RESPONSE

THE DECLINE OF THE FISH/MAMMAL DISTINCTION?

SAMUEL BESWICK†

In response to Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

The public/private distinction was "slain" in 1982.[1] That year, at the Symposium of the *University of Pennsylvania Law Review*, Professor Duncan Kennedy set forth his six *Stages of the Decline of the Public/Private Distinction*, outlining the sequence by which liberal categorizations descend "from robust good health to utter decrepitude."[2]

Professor Kennedy's famed article concerned the history of legal thought over the course of the twentieth century. He described that history as one of "decline"—not just of the public/private distinction, but of numerous other distinctions said to "constitute the liberal way of thinking about the social world."[3] He pronounced on the lifecycle of these ideas and the way in which they—and the public/private distinction in particular—had become unjustifiable in legal thought. It was "[h]ard cases with large stakes" that were the first sign

† Frank Knox Memorial Fellow, S.J.D. Candidate, Harvard Law School. With thanks, for the lively discussions and suggestions, to Duncan Kennedy, John C.P. Goldberg, Bharath Palle, Beatriz Botero Arcila, Patrick R. Gould, Kári Ragnarsson, Pieter-Augustijn Van Malleghem, Lauren Brazier, Malcolm Lavoie, Jennifer Allison, Jane Rabb, Rebecca Williams, and (especially) Steffi Sunny.

1 Or so we thought. *See* Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1004-05 (2012) (arguing that "separating public from private is an inevitable task in *any* legal system").

2 Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350 (1982). Further elaboration of this critique is found in Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 931 (1988) and also in Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 L. & SOC'Y REV. 801, 810-13 (1988).

3 His list of decrepit distinctions included "state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, [and] freedom/coercion." Kennedy, *supra* note 2, at 1349.

of trouble,[4] precipitating compromise until distinctions all but collapsed,[5] only to be reanimated as "continua" or pro/con "balancing" formulae[6] until they became something "we can't believe in . . . any more."[7]

In this Essay, I put to one side legal history and turn attention to the process of decline itself. For it is not only *legal* distinctions that are problematic. There are, indeed, many errant categorizations that fit the story of decline.[8] My target is the so-called fish/mammal distinction. "Fish," it will be shown, is an indistinct category. But if it nonetheless remains acceptable for people (and biologists) to speak in terms of fish, might it be okay for people (and lawyers) to speak in terms of private law?

I. NO SUCH THING AS A FISH

The decline of the phenomenon of "fish" has been attributed to evolutionary biologist and paleontologist Professor Stephen Jay Gould who deduced, "[a]fter a lifetime's study," that there is no such thing as a fish.[9] Rather, there are five separate classes of aquatic vertebrate, which are "not at all closely related to one another."[10] These classes, we surmise, diverged early in the evolutionary chain. So an analytically astute observer would find that a salmon is more closely related to a camel than it is to a hagfish.[11] On what basis, then, do we justify grouping salmon under the label fish, but not camels?

---

4 *Id.* at 1350.

5 *Id.* at 1351-52.

6 *Id.* at 1352-53.

7 *Id.* at 1353-54.

8 *Cf.* David L. Shapiro, *The Death of the Up–Down Distinction*, 36 STAN. L. REV. 465 (1984) (providing a satirical critique, using the up/down distinction, of Professor Kennedy's work); *see also* Frank I. Michelman, *Constitutions and the Public/Private Divide* (postulating a "law for things 'high' and another for things 'low'"), *in* COMPARATIVE CONSTITUTIONAL LAW 298, 304 (Michel Rosenfeld & András Sajó eds., 2012).

9 JOHN LLOYD & JOHN MITCHINSON, QI: THE SECOND BOOK OF GENERAL IGNORANCE 20 (2010); *accord* Carol Kaesuk Yoon, *Science vs. Instinct*, CONSERVATION (Nov. 19, 2009), http://conservationmagazine.org/2009/11/science-vs-instinct/ [https://perma.cc/VC2U-E9VU]. Another common misconception is that tomatoes and pumpkins are vegetables. They are, in fact, fruit. INT'L AGENCY FOR RESEARCH ON CANCER, WORLD HEALTH ORG., FRUIT AND VEGETABLES 15 (2003). Unlike fish, however, fruit and vegetable *are* definable terms, and so they might be more readily justifiable categories (in terms of Professor Kennedy's schema).

10 Keith E. Banister & John Dawes, *Fish, What is a?* ("The five living groups consist of two groups of jawless fishes—hagfishes and lampreys—and three groups with jaws—cartilaginous fishes (sharks and rays), lobe-finned fishes (the coelacanths and lungfishes), and bony fishes (all the rest). The last two groups possess bony, rather than cartilaginous, skeletons."), *in* THE ENCYCLOPEDIA OF UNDERWATER LIFE (Andrew Campbell & John Dawes eds., 2007); *see also* Mark Westneat, *Fishes*, ENCYCLOPEDIA OF LIFE, http://eol.org/info/fishes [https://perma.cc/XFE5-ZXMV] ("[W]e usually know a fish when we see one, but there are lots of exceptions to our fishy definitions.").

11 *QI: Hoaxes* (BBC television broadcast Oct. 1, 2010), https://youtu.be/uhwcEvMJz1Y [https://perma.cc/9XPS-G4DE]; *see also No Such Thing as a Fish*, QI, http://qi.com/podcast [https://perma.cc/9323-LX2M].

1. *Hard cases with large stakes* are those about which people disagree passionately as to which side of the distinction the case falls.[12] In the fish/mammal debate, there are categorizations that we may be tempted to treat as "easy cases."[13] *Everybody knows* that a salmon is a fish. But since it is not possible to define universal characteristics of "fish," hard cases abound.[14] Are eels fish or more like reptiles? Are dolphins fish as well as mammals? And what of seahorses? Hard cases lead us to:

2. *The development of intermediate terms*. These become necessary when we encounter cases that seem to "fit" both categorizations.[15] Dolphins, we know, are mammals, not fish. They are warm-blooded, they breath air using lungs, and they give birth to live young.[16] But the moonfish is warm-blooded,[17] lungfish have air-breathing lungs,[18] and guppies, mollies, and swordtails all give birth to live young.[19] So, might dolphins (and whales, and those like them) be intermediate creatures?

3. *Collapse* of the fish/mammal distinction seems imminent once we accept that even some of our most beloved animal species do not neatly categorize. Trying to fit the terminology just results in "a situation of hopeless contradiction."[20] If you assert that what makes fish unique is their scales and fins, I will present to you the hagfish (which has neither)[21] and the sailfin lizard (which has both).[22] If you assert that gills are the unifying feature, confining fish to an aquatic environment, I will present to you the climbing perch (which can live for six days out of water, as well as hibernate for up to

---

12 Kennedy, *supra* note 2, at 1350.

13 *Cf.* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 416 (1985) (defining an "easy case" in the constitutional context as "one in which a clearly applicable rule noncontroversially generates an answer to the question at hand, and one in which the answer so generated is consistent both with the purpose behind the rule and with the social, political, and moral climate in which the question is answered"); *see also* United Fisheries Ltd. v. Comm'r of Inland Revenue (1985) 7 NZTC 5005 at [5010] (N.Z.) per Somers J (dismissing the Revenue Commissioner's submission that "fish and chips may be a dinner; fish alone is not," on the basis that the statutory phrase "prepared fish dinners" was a question of fact, which was not amenable to appellate review).

14 And it is not hard to see how the stakes are large. Both when ordering animal physiology and when ordering fish-steak at a restaurant, few would consider reindeer and tuna comparable.

15 Kennedy, *supra* note 2, at 1351.

16 4 INTERNATIONAL WILDLIFE ENCYCLOPEDIA 506-09 (3d ed. 2002).

17 *Opah*, ENCYCLOPÆDIA BRITANNICA ONLINE (May 14, 2015), https://www.britannica.com/animal/opah-fish-genus [https://perma.cc/B6M4-P6HW].

18 Karl Heinz Lüling, *Lungfish*, ENCYCLOPÆDIA BRITANNICA ONLINE, https://www.britannica.com/animal/lungfish [https://perma.cc/V6SD-T7LP].

19 DAVID ALDERTON, LIVEBEARERS: UNDERSTANDING GUPPIES, MOLLIES, SWORDTAILS, AND OTHERS 8 (2004).

20 Kennedy, *supra* note 2, at 1351.

21 CECIE STARR ET AL., BIOLOGY: THE UNITY AND DIVERSITY OF LIFE 435 (12th ed. 2009).

22 PHILIPPE DE VOSJOLI, GREEN WATER DRAGONS: PLUS SAILFIN LIZARDS & BASILISKS ch. 9 (1992); *Hydrosaurus Pustulatus*, *in* ENCYCLOPEDIA OF LIFE, http://eol.org/pages/963478/ [https://perma.cc/CFN3-QLPP].

six months in the mud of dried-up creek beds)[23] and the various marine invertebrates, such as shrimp, which would not commonly be called fish, though they inhabit the same environment. Perhaps, then, we must resort to:

4. *Continuumization*—that is to say, no creature is absolutely a fish or not a fish. There are fish-like creatures and there are creatures that bear less resemblance to what we would traditionally call a fish. Categorization of animals (like law) merely involves placing creatures (or legal issues) onto a continuum between the two diametric poles of fish and nonfish (or private law and public law).[24] We can categorize creatures on this continuum "by listing 'factors' that 'cut' one way or the other and must be 'balanced.'"[25] So the climbing perch might fall on the fishier end of the continuum, owing to its gills, scales, fins, tail, and aquatic preference, despite its ability to live on land. Whereas shrimp, although they have gills, seem less fish-like—with their legs and absence of scales, fins, and vertebra.

5. *Stereotypification* is the label Professor Kennedy ascribes to the maelstrom into which we are descending. For the delineation I have just outlined shows nothing more than an exercise of my personal value judgment. Reasonable people might well disagree with my assertions that legs are not a fish-like feature, or that gills are. The distinction comes down to my policy arguments versus yours; or, rather, my political ideology versus yours.[26] The climbing perch, I say, is more a fish than is a shrimp because it fits my worldview of what a fish is. To me, fish do not walk on legs (even though sometimes they do).[27] But under what meta-principle can we say that my categorization—my worldview—is more correct than yours?

6. *Loopification* ensues "when one seems to be able to move by a steady series of steps *around* the whole distinction, ending up where one started without ever reversing direction."[28] The fish/mammal distinction typifies loopification remarkably: for one can start with a salmon and, following out the lines of similarity and difference, arrive at a biological link to a camel before one reaches the hagfish. "Like wow, man,"[29] indeed.

---

23 INTERNATIONAL WILDLIFE ENCYCLOPEDIA, *supra* note 16, at 468; Nathan Waltham, *Invasive "Walking" Fish that Suffocates Its Predators May Be Coming for Australia*, IFL SCIENCE, http://www.iflscience.com/plants-and-animals/resilient-climbing-perch-may-be-coming-australia/ [https://perma.cc/8XKY-AFKU].

24 Kennedy, *supra* note 2, at 1352-53.

25 *Id.* at 1353.

26 *Id.* at 1353-54.

27 Fiona MacDonald, *This Bizarre Fish with Legs Has Been Discovered off the Coast of New Zealand*, SCI. ALERT (Jan. 22, 2016), http://www.sciencealert.com/this-bizarre-fish-with-legs-has-been-discovered-off-the-coast-of-new-zealand [https://perma.cc/64QB-RMV8].

28 Kennedy, *supra* note 2, at 1354.

29 *Id.*

II. So Is There Really No Such Thing as a Fish?

Should we, enlightened by our deconstruction of fish, implore society to abandon use of the term altogether?[30] What good is the fish/mammal distinction when it does not neatly tell us how to designate a dolphin, or when it can so easily be manipulated to one's own preferences?

Do not despair just yet, dear reader. For we can gleam hope from the threshold laid down in Professor Kennedy's opening words:

> Success for a legal distinction has two facets. First, it must be possible to make the distinction: people must feel that it is intuitively sensible to divide something between its poles, and that the division will come out pretty much the same way regardless of who is doing it. Second, the distinction must make a difference: a distinction without a difference is a failure even if it is possible for everyone to agree every time on how to make it. Making a difference means that it seems plain that situations should be treated differently depending on which category of the distinction they fall into.[31]

Before we discard the fish/mammal distinction, we must ask ourselves these two questions.

First, is it possible to distinguish fish from mammals? Yes! We know it is. Children do this every day when visiting zoos and reading picture books. In the great majority of cases, very little confusion or disagreement arises. Everyone agrees how salmon and camels ought to be categorized.[32] Although seahorses present us with a hard case, they do not shatter the distinction—neither society nor biology labs collapse over disagreements as to what seahorses are.

Second, is it plain that animals should be treated differently depending on which category of the distinction they fall into? Absolutely! The fish/mammal distinction is crucial to helping us make sense of the animal kingdom (and dinner menus), and thus to helping us make wise decisions in respect of them. It is plain that, despite their biological differences, salmon and hagfish should be treated more similarly to each other than to camels. We bring more sense to the world—not less—by calling both fish.

And just as the fish/mammal distinction has not descended into extinction, perhaps we should not eagerly abandon the public/private or the other categorizations eulogized by Professor Kennedy. Deconstructionism—valuable as it is in uncovering biases and preconceptions—has not neutered liberal

---

30 And, like dolphins fleeing a hyperspace bypass, simply declare "[s]o long and thanks for all the fish." DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 156 (1979) (emphasis omitted).

31 Kennedy, *supra* note 2, at 1349.

32 As far as I know, camels have never been the subject of study at the biennial International Congress on the Biology of Fish. Nor are they found in the ENCYCLOPEDIA OF FISH PHYSIOLOGY (Anthony P. Farrell ed., 2011).

distinctions.[33] The categorizations remain, despite ambiguities.[34] We are not being unprincipled when we construe a car-accident as a tort or a sale-and-purchase agreement as a contract, and both as phenomena of private law. Such concepts help us to understand the issue before us, giving insight into the purposes, principles, and policies that ought to guide decisionmaking and which, for good reason, may differ from how we approach a case under the rubric of public law.[35] The guiding considerations may adjust as circumstances change—when selecting fish for a sea-park and for a seafood menu, dolphins might legitimately appear within the former but not the latter—but such adjudication is not akin to descending into arbitrary guesswork.[36]

---

33 *See* Stanley Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 659-60 (1986) (contending that the Critical Legal Studies project of clearing away the "mystification" of legal argumentation merely leads to one set of "interested" distinctions being replaced by another); P. John Kozyris, *In the Cauldron of Jurisprudence: The View from Within the Stew*, 41 J. LEGAL EDUC. 421, 434-35 (1991) (arguing that "[Critical Legal Studies] misrepresents the nature and type of communication that makes law intelligible, predictable, and effective," and that "CLS misconceives the balancing and adjustment process among opposing principles that is inherent in the law and thus discovers irreducible 'fundamental contradictions'" (emphasis omitted)).

34 Some contemporary scholars draw sharp normative distinctions between private law and public law. For prominent examples, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) and MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW (2003). Even for those who consider the Critical Legal Studies "onslaught" against the distinction "formidable," the "ghost" of the public/private distinction still subsists in legal reasoning. Michelman, *supra* note 8, at 309-11.

35 WILLIAM LUCY, PHILOSOPHY OF PRIVATE LAW 12-26 (2007); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1648-51 (2012); Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 649-51 (Jules L. Coleman et al. eds., 2004); *see also* ARTHUR RIPSTEIN, PRIVATE WRONGS 292 (2016); Lisa M. Austin & Dennis Klimchuk, *Introduction* to PRIVATE LAW AND THE RULE OF LAW 1, 1 (Lisa M. Austin & Dennis Klimchuk eds., 2014); Peter Birks, *Introduction* to 1 ENGLISH PRIVATE LAW, xxxvi (Peter Birks ed., 2000); Turner, *supra* note 1.

36 I am not in this Essay elaborating a positive theory of adjudication. Others more thoughtful than I have. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 83-85 (1986) (asserting that even skeptics of legal interpretation invariably fall back on moral argumentation); H.L.A. HART, THE CONCEPT OF LAW 204-05 (3d ed., 2012) (defending the judge's ability to interpret laws impartially and neutrally); NEIL MACCORMICK, H.L.A. HART 53-54, 63 (1981) (contending that the common values that underlie legal and moral rules are not merely arbitrary); JOHN RAWLS, A THEORY OF JUSTICE 42 (rev. ed., 1971) (suggesting that a person making a considered judgment can be presumed "to have the ability, the opportunity, and the desire to reach a correct decision . . . ."); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 199-201 (2009) (considering the interpretation of laws (and other things) through the lens of the "ideal case of a rightful condition"—Ripstein invokes the analogy of a malformed, three-legged horse, whose existence does not refute the general claim that horses have four legs); Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 214 (2007) (arguing that Dworkin's theory of adjudication "does the most to eliminate elements of luck and unfairness from adjudication that can reasonably be done, without making matters much worse on other fronts"). Professor Kennedy's thesis was, of course, elaborated in Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) and DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).

Liberal legal distinctions have not collapsed. That is no surprise. The law is an art, not a science. Though it often presents hard problems, lawyers are more than just fish in troubled waters.

Preferred Citation: Samuel Beswick, *The Decline of the Fish/Mammal Distinction?*, 165 U. PA. L. REV. ONLINE 91 (2017), http://www.pennlawreview.com/online/165-U-Pa-L-Rev-Online-91.pdf.