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Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin

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MONISM, NOMINALISM, AND PUBLIC-PRIVATE IN THE WORK OF MARGARET JANE RADIN

CHRIS SAGERS¹

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Margaret Jane Radin has been among our more perceptive observers of the previously unseen, a loyal legal pragmatist whose curiosity and commitment to the importance of ideas have led her to contribute important critiques of prevailing orthodoxy.² In recent years she has been a critic of the evolving culture of high technology and, of central significance in this essay, she has been concerned with its impact on ideas about law and sovereignty. This was the topic of a stimulating talk she delivered here last spring, on which her piece in this Symposium is based and around which the Symposium is built,³ and during that time we also had the pleasure of her urbane wit within our halls for a few days. I wanted to begin with that in mind because, while this essay is critical in tone, it is very much in the spirit of constructive feedback and therefore it is sincere academic flattery. If anything, this essay shows that the problem I want to talk about is an endemic one, as I believe it is present even in the work of a writer who has been very careful and perceptive.

Specifically, though she has never made it her central concern, and though in her occasional comments on it she has had interesting things to say, I think a sore spot in Professor Radin's work is her refusal directly to ask whether, as a jurisprudential proposition, there is any meaningful difference between the "public" and the "private." I believe this distinction is both highly problematic and (though I think she might deny it) of central importance to her work. As I will explain, it appears in various ways throughout the different veins of her work, sometimes more visibly than others. Though it is quite muted, it not only appears in her piece in this Symposium, but I think it happens to appear there in a way that will be very telling and important.

¹Assistant Professor of Law, Cleveland State University. I welcome all comments at csagers@law.csuohio.edu. Special thanks to Peggy Radin, who read the manuscript and gave very useful feedback, and as well for her generous permission to cite unpublished sources.

²She is, after all, a descendant of the legal realist Max Radin. A little known fact.

³Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23 (2006) [hereinafter Radin, *Comment*].

To be sure, if it affects her work it is probably only because it affects everyone's work, as it is so thorny and ingrained that it seems almost impossible to conceive of social issues without it. Thus, what is now a very old conceptual problem, which became central to understanding Western history as long ago as the late Middle Ages, still remains quietly fundamental. We still struggle, for example, to define the state's proper role in structuring family and sexual relationships in our ongoing American *Kulturkampf*.⁴ Criticism of the distinction is likewise hardly new; in the main my arguments below will be similar to arguments of Morris Cohen, Robert Hale, and others made many years ago.⁵ Still it is one that seems continually worth making, as it is repeatedly forgotten. As Radin herself has said, the distinction's pernicious flaws must be continually re-discovered because they are so easily obscured by "the persistent mythological force of laissez-faire ideology in our culture"⁶

In any case, this also happens to be quite an opportune moment to consider the problem. It is tempting just now to believe that American legal scholarship is on the verge of some watershed moment or paradigm shift (though such moments have come and gone before, leaving behind them a remarkable underlying continuity in our discipline), and the excitement seems especially to center on concern for phenomena that bring into question our understanding of the nature of "law." Concern for non-state-but-law-like phenomena has become routine enough that it is now virtually commonplace to say things like the following, as a matter that may be taken for granted: "People's behavior is subject to many different kinds of constraints, of which law is only one."⁷ Implying that law is not especially different from other constraints may never have been all that shocking outside the legal academy,⁸ but among lawyers it is, or at least it used to be – among we who have

⁴A word recently made familiar to Americans in the most apropos of circumstances; see *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing, in disagreeing with the Court's holding that state constitutional ban on "special" treatment of homosexuals deprived them of federal equal protection rights, that "[t]he Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals . . . , but is rather a modest attempt . . . to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws").

⁵See *infra* note 15 and accompanying text.

⁶Margaret Jane Radin, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI-KENT L. REV. 1295, 1295 (1998).

⁷James Grimmelman, Note, *Regulation by Software*, 114 YALE L. J. 1719, 1724 (2005); see also LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 85-99 (1999) (arguing that essentially equivalent "regulatory" effects can follow from law, norms, markets, and "architecture," the latter meaning technological constraints of various kinds that limit the subject's available range of choices).

⁸See, e.g., Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 143, 149 (Walter W. Powell & Paul J. DiMaggio, eds. 1991) (urging a very broad and inclusive definition of "institution" for use among social scientists, a definition that would include government regulatory gestures along with a range of less formal patterns or orders of social reproduction; namely, "institutions are socially constructed, routine-reproduced . . . program or rule systems. They

spent generations arguing about what “law” is and why it is different from other things. In any case, whether it is especially new or not,⁹ this recent interest has found expression in quite a range of legal schools of thought, which seem to be increasingly aware of each other just now and keen to know whether together they make a “movement” Thus, we have seen flourishing work in “voluntary associations,”¹⁰ a legal literature on “norms,”¹¹ the older but still thriving tradition concerning “private ordering,”¹² the recently booming literature on “privatization” or “the new governance,”¹³ and the so-called “New Legal Realism,”¹⁴ which seems aptly named, as its concern for private influence echoes the work of the “old”

operate as relative fixtures of constraining environments and are accompanied by taken-for-granted accounts”).

⁹A skepticism for public-private dichotomies has surfaced elsewhere in the human sciences recently, and it has been suggested that it reflects the general distrust for grand theory we’ve seen throughout the academy in the past few decades. See, e.g., Giorgio Chittolini, *The “Private,” the “Public,” the State*, 67 J. MOD. HIST.: SUPPL. S34, S59 (1995). Skepticism for grand theory seems historically cyclical, at least in modern times.

¹⁰In the legal literature, most of this work is to the effect that private groups, like families, social clubs, and churches, perform a function of such purely *social* significance in society that they should be understood as essentially governmental or sovereign. Its thrust is that these groups are fundamental to individual freedom and actualization and therefore deserve special legal status. See, e.g., Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 AM. U. L. REV. 365 (2004); Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

¹¹See, e.g., Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

¹²“Private ordering” is an old and varied tradition. It has roots both in the University of Wisconsin law-and-society tradition and in law-and-economics thinking rooted in Coase. In any case, interest in these matters remains lively. See, e.g., Amitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179; Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001); Johnathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Rules*, 82 CORNELL L. REV. 1123 (1997); Barak D. Richman, *Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004); Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York*, Harvard John M. Olin Center Discussion Paper No. 384 (2002); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002); Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1.

¹³Discussed at length in Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. (forthcoming 2007) [hereinafter Sagers, *Myth*].

¹⁴See, e.g., Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WISC. L. REV. 479 (discussing emergence of purportedly new and rising schools of thought).

realists.¹⁵ More to the point of this essay, the huge legal literature on high technology, mass communications, and the internet has been especially focused on the peculiar jurisprudential problems they seem to pose concerning the nature of law, and their tendency to blur the boundaries of “sovereignty.”¹⁶ Professor Radin has

¹⁵Finding particular voice in the work of Robert Hale. See BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (2001) (in essence an intellectual biography, situating Hale’s life and work in the politics of Progressive economics and legal academia). Morris Cohen, though perhaps not well described as a realist himself, see JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 20, 74 (1995) (noting Cohen’s critical stance toward the realists), expressed a similar view that was influential in the Progressive years. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L. Q.* 8, 12 (1927) (arguing that “property” by its nature gives some power to its holder; “To the extent that [property I own is] necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want”).

¹⁶This literature is now quite large. Of course, a body of work exists that asks how various more or less mundane questions of doctrine should be handled in the allegedly unique circumstances of computer technology and mass communication, like how antitrust should apply to the software industry. See, e.g., Symposium, *The Interface Between Intellectual Property Law and Antitrust Law*, 87 *MINN. L. REV.* 1695 (2003).

But this technology has also spurred a range of peculiar, intriguing and very basic jurisprudential issues, often going to the core of our political philosophy. Even the seemingly mundane issue of personal jurisdiction led to metaphysical speculation about what “cyberspace” really *is*—or, as commenters frequently asked the question, *where* it is. This in turn raised basic questions of sovereignty and freedom. A leading early article in this vein was David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996) (emphasizing the borderless nature of “cyberspace” and arguing that territorially defined sovereigns are poorly situated to regulate it; arguing that it should be understood as independent of all territorial sovereignties and subject to a self-governing set of norms, to be analogous to the “law merchant”).

More to the point here, some technological and commercial aspects of recent high technology have brought into question the nature of “law” and have suggested that in many respects various technologies and various commercial behaviors are supplanting traditional sovereignty. Commentators have argued that the involvement of traditional government in technology sectors has often been undesirable, see, e.g., A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 *DUKE L. J.* 17 (2000), and they have predicted that private cooperation will have some large role in ordering cyberspace, see, e.g., A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 *HARV. L. REV.* 749 (2003) (describing the rise and influence of the privately organized Internet Engineering Task Force); Johnson & Post, *supra*. There also has been much talk to the effect that some contracting practices apportion power of a regulatory kind to technology producers. This especially is said to be true of new approaches to the licensing of software, both in durable media and online, over which much controversy has raged. See, e.g., Mark A. Lemley, *Intellectual Property and Shrink-Wrap Licenses*, 68 *S. CAL. L. REV.* 1239 (1995) (arguing that “shrink-wrap” licenses pose threat of rendering intellectual property policy obsolete, and significantly expanding manufacturers’ property rights; urging that this not be allowed to happen).

A separate but related area of inquiry has concerned the seemingly regulatory effect of software code itself. Lawrence Lessig has been the most visible exponent on this point, his most lengthy expression being LESSIG, *supra* note 7. His view is that software is “architectural” insofar as it limits its subjects’ possible range of choices, and therefore constrains conduct in a “regulatory” manner. See *id.* at 30-42. Both a summary of the

been a visible participant in this literature and her piece in this Symposium is a contribution to it.¹⁷ I think it is in this context perhaps more than anywhere that she comes into close proximity with the public-private distinction, though as I will try to show I think it plays a large role in her work generally, even though it is not always easy to see. My purpose here is to urge her finally to go all the way and consider whether the distinction is really desirable or necessary (or at least consider what it would mean were we to try to reconceive it).

This essay begins by situating the distinction in history generally and in American legal thought. Its historical aspect seems important because it suggests that the distinction is not predetermined—it is historically and culturally contingent. That fact has been largely ignored in the American legal academy, and among most of the judiciary it is all but outright socialist treachery to suggest it. The essay moves on to consider Radin's work itself. The prominence of the distinction is relatively obvious in some of her work on technological marketing and design issues, but I will suggest that in fact it runs quietly just beneath the surface of all of her work.

An important piece of this discussion will be to address the general philosophical stance Professor Radin has taken throughout her career—what she has described as her “Deweyan pragmatism.” I expect she will say that much of my critique is off the mark for failure to understand the pragmatic perspective. In fact, I fear that grappling with any specific problem in Radin's work threatens to become a grappling with her pragmatism, because the pragmatist will say that my critique is a generalizing one—it attacks a general principle—whereas pragmatists ask questions only on a case-by-case basis, and have neither faith nor concern for arguments made in the abstract. I hope to avoid that as much as possible. Therefore I will do my best to take Radin's pragmatism at its word, understanding it only according to what she has said about it, and presume it to be uncontroversial—as I expect Radin would put it, I will “bracket” all such matters—and focus only on the specific question of the public-private distinction. I do this in part because, with due respect, “pragmatism” is so loose and slippery that to confront it directly is to invite inevitable (and in this case, I think, unhelpfully distracting) digressions about what pragmatism *is* and what the particular pragmatist did or did not say about it at some point in the past.¹⁸ But

literature in this latter area and an original contribution to it appear in an exceptional student note in the *Yale Law Journal*. See Grimmelman, *supra* note 7.

¹⁷See Radin, *Comment, supra* note 3. Her other contributions to the literature appear in MARGARET JANE RADIN ET AL., *INTERNET COMMERCE: THE EMERGING LEGAL FRAMEWORK* (2d ed. 2006); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 *FORDHAM L. REV.* 1125 (2002) [hereinafter Radin, *Online Standardization*]; Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 *IND. L. J.* 1125 (1999) [hereinafter Radin, *Humans, Computers*]; and Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 *J. THEORETICAL & INST. ECON.* 1 (2004) [hereinafter Radin, *Regulation by Contract*].

¹⁸A frequently noticed problem is pragmatism's refusal (or inability) to define itself, a task that might imply a foundationalism at odds with pragmatism's own affinity for the practical and case-by-case. See Steven D. Smith, *The Pursuit of Pragmatism*, 100 *YALE L. J.* 409, 410-11 (1990) (noting the difficulty of discovering “what legal pragmatism *is*”); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 *YALE L. J.* 687, 688 & n.11 (2003) (noting the hesitance of classical pragmatists “to insist on necessary and sufficient conditions for calling something a pragmatic theory,” a step that would “risk converting it into the very positions it seeks to repudiate”); cf. Margaret Jane

this is also a matter of simple fairness and an effort not to be misunderstood as making criticisms I do not intend.¹⁹ In that spirit, it is only fair to add that both Radin's pragmatism and her views on public-private must be pieced together from writings scattered across twenty-five years of work. My rendition of it therefore will be at best a bric-a-bac rather than a living and evolving system of thought. It is only "[a] static interpretation [that] reads an author's later work in light of theories or conceptions laid down in her earlier work,"²⁰ though I fear it is also the best I can do.

Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1705 (1990) [hereinafter Radin, *Pragmatist and Feminist*] (noting that there is not one pragmatism but "a number of pragmatisms").

A related problem and one that will play a role in this essay is that it is logically tricky to remain true to pragmatism's evident anti-foundationalism while also offering constructive critique or holding normative convictions. Therefore it can be very hard to pin down just what the pragmatist stands for, and though Radin and other pragmatists deny it (and I also doubt it very much), the movement's critics have long said the philosophy is "banal." See Sullivan & Solove, *supra*, at 687-88 (collecting statements to this effect from pragmatists and their critics, though arguing ultimately that pragmatism is politically "radical"); cf. Smith, *supra*, at 424 ("Ironically, [because pragmatism on at least one feasible reading is merely truistic], a position that has insisted that an idea is true only to the extent that it is useful would be convicted under its own standard").

Indeed, more dramatically, the movement's critics sometimes argue that pragmatism is really no philosophy at all. As Steven Smith wrote in a careful, perceptive article written during the much-discussed "renaissance" of "legal" pragmatism in the 1980s and 1990s, the pragmatist faces an apparent internal logic problem in that "[p]ragmatists dislike and distrust theory. Pragmatists also like and need theory." Smith, *supra*, at 429. Because the pragmatic effort to avoid this tension gets so much of its rhetorical power from the mere "incantatory repetition of sacred words—'experience,' 'context,' 'perspective,' 'dialogue,' "*id.* at 440—it ultimately boils down to nothing more than exhortation to use "the method, explained gravely[,] [of] [c]areful, correct thinking." *Id.* at 437. As he then says, this seemingly truistic nature renders pragmatism "not too good to be true," but "too true to be good." *Id.* at 424.

I believe that all these points are relevant because part of the problem in grappling with pragmatism is that most pragmatists' efforts to explain away these conflicts render the philosophy *very* slippery and hard to pin down.

¹⁹Thus, I hope Professor Radin agrees that we seem to be "kindred spirits," a fact she thinks some previous critics have ignored, and that I will not be misunderstood as accusing her of an "implicit conservatism." While I believe there is a problem in her approach, and that it tends unnecessarily to give received wisdoms the benefit of the doubt, I have no doubt that in her personal politics she is not "conservative." Cf. Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 409 (1993) (responding to Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1992) [hereinafter Radin, *Transformative*]). Likewise, while I actually am sympathetic to at least one of Schnably's points – that the case-by-case, piecemeal "pragmatic" approach to legal problems, at least so long as it tends to focus on specific doctrinal questions, "will most likely amount to no more than tinkering or [worse yet,] stabilizing reform," Schnably, *supra*, at 382 – I hope nothing here will be mistaken as demanding some totalizing "theory of transformative social change" or a "total revolution." *Id.* at 410.

Incidentally, if I understand her correctly, Professor Radin has not entirely denied the problem of pragmatism's conservative potential. See, e.g., Radin, *Pragmatist and Feminist*, *supra* note 18, at 1710-11 (discussing the problem of pragmatist "bad coherence" and the risk that pragmatism tends to preserve values whether they are "good" or not).

²⁰Radin, *Transformative*, *supra* note 19, at 422.

Ultimately, in any case, the heart of the essay is in Part III. There I will take the distinction head on, address Professor Radin's approach to it, and suggest why it is an important problem in her work. Namely, the distinction is more than just a semantic peculiarity of significance only in judicial opinions. It plays a quietly profound legitimating function in society, effectively obscuring maldistributions of power of very great significance to the lives of human individuals, and therefore goes to what I believe has been the core of Professor Radin's work throughout her career.

I. HISTORICAL AND THEORETICAL PREDICATES; TREATMENT OF THE DISTINCTION IN THE CASES AND IN THE LITERATURE

The history of the distinction in Western thought is surprising and intriguing. While this may not be the place for long digression on its anthropology or history, an important point should be made about it. Given our current popular institutions and the cultural legacy of two centuries of liberal democracy, it is quite difficult even to think about society without some fairly sharp conceptual divide at least between the "individual" and the "state," and for most Americans it is also second nature to perceive some fairly large range of association activity that is distinct from the "state." Thus it seems undeniable that *some* distinction between "public" and "private" is in some way metaphysically real and contingent on neither time nor culture. But, as it turns out, that is apparently not so. The distinction's origin is both surprisingly recent and intimately tied up with the rapidly changing nature of the "self."

While in some very general sense the perceived difference between "state" and "non-state" is ancient,²¹ the modern concept of a public-private divide—a jurisprudential proposition of a metaphysically real division between the public and private spheres, the chief political ideal of which being the primacy of individual human autonomy—did not surface in Western culture until the late Middle Ages, during which there not coincidentally arose the first embryonic beginnings of the modern nation-state. The distinction did not become a significant aspect of Western political thinking until later, some time around the close of the seventeenth century.²² Moreover, though the two are routinely and casually confused, the "private" is definitely not the same as the "individual."²³ That is, while enthusiastic defense of "liberty" against central authority—the distinction between "us" and "the government"—is old (as old in this country as European colonization), the liberal, acquisitive individualism that became our routine self-definition is actually comparatively new, culminating only some time around the turn of the nineteenth

²¹See, e.g., RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 2-6 (4th ed. 2004) (noting origins of the 'public law/private law' distinction in the Code of Justinian).

²²See generally Philippe Ariès, *Introduction*, in 3 A HISTORY OF PRIVATE LIFE: PASSIONS OF THE RENAISSANCE 1-9 (Roger Chartier, ed., Arthur Goldhammer, trans. 1989); Chittolini, *supra* note 9, at S34; Dena Goodman, *Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime*, 31 HIST. & THEORY 1 (1992).

²³Often they are confused because it happens to be politically convenient for some persons nowadays to associate their own individualism with that which allegedly characterized the founding generation. See BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994) (discussing this trend).

century.²⁴ This transition seems to have happened differently in different cultures,²⁵ but it resulted in literally a change in the social construction of the self,²⁶ and accordingly in a changed vision of the relation of the individual, society, and the state.

None of this is to deny that the *idea* of the distinction has some “reality,” as a psychological or phenomenological matter; that is, the *practice of believing* in the distinction is a phenomenon that seems real and may be of interest to the human sciences. The point is merely that the distinction is not biologically predetermined and it does not otherwise reflect some prior ordering of nature. Of course, that proves neither that the distinction is “bad” nor that it is in some way conceptually unnecessary under the conditions of *our* time. Rather, it is open to critique and perhaps in some way or other it could be diminished or dispensed with if in fact it is “bad”

In contemporary thinking there are commonly perceived to be at least two public-private divides, and they are seen as fairly different things.²⁷ First, there exists a sphere of associational activity, giving rise to what might be thought of as organizational or juridical entities, which may be highly informal or which may be more or less formal and bureaucratic, but which are not thought to be the “state.” We might call this the sphere of private “enterprise,” though obviously it is not meant to connote only private commercial *business*. Along with businesses, we

²⁴Historiographical debate has raged recently over whether the *founding* generation in the United States was genuinely individualistic in this sense, and it is said that in fact they held “republican” or some other generally communal views up until the turn of the 19th century. Explanations vary for founding-era communalism, centering mainly on the philosophical predilections of the founding elites, *see, e.g.*, J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975), or the religion of the mass of Americans, *see SHAIN, supra* note 23. No serious disagreement exists, however, that sometime in the early 19th century American political desiderata turned predominantly individualist and liberal in nature, and that we have never as a people turned back.

²⁵In France, for example, it was violent: it has been said that the change began as a royal concession to violent religious conflict and was intended to protect the sovereignty from revolution. Thus, so that there would not be war there came to be recognized a sphere of freedom, debate and criticism which it was not the Crown’s to disturb. *See Goodman, supra* note 22, at 2-8 (Goodman is actually critical of this view in its simple version, though as she says it has been a standard one). In America, by contrast, the transition was not violent, and rather accompanied the gradual decay of a colonial social paradigm. Traditionally, “liberty” had been perceived not as a range of uninhibited individual choice, but as the freedom to live a morally pure life, a life made possible by the freedom of local communities to self-determine morally. Thus, as the transition of the “self” progressed in America, it was made possible by the demise of intrusive, morally and culturally intolerant local community governance. *See SHAIN, supra* note 23.

²⁶It is of no small significance to the arguments in this essay that this origin of the contemporary self and individualism was associated with the rise of a literate middle-class and the rise of widely distributed books—that is, this revolution of the self was to some degree a bourgeois phenomenon, a phenomenon of a propertied class. *See Goodman, supra* note 22, at 11 & n.41. *Cf. Part III, infra.*

²⁷For a representative statement of this common, two-aspect view of public and private, *see* MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002).

would include non-profits, trade and professional associations, churches, clubs, community organizations, and less formal “private” associations. Second, the *family* is conceived as different from all other social entities. A basic difference arguably separates “family” as private and “enterprise” as private—the family, however it may differ in its particulars across time and from place to place, finds a seemingly irreducible basis in the biological fact of reproduction; though family occasionally includes persons not linked by blood or marriage, they are exceptions. (Perhaps surprisingly, though, the nature of the family has also changed quite significantly over time, and in American history the outer boundaries of the “household” have been demonstrably in flux even quite recently.²⁸)

As a jurisprudential proposition the distinction is fairly old, though as recently as Blackstone we can see respects in which its popular understanding seems peculiar to contemporary eyes.²⁹ In contemporary American law the distinction is employed most commonly as a way of saying just what the “government” is, since we frequently recognize responsibilities and incidents of “government” that do not apply to “non-government” entities. This legal proposition tends to be quite a formal one, normally concerned exclusively with the legally defined boundaries of juridical entities (“agencies,” “corporations,” “cities” and so on). It surfaces in basically this contemporary form at least as early as the Marshall Court.³⁰ Now ubiquitous in

²⁸See Barbara Laslett, *The Family as a Public and Private Institution: An Historical Perspective*, 35 J. MARRIAGE & FAM. 480 (1973).

²⁹The distinction is in full evidence in Blackstone; he divides his entire *Commentaries* into the rights of persons, the rights of persons over things, and “public” and “private” wrongs (meaning torts and crimes). See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 118 (Univ. of Chicago, facsimile ed. 1979) (1765). What seems peculiar is that entities we now would reflexively call “public” often had seemingly “private” attributes. The king, most notably, was a private individual as well as a corporate entity, see *id.* at 183, 457, much of whose revenues—despite the fact that they constituted the very public fisc—were conceived as merely the incidents of his privately held property rights. See *id.* at 271-96. Likewise, entities we would call “private” routinely performed seemingly “public” functions. Formal methods of association among tradesmen and entrepreneurs were known in English law even at very ancient times, and they appear to have been fairly autonomous, but they also played distinctly governmental, regulatory roles. Similarly, beginning especially in the 15th century, the English Crown embarked on a number of major exploratory and regulatory efforts by creating corporations, which frequently also attracted significant private investment. Large areas of North America, for example, were under English rule for centuries under the administration of royally chartered but privately managed corporations. See generally 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 2-6 (rev. ed. 1999).

³⁰It explicitly surfaces in U.S. constitutional law at least as early as 1819, when in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Court held that the state of New Hampshire could not interfere with the royally granted, pre-revolutionary corporate charter of Dartmouth College, as such an interference would violate the Contracts Clause of the U.S. Constitution. What is interesting is that in the Court’s view this question required an explicit public-private distinction, because if the Contracts Clause prohibited state government interference with previously created “civil institutions” (like Dartmouth College, if in fact it were a “public” corporation), then the Contracts Clause would seriously frustrate state government administration. See *id.* at 627-30. This problem was averted, however, because the Court found Dartmouth to be a “private” corporation.

American legal doctrine,³¹ for many lawyers the distinction appears as a basic component of our liberal democracy.³² While some jurists occasionally admit their

³¹The distinction is most visible in constitutional contexts, where it surfaces in a wide variety of situations. Its best known role is in the long, tortured, tiresome, and much criticized series of “state action” cases, which necessarily ask whether some challenged conduct was “public” (actionable for violation of constitutional rights) or “private” (not so actionable). Cf. Charles L. Black, Jr., *The Supreme Court 1966 Term, Forward – “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (calling the state action caselaw “a conceptual disaster area,” which “has the flavor of a torchless search for a way out of a damp echoing cave”).

However, it turns up in a large range of other constitutional areas. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (setting out a continuum of degrees of “privacy” within “private” associations, ranging from the family (most private) to for-profit entities (least private), to be used as a test for measuring the degree of a plaintiff’s First Amendment “right of association” in a given context); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (deciding whether particular use of city’s eminent domain power was for a permissible “public” purpose under Takings Clause); *Good News Club v. Milford Central School*, 533 U.S. 98, 115 (2001) (asking whether on-campus religious conduct violates First Amendment by inquiring whether the conduct was genuinely that of the school or merely of the private group, and whether community would be “confused” as to whether school endorsed Christian religion); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 302 (2000) (noting in dicta that tolerance of private speech endorsing religion is to be distinguished from government speech endorsing it). For a long time it played a role in the rights of lawfully resident aliens. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 437-39 (1982) (discussing history of the distinction in this context; noting that governments could discriminate with respect to public benefits, but could not “interven[e] in the private market” by restricting access to private jobs).

Questions of public and private are raised in a variety of “private law” areas, in some of which it is obvious – notably including family law. Likewise, though it is not much explicitly discussed there, it is at the heart of property law, “ownership” being virtually a defining boundary of “private-ness.” The distinction plays a surprising (and not much noticed) role in antitrust law, perhaps reflecting its quasi-constitutional character as a basic gesture of social organization. For example, courts have asked whether a defendant could be liable in antitrust for harms seemingly “caused” by public entities. (The courts say “no.”) See *Massachusetts School of Law at Andover v. American Bar Assn.*, 107 F.3d 1026 (3d Cir. 1997) (holding ABA immune from antitrust liability for its law school accreditation activities, on theory that the “private” ABA had done no more than submit its opinion of plaintiff law school to state governments). The Supreme Court has also sometimes shown a careful concern for the special role of antitrust in defining the legal status of voluntary associations, and has sought to keep it from making them seem like “public” ones. This fairly clearly explains, for example, the result in *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988), which refused to hold that lobbying before a private, closed-door standard setting organization could be legally equated to lobbying before a government (and therefore immunized from antitrust). On a more subtle level it explains *Northwest Wholesale Stationers, Inc. v. Pacific Coast Stationery & Printing Co.*, 472 U.S. 284 (1985), which refused to find that antitrust required private voluntary trade organizations to adopt rules of due process.

The distinction arguably plays at least an atmospheric role in many other controversies that seem quite far afield from the “public law” contexts in which it is obvious. Mass tort liabilities for defective products raise the problem; on one view, they render the entrepreneur an insurer of his fellow citizens, a redistribution of income by judicial fiat at odds with our liberal democracy. Likewise, consider the Supreme Court’s rejection of an attempted “global” class settlement of asbestos lawsuits. The settlement effectively would have used Civil Procedure Rule 23 to set up a nationwide compensation scheme, which would constitute

doubts of the distinction,³³ even the rare open judicial disavowals of it tend to be, apparently, not very serious.³⁴

What seems most important about the distinction in legal thinking is the way in which its notorious difficulty in application is acknowledged by virtually everyone, but then assumed away. Even its critics often assume that, as with most hard legal problems, it is really only hard in the penumbral cases, and not the core cases. Thus, even in those comparatively rare areas in which the distinction has gotten attention from legal academics,³⁵ the focus has rarely been directly on the distinction itself or the problems it causes. Concern rather is usually on particular issues of constitutional or administrative doctrine, intellectual property, or the like.³⁶ Thus, when it is directly considered, most contemporary legal academics see the distinction as approachable without too much difficulty on some heuristic basis or on common sense.³⁷

virtually a free-standing, contractually created regulatory agency to administer asbestos-injury compensation claims. While sympathetic to the burdens of asbestos litigation the Court said this: “The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

³²For example, this seems to explain Justice Rehnquist’s apparent belief in the “essential dichotomy . . . between public and private acts . . .” *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)). One can find similar sentiments among law professors. See, e.g., Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N. C. L. REV. 397, 405 (2006) (“Th[e] [public-private] line is fundamental—it ultimately distinguishes liberal society from its despotic alternatives”).

³³See, e.g., Henry J. Friendly, *The Public-Private Penumbra – Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290-91 (1982) (noting the distinction’s notorious doctrinal confusion within the constitutional “state action” caselaw).

³⁴One is quite surprised, for example, to find such a disavowal by no less a devoted conceptual formalist than Antonin Scalia. See *Richardson v. McKnight*, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting) (dissenting from a ruling that prison guards employed by a for-profit prison management firm do not enjoy “immunity” from §1983 suits as would government employees; admitting that “I see no sense in the public-private distinction, [nor] do I see what precisely it consists of”). Strangely, this dissent was joined by the Chief, who some years earlier had proclaimed this distinction an “essential dichotomy.” See *supra* note 32.

³⁵Except in the area of state action doctrine, the distinction has tended to get comparatively little explicit attention from legal academics. There are notable exceptions. See, e.g., Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

³⁶See Sagers, *Myth*, *supra* note 13 (discussing treatment of the distinction in the so-called “privatization” literature).

³⁷See, e.g., Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 *FORDHAM URB. L. J.* 1477, 1491 (2001) (urging application of constitutional and administrative law rules by “[r]efusing to treat the public/private distinction as an either/or discourse” because “[b]right lines between markets and regulation . . . [are] neither necessary nor desirable”); cf. RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 84-85, 198 (1989) (identifying the public-private split as a well-established “practical measure” to

Another very interesting aspect of debate over the distinction as a legal phenomenon is that it is politically ambiguous. Its critics normally take for granted that it is of value only to their opponents,³⁸ but that is quite false; the distinction serves interests across the ideological spectrum. It is obviously important to libertarians, who normally use it in defining their very position, and others sympathetic to strong individualistic and/or marketplace values. But it is valuable to the left as well, for a variety of reasons. It is seemingly necessary to defense of the regulatory state and to critique of “private” wealth, as well as the protection of private spheres of moral choice concerning issues such as marriage, sexual orientation and reproduction. Generally, invocation of the distinction is a matter of convenience driven by context.

II. MONISM, NOMINALISM AND PUBLIC-PRIVATE IN RADIN’S WORK

Before getting to Radin’s thoughts on the public-private distinction, a few thoughts are in order about the metaphysical status of distinctions in legal practice generally, and how she sees them. To some extent, my ideas on the public-private divide reflect more general jurisprudential problems, and I believe Professor Radin has offered thoughts on them that are important to address here.

A. Radin on Distinctions

To some very large extent, the game of doctrinal practice is a scholastically metaphysical one. It is the practice of saying what some particular thing *is*, into which legal category it belongs, and how it might differ from things in other legal categories. Law, in other words, *is* distinctions. Logically immanent within this game are epistemic and metaphysical claims about human capacity and attributes of nature and justice. An aspect of the game that remains mysterious and which is not logically entailed in the nature of the game itself is whether the announcing of distinctions has a normative aspect.³⁹ While it is not obviously bad if a legal

“distinguish public from private questions” and thereby to protect private institutions important to personal life); Frank Michelman, *Private Personal But Not Split: Radin versus Rorty*, 63 S. CAL. L. REV. 1783, 1783-84 (1990) (discussing Rorty’s position). A fairly common insight is that, while the distinction has no judicially administrable legal meaning, it remains meaningful in understanding governance, and as a concept in political debate. *See, e.g.,* MINOW, *supra* note 27.

Occasionally, for various reasons, an author will urge that the distinction does not matter. *See, e.g.,* Schwarcz, *supra* note 12, at 324 n.25 (arguing that because his paper, dealing with the legitimacy of “commercial private ordering,” considers only public perceptions of legitimacy and not the actual location of regulatory power, he need not engage the distinction itself).

³⁸*See, e.g.,* Morton J. Horwitz, *The History of the Public Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982) (arguing that the legal realists “expos[ed] the conservative ideological foundations of the public/private distinction”). In his defense, Horwitz was concerned mainly with the distinction as it developed in *law* in the 19th century, as opposed to in society generally, but even there his characterization is unduly narrow and incautious.

³⁹I point this out here because it will play an important role in critique at the public-private divide below.

Legal distinctions can be taken as containing propositions about the state of the natural world, and those propositions may or may not be normative. From that perspective they might be characterized as any of the following: (1) as purely positive – reflections of prior

distinction has a normative motivation, it potentially compromises the distinction's accuracy as a sociological description (because it would be only a coincidence if a distinction is both a true description and a politically desirable one) and introduces the risk of politically biased rules.

Though she's not often directly approached the question, Professor Radin appears to have a particular stance on the philosophical problem of doctrinal distinctions, a stance that follows from her general pragmatist's approach to *theory*. First and foremost, the pragmatist approaches all problems, including questions about whether particular rules are good or bad, only in context.⁴⁰ While it would be easy to think that this demand for case-specific context requires rejection of all "theory," based on comments made by Radin and others,⁴¹ the pragmatist is apparently allowed to indulge in it in *some* sense. Radin's various defenses of "theory" appear to mean both that pragmatists can coherently entertain visions of the *ideal* even while working daily within non-ideal conditions⁴² and that they can approach individual questions with a theoretical apparatus so long as that theory is grounded in the actual doing of things being theorized. Thus, the pragmatist cannot answer particular questions unless they are contextualized.⁴³ While these two views seem in some

organization of nature, and therefore as value-neutral sociological description; (2) as both positive and normative; or (3) as purely normative.

⁴⁰See, e.g., Radin, *Pragmatist and Feminist*, *supra* note 18, at 1700 (pragmatists "must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on").

⁴¹See, e.g., *id.* at 1707 (noting that pragmatism is "a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality"); Smith, *supra* note 18, at 424 & n.73 (discussing pragmatic stance toward "theory").

⁴²Radin often says or implies that *some* kind of theory is possible and is desirable, or at least inevitable. See, e.g., Radin, *Transformative*, *supra* note 19, at 413 ("A pragmatist does not suppose, of course, that theory is never possible or that we can somehow do without it altogether. Rather, theory is immanent and evolving; its development is interdependent with practice. Visions of a better life are part of life; they give us the impetus to try to change things. At the same time, those visions are constituted by life as it is now, and they will change as we change our life and our world"); cf. Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 CONST. COMMENT. 539, 541 (1994) [hereinafter Radin, *Deweyan Perspective*] ("Criticism of existing democratic government . . . does not 'touch the social and moral aspirations and ideas with underlie the . . . ideal.' [W]e should clarify and deepen our apprehension of the ideal, and use this deeper understanding to 'criticize and remake its political manifestations.'"). Moreover, she says that theories, despite their imperfections, "guide[] us." Radin, *Transformative*, *supra* note 19, at 416 n.16.

⁴³As Radin frequently says, following Wittgenstein, the pragmatist disfavors abstract answers to particular questions, and instead prefers to "look and see." See, e.g., Radin, *Transformative*, *supra* note 19, at 413 ("With respect to th[e] difficult question of how to implement . . . ideal[s] in practice, . . . there is no algorithm that will tell us how to proceed. We have to look and see, judging each particular case in context, deciding whether it will hurt too much to try to put the ideal into practice now, and re-deciding the particular case when the circumstances change"); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B. U. L. REV. 781, 803 (1989) [hereinafter Radin, *Rule of Law*] ("[W]e [should not] hastily conclude that because there is no such thing as traditional formal realizability [of rules], everything is indeterminate or up for grabs. We shall have to proceed in a more cautious and more piecemeal manner. As Wittgenstein might say, we must 'look and see.'"). Accordingly, she

tension (it is hard to see how one can indulge a theorized “ideal,” which almost by definition does not exist in any practical reality, while disavowing acontextual theory), the latter sense at least is consistent with the traditional pragmatic sense that theory and practice cannot be separated. Apparently, theory exists and is both meaningful and useful, but only as it is employed in action.⁴⁴ As a consequence of this need for context the pragmatist appears to distrust “dichotomies” generally,⁴⁵ and in a powerful earlier piece on the pragmatic consequences for the “rule of law,” Radin explained that rules have no existence independent of their application. Accordingly, while they may exist, rules cannot be stated in the abstract. As she says, “there can . . . be no radical distinction between a rule and the particulars falling under it.”⁴⁶ Accordingly, legal *distinctions*, like other rules, are essentially socially infused and essentially mutable.⁴⁷ Importantly, though, Radin has said that the pragmatist must avoid the “radical particularism” that might follow from this demand for context, and which leads to a “kind of nominalist intuitionism”—that is, the view that rules do not exist at all and that every question must be answered only on case-specific intuition.⁴⁸ She says that cannot be right—because she “doubt[s]

frequently says that questions “are undecidable in the abstract.” Margaret Jane Radin, *On Reconsidering Personhood*, 74 OR. L. REV. 423, 430 (1995) (continuing: “[Arguments] have to be weighed in practice, with respect to specifics”).

⁴⁴This seems consistent both with the views of the classical pragmatists and with those of most legal scholars who take pragmatism seriously. See, e.g., Sullivan & Solove, *supra* note 18, at 700-01 (arguing that pragmatism should reject any “dualism” between theory and practice, and should strive to “make practice more intelligent and more critical, in part by recognizing its theoretical dimension”).

⁴⁵See Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1032 (1991) (“[W]e attack as untenable certain dichotomies, on which th[e] jurisprudence [of autonomous doctrine] rears itself: for example, ‘following’ vs. ‘making’ law, or Rule of Law vs. personal rule”); Radin, *Pragmatist and Feminist*, *supra* note 18, at 1707-08 (“Another pragmatist commitment . . . is the dissolution of traditional dichotomies. Pragmatists . . . have rejected the dichotomy between thought and action, or between theory and practice. John Dewey especially made this his theme; and he also rejected the dichotomies of reason and feeling, mind and body, nature and nurture, connection and separation, and means and ends”); Radin, *Rule of Law*, *supra* note 43, at 801 n.74 (arguing that her interpretation of Wittgenstein “is implicit in the views of many . . . modern critics of foundationalism and the traditional dichotomies of fact and value, theory and practice and the like,” including, by implication, “the modern wave of pragmatism”).

⁴⁶Radin, *Rule of Law*, *supra* note 43, at 808; see also *id.* at 814 (noting that her pragmatic vision “would deny that law consists quintessentially of rules at all, as well as the notion that rules are separate from cases and logically pre-exist their application”).

⁴⁷See Radin, *Rule of Law*, *supra* note 43, at 807-09.

⁴⁸Radin & Michelman, *supra* note 45, at 1046. As they say:

The nonideal pragmatist, awash in formalist/legalist culture, too lazily thinks that since rules can’t possibly be what that culture says rules have to be in order to be any good at all—that is, fact-independently and precontextually operative—then we had better keep away from rules altogether. From rejection of the formalist conception of rulelessness, the nonideal pragmatist may leap (unpragmatically) to the conclusion that all notions of ruleness are misleading, all pretenses of rulelessness misdirected. In other words, she may try to practice the rule that case-by-case judgment, situated

that unaided radical particularism can accomplish much good for human beings.”⁴⁹ Therefore, while Radin is highly circumspect concerning abstractions in general, and she believes that “there is no shared conception that cannot be deconstructed,” for practical and political reasons she believes in a “need provisionally to take for granted (‘bracket’) certain conceptions in order to make others problematic.”⁵⁰ This would seem to follow from her general admonition that the unattainability of ideal theory should not frustrate our efforts to work within our non-ideal circumstances; she chooses not to allow the perfect to be the enemy of the good.⁵¹

From these generalizations can be pieced together a general stance toward legal distinctions, including presumably the public-private distinction. First of all, Professor Radin is suspicious of them to a degree: all generalizations are suspect in the abstract, and even in practice they are unpredictable, as living, evolving and socially contingent things. Moreover, she seems to believe that doctrinal distinctions inevitably will be normatively charged, and therefore (one imagines) she would admit that they are by their nature potentially problematic, both sociologically and politically. However, they remain heuristically useful, and indeed her pragmatism seems to compel that this and other imperfect pre-existing frameworks be preserved as useful human tools despite their imperfections.⁵² Moreover, comfort with a simultaneously “factual” and normative inquiry seems a basic implication of her pragmatism,⁵³ one corollary of which being that we “must dissolve the dichotomy of fact and value.”⁵⁴ Accordingly, while she has been an adept and perceptive critic of

decisionmaking moment by moment, describes all there is and can be to practical, active intelligence.

Id.

⁴⁹Radin & Michelman, *supra* note 45, at 1047. Indeed, as Sullivan and Solove point out, pragmatism *without* some concern for abstractions or “theory”—like that of Richard Posner, which it was their purpose to criticize—can lead to a Burkean conservatism. If pragmatism means merely a commitment to reasonableness or common sense, with a rejection of “theory” and a commitment to case-by-case action to the exclusion of all other evaluation, then it is difficult to know how ever to evaluate larger institutions or traditions. Especially if the would-be pragmatist then concludes that traditions in and of themselves deserve some pragmatic respect by virtue of their very antiquity, then pragmatism is a prescription for ossification and is “conservative” by definition. See Sullivan & Solove, *supra* note 18, at 702, 713-15.

⁵⁰Radin, *Transformative*, *supra* note 19, at 421.

⁵¹See Margaret Jane Radin, *Positive Theory as Conceptual Critique: A Piece of a Pragmatist Agenda?*, 68 S. CAL. L. REV. 1595, 1599 (1995) (urging that Deweyan pragmatists “should work on both nonideal and ideal programs at once”) [hereinafter Radin, *Positive Theory*]; Radin, *Reconsidering Personhood*, *supra* note 43, at 425 (“As a pragmatist, I believe nonideal theory is also necessary. . . . I believe our visions about the nature of human beings and the nature of the good life for human beings cannot be too far divorced from the circumstances that give rise to those visions . . .”).

⁵²See Radin & Michelman, *supra* note 45, at 1032 (“Pragmatically successful critique does not necessarily mean that practitioners give up use of [some problematic intellectual] framework. It may mean, rather, that they watch out and correct for biases to which the culturally situated framework is prone”).

⁵³See *supra* notes 39-52 and accompanying text.

⁵⁴Radin, *Reconsidering Personhood*, *supra* note 43, at 434. As she says, “[f]inding out about the essentials of ourselves and what is a good life for us is simultaneously an empirical

important doctrinal distinctions, particularly in her more recent technology-and-society oriented work,⁵⁵ as a more general matter she takes our status quo institutional apparatus of judging and law-applying, with its dependence on abstract, metaphysical distinctions as a tolerable and apparently indispensable aspect of our “non-ideal circumstances.”

In any case, then, Radin is surely neither monist nor legal nominalist. That is, while her position is a subtle and pragmatic one, she is no thorough-going skeptic of legal distinctions as such. Rather, it appears we should make use of doctrinal distinctions to whatever extent they are useful, a question that must be asked on a context-specific basis. She believes ultimately that by employing “local, working separation[s]” between things, despite whatever problems those distinctions may have, we might be able to achieve “appreciably consistent and purposive rule application.”⁵⁶

B. Radin on Public-Private

As for the public-private problem itself, I believe it can be found throughout Radin’s work. Though muted, it is evident in an important way in the paper around which this Symposium is arranged. However, it will be profitable first to consider the several other, usually more explicit ways it has arisen in her writing.

Her most nearly explicit grappling with it is in her work on the seemingly law-like aspects of contracting and licensing practices and on the law-like nature of some technological phenomena.⁵⁷ The distinction is all but explicitly invoked in her consideration of the seemingly inappropriate or politically undesirable conversion of persons or commercial business organizations into de facto regulatory authorities. This happens when one party in a commercial transaction uses its power over a product—arising perhaps from market power associated with network effects or the

and normative inquiry.” *Id.* The quoted language was actually Radin’s characterization of the views of Martha Nussbaum, but later in the piece Radin noted that her aim was to show “similarities in methodology” between Nussbaum’s work and her own, one of which being the “rejection of the fact/value dichotomy” *Id.* at 444.

⁵⁵For example, in high technology contexts it is hard to know the difference between “text” and “machine,” see Radin, *Online Standardization*, *supra* note 17, or between “contract” and “product,” see Radin, *Humans, Computers*, *supra* note 17.

⁵⁶Radin & Michelman, *supra* note 45, at 1032.

Though it is not directly to the point here, more problematic is her curious, apparently instinctive preference, very common among today’s legal scholars, for policy solutions that take the *via media* or the third way. See, e.g., Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1298 (“We ought to be talking about the details of good mixtures [of “public” and “private” regulation] rather than debating top-down ‘versus’ bottom-up”). Though that instinct bears a certain affinity to her pragmatism, it ultimately and I think irrationally implies the artificial desideratum of *compromise*, which draws suasion only from the questionable fact that it seems reasonable to listen to both sides. Perhaps I’ve misunderstood, but I do not understand compromise for its own sake to be “pragmatic.” Radin herself sometimes seems to acknowledge as much. See, e.g., Radin, *Transformative*, *supra* note 19, at 415 (“I would agree that sometimes [progressive scholars, including Radin] are too ready to see consensus”).

⁵⁷These things have been of concern to a number scholars. See sources cited *supra* note 16.

leveraging of intellectual property—to dictate terms upon the other, who is dependent on that product.⁵⁸ As she says, such situations can result effectively in “private eminent domain” insofar as they lead to “changes of position imposed on one private party by another . . .”⁵⁹ Not only does that situation give a nominally private party power over another, it even allows him to usurp the state itself—he may “privatize information that the intellectual property regimes place in the public domain . . .”⁶⁰ Sometimes in these materials Radin comes tantalizing close to doing away with the distinction altogether.⁶¹

⁵⁸It seems hard to deny that this occurs at least sometimes in reality, and it can arise in peculiar and unforeseen ways. For example, in her casebook Radin relates the well known story of the “MAPS RBL”—the Mail Abuse Prevention System Realtime Blackhole List. MAPS, a non-profit advocacy organization dedicated to opposing “spam” email, began what has become an influential campaign to curb spam by maintaining a list—the RBL—of websites known to send spam and web hosts that provide “spam support services” to their clients. The RBL is then used by ISPs as a list of offenders to include in their “spam filters.” Inclusion on the list is therefore commercially very undesirable to web-hosting services and other service providers—their commercial clients value them more highly if the clients’ presence on their service won’t render them subject to spam filters. Accordingly, MAPS, a privately organized California LLC, has a fair bit of power to encourage compliance with its basic standards against “spam support services” and other behaviors it believes promote spam. MAPS therefore has come to hold significant power that seems indistinguishable from traditionally conceived “government” regulatory power. See RADIN ET AL., *supra* note 17, at 28-32; MAPS homepage, <http://www.mail-abuse.com/>; see also *Media3 Technologies, Inc. v. MAPS, LLC*, 2001 WL 92389 (D. Mass. 2001) (denying preliminary injunction to RBL-listed web-host on any of its claims of defamation, tortious interference or statutory unfair trade practice); *MAPS, LLC v. Black Ice Software, Inc.*, 2000 WL 34016435 (Sup. Ct. Calif., Santa Clara Co. 2000) (allowing a variety of causes of action to proceed against MAPS).

The point here, however, will not be that it does not happen—indeed, I think the phenomenon is omnipresent not just in technology sectors but everywhere—but that there is no meaningful difference between this sort of “private regulatory” phenomenon and the whole other world of examples of social influence arising from circumstances.

⁵⁹Radin, *Humans, Computers*, *supra* note 17, at 1127-28.

⁶⁰*Id.* at 1145; see also Radin, *Regulation by Contract*, *supra* note 17, at 5 (mass software contracts “replace the law of the state with the ‘law’ of the company”).

⁶¹For example, in one article she analyzed the imposition of mass contracts by powerful sellers on buyers who are either weaker or are simply unaware of the contract terms to which they are being bound. (Though she had in mind software licensing contracts, she notes that the situation is not really different than in mass contracts in retail marketing generally.) The problem in such cases, as she characterizes it, is the “puzzle of binding commitment in situations of ‘contract without consent.’” Radin, *Humans, Computers*, *supra* note 17, at 1155-56. She said—“pragmatically,” one presumes—that this problem should be approached by asking “whether we justify party A’s rearranging the entitlements of party B (or a large number of party B’s) on any basis other than consent.” *Id.* at 1156.

But this only makes the absurdity of the distinction glaringly obvious, and her observation would amount to a very perceptive social critique if she had intended it that way. The situation of “party A’s rearranging the entitlements of . . . a large number of party B’s [without] consent” is a plausible model of “government” regulation, and therefore to say that some seemingly “private” entity performs an indistinguishable function is in itself a trenchant critique of any claim that there is a meaningful distinction between public and private.

Likewise, Radin has in several places explicitly made the same observation that a number of the legal realists did, following the insight of Wesley Hohfeld: the realm of social ordering we think of as the “private” one of commercial relationships is infused with a public character, insofar as property and contract are creatures of the state. The background of rights against which private ordering is reached is fixed by the state and reflects non-neutral value allocations. Those allocations preference some interests over others.⁶²

Concern for the distinction is also very clearly evident in her work on the “rule of law,” a project from many years ago that was not much followed up on but that was important in the development of her overall pragmatism. The distinction is implicated there because the model of rules she says is required within in any coherently pragmatic rule of law is one in which “law” is literally made only when legal rules are *followed*; rules do not even exist except as they are followed in practice by people. Such a model implies a radically revised picture of the role of sovereign entities in making “law,” and of the vision that a defining character of law

Radin very briefly addresses the distinction in one other place, though she appears to have raised it as a more or less offhand rhetorical point rather than a serious analytical argument. In discussing how we should feel about the apparently increasing incidence of mass online contracts imposed with no evidence of consumer consent, she suggests that a central problem is how to “justify” their enforceability according to the traditional rationale of mutual consent. “We could . . . make the problem go away,” she says, “by attenuating what we mean by ‘private party.’” Radin, *Humans, Computers, supra* note 17, at 1128. She evidently means we could imagine reconceiving commercial entities with de facto regulatory influence as part of the “state” or as having a claim to legitimacy equivalent to that of the state. Following that, “‘private’ eminent domain [might] be no less and no more justified than ‘public.’” She doesn’t think this will work, however; she does “not believe our ordinary understandings on these matters will change quickly enough to avoid the problem [of justification].” *Id.*

⁶²See Radin & Wagner, *supra* note 56, at 1295-96 (noting arguments that then-emerging “cyberspace” would come to be “privately” ordered, an arrangement said to be superior to government regulation; arguing, however, that such “private” ordering would simply reflect government policy, and explicitly relating this critique to that of the realists); see also Radin, *Humans, Computers, supra* note 17, at 1155 (“I accept the legal realist argument that when the institutions of property and contract take the form of a legal infrastructure, structured and policed by the state, there can be no such thing as a purely ‘private’ ordering”).

As mentioned, this is a Hohfeldian insight. Though he may not have intended it, many of the Realists appear to have found the initial inspiration for their critique in the property law theory of Wesley Hohfeld. Hohfeld, a Yale law professor of the early 20th century, set out to study only property relationships. He began by observing that “property” is not a relation between a human and an object, but between one human and other humans vis-a-vis an object. As a corollary, he argued that every property “right” implies a countervailing “duty” (e.g., the right of exclusion from real property entails the “duty” not to trespass). In other words, every exercise of a property right necessarily limits some person’s countervailing freedom. See generally FRIED, *supra* note 15, at 51-54.

The real problem is that there is no logical stopping point for this critique. From this perspective every right necessarily limits countervailing freedoms. See *id.* at 173-74 (discussing the logical end-point of the Hohfeld-inspired Progressive critique of “rights”). As Professor Fried observes, this was presaged in Holmes’ idea that “even the prohibition on battery, the most apparently nonredistributive of all legal rules, sacrificed the would-be batterer’s ‘gratification of ill-will’ to the other side’s right to be free from pain” FRIED, *supra* note 15, at 53. Holmes expressed this view in Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); see FRIED, *supra* note 15, at 103-04 & nn.164-65.

itself is its origin in “public” acts. Moreover, if the following of a “rule” makes it a “rule” and is a significant component in the make-up of “law,” then the following of law-like norms promulgated by non-state actors must blur the line between “law” and “non-law” and therefore between public and private. As she says, “[i]n the pragmatic view a rule will be [sufficiently known to the] public whenever strong social agreement exists in practice, regardless of whether a legislature or a court has spoken.”⁶³ The making of “law”—a quintessentially “public” act—is always a collaborative project in which actors in the “private” sphere are always participants. Indeed, she goes so far as to say that “[i]f we accept the Wittgensteinian view of rules [as our model of law], . . . we must reject . . . [the] distinction between government as rule-maker and citizens as rule-followers.”⁶⁴

That leads finally to the least obvious question, which is how the distinction plays a role in Professor Radin’s paper in this Symposium, but I think the answer is in many ways the most telling of all. In the main her paper urges a change in the general approach of courts to property rights questions in the “digital environment.”⁶⁵ It works through a series of miscellaneous controversies in recent litigation concerning technology issues, its thrust being that most of the decisions and rhetoric so far have tended to increase the scope of individual ownership in information.⁶⁶ This caselaw is often transparently motivated by misleading “new economy” rhetoric and imagery,⁶⁷ and sometimes driven by bizarre metaphysics, as courts try to conceptualize new technologies as legal objects.⁶⁸ Stressing the “evolutionary and contested character” of property rights in general, Radin urges that recent property trends in the digital environment be reconsidered in light of a variety of policies in addition to property values. She introduces a deliberately physico-

⁶³Radin, *Rule of Law*, *supra* note 43, at 815.

⁶⁴*Id.* at 815-16.

⁶⁵See Radin, *Comment*, *supra* note 3, at 23.

⁶⁶That concern has been common enough among those writing about the social consequences of high technology. See, e.g., sources cited in note 16, *supra*.

⁶⁷Surrounding which, after all, is a certain cautionary history; the rhetoric of the “new” has been a frequently and cyclically misleading phenomenon. One wishes probably in vain that we might someday all learn to stop forgetting our own past. See, e.g., CHARLES P. KINDLEBERGER, *MANIAS, PANICS AND CRASHES* (4th ed. 2000); CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* (1841). In particular, there is a bit of cottage industry in professional critique of New Economy mythology. See, e.g., JEAN GADREY, *NEW ECONOMY, NEW MYTH* (2003); Robert J. Gordon, *Does the “New Economy” Measure Up to the Great Inventions of the Past?*, 14 J. ECON. PERSP. 9 (2000).

⁶⁸Notably, as Radin observes, several courts have analogized the sending of unwanted electronic messages to physical trespasses, and accordingly have relied on common law trespass doctrines in deciding whether those messages are actionable in some way. To do so, however, they have relied on the strained view that the receipt of those messages was a *physical* intrusion because they caused plaintiffs’ computers to receive contact with unwanted *electrons*.

This is probably among the most criticized of current doctrines relating to high technology phenomena. See, e.g., Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 527-28 & n.24 (2003) (setting out conceptual problems in the doctrine, and collecting a long series of journal articles critical of it).

spatial metaphor by which to think about these issues, which she says will lead courts more carefully to consider non-property policy concerns, which are like “neighbors” and are adjacent to property policy in its “neighborhood.”⁶⁹ While admitting this is potentially problematic and can be taken too far,⁷⁰ she says “[t]he propertization neighborhood should always be aware of its function within the city as a whole.”⁷¹ Ultimately, she suggests that the courts will outgrow this initial period of “over-focus on propertization,”⁷² perhaps along with our society’s waning conviction in the eschatological significance of the allegedly “new economy,” but even so, in the meantime she thinks a broader-based consideration of all the affected “neighboring” policies would serve society well and would produce decisions that are “better reasoned.”

I think intentionally or not in this paper she lets slip something that makes the problem of the public private distinction very apparent. One of the many miscellaneous doctrinal problems she considers in the course of the essay, consideration of which she says would be improved through her “neighborhood” metaphor, is corporate limitation of incoming email communications. She asks, “[s]hould a corporation’s property right be expanded to include censorship of incoming email to employees?”⁷³ Tellingly, though she thinks the most important

⁶⁹This “[l]egal milieu,” in which information property decisions should be made, “refers to surrounding legal arenas of thought and political struggle that have bearing on the one we are considering” Radin, *Comment, supra* note 3, at 27. Radin believes that a few “surrounding . . . arenas” in particular have been neglected. Property values themselves serve important interests, as she admits; allocation of property rights is thought to be fundamental to the functioning of healthy markets. See, e.g., Armen A. Alchian & Harold Demsetz, *The Property Rights Paradigm*, 33 J. ECON. HIST. 16 (1973). But other important values are the impact of over-propertization on free speech and competition – she desires the courts “to be as explicit as would be ideal with regard to the neighboring realms of contractual ordering, competition policy, and free speech policy.” Radin, *Comment, supra* note 3, at 34. As becomes clear in the course of her piece, Radin believes these information-propertization cases would be better decided if they were decided more like real property cases, in which explicit consideration of values other than the interests of the individual owner—namely, competition values, free speech values, and contract ordering—has tended to produce property less concentrated in the “owner” and more conscious of social values. Keeping this metaphor in mind, she says, will produce propertization decisions that are “better reasoned.”

⁷⁰See, e.g., Radin, *Comment, supra* note 3, at 27 (noting that her approach “is a heuristic suggestion, which I am proposing in order to try to improve our reasoning about these matters. . . . It is a metaphor, and metaphors should not be pushed too far”). Others have observed that physico-spatial metaphors have in fact produced *bad* judicial decisions, and should be used only cautiously. See, e.g., Lemley, *supra* note 68 (criticizing the “cyberspatial” metaphor, which conceives of “cyberspace” as being genuinely a “place” to which courts could appropriately apply doctrines designed with real property in mind; accepting, however, that the metaphor is probably already ingrained in culture and judicial practice, and that it has led to some bad legal outcomes, but suggesting ways that the metaphor can be used with sensitivity to the special distinctions of online communication).

⁷¹Radin, *Comment, supra* note 3, at 23.

⁷²See *id.* at 39.

⁷³*Id.* at 37. Specifically, she discusses a California state court litigation that culminated in *Intel v. Hamidi*, 1 Cal. Rptr. 3d 1342 (Cal. 2003), which considered whether the Intel corporation could seek to enjoin a former employee from sending mass emails to Intel’s

“neighbor” in this case is free speech values, and though she thinks their propriety should depend on considerations just like those used in Speech Clause cases,⁷⁴ she does not encourage a return to the regime of *Shelley v. Kramer*.⁷⁵ She notes that “[t]he days of expansive state-action doctrine are no longer with us”⁷⁶ But that is *precisely* the point—why not return to *Shelley* if the argument is that some nominally “private” entity would be treated better if it is treated like the state? Why care about formalistic legal distinctions if both the policy problem and the desired approach to it are the same?

Indeed, on a little further consideration it becomes clear that this same transformation, this same sense in which excessive social control is deposited in “private” hands through the process of “proptertization,” runs throughout the essay. It seems that what Radin really desires, in all sorts of “proptertization” scenarios, is for the holders of proptertized values to be constrained in ways that protect the autonomy and social liberties of comparatively weaker persons. While I expect she would say this is not her real meaning, I think the logical conclusion to be drawn from her essay is that, according to her reasoning, private property holders should be held to constraints like those that bind the state – that is, they should be subject to norms essentially like those embodied in our public law, and that result is itself one possible consequence of dissolution of the public-private distinction. So why not just give up on it?

The pragmatist has a very general response to this sort of question, but I will address that below⁷⁷; in the meantime, Professor Radin has offered certain specific thoughts about this particular distinction that are worth discussing. She has

current employees. Intel could not show any physical damage to its system, though it sought to enjoin the emails as “trespass” to its system, and rather argued only that the content of the messages was harmful. The California Supreme Court ultimately denied Intel’s request, arguing that the “trespass to chattels” doctrine should not be extended as far as Intel desired – namely, to reach conduct that causes no physical harm to the plaintiff’s computer system.

⁷⁴She would like to see explicit judicial consideration of how the corporation’s “property” interests in its communications system affect the free speech interests of the corporation’s employees and third parties; she would even like to see concern for whether different results should obtain depending on whether the interdiction is “selective and content-based.” See Radin, *Comment, supra* note 3, at 38.

As mentioned, the California Supreme Court reached the result Radin apparently prefers. She disagrees with the decision, however, because it failed to take her “neighborhood” approach – the Court did not consider the “neighboring” policies in its decision, including most importantly free speech policy. See *id.* at 37. As she says, “in the future, a corporation that wants to enjoin e-mail whose content it does not like will have to show that its computer system was somehow harmed. What sense does it make to sidestep in this way the issues of free speech policy and competition policy raised by this kind of conflict?” *Id.*

⁷⁵334 U.S. 1 (1948) (prohibiting enforcement of restrictive covenants against sale of residential homes to non-whites; finding “state action” requisite to plaintiff’s §1983 action in judicial enforcement of the covenants).

⁷⁶Radin, *Comment, supra* note 3, at 37.

⁷⁷Namely, that we should hold on to even problematic legal rules, both because they might have some value some times and because doing away with such a fundamental concept as this one is unrealistic. I think in this case that general response is not availing; see *infra* notes 81-85 and accompanying text.

sometimes spoken of it disparagingly, though not apparently because she thinks it is inaccurate sociologically or morally.⁷⁸ She has suggested that the distinction is both useful in policy making and, despite acknowledging its penumbral difficulties, thinks it is reasonably administrable by lawyers in some heuristic, Wittgensteinian sort of way.⁷⁹ This sort of approach follows from the general pragmatic model of legal rules discussed above; she thinks that because most public-private problems are in the core and only rarely in the penumbra, we can take the distinction as one that “[w]e all think [of as] self-evident.” Rules of such a nature have some significant meaningfulness because they are taken to be obvious. “[S]omeone who doesn’t see” a result that is within the core to be “self-evident” will be “considered insane or from Mars”⁸⁰

III. TAKING THE DISTINCTION HEAD-ON

In a way, Prof. Radin has an easy response to any general critique of the public-private distinction, either in her work or in law generally, and it is important to face it up front. She could say that, as a pragmatist, she actually makes no generalizations of her own and that, unless the critique is contextualized with some case-specific details, she cannot be called to say whether the distinction is good or not. The pragmatist might say that any critique I could give is itself a generalizing one and with lack of case-specific context it is hopelessly beyond evaluation and therefore that it proves nothing.⁸¹ A separate but related response is that even if we could

⁷⁸As she once said:

I do not need to recapitulate here all the critiques from the right and the left, including some of my own, that undermine the public/private distinction. When all the undermining is done, though, where are we? Have we reached a point where we can consider the social benefit of systems of unconsented-to-contracts imposed by private parties in the very same way we consider the social benefit of statutory provisions imposed by a legislature?

Radin, *Humans, Computers*, *supra* note 17, at 1160. That question was evidently rhetorical (the answer being “no”), and the paper otherwise took the distinction more or less for granted.

⁷⁹She has said this:

I am a pragmatist about the public/private distinction, meaning that in my view it is not a conceptual or formal distinction, an either/or that is easy to deconstruct, but rather a contextual characterization that tends to work in practice most of the time. Most of the time, that is, what is public and what is private has been capable of being sorted out in a way that is functionally understood, in spite of the difficult borderline cases.

Margaret Jane Radin, *Machine Rule: The Latest Challenge to Law 2* (manuscript on file with author).

⁸⁰Radin, *Rule of Law*, *supra* note 43, at 802.

⁸¹She made a related response to a previous critic, which I think is a very good argument and deserves an answer:

The pragmatist will readily grant that someone should work on ideal theory. But why must it be the same person as the one who tries to chart the consequences of alternative courses in light of the complexities [of our existing issues and problems]? To suppose that all the work must be done by one person is to deny that a partial contribution can be a useful contribution. As a pragmatist I tend to think on the contrary that all contributions are partial. The experience of writers as part of an ongoing dialogue seems to bear me out.

simply dispose of a well-settled distinction like this one, which she doubts, we (meaning Radin and those who share her political perspective) should not do so because it may be of strategic advantage to us in advancing our own political goals.⁸²

Despite my own lack of faith in theoretical generalization,⁸³ I think there are several reasons Professor Radin should still take the following analysis seriously. First, this analysis could be read as a critique of a “bad coherence” in her pragmatism.⁸⁴ To the extent the pragmatist is generally open to the distinction or approaches it as a common-sense tool in need only of case-by-case judicial tinkering, or as a tool of use to the pragmatist’s personal political strategy, then I think she is open to a kind of generalizing critique that Radin has said she finds permissible sometimes. Namely, if the public-private distinction is accepted by the pragmatist as “coherent,” it is a coherence of a merely “institutional” kind, and therefore that it is open to categorical rejection; she once made a similar argument about racism and sexism.⁸⁵ Second, to the extent the pragmatist demands a case-specific rather than generalized critique, the following analysis will largely provide it—to really carefully consider the distinction in action is to see just how often it produces results

Radin, *Transformative*, *supra* note 19, at 414. I hope my answer to this point will be evident from what follows.

⁸²She made this point in responding to a previous critic, who alleged that her pragmatic refusal to abandon existing legal rules was inherently conservative. She said that, rather than deconstruct every concept, pragmatists should “use [existing political] ideology for our own political gain.” Radin, *Transformative*, *supra* note 19, at 416. Moreover, she implied that some ideas cannot be dislodged even if it would be good to do so, and specifically that she “do[es] not think . . . that the ideology of private property can be dislodged.” Radin, *Transformative*, *supra* note 19, at 417. Therefore, she thinks that the better course for “our . . . political gain” would be to adopt a “strategy of assimilating more rights into property.” Radin, *Transformative*, *supra* note 19, at 417 n.28. Presumably she would doubt that the deeper and allied concept of the public-private distinction could realistically be challenged in and of itself, and therefore that the better course would be to use it strategically for political gain.

⁸³See Chris Sagers, *Waiting With Brother Thomas*, 46 UCLA L. REV. 461, 469-75 (1998) (noting consequences for “theory” of skeptical epistemology).

⁸⁴The “bad coherence” problem is the tendency, arguably inherent in pragmatism, to conserve “bad” ideas. As Radin has explained, the pragmatist (on her view) follows a “coherence” theory of truth. In a nutshell, this means that the pragmatist, “when . . . faced with new experiences and new beliefs, [will] fit them into [her] web [of existing beliefs] with as little alteration of what is already there as possible” Radin, *Pragmatist and Feminist*, *supra* note 18, at 1708-09. To illustrate, she quotes W.V.O. Quine: “our statements about the external world face the tribunal of sense experience not individually but only as a corporate body.” *Id.* at 1708 n.26 (quoting W. V. O. QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20, 42 (2d ed. 1980)).

As she acknowledges, however, this position has given rise to the criticism of “bad coherence.” Namely, whatever logical suasion the “coherence” position may hold, it is possible that the pragmatist’s existing “corporate body” of beliefs includes morally bad or undesirable ones, and the refusal to reconsider them solely because challenges to them seem “incoherent” might be a politically conservative (and, I would add, patently, painfully obviously logically fallacious) position. *See id.* at 1710.

⁸⁵That is, even while adhering to a coherence theory of truth we can observe that coherence requires fealty to existing *concepts*, not *institutions*. *See Radin, Pragmatist and Feminist*, *supra* note 18, at 1720-21.

in drastic contradiction to our political commitments, even though its odd effects can be hard to see. Likewise, if you think about it, the pragmatic demand for context really just calls on the pragmatist to offer situations in which the public-private distinction works well. It turns out that they are much harder to come by than the pragmatist might think. In any case, even if the pragmatist believes none of this, the following critique can at least be taken as an argument about “ideal theory” of the kind Radin has often said is important even to the pragmatist.

I believe the distinction has no content as either a moral or a sociological proposition. While I will work through case-specific examples, as the pragmatist would presumably insist, the central thrust of my critique is this: *Fundamentally regulatory power, arising from bilateral power asymmetry, is everywhere.* A consequence of this basic observation will be that very difficult (indeed, I believe undecidable) questions of public-versus-private are routine, everyday affairs that are of crucial significance to the lives of real human beings.⁸⁶ I believe the pragmatist is simply mistaken if she suggests (as Radin, most lawyers, and virtually all judges and lawmakers do) that most cases posed under the distinction are “core cases,” and that, except in rare cases at the periphery, the distinction can be easily deployed on some heuristic basis. In fact, however rarely it may be acknowledged, the distinction routinely defies common experience and examples are without number in which it causes there to be different legal treatment of entities that seem substantively similar or identical.

Thus, private universities are not subject to constitutional and administrative law, but public ones are. Religious institutions very literally regulate both their clergy and their parishioners, but are treated in law and theory very differently than governments. Standard setting bodies and trade organizations, which are absolutely ubiquitous in contemporary society, directly regulate and issue opinions that have great influence, but they are generally treated as not only not the government but in fact essentially the same as private individuals.⁸⁷

In terms of quantifiable impact on the lives of individuals, probably the most important example is that large corporations might as well be governments in much of their decisionmaking, but for most legal purposes they are treated nearly as if they were individual human beings. As political scientist Mark Nadel observed, there is little of satisfying substance in a distinction under which decisions made by American auto manufacturers not to employ low-cost safety technology, despite evidence that it would save many thousands of lives annually, are said to be importantly distinct from a federal decision shortly thereafter to require those same measures, on the basis of the same evidence.⁸⁸ More to the point here, it is not clear

⁸⁶As I have written elsewhere more extensively. See Sagers, *Myth*, *supra* note 13.

⁸⁷See Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393 (2004) [hereinafter Sagers, *Antitrust Immunity*] (discussing factual background of standard setting organizations and their treatment under law).

⁸⁸See Mark V. Nadel, *The Hidden Dimension of Public Policy: Private Governments and the Policy-Making Process*, 37 J. POL. 2 (1975). As Nadel says, “[w]hen we say that a member of the school board in Sheboygan, Wisconsin, is part of ‘the authorities’ but the president of General Motors is not, we cannot go very far in understanding political behavior or public policy” *Id.* at 19. Cf. Kurt L. Hanslowe, *Regulation by Visible Public and Invisible Private Government*, 40 TEX. L. REV. 88, 130 (1961) (“[I]t is plain that substantial proportions

why a manufacturing design decision rendered by a massive “private” corporation (or, really, any other generalized decision by such an entity), posing large consequences for individuals, is meaningfully different than the kinds of transactions about which Radin has written recently, which she implies are problematic in that they resemble “public” actions but are not subject to public law norms. Why are any broad choices by major corporations really different than “shrink-wrap” or “click-wrap” software licensing programs? Why are they so different than technological innovations that have the effect of limiting rights that persons otherwise would have? Why are they so different than the MAPS Realtime Blackhole List?⁸⁹

Thus, hard and highly debatable public-private questions are daily, ubiquitous, and hugely important to the lives of individuals. The distinction simply is not a core-and-penumbra phenomenon.

Generalizing, non-pragmatic defenses of the distinction can be made, but they are not at all compelling. Most legal academics are not much impressed by the formalistic, institutional positivism that drives the distinction in judicial practice. Though it surely explains the approach of practicing lawyers and judges, it is neither very morally nor sociologically compelling to say that some consequence is not the work of a “private” person because it was “caused” by some action of an entity that is formally constituted as part of the “government.” As just a few examples, consider the standard setting body composed of industry representatives whose product standard is adopted by state and local governments through an unreflective rubber-stamp,⁹⁰ or the NCAA, a nominally “private” non-profit association whose members include many state universities and which wields significant regulatory power over them.⁹¹ Legal academics are therefore usually sympathetic to more nuanced explanations, but I believe those too are really no more convincing than the most formalistic positivism. I don’t believe the solution can be that “state” authority is backed by “legitimate coercion” or even that the state has a monopoly on “legitimate violence,” because there is such a range of easy counter-examples.⁹² Likewise, it is not because submission to “private” authority is merely “voluntary,” a seemingly thoughtful solution until one remembers it is the same as the logic in

of economic activity are presently not governed by rules that come anywhere near approximating the power-neutralizing, classical, atomistically individualistic, liberal, competitive model”)

⁸⁹See *supra* note 58.

⁹⁰See Sagers, *Antitrust Immunity*, *supra* note 87, at 1398-1402 (discussing the great frequency of this sort of “incorporation by reference”).

⁹¹See *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (refusing to consider NCAA “state actor” for purposes of §1983 procedural due process suit brought by state-university employee disciplined under NCAA pressure).

⁹²First, many nominally “private” organizations wield extensive power that is “legitimate” in our predominant discourse. A wide array of nominally private associations can impose fines, expulsion, and other sanctions. Obvious examples include religious excommunication, expulsion from a trade group for violation of membership or conduct rules, denial of licensure or certification, or money penalties. See *supra* note 87 and accompanying text. Second, many “government” actions are backed by sanctions not including violent coercion. We do not imagine SEC penalties not to be “law” because they are not punishable by death.

Lochner. In reality, subjection to much “state” authority is voluntary whereas subjection to much “private” authority, really, is not.⁹³

Indeed, it turns out that the *only* sense in which the distinction really has any appeal is that it works to some extent as a Holmesian bad-man prediction of what courts will do,⁹⁴ and it is not even especially good at that.⁹⁵ Ultimately, as I have been implying throughout this essay, the public-private distinction is merely a normative commitment that happens to appear as an identification of pre-existing nature. Therein is both an explanation of its weakness as a sociological instrument – it would be only a coincidence if reality matched up with any particular group’s political desiderata – and its moral ugliness – because it is in fact a reflection of a particular political vision, it therefore disadvantages other visions. Indeed, it is the reason why pragmatically cautious refusal to jettison the distinction is a problem of “bad coherence”: invocation of the distinction as a non-arbitrary reflection of pre-existing nature works violence in the everyday lives of people.⁹⁶

I think Professor Radin’s work in particular would benefit from a more explicit and generalizing reconsideration of this issue because, frankly, it raises problems that seem to have been central to her throughout her career. Her abiding project, it seems to me, has always been a humane one: her work surrounds a commitment to what

⁹³At least in our society, subjection to many forms of state authority is quite voluntary, and subjection to many forms of non-state authority is only “voluntary” in the same formal sense as was implied in liberty of contract caselaw. “Certainly,” says Frank Snyder, in a very thoughtful article,

the State is an association that is more difficult to exit than, for example, the Sierra Club or a bowling league, but so is a family, a church, or the market economy. Most State associations are, in fact, voluntary, even for those who reside within the State. I have no obligation to join the Coast Guard or work for the State of California. If I do not like the Forth Worth City Council, I can move to Arlington. If I do not choose to be a Texan, I can move to New Jersey. If I decide I no longer want to be an American, I can go to France or, if I prefer someplace lacking any resemblance to a State, Somalia.

Snyder, *supra* note 10, at 378.

⁹⁴See O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459, 461 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man [Under that perspective, the ‘law’ is] [t]he prophecies of what the courts will do in fact, and nothing more pretentious . . .”).

⁹⁵For example, courts sometimes give significant weight to the government-like acts of private entities. See, e.g., Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (noting the influence of privately set safety and design standards in tort litigation).

⁹⁶Thus it turns out to be slightly ironic that Professor Radin does not explicitly encourage a return to “[t]he days of expansive state action doctrine,” as in *Shelley v. Kramer*, 334 U.S. 1 (1948). Radin, *Comment, supra* note 3, at 37. *Shelley* is not, despite popular lawyerly opinion, just a curiosity or a politicized aberration of little current significance. It was a culminating moment in the career of Robert Hale, the legal realist whose life’s work lay largely in arguing that the fundamental purpose of the public-private distinction is to disguise prior endowments of resources. See FRIED, *supra* note 15, at 87-88.

she describes as a Deweyan “democratic ideal,”⁹⁷ at the core of which is a moral desideratum for self-attainment of the individual.⁹⁸ Direct confrontation of the rhetoric of public-private, in a global and generalizing way, seems of central significance to this project because, ultimately, all the problems with the distinction are really problems of *power*, and the distinction’s tendency to legitimize that power (indeed to conceal it utterly) is disagreeable precisely because that power dehumanizes the individual.

For example, no one seriously doubts that an employer has “power” in some sense over his employees, and few Americans today really question the legitimacy of that influence. The “legitimacy,” however, arises from the concept of property – and therefore directly from the public-private divide. That the employer may hire and fire, and as a consequence set workplace rules, seems appropriate because the proprietor *owns* the productive assets at issue and its revenues.⁹⁹ But indeed, the proprietor can do so much more: the proprietor may discipline, impose institutionalized norms, and socialize workplace behaviors, including whole attitudes, moralities and personalities, all through exercising the “rights” that flow ultimately from the assignment of property. The proprietor, in other words, holds *power*, of a subtle, extensive, and potentially insidious kind.¹⁰⁰ In contemporary society, the scope of this power has become very broad; most Americans now work for organizations that employ very large workforces, most of which are nominally “private.” Accordingly, to a profound degree in current American society there reside in “private” hands accretions of regulatory power, indistinguishable in my mind from anything called “government” power except in the rhetoric we use to explain it.¹⁰¹ By characterizing the coercive potential of property as simply a private

⁹⁷Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 CONST. COMMENTARY 539, 541 (1994).

⁹⁸See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (2001).

⁹⁹No doubt the argument could also be made that such a situation will normally be allocationally efficient, because the assignment of property rights in this case appropriately aligns incentives. This will also contribute to the sense of “legitimacy,” but is by no means its only or, I expect, its primary source.

¹⁰⁰This is power in the sense famously theorized by Steven Lukes as the “radical conception of power,” meaning the ability not only to force a subject to do or not do something contrary to that person’s desires, but also to influence those very desires themselves. See STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2005); Peter Digeser, *The Fourth Face of Power*, 54 J. POL. 977, 978-84 (1992) (discussing Lukes’ vision and comparing it to that of Michel Foucault). Foucault expresses a more subtle and recondite understanding of “power,” based on his view of the “subject” as historically constructed. Its result is a society in which something called “power” is not so much an intentionally exercised capacity of one person over another, but a relation in which the participants are both “vehicles” through which power passes. See *id.*

Foucault’s argument is compelling and meaningful but I think it would also be distracting to try to pursue it here; I think my rhetorical point is made well enough by Lukes’ instinctively compelling notion.

¹⁰¹This fact calls into question much more than the legitimacy of the employer’s property rights or the sociological accuracy of the public-private distinction. It casts doubt on whether, at least in today’s society, there even are such things as “markets,” or at any rate markets that are in any sense “free.” See Sagers, *Myth*, *supra* note 13; Herbert A. Simon, *Organizations*

right of ownership, the common view renders the employee's subjection voluntary and therefore fair. Thus, property and private-ness are themselves agents to legitimize otherwise contingent and debatable allocations of coercive influence. Once that ephemeral veil of legitimacy is disregarded, asymmetrical distributions of truly regulatory power seem to appear *everywhere*.

A completely different question, however, is what difference this really makes. That is, one might say that the criticism here is really just semantic: Maybe in Radin's work there has already been a full and searching critique of the *substance* of maldistributed power, and all she's failed to do is address the arguably cosmetic matter of calling this or that source of power "public" or "private" as the case may be. Maybe labeling it one thing or the other isn't really that important.

In fact I think the critique here makes a very significant difference, for two quite different reasons. First, as I have tried to imply, I believe that on a reasonable reading of her work Radin's logic leads to quite a radical reconception of social relations, but the quiet, legitimating rhetoric of public-private has kept her from considering it. Indeed, I think such a reconceptualization would be *painfully* obvious except that the "persistent mythological force of laissez-faire ideology in our culture"¹⁰² makes it so hard to see: the world of non-state organizations in contemporary society have precisely nothing in common with the individual persons to whom we analogize them, an illusion we could preserve so long in the face of so much reason to believe otherwise *only* because of the public-private distinction. Worse yet, public-private rhetoric tends to conceal the fact that misallocations of power are only becoming worse, and perhaps inexorably so. Organizational choices driven by profit-maximization—which in our liberal capitalism we take largely for granted as the wholesome by-products of dynamic and allocational efficiencies—tend ever more greatly to favor centralization to maximize efficiencies in production and distribution. Weber long ago foresaw this would be the case in his metaphor of the "iron cage," but its grim consequences for the individual tend to be obscured by public-private rhetoric. Therefore, I think the larger work to be done in this area is not the continued pragmatic tinkering with miscellaneous doctrinal issues or the exploration of yet more seemingly unique or peculiar factual scenarios. With respect to power in society—the issue obscured from view by the public-private distinction—the real work is in large-scale reconceptualization.

The second and quite different reason I think this critique matters is also the only real criticism I will offer of Radin's pragmatism as such. Pragmatism, especially in its concern for retaining even problematic rules for the sake of their potential political value, tends to turn legal writing into something other than scholarship; it becomes irreducibly political rhetoric. Maybe the pragmatist will say that this is unavoidable, and indeed maybe pragmatism itself should be taken as an all-encompassing epistemological attack on the very idea of scholarship. Maybe its central message is that politics is all there really is. But unless one is ready to go that far then there is something amiss in a view that says we should avoid purely abstract questions because they don't have immediate practical application or to do so doesn't

and Markets, 5 J. ECON. PERSP. 25, 25 (1991) (broadly critical of price-theory-driven neo-institutional economics; noting, among other things, that "Counted by the head, most of the actors in a modern economy are employees").

¹⁰²Radin & Wagner, *supra* note 56, at 1295.

serve our own political objects (as Radin seems occasionally to have argued). There is something of value in our freedom to indulge very broad critique of the public-private distinction, even if the actual disposal of it seems politically implausible and even if exploiting it might be of political value to the pragmatist herself.