

FOREWORD: FOUR SENSES OF THE PUBLIC LAW-PRIVATE LAW DISTINCTION

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Perhaps the most useful function for a foreword to a symposium on the "Limits of Public Law" would be to explain what is meant by "public law." If there is more than one sense of a distinction between "public law" and "private law," identifying which sense is being used in a particular instance should reduce confusion. As it turns out, there are four different ways to distinguish between public law and private law that are relevant to this Symposium.

I. THE RELATIONSHIP OF DIFFERENT ASPECTS OF LEGAL REGULATION TO DIFFERENT DISTINCTIONS BETWEEN "PUBLIC" AND "PRIVATE" LAW

Each of the different usages of the terms public law and private law arises from a different aspect of *legal regulation*.¹ "Legal regulation" in this context means only that human conduct is being subjected to some form of regular control or constraint (including prohibiting conduct entirely) based on general rules or principles.²

There are at least four different aspects of legal regulation:

(1) the kinds of substantive standards used to assess the types of conduct that may properly be subject to legal regulation;

(2) the different status of persons or entities that may properly complain about violations of legal regulation;

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1. Thomas Aquinas, quoting Aristotle, said that "it is better that all things be regulated by law than to be left to the decision of judges." *SUMMA THEOLOGIAE* 1a2ac, Question 95, art. 1 ("Are man-made laws expedient?"), second conclusion in reply ("*melius est omnia ordinari lege quam dimittere iudicium arbitrio*"). Aquinas was referring to Aristotle's statement: "Now, it is of great moment that well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges . . ." *RHETORIC* 1354a32 (Modern Library ed. 1984).

2. This is a much broader concept of "legal regulation" than its other usual reference to rules issued by administrative agencies—"tax regulations," for example.

(3) the different status of persons or entities that are subject to legal regulation;

(4) the different kinds of institutions that may be charged with adjudicating and enforcing legal regulations. Each aspect of legal regulation leads to a somewhat different use of the terms “public law” and “private law.”

1. *Public Versus Private Standards of Legal Regulation*

It is possible to distinguish between public law and private law according to the kind of standard being applied to individual conduct. For example, some might say that if the publication of sexually oriented material causes a “public harm” or violates a “public standard of decency” then it may be legally regulated. Similar claims may be made about the consumption of intoxicating substances. Here a “public,” as opposed to a “private,” harm is used to justify legal regulation.³ With “public law” of this type, that the regulated conduct may harm particular individuals is of only secondary, if any, importance. Consequently, private harm usually need not be shown to establish this type of “public law” cause of action.

In contrast, some activities are regulated chiefly because they result in “private” harm. That is, while conduct in question— theft, for example—may offend public standards of “good” conduct, it is legally prohibited because it is “wrongful” in that it deprives a particular individual (or group) of something that is said to “belong” to her (or them). Consequently, for this type of “private law” cause of action to be established, particular or individual harm usually needs to be shown.

Of course, once this distinction between public and private law has been drawn, some acts may arguably violate both kinds of law simultaneously. Certain acts that are said to be “offenses against society” may be considered sufficiently “public” in nature to be classified as *crimes*. At the same time, many (but by no means all) crimes—personal and property crimes, for example—will necessarily involve the infliction of private harm. Such “private” offenses may therefore be classified as *torts*, as well as crimes. Appropriate “limits on public law” might be generated

3. See, e.g., J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW: INTRODUCTION TO JURISPRUDENCE* 170 (1984) (“The standard way of drawing this distinction is to say that duties imposed by tort law cover *private* harms, and those imposed in the criminal law cover *public* harms.”).

by a normative analysis that undermines the legitimacy of regulating by law those actions that do not involve the infliction of private harm.

2. *Public Versus Private Complainants*

According to a second distinction between public and private law, “public law” causes of action are those that are usually brought by governmental (“public”) authorities. “Private law” actions are those usually brought by the private individual who was harmed (or her representative or heirs).⁴ When this distinction is employed, the same standards may be applied in either realm. What distinguishes public from private law in this sense is who has standing to complain of violations of the standards.

The issue of who may bring a cause of action, however, is not entirely unrelated to the subject matter distinction just discussed. The enforcement of legal regulation is a costly activity. If conduct that does not work a sufficiently great private harm—that is, conduct that does not sufficiently harm a particular individual or discrete group—is made the basis of a regulation of a “public law” type, then there will likely be no one with sufficient incentive to incur the costs of prosecution. As a result, once public law based on “public standards” is recognized, a need immediately arises to create “public” authorities to enforce these kinds of legal prohibitions.

With “public law” of the first type, prosecution is said to be a “public good” and the creation of tax-funded, monopolistic governmental agencies to prosecute such activity is invariably advocated. Consequently, the first type of public law, based on public standards, very often becomes public law of the second type—legal regulation enforced by governmental agencies. The recognition of public law regulation of the first type, then, carries with it practical consequences that ought to be taken into account when assessing the wisdom and limits of such regulation.

Most public law schemes are promoted to achieve a particular well-recognized and easily articulated benefit. Frequently

4. See, e.g., J. MURPHY & J. COLEMAN, *supra* note 3, at 170 (“In crimes, we rely upon public officials, agents of the state, to enforce the relevant standard; in torts, the standards are enforced *privately*, in the sense that the burdens of detection and initiation of litigation fall on victims.”).

overlooked or minimized, however, are the costs that will likely result from the creation of a public authority empowered to pursue this kind of regulation. Such costs include the diversion of scarce resources from other more useful activities, the likelihood of vindictive or politically motivated prosecutions, and the potential for infringing civil liberties.

In assessing the wisdom of public law regulation of the first type, such costs are usually minimized or ignored, perhaps because they always appear speculative before the implementation of a particular public law. Moreover, even after implementation, it may be difficult to show that it is the public prosecution of a public law that has caused a particular harm. The problems inherent to public prosecution alone, however, argue for some "limits on public law," perhaps of a "constitutional" nature. This need for limits has given rise to a third sense of the terms public and private law.

3. *Public Versus Private Subjects of Legal Regulation*

A third sense of the public law-private law distinction stems from the nature of the parties who are subject to legal regulation. We might call laws that are meant to regulate the internal conduct of governmental authorities and that define their relationship or duties to private individuals "public law." In contrast, we may call laws that define the rights and duties that private individuals and groups owe *to each other* "private law." Roman law, for example, "made a distinction between public law and private law. The former was concerned with the functioning of the state, and included in particular constitutional law and criminal law; the latter was concerned with relations between individuals."⁵

By distinguishing the type of institution governed by legal regulation, we may classify many legal categories as either "public law" or "private law." Public law subjects would in-

5. B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 2 (1962). For a comparable use of the distinction in contemporary constitutional analysis, see, e.g., Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982) (discussing the distinction between state action and private action). Some have recently attempted to connect the public-private distinction with liberal political thought. See, e.g., Kennedy, *The Stages of Decline of the Public/Private Distinction* 130 U. PA. L. REV. 1349 (1982). However, the antiquity of the public-private distinction suggests that it is somewhat anachronistic to exclusively identify it with liberalism. What is peculiarly "liberal" about the modern use of the distinction is the fear that reliance on "public law" enforcement agencies will adversely affect individual liberty.

clude constitutional law, criminal procedure, taxation, administrative law, and at least part of criminal law⁶—each of which seeks to regulate the internal workings of government or the relationship between government and citizens. Private law subjects would include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another.

The appropriate “limits of public law” in this sense would stem from the special dangers that have historically arisen from the creation of “public” agencies with tax-funded monopoly powers. Such limits would be discussed within each public law subject when problems are seen to arise within or between governmental agencies and especially between governmental agencies and private parties. Such problems may argue for limits—constitutional constraints, for example⁷—being placed on public authorities.⁸

4. *Public Versus Private Law Enforcement*

The last sense of the public law-private law distinction concerns the proper institutional framework for applying and enforcing legal regulation. Should the formulation of legal rules and the adjudication of disputes that arise between persons and groups be performed by monopolistic or governmental institutions or by nonmonopolistic competitive institutions? In this sense, then, “public law” would refer to monopolistically or “publicly” provided legal regulation. “Private law” would refer to legal regulation by “private” or nonmonopolistic legal institutions.⁹ The subjects of evidence law, civil procedure and con-

6. That part of the criminal law that concerns harms inflicted on discernible victims might be classified as private law according to this usage (although these crimes would still be considered “public law” according to the first two senses of the public law-private law distinction).

7. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN* 4-5 (1985) (arguing that “a police power must be vested in the sovereign” but that the Constitution is needed to limit the ends that this power may serve and the means by which it may serve them).

8. Some have questioned the ability to utilize the public-private distinction in legal analysis. See *Symposium on the Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982) (critically analyzing this distinction between public and private). *But cf.* Hegland, *Goodbye to Deconstruction* 58 S. CAL. L. REV. 1203 (1985) (generally defending the use of general rules and distinctions in legal analysis from recent deconstructionist criticisms); Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984) (parodying the criticism of the public-private distinction in Kennedy, *supra* note 5).

9. The distinction between multiple and unitary legal systems is discussed in L.

flict of laws, which are now thought of as exclusively governing the administration of government institutions ("public law" in the third sense), could as well be conceived as "private law" in the third sense when such procedures are used by private institutions.

Private law in this fourth sense is probably the least commonly utilized aspect of the public law-private law distinction. But the discussion of private alternatives to governmental enforcement agencies is growing. If it can be shown that it is more efficacious to provide law-making and adjudicative services "privately" than publicly, then this would justify placing "limits on public law" in this fourth sense of the term.

II. THE RELATIONSHIPS AMONG THE FOUR DISTINCTIONS

Distinguishing among the four senses of the public law-private law distinction is useful for purely taxonomic purposes. But the definitional discussion just completed suggests that there are, if not logical, then strategic, relationships among these four senses of the distinction. Once it is decided that "public harms" or "public standards of morality or decency" may be made the object of legal regulation—"public law" in the first sense—then certain consequences unavoidably follow.

First, because inadequate incentives exist to assure the private provision of this kind of law enforcement, it becomes necessary to set up public agencies to prosecute violations of these laws. But the creation of a monopolistic system of "public law" enforcement (in the second sense) generates serious social problems. "Public" institutions are given privileges and powers normally denied to "private" institutions—the right to confiscate resources forcibly ("taxation" and "condemnation"), for example—and this enhanced power increases the opportunity for corruption and the ability to abuse those who do not have such power.¹⁰ Consequently, so-called "constitutional" limits

FULLER, *THE MORALITY OF THE LAW* 123 (rev. ed. 1969) ("multiple legal systems do exist and have in history been more common than unitary legal systems."). For two recent discussions of the pluralist tradition in western law, see H. BERMAN, *LAW AND REVOLUTION* 10 (1983); H. ARTHURS, *WITHOUT THE LAW: ADMINISTRATIVE AND LEGAL PLURALISM IN NINETEEN-CENTURY ENGLAND* (1985). See also Friedman, *Private Creation and Enforcement of Law: An Historical Case*, 8 J. LEG. STUD. 399 (1979) (describing the ancient Icelandic legal system).

10. I have called the belief in the necessity of some such monopolistic legal institutions the Power Principle and have discussed the serious difficulties that such institu-

on such power are sought to protect against these dangers—"public law" in the third sense.

This relationship suggests two proposals for legal reform. First, we could eliminate the need for much of public law (in the second and third senses) by eliminating our reliance on public law regulation (in the first sense). The less we resort to legal regulation where there is insufficient private harm, the less we need resort to public prosecution in all its guises and with all its faults.¹¹ The less we resort to public prosecution, the less we need to invent limitations on such power.

But what about "public law" in the fourth sense? Is not this type of public law essential for the maintenance of social or "public" order? A second area of possible reform would be to pursue the private law alternative to tax-funded monopolistic legal systems. While such a proposal has yet to be widely discussed,¹² the foregoing discussion of the public law-private law distinction suggests that it is an idea worthy of pursuit. If such a private law system were possible, then it might avoid the need to resort to public law with all its attendant difficulties. The ultimate "limit on public law" would then be no public law at all.

III. CONTRIBUTIONS TO THIS SYMPOSIUM

Each article in this Symposium may be seen as questioning some aspect of public law regulation. But each article may differ from the others about which sense of "public law" is being called into question.

Thomas W. Hazlett's article, *Is Antitrust Anticompetitive?*, tests the boundaries of the first sense of the public law-private law distinction. Many economists view antitrust laws as essentially "private law" in nature—in both the first and second senses. First, anticompetitive activity by firms is said to inflict private harms, upon business rivals and consumers, that are said to justify antitrust regulations. Second, antitrust laws also take on a

tions create in Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, CRIM. JUST. ETHICS, Summer/Fall 1985, at 50-56.

11. I discuss the serious problems that are created by one such brand of public regulation and the reasons why they arise in Barnett, *Curing the Drug Law Addiction: The Hidden "Side-Effects" of Legal Prohibition*, in DEALING WITH DRUGS (R. Hamowy ed.) (forthcoming).

12. I sketch such a proposal in Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, CRIM. JUST. ETHICS, Winter/Spring 1986 (forthcoming).

“private law” appearance when private “victims” of anticompetitive practices are authorized by such statutes to sue and collect compensation for their “injuries.” Professor Hazlett questions whether permitting individuals such causes of action is not itself anticompetitive and therefore unwarranted on the assumptions made by antitrust proponents.

But there is also an important “public law” component of antitrust laws. It is reflected both in the treble damages provisions that seek to punish antitrust offenders much as criminal law seeks to punish criminal offenders, and in the enforcement of such statutes by federal and state officials. As significant as its private law implications, then, Professor’s Hazlett’s analysis would, if valid, undercut much of the rationale for public enforcement of antitrust laws—the second sense of “public law.” If the very practices being prohibited as being harmful to the general public were in fact beneficial, then limitations on such public law regulation would be justified.

In *The Antitrust Tradition: Entrepreneurial Restraint*, Yale Brozen, a longstanding critic of antitrust laws, offers general support for Professor Hazlett’s analysis of the anticompetitive effects of private antitrust actions, though with some reservations. In addition, however, Professor Brozen contends that the selection of cases by government prosecutors has improved lately and that judicial decisions have in recent years become more sensible. Finally, he defends a limited role for antitrust laws that itself is quite controversial: the use of antitrust laws to restrict anticompetitive actions of *government*. This last suggestion would move antitrust regulation into the third category of “public law”—that is, principles that attempt to regulate and limit the use of governmental power.

In *The Crime Victim in the Prosecutorial Process*, Juan Cardenas discusses the enforcement of criminal law. Cardenas focuses his attention exclusively on crimes where a private individual has been victimized. His article calls into question the extent to which we now rely on public prosecution of the criminal law—“public law” in the second sense. Cardenas describes in some detail the little-known history of private prosecution in America and elsewhere and its eventual displacement by public prosecution.

In *The Lost Victim and Other Failures of the Public Law Experiment*, Bruce L. Bensen reinforces Cardenas’s analysis of private ver-

sus public prosecution and also expands the discussion to include past examples of private law-making and adjudication—"public law" in the fourth sense. Knowledge that such institutions actually existed and how they worked lends a much needed historical perspective to the typically theoretical discussion of the limits of public law enforcement.

James Branit's article, *Reconciling Free Speech and Equality: What Justifies Censorship?*, chiefly concerns the first sense of public law. He critically analyzes the regulation of sexually explicit material that some have defended on "public" morality grounds. But he concentrates primarily on recent attempts to justify censorship on the normally private law basis—in the first sense—that pornography causes private harm to individuals. He takes this private law argument for regulating sexually explicit material seriously, but concludes that when private harms occur, traditional private law remedies—not censorship—are the appropriate modes of relief.

Geoffrey R. Stone's *Anti-Pornography as Viewpoint Discrimination*, on the other hand, shifts the discussion away from a private harms analysis and towards a constitutional one—the third sense of "public law." He analyzes the opinion authored by Judge Frank Easterbrook in the recent case of *American Booksellers Association v. Hudnut*,¹³ which struck down one such ordinance regulating the sale and possession of sexually explicit material. Professor Stone concludes that this type of public legal regulation is a form of viewpoint discrimination that is contrary to well-established First Amendment limits on public regulation.

In his article, *The Ethics and Economics of Right-to-Farm Statutes*, Keith Burgess-Jackson assesses the efficacy and morality of recent statutory limits on nuisance suits against and public regulation of farming activity. His analysis implicitly raises the question of how such statutes should be categorized. Are they an unwarranted form of "public law" regulation (in the first sense)? That is, are they inefficient or unjust public interferences with the private law rights of adjacent land owners? Or do they merely codify the legitimate "private law" rights of farmers that misguided theories of nuisance law have undermined? In their comment, Jo Kwong and John Baden accept

13. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 106 S. Ct. — (1986).

Burgess-Jackson's framework, but question some of the conclusions he reaches about the efficiency of "right-to-farm" statutes.

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