

Part III

The Role of Goals in Private Law

Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century

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I. Introduction

It is a commonplace in the philosophy of law that you can try to understand legal institutions and practices from two points of view: you can look at them from the outside in, or from the inside out. From the outside or ‘external point of view’, you try to make sense of them by looking at the externals: what the various officials and other participants are actually doing and (what is in practice inseparable) what they say they are doing. From the inside or ‘internal point of view’ you try to get into the heads of the lawyers, to grasp what they think they are doing by considering their thoughts and (what is in practice inseparable) their utterances. Neither viewpoint is reducible to the other. Legal systems have real-world effects, which cannot be explained away by pointing out that lawyers don’t always intend those effects or recognise them when they have occurred. And legal *systems*—I use the expression deliberately—are as much in lawyers’ heads as they are anywhere else. Both viewpoints, then, have something to say and something worth listening to. Both ultimately focus on the same thing—legal language—but they take different routes towards it.

This is well-travelled ground in legal theory, which I will not retrace here.¹ But to clear the ground, I must make some very basic observations. First, enthusiasm for one point of view is hardly ever meant as a *criticism* of the other. Hart’s own advocacy of the ‘internal point of view’ was never meant to supplant the external point of view; on the contrary, he took it for granted that much serious thought

* Many thanks to all who have helped with this chapter, including Tony Duggan, John Gava, Shane Kilcommins, William Lucy, Geoff McLay, Jonathan Morgan, Annette Morris, Andrew Robertson, Chaim Saiman, Geoff Samuel, Colin Scott, Stephen Smith, David Wright and Tang Hang Wu. I would be delighted to receive comment on or criticism of this chapter at s.hedley@ucc.ie.

¹ For Hart’s classic exposition see HLA Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961) 54–7.

about legal systems would be from an external perspective (and his own theory was obviously external). Secondly, it is usual to find *both* views within the same skull. Of course, brief descriptions of the insider/outsider distinction often imply that the insider view is held by (say) judges, whereas the outsider view is held by (say) sociologists from other cultures; but this is an over-hasty slurring over the facts. A sociologist who failed to notice the continual appeals by legal actors to the legal system's own values would not be a very observant one. And a judge who never appeals to values outside the law—responding to all such appeals with 'It's the system, what can you do?'—could only be either a confirmed cynic or seriously in need of Prozac. Both perspectives have their place. Neither excludes the other.

What has this to do with obligations? General notions about law always have relevance to obligations, but there is a much closer connection, and that is what I want to consider here. Differences of approach to obligations have become rather stark of late, and a rather sharp division between internal and external perspectives seems to be emerging. On one side, you have writers looking purely inward, creating internal structures and maps for its constituent parts, and being greatly concerned for its overall coherence. These writers are far from unanimous as to which structures are the right ones—some draw on corrective justice, some on Roman law, some on notions of rights. But they are agreed that the solution to the problem they are addressing is to be found *within* the law and legal thought, not outside in questions of utility or the social effects of the legal system, questions which are seen as essentially political. On the other side, you have those who look externally, asking what purpose and interests legal structures serve, comparing other areas of law that bear on the same problems, and considering how the law should be described and developed against that background. Again, from the externalists there is no single view on any of those questions, no common view of what is the right way for the law of obligations to grow. There is, however, a consensus that these externally-oriented questions must be asked.

A mere division of opinion is of course not really cause for comment. We are lawyers and we are academics—difference and debate are what you would expect. But we are in danger of losing track of what we are in fact agreed upon. In particular, there is a developing school of radical internalists who are prepared to deny any validity at all to the external viewpoint, and have been quite explicit that externalists should either be deprived of influence within the law school or even be run out of it (on the argument that externalists are not really 'doing law' at all). This view is, I argue, entirely wrong-headed. Each side has something to say, and it is grotesque to exclude proponents of the 'wrong' one. I am not unaware that the converse accusation has been levelled at some externalists, including perhaps myself: that our disdain for some structural concerns amounts to refusing any kind of internal view its rightful place in legal thinking. This would be equally bad if proven, but as I hope to show, the accusation is unfounded. Criticism of particular proposed structures, suggestions for alternatives, and discussion of the precise significance to be attached to structures are all very different things from a denial that structure has a role at all. Moreover, much of what the externalists are

doing is merely reminding internalists of what the rest of the legal system—public law and regulatory law especially—is *already* doing. We are happy to share the law school with the internalists, but expect a similar concession in return.

In summary, then, both internal and external points of view play vital roles. Without the internal viewpoint, without at least *some* attention to structure and process, the legal system is not a ‘system’, and arguably isn’t ‘legal’ either. Whether the same is true of the external point of view is a moot point (it is much-debated, whether a system without externally defensible morality or goals can truly be ‘legal’), but no internalist would (I hope) defend obligations if it were in such a state. *Without the internal viewpoint, obligations cannot survive; without the external viewpoint, it does not deserve to.* And both viewpoints deserve their place in the legal academy.

II. The Emerging Internalists and Externalists

While many of its elements were in place in earlier years, the revival of strongly internalist views is really a phenomenon of the last two decades, at least in the common-law world (excluding for present purposes the United States, which moves to a very different intellectual drum-beat). There were certainly hints of what was to come: Atiyah’s externalist commentaries on contract law² provoked much comment, as did Fried’s internalist account of contract.³ But the key event was Birks’ *Introduction to Restitution*,⁴ which proposed to systematise that subject in a very particular and very precise way, drawing heavily on Romanist models, and pre-supposing that surrounding areas of law could be similarly systematised (a task which Birks seemed to think would be relatively uncontroversial). The ambition was always broader than the banal technicalities of restitution; it was not merely to find restitution on the map, but to ensure that the map itself was properly drawn. The radical internalist project was on the road.

The last decade has seen these intellectual tools brought to bear on a wider subject-matter, in most (though not all) cases by those who learned their restitution from Birks. Four main strands are discernable, though perhaps they are not really distinct from one another, and some theorists endorse more than one of them.

² Much of that strand of his writing was collected into PS Atiyah, *Essays on Contract* (Oxford, Clarendon Press, new ed 1990).

³ C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge MA, Harvard University Press, 1981).

⁴ P Birks, *An Introduction to the Law of Restitution* (Oxford, Oxford University Press, 1985). The final statement of this theory was in P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005).

Taxonomists take Birks' campaign to a wider world, attempting the same sort of analysis of other fields of law. Leading examples are Chambers on property law⁵ and Pretto-Sakmann on personal property.⁶ An overall view of English private law under this taxonomy was written by a team assembled by Birks himself,⁷ though the Birksian taxonomy really only controls the chapter headings, each of the chapters then proceeding on a more individual basis.⁸ The reluctance of this approach to tackle statutory material, except where it accepts common law assumptions, ensures that the scope for this sort of work is limited.⁹

Rights Theorists regard the key question in obligations cases as the identification of the plaintiff's right, arguing that once this is done, the answer to other questions should fall into place rapidly and uncontroversially. In particular, this minimises reference to policy concerns, which are seen as objectionable. 'Name the right, define it, and the rest is mere application in the light of the circumstances. More juris, less prudence.'¹⁰ Originally proposed in relation to restitution, the theory clearly has broader application, and has recently been urged as the basis both of negligence¹¹ and of tort generally.¹² A notable feature of the theory is the reluctance, to date, to definitively list the rights, or describe them in other than vague terms.¹³

Corrective Justice Theorists were active long before current controversies—many trace the core notions back to a brief and obscure theoretical foray by Aristotle, and indeed some regard later attempts to correct Aristotle's line of thought as retrograde.¹⁴ However, it is obvious that the theory shares many assumptions with

⁵ R Chambers, 'Integrating Property and Obligations' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (London, Routledge Cavendish, 2004) 127; see also the same author's *An Introduction to Property Law in Australia* (Sydney, Law Book Co, 2001).

⁶ A Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Oxford, Hart Publishing, 2005).

⁷ P Birks (ed), *English Private Law* (Oxford, Oxford University Press, 2000); see also the 2nd edn, A Burrows (ed), 2007.

⁸ See book review by N Kasirer (2003) 3 *Oxford University Commonwealth Law Journal* 249, 255.

⁹ cf the companion volume, D Feldman (ed), *English Public Law* (Oxford, Oxford University Press, 2004).

¹⁰ D Stevens and J Neyers, 'What's Wrong with Restitution?' (1999) 37 *Alberta Law Review* 221, 227.

¹¹ A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007). Also relevant to the themes of this chapter is the same author's 'Particularism and Prejudice in the Law of Tort' (2003) 11 *Tort Law Review* 146.

¹² R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007). Both Beever and Stevens also link their claims to corrective justice (see Beever, *Rediscovering Negligence*, above n 11, at 52–5 and *Torts and Rights* at 327).

¹³ Beever does not provide an account of the rights, and thinks it unreasonable that he should be asked to: 'This book is a theoretical examination of the law of negligence as it operates in terms of the categories of enquiry with which we are familiar ... Without becoming entirely unwieldy—and impossibly long—it cannot also become a philosophical investigation of personal and property rights': *Rediscovering Negligence*, above n 11, at 62. How happy lawyers will be with such an approach, which apparently requires an 'unwieldy' and 'impossibly long' philosophical investigation even to answer the most basic questions it raises, must be a matter for speculation. Stevens provides various partial lists of rights (*Torts and Rights*, above n 12, at 4–17 and 303) though he seems to regard most questions they might raise as still open (at 337–40).

¹⁴ J Gordley, *Foundations of Private Law* (Oxford, Oxford University Press, 2006) 7–32.

the taxonomists, and there has in recent years been regular dialogue between them in the hope of constructing an account of the law acceptable to both, particularly involving leading corrective justice theorists such as Weinrib¹⁵ and Gordley.¹⁶

Interpretive Theorists seek to discern meaningful patterns in law; interpretive theory 'is nothing more (nor less) than the attempt to understand legal concepts in terms of their meaning'.¹⁷ The theory has roots in Dworkin's concept of 'Law as Integrity',¹⁸ though arguably the roots are shallow ones, as Dworkin's concerns were with individual 'hard' cases, not structural ideas per se. Interpretive theory openly draws on the previous three theories, and perhaps is best seen as an attempted synthesis of them rather than as a distinct notion.¹⁹

Clearly, these various theorists do not agree on everything (indeed, it is a cause for celebration if we find two corrective justice theorists who can agree on what 'corrective justice' is). Equally clearly, they agree on a great deal, and can fairly be regarded as a coherent school or movement within obligations scholarship.²⁰ Common features (all of which indicate the inward focus) are: the concentration on common law at the expense of statute; an insistence that they are describing matters common to *all* legal systems (which is taken to excuse them from discussing any one system); and a disdain for the *purpose* of legal institutions. Indeed, some deny that obligations can properly be said to have a purpose at all, unless that purpose is merely to be itself; private law no more has a purpose than Love has a purpose. 'Love is its own end. My contention is that, in this respect, private law is just like love.'²¹ Engagements with the external point of view are therefore typically brief and fraught with hostility.

Externalist writers by contrast have tended not to cluster together, and are agreed on little except that standards and perspectives external to obligations are nonetheless of relevance within it. Serious engagement with internalist ideas

¹⁵ EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995).

¹⁶ Gordley, above n 14.

¹⁷ A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320, 328.

¹⁸ R Dworkin, *Law's Empire* (London, Fontana, 1986) ch 7.

¹⁹ A good example is S Smith's *Contract Theory* (Oxford, Clarendon Press, 2004) (which, despite what its name suggests, focuses almost exclusively on interpretive theories of its subject-matter). I have written in more detail on this strand of internalist theory in 'The Shock of the Old: Interpretivism in Obligations' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law—Essays for Peter Birks* (Oxford, Hart Publishing, 2008).

²⁰ For a general survey of the area see W Lucy, *Philosophy of Private Law* (Oxford, Clarendon Press, 2007).

²¹ Weinrib, above n 15, at 6. This remark is puzzling, even as a comment on love. What Weinrib may mean is that those who are in love will typically show little interest in a rigorous analysis of that phenomenon; perhaps also he has in mind that 'The mind has a thousand eyes/And the heart but one' (FW Bourdillon, *The Night has a Thousand Eyes*). Yet questions about what love is *for* are routinely asked in literary criticism, social theory, theology, cultural studies, developmental psychology and reproductive biology—and why should they not be? Weinrib's (purposefully absurd) example of proposing economic efficiency as the explanation of love (at 5) merely shows that some possible answers are wrong, not that it is a mistake to ask the question. For comment and critique see J Gardner, 'The Purity and Priority of Private Law' (1996) 46 *University of Toronto Law Journal* 459.

usually involves thorough immersion in them; the diversity of alternative viewpoints militates against the emergence of a unitary 'externalist' point of view. Indeed, much 'externalist' writing goes little beyond the demand that the role of external preferences when choosing between internal theories should be more openly acknowledged.²² This is, I argue, no bad thing; the dogmatism of the more radical internalists is not a feature to be emulated. New perspectives on obligations have come from public law, from sociology, from political thought, from history and from economics. The best writings in this area have been attempts at synthesis of differing viewpoints to gain a clear perspective on legal theories:²³ special mention in relation to torts should go to the writings of Stapleton,²⁴ Cane²⁵ and Keren-Paz;²⁶ in relation to contract, Wightman²⁷ and Collins;²⁸ and in relation to restitution, Dagan.²⁹

A more thorough-going externalism, which would attempt to understand and assess obligations *entirely* from some perspective outside it, is certainly imaginable. But no such approach has even a toe-hold in common law culture outside the United States. While Christian legal scholarship seems to be growing in volume and sophistication,³⁰ it has had little to say on obligations as yet even in America. The more fundamentalist varieties of law-and-economics are rather better established there, but have yet to make it far into other common law jurisdictions; such lawyer-economists as have prospered in the United Kingdom

²² Most of the 'anti-Birks' writings, including those of the present author, are of this type; the alternative theories of restitution urged are for the most part no more externally-oriented than the theories they oppose.

²³ Foremost in promoting this strand of scholarship was PS Atiyah, particular with *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979) and *Accidents, Compensation and the Law*, 1st edn (London, Weidenfeld & Nicolson, 1970); see also current edition, P Cane, *Atiyah's Accidents, Compensation and the Law*, 7th edn (Cambridge, Cambridge University Press, 2006).

²⁴ See especially J Stapleton, *Product Liability* (London, Butterworths, 1994).

²⁵ See especially P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997). Cane's more recent work has concentrated on shoring up the internal perspective, eg 'Tort Law as Regulation' (2002) 31 *Common Law World Review* 305; *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002), but not I think to the extent of abandoning the external perspective entirely (unless Peter wants to tell me different!).

²⁶ See especially T Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Burlington, Vermont, Ashgate, 2007), and the same author's 'Private Law Redistribution, Predictability and Liberty' (2005) 50 *McGill Law Journal* 327.

²⁷ See especially J Wightman, *Contract: A Critical Commentary* (London, Pluto, 1996).

²⁸ See especially H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999), and review of it by D Campbell, 'Reflexivity and Welfarism in the Modern Law of Contract' (2000) 20 *Oxford Journal of Legal Studies* 477.

²⁹ See especially H Dagan, *The Law and Ethics of Restitution* (Cambridge, Cambridge University Press, 2004); and the same author's 'Just and Unjust Enrichments' ch 17. Also worthy of mention is K Barker's call for a more pluralist approach: 'Understanding the Unjust Enrichment Principle' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Oxford, Hart Publishing, 2004) 79.

³⁰ For a general survey see D Skeel, 'The Unbearable Lightness of Christian Legal Scholarship' (2008) 57 *Emory Law Journal* 1471.

have been of the less absolutist sort.³¹ And if law can be said to have started on the road towards becoming a proper social science, it clearly has a long way to travel.³²

III. Why Have We Not Progressed?

When it comes to a detailed statement of the law of obligations, it is striking how much of the modern vision of internalists merely repeats the views of leading law teachers circa 1880. Those who look inward see an antique set of rules. Certainly contract has changed very little: a modern law teacher who reads the first editions of Pollock or Anson on contract³³ will find little that is strange. The tort books of that time would be a little stranger, no doubt, though mostly on matters of emphasis rather than substance. Restitution is the newest component of obligations, though its writers have rapidly ‘traditionalised’ themselves by the rapid ingestion of large slabs of Romanist thought. Crucially, the underlying political assumptions of the Victorian text writers and the modern internalists would apparently be the same: namely that the topic under discussion is justice between individuals, not wider concerns of social justice; that while there are occasional parliamentary intrusions into the law, there is little point in looking for a pattern in them; that freedom of contract should be assumed to be the norm; and that order and system are to be found in the eternal common law, not in the random forays of here-today-gone-tomorrow politicians and civil servants. (It will be appreciated that I am describing the more ‘traditional’ modern textbooks here; my description does an injustice to the entire range available, but I think identifies a solid strand within modern writing.) And where the internalists appear to have innovated, it is usually simply by completing projects the Victorians themselves started but left incomplete: finding a unitary basis for tort, or finding a more satisfactory description of the materials traditionally labelled ‘quasi-contract’.

We are so used to this that it has ceased to strike us as odd. But it *is* odd. Every other branch of human knowledge—including legal knowledge—has progressed immeasurably over the past century. In any other area, academics would be embarrassed at using much the same theories and attitudes as were advanced a century and a half ago, with nothing to show for the work of the intervening

³¹ The apparent unexportability of law-and-economics is starting to be an issue in the literature (see eg K Grechenig and M Gelter, ‘The Transatlantic Divergence in Legal Thought: American Law and Economics vs German Doctrinalism’ (2007) 31 *Hastings International and Comparative Law Review* 295) but there is a way to go in understanding it.

³² G Samuel, ‘Is Law Really a Social Science? A View from Comparative Law’ [2008] *Cambridge Law Journal* 288.

³³ F Pollock, *Principles of Contract at Law and in Equity: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England*, 1st edn (London, Stevens, 1876); W Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract*, 1st edn (Oxford, Oxford University Press, 1879).

period except some minor updating. In fact, the similarities between the Victorian text writers in obligations and the modern ‘internalists’ fade when we consider *why* they wrote as they did. The Victorians took many of the same choices as the modern internalists but for vastly different reasons, which (from our vantage point) seem to be more about their past than their future. Their preference for principle over discretion seems to have been a reaction to the chaos of the medieval common law, and their choice of Roman law as (barely acknowledged) organising tool is unsurprising, given the lack of alternatives;³⁴ anyone adopting those positions today must presumably have rather different reasons. Their lack of concern with individual fairness must be seen in the context of a jury system that could apply the law flexibly to each case—jurists did not need to consider fairness in individual cases, because that could be left to juries. With juries now largely removed from the civil legal system,³⁵ jurists’ neglect of fairness sends a very different message.

And of course the Victorian jurists, respectable gentlemen all, had the blindnesses of their generation: drawing a rigid line between private law and public law, and somehow failing to notice the growing mass of governmental regulation law which made a nonsense of the distinction. Terrified at the broadening of the electorate, and the socialist barbarism they feared would quickly follow, they turned their backs on the law as it actually was, and so left us no internal account of the (tortuous but in the event largely peaceful) transformation of law and government which democracy brought about. It is one of the most sobering aspects of modern legal history that the Victorians constructed the basis of the modern administrative state, and yet their best legal brains failed to notice what was going on. The occasional genius did, perhaps. It took a John Stuart Mill to point out that the law of contract always involves a deliberate public choice as to which bargains the state will enforce, and so talk of ‘respecting the will of the parties’ is therefore merely obfuscation;³⁶ and a Frederick Maitland to notice (eventually) how detailed and how thorough regulation of the economy had become, protesting feebly that his colleagues still spoke as if this only involved the occasional use of the royal prerogative.³⁷ In this, as in other matters, the past is a foreign country. The Victorian text writers were not ‘adopting the internal point

³⁴ On the reception of Romanist doctrine in contract see J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, Clarendon Press, 1991) especially chs 6–8.

³⁵ For the (rather sudden) decline of the civil jury in England see M Lobban, ‘The Strange Life of the English Civil Jury, 1837–1914’ in J Cairns and G McLeod (eds), *The Dearest Birth Right of the People of England* (Oxford, Hart Publishing, 2002).

³⁶ JS Mill, *Principles of Political Economy*, 7th edn (1871, reprinted, Oxford, Oxford University Press, 1998) 162. This passage (too long to reproduce here) is a remarkable one from a common law point of view. By evaluating private law principles as state action, it anticipates *Shelley v Kraemer*, 334 US 1 (US Supreme Court, 1948) by three-quarters of a century, and is within spitting distance of the ‘horizontal effect’.

³⁷ F Maitland, *The Constitutional History of England* (Cambridge, Cambridge University Press, 1913) 417.

of view'; by their standards, they addressed issues broadly and with full regard to relevant policy concerns. They were simply Victorian.

And yet it was this generation of scholars that set the tone for almost a century in England and in most of the Commonwealth. The precise history of those who followed them differs from country to country, but the overall stories are much the same: the social sciences separated out and 'professionalised' themselves, with the result that each had less to say to the other, if indeed they talked at all; most law schools were dominated by part-time teachers and practitioners, with little interest in what the rest of the university was doing; innovation in legal theory was poorly rewarded by universities and not rewarded at all by legal professional bodies, which tended to assume that new theory with no immediate application in legal practice must be unimportant.³⁸ The effects of this period in the doldrums are still with us, not least because during it many law schools attained 'cash-cow' status within their universities—high student numbers, grimly efficient teaching, low research costs—and now find it hard to take a different tack without incurring their superiors' displeasure. There is much more to say on this, and on why the US legal academy followed such a different path.³⁹ But the low morale and low intellectual productivity of that period in legal scholarship are well known.

It was in the 1960s that the tide turned. Increasing government investment in universities, coupled with the obvious importance of law in an increasingly juridified political climate, led to a huge expansion in the number and quality of legal academics. Full-time law staff, on well-defined career tracks where high-quality publications have a good chance of leading to promotion, steadily became the norm. In such a vastly increased university system, there are niches for all sorts of views: the law schools and their occupants are diverse as never before. With an increasingly complex legal system, and with significant numbers of ambitious scholars keen to make their individual marks (for law is still the field of the lone scholar, despite trends to the contrary in other fields), an inevitable consequence has been increased specialisation. The breadth of knowledge achieved by earlier generations of scholars is usually not attainable, and indeed may no longer be desirable, because knowledge so broad must in modern conditions be horribly shallow. The law has essentially been written afresh. Many of the subjects now written on simply did not exist five decades ago. It is a sobering thought that neither administrative law nor labour law were established legal academic subjects in the United Kingdom in 1960, and while family law and constitutional law have an earlier history, those subjects are today unrecognisable from earlier writings. In modern conditions, the law is being constantly re-written both through the

³⁸ Atiyah, *The Rise and Fall of Freedom of Contract*, above n 23, especially 660–71.

³⁹ For some relevant consequences of which see C Saiman, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party' (2008) 28 *Oxford Journal of Legal Studies* 99; the same author's 'Restitution and the Production of Legal Doctrine' (2008) 65 *Washington and Lee Law Review* 993; E Sherwin, 'Legal Positivism and the Taxonomy of Private Law' in C Rickett and R Grantham, above n 19, at 103.

political process and through emerging academic ideas.⁴⁰ Change is the only constant.

And yet many in obligations still emulate the Victorian textbook style, *even though* that style, with its blinkered refusal to acknowledge external influences or public concerns, was out-of-date even when originally employed. Viewed externally, the law of obligations is not an island: its rules have social and economic effects like any other area of law, and there is sustained and complex legislative intervention there as elsewhere. What is unique about the law of obligations is a deeply ingrained internalism, which looks for system in the common law only: it still refuses to take seriously the idea that statutory interventions might be purposeful, or might reflect concerns more urgent than those to be found in the old case law. This extreme internalism is not a unanimous view, to be sure. Not everyone treats statutory regulation of contract and tort as some kind of alien intrusion, or prefers Victorian values to modern ones. But there is a persistent strand of thought that the common law safeguards important values of personal responsibility and limited government which legislation *necessarily* (at least, as currently practiced) disregards.

For most of the latter half of the twentieth century, those who thought this way saw obligations as a dying subject, to be fought for while it lasted, but doomed eventually to be submerged by the rising tide of regulation.⁴¹ By the 1990s, this fatalistic cast of mind had found a new outlet—promoting unitary theories of obligations which attempted to unite the cases, with theories which concerned themselves only with justice between individuals—and ignored both wider public concerns and most legislation. Particularly influential was the Romanist model proposed by Peter Birks in relation to unjust enrichment, and which is now increasingly being applied to contract and tort as well. And there is no doubt that this vision of obligations suits some very well indeed: those who wish to portray public law as innovative, sophisticated and responsive to modern concerns can do so all the better if they assume that private law is conservative, narrow and wilfully old-fashioned.⁴² And so long as the question is posed that way—Do we stick with the traditional approach to obligations, or do we adopt a new public-oriented focus?—then we do indeed have to choose, however unpalatable both the alternatives seem to be.

⁴⁰ For accounts of the history see W Twining, *Blackstone's Tower—The English Law School* (London, Sweet and Maxwell, 1994) ch 2; F Cownie, *Legal Academics—Culture and Identities* (Oxford, Hart Publishing, 2004) ch 2.

⁴¹ One of the more eloquent proponents of this view (I do not know if he still holds it) was Nigel Simmonds. See his *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester, Manchester University Press, 1984) especially chs 2 and 9.

⁴² M Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003); on Loughlin's view of what private law is, see book review by N Barber (2005) 25 *Oxford Journal of Legal Studies* 157, 165–6. Contrast D Oliver, *Common Values and the Public-Private Divide* (London, Butterworths, 1999); and M Moran, 'The Mutually Constitutive Nature of Public and Private Law' ch 2 of this book.

IV. The Modern Interweaving of Private and Public

Yet this stark choice is an illusion, an ideological holdover from before the fall of the Berlin Wall, an unsophisticated and barely intelligible demand that we chose between State and Market. In fact, we are stuck with *both* a strong state *and* an all-pervasive market for the foreseeable future. Governments tempted to reduce the power of the state have won few victories; governments tempted to abolish markets routinely fail to generate wealth by other means, for which they are rapidly punished by their citizens. There are differences over the relative role of state power and of markets, but on all but the fringes of politics they are differences of emphasis only.⁴³ The thesis of unrestrained capitalism has encountered the antithesis of state socialism, and we are now the heirs to the (inelegant and theoretically untidy) synthesis: a blending of public and private concerns, in which market institutions play a major role but are forever subject to public monitoring, review and reform. Where traditional legal rules survive, it is not *because* they are traditional but because the political system has determined (rightly or wrongly) that they are better than the alternatives on offer. The ideals which inspired an earlier generation of judges to lay them down are no longer to the point.

Modern obligations law, therefore, along with most other areas of law, represents an interweaving of public and private concerns. No area of law can be 'purely private', neglecting the public good or trusting that the invisible hand of the market will cure all ills. So legislative intervention into 'private' areas is commonplace; and the state acts not merely by abolishing those parts of the common law it does not care for, it also modifies and re-moulds the common law to suit its purposes. Law is a flexible tool in the state's hands, and the state has proved adept at turning old legal institutions to new purposes. But this is not a one-way process: the private influences the public too. 'The state' is not really a unitary entity at all, still less a capricious tyrant that can act as it pleases without fear of the consequences. The state could in theory abolish property ownership (or any other legal concept) tomorrow if it wanted to, but would in practice run into irresolvable difficulties if it tried; accordingly, ownership is *not* a myth.⁴⁴ The state cannot itself make wealth or improve social conditions—it can only hope to create economic and social circumstances in which others will be able to do achieve this—and the legitimacy and power of those currently at the helm depend heavily on results. The state, then, cannot simply 'do what it wants'—its powers are limited (not least by the powers of private actors)—and always runs the risk of being held responsible for the results of its actions (including results mediated

⁴³ S Deakin, 'Private Law, Economic Rationality and the Regulatory State' in P Birks (ed), *The Classification of Obligations* (Oxford, Clarendon Press, 1997) 283.

⁴⁴ Contrast L Murphy and T Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford, Oxford University Press, 2002), reviewed by F Maultzch (2004) 67 *Modern Law Review* 508.

through the reactions of private actors). So the public moulds the private, and the private moulds the public. And an observer who looks at the private alone, as if it were a distinct entity, will miss most of what is going on.⁴⁵

This process is ongoing throughout the modern law, and is at its most fascinating when it comes to the creation of new forms of private property, usually in trying to locate new technologies within the complex web of modern law. (When are biological entities ‘property’, and what are their ‘owners’ allowed to do with them? Are databases property, and how much proprietary protection does ‘intellectual property’ deserve? And who ‘owns’ the bread-crumbs trail of electronic records you leave as you surf the web?) More mundane examples abound, even in the core areas of obligations. Two examples follow.

That the law on *personal injury compensation* could be defined purely ‘internally’ or ‘apolitically’ would have been an impossible position in (say) the middle of the nineteenth century. Industrial safety was a leading concern of the growing trade union movement; and employers were quite open in arguing that generous rights of action for injured employees threatened economic development (because of cost, and because of the loss of managerial flexibility implicit in injury prevention). The steady ‘de-politicisation’ of personal injury law was simply the steady victory of the union side, as increasing democracy made it harder for government to ignore working-class concerns, and as increasing access to legal services ensured that both plaintiffs *and* defendants had lawyers. The legislative influence is clear enough, with reforms whittling away defences previously available to defendants, increasing the scope of public legal provision, encouraging public liability insurance, and (perhaps most important of all) not providing any other legal outlet for injured plaintiffs.⁴⁶ The growth of liability was therefore the product of both internal forces (the inner logic of the legal concepts) *and* some rather forceful influence from outside. What of the brave new world we now live in, where tort is ‘in crisis’, where governments now seek to *reduce* the scope of liability,⁴⁷ where much of the public (who are not really into internalism) regards tort law as a bureaucratic intrusion by an over-meddlesome state,⁴⁸ and where industrial safety

⁴⁵ For some of the issues see M Zamboni, *The Policy of the Law—A Legal Theoretical Framework* (Oxford, Hart Publishing, 2007).

⁴⁶ For the history in one jurisdiction see W Cornish and G de N Clark, *Law and Society in England 1750–1950* (London, Sweet and Maxwell, 1989) ch 7. An intriguing counterpoint comes from another common law jurisdiction that took a different path entirely, attempting from the 1970s onwards to replace the common law scheme of liability with a system of payments from public funds. Yet there too the private lawyers have by-and-large refused to engage with the law as it is, falling back on common law principles when the law has (all too obviously) moved on: G McLay, ‘Accident Compensation—What’s the Common Law Got to Do With It?’ [2008] *New Zealand Law Review* 55.

⁴⁷ P Cane, ‘Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law’ (2005) 25 *Oxford Journal of Legal Studies* 393 and also in M Bryan (ed), *Private Law in Theory and Practice* (London, Cavendish, 2007) 27.

⁴⁸ Indeed, even some judges see it that way: see JJ Spigelman, ‘Negligence: The Last Outpost of the Welfare State’ (2002) 76 *Australian Law Journal* 432. For debate on the ‘compensation culture’ see F Furedi, *Courting Mistrust* (London, Centre for Policy Studies, 1999); E Lee et al (eds), *Compensation Crazy: Do We Blame and Claim Too Much?* (London, Hodder and Stoughton, 2002); S Thomson,

seems little different from the Victorian scene except in being more overtly racist (as dangerous trades are increasingly moved abroad, to developing nations whose rulers say they cannot afford first-world health-and-safety laws—just as first-world Victorian employers did)? It will be apparent that this area of law cannot be understood without appreciating *both* its inner logic *and* how it appears to the community whose interests it is supposed to serve.⁴⁹ To view it only ‘internally’ is to ignore the one argument which might possibly justify it—namely, that all the alternatives we might put in its place are even worse.⁵⁰

Equally, the law on *the contents of contracts*. Here we encounter a peculiarly Victorian blind spot. The Victorian text writers started from the notion that contracts were usually the product of individual agreement (not an unreasonable view, around the middle of the nineteenth century) and reasoned that *therefore* the individual terms of contracts must also be the product of individual agreement—agreeing to a contract was equated with agreeing to its terms. This is of course a non-sequitur (you can’t deny your agreement simply because you did not set the terms, any more than you can deny your marriage simply because you had no hand in framing the marriage laws⁵¹), and the basic contradiction implicit in this has dogged contract theory ever since. In the late Victorian period, it led to the (confused and confusing) distinction between ‘contract’ and ‘status,’⁵² as well as increasingly desperate attempts to regard all the various sources of terms (custom, industry practice, national legislation, international treaty) as somehow mere aspects of personal agreement. One might have thought that the emergence of the corporate economy, where large economic units simply impose their terms on others without any pretence of ‘agreement’, would have put paid to this talk.⁵³ Yet

‘Harmless Fun Can Kill Someone’ (2002) 1 *Entertainment Law* 95; L McIlwaine, ‘Tort Reform and the “Compensation Culture”’ [2004] *Journal of Personal Injury Law* 239; K Williams, ‘State of Fear: Britain’s “Compensation Culture” Reviewed’ (2005) 25 *Legal Studies* 499; A Morris, ‘Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury’ (2007) 70 *Modern Law Review* 349.

⁴⁹ For parallel concerns see J Solomon, ‘Judging Plaintiffs’ (2007) 60 *Vanderbilt Law Review* 1749; R Bagshaw, ‘Tort Law, Concepts and What Really Matters’ ch 10 of this book.

⁵⁰ For integrated discussions see, eg, P Cane, *Atiyah’s Accidents, Compensation and the Law*, 6th edn (Cambridge, Cambridge University Press, 2004) chs 18–19; D Howarth, ‘Three Forms of Responsibility’ [2001] *Cambridge Law Journal* 553. See generally C Robinette, ‘Can There Be a Unified Theory of Torts?’ (2005) 43 *Brandeis Law Journal* 369. For some excellent ongoing work see the ‘Compensation Culture Project’ (Principal Investigators: S Halliday and C Scott), which employs participant observation in local authority offices to ask (amongst other things) whether the applicable tort regime *in fact* operates as a system of regulation.

⁵¹ Of course, whether marriage is truly a contract has been a talking-point down the ages, though with temporary and local variations depending on what ‘marriage’ is, what ‘contract’ is, and what marriage could possibly be if not a contract.

⁵² Maine’s famous claim that ‘the movement of the progressive societies has hitherto been a movement from Status to Contract’ (*Ancient Law* (1861) 170) has been much debated, though as Atiyah notes, it is now almost a cliché to say that this trend has reversed itself, if indeed it was not already in reverse when Maine was writing (Atiyah, above n 23, at 259–60 and 716). See M Rehbinder, ‘Status, Contract, and the Welfare State’ (1971) 23 *Stanford Law Review* 941.

⁵³ PS Atiyah, *The Rise and Fall of Freedom of Contract*, above n 23, at 596–601. Note also the late-19th and early 20th century English movement, in many respects successful, to escape orthodox legal views of

the Victorian habit has stuck with the internalists, who continue to *say* ‘contract’ and *mean* their general theory of contract, which stresses individual free choice and ignores the messy battles over which terms shall govern. To study *those* battles, one must look in the books on individual types of contract, or even on ‘regulation’ and ‘competition law’, where the multitude of collectivities (private and public, national and international) seeking to influence contract terms each seek to have their say. Again, it is not a question of *choosing between* the internal and external perspectives, as both have some validity. To paraphrase Collins, externalists do not criticise the notion of contract-as-promise *in order to dismiss it*. We criticise it because *unless its vulnerability to criticism is understood and its weaknesses appreciated, the limited role it plays in the modern law of contract cannot be understood*. Contract-as-promise is not dead; it is not even dying. But it is only one aspect of a vastly more complex law which regulates the modern institution of contract.⁵⁴

As these examples illustrate, it is not a question of either ‘internalism’ or ‘externalism’ being untenable. Rather, neither view is enough on its own. The kind of radical internalism I am critiquing here routinely falls into this trap, by carefully limiting its attention to its chosen area (‘common law of obligations’) and proceeding as if it does not matter what is outside it. But the common law is not an isolated bubble, and questions of how judges are to develop the law depend very much on whether they are the best people to do it—which in turn means asking what the functions of other organs of government are and should be, and perhaps re-thinking what the functions of the judiciary should be.

The truth is that we are in a period of extreme flux and uncertainty. There was a time when a constitutional law student could answer the question ‘Who makes the law?’ with ‘the Queen in Parliament’, and expect to pass with only a smidgeon of corroborative detail. Today, while the Queen is still on her throne, such a student would be failed outright in any law school worthy of the name. Leaving royalty aside, national parliaments do *not* make the law to the extent that they did, and many of them complain bitterly at this. Regional and international bodies make more and more of the law, though their remoteness from the people they govern places sharp limits on their legitimacy and their powers. Greater emphasis on rights and proper procedures, as well as a host of other factors, has led to more and more issues being classified as ‘legal’. This juridification has led to a hugely increased *judicial* sphere of influence: a universally acknowledged fact, if not seen by all as reason to celebrate.⁵⁵ Against that background, it is unsurprising that judges in the higher courts have in recent years broadened their vision, being

what the terms of contracts should be, by means of standard forms, arbitration, and a new Commercial Court which could be relied upon to take a ‘commercial’ view: H Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th Century England* (Toronto, Toronto University Press, 1985) ch 3.

⁵⁴ H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) 9.

⁵⁵ Indeed, the modern assumption of power by judges is often spoken of almost as a world-wide political coup. See R Hirschl, *Towards Juristocracy* (Cambridge MA, Harvard University Press, 2004); AS Sweet, ‘The Juridical Coup d’État and the Problem of Authority’ [2007] 8 (10) *German Law Journal* 915, and other articles in that number, at www.germanlawjournal.com.

bolder both in developing the law and in the range of arguments they have been prepared to listen to. Yet in commenting on this we see radical internalism at its worst, praising judicial innovations where they happen to like them (such as in the introduction and progressive refinement of unjust enrichment), but bleating against the judges' use of 'policy reasons' which they do not care for, and insisting that judges should stick to 'principle'. But a distinction between 'principle' and 'policy' can only be made to work when those terms are well defined. At this particular juncture, neither is.

At the risk of being seen as parochially European, I should perhaps add that these issues of the status and character of private law can all be seen in microcosm in the debates on harmonisation of private law throughout the European Union—debates on whether it should be done, what difference it might make, to what extent the aim should be reform and to what extent merely consolidation, and how it can be justified under the existing treaties.⁵⁶ One of the most striking features of this is that not merely the arguments but *the actual topic of debate* is forever changing. Sometimes it is about economics and the facilitation of cross-border trade (But whose view of economics? With what role for differing national policies?⁵⁷). Sometimes it is about attitudes to the heritage of Roman law (But is this really an appeal to common origins, or merely a bid for power by those who claim to be Roman law's most faithful guardians? Is the common law really different, or does its serial plagiarism from Roman sources—of which Birks is merely the most recent example—invalidate that argument?⁵⁸). And sometimes it is about uniformity and the messages uniformity sends (Would harmonisation of laws across Europe be a clear and welcome statement of unity, or an undemocratic usurpation of power which would never have been granted had it been asked for explicitly?⁵⁹ Is the tenacity of national legal cultures mere lawyerly self-interest, or

⁵⁶ The literature on this topic is voluminous, repetitive and in a variety of respects tedious beyond all comparison. However, some contributions rise markedly above the usual level, and are particularly relevant to the themes of this chapter. In addition to the pieces referred to in the following footnotes see M Hesselink, *The New European Private Law* (The Hague, Kluwer, 2002) and C Twigg-Flesner, *The Europeanisation of Contract Law* (London, Routledge Cavendish, 2008).

⁵⁷ See, eg, E Carbonara and F Parisi, 'The Paradox of Legal Harmonization' [2007] *Public Choice* 367; F Nicola, 'Transatlanticisms: Constitutional Asymmetry and Selective Reception of US Law and Economics in the Formation of European Private Law' (2008) 16 *Cardozo Journal of International and Comparative Law* 101.

⁵⁸ See, eg, R Zimmermann, 'Roman Law and the Harmonisation of Private Law in Europe' in A Hartkamp et al (eds), *Towards a European Civil Code*, 3rd edn (The Hague, Kluwer, 2004). More generally on unoriginality and plagiarism in legal development, see AWB Simpson, 'Innovation in 19th Century Contract Law' (1975) 91 *Law Quarterly Review* 247, reprinted in AWB Simpson, *Legal Theory and Legal History* (London, Hambledon, 1987) ch 10; M Siems, 'Legal Originality' (2008) 28 *Oxford Journal of Legal Studies* 147.

⁵⁹ See, eg, B Markesinis, 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity' (1997) 5 *European Review of Private Law* 519; H Collins, 'The Voice of the Community in Private Law Discourse' (1997) 3 *European Law Journal* 407; E McKendrick, 'Harmonisation of European Contract Law: The State We Are In' in S Vogenauer and S Weatherill, *The Harmonisation of European Contract Law* (Oxford, Hart Publishing, 2006) 5–30.

a legitimate exercise of subsidiarity?).⁶⁰ Such is the modern legal system: the many and diverse perspectives within it are each entitled to their say. If theorists choose to concentrate on smaller areas, then let them do so; but let them not deny what it is that they are doing, or simply assert that their favourite problem is somehow more important than the problems they leave for others.

V. The Problem: Polarisation and Mutual Disdain

The problem is not, therefore, too much internalism/too much externalism, or too much order/too little. Everyone agrees that the law of obligations is more-or-less structured, though some are interested in the 'more', others in the 'less'. The problem is how to make each camp pay due respect to the work of the other. Every scholar will choose the sort of work that they find most congenial, or where they think they can best make their mark. What must be avoided is allowing them to suppress or denigrate work against which they have no legitimate complaint, but simply do not care to do themselves.

In my view, the writing here is unbalanced. When we go looking for externalists who have denied any validity at all to internal views, we simply do not find them. The need for *some sort* of structure has never been denied (the dispute has been over the adequacy of the structures on offer, and the need for better ones). Are there any 'radical externalists' to be found, who are simply not interested in any kind of legal structure? Kaye has recently protested against the 'fundamentalists' in both camps, damning both the rights theorists (internal) and the more enthusiastic law-and-economics theorists (external)⁶¹—but *that* sort of law-and-economics has no significant uptake outside the United States. Some externalists have been accused of the vile crime of being legal realists (who are assumed to be awful creatures, with no regard for properly structured legal thought), but Dagan's work has undermined the charge, exposing the idea that legal realists had no respect for law's internal structure as the nonsense it is.⁶² Where externalists have been accused of ignoring law's internal workings, it is usually in the defence of some very particular internalist view—so someone who attacks Birks' view on how to structure unjust enrichment is told (wrongly) that they are attacking the very idea of structure itself.⁶³ The truth is that externalists understand the

⁶⁰ See, eg, H Collins, 'European Private Law and the Cultural Identity of States' (1995) 3 *European Review of Private Law* 353; J Smits, 'A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference' (2008) 19 *Stellenbosch Law Review* 179–88; S Glanert, 'Speaking Language to Law: The Case of Europe' (2008) 28 *Legal Studies* 161.

⁶¹ T Kaye, 'Rights Gone Wrong: The Failure of Fundamentalist Tort Theory' (May 2008), available at <http://ssrn.com/abstract=1130492>.

⁶² H Dagan, 'Legal Realism and the Taxonomy of Private Law' in C Rickett and R Grantham, above n 19, at 147.

⁶³ See eg, the charge that my own writing on restitution is 'anti-theoretical' and 'downplays the importance of principled legal reasoning': D Sheehan, 'Implied Contract and the Taxonomy of

strengths of internalism well, and use internalists much as a truffle-hunter uses truffle hounds—if there is order to be found, we can trust them to sniff it out, and we ourselves will do whatever else is required. If internalists feel challenged by criticisms of their structures, then so they should be—and let them respond with reasoned defences of it, not with the nonsensical charge that their critics reject all structural notions.⁶⁴ A more promising line of internalist attack is one which acknowledges their opponents' strengths, as for example with Goldberg's recent charge that those taking up rigid theoretical positions are promoting half-truths about tort law.⁶⁵ Precisely! Each side has some proportion of the truth—let us politely say that each has a half, until the contrary is shown—and let us then tease out in debate precisely where the whole truth lies.

Very different are those writers for whom internalism has become the whole game. For them, it is not a question of balance. Externalist viewpoints must be ignored or their relevance denied, because otherwise legal debate ceases to be distinctively legal: it becomes a free-for-all in which the very meaning of law is lost. While the point has been put in various ways, the essential argument is the same, and has been made many times by leading internalists: that we have a stark choice, between an utterly pure internalism and an utterly pure externalism, and that anyone who chooses the second is simply not a lawyer.

The danger is that, as an appeal to policy becomes a more frequent practice, academic lawyers will appeal to policy rather than attempt to refine their understandings of private law so that they are no longer inadequate. If this occurs, then, with respect to the private law, academic lawyering will no longer exist as a discipline ... On this view, academic private lawyers will have abandoned the primary task of the academic lawyer, which is to treat the law as an academic discipline.⁶⁶

[O]ne must either accede to the possibility that law can be understood through itself or deny the possibility that law can be understood at all. Perhaps it is hardly surprising that dissatisfaction with contemporary scholarship has caused exponents of 'critical legal studies' to explore this latter skeptical alternative.⁶⁷

I do not seek for one moment to deny the fascination and significance of jurisprudence, law and economics, law and literature, and the like. I have long been fascinated

Unjust Enrichment' in P Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (The Hague, Martinus Nijhoff, 2007) 187. This assumes that Birks' theory is the only theory worthy of the name, and Birks' principles the only principles.

⁶⁴ cf P Jaffey, *Private Law and Property Claims* (Oxford, Hart Publishing, 2007) 30.

⁶⁵ J Goldberg, 'Ten Half-Truths About Tort Law' (2008) 42 *Valparaiso University Law Review* 1221. Also working towards a more balanced view (though still too ready to damn externalism as destructive, rather than as describing necessary limits to internalism) is E McKendrick, 'Taxonomy: Does It Matter?' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment—Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002) 627.

⁶⁶ A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320, 335–6.

⁶⁷ Weinrib, *The Idea of Private Law*, above n 15, at 18. The choice of the crits as target here is particularly bizarre, given their repeated insistence that law is *not* simply the product of external political forces, but should be regarded as 'relatively autonomous'.

by them myself. Without question they have a role to play in a modern law school. But to regard those studies as 'what proper legal academics should be doing' seems to me unacceptable. At the end of the twentieth century, the work of the practical legal scholar—and our working relationship with the judiciary—is too important to society for us to sell out to the departments of philosophy, history or economics.⁶⁸

Waddams is clearly correct to say that map-makers' claims about the importance of particular rules or decisions are invariably made from the perspective of their general theories of the law. But there is no other way that such claims can be made. There is no external perspective from which claims of importance can be made.⁶⁹

Various principled reactions to these passages are possible. All the usual warnings about taking isolated statements out of context apply (though in each case, it seems to me that the context confirms that each writer meant every word). It would also be unfair to dismiss views merely because they happen to be overstated or inelegantly expressed (though again, unless we are prepared to dismiss entire articles as mere slips of the pen, the argument seems to miss what is being said). One could also retort that the barbarians at the gate are really *public lawyers* rather than other sorts of social scientist. 'Sociology is not law' is a claim with a certain naïve charm, and may possibly contain some truth; 'public law is not law' deserves no such indulgence. Yet this does not address the real problem—the fear of obsolescence in a new century—leading convinced internalists to deny that their externalist colleagues even belong in the law school. This needs to be tackled more directly.

Almost by definition, those who concentrate purely on internal legal issues are unlikely to be very good at explaining why those issues matter. A solid argument for the significance of a particular approach involves asking why others should care about it, and what other solutions for the same problem are available—a reluctance to enquire into either will constitute a serious handicap. Building a beautiful theory of law is only half the battle—faced with such a theory, others may assume that its appeal is primarily aesthetic. If internalism is not to become a dead end, its proponents need to pay more attention to why their claims matter. With this in mind, I list eight points to bear in mind when considering this aspect.

1. *The worth of a logical system cannot be evaluated from inside that system.* What do they know of obligations, who only obligations know? The internal consistency of a legal model is only one feature of it, and is by no means a knock-down argument in favour of its acceptance; many extremely bad theories have been internally consistent.⁷⁰ The question 'why?' will not go away, nor will it answer itself; and attempts to answer it without questioning the system's definitions will only lead to circular claims.

⁶⁸ A Burrows, *Understanding the Law of Obligations* (Oxford, Hart Publishing, 1998) 113 and 119.

⁶⁹ S Smith, 'A Map of the Common Law?' (2004) 40 *Canadian Business Law Journal* 364, 380.

⁷⁰ P Schlag, 'Law and Phrenology' (1997) 110 *Harvard Law Review* 895.

2. *World-wide claims require world-wide knowledge.* Anyone who claims that a certain theory is part of the common law, not limiting the claim to any particular jurisdiction, would appear to be saying that it is the law in every State in the United States, most of the United Kingdom and Canada, Australia, Singapore, Ireland, New Zealand, and a number of other places. Such a claim to knowledge is not usually credible; it could only be made by an exceptional individual with access to law libraries of superb coverage. If there is a serious claim there, it will usually be a rather lesser one; but if its own author cannot spell it out, it seems unlikely that their readers will be able to do so.
3. *If the law is truly in chaos, it is most unlikely that some new theory can instantly restore order.* Internalists have tended to assume that 'order' and 'disorder' in law are purely functions of the concepts the lawyers employ, so that a revolution in those concepts can radically alter the level of certainty in the law. But certainty in law has many roots. The law of murder will always be in conceptual chaos, because decision-makers feel strongly about these things and will not be dictated to by mere legal logic; medical negligence cases will always be harder to resolve than other negligence cases, because of the complexities of causation and the uncertainties of prognosis; juries are entirely uncertain in some respects and entirely predictable in others. A claim to be injecting much-needed certainty into the legal process needs empirical back-up if it is to be taken seriously, and is an unlikely claim if based solely on conceptual considerations.
4. *Appeals to the 'best explanation' of particular areas of law are a dubious form of argument at best.* Rationality is not ensured by a rigorous search for the 'best explanation' of the law, because the answer has already largely been determined by the choice of what it is that needs explanation. Framing is all. The 'best explanation' of the law on escaped snails may be one thing, the 'best explanation' of ginger-beer-consumers' rights may be another, the 'best explanation' of the law of negligent injury may be a third thing; and there is no good reason to suppose that these 'best explanations' will cohere with one another. This 'best explanation' device, as used in court to resolve hard cases, has solid jurisprudential backing⁷¹ (how strong, is not my current concern); but its use in structural arguments does not, and relies heavily on 'the classic formalist misconception that unsettled law and controversial cases can be resolved solely by conceptual analysis.'⁷² To paraphrase Llewellyn, a court has the legal issues defined for it by the parties, whereas in academic argument each participant defines the issues as they like, and 'consequently always rides his straw man down.'⁷³

⁷¹ R Dworkin, above n 18, ch 7.

⁷² P Jaffey, 'Contract, Unjust Enrichment and Restitution: The Significance of Classification' in P Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (The Hague, Martinus Nijhoff, 2007) 227.

⁷³ K Llewellyn (unpublished), quoted in W Twining, 'Some Scepticism about Some Scepticisms' (1984) 11 *Journal of Law and Society* 137, 163–4.

5. *Not many people read Aristotle, Justinian or Kant any more.* There was a time—not really very long ago—when a classical education was the mark of an educated person, and a philosophical grounding a mark of special distinction. That being so, any would-be legal theorist would be sure to include ample references to the classics or philosophy. But those days are gone, there is too much else to learn, and those traditional disciplines must compete in the market-place of ideas with many others. It may be a mistake, therefore, to treat a proven connection between a favourite theory and that of the ancients as an advantage. If it is suggested that the connection is a useful one, some explanation is called for. And someone who is offended by such questions as ‘Who cares what Immanuel Kant thought?’ may not be an effective advocate for their cause.⁷⁴
6. *No one has a monopoly on ‘rights’ or ‘justice’.* To base your theory on either is to invite comment from those with a different view, very probably ‘external’ to your conceptual world. These days, anyone who has time to engage in political argument will have some sort of a view on both, and on the extent to which they should be reflected in law. (My UK audience will know that even *The Sun* has a view on these matters, though it’s not pretty.) These concepts can no longer be used in a purely technical sense, as if lawyers could define them to suit themselves; there are even those who believe that rights are pre-legal, or may be better off *not* being protected in law.⁷⁵ Arguments about rights are not internal legal arguments any more—if they ever were.
7. *History is on no one’s side.* When intellectual history—legal or otherwise—is done in a hurry, it often results in hasty over-generalisations: The Romans thought ‘x’, or eighteenth century legal theory said ‘y’, or no one ever thought ‘z’ until Lord Denning said it in 1969. This apparent neatness is seen by some internalists as a confirmation of their approach: earlier legal thought can be characterised by these unambiguous general descriptions, so why not continue the habit? But when we have the time to do our legal history properly, this certainty falls apart. At any period, there is argument over how to characterise legal notions. The legal system is always in flux. Even when some legal institutions are uncontroversial, there might be unfathomable differences on why they are uncontroversial. So while historical argument is always a useful resource, properly done it will never yield unambiguous answers. And (contrary to the views apparently held by some) there is no special category of internalist legal history, by which we are entitled to attribute certain views to historical figures to satisfy legal theory, when the facts suggest that their views were otherwise. ‘Actual assertions about the past should be tested and if

⁷⁴ For a limited defence of the use of Roman law in modern common law contexts, see J Lee, ‘*Confusio*: Developing English Private Law through Reference to Roman Law’, paper presented at the Fourth Biennial Conference on the Law of Obligations, Singapore, July 2008.

⁷⁵ See especially M Dembour, *Who believes in Human Rights? Reflections on the European Convention* (Cambridge, Cambridge University Press, 2006) especially ch 8.

they turn out to be false, should be contradicted?⁷⁶ Do legal history properly, or don't do it at all.⁷⁷

8. *No one does policy well. It follows that no one is excused from doing it merely because they may do it badly.* A frequent internalist argument is that judges and legal academics are no good at policy formation, so they should leave it to others. But (leaving aside the point that we have no sure idea where 'policy' begins or ends) there is a gap in the argument. No person alone is ever good at policy, because sound policy can only be the product of multiple viewpoints. Whether legal officials are the least-worst people to be trusted with such power will require case-by-case consideration—it is not enough simply to assert that legal resort to policy is an admission of failure.⁷⁸ There are really two objections here—that lawyers may lack the knowledge to decide these issues, and that they may lack the legitimacy to do so. Neither argument applies in all circumstances (lawyers have both knowledge and legitimacy in many areas). This objection, then, cannot be applied with a broad brush, but needs discrimination.⁷⁹

Let the political merits of a pure internalism be clearly recognised, so that there is no mistaking its worth. The notion that law is an autonomous science, which yields definitive answers without the need for external intervention, is an extremely valuable one, with deep cultural roots. Much like the myth of Father Christmas, properly employed it can encourage proper behaviour, divert greed into socially useful channels, and promote the impression that virtue is rewarded and its converse punished. It also has a useful educational role: eventually, young people who initially believe the myth will realise for themselves that they have been misled, which will teach them further valuable lessons on the reliability of official pronouncements—lessons which might not be understood if explained in direct language. The difficulty comes when the entire academic establishment is meant to pretend that Father Christmas exists, simply because it would be nice if he did. If 'internal' legal theories can only be defended by these means, then they do not deserve to survive in the academy, however they may fare outside it.

VI. The Poverty of Either Approach Alone

Neither internalism nor externalism is a viable philosophy on its own. To ignore internalism is to miss much of what makes law 'legal'; to ignore externalism deprives

⁷⁶ S Waddams, 'Private Right and Public Interest' in Michael Bryan (ed), *Private Law in Theory and Practice* (Abingdon, Routledge-Cavendish, 2007) 3, 4.

⁷⁷ Compare R Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57.

⁷⁸ A Beever, 'Policy in Private Law: An Admission of Failure' (2006) 25 *University of Queensland Law Journal* 287.

⁷⁹ For an attempt to describe 'policy' in narrower and more defensible terms, see A Robertson, 'Constraints on Policy-Based Reasoning in Private Law' ch 11 of this book.

law of any point. And it is all one thing. It's not that you *can't* separate outside from inside, public from private; it's that nothing makes any sense if you do.⁸⁰

All legal thinkers need to know this, but some (I have argued) learned it long ago. Every externalist will already be entirely familiar with internalist ways of thought (many law courses consist of little else), and externalist scholarship, whatever its weaknesses, does not suffer from a failure to appreciate internalism's merits. It is the internalists who have retreated to their bunkers, and have recently dug in deeper. They need to rediscover that, like it or not, they are part of a wider political system. They can only learn about that wider system by talking to public lawyers and even non-legal academics, however unappealing that prospect may now seem. They will learn yet more if they will take press criticism of their discipline seriously, as newspapers are still the main conduit through which public views are conveyed. As ever, Tom Stoppard had it right—'I'm with you on the free press. It's the newspapers I can't stand'—but it is too easy to dismiss genuine public fears on the way law is developing, merely because most journalists do not have law degrees. More generally, the study of the common law should not become a nineteenth century theme park, or an exercise in disgust that the world has moved on from then. In the modern age, private rights are actively made and re-made every day, not merely inherited from the last generation of lawyers—and we all have a responsibility to ensure that they are made as well as they can be. It is absolutely true (as several internalists have insisted) that traditional legal doctrine is very bad regulation, but we must be very careful when we decide which way that cuts. Does it mean that we must abandon the idea that law is regulation (on the basis of the rather snobbish idea that common law is above that)? Or does it mean that considerable improvement is needed in existing legal provision?

Neither internalism nor externalism makes sense without the other. They must learn to live together.

⁸⁰ Compare M Scordato, 'Reflections on the Nature of Legal Scholarship in the Post-Realist Era' (2008) 48 *Santa Clara Law Review* 353.