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Private Law Statutory Interpretation

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INTRODUCTION

While scholars routinely question the normative significance of the distinction between public law and private law, few—if any—question its conceptual basis. Put in simple terms, private law refers to bodies of legal doctrine that govern the horizontal interaction between actors, be they individuals, corporate entities, or on occasion the state acting in its private capacity.[1] Public law on the other hand refers to doctrinal areas that deal with vertical interaction between the state and non-state actors, wherein the state exerts a direct and overbearing influence on the shape and course of the law.[2] The latter is epitomized by the areas of constitutional law, administrative law, and criminal law, while the areas of contract law, tort law, property law, and the law of unjust enrichment exemplify the former.

Underlying this basic distinction is an important institutional dimension. Most areas that are treated as exemplifying private law are areas of the common law, meaning that they are judge-made in origin. Common law rules continue to be policed and developed by courts incrementally, from within the context of individual disputes.[3] Consequently, private law and the common law are routinely treated as synonymous and analytically coterminous with each other. While this characterization may have had few

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1. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 n.2 (2016); Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125, 125–26 (2013).

2. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 n.2 (2016); Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125, 125–26 (2013).

3. *See* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 4–7 (1988).

problems in simpler times, the emergence of the modern administrative state has served to render it grossly misleading in important respects.

Treating private law as subsumed entirely within the common law has produced a critical blindspot for private law thinking. It causes discussions of private law to overlook the role of the legislature in governing horizontal legal interactions.[4] In numerous areas, statutory intervention has come to supplement and modify common law rules. Indeed, several domains of horizontal interaction between private actors are today governed entirely by statutory law. While this neglect is for the most part seen in all common law countries, in the context of the U.S. it has come to be further entrenched by an influential development in post-World War II legal thinking that has given it a superficial structural legitimacy. And this is the reality that under the influence of the Legal Process school of thinking, the subjects of "legislation" and "statutory interpretation" have come to be understood and theorized as public law subjects. By prioritizing form over substance and thus focusing on the institutional origin of the law rather than on its substantive content, this public law approach to legislation today dominates American legal thinking in a way that has served to turn private law's legislative blindspot into a serious threat to the very analytical significance of private law thinking.

This Essay is an attempt to describe the basis and consequences of the disconnect between private law and legislation, both for private law theorizing and legal thinking more generally. It does so by focusing on "private law statutes," legislation (and legislative provisions) that creates or modifies rights and obligations between parties in their private capacities. Private law statutes do more than merely create private causes of action. While they create private cases, they do so on the basis of principles that are specific to the horizontal interaction between parties, rather than entirely for public-regarding policy reasons. While statutes in the areas traditionally identified as private law remain obvious examples, the category extends to altogether new domains as well.

Private law statutes are today well known in the U.K. (and numerous

4. For prior efforts to identify this shortcoming, see T.T. Arvind & Jenny Steele, *Introduction: Legislation and the Shape of Tort Law*, *in* TORT LAW AND THE LEGISLATURE: COMMON LAW, STATUTE AND THE DYNAMICS OF LEGAL 1, 1 (T.T. Arvind & Jenny Steele eds., 2012); Kit Barker, *Private Law: Key Encounters with Public Law*, *in* PRIVATE LAW: KEY ENCOUNTERS WITH PUBLIC LAW 1, 6 (Kit Barker & Darryn Jensen eds. 2013). For what is to date the only discussion of this in the U.S. context, see Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1691 (2014).

other common law jurisdictions that follow the U.K. model[5]), where statutory interpretation is far from being regarded as a purely public law subject. Courts (and increasingly scholars) in these jurisdictions remain willing to interpret and understand these statutes using private law principles and ideas, without necessarily allowing considerations of form, structure, and policy to override substance. This presents an interesting contrast to the U.S., where courts and scholars take the public law orientation of a statute for granted and search exclusively for public policy considerations in interpreting it, despite its content.[6] The contrast—between what is best described as *private law statutory interpretation* and *public law statutory interpretation*—offers helpful lessons for how American legal thinking might reorient its approach to statutory interpretation in order to recognize the distinctiveness of private law statutes.

Part I begins with an overview of the dominant approach to legislation and statutory interpretation in the U.S., which views the subject as a public law area. Part II then introduces the idea of private law statutes and private law statutory interpretation. It describes the operation and significance of private law statutes in the U.K. and contrasts the approach to interpretation that courts adopt in interpreting them with the approach adopted by U.S. courts on similar issues. Part III then moves to the prescriptive and offers a few tentative suggestions for how U.S. courts might develop an approach to interpreting private law statutes and provisions.

I. STATUTORY INTERPRETATION AS PUBLIC LAW IN THE U.S.

While the subjects of "legislation" and "statutory interpretation" had been in existence in American legal scholarship since the nineteenth century, they remained significantly under-theorized until the middle of the twentieth century.[7] To classical legal thinkers (that is, the "Legal Formalists") legislation was at best an imperfect source of law, given its political (and therefore unprincipled) overtones.[8] And to the Legal Realists who came after

5. Examples in this category include Australia, New Zealand, Canada, India, Singapore and other members of the Commonwealth, consisting mostly of prior British colonies. *See generally* Howard W. Leichter, *The Patterns and Origins of Policy Diffusion: The Case of the Commonwealth*, 15 Comp. Pol. 223, (1983).

6. Pojanowski, *supra* note 4, at 1692 ("much scholarship on statutory interpretation, a field that has also witnessed great theoretical development, considers itself to be operating in the realm of public law.").

7. For a useful account of this revival, see generally Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241 (1992) (discussing the development of scholarship in legislation).

8. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 34 (1983); Christopher Columbus Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to*

them, statutory interpretation promoted a variety of post-hoc rationalizations that masked the indeterminacy of legal doctrine.[9]

All of this changed with the advent of the Legal Process school of thinking, developed and advanced by Henry M. Hart, Jr. and Albert Sacks, which sought to develop the central insights of the Realists but grounded it in a structural theory about law-making and state institutions.[10] The Legal Process approach is routinely described as one of the most influential approaches to "public law" in American history, and as having charted the direction of public law thinking for several generations.[11] Describing it as a "theoretical watershed in [American] statutory interpretation," Bill Eskridge notes how Legal Process thinking advocated looking beyond statutory text and legislative history in interpreting legislation.[12] Implicit in their theory, according to Eskridge, was a recognition that statutory interpretation ought to be guided by a "public values analysis"—a set of public law based background principles that guide the interpreter.[13] Central to the idea of public values is the recognition that the law is driven by conceptions of justice and the common good, rather than individualist or private considerations unique to any individual or group.[14] The Legal Process approach to statutory interpretation proved to be enormously influential in the American context, post-World War II.

Critical to Legal Process thinking, especially in its application to legislation, was the belief that underlying every statute was an overarching collectivist "policy" or common purpose.[15] This policy or purpose was worth discerning, explicating, and applying during the interpretive process—even at the cost of other variables. Speaking of Hart's own theory of statutory

Legislation as Illustrated by English Legislation, or the Absence of It, During That Period, 19 HARV. L. REV. 151, 152–53 (1906).

9. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1266 (1947).

10. *See generally* HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW (William N. Eskridge & Philip P. Frickey eds., 1994) (discussing development of a theory of legal decision-making, particularly with respect to public law).

11. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012 (1989).

12. *Id.* at 1012–13.

13. *Id.* at 1012.

14. *Id.* at 1008 ("[p]ublic values appeal to conceptions of justice and the common good, not to the desires of just one person or group.").

15. *See* HART & SACKS, supra note 10, at 3; William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2043 (1994).

interpretation, two theorists of Legal Process thus note that he "preferred practical, dynamic, policy-oriented applications of statutes over legalistic, static, linguistic-oriented or history-oriented interpretations."[16] He also took the view that legislative interventions in statutes could form arbitrary starting points, such that background principles could be legitimately sacrificed.[17]

This last point is particularly important for the analysis here, since it suggests a few things of importance about this approach to statutory interpretation. It tells us that an overarching "policy," understood as the overall purpose behind the statute, takes precedence over unarticulated background principles, which merely represent the means needed to achieve the purpose. The distinction between policy and principles is a well-known if complicated one, made famous by Ronald Dworkin. Dworkin understood a policy in terms of the law's overall goals, which were usually externally defined, in contrast to principles, which to him were to be derived from within the law and its commitment to justice, fairness, or morality.[18] The distinction is of some significance to private law theories, wherein principles deriving from the horizontal interaction between the parties are seen as just as important (if not of greater normative import) than the policy goals at hand.

Fidelity to an identified legislative policy was therefore the overarching ideal of the Legal Process approach to interpretation. Quite naturally, this also meant ignoring any principles enmeshed in the substantive content of the law, when in conflict with such policy. The working of this public law approach to interpretation is best captured by the first example that Hart and Sacks use to illustrate their theory: "The Case of the Spoiled Cantaloupes."[19] While not offered (by them) as an illustration for statutory interpretation, its deployment of the statute effectively captures this policy-focused thinking within the domain of interpreting and applying legislation. Drawn as it was from the context of an actual set of opinions, it also aptly illustrates the approach to legislation that had become entrenched by the time of their writing.

In 1930, Congress passed a federal law known as the Perishable

16. Eskridge, Jr. & Frickey, *supra* note 15, at 2038.

17. William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 10, at lxxx (drawing these conclusions from a detailed review of Hart's notes and papers).

18. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1977); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967).

19. HART & SACKS, *supra* note 10, at 10.

Agricultural Commodities Act (PACA).[20] Its principal provision made it unlawful for "any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity" that had been entered into interstate commerce.[21] Structurally, it was therefore a law that was parasitic on (state) contract law and the terms of the contract. A depression-era legislation, PACA was enacted to protect vendors of perishable commodities against unfair dealings by receivers, who had the ability to hold the vendors hostage given the perishable nature of the goods at issue.[22] As a piece of economic legislation, PACA was therefore designed to produce a more efficient and egalitarian marketplace. Yet at the same time, it was also a piece of contract law, in that it merely added a federal remedy for the breach by simply providing that a violation will result in "liab[ility] to the person or persons injured thereby for the full amount of damages . . . sustained in consequence of such violation."[23]

Hart and Sacks use the case L. Gillarde Co. v. Joseph Martinelli & Co.,[24] that employed the PACA to illustrate their theory. The case involved a contract for the supply of cantaloupes of a certain quality, sold under the terms "[R]olling [A]cceptance [F]inal." When the vendor supplied them, the recipient rejected them claiming that they were not of the specified quality since they had been infected with rot, and the dispute that arose was whether the rejection was lawful.[25] The vendor began the action by filing a complaint with the Department of Agriculture, which ruled that the recipient had no right of rejection.[26] The recipient then took the matter to the federal courts. The district court treated the case as a simple contract law dispute and applied the traditional principles of the law of sales. On that basis, it concluded that the rejection was lawful since a rolling acceptance merely required the recipient to accept responsibility for any in-transit damage or deterioration. When the goods were not as described in the contract, the implied warranties of description and quality were violated, which allowed for the rejection.[27]

20. 7 U.S.C. §§ 499a–499s (2017).

21. *Id.* § 499b(2).

22. For an overview, see J.W. Looney, *Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust Under the Perishable Agricultural Commodities Act*, 23 U.C. DAVIS L. REV. 675 (1990).

23. 7 U.S.C. § 499e (a) (2017).

24. 169 F.2d 60, 60 (1st Cir. 1948).

25. Joseph Martinelli & Co. v. L. Gillarde Co., 73 F. Supp. 293, 294–95 (D. Mass. 1947).

26. *Id.* at 294.

27. *Martinelli*, 73 F. Supp. at 296.

On appeal, at first the Court of Appeals reversed the district court—but on purely contract law grounds—finding that under the express terms of the contract, the recipient's right to reject had been waived.[28] Instead, it concluded that in light of the breach of warranties, the recipient was entitled to no more than a claim for damages sustained from the breach.[29] After the appellate court's decision however, the respondent filed a petition for rehearing, which was supported by the Department of Agriculture in an amicus brief. The Department advanced an interpretation of the statute that consciously underplayed the role of general contract law. Instead, it argued that as a matter of public policy, the court ought to be more aware of how rejections of perishable commodities impacted the market for them. In specific, it emphasized that the court was to pay attention to the "rejection evil," which "was one of the principal factors which led to the enactment of the" PACA.[30]

Somewhat surprisingly, the Court of Appeals gave in and reconsidered its decision. In its new opinion, it adopted an interpretation of the statute that in many ways showcases the Legal Process-driven public law approach. The new opinion said nothing of traditional contract law principles as it once had, and instead focused on discerning the "intent[ion]" behind the statute, which was the court's term for the overall purpose and policy which had motivated its passage.[31] The court bought the argument that the rejection "evil" was of paramount importance, and accordingly signed on to the Department's interpretation, reversing its own decision on the availability of a damages remedy.[32]

While Hart and Sacks use the case to illustrate the working of their overall theory of institutional settlement in the law, it is also a useful lesson in the approach to statutes and legislation that they advance in the course of their theory—and which has since come to dominate American thinking since. The straightforward private law question of whether a party was entitled to seek damages for non-performance even after wrongfully rejecting the goods (discounting for the loss occurring from that wrongful rejection) was rendered altogether irrelevant by a collectivist policy consideration that had to do with the overall regulation of the market. It wasn't that the court sought to balance the parties' private considerations

28. L. Gillarde Co. v. Joseph Martinelli & Co., 168 F.2d 276, 280–81 (1st Cir. 1948).

29. *Id.*

30. HART & SACKS, *supra* note 10, at 56–57 (reproducing portions from the brief filed by the Department).

31. L. Gillarde Co., 169 F.2d at 61.

32. *Id.*

against broader public ones, but instead that it allowed the latter to eviscerate the need for the former altogether. Principles of basic contract law would have had the court focus on the parties' contractual intent and/or whether the contractual consideration covered the claim at issue. Yet none of that now mattered to the court once the public purpose behind the statute was seen to be paramount.

The case epitomizes the public law approach to statutory interpretation that has since taken hold of American legal thinking. The approach makes obvious (and perfect) sense when the underlying substance of the legislation is collectivist in orientation, such as it is with regulatory enactments. All the same, when it involves horizontal interactions—most commonly in the form of private causes of action—those interactions are seen as adding nothing of normative import at all to the legislation. Instead, they are seen as mere means to the overall public end.

With the elimination of federal general common law by *Erie*,[33] most U.S. federal legislation has come to be understood almost exclusively in public law terms. The pervasiveness of this approach is best captured by the following observations of the Supreme Court in a 1950s decision interpreting the provisions of a labor statute:

> Statutes may be called public because the rights conferred are of general application, while laws known as private affect few or selected individuals or localities. . . . [The] distinction between public and private law is less sharp and significant in this country, where one system of law courts applies both, than in the Continental practice which administers public law through a system of courts separate from that which deals with private law questions. . . . Perhaps in this country the most usual differentiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts. . . .
>
> Federal law has largely developed and expanded as public law in this latter sense. *It consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right.*[34]

The Court's language here is telling and vividly showcases the two core points previously made: (i) statutory law—especially federal law—is public

33. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law.").

34. Garner v. Teamsters, Chauffeurs & Helpers Local Union, 346 U.S. 485, 494–95 (1953) (Jackson, J.) (emphasis added). It is worth noting that the Court's observations in this quote appear analytically unsophisticated and conclusory in nature. Yet, they likely reflect the dominant understanding of the time, given the confidence with which the pronouncement was made.

law, and (ii) public (interest and) policy is paramount in the construction and understanding of these statutes. Principles take a veritable backseat.

II. PRIVATE LAW STATUTORY INTERPRETATION

The idea of statutory law as public law regardless of its substantive content is today well ensconced in American legal thinking. While public law thinking is principally responsible for this reality, American private law scholars share a good deal of responsibility for it as well. In limiting their focus principally to private law doctrine produced through the common law method, private law scholars have done surprisingly little to challenge the dominance of the public law view of statutes. This despite the abundance of what are best described as "private law statutes:" legislative enactments on private law subjects (i.e., those dealing with the horizontal interaction between parties) that seek to influence and mold the relationship between parties using principles specific to their horizontal interaction rather than entirely through collectivist ideals.

Ironically, private law statutes are today far more common in non-U.S. common law jurisdictions including the U.K., the birthplace of the common law. And while courts and scholars in these jurisdictions do not refer to such statutes by that name, they nonetheless understand, interpret, and apply them in a way that is faithful to their substantive (i.e., private law) content without defaulting into an overly deferential search for a collectivist legislative policy. The remainder of this Part explores the divergence between U.S. and non-U.S. thinking (i.e., statutory interpretation) on the issue, even within the common law world. It does so by examining how courts approach the interpretation of a U.K. statute that is self-consciously within an area traditionally defined as private law (contract law); and then looking to another area (copyright law) that has in the U.S. come to be understood as public law, in contrast to the U.K. where it is implicitly treated as a private law subject and comparing the interpretive approaches of U.S. and U.K. courts therein.

An important caveat about line drawing is in order before proceeding further. The term "private law statute" refers not just to statutes that are entirely private law focused but also to provisions within otherwise sprawling statutes where this private law orientation manifests itself. A more precise term for these provisions might be "private law provisions," yet to avoid a multiplicity of terms the former is used to cover the latter as well. Situations involving private law provisions within broader statutes present their own set of line drawing and classificatory complexities, which this paper does not address. In particular, the issue of how to deal with statutes

that are principally regulatory and policy-driven in their orientation, but then deploy private law thinking to realize their policy goals, presents its own set of questions about the desirability of this public law/private law synthesis and the effect of this interaction on the normative values that each body of thought brings to the statute.

A. THE [U.K.] CONTRACT (RIGHTS OF THIRD PARTIES) ACT OF 1999

A bedrock principle in the common law of contracts has long been the doctrine of privity.[35] The doctrine was understood as precluding third parties—who were not party to the actual contract—from being able to enforce the contract, even if they had been expressly identified as such.[36] The logic for this prohibition was tied to the rule that non-parties obtained neither benefits nor burdens from a contract that could be legally enforced.[37] In due course it also came to be tied up with the idea of contractual consideration, such that some courts justified the prohibition on the basis that the third party had given no consideration to the original contracting parties to justify the conferral of enforceable rights on it.[38]

Over the years, the principle was seen as unduly restrictive and of little practical utility, especially in situations where all the parties involved had actively wanted a third party to take some benefit from the contract. This was especially true in cases involving maritime contracts, where parties consciously try to extend contractual benefits to third parties involved in the transportation chain. English common law courts thus began to craft tailored exceptions to the general rule and in their decisions openly noted the impracticality of the prohibition, when applied as a bright line rule.[39]

35. For an overview of privity, see Robert Merkin, *Historical Introduction to the Law of Privity*, *in* PRIVITY OF CONTRACT 1–18 (Robert Merkin ed., 2000). The fundamental nature of the doctrine was famously echoed by Viscount Haldane in Dunlop Pneumatic Tyre Co. v. Selfridge Ltd. [1915] AC 847 (HL) 853 (appeal taken from Eng.)

36. This rule was known as the "third party rule." *See* Stephen A. Smith, *Contracts for the Benefit of Third Parties: In Defense of the Third Party Rule*, 17 OXFORD J. LEGAL. STUD. 643, 644 (1997).

37. For a defense of the rule, see *id.* at 645–49.

38. *Id.* at 644 (separating the "third party rule" and the "consideration rule"); Merkin, *supra* note 35, at 10–12.

39. *See, e.g.*, Pyrene Co. v. Scindia Navigation Co. [1954] 2 QB 402 at 425–26 (Eng.) ("finding it would have made no sense to hold that a shipowner was not liable for goods not loaded when he was not a party in a contract between a buyer and seller of those goods"); New Zealand Shipping Co. v. Sattherwaite Ltd. [1975] AC 154 (PC) ("holding that a shipping company was able to gain the benefit of exemption from liability for damage to goods shipped even though it was not explicitly a party to the contract between a manufacturer and purchaser and even though the contract did not specify consideration on the shipping company's part in exchange for such liability exemption because the consideration was implied to be the performance of shipping services"); K.H. Enterprise v. Pioneer Container [1994] 2 All

After years of deliberation, Parliament enacted the Contract (Rights of Third Parties) Act in 1999, based on the Law Revision Commission's study of the topic and its recommendations for reform through legislation.[40] The principal aim of the law was to relax the rigidity of the privity rule for third party beneficiaries. A short statute (of ten sections), its principal provision is Section 1(1), which allows a third party to enforce a term of a contract "in his own right" if the contract either expressly allows for such enforcement or purports to confer a benefit on him.[41]

A few things are noteworthy about the statute and its passage. Despite having clear commercial effects on different sectors of the economy, in its actual framing the entire statute is sector neutral and couched in the abstract language of contract law doctrine. Further, this is so despite the Commission study on which it was based, which conducted an elaborate survey of the need for the law from the perspective of various market sectors.[42]

Despite dealing with contract law, an area traditionally classified as private law, the statute could have been understood and interpreted in either public law or private law terms. Under the public law rubric (characteristic of Legal Process thinking), it could have been understood as a piece of economic legislation directed at facilitating contractual arrangements commonly seen in certain sectors—such as the shipping and transportation industries—and therefore reflecting a grand bargain of sorts that balances the multiple interests at issue. Then, when an interpretive question arises a court would treat the bargain as the starting point for its identification of a policy and arrive at an interpretation aligned with that policy and purpose. The Court of Appeals' second opinion in the *Gillarde* case is a prime example of how this might have happened, perhaps even inviting the intervention of federal agencies dealing with contractual arrangements, such as the Federal Trade Commission (FTC).

By contrast, in the private law approach, the statute would be

ER 250 (PC), 1–17 (appeal taken from H.K.) ("finding by reference to bailment law that an owner of goods could sue a sub-contracted shipping company for lost goods even though the owner did not have privity of contract with the shipping company, but also finding that the owner was held to an exclusive jurisdiction clause in the sub-contract because the owner's contract with the initial shipping company stipulated that its goods may be shipped by a sub-contractor "on any terms" and the exclusive jurisdiction provision was not unreasonable"); The Mahkutai [1996] 3 All ER 502 (PC), 1–4, 13–17 (appeal taken from H.K.) ("finding that the owner of goods could sue a sub-contractor despite a lack of privity, but that an exclusive jurisdiction clause in the original contract between the owner and shipping contractor was not binding on the owner in its suit against the sub-contractor").

40. Contracts (Rights of Third Parties) Act of 1999, c. 31 (Eng.).

41. *Id.* at § 1(1).

42. LAW COMMISSION NO. 424: PRIVITY OF CONTRACT: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES §§ 4.1–4.35 (1996).

understood as itself driven by the contract law principle of prioritizing contractual intent over all else absent concerns of morality or public policy. The legislation would thus be seen as simply allowing contractual intent to override concerns about privity and consideration, when abundantly clear—a simple rearrangement of horizontal contract law principles. The interpretive approach accompanying this understanding would eschew any reference to an external/market purpose or policy underlying the statute and defer to contract law principles rather than a legislative policy, if any.

Indeed, scholarly analyses and interpretation of the statute have almost uniformly treated the statute as a private law enactment and attempted to analyze it using the rubric of contract law principles.[43] Even those critical of the Act appear to concede that it is best understood as a principle-driven legislation, and that attempting to understand it in terms of overarching commercial policy is futile.[44] One private law scholar takes issue with the statute's deviation from the traditional rationales and principles for private law liability in the common law, arguing that the mere reliance on contractual intent is insufficient as an independent (principled) basis for civil liability.[45] Notably though, this scholar stops well short of identifying the statute in anything but private law terms; to the contrary, his own criticism is premised on the statute being a private law statute.[46]

In the years since the enactment of the statute, the few courts interpreting it have almost uniformly understood it in private law terms. The earliest cases interpreting the principal provisions of the statute treated it as applying a purely objective test of contractual intention, an established principle that the statute was seen as incorporating.[47] In one notable case, a plaintiff relied on the statute to claim that it was an identified beneficiary in

43. *See, e.g.*, Neil Andrews, *Strangers to Justice No Longer: The Reversal of the Privity Rules Under the Contracts (Rights of Third Parties) Act 1999*, 60 CAMBRIDGE L.J. 353, 357–78 (2001) (examining *inter alia* the Act's treatment of determining third party rights, available remedies to third parties, contracting parties' power to rescind, defenses against third party claims, and the scope of third party rights); Catharine Macmillan, *A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999*, 63 MOD. L. REV. 721, 723–738 (2000) (discussing *inter alia* the contracting parties' ability to "gift" or limit third party rights, potential difficulties for third parties to enforce their rights, and the relaxation of consideration); Robert Stevens, *Contracts (Rights of Third Parties) Act 1999*, 120 L. QUART. REV. 292 (2004).

44. Stevens, *supra* note 43, at 323 (noting how "the Act has left English law in an incoherent state.").

45. Kincaid, *supra* note __, at 46-47.

46. *Id.* at 47. He nevertheless does suggest that the Act appears to be more concerned with collectivist considerations than private law ones.

47. Nisshin Shipping Co. v. Cleaves & Co. [2003] EWHC (Comm.) 2602 (Eng.); Laemthong Int'l Lines Co. v. Artis [2005] EWHC (Comm.) 1595 (Eng.).

a transfer agreement between two corporations.[48] The agreement had the transferee assume any liabilities of the transferor, and made the transferee agree to complete any outstanding customer orders. The plaintiff sought to argue that this satisfied the statute's requirement that the beneficiary be "expressly identified."[49] The court disagreed, and in so doing rejected a plausible argument grounded in consumer protection policy, though noting that the "temptation" to accept such logic was "great".[50] Instead, the court relied on the logic that the statute was clear about the distinction between an identified and an unidentified class, and sought to limit its relaxation of the privity doctrine to the former; again, in keeping with the idea that contractual intention was the principle at the root of the legislation.

The U.K. Act thus illustrates the working of a statute that was self-consciously designed as a private law statute and interpreted and understood by courts and scholars as such. In dealing with the statute, courts' and scholars' interpretive focus has been on the basis and logic for the private cause of action brought by the third party, and for which they have made primary resort to contract law principles, eschewingcat times consciously—reference to collectivist goals and ideals.

B. U.K. AND U.S. COPYRIGHT LEGISLATION

Given that the Act of 1999 was in an area traditionally thought of as private law to begin with, it may seem altogether unsurprising that courts (and scholars) interpret it using private law ideas and principles. Additionally, drawing a comparison to U.S. courts' approach on similar issues poses obvious difficulties since general contract law remains an area beyond the purview of federal legislation except under rare circumstances relating to national concerns (e.g., PACA). Highlighting the divergence in interpretive approaches between U.S. and U.K. courts more fully necessitates looking to an area that (a) presents comparable statutes in both jurisdictions, and (b) is amenable to both public law and private law interpretations such that the adoption of one over the other is a matter of choice. Copyright law fits both criteria rather well and evinces this divergence between the two jurisdictions.

The most recent copyright statutes in both countries were enacted within a decade of each other, the U.S. Act in 1976,[51] while its U.K.

48. Avraamides v. Colwill [2006] EWCA (Civ) 1533 (Eng.).
49. Act of 1999, § 1(3).
50. Avraamides [2006] EWCA (Civ) 1533, at ¶ 18.
51. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541.

counterpart in 1988.[52] Both are elaborate pieces of comprehensive legislation that build on prior statutes and case law. Covering the entirety of copyright law in order to compare how courts have approached interpreting the statute in the two countries is well beyond the scope of this paper. Consequently, the discussion that follows focuses on two important domains (both covered by the respective statutes) where this divergence is most apparent: joint authorship and originality.

1. Joint Authorship

The phenomenon of multiple authorship is ancient; and yet copyright law around the world has struggled to develop a coherent framework to analyze the practice and accord it appropriate importance. All the same, it remains an excellent example to compare public and private law thinking in so far as it combines elements from contract law, tort law, and property law within the overall skein of copyright's other normative ideals.

The U.S. copyright statute approaches joint authorship through the nature of the work produced through the process, which it defines as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[53] The U.K. statute—the Copyright, Designs and Patent Act of 1988—does something very similar and defines a work of joint authorship as "a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors."[54]

A notable distinction between the two provisions is that the former expressly incorporates a reference to "intention" while the latter does not. Unsurprisingly, this has caused courts to interpret the provisions differently. All the same, one interpretation adopted an overt policy-driven public law approach, while the other treated copyright like the private law institution that it always was as a historical matter.

In the U.S. context, it wasn't until the year 1991 that the provision invited serious judicial scrutiny. In a case brought by the producer of a play against its principal author wherein the former claimed to be a joint author of the play, *Childress v. Taylor*[55], the Second Circuit was called to interpret

52. U.K. Copyright, Designs and Patents Act 1988, c. 48.
53. 17 U.S.C. §101 (definition of "joint work").
54. CDPA 1988, § 10(1) (defining a "work of joint authorship").
55. 945 F.2d 500 (2d Cir. 1991).

the statute's requirements for joint authorship. In so doing, the court concluded that most of the statutory definition of the idea was "straightforward" except for its emphasis on intention,[56] for which it looked to the legislative history accompanying the enactment of the 1976 Act, which noted that "the touchstone here [i.e., in the definition] is the *intention, at the time the writing is done*, that the parts be absorbed or combined into an integrated unit."[57] Using this language, the court then concluded that the requirement of intention was so overarching that a collaboration as such was insufficient to generate joint authorship unless the requisite intention could be independently proven.[58]

The court's rationale for this interpretation was to avoid joint authorship being extended to "many persons who are not likely to have been within the contemplation of Congress" because it would allow an individual making a minimal contribution to the work to unfairly claim an "undivided half interest" in the work.[59] This last set of considerations had little to do with the nature and form of the collaboration at issue, the process through which the work was created, or indeed the text of the statutory provision; it was instead motivated by an important policy consideration: avoiding contributors from overreaching in their claims, which would itself deter additional collaboration and joint authorship. Signaling the need for a higher threshold—in the nature of proof of intention—was thus meant to send a signal for the future.

The court's interpretation was thus driven by its identification of a policy-rationale, and was overtly collectivist in orientation in that it was more about Congress' presumptive concerns with contributor overreach. Missing altogether in the opinion, even if intention were taken as central to the provision, was any reference to what such intention was meant to serve and its role as a mechanism of evidencing a common design, a *consensus ad idem*, an idea well developed in contract law.

The *Childress* opinion is to be contrasted with how courts in the U.K. have interpreted the definition of a joint work under the 1988 Act. In a 2003 case, *Hodgens v. Beckingham*,[60] the Court of Appeals was asked to consider introducing the idea of intention into the definition, as an implicit requirement underlying the idea of a collaboration. Specifically, the court

56. *Id.* at 505.
57. H.R. REP. NO. 94-1476, § 201, at 120 (1976).
58. Childress, 945 F.2d at 505–06.
59. *Id.* at 507.
60. [2003] EWCA (Civ) 143 (Eng.).

was asked to follow the example of *Childress*.[61] It balked at the idea, noting that the logic of *Childress* was entirely policy-driven, and premised on the belief that Congress would have wanted to limit joint authorship. U.K. courts, the Court of Appeals concluded, were to limit themselves to the statute and principles implicit within it, rather than delving "into the uncertain realms of policy."[62]

Rejecting a policy-driven approach, as the U.K. courts have, is a far cry from suggesting that they instead do no more than apply the plain text of the provision. To the contrary, U.K. case law has embellished the statutory definition as well, but in doing so has looked entirely to principles internal to the idea of joint authorship and collaborative design. The High Court decision of *Martin v. Kogan*[63] offers a useful contrast in so far as it addressed the same question as *Childress*, namely whether there needed to be a sufficiency threshold for a contribution to qualify for joint authorship. In answering that in the affirmative, the court chose to look at the idea of authorship and derive from it the principle that each type of work (literary, artistic, etc.) had a "primary skill" associated with its creation, and that for a joint work each author had to contribute a substantial amount of primary skill. [64] While "secondary skills" did not imply the absence of joint authorship, they nevertheless made its occurrence difficult owing to evidentiary reasons relating to copyright's protectability doctrines.[65] The court in *Martin* also emphasized that joint authorship was related to the idea of co-ownership, but that as with co-ownership there could well be disparate shares of ownership involved, which required an apportionment.[66]

Relying thus on principles drawn from (i) the nature of authorship (i.e., skills involved), (ii) the connection between authorship and ownership (i.e., apportionment), and (iii) the centrality of copyright's protectability rules (i.e., secondary skills and substantiality), the court arrived at nearly the same place as *Childress*. Yet, its logic was principle-oriented, driven by the interior design of authorship and ownership, and eschewed *any* reference to a collective legislative design that it was merely seeking to give effect to for the collective good.

61. *Id.* at ¶ 52.
62. *Id.* at ¶ 53.
63. [2017] EWHC (IPEC) 2927 (Eng.).
64. *Id.* at ¶ 44–49.
65. *Id.* at ¶ 51.
66. *Id.* at ¶ 53.

2. Originality

The doctrine of originality is copyright's most important protectability requirement. While originally a creation of courts in both countries (i.e., the U.S. and U.K.), the doctrine was later incorporated into their respective copyright statutes—with the understanding that courts could continue to develop it incrementally and contextually as they had before. As a formal matter, originality today therefore derives from the statute but affords courts significant interpretive leeway—akin to common law statutes.[67] This dimension injects an additional point of interest into the comparison.

The U.S. Act of 1976 accords copyright protection to all "*original* works of authorship."[68] The absence of a definition in the statute was intended to allow for the incorporation of the extant judicial understanding of the term.[69] The originality doctrine had evolved in different ways over the lifetime of American copyright law,[70] but under the 1976 Act it received its most elaborate treatment and interpretation by the U.S. Supreme Court in the case of *Feist v. Rural Telephone Service Co.*[71] *Feist* showcases the dominance of the public law approach to statutory interpretation and construction and a rather complete disregard of private law ideals during that process.

Feist involved the question of whether a telephone directory was copyrightable when it was nothing more than a compilation of facts. In a pathbreaking move, the Court departed from the doctrine as it had been understood previously and added a requirement of "minimal creativity" to it, noting that "originality. . . means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[72] The Court's logic for this interpretation, which it drew from past precedent, was the text of the Constitution.[73] Reading the Constitution's mandate that copyright "promote

67. Common law statutes are those that delegate law-making to courts. *See* Frank H. Easterbrook, *Statutes' Domains,* 50 U. CHI. L. REV. 533, 544 (1983).

68. 17 U.S.C. § 102(a) (2015).

69. H.R. REP. NO. 94-1476, *supra* note 57, at 51.

70. For a wonderful historical account of this evolution, see Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J., 186 200–24. (2008).

71. Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). For commentary on the case, see Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992) (a commentary on the Feist case); Jessica Litman, *After Feist*, 17 U. DAYTON L. REV. 607 (1992); Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3 (1992).

72. Feist, 499 U.S. at 345.

73. *Id.* at 346 ("[o]riginality is a constitutional requirement.").

the Progress of Science and useful Arts," the Court concluded that an originality requirement that focused on a minimal level of creativity and eschewed a bare reliance on creative labor was essential.[74] The Court's construction was therefore "the means by which copyright advances the progress of science and art."[75]

Feist's invocation of the Constitution to interpret originality in a manner that denies protection to pure works of information has been understood as "implement[ing] a policy favoring general, free access to disclosed data," and seen as driven by an impulse to reorient law-making power between Congress and the courts.[76] Leaving aside the merits of the actual originality standard set out in the opinion, *Feist*'s decision to look to the primary source of public policy (i.e., the Constitution) for guidance, rather than to copyright's internal principles is quite telling. In constitutionalizing an established copyright law doctrine, it effectively confirmed the primacy of copyright policy (as defined in the constitution) over any of the doctrine's underlying principles: a rather direct and bold instantiation of the Legal Process approach.

Just what might those principles have been instead? For that, we merely have to look to how U.K. courts have approached the question. Since the early twentieth century, English courts have consistently held that originality in copyright law was primarily a question of individual skill and effort in the production of expression.[77] As long as an author applied skill and labor in the creation of a work, such that it might be said to have originated with that author, the standard was satisfied.[78] This approach might be understood to embody the principle of "skill and effort origination" emanating from copyright's fundamental idea of authorship, predicated on the connection between creator and work.[79] The approach consciously abandons any assessment of the merits of the work, which the *Feist* court implicitly adopted in its emphasis on the work showing a minimal amount of creativity.

74. *Id.* at 349–50.

75. *Id.* at 350.

76. Ginsburg, *supra* note 71, at 339.

77. *See, e.g.*, Univ. of London Press v. Univ. Tutorial Press [1916] 2 Ch 601, at 609–10 (Eng.); Walter v. Lane [1900] AC 539 (Eng.); Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 All ER 465.

78. *Cf.* Andreas Rahmatian, *Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure*, 44 INT'L REV. INTELL. PROP. & COMPETITION. L. 4, 13 (2013) (reading an element of Locke's labor theory of ownership into this understanding of originality, which seems a little far-fetched.).

79. For more on this connection and its normative dimensions, see Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 11–34 (2017).

U.K. courts have had little problem applying this interpretation of originality to the Act of 1988. They have extended it to databases as well, emphasizing that the test involves assessing the "process of creation and the identification of the skill and labour that has gone into it."[80] Once significant effort, skill, and time are seen to have been applied in the process of creating a work, the requirement is seen as satisfied since the individual has effectively become the author of the work. Under the influence of EU law, courts have insisted that the standard requires that the work bear the imprint of the author's "own intellectual creation," which does not modify the prior standard significantly.[81] If anything, it reiterates the "skill and effort origination" principle that the U.K. originality doctrine has been crafted on.

In practice and application, little may turn on the difference between the two countries. Yet, it represents a fundamental divergence in the interpretation and understanding of the doctrine. In theory, a work (e.g., such as the telephone directory in *Feist*) could be denied copyright protection in the U.S. for being insufficiently creative in its result, while it would obtain protection in the U.K. for reflecting the own skill and labor of its compiler in its process of creation. And the former outcome would have been driven by the policy of using copyright to promote the progress of the sciences and useful arts, while the latter would remain rooted in the principles of authorship, skill, and effort origination that it embodied. Leaving aside which one is preferable, the methodological divergence in approach is obvious.

* * *

The copyright statute is thus for the most part treated as a private law statute in the U.K. (and indeed in most other common law countries), where the rights of the individual creator and his/her interactions with others forms the focal point of the analysis, and from which doctrines are interpreted and expounded on in a principled manner. Courts do of course occasionally look to the broader socio-economic objectives of the law—its policy—in their analysis, but rarely ever do they either start with this policy in their interpretation of the law, or let the policy override existing principles. In the U.S., the opposite is true. The law's overarching goals—often drawn from congressional reports accompanying the legislation, economic theory, or the text of the Constitution—operate as starting points for the analysis and often function as complete substitutes for principles. While it would be a far cry to

80. The Newspaper Licensing Agency Ltd. v. Meltwater Holding B.V. [2010] EWHC (Ch) 3099, at ¶ 71.

81. Rahmatian, *supra* note 78, at 25–29.

suggest that this has had the effect of converting U.S. copyright law into an area of public law, it is certainly the case that interpretations of the U.S. copyright statute readily partake of the legal process phenomenon of public law statutory interpretation, which has an overtly collectivist orientation rather than one that is individualist and focused on the author's rights and allied obligations.

III. PRIVATE LAW VALUES IN STATUTORY INTERPRETATION

Obviously, the methods of private law statutory interpretation merit application to statutes when the interpreter determines that the statute incorporates ideals and values from private law thinking. This is most likely to be the case when (i) the statute creates a private cause of action for a new wrong, or (ii) is parasitic on an area of the law traditionally understood as private law in orientation.

It bears emphasizing that a statute need not abjure all collectivist ideals for courts to see it as incorporating private law elements. This is especially true of statutes that fall under the first category above, involving the creation of a new wrong and corresponding private cause of action. Anti-discrimination statutes, such as Title VII, are good examples here. Deriving from the constitutional goal of equality, the statute works by creating a private wrong and rendering it actionable by the individual harmed. The collectivist ideal at its heart interacts with the private harm and wrong that it identifies to produce a confluence of normative ideals, and interpretations of the statute would do well to avoid ignoring the private law ideals that it incorporates.[82]

This then brings us to the obvious task of identifying these "private law values" that interpretations of private law statutes and provisions should pay attention to. The remainder of this Part provides a brief overview of three such values; and while more may indeed exist these three remain central to the functioning of private law statutes and are worthy of recognition in the interpretive process.

1. Redressive Autonomy

A hallmark of numerous statutes is their allowance for a private cause of action, when a breach of a statutory obligation or directive results in harm.

82. For an important account making this move and emphasizing the role of private law and considerations of individualism in discrimination law, see generally Sophia Moreau, *What is Discrimination?*, 38 PHIL. & PUB. AFFS. 143 (2010).

Civil rights legislation,[83] antitrust law,[84] *qui tam* statutes,[85] intellectual property statutes,[86] environmental legislation,[87] just to name a few all embody important private actions that afford parties a mechanism of civil redress against wrongdoers. As a general matter, these provisions have been understood almost entirely in public law terms, as embodying what scholars have long described as a mechanism for a "private attorney general" which is generally defined as "a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own."[88] This definition captures the collectivist stance in the understanding of private enforcement provisions, which are thus seen as doing nothing more than allowing an individual to stand-in for the state and enforce collectivist ideals and concerns. In this understanding the state is seen as using private individuals as a mere means towards it collective end, and that use (so to speak) adds no normative content of its own.

As should be apparent, this approach denies altogether the autonomy of the private individual in the overall skein of the statute. By assuming that the right set of monetary incentives will motivate actors to bring actions whenever there is a sufficient recovery at stake, it undervalues the complex set of motivations that ordinarily accompany a private lawsuit and the claims made therein.[89] In other words, it fails to recognize that there could well be reasons—deriving from the horizontal relationship that a private action entails—for an individual to bring or forego a private action *even when* there is a clear basis for recovery. Sometimes the norms of human interaction involve tolerating otherwise clear breaches of the law, for relational reasons.[90] And in so doing, the toleration produces its own set of norms that make their way into conventional morality.[91]

A private law approach to such private enforcement provisions would

83. 42 U.S.C. § 1983 (2012).

84. 15 U.S.C. § 15 (2012).

85. 31 U.S.C. § 3730(b) (2012).

86. 17 U.S.C. § 501 (2012); 35 U.S.C. §271 (2012).

87. 42 U.S.C. § 7604 (2012).

88. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005).

89. Much of this thinking relies on the idea of a rational actor motivated entirely by individual self-interest, measured in terms of costs and benefits. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3, 23–24 (2010).

90. This is the premise of an idea in copyright law that identifies a set of exceptions produced entirely by creators tolerating acts of infringement by choosing not to enforce them, for a variety of different reasons. *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008); Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 752 (2013).

91. Balganesh, *supra* note 90, at 760.

instead recognize the intrinsic autonomy of the private actor involved, a form of autonomy best described as "redressive autonomy." Recognizing this autonomy would in turn allow the analysis to move away from the banal treatment of such actions as driven entirely by public interest considerations. It would instead acknowledge the complex relational dimensions involved in the action and the set of norms and values at stake in such actions, which may not be to the exclusion of the public interest but can at times certainly influence or modulate it.

2. Individuation of Directives

Individuation refers to the idea that private law, at its core, operates by creating individual private rights and obligations. They are private in the sense that they have a normative existence that is analytically independent of the state, and operate relationally between parties at the horizontal level. Private law statutes thus work by creating rights and duties between parties. Yet, after such formal creation, these rights and duties operate between the parties on their own quite independently of the state—through market and non-market interactions and other forms of interpersonal relationships. An exclusive focus on statutes as nothing more than embodiments of collective ideals ignores the centrality of such individuation that statutes can indeed produce.

Individuation can emanate from a statute, when it is the starting point for an area of law such as it is with copyright. Here, the statute sets up a framework of author's rights and copier's obligations; yet thereafter authors, copiers, and other actors interact and deal with each other on a regular basis without the direct involvement of the statute or the state.[92] To be sure, this doesn't mean that the possibility of state action doesn't loom large over such interactions, just that the interactions assume a life of their own at the individual—rather than collective—level, which is of the missed in the public law approach to interpretation. At other times, a statute may be parasitic on a pre-existing set of interpersonal interactions. Legislation in the domain of contract law is a good example.[93] Here, readings of the statute again need to be sensitive to the individuated sub-structure that they are premised on and the manner in which that individual interaction is likely to

92. Undoubtedly, they do so in the shadow of the law. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

93. Such as it was the with the Uniform Commercial Code, which built on existing contract law rules and self-consciously enabled courts to continue to develop common law rules in its domains. For a fuller account, see Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401 (1968).

be affected and impacted by its terms.

To be clear, recognizing the importance of individuation private law statutes does not require jettisoning collective ideals and goals in the interpretive process. Instead, it recognizes a separate set of messages that the provision communicates to actors shaping their lives and interactions around the statute's rights and responsibilities that operate at the level of the individual.

3. Principled Horizontal Coherence

A third value of importance involves the repudiation of an idea that was central to Henry Hart's thinking about statutes—namely, that they could operate as "arbitrary starting points" for the interpretation.[94] In other words, the public law approach assumes that the statutes can identify their own purposes and values (policy), which need to be taken at face value given the supremacy of the legislative as law-making body. Private law statutory interpretation would question this and instead operate on the assumption that the legal directives at issue operate to govern a set of horizontal relationships or interactions, and that they are to be understood and interpreted using principles and values that derive from that horizontality.

A hypothetical example might illustrate this idea. Assume that tomorrow Congress decides to amend the U.S. copyright statute to introduce a provision that defines originality by merely saying, "a work is original if it is created by the author." On its face now, in plain terms originality requires creation. A court—such as *Feist*—reading it in public law terms and looking to the Constitution could interpret the idea of "created" to require an examination of some minimal creativity on the face of the work for it to obtain protection. A private law approach that takes the horizontal coherence of copyright's authorship ideal seriously would instead seek to render the definition compatible with the law's understanding of authorship and its principles for identifying who an author is in different contexts. This interpretation would merely see the originality standard as a continuation of the system's emphasis on author's rights.

The idea of principled horizontal coherence builds on Dworkin's idea of "law as integrity" but in a limited manner.[95] It seeks integrity in the set of ideas and principles underlying the particular private law area at issue and not beyond, but takes seriously the idea that such interpretation must operate as a chain novel, rather than allowing for each provision to become an

94. HART & SACKS, *supra* note 10, at lxxx.
95. RONALD DWORKIN, LAW'S EMPIRE 226 (1986).

arbitrary and independent starting point each time.[96]

CONCLUSION

Statutory law is today ubiquitous and an undeniable reality of the modern state. Private law theory and thinking would do well to pay greater attention to statutory law. This is especially true in the U.S., where statutory interpretation has come to be co-opted by public law thinking, such that the idea of private law statutes remains something of a novelty. As I have shown this is less true in other common law countries, especially the U.K. where the common law has come to be codified and/or supplemented by legislation. The effect of this neglect in the U.S. is that statutory subjects that deserve to be understood—even if only partially—through private law ideas never really obtain such treatment.

Solving this problem in American legal thinking is obviously more complex than it might seem. Among other things, it involves uprooting decades of skepticism about the distinctiveness of private law, while challenging the general dominance of public law thinking in all areas of American legal scholarship. While that remains a tall order, an important first step remains having courts and scholars acknowledge the existence of independent private law values that are worthy of incorporation into the exercise of statutory interpretation. And for this, they would do well to acknowledge the divergence between U.S. and non-U.S. legal thinking on this matter and recognize the shortcomings of American exceptionalism in this area.

96. The "chain novel" metaphor was used by Dworkin in his description of law as integrity. *Id.* at 229–32.