving the normative aspirations that drive it for work of critical theory. By comparison, interpretation focused on elucidating juridical justification is less prone to interpretive excess because it throws off strong coherentism.⁴⁰ It might be informed by expectations of moderate (usually local) coherence.⁴¹ But the expectation is a default, readily ceded to recognition that law, being an artifice (a constructed normative system), will invariably bear the flaws⁴² of human handiwork.

B) Contrasts, II: Middle-Level Justification

There is a halfway house between the strong coherentism of foundationalism and the modest coherentism of work on the juridical justification of private rights. It is occupied by those who engage in “middle level” interpretive theory.

The middle level theorist believes it to be possible and valuable to abstract from particular rights and juridical reasons a set of principles operative in particular areas of law. The invitation to, and scope for, abstraction is generated (and cabined) by doctrinal and other objective indicia of conceptual and/or normative links between various private rights, including such as might be suggested by their source, content, or practical orientation. Thus, for example, a theorist might

⁴⁰ On problems with strong coherentism, see Joseph Raz, ‘The Relevance of Coherence’ (1992) 72 Boston University Law Review 273. For wider discussion, see Khaitan and Steel, *supra* note 3, at 7-10.

⁴¹ The expectation is rooted in the recognition that in giving law, political communities aspire toward coherence and systematicity, even as they predictably fail to achieve perfect coherence and totalizing systematicity. See generally Jeremy Waldron, ‘“Transcendental Nonsense” and System in the Law’ (2000) 100 Columbia Law Review 16.

⁴² On which, see Cass R. Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, ‘Predictably Incoherent Judgments’ (2002) 54 Stanford Law Review 1153.

defend a supposition of intended systematicity in respect of the moral or policy design of a set of statutes, or between a statute and background law. Alternatively, a theorist might identify a moral or policy principle or set of principles in the content of, or posited reasons for, a limited subset of private rights.

For whatever reason, there haven't been many takers on middle level theory. However, it has had prominent exponents, including Jane Stapleton.⁴³ Stapleton has repeatedly expressed concern over interpretive excesses characteristic of foundationalist theories of tort law.⁴⁴ And she has argued for, and offered, a middle-level approach to interpretive theory that suggests that different pockets of tort law are responsive to different values.⁴⁵ For instance, in tort law's response to economic loss, Stapleton finds concern for moral and social problems associated with indeterminate liability, as well as the value of self-protection balanced by the moral importance of ensuring due protection of the vulnerable.⁴⁶ In other work, Stapleton has argued that commercial torts are responsive to values associated with trust, cooperation, and commercial certainty.⁴⁷

Whether middle-level interpretive theory is illuminating or distorting will depend on whether the law admits of the representations made of it. That is, the cogency of middle-level interpretation will depend on the level of congruence between a given set of private rights and associated juridical reasons on the one hand, and the principles that the latter are, on the other hand, said to reflect.

⁴³ Another is Gary Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1997) 75 Texas Law Review 1801. For some acute reflections on the normative eclecticism of tort law, see Scott Herschovitz, 'The Search for a Grand Unified Theory of Tort Law' (2017) 130 Harvard Law Review 942.

⁴⁴ Jane Stapleton, 'Comparative Economic Loss: Lessons from Case-Law-Focused Middle Theory' (2002) 50 UCLA Law Review 533.

⁴⁵ *Ibid.*, at 534: "tort law cannot be explained by grand unitary theory but only by a rich 'mixed' set of values that generate the complex boundaries of liability that interest practitioners and courts."

⁴⁶ *Ibid.*

⁴⁷ Jane Stapleton, Clarendon Law Lectures 2018, University of Oxford Faculty of Law (April 30 – May 2, 2018): <<https://www.law.ox.ac.uk/clarendon-law-lecture-series>>

There is no inconsistency as a matter of principle between interpretive analysis focused on elucidating juridical, middle-level, and foundational justifications of private rights. However, a person drawn to foundationalism will often have ambitions that cannot be sated in appreciation of sound juridical or middle-level analysis. And the person drawn to middle-level or juridical analysis will worry about the impact of those ambitions on interpretive fidelity. Thus, a theorist will often choose between them. One drawn to foundationalism might think that others are unduly timid or cautious – and, ultimately, shallow – in the interpretive analyses that they provide. Their counterparts will resist the prodding because they don't believe that foundational justifications are availing and sound as interpretation of the values to which private law is responsive.

V – THE SIGNIFICANCE AND LIMITS OF JURIDICAL JUSTIFICATION

I have already noted features of juridical justification that can limit the absolute and relative justificatory power of juridical reasons. I noted, in particular, that juridical reasons tend to be thin, relatively underdeveloped, and eclectic. Even for a non-controversial right, juridical justification might appear little more than an ad hoc arrangement of crowd-sourced reasons.

Bearing this in mind, I wish now to comment on the significance of juridical reasons in, and for, legal argument and adjudication. As will become plain, some infirmities of juridical reasons are the product of exigencies of law as an embodiment of a distinctive set of public practices of practical reasoning - practices that must be open to, and understood by, a diverse public, and that are engaged in by lawyers and legal officials acting in representation of others.

Having established the significance of juridical reasons, I will also address their limits. In doing so, I will underscore the importance of rigorous assessment of the practical reasonableness of juridical reasons in public discussion of, and debate about, the law.

A) The Significance of Juridical Justification

Juridical reasons for private rights are sometimes not just thin but weak, providing incomplete or otherwise imperfect indication of moral or prudential bases for a right. They might be given in little more than a sentence in an otherwise prolix judgment, or be set out in a tersely worded objects clause in a statute. Alternatively, a mesmerizing array of reasons may be put for a right – or framework of rules in which a right is embedded – by countless judges in scores of cases, or by several legislators debating or speaking in support of legislation. Where reasons are articulated briefly, multitudinously, and in haste, it can be hard to determine what to make of them.

Consider, for example, the assertion, oft-repeated by judges, that one ought to perform on one's contracts because they are a kind of morally binding promise. Consider, too, the common suggestion that self-dealing by fiduciaries involves immoral appropriation of power or property. And think of the familiar assertion that patents systems are justified on the basis of social utility, to the extent that they promote innovation and the dissemination of knowledge.

These examples serve well to illustrate the curt and often conclusory way in which juridical reasons are put. They strike many as intuitively plausible. But they are remarkably thin, and sometimes weak; an understandable reaction to weaknesses associated with the thinness of juridical reasons might be a desire for more or better – which is to say: thicker – public justification. Furthermore, again partly because of factors that also drive their thinness, juridical reasons sometimes are not just weak but flawed, whether because inapt, unsupported, incoherent, or outweighed by countervailing reasons. But, setting to one side the recognition that juridical reasons are sometimes bad reasons, I want to focus on how and why their characteristic thinness might reflect and support their significance in law.

I should, however, first clarify that I mean by “thin” both that juridical reasons are usually unsupported by elaborate normative argument, and that they are usually amenable of being understood as expressing different values. So, for example, references to “trust,” “honesty,” “freedom,” “autonomy,” “good faith,” “reasonableness,” “equality,” “fairness,” “efficiency,” “social utility,” and “public good” signify a range of reasons capable of generating convergent acceptance within political communities notwithstanding that – indeed, *because* – their precise normative salience is understood differently by different people, including those who might wish to build up a thicker normative story about them by way of interpretation or critique.

Now, as for their significance, it may be observed that juridical reasons figure centrally in public justification undertaken by lawmakers in support of laws they that they have promulgated or recognized. It may be that they are thin because legal and political deliberative processes short-circuit extended reflection requisite to the development of thicker reasons. But the daily lives of legislators and judges are, in any case, usually not conducive to extended reflection; they work under practical imperatives that compress deliberation and favor parsimonious expression.⁴⁸ It might be, then, that the thinness of juridical reasons is, as a practical matter, overdetermined.

However, in addition to these observations are considerations of principle: the thinness of juridical reasons makes it more likely that they can serve as workable shorthand - a mode of normative argument or explication that is accessible to, and can be engaged in by, laypeople. Additionally, as intimated earlier, thin reasons are *ceteris paribus* more likely to reflect and/or

⁴⁸ Admittedly, this is an unproven empirical point. But it enjoys plausibility. On factors that influence the kind and quality of moral reasoning typically engaged in by judges and legislators, respectively, see Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale Law Journal 1346; Jeremy Waldron, ‘Do Judges Reason Morally?’ on Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008); and Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 1 International Journal of Constitutional Law 2.

attract agreement within diverse political communities.⁴⁹ It would thus appear that, as a general matter, the thinness of juridical reasons enables them to better instantiate the law's guidance function.

I should say a little more about the relationship between the thinness of juridical reasons and normative guidance. First, I observe that law is to guide most of the practices of lawyers and judges, including advice given to clients, transactional and other solicitor work, arguments made in and out of court, settlements, judgment, and the preparation and issuance of public reasons for judgment. Legal issues and the factual circumstances in which they arise are often complex. All of this makes for a delicate real-world economy of practical reasoning that favors law and legal reasons that are clear and comprehensible. These familiar rule of law virtues are served by concision. It is easier, and in some cases only feasible, for lawyers to discern and make, and for judges to follow and develop, sound legal arguments where pertinent legal reasons are relatively simple. Likewise, in reaching conclusions that are both right in law and defensible for their practical reasonableness. Equally, in turn, those who look to the law only for prospective guidance (i.e., those not parties to a suit) are best served by relative simplicity in the public justification of law, even if that means that one gets little more than the gist of a justification.

Second, the thinness of juridical reasons renders the law more amenable to reform. It must be remembered that the law is ever a work in progress, legal texts being residue of a reflexive set of public practices of practical reasoning. The positing of law and juridical reasons are expected to reflect and to produce a settlement of normative issues for a political community, but the settlement is never permanent and is often openly tentative. Law does not always have the positive

⁴⁹ Compare Smith, *supra* note 3, at [ms p.1]: “judges properly seek justifications that are acceptable to citizens who hold different [moral] theories or, indeed, who don’t hold any [moral] theory” and [ms p.12] “if you want to coordinate behavior in a pluralist society, it is advisable to do so on the basis of low-level generalizations.”

moral or prudential impact intended for it. And juridical reasons do not always hold up to scrutiny. As such, we are often best served by a relatively thin fabric of public justification, insofar as its thinness makes it more amenable to public scrutiny and deliberate revision. This is not to say that we are well served by shoddy or impressionistic normative assertion or argument. It is, rather, to say that clarity and progress are often best enabled through the relatively simple and fungible legal reasons.

B) The Limits of Juridical Justification

I have explained the characteristic thinness of juridical reasons, and the sense to their thinness. But I have also hinted at the limits of juridical reasons and, in turn, juridical justification. I noted that, being thin, juridical reasons are often given without extended normative argument of the sort that would, in an academic context, be taken to be necessary to situate them (i.e., to determine what, precisely, the reason(s) claim) and to evaluate them (i.e., to determine what weight they have given the value(s) they reflect). Thus, one limit of juridical reasons is amorphousness. One who subjects juridical reasons to careful scrutiny might find them irredeemably wanting, or, to the extent wanting but apt, feel that they need still to be amplified, focused, or refined.

When one considers in a clear-eyed way the legal and political processes through which laws are publicly contested, deliberated upon, and posited, it should be unsurprising that juridical justification is eclectic and often flawed. The thinness and amorphousness of juridical reasons might be features rather than bugs. But there are plenty of bugs to go around. I have already noted that juridical reasons are usually weak. They are sometimes incomplete or missing in action. Otherwise, they might be incoherent or impossible of being reconciled with other reasons with which they should comport. Finally, they can reflect moral error or policy miscalculation.

Recognition that juridical reasons suffer shortcomings such as these gives rise to some important lessons. The most important is that interpretive theorists should wary of reading into the law a level and extent of practical reasonableness that simply isn't there. As the product of and fulcrum for reflexive practices of practical reasoning, it would be surprising if the law were generally pervasively irrational. However, the fact that law manifests reason does not license one to paper over its defects. It is thus that I've argued here that interpretive theorists might profitably start with the reasons we've been given for the laws we have.

CONCLUSION

This chapter is an effort to encourage wider engagement with questions of methodology in private law theory. It offers suggestions about how one might frame the tasks of interpretive and critical theoretical analysis of private law, respectively. The chapter situates these inquiries relative to the general jurisprudential literature on the relationship between law and practical reasoning, explaining how one ought to understand private rights and posited reasons for these rights. I have argued that, in explicating private rights and associated practical reasons as an interpretive matter, theorists ought to carefully distinguish those reasons that are posited from those that are arrived at through rational reconstruction involving the interpretive linking of posited reasons and higher-order practical reasons. Finally, the chapter explores the significance of juridical reasons in private law and more widely, as well as some common limits of, and deficiencies in, the practical reasonableness of juridical reasons.