

Charter *Horizontality*, the *Public/Private Divide*, and *Responding to Injustice*

Sina Akbari*

I. Introduction

In recent years, there has been significant growth and expansion of the “platform” economy. Corporations such as Uber, Netflix, Amazon, and Facebook have come to occupy major positions in the economy. Their rise has, in part, been facilitated by foundational doctrines of contract law. For example, the concepts of offer and acceptance have been interpreted to render “click-wrap” and “browse-wrap” agreements legally enforceable contracts.¹ Such interpretations legally bind users of platforms to the numerous and detailed terms of service set unilaterally by the corporation itself. The legal enforcement of boilerplate agreements reduces the transaction costs associated with negotiating agreements on a user-by-user basis but it also allocates significant power to the corporations who set the terms of the agreement.² This power has been exercised in ways that strike many as unjust, and as a result, legal arguments have been developed for interpreting contract doctrine in ways that respond to this power imbalance. Perhaps most notably, in *Uber Technologies Inc v Heller*,³ a majority of the Supreme Court of Canada (“SCC”) relied on the doctrine of unconscionability to invalidate

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1 See *Century 21 Canada Ltd Partnership v Rogers Communications Inc*, (2011), 338 DLR (4th) 32, 96 CPR (4th) 1 (BC SC).

2 Margaret Radin has argued that unregulated boilerplate agreements or contracts of adhesion may degrade the normative basis of freedom of contract and undermine the rule of law. See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013).

3 [2020] 2 SCR 118 [*Uber*].

a mandatory arbitration clause set out in Uber’s standard form services agreement. They reasoned that the inequality of bargaining power between Uber and its drivers enabled Uber to extract an improvident bargain.

The applicants in *Cool World Technologies Inc v Twitter Inc*⁴ aim to add another arrow to the quiver of those concerned with responding to the power of platforms. However, rather than developing an argument strictly within the bounds of private law doctrine, they argue that public law values in the *Canadian Charter of Rights and Freedoms*⁵ (“*Charter*”) ought to apply to the common law of contract. The issue of whether and how the *Charter* applies to private relations, referred to as the question of “horizontality,” has been subject to substantial scholarly debate in the public law literature.⁶ But this issue has, until recently,⁷ received less attention from private law scholars in Canada. This is surprising because, while claims about horizontal effect are claims about the *Charter* and its application, they are at the same time claims about private law. We would expect that private law scholars would have much to say about this issue.

One possible explanation for this lack of engagement on the part of private law scholars might be a practical one. Academic specialization results in siloing, which provides theorists with fewer opportunities to engage with each other and discuss how their areas of expertise might intersect. However, another possible explanation is a theoretical one. The issue of horizontality can be seen as another way of revisiting the more general theoretical debate about the line, if any, between private and public law. If a theoretical boundary can be drawn around private law, scholars of private law are justified in going about their business without concern about if and how public law, including the *Charter*, might apply to the law of property, contract, or tort.

The aim of this article is to explore the ways in which private law theory bears on the question of the horizontal effect of the *Charter* and the promises and limits of horizontality as a way of responding to injustice. Specifically, I ask whether the strategy pursued by the applicants in *Cool World* is likely to be effective in securing the progressive vision of social justice which Joel Bakan — co-counsel for the applicants — defended in his earlier work on the *Charter*.⁸ I offer a response to this question by showing how private law theorists understand the relationship between private law and “public” forms of distributive and social justice. In Part II of the article, directly below, I examine how scholars have theorized private law in a way that insulates the practice of private law from public law values like those in the *Charter*. I

4 2022 ONSC 7156 [*Cool World*].

5 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

6 Particularly by comparative constitutional law scholars, see, e.g. Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights” (2003) 102 Mich L Rev 387 and Mark Tushnet, “The Issue of State Action/Horizontal Effect in Comparative Constitutional Law” (2003) 1:1 IJCL 79.

7 Ernest Weinrib’s most recent book includes an in-depth discussion of the issue of horizontality and private law theory. See Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford: Oxford University Press, 2022) [Weinrib, *Reciprocal Freedom*]. But it is worth noting that *Charter* horizontality is not discussed at all in his earlier, landmark book on private law theory, *The Idea of Private Law* (Oxford: Oxford University Press, 2013) [Weinrib, *The Idea of Private Law*]. I discuss Weinrib’s views in Part II of this paper.

8 Joel Bakan, *Just Words* (Toronto: University of Toronto Press, 1997).

focus on two prominent strands in the literature which theorize the division in different ways. First, I consider the law and economics perspective, which argues that law is justified on the basis of maximizing social welfare (this has been characterized as “public law in disguise”), and that the sole aim of private law ought to be wealth maximization, even if other legal institutions ought to be used to promote other values such as distributive justice. Second, I provide a brief outline of Ernest Weinrib’s corrective justice theory of private law, which casts private law as reflecting a special relational morality, with its own immanent norms, that is separate and distinct from distributive justice and public law relations.

In Part III of the article, I then draw on Nancy Fraser’s distinction between affirmative and transformative responses to injustice to show how theorizing about private law can limit the institutional possibilities for responding to injustice. I show how, despite their different moral points of view, both camps discussed in Part II underwrite a broadly similar institutional division of labour between private and public law: each provides a normative justification of private law which supports a free market and it is only after the operation of the market produces unjust outcomes that public law institutions are justified in stepping in and ameliorating those effects. Bad consequences produced by private law relations may be subject to after-the-fact legal intervention, but the underlying structure of private relations is preserved. By contrast, a transformative approach would recommend altering the underlying structure of private relations in order to address the root causes of injustice. I show that Bakan’s earlier work on the *Charter* was grounded in a normative account of justice that was transformative in this sense.

In the final Part, I examine Cool World’s argument that contract law doctrine ought to be interpreted in light of *Charter* values. While recovering and developing horizontality in Canadian jurisprudence is an important project, I raise some worries about this approach in this particular case. In doing so, I draw on Bakan’s earlier work on the *Charter*. I show that the horizontality argument in *Cool World* implicitly accepts broadly the same institutional response to injustice endorsed by the economic and corrective justice theorists of private law. That is, it focuses on the *effects* of unequal private power rather than reconfiguring private law relations to alter the power of the parties. By doing so, not only does horizontality not address the root causes of unjust outcomes, it may also have the effect of naturalizing the existing state of affairs. As an alternative, I suggest that a law and political economy approach, one which sharpens the focus on how power is allocated through private law entitlements in the first place, rather than focusing on how power is exercised after it has already been acquired, arguably does a better job of securing the transformative form of justice Bakan has defended.

II. How Theorists Insulate Private Law from Public Law

In this Part, I summarize two arguments in the private law theory literature about how the line between private and public law is drawn and show how they insulate private law from public law values like those expressed in the *Charter*: law and economics and corrective justice. I focus on these two strands of thought for several reasons. First, while other theoretical viewpoints have been developed in the literature, law and economics and corrective justice are

9 Leon Green, “Tort Law: Public Law in Disguise” (1959) 38:1 Texas L Rev 1.

arguably two of the most prominent in the field.¹⁰ Second, despite the disagreement between these two schools of thought and their fundamentally different moral viewpoints, I show that they ultimately end up in, broadly, the same place: justifying a market-based economy, with any social harms created by the operation of the market addressed reactively, after-the-fact. However, they arrive at this conclusion for different reasons.

In *Fairness Versus Welfare*,¹¹ law and economics scholars Louis Kaplow and Steven Shavell argue that the sole aim of all legal institutions ought to be the promotion of overall social welfare and not “fairness.”¹² According to this type of “welfarism,” the basic moral principle is the promotion of the well-being of individuals. Economic analysts of the law generally adopt a preference- or desire-based conception of well-being: an individual’s well-being is enhanced through the satisfaction of her preferences.¹³ Kaplow and Shavell’s account differs from earlier economic theories of law such as that of Richard Posner, who argued that the sole aim of law ought to be wealth-maximization.¹⁴ However, according to Kaplow and Shavell, the desire-satisfaction account of well-being is broad enough to incorporate values beyond just wealth. Because individuals may have a “taste” for things like fairness and equality, they argue, these preferences can be incorporated into the social welfare function and realized through the operation of legal institutions designed to bring them about.¹⁵ That is, values such as equality, distributive justice, fairness, etc. are not valuable as such, but they are indirectly valuable insofar as their realization enhances the well-being of individuals.¹⁶ So, on Kaplow and Shavell’s more capacious account of welfare, values such as justice, equality, etc. may be justifiably pursued by the law.

However, despite accepting the possibility that a taste for justice or equality might justify laws aimed at distributive or other concerns, Kaplow and Shavell provide a further argument for why *private* law should be designed solely to promote wealth maximization. In order to defend this claim, they make the analytical assumption that, as a practical matter, wealth can be used as a proxy for well-being for the purpose of legal design and analysis.¹⁷ Further,

10 There is a large literature examining the relationship between different areas of private law and distributive justice. Contrary to the theorists discussed here, some have argued that areas of private law such as contract ought to incorporate the demands of distributive justice. For a classic example, see Anthony Kronman, “Contract Law and Distributive Justice” (1980) 89 Yale LJ 472. However, I focus on law and economics and Weinrib’s account of corrective justice because they are two of the most prominent theories of private law in the Canadian literature.

11 Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge: Harvard University Press, 2002).

12 They define “fairness” in the negative: “[W]e employ the terminology of ‘notions of fairness’ to refer only to principles that accord weight to factors that are independent of individuals’ well-being.” *Ibid* at 44.

13 *Ibid* at 18–24.

14 For Richard Posner, the sole criterion of value is value in exchange which is determined by willingness to pay. As he put it: “The individual who would like very much to have some good but is unwilling or unable to pay anything for it — perhaps because he is destitute — does not value the good in the sense in which I am using the term ‘value.’” Richard A Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981) at 61.

15 Kaplow & Shavell, *supra* note 11 at 21–23 and 431–436.

16 For a critique of the claim that non-welfarist moral values can be incorporated through the satisfaction of preferences, see Lewis A Kornhauser, “Preference, Well-Being, and Morality in Social Decisions” (2003) 32:1 The Journal of Legal Studies 303.

17 Kaplow & Shavell, *supra* note 11 at 36–37.

they argue for the principle of institutional specialization: values other than wealth (e.g. distributive justice or equality) are better realized through targeted institutions (e.g. taxation and transfer) from the perspective of overall welfare because such institutional specialization reduces costly distortionary effects that are inefficient.¹⁸ So, on Kaplow and Shavell's view, non-wealth maximizing values can be incorporated through the preferences of individuals, and might be justifiably pursued through the law. But it is more efficient, in their view, to have private law maximize wealth and have other specialized legal institutions aimed at securing non-wealth maximizing aims. These scholars do not engage directly with the issue of horizontality, but the structure of their theory suggests that public law values such as those found in the *Charter* ought to be pursued through public law institutions and not the private law.

Unlike economists, who view private law as a tool or means for promoting social aims, Ernest Weinrib has defended "an internal account" of private law which aims to understand "the law in its own terms."¹⁹ In *The Idea of Private Law*, Weinrib argues against views that understand private law as serving purposes external to the practice of private law itself. As he puts it: "the purpose of private law is to be private law."²⁰

Weinrib is an avowed formalist.²¹ His method of theory construction begins with the formal structure of private law relations and, through the process of regression, he identifies "the moral standpoint immanent in its structure."²² On Weinrib's account, the core feature of private law is the correlative structure of the relationship between plaintiff and defendant: when a plaintiff is wronged, they have a rights claim against a particular defendant. It is the correlativity of private law rights and obligations that characterizes private law's distinctive structure. On Weinrib's view, this formal structure of private law relations reflects corrective justice, and the idea of Kantian right supplies the normative content immanent in that relation.²³ The plaintiff has a natural right to their person and property and the defendant has a correlative duty to not interfere with that right. Further, private law reasoning reflects the idea of formal freedom and formal equality; it ignores any substantive differences between the parties (e.g. their relative wealth) and is indifferent to the particular ends which the parties are attempting to achieve through the exercise of their rights.²⁴ So, on Weinrib's view, private law reflects the concretization of an individual's abstract and innate right to freedom as non-interference.

One consequence of this framing is that theories that understand private law as serving aims external to the bilateral and correlative relationship of right and duty between plaintiff and defendant — such as social welfare, distributive justice, or promissory morality — fail because of their inconsistency with private law's formal structure.²⁵ Because private law reflects its own immanent morality, Weinrib argues that private law is autonomous and non-

18 *Ibid* at 28–35.

19 Weinrib, *The Idea of Private Law*, *supra* note 7 at 12–14.

20 *Ibid* at 5.

21 See *ibid* at chapter 2.

22 *Ibid* at 19.

23 See *ibid* at chapters 3, 4.

24 See *ibid* at chapter 4.

25 *Ibid* at 46–55.

political.²⁶ It is autonomous because the normative grounding of private law can be drawn from within the practice itself, and it is non-political because it does not entail the weighing and trading-off of competing interests. Accordingly, there is a bright line drawn between private law (which instantiates corrective justice) and public law (which instantiates distributive justice).

The two views I have summarized so far demonstrate how private law theory can operate to insulate private law from public law. Both camps engage in the exercise of theoretical boundary drawing. Neither directly addresses the question of horizontality, but both theorize private law in a way that leaves no space for arguments about how constitutional law might bear on private law. My suggestion is that this kind of private law theory, which endorses strong boundaries between private and public law, might be one explanation for why the issue of horizontality has not captured the attention of private law scholars in the same way it has for scholars of public law.

However, because horizontality persists in the legal practice of several jurisdictions, private law scholars have begun to turn their attention to the issue. For example, in his most recent book, *Reciprocal Freedom*, Weinrib further elaborates his view on the relationship between public and private law by addressing the issue of horizontality, and the question of whether and how the constitution might apply to private law.²⁷ Now, Weinrib argues that constitutional rights operate on the private law in three ways. The first is the “determinacy function” according to which the constitution assists to “render legal norms more determinate.”²⁸ The second is by using constitutional rights as values that assist in the development of private law doctrine, which he calls the “development function.”²⁹ Finally, the most demanding is what he calls the “dignity function,”³⁰ which “places the courts under a duty to orient the private law towards the actualization of constitutional values.”³¹ To claim that courts are obligated to realize constitutional values through the private law is a striking development in Weinrib’s theory. I agree with Alan Brudner’s assessment that, given the position that Weinrib defended in *The Idea of Private Law*, “that statement is a jaw-dropper.”³² If there is a duty to actualize constitutional values through private law, how does private law preserve its distinctive form of justice?

Weinrib’s proposal for addressing this dilemma is to differentiate between the “scope” and “operation” of horizontality.³³ Scope is a “threshold issue”; it asks “whether, in a given situa-

26 See *ibid* at chapter 8.

27 Weinrib’s discussion of horizontality begins with the “path-breaking Luth decision in 1958” of the German Federal Constitutional Court. See *Reciprocal Freedom*, *supra* note 7 at 117. The first treatment of the issue of horizontality by the Supreme Court of Canada was in the 1986 decision of *RWDSU v Dolphin Delivery Ltd.* [1986] 2 SCR 573. Given that both decisions predate the publication of *The Idea of Private Law*, it is surprising that this line of jurisprudence is not discussed in that work.

28 *Ibid* at 132.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 Alan Brudner, “The Rise and Fall of Private Law — *Reciprocal Freedom: Private Law and Public Right*, Ernest J Weinrib” (2024) 37:1 Can JL & Jur 323 at 338.

33 See Weinrib, *Reciprocal Freedom*, *supra* note 7 at chapter 7.

tion, a constitutional right is implicated in the private law controversy at all.”³⁴ It is only after we have settled the question of scope and determined that the *Charter* does apply, that we turn to the question of operation: “the process of balancing the rights invoked by the two parties.”³⁵ According to Weinrib, the boundaries of the scope of application of horizontality to private law are set by the “structure of the private law relationship”³⁶ and “the fundamental private law distinction between non-feasance and misfeasance.”³⁷ Misfeasance is “any act or omission by one that impairs, damages, or otherwise affects something that comes under another’s exclusive rights vis-à-vis the first,”³⁸ whereas non-feasance is a failure to confer a benefit on another. So, it would appear that when a “constitutional right specifies rights that are distributive in nature, as in the case of social and economic rights,”³⁹ they would be incompatible with the structure of private law, because they involve the conferral of a benefit and there is therefore no scope for application. But constitutional rights like those found in the *Charter* are, by Weinrib’s own lights, distributive in nature and represent a form which is fundamentally distinct from corrective justice. So, how could a private law relationship ever fall within with the scope of horizontal application of *Charter* rights?

Weinrib points to an example from the South African jurisprudence, *Governing Body of the Juma Masjid Primary School v Essay NO*,⁴⁰ as an example of a coherent way of addressing the issue of scope and resolving the potential conflict between positive obligations arising from constitutional rights and private right.⁴¹ In *Juma Masjid*, the Juma Masjid Trust leased their property to the state Department of Education in order for the latter to operate a primary school on the premises. As a result of the Department’s repeated non-payment of rent, the trustees sought an order evicting the school from the premises. However, one consequence of granting such an order would be to interrupt the education of the children currently enrolled at the school and infringing their right to a basic education guaranteed by the South African Constitution. Here we have a private law relationship: the Juma Masjid Trust holds a right to use its property and the Department has a correlative duty of non-interference with that right; for the school to remain on the property would amount to an infringement of the Trust’s private right. We also have a public law relationship: the children have a right to a basic education and the state has a correlative duty to provide that education; a failure by the state to provide a basic education would amount to an infringement of the children’s constitutional rights.

So, you might think that, given the structure of private law, the coherent resolution of the issue would be to grant the order to the Trust. If the children’s right to a basic education is *vis-à-vis the state and not the Trust*, then the Trust’s eviction of the school would seem to be an act of non-feasance (i.e. a failure to provide a benefit to the children) rather than misfeasance

34 *Ibid* at 150.

35 *Ibid* at 149.

36 *Ibid* at 150.

37 *Ibid* at 152, citing Peter Benson, “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60 UTLJ 731.

38 *Ibid* at 158, citing Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge: Belknap Press, 2019) at 7.

39 *Ibid* at 150.

40 [2011] ZACC 13 [*Juma Masjid*].

41 The following relies on Weinrib’s discussion of *Juma Masjid* in *Reciprocal Freedom*, *supra* note 7 at 153–160.

(i.e. an infringement of a right the children hold against the Trust). The children would have a rightful claim against the state but not the Trust. That is, the transaction would fall outside the scope of the horizontal application of the Constitution.

But Weinrib arrives at the opposite conclusion: he argues that the children's right to education does have an effect on the private law relationship between the Trust and the Department. On his view, "once ... the children had been allowed into the space the owner could disinvite or expel them at will ... [b]ut they could not be disinvited or expelled in a way that would impair the existing rights that they were enjoying."⁴² While the Trust had no "antecedent obligation to assist ... the children in the exercise of their rights, they could not injure those rights through their ownership of the location where the rights were being exercised; doing so would cross the line from non-feasance to misfeasance."⁴³ Given the relational and correlative structure of private right, this is a surprising result. And Weinrib acknowledges this: "[i]t may seem odd that in the *Juma Masjid* case the constitutional right has the chameleon-like quality of shifting its significance from distributive to corrective justice, and of shifting the conduct that affects it from non-feasance to misfeasance."⁴⁴ Nevertheless, Weinrib insists that despite the horizontal application of the Constitution in this case, the distinctive structure of private law as corrective justice and the misfeasance/nonfeasance distinction is preserved.

Once it is determined that a particular private law dispute falls within the scope of horizontality, there is the further question of how horizontality operates on the private law. Weinrib argues that, where private law rights and constitutional rights clash, horizontality operates by "balancing the divergent effects of different rights."⁴⁵ For example, where there is a conflict between the constitutional right to freedom of expression and the private right to privacy, such conflict is resolved by comparing "the effect of those rights on the reciprocal freedom of the parties in the particular circumstances of the case"⁴⁶ and "minimiz[ing] the degree to which the exercise of each person's right impairs the exercise of the right of the other."⁴⁷ As Weinrib acknowledges, "[f]rom the standpoint of corrective justice, the balancing that characterizes the operation of horizontality is unusual."⁴⁸ Weighing and balancing the comparative effects of a conflict between rights appears to have more in common with the analysis of the welfarists that Weinrib criticized in *The Idea of Private Law*. Nonetheless, he argues that the distinctive nature of private law is preserved because horizontality is concerned with balancing the effects on the purpose of each right at issue and remains "indifferent to the purposes for which persons exercise their right."⁴⁹

Weinrib's recent work demonstrates the challenges with endorsing direct horizontality while maintaining a strict boundary between private and public law. Brudner has argued that "with horizontality ... Weinrib's subordination of private to public law becomes total."⁵⁰ With

42 *Ibid* at 158–159.

43 *Ibid* at 159.

44 *Ibid* at 158.

45 *Ibid* at 173.

46 *Ibid* at 175.

47 *Ibid* at 177.

48 *Ibid* at 174.

49 *Ibid* at 179.

50 Brudner, *supra* note 32 at 336.

respect to the scope of horizontality, Brudner argues that Weinrib does not reconcile horizontality with the misfeasance/nonfeasance distinction — a distinction that is central and distinctive to private law. Rather, Weinrib “merely strains the meaning of misfeasance, while basing liability on what private law would call an omission to extend the term of an unpaid-for benefit.”⁵¹ Further, with respect to the operation of horizontality, Brudner argues that balancing the effects on the rights of parties is inconsistent with the correlative structure of liability that was central to Weinrib’s corrective justice account in *The Idea of Private Law*. Reasoning that compares the effects of a conflict on the respective rights of two individuals weighs considerations which “fall on each party separately rather than on both correlatively.”⁵² It is difficult to see how private law remains autonomous and non-political once the demands of horizontality are placed on it.⁵³

In this Part I’ve tried to show that the way in which private law theorists have often theorized about private law in part amounts to a boundary-drawing exercise between the public and the private. We’ve seen how this line was drawn by economists and by Weinrib in his earlier work. By sealing off private law from public law, this kind of theoretical boundary-drawing exercise might explain why private lawyers have largely overlooked the application of the *Charter* to private law. The strict divide between public and private defended by these theorists might be one reason for why even less demanding, indirect horizontality has not been fully reconciled with private law. I’ve also tried to show the difficulties that theorists run into when they do attempt to reconcile *Charter* horizontality with the idea of private law as a distinct domain. Because horizontality requires taking account of public law values in private law contexts, this inevitably puts pressure on the strict distinction between the public and the private. This tension becomes more severe when the more demanding direct horizontality is being reconciled. As we saw, critiques of Weinrib’s more recent work argue that the private/public distinction is untenable in direct horizontality; private law becomes subsumed by public law. My claim here is not that no form of horizontality can be reconciled with the position that private law is distinct from public law. Rather it is to show that theorizing about private law often involves some claim for why private law is distinct from the aims and purposes of public law and that reconciling horizontality presents challenges for private law theorists because it may undermine the ability to defend those boundaries.

III. The “Division of Labour” and Transformative Responses to Injustice

In the previous Part, I outlined two arguments by private law theorists for why private law ought to be insulated from public law values. Now I’d like to emphasize a key difference and a key similarity between the corrective justice and law and economics accounts of private law. The most obvious difference is that these theorists offer very different moral justifications for private law. As discussed in Part II, Kaplow and Shavell’s law and economics approach adopts a welfarist, consequentialist political morality. While their approach might (indirectly) incorporate non-welfarist values such as justice or fairness, private law remains restricted to pro-

51 *Ibid* at 338.

52 *Ibid* at 340.

53 In discussing Weinrib’s analysis of *Juma Masjid*, Brudner concludes: “How this form of horizontality would be structurally different from the functionalist’s orientation of private law towards welfare goals specified as valuable external to private law is difficult to discern.” See Brudner, *ibid* at 338.

moting wealth-maximization on welfarist, efficiency grounds. By contrast, Weinrib's corrective justice account of private law rests on a natural rights-based, deontological moral theory. For him, an individual's innate right to non-interference is the moral principle that explains the form of corrective justice that regulates private relations and excludes distributive justice.

These two moral viewpoints are typically understood to be at odds with each other. But my aim is not to wade into this debate and offer my own substantive argument in defence of one moral point of view over the other (there is a large body of literature engaged with these questions).⁵⁴ Despite adopting moral points of view that appear to be opposed, what I'd like to emphasize here is a central feature they both share. Both camps ultimately endorse the same broad institutional approach to justifying and integrating the demands of distributive justice: it is only once the operation of the free market, through private law, has produced results that either undermine welfare (in the case of the economist) or threaten an individual's independence (in the case of the corrective justice theorist), that the state is justified in responding to demands for distributive aims through public law institutions. They each supply a moral basis for market relations and only justify after-the-fact intervention by the state to correct the injustice that those relations produce. That is, both camps of private law theorists draw a boundary between public and private law in a way that reflects the idea of an institutional "division of labour" in liberal political philosophy.⁵⁵ This should not come as a surprise; both corrective justice and law and economics defend liberal theories of property and contract.

A different way of putting the point draws on Nancy Fraser's distinction between "affirmative" and "transformative" ways of remedying injustice.⁵⁶ Affirmative remedies are "aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them."⁵⁷ The liberal division of labour between private and public law is affirmative in the sense that public law institutions, such as taxation and transfer, are justified on the basis of correcting outcomes without changing the underlying (market) framework that produces those outcomes. Because affirmative responses to injustice leave the underlying structure of private relations untouched, they legitimate the status-quo structure of private relations.

54 For example, the moral basis of Weinrib's theory is "innate right ... the right that belongs to every human being not through an act of acquisition but by virtue of being born" (Weinrib, *Reciprocal Freedom*, *supra* note 7 at 154). But, as Miller and Pojanowski have argued, this is implausible in the context of artificial persons like a state or a corporation. See PB Miller and JA Pojanowski, "Torts Against the State" in Paul B Miller & John Oberdiek, eds, *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020). Similarly, Liscow has developed a critique of Kaplow and Shavell's institutional specialization principle internal to the economic framework. See Zachary Liscow, "Is Efficiency Biased?" (2018) 85 U Chicago L Rev 1649. Further, there is a vast literature in moral philosophy which argues that welfarism fails to capture important non-welfarist moral intuitions. See e.g. Amartya Sen, "Utilitarianism and Welfarism" (1979) 76:9 *The Journal of Philosophy* 463.

55 Dagan and Dorfman use the "division of labour" idea as a way to understand and argue against traditional conceptions of the private law/public law divide which are reflected in "liberal" theories of private law. Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 *Colum L Rev* 1395 at 1402. The "division of labour" idea has been discussed by several theorists in political philosophy. See e.g. Samuel Scheffler, "The Division of Moral Labour" (2005) 79 *Proceedings of the Aristotelian Society*, Supplementary Volumes 229.

56 Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 *New Left Review* 68.

57 *Ibid* at 82.

Kaplow and Shavell's theory of private law and its relation to distributive justice is affirmative in precisely this sense: they interpret justice solely as a question of redistributing market outcomes and leave the underlying market relations structured by private law untouched. Because they are consequentialists, they understand justice as a question of the distributional effects of legal practices. Their view does not admit of understandings of justice as relational; that is, accounts of justice that focus on the structures and processes that affect how individuals relate to one another, rather than the outcomes they produce.⁵⁸

Weinrib's account is also arguably affirmative, although this is less clear given his more recent work. Weinrib clearly assigns conceptual priority to private law relations; the first step in the conceptual sequence is the recognition of an individual's natural and innate right to non-interference with their person and property. The private right to non-interference and the related idea of misfeasance explains the distinctive moral basis of private law. It is only after private right is recognized in the civil condition that the state has wide authority to respond to any threats to individual independence that might result from the recognition of private right, including ensuring constitutional values are developed through the private law. Nonetheless, Weinrib insists that the distinctive morality and structure of private law relations as corrective justice remain intact and that this morality and structure limits the scope of application of the *Charter* in ways that insulate private law from the demands of social or economic justice. But the other way in which Weinrib's account might be interpreted as affirmative is that horizontality is given effect on an individual-by-individual or case-by-case basis. Horizontality as a response to injustice on Weinrib's view is transactional and personal rather than structural and impersonal. That is, *Charter* values bear on the private law in the specific context of a particular dispute between two parties; they do not influence and shape the nature of private right in the first instance.

By contrast, Fraser argues that "transformative" remedies are "aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework."⁵⁹ The difference between the two approaches is a focus on "end-state outcomes versus the processes that produce them."⁶⁰ So, a transformative approach to injustice would require an understanding of the relations and processes that produce injustice and would recommend reconfiguring the underlying structure and not just correcting for the effects that the structure produces. With respect to economic injustice, this would mean "redress[ing] unjust distribution by transforming the underlying political-economic structure"⁶¹ through remedies such as "universalist social-welfare programmes, steeply progressive taxation, macro-economic policies aimed at creating full employment, a large non-market public sector, significant public and/or collective ownership, and democratic decision-making about basic socioeconomic priorities."⁶² Accordingly, a transformative approach would look at how private law structures relations and would recommend reconfiguring those relations in a way which addresses the causes of socioeconomic injustice rather than simply ameliorating its effects through public law, e.g. via

58 See e.g. Iris Marion Young, "Displacing the Distributive Paradigm" in *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2012) 15

59 Fraser, *supra* note 56 at 82.

60 *Ibid.*

61 *Ibid* at 84.

62 *Ibid* at 85.

tax and transfer. This kind of argument is familiar to legal scholars who have interrogated the ways in which the public/private divide operates in liberal political theory.⁶³

In *Just Words*, Bakan argued that we should be cautious about the promise of the *Charter* in achieving a “progressive” vision of “social justice.”⁶⁴ His conception of social justice included the ideals of 1) equality, understood as the “elimination of major disparities in people’s material resources, well-being, opportunities, and political and social power, and an absence of economic, social, and cultural oppression and exploitation”;⁶⁵ 2) freedom, which “encompasses negative freedom, or the protection of people from arbitrary uses of official authority and coercive power, but ... also includes a positive dimension: the capacity — the resources, abilities, and opportunities — to exercise freedom and avoid coercion by others”;⁶⁶ and 3) democracy, which “means active participation of people in determining the conditions of their existence and association.”⁶⁷ The worry with *Charter* commentary of the day, Bakan argued, was that there was “insufficient attention to the constraining influences of economic, social, and political conditions on the operation and effects of the *Charter*.”⁶⁸ Bakan’s worry was that these background conditions might limit the potential of the *Charter* to realize these ideals.

Drawing on Fraser’s distinction, I believe we can interpret Bakan as arguing for a transformative approach to responding to injustice. Bakan’s caution about the progressive potential of the *Charter* was, in part, grounded in “the empirical reality ... that we live in a capitalist system of social relations.”⁶⁹ Specifically, Bakan argued that the underlying structure of capitalist social relations limits the possibility of realizing the ideals of equality, freedom and democracy. He argued that judicial protection of *Charter* rights would leave underlying social relations untouched; to use Fraser’s terminology, it represents an affirmative response to injustice. Accordingly, for Bakan, the *Charter*, on its own, would be insufficient to achieve these ideals. What is necessary is a transformation of the private law which structures those underlying social relations.

My aim here is not to argue in favour of transformative approaches over affirmative ones, although my sympathies do lie in that direction. Rather, my point is to show how the theoretical project of demarcating the boundaries of private law described in Part II may implicitly restrict the ways in which we might respond to injustice. Theories of private law which insulate private law from “public” values like distributive justice or *Charter* values may limit the institutional possibilities for achieving justice. They may also limit the possible understandings of what justice demands by focusing on the distribution of outcomes rather than the relations and processes which produce those outcomes. Transformative approaches to injustice entail a reconfiguration of the underlying structure of social relations, including those constituted by private law. Fraser’s distinction between affirmative and transformative responses to injustice can help sharpen the promises and limits of horizontality in securing justice.

63 See e.g. Margaret Thornton, ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995).

64 Bakan, *supra* note 8 at 9.

65 *Ibid* at 9–10.

66 *Ibid* at 10.

67 *Ibid* at 10–11.

68 *Ibid* at 9.

69 *Ibid* at 8–9.

IV. *Cool World*, Horizontality, and Root Causes

In this Part, I do not examine whether *Cool World*'s horizontality argument is sound from a doctrinal perspective. While I believe the legal argument is persuasive, the question I'm interested in exploring is a practical one: will horizontality of the kind argued for in *Cool World* help secure the progressive vision of justice Bakan endorsed in his earlier work? The dispute in *Cool World* turns on the interpretation and enforcement of Twitter's boilerplate "User Agreement." According to the contractual term at issue, Twitter has "absolute discretion" to refuse to promote or host tweets. Twitter purported to exercise its discretion by refusing to promote *Cool World*'s tweet advertising a film produced by the applicant, specifically on the basis of the film's political content. The applicants argue that, in order to protect their *Charter* right to free expression, the contractual term conferring absolute discretion to Twitter ought to be legally unenforceable. Very briefly, the structure of their argument is 1) *Cool World*'s trailer constitutes speech that is constitutionally protected by the *Charter*; 2) Twitter's platform is a *de facto* public arena; and 3) the court should interpret and apply the public policy doctrine in contract law in light of the values expressed by section 2(b) of the *Charter* (freedom of expression) to render the contractual term void.⁷⁰

The *Cool World* litigation is an important intervention. It picks up a thread of legal argumentation that has largely been ignored or forgotten by private lawyers. Since the Supreme Court's first treatment of the issue of *Charter* horizontality, there have been few cases where parties have grounded their claim on the basis of the *Charter*'s applicability to common law doctrine.⁷¹ Further, it is a salutary intervention from the perspective of those who are skeptical of the normative basis of the division between private and public law, because it advances a doctrinally-grounded argument that places pressure on, and reveals the tension in, the private/public distinction in law.

Developing a body of caselaw and jurisprudence around the horizontal application of *Charter* values to private law is, in and of itself, an important achievement, as it offers an additional context in which legal arguments grounded in the *Charter* can be framed. However, here I'd like to reflect on arguments for why this strategy might or might not be effective in ameliorating the injustice at issue in *Cool World* and furthering a more substantive ideal of freedom of expression. In particular, I will raise some worries about the possibility of meaningfully addressing the power of social media platforms through *Charter* horizontality and the courts.

One argument for why this strategy might be successful is that Canadian courts are, today, more amenable to an interpretation of the *Charter* which reflects progressive understandings of social justice. This is an empirical and predictive claim. In the past — the argument goes — the judiciary might have been more inclined to interpret and apply the *Charter* in a way that serves the interests of the more powerful, but today we see a shift which suggests that Canadian courts might be more sensitive to the interests of those dealing with powerful economic actors. In support of this, one might point to examples like the Supreme Court's recent *Charter*

70 For a more detailed discussion of the applicant's argument, see Bakan and Choudhry's piece in this volume: "The Hidden Promise of *Dolphin Delivery*: Shields, Swords and Horizontal Application of the *Canadian Charter of Rights and Freedoms*" (2025) 33:4 *Const Forum Const* 1.

71 For a discussion of the Canadian jurisprudence, see *ibid.*

jurisprudence on labour rights, which held that the right to freedom of association includes the right to a meaningful collective bargaining process and the right to strike.⁷² This has been interpreted by some commentators as a dramatic reversal of the Court's position from the old "Labour Trilogy" of 1987 and a significant expansion of the constitutionally protected rights of labour.⁷³ These kinds of decisions, it could be argued, reflect a shift in the tendency of the Supreme Court towards interpreting the *Charter* in a way which protects the interests of those with less economic power.⁷⁴ As such, now might be precisely the right time for a case like *Cool World*, which could lead to the development of a robust horizontality jurisprudence propelled by this shift in tides.

Of course, this claim is entirely contingent and depends on the ability to accurately predict the tendency of the judiciary to further social justice at a particular moment in time. In the past, by contrast, scholars expressed caution about pursuing justice through *Charter* litigation.⁷⁵ They believed that, at the particular moment in history during which they were writing, the judiciary was predisposed to serve the interests of more powerful actors. For example, they pointed to how section 2(b) of the *Charter* was interpreted to protect the right to "commercial expression" to buttress the claim that the judiciary served the interests of powerful commercial actors.⁷⁶ So, in a different time and place, the argument might cut the other way.

However, even if one could accurately predict that a court would be persuaded by Cool World's arguments, there is a deeper worry: this strategy would only address the effects and not the root causes of the power imbalance in the relationship between Twitter and its users. Like the law and economics and corrective justice theories discussed above, it reflects an affirmative rather than transformative approach to injustice because it leaves the underlying structure or framework as it is; it addresses the way platforms like Twitter exercise their power rather than focusing on the relations and processes that explain how that power was acquired to begin with. Even if Cool World's argument is successful, such a transactional approach to protecting the right to freedom of expression provides no guarantee that Twitter would not happily continue to exercise its absolute discretionary power unfettered in other instances. Each infringement of that right would have to be challenged on an individual-by-individual basis. In this sense, and as Bakan put it, the structure of a *Charter* rights claim is "dyadic": it conceptualizes (in)justice as "discrete clashes between rights-bearers and duty-holders, each

72 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.

73 As Harry Arthurs put it: "Indeed, the Supreme Court has performed a complete *volte face*. In a remarkable series of judgments culminating in *Saskatchewan Federation of Labour*, it has not only repudiated its 1987 Trilogy, it has affirmed and expanded — and yes, even created — rights for working people." Harry Arthurs, "Of Skeptics and Idealists: Bernie and Me and the Right To Strike" (2016) 19 CLEJ 327. Not everyone expressed the same optimism about the potential of these *Charter* rights for labour, however. See e.g. Eric Tucker, "Freedom to Strike? What Freedom to Strike? Back-to-Work Legislation and the Freedom to Strike in Historical and Legal Perspective" (2020) 86 Labour / Le Travail 135.

74 One could also point to private law jurisprudence such as *Uber*, *supra* note 3, as evidence of this shift.

75 It is worth noting that Arthurs himself admits that he failed to accurately predict the shape of *Charter* jurisprudence around labour rights. See Arthurs, *supra* note 73 at 330. This reflects the difficulty in the predictive project.

76 Allan C Hutchinson, "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990) 17:1 Can Bus LJ 2. In light of these worries, it is worth noting that the litigants in *Cool World* are corporations and the speech at issue is an advertisement in the form of a film trailer.

clash potentially resolved by adjusting the relationship between the two disputants.⁷⁷ And there is no guarantee that users will have the means to vindicate their right to freedom of expression in court.⁷⁸ Cool World's argument about the applicability of *Charter* values to a common law contract right shares the same structure.

Such a strategy for protecting the right to freedom of expression fails to directly address the root causes of the private power that platform companies like Twitter exercise because it situates the right to freedom of expression as a matter of personal wrongs and not as one shaped by structural or impersonal forces. Bakan alerted us to this worry in his earlier work: “[e]ven if the Court is someday prepared to take the quite radical steps of extending obligations to respect freedom of expression to private actors ... it is unlikely that communicative freedom would be substantially enhanced. The atomistic form of rights would preclude the courts from ordering the kind of transformation of knowledge-producing structures and institutions that would be necessary to ensure that all people could freely and genuinely participate in the so-called marketplace of ideas.”⁷⁹ That is, this approach “deal[s] only with discrete symptoms, leaving underlying social structures untouched.”⁸⁰

In order to address the root cause, what is required is an analysis of how law facilitates or structures private power. To put it in terms of the argument in *Cool World*: how does law operate in order for a company like Twitter to become a *de facto* public arena in the first place? Here, the work of scholars who take a law and political economy approach to social media platforms is instructive. For example, Rachel Griffin has argued that current approaches to social media governance tend to overlook the fact that the power of platforms like Twitter and the markets they operate in “are constituted by law and rely on continual state support.”⁸¹ The market for social media is “constituted by the law of contract, property, the rules of (im) permissible conduct in negotiations, (im)permissible forms of economic coordination, and so on, which not only enable market transactions to take place but shape market outcomes by determining the relative bargaining power of different actors.”⁸² What is important is the way that law structures and allocates bargaining power among participants in the social media economy to begin with. The worry is that an approach that relies on the courts and the *Charter* is less effective because it does not alter the legal structure which sets the background conditions for the operation of platform companies like Twitter.

A transformative approach, on the other hand, would call for structural reform that would bolster an individual's freedom of expression. What this might look like in the social media platform economy is policies which allocate more bargaining power to individuals. The precise prescription would depend on the particular companies and the legal structure of the markets in question. For example, there have been calls to decrease corporate power, promote

77 Bakan, *Just Words*, *supra* note 8 at 47.

78 As Bakan put it: “Social circumstances often make it impossible for people to exercise the rights created by successful cases... In short, for many people, winning a right does not automatically mean that it can be exercised.” Bakan, *supra* note 8 at 57.

79 *Ibid* at 70, fn 26.

80 *Ibid* at 47.

81 Rachel Griffin, “Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability” (2023) 14:1 *Transnational Legal Theory* 46 at 62.

82 *Ibid* at 63–64.

media pluralism,⁸³ mandate interoperability requirements,⁸⁴ reform competition law,⁸⁵ and regulate platform companies as public utilities.⁸⁶

In the context of *Cool World*, the issue is how to address Twitter's power to moderate the content on its platform. As technology critic Cory Doctorow puts it, this issue can be addressed through "two broad approaches: the first is to fix the tech giants and the second is to fix the Internet."⁸⁷ The first approach focuses on shaping the behaviour of the platforms themselves; "demanding that these self-appointed dictators be *benevolent* dictators."⁸⁸ That is, to focus on how Twitter's power is exercised. This is the remedy that *Cool World* is effectively seeking: to ensure that Twitter's power to determine what is or is not hosted on its platform is exercised in way that is consistent with *Charter* values.

The second approach focuses on the structure of the platform economy and on how law can bolster or dilute the power of different actors in the market. Very generally, as Doctorow explains, the power of platforms like Twitter derives from "a 'network effect': the more people there are on Twitter, the more reason there is to be on Twitter and the harder it is to leave. But technologists have another name for this: 'lock in.' The more you pour into Twitter, the more it costs you to leave. Economists have a name for that cost: the 'switching cost.'"⁸⁹ Doctorow's proposal for diluting the power of platforms like Twitter is to lower users' switching costs by mandating interoperability requirements. Interoperability "is the act of making a new product or service work with an existing product or service."⁹⁰ Specifically, he advocates for what he calls "*adversarial* interoperability: that's when you create a new product or service that plugs into the existing ones *without the permission of the companies that make them*."⁹¹ Legally mandated adversarial interoperability would empower users to make credible the possibility of moving from Twitter to another platform by lowering switching costs. If a user like *Cool World* disagrees with Twitter's content moderation decisions, they could move to a different platform but continue to communicate to their Twitter community. However, as Doctorow notes, existing "laws, regulations, and court decisions ... have dramatically restricted adversarial interoperability."⁹² It is these laws that help explain Twitter's power, and that would be the target of reform in a transformative approach to injustice.

Of course, the particular technical and legal steps necessary to implement Doctorow's proposal are beyond the scope of this paper, and there may be other approaches which take up the

83 *Ibid* at 84.

84 See e.g. Ian Brown, "Interoperability as a Tool for Competition Regulation" (2020) OpenForum Academy, online: <https://openforumeurope.org/wp-content/uploads/2020/11/Ian_Brown_Interoperability_for_competition_regulation.pdf>.

85 See e.g. Lina M Khan, "Amazon's Antitrust Paradox" (2017) 126 Yale LJ 710.

86 See e.g. K Sabeel Rahman, "Regulating Informational Infrastructure: Platforms as the New Public Utilities" (2018) 2 Georgetown Law & Technology Review 234.

87 Cory Doctorow, "Twitter and Interoperability: Some Thoughts From the Peanut Gallery" (25 January 2021), online: <<https://www.eff.org>> [<https://perma.cc/DPY3-FRQZ>].

88 *Ibid* (emphasis in original).

89 *Ibid*.

90 Cory Doctorow, "Adversarial Interoperability" (2 October 2019), online: <<https://www.eff.org>> [<https://perma.cc/D78F-KCBH>].

91 *Ibid* (emphasis in original).

92 *Ibid*.

“fix the internet” approach. My aim here, however, is to demonstrate two different approaches to addressing the issue which track the broad distinction between getting at root causes and ameliorating bad effects of Twitter’s power, and to raise some worries about the latter kind of approach.

Transformative structural reform of this sort would seemingly depend on legislative and administrative institutions and not the courts. So, one rejoinder might be: given that, at this time, those institutions are unlikely to achieve progressive change of this sort, isn’t pursuing freedom of expression protections through the application of *Charter* values to the common law better than nothing? While I am sympathetic to this kind of argument, there is a further worry. One of the qualities of affirmative responses to injustice is that a focus on outcomes tends to obscure the underlying structure of relations that produce those outcomes. One potential upshot is that this may serve to legitimate or naturalize existing underlying private relations. While it is possible to pursue change both through the courts and through the legislature, there is a risk that a *Charter*-based victory in cases like *Cool World* will result in a quietism about the laws which structure the market that companies like Twitter operate in and that are the targets of Doctorow’s call for reform. My point here is not to co-sign the more strident progressive critiques of the *Charter*⁹³ or to say that horizontality arguments ought not to be pursued; the labour rights jurisprudence noted above demonstrates the progressive potential of *Charter* rights to strengthen the bargaining power of workers. Rather, the point is that the effectiveness of the horizontality strategy in a given case will turn on whether a particular *Charter*-based challenge will have transformative potential rather than affirming existing underlying structures.

V. Conclusion

A robust Canadian jurisprudence on *Charter* horizontality has not been developed since the issue was first contemplated by the Supreme Court. One suggestion for why this might be the case is that private law scholars have set theoretical boundaries around contract, property, and tort in a way that purports to insulate them from *Charter* values. In this regard, *Cool World* is a salutary intervention. It picks up the thread from cases like *Dolphin Delivery* and develops a compelling and novel legal argument for why courts should interpret and apply common law contract doctrine in light of the values expressed by the *Charter* to render Twitter’s boilerplate contractual term void. In doing so, it also places pressure on the normative basis for the public/private division. And yet, at the same time, I have tried to raise some potential worries about this approach that track concerns raised by Bakan in earlier work. We should remain cognizant of the potential pitfalls of responses to injustice which leave the underlying framework of social relations untouched.

93 See e.g. Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada* (Toronto: Thompson Education Pub, 1994).

