

The Humanity of Private Law

Part II: Evaluation

Nicholas J McBride

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2020

Copyright © Nicholas J McBride, 2020

Nicholas J McBride has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©.

All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©.

This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998–2020.

A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

ISBN: HB: 978-1-50991-199-8
ePDF: 978-1-50991-201-8
ePub: 978-1-50991-200-1

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



To find out more about our authors and books visit www.hartpublishing.co.uk.
Here you will find extracts, author information, details of forthcoming events
and the option to sign up for our newsletters.

PREFACE AND ACKNOWLEDGEMENTS

Part I of *The Humanity of Private Law* began by quoting Richard O’Sullivan KC as saying in 1950 that ‘The Common Law of England is one of the great civilising forces in the world.’¹ Writing 45 years later, and after listing a long series of moral disasters that afflicted British society in the second half of the twentieth century, Anne Glyn-Jones concluded that we live in a civilisation ‘which has run its course, which is morally, aesthetically and spiritually bankrupt’.² Both views cannot be right. If they were, then it would have to be the case that the common law was one of the great civilising forces in the world *and* the inheritance of the common law’s civilising effect was completely squandered in less than half a century. This seems too implausible to be true. Either O’Sullivan was wrong and the common law was not as beneficial as he supposed; or Glyn-Jones was wrong and our civilisation is not in as bad shape as she feared.

As between O’Sullivan and Glyn-Jones, I think Glyn-Jones is closer to the truth and would, in correction of O’Sullivan, say that ‘The Common Law of England *sought* to be one of the great civilising forces in the world.’ It did so by seeking to promote the flourishing of its subjects (while maintaining the conditions of its own legitimacy). However, the common law’s attempt to carry out this project was fundamentally flawed because – as I will attempt to show in the following pages – it adopted a flawed view of what human flourishing entails.

In Part I, I called this view, the ‘RP’: the *picture* of human flourishing that most reflective people in modern Western liberal societies would endorse, not least because it is the *picture* that they *receive* from the culture in which they live. According to the RP, someone (S) is flourishing if S: (1) is in good health; (2) is well-educated; (3) is practically reasonable; (4) identifies with the way S’s life is going; (5) has friends and a life partner that S cares about, and those friends and life partner are flourishing as well; (6) cares about S’s own flourishing; (7) has at least one ‘desire of the heart’ to pursue some meaningful cause or project; (8) has mastered at least one trade and game that involves some degree of skill; (9) has opportunities to be creative; (10) is free of anxieties about S’s future flourishing being impaired; (11) lives in a ‘caring society’ that seeks to foster the flourishing of all its members; and (12) does not depend on the suffering of others in order to flourish. If (1)–(12) are true of S we can say that S is flourishing according to the picture of human flourishing provided us by the RP – or, more succinctly, that S is RP-flourishing.

Part I claimed that English private law seeks to help us live an RP-flourishing life, a life characterised by the enjoyment of goods (1)–(12). Part II will argue, however, that the idea that human flourishing consists in the enjoyment of this combination of goods is illusory.

¹ O’Sullivan, *The Inheritance of the Common Law* (Hamlyn, 1950), 3.

² Glyn-Jones, *Holding Up a Mirror: How Civilisations Decline* (Imprint Academic, 1996), 506.

Moreover, the fact that our civilisation is founded – via institutions like private law – on a false picture of the nature of the human flourishing is the root cause of the legions of chickens coming home to roost that Glyn-Jones catalogued so exhaustively. The first three chapters of Part II seek to make out this argument.

Chapter 8³ measures the RP against four postulates about human flourishing – propositions about human flourishing which I cannot prove to be true, but which I think we have good reason to accept – and finds it wanting. Instead, Chapter 8 sets out a quite different understanding of what human flourishing involves, based not on what you *have* in your life but on the *direction* in which your life is heading. I will argue that this ‘journey model’ of human flourishing has a much greater chance of satisfying our four postulates about human flourishing than any other model. Chapters 9 and 10 will flesh out the alternative vision of what human flourishing entails that was sketched in Chapter 8. Chapter 9 argues that human flourishing involves *someone’s being engaged in a quest to lead a truthful life* (what I will call, more succinctly, ‘QTL-ing’). Chapter 10 vindicates Chapter 9’s claim that human flourishing consists in QTL-ing by testing it against the view of human nature that was introduced at the end of Part I: that we are the beings that are aware (or are capable of being aware) that we participate in Being.⁴

Chapter 11 turns back to private law and asks what would private law look like if it were based on the view that human flourishing consists in QTL-ing? The unsurprising answer is: very different. The most obvious difference will be over what kind of harms private law seeks to protect its subjects from suffering. A private law that seeks to foster RP-flourishing will seek to protect people from suffering the loss of goods such as health, wealth, and property. A private law that identifies human flourishing with QTL-ing will be far more concerned with protecting people’s ability to interact properly with reality, and will as a result seek to protect people’s attention capacities, self-image, and attitudes towards other people from being damaged or distorted. A private law that is concerned to promote QTL-ing will also be far more concerned to protect people’s freedom of speech than our RP-flourishing-centric private law has proved to be.

Chapter 12 concludes by asking – should the rules and doctrines of private law be altered so that they give effect to the more authentic vision of human flourishing set out in this book? Unlike many other private law scholars, who would like to see their vision of private law implemented today, if not yesterday, I will answer this question in the negative, for the time being. The reason for my reticence is rooted in the fact that you can only be *helped*, and not *made*, to flourish as a human being – flourishing as a human being is like reading, sleeping or eating: it is ultimately something you have to do *yourself*. In the same way, you cannot be helped to flourish as a human being according to a vision of human flourishing that you do not yourself accept. This creates a fundamental democratic limit on what vision of human flourishing private law can base itself on: it can only base itself on the vision that is accepted by a large majority of its subjects. And it is obviously the case that the vast majority of the subjects of English private law do *not* identify human flourishing with QTL-ing, but instead identify it with the RP.

³ The chapter numbers follow on sequentially from those in Part I.

⁴ McBride, *The Humanity of Private Law, Part I: Explanation* (Hart Publishing, 2019), 262–65.

It follows that a renewal of private law along the lines proposed in this book must await a more fundamental renewal of people's views as to what human flourishing involves. If we are to avoid proving Glyn-Jones right, the need for us to think again as to what it means to live a good life is urgent, and our only hope of being part of the first civilisation in history that took itself to the precipice of ruin and turned back, rather than throwing itself over the edge. This book will have achieved its purpose if it improves the odds of our undergoing such a revolution in the head, as well as providing readers a glimpse of what English private law might look like in future should we find our way out of the dark woods in which we have lost ourselves.

The intellectual debts I have incurred and drawn on in working on this project on the humanity of private law have already been acknowledged in *The Humanity of Private Law, Part I*. However, I would like to acknowledge the especial and providential assistance that attending Thomas D'Andrea's reading group on 'The Metaphysics of Being' provided me in writing this volume. Tom helped to introduce me to a huge range of thinkers of whom I was previously only dimly aware, and whose influence will be obvious to anyone who reads this book, especially Chapter 10. I would also like to acknowledge the invaluable research assistance provided by Zoe Adams in preparing Chapter 8. I am also grateful to everyone at Hart Publishing for their help in bringing this book to publication, especially Sinead Moloney, Tom Adams, and Helen Kitto.⁵ As always, my debt to my best friend Isabel and her two children, Ines and Luca, who are the dedicatees of this volume, is beyond words. Happily, and again perhaps providentially, the cover photo for this book (like the previous volume, of Rouen Cathedral)⁶ fits the themes of this book – identifying human flourishing with a search or a quest – like a glove,⁷ and features a young child who looks so much like Ines that, on seeing the cover, Luca indignantly demanded to know why he was not in the picture. It is my dearest hope that this book will help them, and others their age, find their way to an existence that more closely embodies authentic human flourishing than the kinds of existence sustained by our current social order.

⁵ It should be noted that all references to sources on the Internet in this book are up to date as of 1 September 2019.

⁶ As to why Rouen Cathedral, see McBride, *The Humanity of Private Law, Part I: Explanation* (n 4), 30, n 136.

⁷ We will come across the philosopher Martin Heidegger frequently in this book, particularly in Chapter 10. When Heidegger knew he was dying, he asked Bernard Welte, the priest of the Archdiocese of Freiburg and a former student of Heidegger's, to preach a sermon at his graveside on the theme of 'Ask and you will receive, seek and you will find, knock and the door will be opened to you' (Luke 11:9): Richardson, *Heidegger: Through Phenomenology to Thought*, 4th ed (Fordham UP, 2003), 649–50. The sermon – Welte, 'Seeking and Finding: The Speech at Heidegger's Burial' – may be found in Sheehan (ed), *Heidegger: The Man and the Thinker* (Precedent Publishing, 1981).

TABLE OF CONTENTS

<i>Preface and Acknowledgements</i>	vii
<i>Abbreviations and Key Terms</i>	xiii
<i>Table of Cases</i>	xv
8. Human Flourishing II – Models and Postulates.....	1
1. Three Models	1
2. Problems with the Service Model	3
3. Four Postulates	6
4. Problems with the Possessions Model.....	15
5. Advantages of the Journey Model.....	23
9. Truth and the Journey Model.....	31
1. Intimations of the Truth	31
2. The Truth-Seeking Life	33
3. Compatibility with the Postulates	54
4. Three Objections	65
10. The Approach of Being.....	71
1. Being and Beings.....	72
2. Truth and Being.....	80
3. Anti-Being.....	98
4. Human Flourishing: A Restatement.....	106
11. Applications and Implications.....	108
1. Fraud Unravels All	108
2. Speech and Silence	120
3. Attention Wells	130
4. Like a Dog	134
5. The Hate You Make	145
6. The Burden of the Past.....	149
7. The Perils of Litigation.....	155
12. The Limits of Democracy.....	168
1. Six Positions	168
2. The Superiority of the Simple Formula	170
3. The Need to Choose	185
4. The Future of Politics	189
<i>Index of Names.....</i>	195
<i>Index of Subjects.....</i>	199

ABBREVIATIONS AND KEY TERMS

(P1)	The first postulate of human flourishing: that human flourishing is within the reach of any human being and is not something that can only be enjoyed by a privileged elite.
(P2)	The second postulate of human flourishing: that anyone's flourishing can be harmed by a wide range of different events.
(P3)	The third postulate of human flourishing: that human flourishing is a good thing, everywhere and anywhere it exists.
(P4)	The fourth postulate of human flourishing: that human flourishing is self-sustaining across time and across persons.
QTL-flourishing	Living a life that is flourishing because it involves being engaged in a quest to lead a truthful life.
QTL-ing	Engaging in a quest to lead a truthful life.
RP	The picture of human flourishing that is widely accepted by <i>reflective</i> people in modern Western liberal societies, and is <i>received</i> in that it is promoted by the culture of those societies.
RP-flourishing	Living a life that is flourishing according to the RP.

TABLE OF CASES

A v B (damages: paternity) [2007] EWHC 1246 (QB)	152, 153
Abrams v United States, 250 US 616 (1919) (US SC)	123
AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58, [2015] AC 1503.....	182
Ajinomoto Sweeteners SAS v Asda Ltd [2010] EWCA Civ 609, [2011] QB 497	111
AKJ v Commissioner of Police of the Metropolis [2013] EWCA Civ 1342, [2014] 1 WLR 285; reversing, [2013] EWHC 32 (QB), [2013] 1 WLR 2743	150
Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL).....	148
Alexander v Home Office [1988] 1 WLR 968 (CA).....	148
Amin v Imran Khan & Partners [2011] EWHC 2958 (QB)	137
Anderson v United Kingdom (1998) 25 EHRR CD172 (ECommHR)	122
Angove's Pty Ltd v Bailey [2016] UKSC 47, [2016] 1 WLR 3179.....	110
Appleby v United Kingdom (2003) 37 EHRR 38 (ECtHR)	122, 129, 130
Archer v Brown [1985] QB 401 (QB)	109
Armes v Nottinghamshire County Council [2017] UKSC 60, [2018] AC 355	183
Armitage v Nurse [1998] Ch 241 (CA)	110
Armstrong v Sheppard & Short Ltd [1959] QB 384 (CA)	110
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 (HCA)	152
B v IVF Hammersmith Ltd [2018] EWCA Civ 2803.....	152, 153
Bridge v Campbell Discount Co Ltd [1962] AC 600 (HL)	114
Briess v Woolley [1954] AC 333 (HL)	109
Campbell v Edwards [1976] 1 WLR 403 (CA)	114
Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457	120
Candler v Crane, Christmas & Co [1951] 2 KB 164 (CA).....	179
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA).....	132
Chaplin v Hicks [1911] 2 KB 786 (CA)	155
CIN Properties Ltd v Rawlins [1995] 2 EGLR 130 (CA)	122
Combe v Combe [1951] 2 KB 215 (CA)	183
Constantine v Imperial Hotels Ltd [1944] KB 693 (KB)	129
Costello v Chief Constable of Northumbria Police [1999] 1 All ER 550 (CA)	135–6, 137
Derry v Peek (1889) 14 App Cas 337 (HL)	109
DIL v Commissioner of Police of the Metropolis [2014] EWHC 2184 (QB).....	150
Discount Records Ltd v Barclays Bank Ltd [1975] 1 WLR 315 (Ch)	114
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 (CA)	109
Duke of Marlborough, Re [1894] 2 Ch 133 (Ch)	109
Dunlop v Maison Talbot (1904) 20 TLR 579 (CA)	111
Frost v Chief Constable of South Yorkshire [1999] 2 AC 455 (HL)	159

Gonthier v Orange Contract Scaffolding Ltd [2003] EWCA Civ 873	110
Google Spain SL v Agencia Española de Protección de Datos (AEPD) [2014] QB 1022 (ECJ).....	124
HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 1 All ER (Comm) 349	110–1, 112–3
Horwood v Millar's Timber and Trading Co [1917] 1 KB 305 (CA)	121
Hunt v Severs [1994] 2 AC 350 (HL).....	158
Hussain v The Chief Constable of West Mercia Constabulary [2008] EWCA Civ 1205	137–8
Investment Trust Companies v Revenue and Customs Commissioners [2017] UKSC 29, [2018] AC 275	180–1
Jones v Swansea CC [1990] 1 WLR 54 (CA)	138
Khodaparast v Shad [2000] 1 WLR 618 (CA)	111
Kralj v McGrath [1996] 1 All ER 54 (QB).....	136
Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] 2 AC 122	137
Lambert v Lewis [1982] AC 225 (HL)	132
Lazarus Estates Ltd v Beasley [1956] 1 QB 702 (CA)	114
Ley v Hamilton (1935) 153 LT 384 (HL).....	148
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (HL).....	157–8
Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215	157, 182
London General Omnibus Co Ltd v Holloway [1912] 2 KB 72 (CA)	114
Magill v Magill (2006) 226 CLR 551 (HCA).....	152
Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] EWCA Civ 151, [2002] Ch 216	110
Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2001] UKHL 1, [2003] 1 AC 469.....	110
Marsh v Alabama, 326 US 501 (US SC)	128
May v Platt [1900] 1 Ch 616 (Ch)	114
McDonald's Corporation v Steel and Morris [1997] EWHC 366 (QB)	151
McLoughlin v O'Brian [1983] 1 AC 410 (HL).....	148
McMillan v Singh (1984) 17 HLR 120 (CA).....	148
McWilliams v Sir William Arrol & Co Ltd [1962] 1 WLR 295 (HL)	154
Michael v Chief Constable of South Wales [2015] UKSC 2, [2015] AC 1732.....	152, 182–3
Midland Bank Trust Co Ltd v Green [1980] Ch 590 (CA)	114
Mohamud v Wm Morrison Supermarkets plc [2016] UKSC 11, [2016] AC 677	182
Monsanto v Tilly [2000] Env LR 313 (CA)	123
Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535 (HL)	121
O (a child) v Rhodes [2015] UKSC 32, [2016] AC 219	119
Organ Retention Group Litigation, In Re [2004] EWHC 644 (QB), [2005] QB 506.....	148–9
Osman v United Kingdom [1999] 1 FLR 193 (ECtHR)	136
P v B [2001] 1 FLR 1041 (QB)	152
Pasley v Freeman (1789) 3 TR 51, 100 ER 450 (KB).....	109
Patel v Mirza [2016] UKSC 42, [2017] AC 467	181

Patterson v Colorado, 205 US 454 (1907) (US SC).....	123
PGF II SA v OMFS Co I Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386.....	162
Poole BC v GN [2019] UKSC 25.....	135
Porter v Commissioner of Police of the Metropolis [1999] 10 WLK 607 (CA).....	123
PP v DD, 2017 ONCA 180	152
Prudential Assurance Co Ltd v Revenue and Customers Commissioners [2018] UKSC 39.....	180–1
Quinton v Pearce [2009] EWHC 912 (QB).....	111
Rabone v Pennine Care NHS Foundation Trust [2012] UKSC 2, [2012] 2 AC 72.....	148
Reilly v Merseyside Health Authority (1995) 23 BMLR 26 (CA)	148
Reynolds v Times Newspapers Ltd [2001] 2 AC 127 (HL).....	120
Robinson v Chief Constable of West Yorkshire [2018] UKSC 4, [2018] AC 736.....	135, 180, 183
Rochefoucauld v Boustead [1897] 1 Ch 196 (CA).....	109
Rothwell v Chemical & Insulating Co Ltd [2006] EWCA Civ 27	154
Schenck v United States, 249 US 47 (1919) (US SC)	123
Selçuk and Asker v Turkey (1998) 26 EHRR 477 (ECtHR).....	136
Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34, [2008] AC 561.....	181
Smith New Court Securities Ltd v Citibank NA [1997] AC 254 (HL).....	109
Spaulding v Zimmerman, 116 NW 2d 704 (1962) (Minn SC).....	156
Steel and Morris v United Kingdom (2005) 41 EHRR 22 (ECtHR)	151
Sutcliffe v Pressdram Ltd [1991] 1 QB 153 (CA)	148
Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330, [2015] Ch 602	110
Takhar v Gracefield Developments Ltd [2019] UKSC 13	109
Thompson v Hill (1870) LR 5 CP 564 (CP)	148
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16, [2003] 2 AC 1	136
United City Merchants (Investments) Ltd v Royal Bank of Canada, The American Accord [1983] 1 AC 168 (HL)	110
Verrall v Great Yarmouth BC [1981] 1 QB 202 (CA)	122
Watkins v Secretary of State for the Home Department [2006] UKHL 17, [2006] 2 AC 395.....	137
Westdeutsche Landesbank v Islington LBC [1996] AC 669 (HL)	110
Wilkinson v Downton [1897] 2 QB 57 (QB)	119
Willers v Joyce [2016] UKSC 44, [2018] AC 779	182
Willis & Son, J v Willis [1986] 1 EGLR 62 (CA)	110
Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] AC 173 (HL)	122
With v O'Flanagan [1936] Ch 575 (CA).....	109
Wood v Leadbitter (1845) 13 M & W 838, 153 ER 351 (Exch)	122
Z v United Kingdom [2001] 2 FLR 612 (ECtHR)	136
Zurich Insurance Co plc v Hayward [2016] UKSC 48, [2017] AC 142	109

12

The Limits of Democracy

The title of this chapter is ambiguous. It could be read as referring to the limits that should be placed on the ability of majorities to determine the shape of the society they live in. A book on public law would probably refer to ‘the limits of democracy’ in that first sense.¹ However, as a private lawyer, I intend my chapter title to be read in a second way: as referring to the limits that democratic considerations place on how far unelected judges can go in developing private law, and as asking whether those limits would be breached by a judiciary that sought to develop private law so that it fostered QTL-flourishing, rather than RP-flourishing.

A simile will help explain the concern of this chapter. We can compare private law to a ship that is currently bound in a certain direction – that of promoting RP-flourishing. The passengers aboard the ship – the subjects of private law – are largely happy with where the ship is going. This is because the RP is ‘the RP’ – it is the picture of human flourishing that is widely endorsed in our society. However, suppose that the ship’s captain and crew – the judges – are convinced by the arguments in this book that the ship is currently bound in the wrong direction: the RP is a false picture of what human flourishing involves, and human flourishing actually consists in QTL-ing. Should they override the wishes of their passengers and alter the direction of the ship towards the goal of promoting the passengers’ QTL-flourishing? Or should they allow the passengers to dictate the ship’s course? – even though doing so is likely to result in the ship’s continuing on its current direction, a direction that the captain and crew now believe to be profoundly misguided.

The answer I will offer is a complex one, undemocratic in theory but democratic in practice. The ship’s captain and crew should do what *they* – and not the passengers – think is best in steering the ship. However, what happens to be best is that they continue on the course that the passengers currently want, which is in the direction of promoting RP-flourishing. Any change of course must wait on a general change of heart among the passengers: to change course any earlier than that would be unwise.

1. Six Positions

Let’s begin by considering how we might evaluate whether or not the judges should change private law in one way or another. Suppose that the courts are invited to develop

¹ See, for example, Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard UP, 1980); Allan, *The Sovereignty of Law* (OUP, 2013), ch 8; Lemieux and Watkins, *Judicial Review and Contemporary Democratic Theory* (Routledge, 2018).

private law in a particular way – let's call that development, δP. In judging whether or not the courts should δP, there are a number of different positions we might adopt:

- (A) The courts should δP if that would make things go best.²
- (B) The courts should δP if that would make things go best, but only if a majority of the subjects of private law would support the courts' doing this.
- (C) The courts should δP if that would make things go best, but only if doing so would not violate anyone's rights.
- (D) The courts should δP if that would make things go best, but only if doing so would be consistent with the subjects of private law thinking that they are being treated with equal concern and respect.
- (E) The courts should δP if that would make things go best, but only if δP represents an incremental change in the law.
- (F) The courts should δP if doing so would enhance the protection private law gives to its subjects' rights.

This is not, and is not meant to be, an exhaustive list of the positions that might be adopted when evaluating whether the courts should δP. However, this list seems representative of the positions that might realistically be adopted in evaluating whether the courts should δP.

In considering these positions, two points should be noted. First, it might be a matter of some controversy whether a given condition on the courts' δP-ing is satisfied. For example, (A) specifies that the courts should δP if that would make things go best – but who decides whether δP-ing will make things go best? In order to resolve this issue, let's stipulate that every 'if' in the above formulae is followed by 'the courts think'. Of course, some other viewpoint could be adopted. (A) could be read as saying that the courts should δP if the Vinerian Professor of English Law at Oxford University thinks that would make things go best. But this does not seem to be a position that might realistically be adopted. The only viewpoint that it seems to make sense to adopt in determining whether any of the above conditions on the courts' δP-ing are satisfied is that of the courts themselves.

Second, it should be noted that (B), (C) and (D) all place some kind of *democratic constraint* on the courts' δP-ing. The different constraints that they place on the courts' ability to δP reflect differing views as to what it means to live in a democracy. On one view, in a democracy, the majority should have the final word on issues about how the power of the state is to be deployed.³ On another view, in a democracy, individual rights limit how state

²The phrase 'make things go best' is borrowed from Parfit, *On What Matters: Volume One* (OUP, 2013), 22.

³Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960), ch 7; Waldron, *Law and Disagreement* (OUP, 1999), ch 11.

power may be deployed.⁴ On a third view, in a democracy, everyone must be treated in a way by the state that enables them to think that they are being treated with equal concern and respect.⁵ It should also be noted that while (E) does not place any kind of democratic constraint on our judgment as to whether or not the courts should δP , (E) is still *democratic in nature*, because it takes the view that radical changes to private law should be reserved to a democratically-elected legislature. By contrast, each of (A) and (F) are *undemocratic*. Neither (A) nor (F) places any kind of democratic constraint on when the courts should δP , and neither provides that certain changes in private law should only be made by a democratically-elected legislature.

So which position should we adopt in determining whether or not the courts should δP ? I will argue in favour of position (A), which we can now rename ‘the *Simple Formula*’. I will argue that the *Simple Formula* is superior to any of its rivals when it comes to providing a basis for evaluating a proposed judicial development in private law. If this is right, then the question of whether the courts should change private law so that it no longer promotes RP-flourishing but instead promotes QTL-flourishing along the lines proposed in the previous chapter falls to be determined by application of the undemocratic *Simple Formula*. If this is right, then the charge that changing private law in this way would be ‘undemocratic’ is irrelevant to the issue of whether the courts should effect such a change of direction in private law: the courts should simply do whatever they think would make things go best.

However, the question still remains whether changing private law so that it is concerned to foster QTL-flourishing rather than RP-flourishing *would* make things go best. I will answer that question in the negative: until there is a general change in social views as to the nature of human flourishing, away from identifying human flourishing with the RP and towards identifying human flourishing with QTL-ing, there is little point (and much to be said against) changing private law so that it fosters QTL-flourishing. I will then conclude by reflecting on the prospects of such a general change occurring in the foreseeable future.

2. The Superiority of the Simple Formula

Before we compare the *Simple Formula* with its rivals, we should say something about how the *Simple Formula* works. In applying the *Simple Formula*, the courts would be well-advised to employ what we can call the *no sacrifices heuristic*,⁶ which says that promoting

⁴ Rawls, *A Theory of Justice*, revised ed (Harvard UP, 1999), 53, and Rawls, *Justice as Fairness* (Harvard UP, 2001), 42, explaining that the first principle of justice governing the basic structure of a democratic society requires that the members of that society equally enjoy certain ‘basic rights and liberties’ such as freedom of thought, liberty of conscience, and freedom of association.

⁵ Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP, 1996), 17, and Dworkin, *Is Democracy Possible Here?* (Princeton UP, 2006), ch 5; Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (OUP, 2008), ch 3.

⁶ A heuristic is a quick device for finding a reasonable solution to a problem where finding the optimal solution to that problem would be impossible or take far too long. An example of a heuristic is the ‘Lindy’ heuristic popularised by Nassim Nicholas Taleb – and named after the New York deli where it was discovered – that a Broadway show that had run for 200 days could be expected to run for 200 days more, a show that had run for 100 days could be expected to run for 100 days longer, and so on. Taleb consequently dubs as ‘Lindy’ something that ages in reverse: the longer it lives, the longer it can be expected to live. See Taleb, *Skin in the Game* (Allen Lane, 2018), 141–43.

X's flourishing at the expense of Y's will be self-defeating; in other words, you can't promote one person's flourishing at the expense of another's. The *no sacrifices heuristic* may break down in certain extreme cases – all heuristics do – but the courts are much more likely to go right in giving effect to the *Simple Formula* if they apply the heuristic than if they don't.⁷ Employing the *no sacrifices heuristic* allows us to say a given change in private law – δP – will only make things go best if: (i) δP will enhance the capacities of some individuals to flourish as human beings and (ii) δP will not damage any other individuals' capacities to flourish as human beings.⁸

In light of this, let us match the *Simple Formula* for evaluating whether the courts should δP against each of its rivals, beginning with position (B), which says that the courts should δP if the courts think that would make things go best, but only if the courts think a majority of the subjects of private law would support the courts' doing this.

The Simple Formula versus (B)

In order to see whether we should prefer the *Simple Formula* to (B), or *vice versa*, we need to construct an argument as to when political power should be exercised in accordance with the wishes of the majority, and see whether that argument applies to the kind of exercise of political power that δP represents. Such an argument should not rest on, or appeal to, the ideas that people have certain basic political rights, or that people should be treated with equal concern and respect by those who govern them, as we will be testing the *Simple Formula* against ideas such as those when we come to positions (C) and (D). Can such an argument be made? I believe it can, and it goes as follows:

- (1) *The durability of political power.* The first step in the argument observes that however political power is acquired – at the point of a gun or through popular acclaim or through the accident of birth – political power is not likely to endure for very long unless the fact of its location is generally accepted by the subjects of that power. This was Gandhi's insight: 'even the most powerful cannot rule without the co-operation of the ruled.'⁹
- (2) *The inevitability of disagreement.* At the same time it is virtually inevitable that the subjects of political power will disagree among themselves as to how that power should be exercised. Diversities of background, upbringing, education, status, and taste, combined

⁷ The *no sacrifices heuristic* makes sense against the background of: (1) the first postulate of human flourishing, which holds that under reasonably favourable circumstances there should be no need to sacrifice anyone's flourishing to promote another's flourishing; (2) arguments (laid out in McBride, *The Humanity of Private Law, Part I: Explanation* (Hart Publishing, 2019), 100–07; also above, pp 52–53) for thinking that it would be difficult for anyone to flourish in a political community that did not seek to promote the flourishing of all of its members; (3) the dismal record, when it comes to promoting human flourishing, of governments that thought the saying 'you can't make an omelette without breaking eggs' was a useful guide to public policy.

⁸ In the language of the economists, δP will make things go best if δP represents a Pareto improvement.

⁹ Gandhi, 'Russia and India' *Indian Opinion*, 11 November 1905; *The Collected Works of Mahatma Gandhi, Volume 5: 1905–1906* (The Publications Division, Ministry of Information and Broadcasting, Government of India, 1961), 132.

with natural human weaknesses (in particular, the all-too-human tendency to identify what is in my interests with what is in the general interest) will inevitably result in different people adopting different views as to how political power should be exercised.

(3) *Preserving power through disagreement.* Confronted with subjects who disagree on how he should exercise the powers he holds over them, the holder of those powers (call him *Rex*) has a problem: however *Rex* exercises his powers, a significant number of those subjects will disagree with his choice and as a result – given point (1) – *Rex*'s continued hold on his powers will be endangered. How, then, can *Rex* exercise his powers without losing them?

(4) *Democracy as a solution.* One solution to *Rex*'s problem is to make it clear that he will exercise his powers in a way that is approved of by the majority of the subjects over whom *Rex* exercises those powers. Provided *Rex* proceeds fairly to ascertain the majority opinion among those subjects – and even better if *Rex* encourages those subjects to deliberate among themselves before expressing their opinion¹⁰ – *Rex* will be able to exercise his powers without endangering his continued hold on those powers. The majority of *Rex*'s subjects will obviously be happy that *Rex* has exercised his powers in accordance with their wishes; but, much more crucially, the minority who thought that *Rex* should have exercised his powers in some other way will also be happy that *Rex* exercised his powers in the way he did.¹¹ This is because they will think they had a fair chance of forming a majority themselves and winning *Rex* over to their side of the argument; and fair play dictates that they should accept their loss gracefully, just as they would have wanted the other side to have done if they had formed the majority – and which they may well still do, sometime later on down the line.¹²

(5) *Expertise as an alternative.* This democratic solution to *Rex*'s problem has its downsides. The first is that it makes *Rex* a cipher for the views of the majority of his subjects, thus diminishing his agency as the holder of political power. Second, the democratic solution will prove to be no solution at all if a significant number of *Rex*'s subjects are destined permanently to be in the minority. They will not think that they had a fair chance to form a majority themselves and therefore have no reason to feel happy with *Rex*'s giving effect to the wishes of the majority. Given this, *Rex* may cast around for a different solution to his problem of how to exercise his powers without endangering his continued hold on them. The alternative solution will be for *Rex* to persuade his subjects that he is in a better position than they are to determine how his powers should be exercised. If he is successful in persuading his subjects of his superior expertise in exercising his powers, those subjects could be expected to accept *Rex*'s decision to exercise his powers in a certain way, even though had they been in his shoes they might have exercised those powers differently.

¹⁰ Along the lines recommended in Gutmann and Thompson, *Democracy and Disagreement* (Harvard UP, 1996), ch 2; and Gutmann and Thompson, *Why Deliberative Democracy?* (Princeton UP, 2004), chs 1–4.

¹¹ Richard Wollheim identified this as 'A Paradox in the Theory of Democracy' in Laslett and Runciman (eds), *Philosophy, Politics and Society* (Blackwell, 1962), when it is in fact of the essence of democracy's value in ensuring political stability.

¹² Cf. Bickel, *The Morality of Consent* (Yale UP, 1977), arguing (at 15) that democracy functions 'not merely as a sharer of power, but as a generator of consent.'

(6) *Excursus: Burke's address to the electors of Bristol.* Edmund Burke's famous address to the electors in his Bristol constituency¹³ illustrates the two solutions to *Rex's* quandary. Burke's opponent opts for the first solution to preserving political power: 'My worthy colleague says, his Will ought to be subservient to yours.' But Burke opts for the second solution, the way of expertise, observing of the electors' representative that 'his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you ... Your Representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.' Burke goes on to attempt to vindicate his claims of superior expertise in deploying the political power entrusted him by the electors of Bristol: 'what sort of reason is that, in which the determination precedes the discussion; in which one sett of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?'

(7) *Conclusion.* If *Rex* wants to continue holding the political powers he currently holds over his subjects, he would be well-advised to make it clear that he will exercise those powers in a way consistent with the majority's opinion as to how those powers should be exercised *unless* he can convince his subjects that he enjoys a superior expertise to them in deciding how those powers should be exercised.

Applying this conclusion to the issue of whether (B) is a superior yardstick to the *Simple Formula* for determining whether the courts should δP, (B) should be preferred to the *Simple Formula* *unless* the courts can convince the subjects of private law that they possess a superior expertise to those subjects in determining how private law should be developed.¹⁴ Can they? The answer is 'Of course they can – and in fact, they already do.'

It is a striking fact of our current political order that there is virtually no general public interest in the state of private law or the question of how private law should be developed.¹⁵ This lack of interest is most easily accounted for on the ground that the public is convinced that the courts know best when it comes to private law, and there is little need for them to take an interest in the courts' performance in developing private law. It is easy to identify a number of reasons for this.

First, private law is very *technical*, and it is hard for a layperson to master its technicalities as a preliminary to taking a position on what private law should say. Second, private law is made up of a lot of *interlocking* rules and doctrines, with the result that it is hard to form a view of how private law should develop without first having spent a lot of time

¹³ Burke, 'Speech at the conclusion of the poll, 3 November 1774' in Elofson and Woods (eds), *The Writings and Speeches of Edmund Burke, Vol III: Party, Parliament and the American War 1774–80* (OUP, 1996), 68–70.

¹⁴ Lord Reid took the same position in 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law (New Series)* 22, 23, arguing that 'we must play safe [and] decide the case on the preponderance of authority [when it comes to] issues which the ordinary man regards as controversial. On many questions he will say: "That is the lawyers' job, let them get on with it." But on others he will say: "I ought to have my say in this. I am not going to accept dictation from the lawyers." The corollary of this position is that on issues which the 'ordinary man' does not regard as controversial, and as 'the lawyers' job' to get on with, the courts do not have to play safe at all, but can do what they think is best *à la* the *Simple Formula*.

¹⁵ It is even more striking that when political philosophers discuss the relationship between judges and democracy, their attention focuses exclusively on judicial controls on government action via judicial review; there is, so far as I can see, no discussion by a political philosopher of whether the judges should be more democratically accountable in developing private law.

and effort tracing the connections between the different parts of private law and how they interact. Third, private law is *long-standing*, with the result that the courts' claims to superior expertise in developing private law have been vindicated by prescription – ordinary people will feel that the courts must be doing something right if they have been allowed to develop private law for so long without noticeable disaster.¹⁶ Fourth, the costs of private law are *not obvious*. Obviously, in every private law case there are winners and losers, but it is not obvious that anyone or any class of individuals loses out overall as a result of the existence of private law. As a result, private law is viewed by ordinary people as a force for good, and therefore not something that they should concern themselves with.¹⁷

By contrast, when it comes to *public* law, the courts have a much harder time of it in terms of convincing ordinary people of their superior expertise in determining how public law should be developed, and consequently come under much more pressure to respect the majority of public opinion in developing public law.¹⁸ All of the features of private law that make private law a matter of little interest to members of the public are absent from public law; indeed, the precise opposite features figure large in public law and make the operation and development of public law something that members of the public feel able to have a view on.

First, public law is not technical. It consists in the repeated application of well-worn formulae derived from the common law and the European Convention on Human Rights to judge the legality of governmental action. It is therefore not difficult for a layperson to understand public law and form a view on it. Second, public law cases are fairly discrete – housing cases are not social security cases are not immigration cases. As a result, a layperson does not have to keep their eye on a lot of different moving parts within public law in order to form an intelligent view as to how public law is operating in a particular area of interest to them. Third, public law is very new – the modern common law of judicial review is only of about 50 years' standing, and the law on judicial review for violation of human rights standards is only about 20 years old – with the result that public law has simply had no chance to prove its worth in the public eye. Fourth, the costs of public law are obvious, in terms of the way public law – as it has been developed – hampers the government's ability to pursue its vision (which also may be the majority's vision) of the common good.

These features of public law mean that the courts may be well-advised to adhere to something like (B) in developing public law; otherwise, they may well be stripped of their powers to develop public law at all. By contrast, there is no need for the courts to adhere to (B) in developing private law. The courts' claims to superior expertise in developing private law are acknowledged by general public opinion, with the result that the courts' adhering to the *Simple Formula* in developing private law will not endanger the courts' continuing to have the power to develop private law.

¹⁶ Private law is a good example of something that is 'Lindy', in Nassim Nicholas Taleb's terms (n 6): the fact that it has been around for so long gives us reason that it will be around for a long time in the future.

¹⁷ Confirmation of this is provided by the fact that when private law is perceived by the public as being in danger of causing harm – such as when it is seen as encouraging a 'compensation culture' that discourages people from engaging in valuable activities for fear of being sued – then suddenly the public becomes very interested in private law, and measures such as s 1 of the Compensation Act 2006 have to be passed to address that public concern.

¹⁸ Cf of the concerns about the state of English public law articulated by Sumption, 'The Limits of Law' and Finnis, 'Judicial Law-making and the "Living" Instrumentalisation of the ECHR', both in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016).

The Simple Formula versus (C)

(C) says that the courts should δP if that would make things go best, but only if doing so would not violate anyone's rights. Ronald Dworkin's inspired characterisation of 'rights as trumps'¹⁹ might be taken as supporting (C) – that where making things go best comes into conflict with someone's rights, then that person's rights 'trump' our desire to make things go best.²⁰

However, we should recall that under the *no sacrifices heuristic* δP will only make things go best if (i) δP will enhance the capacities of some individuals to flourish as human beings and (ii) δP will not damage anyone else's capacities to flourish as human beings. If (i) and (ii) are true, it is hard to imagine that anyone could have a right that the courts not δP or – in other words – that the courts δP -ing would violate anyone's rights.²¹ If δP will do some people some good, and do no harm to anyone else, how could someone say that they have a right that such good not be done? Who could this 'someone' be? Clearly not, one would have thought, someone who belongs to the group of people who will suffer no harm as a result of the courts' δP -ing. So if someone has a right that the courts not δP , it must be someone in the group of people who will be *benefited* from the courts δP -ing. *Can* someone have a right not to have a benefit conferred on them?

The idea that there can be such a right seems to run up against the idea that the rights we have exist to protect our interests.²² If this is correct, the idea of your having a right that I *not act in your interests* seems paradoxical. However, what is normally called the 'Interest Theory' of rights is not the only game in town; it is opposed by the 'Will Theory' of rights, according to which your having a right against me involves my having a duty to act in a particular way and your having the power to control whether or not that duty exists.²³ On this view, your having a right that I not act in your interests boils down to my having a duty not to act in your interests unless you want me to do so. This seems less paradoxical.

For example, suppose that I discover that you are in financial trouble and owe £10,000 on your credit card, and you are £15,000 in the red on your current account (a sum that is far in excess of your overdraft limit). As I have money to burn (and also know your bank details), I sit down at my computer and with a few strokes on the keyboard I pay off your debts to the bank, and pay an extra £5,000 into your current account to give you a bit of a financial cushion. You react angrily to what I have done: 'It was very nice of you to pay off

¹⁹ Dworkin, *Taking Rights Seriously* (Harvard UP, 1977), xi; Dworkin, 'Rights as Trumps' in Waldron (ed), *Theories of Rights* (OUP, 1984).

²⁰ Note, however, that Dworkin himself did not mean for his phrase 'rights as trumps' to be read in this way, but rather saw people's rights as constraining the *kinds of reasons* that the government could act on, and in particular as constraining the government from failing to treat its subjects with equal concern and respect. So Dworkin's conception of 'rights as trumps' was meant to support (D) rather than (C). See Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *Journal of Legal Studies* 301.

²¹ Indeed, as we have seen, the dramatic change in private law that is contemplated in this book – private law's fostering QTL-flourishing rather than RP-flourishing – might bring about *greater* protection for traditional political rights such as freedom of speech: above, pp 120–30.

²² Raz, *The Morality of Freedom* (OUP, 1986), 166; Kramer, 'Rights Without Trimmings' in Kramer, Simmonds and Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (OUP, 1998).

²³ Hart, 'Legal Rights' in his *Essays on Bentham* (OUP, 1982), 184.

my debts, but you shouldn't have. My business is my business and if I had wanted your help I would have asked for it. Here is the extra £5,000 you paid into my account: I cannot accept it. Obviously, I can't afford to give you back the £25,000 you paid my bank, but I will try to repay it when I can.' This seems like an intelligible reaction to what I did, and supports the idea that you had a right (in the 'Will Theory' sense of the term) that I not act in your interests, at least on this occasion.

What might motivate such a furious reaction to my doing you a favour? What seems to underlie it is the threat to your independence that my paying the money into your bank account seems to pose. This threat seems to take two forms. First, it seems like I am treating you like a child. You have gotten into trouble and rather than allowing you to fix your own problems (or learn from the mistakes you have made), I have sorted them out for you without even asking for your say-so. Second, now that I have paid off your debts (and given you an extra £5,000 on top) you may feel that you now owe me in some as yet indefinable way – and that feeling of obligation may constrain you in your future dealings with me from treating me as you would if you owed me nothing.

So we can make sense of the idea of your having a right that I not act in your interests where my doing so would threaten your independence, either by treating you like a child, or by making you feel that you owe me something with knock-on effects on how you are able to relate to me in future. But does this support the idea that the courts' δP -ing – where δP will enhance some people's abilities to flourish as human beings, while not harming other people's abilities to flourish – might violate the rights of the group of people (call the group 'G') whose capacities to flourish are *enhanced* by the courts' δP -ing? It is hard to see that it does.

First, if the courts' δP -ing does have the effect of enhancing the capacities of the members of G to flourish as human beings, the members of G might well feel grateful to the courts for doing this, but it is hard to imagine that this sense of gratitude would threaten the future independence of the members of G. It is hardly likely that they will have any future dealings with the judges that were responsible for δP ; and even if they did, it is hard to imagine that sense of gratitude as seriously impinging on the way they relate to those judges.

Second, it is hard to see that the members of G are being treated like children if the courts' δP -ing enhances their capacities to flourish as human beings. This is particularly the case where the *only* way to enhance their capacities to flourish as human beings is through the courts' δP -ing. This case would be analogous to the situation where there has been a computer glitch at your bank and you are now *wrongly* accounted as owing £10,000 on your credit card and as being £15,000 in the red on your current account. You have tried to get the bank to remedy the error, but they are being obstructive. I learn from a mutual friend what has happened, and as I have some influence with the bank, I make representations on your behalf without your knowing about it. The bank responds to those representations by correcting the error in your accounts. I further suggest that the bank pay £5,000 in your account as compensation for your inconvenience, and the bank accedes to this suggestion. It is hard to imagine you would react furiously to my intervention in your case – and if you did, most reasonable people would think you were in the wrong to do so.

In light of these arguments, it seems like (C) adds nothing to the *Simple Formula*. If δP -ing would make things go best, δP -ing will not violate anyone's rights. It follows that we have no reason to prefer (C) to the *Simple Formula*.

The Simple Formula versus (D)

(D) says that the courts should δP if that would make things go best, but only if doing so would be consistent with the subjects of private law thinking that they are being treated with equal concern and respect. At first sight, it seems like (D) falls foul of the same problem as (C) – if the courts' δP -ing would make things go best, then it is hard to see how the courts' δP -ing would involve them in failing to treat the subjects of private law with equal concern and respect. As such, (D) seems – like (C) – to add nothing to the *Simple Formula*.

However, it may be that (D) comes into its own if and when the courts contemplate the kind of δP that is the concern of this book – that of altering the rules and doctrines of private law so that it no longer fosters RP-flourishing, but instead fosters QTL-flourishing. Let's assume that such a change will make it harder for people to enjoy an RP-flourishing life, and easier for people to QTL. Would such a change involve treating individuals who identify human flourishing with RP-flourishing with less concern and respect than individuals who identify human flourishing with QTL-ing? Ronald Dworkin thought that it would:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods and opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality ...²⁴

In Dworkin's view, the kind of δP contemplated in this book would not necessarily involve a failure of concern, but it would involve a failure of *respect*. It would involve the courts in showing a preference for one kind of life over another, and distributing private law rights and duties, powers and liabilities in order to facilitate the preferred lifestyle at the expense of people's abilities to lead the disfavoured lifestyle. But does doing this actually involve a failure of respect, and if so is that something that should concern us?

Dworkin says that (1) 'Governments must treat those whom it governs with ... respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived' and (2) a government's treating its subjects with *equal* respect means that it 'must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's'.²⁵ However, (2) does not seem to follow from (1).

(1) seems to suggest that treating A and B with *equal* respect means acknowledging that *both* A and B are *capable* of 'forming and acting on intelligent conceptions of how their lives should be lived.' But if I am capable of doing *x* then – by definition – I am also capable of failing to do *x*.²⁶ Moreover, if the issue of how to live one's life is something that can be the

²⁴ Dworkin, 'What Rights Do We Have?' in Dworkin, *Taking Rights Seriously* (n 19), 272–73.

²⁵ *Ibid.*

²⁶ Cf an analogous point about law made by John Gardner: that law cannot *aim* to be morally justified if law is morally justified, because aiming entails the possibility of failure. See Gardner, 'Law's Aims in *Law's Empire*' in Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP, 2008), 216.

subject of intellectual reasoning – as Dworkin suggests it is, by acknowledging that conceptions of how one's life should be lived can be 'intelligent' – then it is possible for someone to reach a conclusion on that issue that is both intelligent, in that they reached that conclusion by engaging in intellectual reasoning, and *wrong*, in that that conclusion was arrived at through a process of intellectual reasoning that went awry somewhere along the way.

So a government that acknowledges that both A and B are capable of 'forming and acting on intelligent conceptions of how their lives should be lived' will acknowledge that (R) is true, where (R) says:

(R) It is possible that A will (i) succeed in forming and acting on an intelligent conception of how his life should be lived; but it is also possible that A will (ii) fail to form and act on an intelligent conception of how his life should be lived. And even if A does (i), A's intelligent conception of how his life should be lived may be right, but it may also be wrong. And everything that is true of A will also be true of B.

What does a government's acknowledging (R) is true entail for how it treats A and B? Nothing at all, so far as I can see, when it comes to treating A and B with *equal respect*. Certainly, there is no reason why a government that acknowledges that (R) is true would end up concluding that it must not 'constrain liberty' on the ground that A's conception of the good life 'is nobler or superior' to B's. But a government that acknowledges that (R) is true may well conclude that so far as treating A and B with *equal concern* is involved, it is required to do what it can to help maximise the chances of both A and B's succeeding in forming and acting on an intelligent and accurate conception of how their lives should be lived.

So a government treats its subjects with equal respect when it acknowledges that human fallibilities and frailties are such that *all* of its subjects need all the help they can get to flourish as human beings; and it treats its subjects with equal concern when it provides *all* of its subjects with the help they need to flourish as human beings. Given this, it is hard to see how giving effect to a δP that will enhance people's chances of succeeding in flourishing as human beings could involve a failure to treat the subjects of private law with equal concern and respect.

Is there some other way of establishing that a δP that involves private law seeking not to foster RP-flourishing but fostering QTL-flourishing instead shows a lack of respect for those who identify human flourishing with RP-flourishing? One way might be to argue that such a δP suggests that those who identify human flourishing with RP-flourishing are *stupid*. There is therefore an element of insult involved in the kind of δP we are currently considering. However, this argument does not work. To suggest that someone's position on a particular issue is wrong, and to proceed on that basis, is *not* to suggest that that person is stupid.²⁷ Dworkin himself acknowledged this to be the case when he observed that 'My understanding of human dignity might be defective. You must judge for yourself and, if necessary, correct my account.'²⁸ Intelligent people – and they do not come much more intelligent than Dworkin – can be wrong, and no insult or disrespect is involved in making that observation.

²⁷ Cf Christiano, *The Constitution of Equality* (n 5), 225: 'one does not treat another person as inferior merely by thinking that some or even many of their ideas are less defensible than one's own. Indeed, one can think of another as superior ... while rejecting their particular views.'

²⁸ Dworkin, *Justice for Hedgehogs* (Harvard UP, 2011), 338.

Second, it might be argued that the kind of δP we are considering *will* – whether we like it or not – have the effect of causing those who identify human flourishing with RP-flourishing to feel disrespected by their government, in that they will feel like they are second-class citizens in their own country. Whatever one's conception of human flourishing, this must count as a significant harm. As Joseph Raz observes:

the very ability to identify with one's society is an independent background good, and feeling alienated from it is a significant handicap. They have a considerable, often imperceptible impact on people's ability to engage in activities involving relations with other people, or contributions to their well-being or to the common good.²⁹

Let's call the harm of feeling like a second-class citizen in one's own country, *alienation*. The fact that a δP that involves private law seeking to foster QTL-flourishing rather than RP-flourishing may result in people who identify human flourishing with RP-flourishing suffering the harm of alienation does *not* require us to endorse (D) in relation to this kind of δP . This is because the fact that people may suffer the harm of alienation as a result of this kind of δP is something that can and should be taken into account under the *Simple Formula* in judging whether or not that δP will make things go best. After all, under the *no sacrifices heuristic* a δP will *not* be judged to make things go best if it promotes some people's capacities to flourish as human beings at the expense of harming other people's capacities to flourish.

So even in relation to a major δP – such as private law's switching from seeking to foster RP-flourishing to fostering QTL-flourishing – (D) adds nothing to the *Simple Formula*, just as it adds nothing to the *Simple Formula* in cases where a minor δP is adjudged to make things go best. Given this, we should prefer the *Simple Formula* to (D), while at the same time acknowledging that our reflecting on (D) has resulted in a warning flag being posted in relation to the major δP discussed in this book – it may be that such a δP will not make things go best because bringing it about will cause people to suffer the harm of alienation. This is a topic that we will return to in the next major section of this chapter. But for the time being, we continue to evaluate the *Simple Formula* against its rivals.

The Simple Formula versus (E)

(E) says that the courts should δP if that would make things go best, but only if δP represents an incremental change in the law. Some judges support (E), but equally other judges do not. Lord Reid observed that:

[In the] Appeal Court ... broadly speaking you will find three lines of approach. There are those who used to be referred to as black letter lawyers; careful men who like to go by the book or, if you like, Lord Denning's 'timid souls'.³⁰ Then there are those who want to press on, by the nature

²⁹ Raz, 'Free Expression and Personal Identification' (1991) 11 *OJLS* 303, 314. See also Christiano, *The Constitution of Equality* (n 5), 61–63 (on people's interest in 'being at home in the world').

³⁰ This refers to Denning LJ's judgment in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178: 'This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v White*, *Pasley v Freeman* and *Donoghue v Stevenson* you will find in each of them the

legal reformers. And lastly there are those who are impatient with technicalities and who are not content unless common sense prevails.³¹

Judges in the first group could be expected to support (E), while judges in the second or third group would not – they would support the *Simple Formula*.

Of the judges who have recently sat in the UK Supreme Court, Lord Reed serves as a model of a judge who seems to support (E), while Lord Toulson seemed to reject (E) in favour of the *Simple Formula*.³² For example, in *Robinson v Chief Constable of West Yorkshire*,³³ Lord Reed rejected the idea that the courts could or should determine whether or not a defendant owed a claimant a duty of care by simply asking whether it would be ‘fair, just and reasonable’ to find that such a duty of care was owed. Instead, he argued that in cases where ‘it has clearly been established that a duty of care is or is not owed’ the courts should simply give effect to the established position and refuse to consider ‘whether the existence of the duty is fair, just and reasonable’ unless the case is being heard in the UK Supreme Court and the court is being ‘invited to depart from an established line of authority’.³⁴ In novel cases where it has not been established whether or not a duty of care is owed, Lord Reed recommended that the courts adopt ‘the characteristic approach of the common law in such situations [which is] to develop incrementally and by analogy with established authority’.³⁵

Writing extra-judicially about the law of restitution, Lord Reed observed that ‘academic scholarship which adopts an abstract and universalising approach to legal problems seems to me to be less useful to a judge than scholarship which demonstrates an awareness that legal problems are situated at a particular time and place and that they require an approach to their resolution which is concrete and particular’.³⁶ As a result, he counselled against attempting to reduce down the law of restitution to a set of mechanical formulae that could be applied across the board to all cases involving a claim for restitution,³⁷ endorsing instead Lord Walker’s observation in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* that ‘it is of the nature of the common law to develop slowly, and attempts at dramatic simplification may turn out to have been premature and indeed mistaken’.³⁸

Lord Reed’s incremental approach to the law of restitution is well-demonstrated by his judgments in *Investment Trust Companies v Revenue and Customs Commissioners*³⁹ and *Prudential Assurance Co Ltd v Revenue and Customers Commissioners*.⁴⁰ In the ITC case,

judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

³¹ Lord Reid, ‘The Judge as Law Maker’ (n 13), 22–23.

³² As of the time of writing (August 2019), Lord Reed is poised to become President of the UK Supreme Court. Lord Toulson served on the UK Supreme Court for just over three years, retiring from the court on 22 September 2016. He tragically died while having heart surgery less than a year later, on 27 June 2017.

³³ [2018] AC 736.

³⁴ Ibid, [26].

³⁵ Ibid, [27].

³⁶ Reed, ‘Theory and Practice’ in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016), 313.

³⁷ Ibid, 316.

³⁸ [2007] 1 AC 558, at [156].

³⁹ [2018] AC 275.

⁴⁰ [2018] UKSC 39.

Lord Reed observed that ‘A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis’⁴¹ and that ‘the adoption of the concept of unjust enrichment … does not provide the courts with a tabula rasa, entitling them to disregard all authorities pre-dating’⁴² the case that adopted that concept as a ground of liability.

In *Prudential Assurance*, Lord Reed (together with Lords Hodge and Mance) departed from the House of Lords’ decision in *Sempra Metals Ltd v Inland Revenue Commissioners*,⁴³ which decided – only 10 years before *Prudential Assurance* – that compound interest could be awarded against a defendant who was liable to make restitution of money paid by mistake to the defendant. Lord Reed assailed the decision in *Sempra Metals* as illustrating ‘the risks of effecting major changes to the law of restitution through judicial decision’⁴⁴ and as inconsistent ‘with a long-established understanding of, first, the nature of the cause of action based on a mistaken payment, and secondly, the basis on which interest is payable.’⁴⁵ Lord Reed also quoted with approval from Lord Mance’s dissenting judgment in *Sempra Metals*, where Lord Mance ‘cautioned against a radical reshaping of the law, observing … that “we must navigate using the reference points of precedent, Parliamentary intervention and analogy, and we should bear in mind the limitations of judicial knowledge and the assistance provided by a series of Law Commission reports.”’⁴⁶

Lord Toulson was altogether more swashbuckling in his approach to developing private law, no more so than in *Patel v Mirza*,⁴⁷ where he pushed the doctrine of precedent to its absolute limit (and some would say beyond its limits) not only in seeking to reformulate the law on when a claimant’s illegal act would bar the claimant from bringing a claim in the case at hand – a claim for restitution of money paid for a consideration that failed – but also in seeking to use his decision to reformulate how the defence of illegality would apply in *all* private law cases.

Lord Toulson ruled that a ‘court which is considering the application of the common law doctrine of illegality [should] have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed.’⁴⁸ Lord Toulson rejected the criticism that this ‘relatively flexible approach’ to the defence of illegality ‘would create unacceptable uncertainty’ on the basis that he was ‘not aware of evidence that uncertainty has been a source of serious problems in those jurisdictions which have taken’ the same approach, and that while ‘there are areas where certainty is particular important’ the law on when a defence of illegality to a private law claim can be raised is not one of them.⁴⁹

⁴¹ [2018] AC 275, at [39].

⁴² *Ibid.* at [40].

⁴³ [2008] AC 561.

⁴⁴ [2018] UKSC 39, at [63].

⁴⁵ *Ibid.* at [75].

⁴⁶ *Ibid.* at [53], quoting from [2008] AC 561, at [205].

⁴⁷ [2017] AC 467.

⁴⁸ *Ibid.* at [109].

⁴⁹ *Ibid.* at [114].

The same bold approach to developing private law is evident in Lord Toulson's judgments in *Willers v Joyce*,⁵⁰ *AIB Group (UK) plc v Mark Redler & Co Solicitors*,⁵¹ and *Mohamud v Wm Morrison Supermarkets plc*.⁵²

In *Willers*, Lord Toulson recognised a new tort of maliciously instituting civil proceedings against another, in the teeth of objections that doing so was 'unwarranted by authority, unjustified in principle and undesirable in practice'.⁵³ Lord Toulson recognised this new tort because 'It seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for [that] injury' and because he was not convinced there existed any 'countervailing factors such that [the tort of malicious prosecution's] applicability to civil proceedings should be limited ...'.⁵⁴

In *AIB*, Lord Toulson ruled that where a trustee paid out money to another in breach of trust pursuant to a commercial transaction, the trustee should not – as traditional equitable principles might suggest – be held liable to restore the misallocated money to the trust fund, but instead 'the extent of the equitable compensation [payable] should be the same as if damages for breach of contract were sought at common law.' This was because 'the fact that the trust was part of the machinery for the performance of a contract is relevant as a fact in looking at what loss the [claimant] suffered by reason of the breach of trust ...'.⁵⁵ As a result, the trustee would only be held liable for any loss that would not have happened had he applied the trust money correctly.

In *Mohamud*, Lord Toulson – in, effectively, only one paragraph of his judgment and without citation of any supporting authority – extended the scope of an employer's vicarious liability for the torts of his employee to the case where there was 'an unbroken sequence of events'⁵⁶ between the employee's doing something he was supposed to do for his employer (in *Mohamud*, serving a customer) and the employee's tort (in this case, following the customer into a car park and subjecting him to a vicious and racist assault). The result of the decision in *Mohamud* was an extension of the scope of the law on vicarious liability far beyond its previous bounds, under which an employer could be held vicariously liable for an employee's tort not only where the employee did something he was employed to do by committing that tort, but also where the nature of the employee's employment created a 'special risk' that he might commit that kind of tort.⁵⁷

However, it may be over-simplistic to pigeonhole Lord Reed as a cautious incrementalist and Lord Toulson as a reforming 'bold spirit'. After all, it was Lord Toulson's adoption in *Michael v Chief Constable of South Wales* of an incremental approach to finding a duty of

⁵⁰ [2018] AC 779.

⁵¹ [2015] AC 1503.

⁵² [2016] AC 677.

⁵³ [2018] AC 779, at [174] (per Lord Sumption, dissenting). Lords Neuberger, Mance and Reed also dissented. In his brief judgment, Lord Reed argued that 'major steps in the development of the common law should not be taken without careful consideration of the implications, however much sympathy one may feel for the particular claimant' (*ibid*, at [184]).

⁵⁴ *Ibid*, at [43]; also [57].

⁵⁵ [2015] AC 1503, at [71].

⁵⁶ [2016] AC 677, at [47].

⁵⁷ *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

care in negligence⁵⁸ that underpinned Lord Reed's later endorsement of that approach in the *Robinson* case. And it was Lord Reed who delivered the *extremely bold* decision of the UK Supreme Court in *Armes v Nottinghamshire County Council*,⁵⁹ to find a local authority vicariously liable for tortious acts of physical and sexual abuse carried out by foster parents with whom the defendant local authority had placed the claimant victims of those acts of abuse. The decision in *Armes* has been widely criticised, with one commentator claiming that the decision 'affirms that the law of England and Wales concerning vicarious liability is long on policy, and short on principle'⁶⁰ and is 'now no more than a blunt tool for giving effect to judicial instincts for social justice'.⁶¹

The fact that judges who instinctively give effect to the *Simple Formula* sometimes act as though they endorse (E), and judges who are temperamentally inclined to endorse (E) sometimes find themselves giving effect to the *Simple Formula* in developing private law, suggests that (E) and the *Simple Formula* are not so opposed as might first appear.

Rather, it could be argued (and I would argue) that (E) adds nothing to the *Simple Formula*. Instead, (E) represents a check on the application of the *Simple Formula*: (E) reminds the judges that when they are considering effecting a major development in private law, their capacity to determine whether such a change will make things go best is limited and advises them that that kind of change in private law would be better made by Parliament or a law reform body, which will be in a better position than they are to evaluate the consequences of that change. Some judges, like Lord Reed, usually heed the advice (E) gives them and steer clear of making major changes in private law; but they occasionally disregard that advice, as Lord Reed did in *Armes*. Other judges, like Lord Toulson (or Lord Denning), are bolder and usually are not deterred by (E)'s advice from relying on their own judgment to decide whether a major development in the law will make things go best. But sometimes they will heed the advice given them by (E), as Lord Toulson did in *Michael*,⁶² and leave a proposed major change in private law to Parliament.

If (E) adds nothing to the *Simple Formula*, but merely represents advice as to how the courts should give effect to the *Simple Formula*, we have no reason to prefer (E) to the *Simple Formula*. This now leaves only (F) as a potential rival to the *Simple Formula* for providing us with a basis for determining whether or not the courts should δP.

The Simple Formula versus (F)

(F) says that the courts should δP if doing so would enhance the protection private law gives to its subjects' rights. In trying to make sense of (F) we immediately run into the problem of determining what is meant by the *rights* of the subjects of private law. However,

⁵⁸ [2015] AC 1732, at [102] ('The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable?')

⁵⁹ [2018] AC 355.

⁶⁰ Dickinson, 'Fostering Uncertainty in the Law of Tort' (2018) 134 LQR 359, 359.

⁶¹ *Ibid*, 363.

⁶² For an example of Lord Denning doing the same, see *Combe v Combe* [1951] 2 KB 215.

the definitional work done in Part I of this project⁶³ allows us to make short work of this question. *Rights* could mean, in relation to the subjects of private law:

- (1) Those subjects' *interests* that are currently protected under private law, and which result in some people saying that the subjects of private law have a 'right to ...' liberty, or personal security, or their possessions, and so on.
- (2) The things that those subjects have a 'right to ...' in a *Kantian way*.⁶⁴ In other words, the means that Kantians think belong to a subject of private law (such as her body and her property).
- (3) The legal 'rights that ...' those subjects have under private law that other people act in particular ways.
- (4) The *Kantian* 'right that ...' those subjects have under the Kantian Doctrine of Right that other people not violate their independence as persons.

Of these possible meanings, we should instantly dismiss (3). Under meaning (3), (F) says that the courts should δP if doing so would enhance the protection private law gives to its subjects' private law rights (whatever they currently happen to be) that other people act in particular ways. It is very hard to see why the courts' powers to δP should be limited in this way. In fact, virtually any proposed δP would be ruled out on this version of (F).

This leaves us with three possible versions of (F). Under two of those versions (those supplied by meanings (2) and (4) of the word *rights*), the courts should only δP where their δP-ing would develop private law in a way approved of by Kantians. Under meaning (2), the courts should only δP when doing so would enhance the protection private law gives to those things that Kantians think belong to a subject of private law, such as their body or their property. Under meaning (4), the courts should only δP when doing so would enhance the protection private law gives to people's 'rights to independence'.

It is hard to imagine these versions of (F) appealing to anyone but Kantians. The version of (F) supplied by meaning (2) would rule out a δP that would enhance the protections private law gives to people's privacy (unless a Kantian argument can be made that people's privacy belongs to them). The version of (F) supplied by meaning (4) would rule out a δP that would impose a duty of easy rescue on people who are well placed at no inconvenience to themselves to save a stranger from harm. Instead of asking and debating – as we would under the *Simple Formula* – whether such developments in private law would make things go best, such developments would simply be forbidden to the courts under these versions of (F).

Quite right too, would be the response of the Kantians. But if the arguments made in Part I of this project are correct, and Kantian explanations do not in fact provide the most satisfying and perspicuous explanations of English private law in its current state, then accepting either of these versions of (F) would have the effect of rendering English private law deeply incoherent. If, as Ronald Dworkin argued, the common law in any jurisdiction can be compared with a 'chain novel' where each generation of judges attempts to develop the law in a way that is continuous with the efforts of their predecessors,⁶⁵ then requiring

⁶³ See McBride, *The Humanity of Private Law, Part I* (n 7), 43–54.

⁶⁴ For this use of the term 'right to ...', see *ibid*, 51–54.

⁶⁵ Dworkin, *Law's Empire* (Harvard UP, 1986), 229.

the courts *now* only to develop private law in ways that are stamped with the Kantian seal of approval would be akin to George Eliot's turning Dorothea Casaubon into a vampire halfway through *Middlemarch*.⁶⁶ Private law could no longer claim to amount to a body of law that treats everyone's cases alike under a coherent set of rules and principles. As a result, private law's legitimacy and therefore its effectiveness would come into question.

In light of this, the already unappealing Kantian versions of (F) become appalling and should be rejected. This leaves only the version of (F) that is produced by meaning (1) of the word *rights*, under which the courts should only δP if doing so would enhance the protection that private law gives to the interests of its subjects that it already protects. It is hard to see this version of (F) as having any intelligible appeal – if private law is currently failing to protect some acknowledged interest of one of its subjects, why shouldn't the courts develop private law so that it protects that interest? – but even if we think it does, (F) still adds nothing to the *Simple Formula*. If the arguments made in Part I of this project are correct, then the ultimate interest of its subjects that private law protects is their interest in flourishing as human beings. So – according to this version of (F) – the courts should only δP if doing so will enhance the protection private law gives to its subjects' flourishing as human beings. But that is exactly what the *Simple Formula* says.

Conclusion

The *Simple Formula* has triumphed over all its rivals. When it comes to a proposed development in private law – δP – the courts should δP if doing so would make things go best, where δP will make things go best if (i) δP would enhance the capacities of some of its subjects to flourish as human beings, and (ii) δP would not damage the capacities of anyone else to flourish. The first hurdle in the way of private law's being developed so that it promotes QTL-flourishing rather than RP-flourishing can be surmounted. The possibility that such a change in the law – occurring as it would at a time when most people identify their flourishing with RP-flourishing rather than QTL-ing – would be 'undemocratic' is neither here nor there. The only question is whether developing private law in this way would make things go best. It is to that question that we now turn.

3. The Need to Choose

Ronald Dworkin distinguished between 'two types or classes of political decisions: those involving mainly what I shall call *choice-sensitive* issues, and those involving mainly *choice-insensitive* ones'.⁶⁷

Choice-sensitive issues, he explained, 'are those whose correct solution ... depends essentially on the character and distribution of preferences within the political community'.⁶⁸ He offered the question of 'whether to use available public funds to build a new sports center

⁶⁶ At least in Seth Grahame-Smith's *Pride and Prejudice and Zombies* (Quirk Books, 2009), the existence of zombies in Regency England is acknowledged in the very first line of the book.

⁶⁷ Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard UP, 2000), 204.

⁶⁸ Ibid.

or a new road system' as an example of a choice-sensitive issue, on the ground that 'information about how many citizens want to use or will benefit directly or indirectly from each of the rival facilities is plainly relevant, and may well be decisive'⁶⁹ to the issue of how the public funds should be used. By contrast, a choice-insensitive issue is one whose correct solution does not depend on people's preferences. So 'the decision whether to kill convicted murderers or to outlaw racial discrimination' is choice-insensitive because the right decision on these issues does not depend on 'how many people want or approve of capital punishment or think racial discrimination is unjust'.⁷⁰

Dworkin went on to suggest that allowing political issues to be resolved by majority vote makes most sense in relation to choice-sensitive issues, and that if we allow choice-insensitive issues to be similarly resolved that is because of the symbolic, negative impact that denying people a vote on those issues would have.⁷¹

I want to suggest in this section that the issue of whether developing private law so that it fosters QTL-flourishing rather than RP-flourishing will make things go best is choice-sensitive, in this way: it depends on how many of the subjects of private law identify human flourishing with QTL-flourishing rather than RP-flourishing. For ease of discussion, let's call the ΔP that involves private law's seeking to foster QTL-flourishing rather than RP-flourishing, ' ΔP '. And let's consider five cases, set out in the following table.

CASES	Percentage of private law's subjects who identify human flourishing with	
	RP-flourishing	QTL-flourishing
(1)	100	0
(2)	70	30
(3)	40	60
(4)	10	90
(5)	0	100

As in the previous section, we will apply the *no sacrifices heuristic* and proceed on the basis that ΔP will make things go best if and only if: (i) ΔP will enhance some people's capacities for flourishing as human beings, and (ii) ΔP will not damage other people's capacities for flourishing.

We begin by focussing on Case (1), which describes our current situation: all (or as good as all) of private law's subjects identify their flourishing with RP-flourishing. The discussion in the previous section gives us a couple of reasons for thinking that (ii) will not be satisfied if ΔP occurs in Case (1).

First, such a ΔP is likely to result in private law's subjects suffering the undoubted harm of *alienation*, of feeling that they are being treated as second-class citizens in their own country. Alienation is an undoubted harm because it counts as a harm whatever one's

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Dworkin, *Sovereign Virtue* (n 67), 205–07.

conception of what human flourishing involves. It counts as a harm if human flourishing is identified with RP-flourishing, because being able to mix with other people without shame is an important secondary good that one has to enjoy in order to enjoy the primary goods that make up RP-flourishing.⁷² It counts as a harm if human flourishing identified with QTL-flourishing because alienation impairs someone's ability to form productive relationships with other people, and threatens to cause the alienated individual to adopt a falsely negative view of him or herself.

Second, if ΔP occurs in Case (1), when private law's subjects identify their flourishing with RP-flourishing, then private law would become as politically controversial as public law is at the moment. The result would be that the courts' abilities to develop private law so as to make things go best would come under threat when the nature of private law – its technicality and the fact that its different parts interlock – means that only the courts have, or will ever have, the expertise to develop private law in a way that will make things go best. Should that threat materialise and the courts be permanently prevented from further developing private law by legislation that provides, for example, that no new torts will be recognised and that all validly made contracts will be given effect to in full unless doing so offends against some statutory provision, private law would quickly lose what effectiveness it has to make things go best and would become an irrelevant relic of the past.

So we have good reason to think (ii) would not be satisfied in respect of ΔP in Case (1). It is therefore likely that under the *no sacrifices heuristic* such a ΔP will not make things go best. And even if we dispense with the *no sacrifices heuristic*, we will reach the same conclusion. This is because (i) will not be satisfied: there will be *no benefits* from ΔP , in terms of enhancing people's capacities for human flourishing.

The reason why ΔP would yield no benefits in Case (1) is rooted in the fact that human flourishing is like eating or sleeping or reading. No one can do it for you: you have to do it yourself. This is why no government can *make* its subjects flourish as human beings: all it can do is *assist* them to flourish by creating the right conditions within which people can do what they need to do to flourish as human beings. This point is sometimes obscured by Possessions Models of human flourishing, which tend to suggest that flourishing is simply a matter of having the right goods in one's life. However, even under a Possessions Model of human flourishing, you cannot be counted as flourishing unless you *hold on* to the goods that are constitutive of your flourishing: and that holding on is something only you can do yourself. And the point that human flourishing is something that you have to do yourself is obvious if we adopt a Service Model or Journey Model of human flourishing. So, for example, if it is the case (as I have contended) that the essence of human flourishing is being engaged in a quest to lead a truthful life, you cannot be said to be engaged in such a quest unless you have chosen to engage in that kind of quest. You cannot engage in a quest by accident.

The implication is that if I identify my flourishing as a human being with RP-flourishing, I will be *incapable* of QTL-flourishing. You can, of course, try to assist me in all sorts of ways to engage in a quest to lead a truthful life, but unless I believe that my flourishing depends

⁷² See McBride, *The Humanity of Private Law, Part I: Explanation* (n 7), 98, 124.

on my engaging in such a quest, the idea of engaging in such a quest will never occur to me, or if it does, the idea will strike me as literally *quixotic*.⁷³ If this is right, it is futile for the courts to ΔP in Case (1). The assistance private law will provide those subjects to QTL-flourish will be of no assistance at all until those subjects begin to identify their flourishing with QTL-flourishing.

How many subjects of private law would need to undergo this change of heart before we can say that ΔP will make things go best? To deal with this question, let's move on to consider Cases (2), (3) and (4). Applying the *no sacrifices heuristic* may lead us to conclude that ΔP will not make things go best in *any* of these cases. This is because in all these cases it could be argued that ΔP will damage the flourishing of those who identify their flourishing with RP-flourishing by alienating them from the society they live in. As a result, we will be unable to find that ΔP will make things go best in Cases (2), (3) or (4). We can only be confident that ΔP will make things go best in Case (5), where 100 per cent of private law's subjects identify their flourishing with QTL-flourishing.

This position is so extreme that it casts doubt on the validity of the argument that has led to its being adopted. The fault lies not in the *no sacrifices heuristic* but in the fact that the blame for the feelings of alienation suffered by those who identify their flourishing with RP-flourishing is laid at the door of ΔP in *each* of Cases (2), (3) and (4). This seems unreasonable.

For example, suppose that *Linus* and *Lucy* are siblings, and they both live in their parents' house. *Linus* wants to listen to death metal music in his room, turned up to 11. *Lucy* wants to practise playing the tuba for her school band and orchestra. Their parents forbid *Linus* to listen to death metal music unless he uses headphones (which he complains may result in his hearing being damaged), but they encourage *Lucy* to practise as much as possible on the tuba. Faced with this difference in treatment, *Linus* may well feel alienated from his parents and find it harder to identify with his home as *his* home. If it's *his* home, he may think, how come *Lucy* gets to do what she wants to do, when he isn't allowed to do what he wants to do? The reality is, he might conclude, that it's really *Lucy's* home, and he's just staying in it until he can afford to get out and get his own place. While *Linus*'s feelings of alienation are understandable, they are also unreasonable. They fail to take into account the reasons why the parents might discriminate between listening to death metal music and playing the tuba, and that failure is something for which *Linus* can justly be blamed. So any feelings of alienation *Linus* experiences are *his* fault, not his parents' fault.

In light of this, let's now return to our three cases. In Case (2) the feelings of alienation that will be experienced by the 70 per cent who identify their flourishing with RP-flourishing when ΔP occurs will be both understandable and reasonable. General faith in the 'wisdom of crowds' – another heuristic – will mean that the 70 per cent will have no reason to think that their conception of human flourishing is defective in anyway. As a result, it will be reasonable for them to experience ΔP as an unwelcome and unwarranted judicial coup; and

⁷³ The eponymous hero of Miguel de Cervantes' novel *Don Quixote* (1605–15) engages in a quest to become a knight errant at a time that had outgrown such *folies de grandeur*. Cf. Unamuno, *Tragic Sense of Life* (Macmillan, 1921), 329: 'What, then, is the mission of Don Quixote, today, in this world? To cry aloud, to cry aloud in the wilderness. But though men hear not, the wilderness hears, and one day it will be transformed into a resounding forest, and this solitary voice that goes scattering over the wilderness like seed, will fructify into a gigantic cedar, which with its hundred thousand tongues will sing an eternal hosanna to the Lord of life and death' (trans Crawford Flitch).

their resulting feelings of alienation will be something for which ΔP can justly be blamed. In Case (4) the position is reversed. The 10 per cent who still identify their flourishing with RP-flourishing have every reason to question whether their conception of human flourishing is correct and to search out arguments – such as those made in this book – that establish that it is not. Their failure to do so is something for which they can be blamed, with the result that the feelings of alienation that they experience when ΔP occurs cannot be laid at the door of ΔP . Case (3) is obviously more marginal, and my view is that it is more akin to Case (2) than Case (4), with the result that the 40 per cent's feelings of alienation from private law after ΔP occurs are the fault of ΔP , and are not due to the failings of the 40 per cent.

It follows that if ΔP is not to cause any flourishing-impairing feelings of alienation for which ΔP can rightly be blamed, there must first exist a super-majority of subjects of private law (around 75 per cent?) who identify their flourishing with QTL-flourishing. If such a super-majority exists, there will also be little likelihood of ΔP bringing private law into such political disrepute that a flourishing-impairing threat to future judicial control over the development of private law will be created. So ΔP will make things go best – in the sense of enhancing people's capacities to flourish as human beings without at the same time being responsible for other people's capacities to flourish being damaged – when there exists a super-majority of subjects of private law who identify their flourishing with QTL-flourishing. But before that moment is reached, ΔP will have flourishing-impairing effects (principally, creating feelings of alienation) that will make it hard to say ΔP will make things go best under the *no sacrifices heuristic*.

How likely is it that that moment will ever arrive? That is the question we will address in the following section, the final section of this project exploring the humanity of private law.

4. The Future of Politics

2016 seems destined to join 1066, 1215, 1535, 1649, 1688, 1776, 1815, 1833, 1914, 1945 and 1979 as a momentous year in the history both of British politics, and world politics generally. For it was in 2016 that what Robert Nozick called 'the zigzag of politics'⁷⁴ came to an end.

What that phrase of Nozick's referred to was the way the electorate in both the United Kingdom and the United States would zigzag between different political parties, first voting for a left-wing party, then for a right-wing party, and then going back to the left. Nozick explained that this zigzag arose out of the fact that 'there are multiple competing values that can be fostered, encouraged, and realized in the political realm' and that it 'is impossible to include all of those goals in some consistent manner' in a given party's political programme.⁷⁵ As a result, the electorate has no choice but to zigzag between parties in order to ensure that none of the politically important values are neglected:

Goals and programs have been pursued for some time by the party in power, and the electorate comes to think that's far enough, perhaps even too far. It's now time to right the balance, to include

⁷⁴ Nozick, *The Examined Life* (Simon & Schuster, 1990), ch 25.

⁷⁵ Ibid, 292, 293 (emphasis in original).

other goals that have been, recently at least, neglected or given too low a priority, and it's time to cut back on some of the newly instituted programs, to reform or curtail them.⁷⁶

'The electorate wants the zigzag,'⁷⁷ Nozick confidently asserted. 'Sensible folk, they realize that *no* political position will adequately include all of the values and goals one wants pursued in the political realm, so these will have to take turns.'⁷⁸

What may have been true of the electorate in 1990, when Nozick was writing, was no longer true in 2016, when a very large number of people in both the United Kingdom and the United States made it clear they were no longer willing to zigzag between the conventional positions adopted by the established left-wing and right-wing parties, but wanted something different. What underlay the breakdown of the zigzag is still a controversial question, but my diagnosis is that it was triggered by a loss of faith that the zigzag was heading in a progressive direction, towards a social order where *everyone* could enjoy a greater than 50:50 chance of RP-flourishing. Instead, there was a growing realisation among a significant number of the electorate in both the United Kingdom and the United States that (i) they were living in a social order where very large numbers of people – unprecedented in world history – were enabled to RP-flourish, but (ii) at the same time, equally large numbers of people living in that social order enjoyed no realistic prospects of RP-flourishing, and (iii) there was no realistic prospect that further zigzagging between the established parties of the right and the left would bring about the kind of social change that would enable everyone living in their society to RP-flourish. Hence the desire to abandon the zigzag in favour of something different.

Three years on from the momentous events of 2016, it is clear that what has replaced the zigzag is a four-way political fight between the following groups. First, the *Populists*. This group is made up of people who believe that it is possible to live in a social order that will enable *everyone* living in that order a reasonable chance of RP-flourishing – hence the term, 'populist'. But the populists believe that such a social order will have to look very different from the sort of order that has so far prevailed in modern Western liberal societies: less cosmopolitan, less infatuated with free markets, more conservative in the old-fashioned, Burkean, sense of that term.⁷⁹ The *Populists* are opposed by the *Cosmopolitans* – those who have managed to achieve an RP-flourishing lifestyle under the social order prevailing in modern Western liberal societies and see the populist push for changes in that social order as (i) a threat to their own personal position and livelihood, and (ii) potentially disastrous, in that they threaten to throw away the very real gains achieved by modern Western liberal societies in enabling RP-flourishing on a historically unprecedented scale.

The two-way fight between the *Populists* and the *Cosmopolitans* is turned into a three-way fight by the *Gnostics*. 'Gnosticism' is a term derived from the Greek word for 'knowledge',

⁷⁶ Ibid, 294.

⁷⁷ As did Nozick: 'given a choice between permanently institutionalizing the particular content of any group of political principles ... – I mean the types of principles meant to specify what goals should be pursued *within* a democracy, not the ones that underlie a democracy itself by providing its rationale and justification – and the zigzag process of democratic politics, one where the electorate can have been presented with those same principles too among others, I'll vote for the zigzag every time' (*ibid*, 296, emphasis in original).

⁷⁸ Ibid, 295 (emphasis in original).

⁷⁹ In his *Dictionary of Political Thought*, 3rd ed (Palgrave Macmillan, 2007), 69–70, Roger Scruton identifies the elements of Edmund Burke's thought as consisting in: (i) defending social continuity; (ii) criticising individualism; (iii) viewing society as a partnership not between members of that society but across generations and as including the dead and yet to be born; (iv) recognising inequality as inescapable, (v) in favour of private property, and (vi) defensive of tradition and custom against abstract reason.

gnosis. Ancient gnosticism was characterised by the belief, or knowledge, that the universe is evil, and the earth is nothing but a miserable prison for human beings.⁸⁰ Salvation from the grim plight in which human beings find themselves could only come from a benevolent God, who is not responsible for the evil state of the universe but has the power to intervene to create a new universe and, within it, a new earth that will provide a happier home for human beings. Ancient gnosticism was killed off by the rise of Christianity, but has been replaced by a modern (or secular) form of gnosticism.⁸¹ Like their ancient counterparts, modern gnostics believe that there is something wrong with the world, but unlike ancient gnostics, modern gnostics believe that it is possible for *human beings* to recreate the world in a way that will eliminate the evils that currently afflict it. So for modern gnostics, the salvational role played by God in ancient gnosticism is instead played by human beings – or at least the select group of human beings who are ‘in the know’ as to what’s wrong with the world, and what can be done to set things right and create a ‘heaven on earth’.

In the political realm, *Gnostics* tend to be the children of *Cosmopolitans* – people who have grown up enjoying an RP-flourishing lifestyle, but who have come to reject the RP as an authentic vision of human flourishing and have instead adopted a Service Model of human flourishing instead. The particular form of Service Model that they have adopted is one which identifies their flourishing with their serving the goal of eliminating one or more of the evils that afflict the world. There are as many strains of gnosticism as there are evils that people see themselves as existing to defeat, but two strains in particular have given rise to important political movements, not least because the evils they seek to address are very real. The first strain is *green gnosticism*, which targets the evil of environmental degradation. The second strain is *liberal gnosticism*, which dedicates itself to ridding the world of the evil of cruelty. Originally focussed on creating a world that would be free of the cruelty of *brutality*,⁸² liberal gnosticism now focusses much more on the cruelties of *exclusion* and *humiliation*, where the cruelty of exclusion exists whenever someone is excluded from some valuable opportunity or activity by virtue of who they are, and the cruelty of humiliation exists whenever someone is made to feel that they are second-rate.

So the *Populists* and *Cosmopolitans* agree in identifying human flourishing with RP-flourishing but the *Populists* think much more can be done to encourage universal RP-flourishing, whereas the *Cosmopolitans* seek to defend what has been achieved so far by way of encouraging RP-flourishing from being undermined by the *Populists*. By contrast, the *Gnostics* reject any kind of Possessions Model of human flourishing like the RP, and instead endorse a Service Model of human flourishing centred around serving the cause of ridding the world of evil.

Joining this now three-way fight are the *Liberty Lovers*. While the *Populists* can be seen as having overthrown the original zigzag of politics and the parties of the *Cosmopolitans*

⁸⁰ For discussion, see Rudolph, *Gnosis: The Nature and History of Gnosticism* (Harper & Row, 1987); Jonas, *The Gnostic Religion*, 3rd ed (Beacon Press, 2001).

⁸¹ On which see, in particular, Eric Voegelin’s *The New Science of Politics* (Univ of Chicago Press, 1952) and his *Science, Politics, and Gnosticism* (Regnery Gateway, 1968).

⁸² The liberal views of Judith Shklar (*Ordinary Vices* (Harvard UP, 1984), ch 1, and ‘The Liberalism of Fear’ in Rosenblum (ed), *Liberalism and the Moral Life* (Harvard UP, 1989)), Annette Baier (‘Moralism and Cruelty’ (1993) 103 Ethics 436) and Richard Rorty (*Contingency, Irony, and Solidarity* (CUP, 1989), ch 4) were all explicitly rooted in the need to live in a world free of the cruelty of brutality, and claimed to draw inspiration for those views from Montaigne and Montesquieu (Shklar), David Hume (Baier), and Orwell and Nabokov (Rorty).

and the *Gnostics* can each be seen as having arisen in an attempt to command the political space created by the zigzag's overthrow, the *Liberty Lovers* were an integral part of the zigzag and regard its overthrow with some bemusement. This is because for the *Liberty Lovers*, politics is much less about promoting human flourishing as it is about defending human freedom. So the *Liberty Lovers* will have nothing to do with the fights between the *Populists*, *Cosmopolitans* and the *Gnostics* over how our politics should promote human flourishing. Instead, they continue to do as they did before 2016: speak in favour of a politics that is much more limited in its ambitions, as attempting to secure for everyone some measure of liberty, while debating among themselves how to define that measure of liberty, whether in terms of freedom from harm, or freedom from one's rights being violated, or some form of positive liberty to pursue the life one wishes to pursue.

How will it all turn out? – is the question that everyone living in the aftermath of the zigzag's overthrow wants answered. The arguments made in this book allow us to make some educated guesses.

First, if the arguments made in this book are correct, the *Populists'* hope that it will be possible to create a new social order which will do a much better job of promoting RP-flourishing than the one that tends to prevail in modern Western liberal societies is destined to be disappointed: no such order is on offer to us, and the fact that no such order is on offer to us is one of the biggest reasons we have for thinking that the RP is not an authentic vision of what human flourishing involves.⁸³

To that extent, then, the *Cosmopolitans* are right: what we have at the moment is the best we can hope for by way of promoting RP-flourishing. However, while this position may be right, there is also a very real ugliness involved in the *Cosmopolitans'* maintaining it. The ugliness lies in the fact that there is only one way in which someone can identify human flourishing with RP-flourishing while at the same time asserting that modern Western liberal societies are the best we can hope for by way of promoting RP-flourishing – and that is by rejecting the first postulate of human flourishing, which is that human flourishing is within the reach of every human being, and is not the preserve of a privileged elite.

If, to borrow the language of Sellar and Yeatman, the *Populists* are 'Wrong but Wromantic' while the *Cosmopolitans* are 'Right but Repulsive',⁸⁴ the *Gnostics'* adoption of a Service Model of human flourishing centred on fighting evil makes them positively dangerous, both to themselves and to others.⁸⁵ This gnostic conception of human flourishing eats away at anyone who adopts it: no one can maintain a sense of personal integrity and decency for very long when they enter into a symbiotic relationship with evil, needing evil to exist in order for them to think that they are leading a flourishing life by fighting it.⁸⁶ Moreover, where the evil that the gnostic pins their flourishing on eliminating finds its roots not in capitalism or the class system or historic inequalities, but rather humanity itself,⁸⁷

⁸³ See above, pp 19–20.

⁸⁴ Sellar and Yeatman, *1066 and All That* (Methuen & Co Ltd, 1930), 71.

⁸⁵ Cf. the doubts raised above about Service Models of human flourishing in general, at pp 3–4.

⁸⁶ Cf. Burkart, 'From the Economy to Friendship: My Years of Studying Ivan Illich' in Hoinacki and Mitcham (eds), *The Challenges of Ivan Illich: A Collective Reflection* (State University of New York Press, 2002), 158: 'When people asked me, "How's work going?" I would answer, "Never been better. Families are falling apart, so there is plenty of divorce and juvenile delinquency; arrests are up, so I have a lot of criminal trials; auto accidents and injuries at work are high, so my personal caseload is huge. Business is good." In a strange way all of us in the [social] service economy are feeding off social decay, a kind of cannibalizing of society.'

⁸⁷ Cf Solzhenitsyn, *The Gulag Archipelago* (1958–68), Volume II, Part IV, Chapter 1: 'the line separating good and evil passes not through states, nor between classes, nor between political parties either – but right through every

the gnostic ambition to eliminate evil can mutate into a terrifying ambition to eliminate humanity itself.

If, then, the aftermath of the overthrow of the zigzag saw just a three-way fight for political control between the *Populists*, the *Cosmopolitans*, and the *Gnostics*, the future would be depressing indeed. We would effectively be faced with a choice between living in a reheated version of the Soviet Union (should the *Populists* gain control and seek fundamentally to re-order society in order to enhance people's general capacities for RP-flourishing), the Holy Roman Empire (should the *Cosmopolitans* prevail, casting aside all pretence that the (neo-feudalist) social order that will be controlled by them exists for the benefit of anyone but them), or Maoist China (should the *Gnostics* come to power). However, the *Liberty Lovers* are also in the post-zigzag fight for political control and it seems that our hopes for a decent future are dependent on that party winning out. However, such an outcome, while less depressing, is hardly inspiring (as well as being extremely unlikely to boot). As has already been observed,⁸⁸ human flourishing is fragile and is unlikely to prosper within a legal order that leaves it alone to fend for itself.⁸⁹

It may be, then, that the four-way fight that has succeeded the overthrow of the zigzag simply represents the playing out of an endgame that will inevitably culminate in checkmate for the prospects of human flourishing in the West. Certainly, that analysis would be consistent with Anne Glyn-Jones' conclusion, quoted at the start of this book, that we live in a civilisation 'which has run its course ... which is bankrupt'.⁹⁰ However, I think we still have grounds for hope.

The very fact that three of the four parties in our four-way fight owe their existence to the stance they take on the nature of human flourishing should give us hope that they will be open to listening to the arguments made in this book to the effect that the accounts of human flourishing that they currently endorse are intellectually unsustainable and that they should instead take the position that their flourishing consists in their being engaged in a quest to lead a truthful life (QTL-ing). Should they listen to, and accept, those arguments then enough of a majority would coalesce around the view that human flourishing consists in QTL-ing to make it justifiable for English private law to be transformed in the ways canvassed in the previous chapter. This would in turn strengthen people's capacities to QTL, and help kick-start the widespread adoption of the kinds of activities and attitudes that would make QTL-flourishing self-sustaining across persons and time, in line with our fourth postulate of human flourishing. Should this happen, then far from portending an imminent collapse, the overthrow of the zigzag and the travails ushered in by that momentous event will prove to have been indispensable first steps towards our living in a social order that truly fosters our flourishing as human beings; a flourishing that will take on as many different forms as there are human beings but will always involve our being moved by, and towards, the Love that moves the sun and the other stars.

human heart – and through all human hearts. This line shifts. Inside us it oscillates with the years. And even within the hearts overwhelmed with evil, one small bridgehead of good is retained. And even in the best of all hearts, there remains ... an unrooted small corner of evil' (ellipsis in original).

⁸⁸ See above, pp 8–9, 177–78.

⁸⁹ For a glimpse of what English private law would look like in the aftermath of a victory for the *Liberty Lovers*, see Atiyah, *The Damages Lottery* (Hart Publishing, 1997); Epstein, *Simple Rules for a Complex World* (Harvard UP, 1995); Morgan, *Contract Law Minimalism* (CUP, 2013).

⁹⁰ See above, p vii.

INDEX OF NAMES

- | | |
|--|--|
| <p>Achilles, 146
Allison, H, 73
Anderson, E, 139, 140
Aquinas, St T, 30, 76, 78, 80
Aristotle, 2, 48, 54, 56, 72, 80, 145–6
Arnold, M, 50
Atiyah, PS, 193
Augustine, St, 30, 76

Bacon, F, 101
Balkin, JM, 108
Barrett, W, 72, 80, 89, 101
Bauman, Z, 37
Beatles, The, 52, 133
Beethoven, L van, 52
Belloc, H, 166
Benson, O, 60–1
Bentham, J, 91
Berry, W, 125, 126
<i>Bhagavad-Gita, The</i>, 84
Bickel, A, 172
Blackstone, W, 121, 122, 123, 128
Blake, W, 39
Bloodworth, J, 139–40
Bradley, FH, 78
Brandeis, LC, 163–4
Bringhurst, R, 82, 89
Brooks, M, 57
Brougham, Lord, 158
Burkart, EJ, 192
Burke, E, 173, 190
Burnham, J, 141–2

Caldwell, C, 19
Campos, P, 126
Capobianco, R, 74, 75, 83, 86, 95
Caputo, JD, 75, 79
Casals, P, 49
Cavafy, CP, 3
Cézanne, P, 86
Chamberlain, E, 138
Chenavier, R, 32
Chesterton, GK, 42, 166
Christ, J, 158
Christiano, T, 170, 178, 179
Cottingham, J, 7
Cowan, T, 121, 126, 127</p> | <p>Craig, E, 59
Crawford, M, 34, 35, 37, 88, 89, 131, 132, 133
Csikszentmihalyi, M, 87
Cummings, EE, 86

D'Andrea, T, 30
Darwin, C, 72
Davies, D, 112
Davies, J, 82
Denning, Lord, 114, 179, 183
Descartes, R, 78
Diderot, D, 64
Diplock, Lord, 114
<i>Don Quixote</i>, 188
Dostoevsky, F, 4
Douglass, F, 145–6
Dreyfus, H, 88, 165
Dun Scotus, 78
Dworkin, R, 170, 175, 177, 178, 184, 185–6

<i>East Coker</i>, 82
Easterbrook, G, 22
Einstein, A, 60
Ellul, J, 100
Epictetus, 8–9, 14, 15
Epstein, R, 193
<i>Euthyphro</i>, 36

Feynman, R, 93, 94
Finnis, JM, 15, 16, 30, 50, 54–5, 71, 174
Ford, H, 134
Frank, JP, 164
Frankfurt, H, 34, 36, 59, 90
Fromm, E, 19, 22

Gaita, R, 7–8, 20, 28, 29, 56, 57, 58
Galanter, M, 162, 163
Gamwell, FI, 32
Gandhi, M, 2, 171
Gardner, J, 26, 150, 152, 177
Geach, P, 47
Gelven, M, 42, 60
Genn, H, 160–1, 162
Glyn-Jones, A, vii, viii, ix, 77, 193
Gonzalez, FJ, 72
Graeber, D, 126, 141, 142
Gray, K and SF, 122–3, 128, 130</p> |
|--|--|

- Grimstone, B, 95
 Grisez, G, 30
 Guénon, R, 79
 Guilluy, C, 19
- Haack, J, 127
 Hasday, JE, 115, 119, 148
 Haskey, I, 144
 Hatab, L, 72, 80
 Hauerwas, S, 44, 58
 Havel, V, 44–5, 46
 Hayek, F, 102
Heart of Darkness, 71
 Heidegger, M, ix, 71–2, 74–6, 77, 78, 83, 84, 87, 88, 95, 99, 101, 118, 165
 Henley, WE, 27
 Hirschman, AO, 67
 Hirshfield, J, 52
 Holmes, OW, 123–4
 Hopkins, GM, 86
 Hume, D, 99, 191
- Iliad*, 146
 Illich, I, 108, 129
Invictus, 27
 Isaacson, W, 68
- James, CLR, 2
 Job, 16, 99
 Jobs, S, 67–8
 Joyce, J, 39
- Kafka, F, 134
 Kahneman, D, 68
 Kant, I, 71, 73, 74, 77, 78, 99, 184
 Kekes, J, 65, 66, 67, 69, 105
 King, M, 97
 King, ML, 2, 4
King Lear, 71
 Kockelmans, JJ, 74
 Kraut, R, 7, 10–11, 25
 Kreeft, P, 4, 79
 Kronman, A, 160, 164
 Kuyper, A, 42
- Lane, RE, 18
 Lessing, G, 42
 Levi, P, 48, 75
 Lewis, CS, 82, 100
 Luban, D, 159
 Lynch, M, 46, 59, 67
- MacIntyre, A, 2, 24, 25, 26, 30, 44, 67, 100, 102, 126
 Magee, B, 24, 74, 89
 Mantouvalou, V, 120
- Marcel, G, 80, 81, 84, 101
 Marx, K, 19
 Matthiesen, P, 95
 McFarlane, B, 151
 McBride, NJ, ix, 9, 12, 25, 32, 47, 51, 54, 70, 73, 91, 104, 117, 120, 122, 124, 125, 129, 135, 151, 152, 154, 157, 163, 171, 184, 187
 McCloskey, D, 20
 Megarry, R, 114
 Melville, H, 99, 106, 147
 Merton, T, 33, 37, 40, 47, 79, 86
 Michelangelo, 52
 Mill, JS, 3, 91
 Milosz, C, 45
 Milton, J, 5, 99
Moby Dick, 99, 100
 Morgan, J, 193
 Murdoch, I, 33, 37, 38, 39, 41, 47, 55, 71, 72, 75
 Murphy, J, 138
- Neyers, J, 119, 152
 Nietzsche, F, 36, 72
Nineteen Eighty Four, 49
 Nozick, R, 31, 57, 80, 132, 189, 190
 Nussbaum, M, 8, 9, 145, 146
- Odyssey*, 26
 Oppenheimer, R, 84
 Orwell, G, 49, 191
 O'Sullivan, R, vii
- Parfit, D, 79
 Parmenides, 78
 Parra, V, 64
Parsifal, 26
 Pascal, B, 37–8, 48, 60
 Paul, St, 47, 51, 60, 158
Perelandra, 82
 Perelman, M, 18
 Pericles, 12–3, 14
 Pesic, P, 101
 Pieper, J, 5, 9, 32, 35, 50, 56, 60
 Pilate, P, 34
 Pirsig, RM, 79
 Pitter, R, 40, 86
 Plato, 36, 40, 78
 Plotinus, 76, 79
 Popper, K, 93, 94
 Post, RC, 127
- Rawls, J, 170
 Raz, J, 28, 55, 121, 179
 Reed, Lord, 180–1, 182, 183
 Reid, Lord, 156, 173, 179, 180
 Rich, A, 49

- Richardson, WJ, ix, 75, 89
Rieff, P, 34
Russell, B, 47

Salinger, JD, 95
Saurin, J, 18
Schopenhauer, A, 71, 72, 73, 74, 76, 77, 78, 79, 99
Schuon, F, 79
Sennett, R, 52
Sertillanges, AG, 37, 40, 41, 63
Sklair, L, 17
Socrates, 8, 9, 14, 15, 36
Solzhenitsyn, A, 59–60, 192
Sophie's Choice, 103–04
Sousa, R de, 4
Sprigge, TLS, 78
Srinivasan, A, 145
Stangroom, J, 60–1
Steel, S, 145, 163
Steiner, G, 74–5, 84, 101
Stevens, R, 129, 157
Stove, D, 73
Sumner, W, 32, 69–70
Swinton, J, 126

Taleb, NN, 127, 170, 174
Taylor, C, 3–4, 29, 36, 38, 91–2, 96
Teichmann, R, 3
- Tolstoy, L, 82, 98
Toulson, Lord, 109, 180, 181–2, 183
Trial, The, 134
Tversky, A, 68

Unamuno, M de, 188
Upanishads, The, 79

Van Cleve, J, 74
Van Gogh, V, 117, 118, 119
Vanier, J, 57–8

Waldron, J, 169
Wallace, DF, 38–9, 41, 48, 57
War and Peace, 82
Webb, J, 160
Weil, S, 7, 32, 35, 37, 38, 51
Weltev, B, ix, 87
Whitman, W, 86
Widdows, H, 33
William of Ockham, 78
Williams, B, 4, 35, 48, 63, 64
Williams, J, 132–3
Williamson, K, 114
Wollheim, R, 172
Wood, W, 43, 47
Woolf, V, 39
Wozniak, S, 68

INDEX OF SUBJECTS

- academic freedom, 76, 121, 126–7
access to justice, 161–2
advertising, 131
aggravated damages, 135, 136, 137, 147–8
alienation, 179, 186–7, 188–9
altruists' dilemma, 4–5
anger, 4, 7, 145–7, 148
anxiety, 37
aretaic community, 12, 14, 20, 51, 52, 63
art, 20, 52, 84, 89, 101, 118–9
artificial intelligence, 160, 165
attention, 36–41, 47, 51, 52, 57, 85–6, 88, 93, 95, 103–4, 105, 107, 112, 117, 125, 130–3
authenticity, 46, 55, 63
autotelic activity, 131
- bereavement, 148
betrayal, 46, 67, 104–6, 125, 149, 150–2, 153, 164
birth rates, 21, 22
boredom, 39, 89
Buddhism, 79, 85
built environment, 155
bullshit jobs, 141–2, 144
- care, 59, 63, 82, 84, 93, 104, 145, 146, 147
children, 10–1, 21, 22, 32, 95, 176, 191
choice-sensitivity, 185–6
Christianity, 64, 78, 147, 158, 191
clearing, 83, 165
common innkeepers, 122, 128
court fees, 162
cowardice, 35, 36, 45, 46
creativity, 1, 17, 18, 19, 35, 51–2, 67–8
- Dalkon Shield litigation, 159, 166
dance, 82–3, 84, 98
death, 8, 9, 21, 22, 29, 71, 84, 131, 147, 148
deceit (tort), 109, 110, 119, 153, 154
declaratory theory of law, 156
defamation, 120, 124, 129
desire of the heart, 17, 50
deficits, 18, 115, 161
disability, 8, 20, 28, 56, 58, 104
distributism, 166
diversity, 96–7, 193
- emotional distress, 109, 119, 137, 148, 149
employment, 19, 121, 139–44
epistemic harm, 117–9
equality, 7, 18–9, 166, 190, 192
equal concern and respect, 169, 170, 175, 177–8
evil, 3–4, 7, 45, 76–7, 80, 114, 146, 191, 192–3
experience machine, 31, 57, 132
- factory work, 37, 51
film industry, 112
floating trust, 116
flow, 87, 89
fraud (generic), 108–16
free speech, 120–4
friendship, 15, 50, 55, 58, 99, 145
- gaslighting, 118, 119
general damages, 152
gnosticism, 190–1, 192–3
God, 4, 30, 42, 71, 76, 84, 146, 191
Golden Rule, 146
- hatred, 4, 7, 98–100, 104, 117, 145–9, 158, 159
health, 1, 16, 50, 58, 107, 117, 132, 142, 143, 144, 154
heart balm laws, 148
heuristic, 170, 171
Hinduism, 79
honesty, 33, 43–5, 120, 136, 156, 157
human nature, 38, 54, 71, 80
humility, 41–3, 47, 64, 85, 86–7, 93, 98
hypergoods, 91–2
- incremental approach, 169, 179–83
ineffable, 79, 85
injunctions, 110, 121, 122, 152
injury, 20, 28, 103, 133, 137, 154, 162
integrity, 45–7, 61, 66, 92
interpretation, 35
Islam, 79
- journalism, 125–6, 127, 128
Journey Model, 1, 2–3, 6, 14, 23–30, 32, 57, 106, 149, 187
- judges, 35, 84, 114, 156–7, 160, 164, 166, 168, 173, 179–80, 183, 184

- Kantian views of private law**, 119, 164, 184, 185
- knowledge**, 13, 15, 33, 41, 52, 55, 59, 93, 100, 112, 118, 126, 127, 190–1
- landowners**, 122–3
- language**, 52, 79, 83–4, 155
- lawyers**, 156, 158–9, 160, 163–5, 173
- legal aid**, 161, 162
- leisure**, 35, 50, 53, 107, 117
- lighting up**, 75, 88, 96
- Lindy heuristic**, 170, 174
- loss of a chance**, 154–5
- love**, 4, 5, 9, 15, 16, 27–8, 33, 39, 40, 41, 47–9, 51, 53, 57, 58, 63, 64, 84, 85, 89, 93, 98, 107, 148, 149, 158, 160, 193
- love test**, 31, 32, 54
- lumpers**, 72, 73, 74, 76
- managers**, 100–1, 102, 103, 112, 140, 141, 142, 144
- manipulation**, 34, 49, 87, 100, 102, 133, 140
- middle class**, 19
- misfeasance in public office**, 136–8
- mutual wills**, 116
- Nazi Germany**, 44, 72, 75–6, 77, 103
- no sacrifices heuristic**, 170–1, 175, 179, 186, 187, 188
- nominalism**, 78
- noumenal reality**, 73, 74, 99
- omissions**, 135, 136, 137, 138
- online platforms**, 122, 129, 130
- ownership**, 122, 128, 130
- Pareto improvement**, 171
- payback**, 145, 146, 147, 158
- peer review**, 127
- pessimism**, 71, 72, 74, 76, 77, 79, 99
- phenomenal reality**, 73–4, 75, 99
- poetry**, 3, 5, 27, 40, 48, 52, 82, 86, 89, 91, 92
- police**, 125, 127, 128, 135, 137, 150–1, 164
- populism**, 190, 191, 192, 193
- Possessions Model**, 1, 2, 5, 6, 14, 15–23, 29, 30, 150, 187, 191
- pride**, 98
- prior restraints**, 121
- privacy**, 120, 121, 124–5, 184
- proprietary estoppel**, 151
- public law**, 138, 168, 174, 187
- push-pin**, 91
- quests**, 24, 25, 26, 27, 28, 29, 30, 32, 33, 43, 48, 50, 93–4, 96, 134, 187, 188, 193
- realism**, 43–4
- relational wrongs**, 148
- resource curse**, 18
- restraint of trade**, 121
- right to be forgotten**, 124
- rights**, 117, 142, 150, 151, 169, 175–6, 183–4
- satisfaction test**, 54
- second-order desires**, 36, 90
- self-deception**, 43–4, 47, 64, 66
- Service Model**, 1, 2, 3–6, 187, 191, 192
- sex**, 100–1, 146, 150, 152, 153, 159
- sham trust**, 116
- shame**, 35, 45, 187
- shepherd of Being**, 83, 84, 85–92, 95–7, 98–102, 103–6, 124, 134, 155, 165
- sincerity**, 44–5, 47
- smartphones**, 131, 132, 133
- space and time**, 50, 60, 73, 74, 96
- splitters**, 72, 73,
- strong evaluation**, 91–2
- stuckness**, 88, 89
- suicide**, 10, 21, 22, 24, 103, 132
- Taoism**, 79
- technology**, 19, 76, 100, 101–3
- thick ethical concepts**, 35–6, 46, 47, 49, 50, 61, 66, 90–1, 93
- time and space**, 50, 60, 73, 74, 96
- trusts**, 109, 110, 111, 116, 182
- unfair dismissal**, 120
- universities**, 64
- unjust enrichment**, 157, 181
- vicarious liability**, 157, 182, 183
- vices**, 98
- virtues**, 33, 36, 41, 47, 49, 51, 85, 97, 118
- whistleblowing**, 127–8
- working time**, 50, 142–4
- zigzag**, 189–90, 191, 192, 193