

Private Law: Torts, Contracts and Property

“Our legal system is based on the idea that such protection [that law has selected which harms to protect people against] necessarily involves holding persons responsible for causing harm” – Altman, 111

Traditionalists: Law legally prohibits harm in two ways.

- i. Insofar as harms are setbacks to the interest of society as a whole. (Public Law)
- ii. Insofar as harms are setbacks in a private matter between the individuals involved. (Private Law)

Traditionalists’ Private-Public Distinction: The Right Solution?

Public Law: “Rules that establish the basic framework of government, as well as rules that define what counts as harm to society as a whole and how those accused of such harm are to be dealt with, should be responsive to the political will of the people” – 113.

→ Is this subject to the tyranny of the majority, whether it is a political, religious, economic or ethnic one?

i.e. – White, male landowners in the late 18th century?; the Rockefeller’s of the industrial revolution?

Private Law: “Legal rules covering torts, contracts and property should be apolitical...[which] should be decided by judges” – 113-4.

→ Are judges free from political pressures? Could the judiciary branch become subject to a theocracy in a Dworkinian government?

- Conclusion: The Traditionalists view could result in a competing Rule of Recognition within a society.

i.e. Hart’s example

- Legal Realists Criticism of Traditionalists’ Views: Would a system without Natural Rights work?

Legal Realists’ Basis: The pre-existing laws of the 19th century were based on political biased in favor of the wealthy (a la Industrial Revolution).

→ Concurs with aforementioned arguments of “tyranny of the majority”.

→ *Problem*: “The rights protected by private law rules are merely creations of the rules themselves, not some independent basis for the rules” – 115.

- The Legal Realists go too far in claiming that there are no pre-existing legal rules.

i.e. According to the Legal Realists, would the following phrase be valid:

“We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” – Declaration of Independence

→ In agreement with Altman, “it doesn’t follow that even if property rights are simply creations, all other rules are as well” – 118.

Traditionalists’ Tort & Contract Law: Really a Matter Solved Apolitically?

Tort Law: looks to compensate a victim for the harm suffered, and is imposed by society.

Contract Law: looks to give the victim of a breach of contract the equivalent of what he or she would have had, and is self-imposed.

→ Criticisms:

- If tort law is considered private law, then it should be free of political influences. Yet, society will undoubtedly will base decisions on political, religious, economic and/or ethnic influences.
- “Duty” is a subjective term, and, thus, could be problematic in ascertaining a concrete system of contract law.