Making Sense of Private Law Theory

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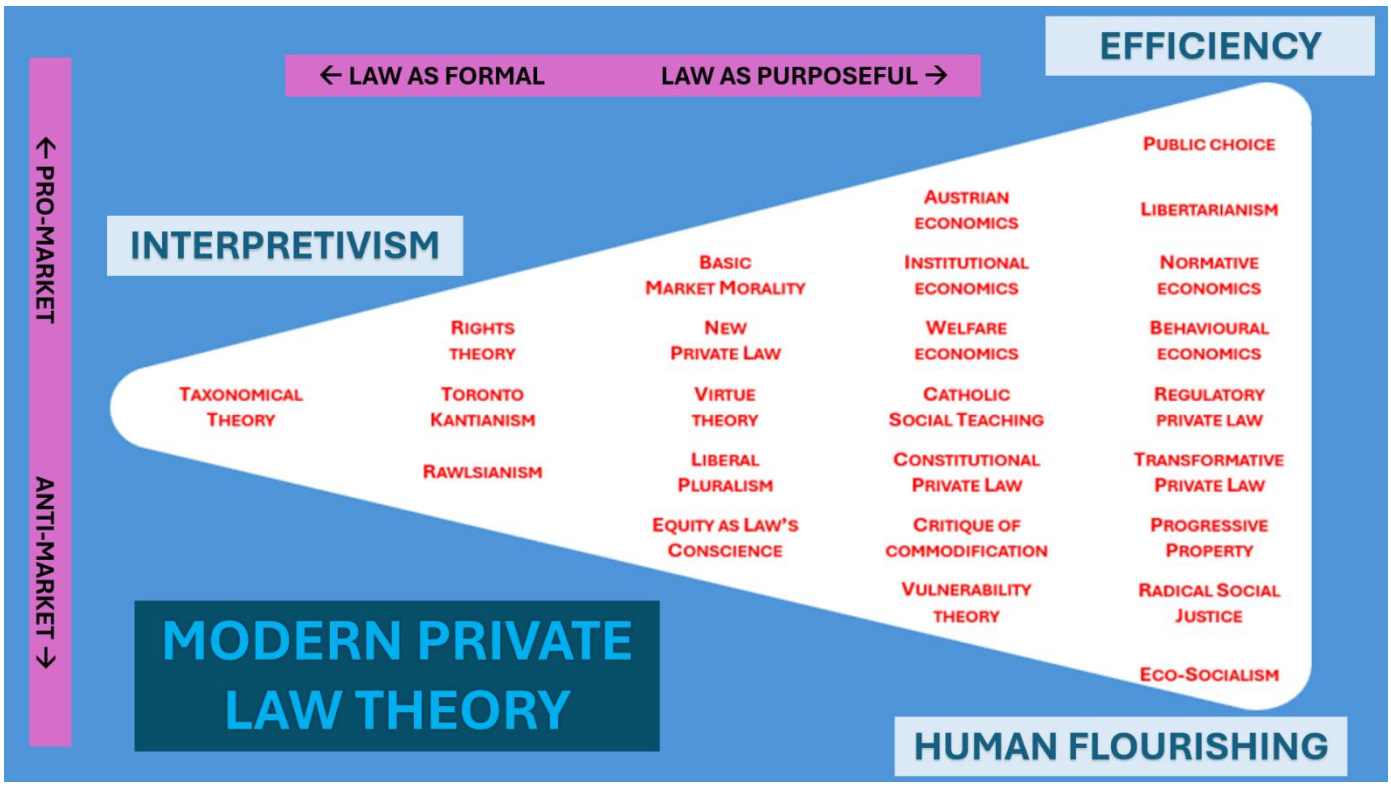

AN INTRODUCTION TO THE LITERATURE

1. Austrian Economics. Much influenced by Friedrich Hayek, who saw private common law as a largely efficient economic ordering, spontaneously emerging from market activity – see especially F Hayek, *Law, Legislation and Liberty* (1973-1979) vol I ch 2. See eg B Leoni, *Freedom and the Law* (1961).

2. Basic market morality. Not so much a coherent school as a consistent orientation: private law as pragmatic moralism, emphasising autonomy in the market. These writers are not much interested in formal economic models, but are nonetheless convinced of the importance of freedom of contract. See eg C Fried, *Contract as Promise* (1990; 2nd ed 2015); J Morgan, *Contract Law Minimalism* (2013); N Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* (2016).

3. Behavioural Economics. Strong interest in promoting economic efficiency, but willing to relax common economic assumptions – notably, the assumption that economic actors are entirely rational. These writers are typically cross-disciplinary, incorporating psychological and sociological insights. See eg O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012); K Mathis and A Tor (eds), *Nudging – Possibilities, Limitations and Applications in European Law and Economics* (2016).

4. **Catholic Social Teaching.** Catholic critique of the market – particularly as stated in *Rerum Novarum* (1891) and subsequently. Often comparable to moderate secular critiques of market-oriented law, though the basic concepts (and metaphysics) are different (eg 'justice in exchange' rather than 'equality of bargaining power' or 'recognition of vulnerability'). See eg J Finnis, *Natural Law and Natural Rights* (1980); P Franzese and A Carmella, 'Housing and Hope: Private Property and Catholic Social Teaching' in R Cochran and M Moreland (eds), *Christianity and Private Law* (2021). For current attitudes to the market see eg *Evangelii Gaudium* (November 2013). For an exercise in placing 'justice in exchange' theory in the context of modern private law theory see J Reyes, *Just Price Theory: A Reassessment* (2023).

5. **Constitutional Private Law.** Integrating private law thought with constitutional values, especially (horizontal) human rights. From this point of view judicial creativity should be subject to human rights limitations, as should all governmental power. See eg C Mak, *Fundamental Rights in European Contract Law* (2008).

6. **Critique of Commodification.** Not so much a school of thought as a consistent critique of neoliberalist law, for treating fundamental social values as mere market commodities. Human dignity and fundamental rights should not be for sale. See eg M Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2012); K Pistor, *The Code of Capital* (2019); C Ondersma, *Dignity not Debt* (2024).

7. **Eco-Socialism.** Law should serve the community's good; and this should be the default position in the law, not a mere exceptional qualification on private rights. See eg U Mattei and A Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (2019).

8. **Equity as Law's Conscience.** A rigid, market-based common law is only acceptable if a safety-valve is available for abuse of common law rights. Equity has historically acted as such a safety valve, and should be encouraged to do so for the future. See eg I Samet, *Equity: Conscience Goes to Market* (2018); L Smith, *The Law of Loyalty* (2023). For a similar (though more economics-friendly) approach see H Smith, 'Equity as Meta-Law' (2021) 130 *Yale Law Journal* 1050.

9. **Institutional Economics.** Emphasising the role of actual economic institutions and not-entirely-rational market behaviour, these writers seek to promote efficiency by reducing transaction costs. See eg O Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985); D North, *Institutions, Institutional Change, and Economic Performance* (1990).

10. **Liberal Pluralism.** These writers believe that private law should aim for individual self-determination, particularly in the context of relationships with others. While the law can be said to have a primary goal ('autonomy' or 'non-domination'), it embodies a variety of values, and cannot be reduced to a single over-arching principle. See eg H Dagan, *A Liberal Theory of Property (*2021), (with A Dorfman) *Relational Justice: A Theory of Private Law* (2024) and (with M Heller) *The Choice Theory of Contracts* (2017); P Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (2019).

11. **Libertarianism.** Individual liberty, private property rights and voluntary agreements are the best basis for society, and should be allowed to operate largely unchecked; private law should reflect this. See eg R Epstein, *Simple Rules for a Complex World* (1995); R Barnett, *The Structure of Liberty* (2000).

12. New Private Law. A broad church, with a common theme of recovering whatever is valuable from doctrinal legal thinking, and resisting an over-zealous application of legal realism: eg J Goldberg and B Zipursky, *Recognizing Wrongs* (2020). Whether this is a coherent intellectual movement or merely a debating club may be a matter of opinion. For a range of writers under this banner see: A Gold, J Goldberg, D Kelly, E Sherwin and H Smith (eds), *The Oxford Handbook of the New Private Law* (2020).

13. Normative Economics. These writers are committed to the usefulness of economic analysis in explaining and evaluating private law, but are rather undogmatic as to whether or when economic concerns should predominate; efficiency is one goal, but other goals may outweigh it. See eg G Calabresi, *The Costs of Accidents* (1970) and *The Future of Law and Economics* (2016); B Fried, *Facing Up to Scarcity* (2020).

14. Progressive Property. Property involves plural and incommensurable values, some individual, some serving wider concerns. See generally: G Alexander, E Peñalver, J Singer and L Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743 ('Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation'). See eg G Alexander, *Property and Human Flourishing* (2018).

15. Public Choice Theory. These writers are sceptical of state involvement in private law, viewing law-makers and judges as self-interested political actors. Some explore possibilities for non-state resolution of private disputes. See eg E Stringham, *Private Governance: Creating Order in Economic and Social Life* (2015); B Benson, *The Enterprise of Law: Justice Without the State* (1990): G Tullock, *The Case against the Common Law* (1997); and J Warren, 'Law without Hierarchy' (2024) 53 *Journal of Legal Studies* 339.

16. Radical Social Justice. Several of these schools assert that social justice is at the core of what they do, but these particular writers go further, insisting that social justice is at least in part a political concern, and that the law is a legitimate instrument for advancing it. See eg H-W Micklitz, *The Politics of Justice in European Private Law* (2018); P Ireland, *Property in Contemporary Capitalism* (2024). Note also D Caruso, '*Qu'ils mangent des contrats*: Rethinking Justice in EU Contract Law' in D Kochenov, G de Búrca and A Williams (eds), *Europe's justice deficit?* (2015).

17. Rawlsianism. Private law as part of the basic structure of society, and accordingly as responsive to basic structural concerns. See eg P Benson, *Justice in Transactions* (2020). For controversies over precisely what Rawls believed in this regard see eg D Blankfein-Tabachnick and K Kordana, 'On Rawlsian Contractualism and the Private Law' (2022) 108 *Virginia Law Review* 265.

18. Regulatory Private Law. Private law functions not merely to resolve disputes between private parties, but also to advance a range of public policy goals, such as environmental protection, consumer safety, or market fairness. See eg H Collins, *Regulating Contracts* (2004) and *The European Civil Code: The Way Forward* (2008); C Hodges, *Law and Corporate Behaviour* (2015). C Mitchell (*Contract Law and Contract Practice* (2013) and *Vanishing Contract Law* (2022)), while not framing her argument in quite these terms, nonetheless seems to have much in common with this approach, stressing the increasing lack of real-world relevance of traditional contract law. See also T Wilhelmsson, *Free Movement of Legal Ideas* (2024).

19. Rights Theory. These writers structure the law as protecting individual rights, rather than as tools for achieving collective goals. See eg R Stevens, *Torts and Rights* (2007).

20. **Taxonomical Theory.** These writers seek to provide structure and clarity for private law by reducing it to an unambiguous and rigid structure of principles. This approach is particularly associated with P Birks, *An Introduction to the Law of Restitution* (1985; revised edn 1989), though it has also been applied more widely (see P Birks (ed), *English Private Law* (2000)). See eg P Birks, *Unjust Enrichment* (2003); A Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) and *A Restatement of the English Law of Contract* (2016). For an example, where consistency within the law is treated as the most important consideration, see D Nolan, 'Against Strict Product Liability', ch 14 in his *Questions of Liability: Essays on the Law of Tort* (2024).

21. **Toronto Kantianism.** These writers find structure and justification for private law through Kantian principles of private right and (to a rather limited extent) public right. See eg E Weinrib, *The Idea of Private Law* (1995; revised edn 2012) and *Reciprocal Freedom: Private Law and Public Right* (2022); A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009) and *Private Wrongs* (2016); A Beever, *Rediscovering the Law of Negligence* (2007). For Beever's more recent (and more overtly political) take on this see his *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (2013) and *Freedom Under the Private Law* (2023).

22. **Transformative Private Law.** This approach emphasises private law's role in achieving social transformation, particularly by addressing systemic inequalities and responding to ecological challenges. See especially G Brüggemeier and others, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 *European Law Journal* 653; see also M Hesselink, *Justifying Contract in Europe* (2021); H Muir Watt, *The Law's Ultimate Frontier: Towards an Ecological Jurisprudence* (2023); and https://transformativeprivatelaw.com/.

23. **Virtue Theory.** These writers view private law not just as a system of rules but as a framework that shapes moral character and ethical relationships. See eg J Gordley, *Foundations of Private Law* (2006); A Brudner, *The Unity of the Common Law* (1995; 2nd ed with J Nadler 2013).

24. **Vulnerability Theory.** These writers emphasise the extent to which individuals are vulnerable and dependent, rather than empowered and autonomous, and promote the use of private law to address resulting problems. A leading writer is Martha Fineman (eg 'The Vulnerable Subject and the Responsive State' 60 *Emory Law Journal* 251 (2010)), though it has been left to others to spell out the implications for private law. See eg J Nedelsky, *Law's Relations* (2012); J Herring, *Law and the Relational Self* (2019); M Ertman, 'Contract's Influence on Feminism and Vice Versa' in D Brake (ed), *The Oxford Handbook of Feminism and Law in the United States* (2022). This perspective is also increasingly prominent in EU and ECHR law: see eg L Waddington, 'Exploring Vulnerability in EU Law' (2020) 45 *European Law Review* 779.

25. **Welfare Economics.** These writers seek to promote efficient allocation of resources and to minimize the costs of harmful behaviour, thereby maximizing social welfare. See eg R Posner, *Economic Analysis of Law* (1973; 9th ed 2014); S Shavell, *Foundations of Economic Analysis of Law* (2004) .

Further reading: While the writing in this area is extensive, there is so far relatively little to give a bird's-eye view of it. W Lucy, *Philosophy of Private Law* (2006) is an excellent description of the state of play two decades ago – but much has happened since then. One way in is via multi-author handbooks: see especially H Dagan and B Zipursky (eds), *Research Handbook on Private Law Theory* (2020); S Grundmann, H-W Micklitz and M Renner, *New Private Law Theory – A Pluralist Approach* (2021); and A Gold, J Goldberg, D Kelly, E Sherwin and H Smith (eds), *The Oxford Handbook of the New Private Law* (2021). For an earlier attempt of mine at a more integrated picture, see 'Private Law Theory: The State of the Art' (2021), https://ssrn.com/abstract=3917777.