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Contracts, markets, and justice

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Review Essay of PETER BENSON, *Justice in Transactions* (Cambridge, MA: Belknap Press, 2019)[†]

Peter Benson's Justice in Transactions offers a compelling internal, non-instrumental Hegelian conception of the law of contracts. It also connects this non-instrumental conception with broader issues like the social theory of the market, liberal justification, and socio-economic justice. The book is a remarkable achievement. As such, it will – and should – become part of the canon of contract theory. In this review essay, I focus on the theoretical status of the reconstruction offered by Benson in Part I of the book. I am sympathetic to the 'juridical' starting point of Benson's theory and agree that contract law and its doctrinal categories should be taken seriously. However, I argue that Benson's theory sits at a middle position between a doctrinalist account and a full-blown philosophical theory of contracts and that this detracts from its ability to provide an adequate public justification of contract law as a legal institution. Finally, I cast some doubts on Benson's account of the relationship between his juridical conception of contract and markets and distributive justice.

Keywords: contract theory, juridical conception, justice in transactions, Peter Benson, public justification

I Introduction

For better or for worse, North American legal academic discourse about private law in recent decades has been heavily influenced by law and economics. Thus, Oliver Wendell Holmes apparently got it right when he affirmed that 'the man of the future is the man of statistics and the master of economics.'¹ Since the 1990s, however, several scholars from the University of Toronto – among others, Ernest Weinrib, Arthur Ripstein, Alan Brudner, and Peter Benson – began to formulate a robust and philosophically sophisticated alternative to the economic approach to private law.

Peter Benson's contribution to this project has focused on contract theory, and *Justice in Transactions* offers a comprehensive account of Benson's view. The

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1 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10:8 Harv L Rev 991 at 1001. Regrettably, to a significant extent, the 'man' part was also an accurate prediction. See Gráinne de Búrca, Marcela Prieto Rudolph & Michaela Hailbronner, 'Editorial: Gender in Academic Publishing' (2019) 17:4 Intl J Constitutional L 1025; Meera E Deo, *Unequal Profession: Race and Gender in Legal Academia* (Stanford, CA: Stanford University Press, 2019).

2 Peter Benson, 'Contract as a Transfer of Ownership' (2006) 48 Wm & Mary L Rev 1673.

book incorporates and refines some of Benson's previous arguments about contract as a transfer of ownership,² the public justification of contract,³ the distinction between misfeasance and nonfeasance,⁴ and the doctrine of consideration.⁵ But the book goes well beyond recasting Benson's already existing work. The book offers, in its first part, a comprehensive reconstruction of the main principles and doctrines of the common law of contracts. The second part of the book presents a more theoretical account. It asks whether the account sketched in the first part is juridically coherent and morally acceptable, as well as how it can fit within a wider set of institutional arrangements in liberal democratic societies (xi–xii).

Peter Benson's *Justice in Transactions* is an admirable book. It offers a compelling and fully articulated presentation of an internal, non-instrumental conception of the law of contracts. The book also connects this theoretical construction with the social theory of the market and broader considerations of socio-economic justice. In both tasks, the book is remarkably clear, captivating, and thoughtful. Even those who disagree with Benson will find much to learn from this book, and the work will probably – and, in any event, should – become part of the canon of contract theory, alongside works like Grant Gilmore's *The Death of Contract*,⁶ Charles Fried's *Contract as Promise*,⁷ and Stephen Smith's *Contract Theory*.⁸

Many sections in the first part of the book are insightful and make an important contribution to contract theory. Just a few examples include Benson's account of contractual fairness (165–240), his analysis of implication (122–64), and his intelligently articulated critique of the 'perform-or-pay' interpretation of contractual rights defended most recently by Daniel Markovits and Alan Schwartz (304–14).⁹ These are all sophisticated, compelling, and insightful arguments. Most of what I disagree with in the first part of the book has to do with Benson's analysis of consideration; coming from a civil law perspective, I find the drive to find a theoretical justification for what seems to be an idiosyncratic feature of the common law of contracts somewhat puzzling. I also disagree with Benson's account of offer and acceptance, which he sees as necessary to supplement consideration (101–2). This seems unwarranted given that, to my mind at least, the crucial legal requirement is mutual assent. Offer and acceptance seem to me to be just devices that might be useful in reaching the conclusion that the parties have actually assented.¹⁰ I also have some quarrels

3 Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33:2 Osgoode Hall LJ 273 [Benson, 'Idea of a Public Basis'].

4 Peter Benson, 'Misfeasance as an Organizing Normative Idea in Private Law' (2010) 60:3 UTLJ 731.

5 Peter Benson, 'The Idea of Consideration' (2011) 61:2 UTLJ 241.

6 Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1995).

7 Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981).

8 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004).

9 Daniel Markovits & Alan Schwartz, 'The Myth of Efficient Breach: New Defenses of the Expectation Interest' (2011) 97 Va L Rev 1939.

10 See *Restatement (Second) of Contracts* § 22 cmt (a) (1981). See also Joseph Perillo, *Contracts*, 7th ed (St Paul, MN: West Academic Publishing, 2014) at 25.

with Benson's theory of contract remedies.¹¹ Many contract theorists will find a lot more to think about – and to disagree with – in these parts of the book. Despite my disagreements with some aspects of Benson's account of the central doctrines of the common law of contracts, the overall project is admirable and an extraordinary effort at providing a sophisticated and elegant account of this area of law.

In this review, I will focus on the theoretical status of the reconstruction offered by Benson in Part I (rather than on its details) and on the relationship between that reconstruction and liberal justification, markets, and distributive justice, all of which is covered by the second part of *Justice in Transactions*. More specifically, I will refer to the juridical starting point that Benson assumes and the relationship of Benson's theory to legal doctrine (Part II); the connection between Benson's theory and the liberal conception of public justification (Part III); and the relationship that Benson draws between contracts, markets, and distributive justice (Part IV). Part V concludes.

II *Starting from the law*

In his discussion of Richard Craswell's contention that autonomy and promissory theories of contract lack the resources to dictate the content of contract law's background rules,¹² Benson writes:

Now, here as elsewhere, it is important for a contention about contract law and theory to draw, at least provisionally, on features and conceptions that are part of and that are supposed by contract law itself. Otherwise, why should contract law view the argument as at all relevant to *its* concerns and soundness? (129; emphasis in original)

In other parts of the book, Benson similarly characterizes his mode of analysis as a strictly 'juridical' approach to contract theory (see, for example, xi, xii, 8, 21, 26, 27, 28, 66, 84, 244, 252, 313, 316, 320, 324, 341, 364, 369). While the notion of the 'juridical' might seem somewhat obscure, my interpretation is that, by using it, Benson intends to highlight a specific, distinctively legal, way in which legal institutions can be theorized.¹³

Perhaps a comparison might make the idea of a 'juridical' approach clearer. One way to think about legal institutions is the following. You think about what a certain moral or political conception requires and then you try to design, interpret, and evaluate legal institutions on the basis of their ability to achieve the goals of, secure the goods associated to, or otherwise cohere with whatever moral or political conception you find compelling. For instance, if you are a utilitarian, you take that conception as the starting point or the blueprint to design, interpret, and evaluate legal institutions. An alternative route is suggested by the

11 See Felipe Jiménez, 'Rethinking Contract Remedies' [manuscript on file with author].

12 Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 Mich L Rev 489.

13 This and the following paragraphs build upon Martin Stone, 'Legal Positivism as an Idea about Morality' (2011) 61:2 UTLJ 313.

notion of the 'juridical.' Under this type of approach, you do not take a specific conception of political morality as a template for legal institutions and their aims. Instead, you start from legal institutions and think about the more abstract moral ideals, rights, and intuitions on which they are not only based but also contribute to determine and settle authoritatively. Under this view, morality is not an almost complete blueprint for the design, interpretation, and evaluation of law. Instead, morality requires law in order to be fully realized, determined, and implemented. Thus, there is no external blueprint which provides a full standard for legal design, interpretation, and evaluation. Instead, the law itself is a guide for the moral ideas that might underlie it. Areas of law, like contract law, from this perspective, should be explained 'in [their] own terms' (9).

Of course, this is a stylized opposition. Even utilitarians would agree that many details in legal regulation depend on specific conventions that are not directly prescribed by the principle of utility, and which might be the legitimate subject of legal theory. And a juridical approach does not assume that there is no external moral standpoint from which you can evaluate law. Many non-juridical approaches will share some traits of the juridical approach: some might start moral deliberation from law just because it is an important social practice with a long history and, hence, might be a useful resource to think about how things ought to be; some others might see law as an important tool in realizing the demands of political morality (again utilitarianism comes to mind). The distinction still holds as a stylized one, which captures in a somewhat crude way two different clusters of perspectives toward legal institutions: one that asks what political morality requires and then uses the answer to that question as a guide to the design, evaluation, and reform of legal institutions and another that sees political morality as incapable of providing such a complete standard without the specificities of legal rules and institutions – and that therefore also takes the forms of law seriously as a starting point for philosophical reflection.¹⁴

In terms of this stylized distinction, a juridical approach to private law theory takes the institutions and formal structures of private law seriously as the starting point for theoretical reflection. The reason for this starting point is not a blind belief in the moral value or theoretical coherence of private law as it stands. Instead, this starting point makes sense because, and to the extent that, private law rules and institutions instantiate and determinatively settle a more indeterminate series of moral demands, intuitions, rights, and obligations. Under this view, there is still space for the moral evaluation of legal institutions. But there is no belief that morality provides a self-sufficient template from which that evaluation takes place. Morality might require law for its full actualization, and, therefore, before we even begin morally evaluating private law, we need to understand its specific doctrines and features. Under my reading of Benson, then, we should take law and its institutions seriously as the starting point for theory – and not

14 By the notion of taking the forms and structures of law seriously, I mean the idea that the legal rules, structures, and institutions we have are able to tell us something helpful, important, or illuminating about the kinds of moral problems that the law is trying to address or the types of moral aims that law is trying to achieve.

see them just as a clumsy attempt to approach an ideal template which we can independently identify.

Now there are two questions one could raise about the juridical approach that *Justice in Transactions* masterfully exemplifies, and which Weinrib and Ripstein have also employed in their Kantian reconstructions of tort law.¹⁵ The first question is why we should be motivated to take private law and its existing rules and institutions so seriously. The second is whether the demand for taking the formal structures and institutions of law seriously is best satisfied by an approach that sees law as the instantiation of abstract right, as envisioned by German idealism. I discuss these two points in the following subparts.

A WHY TAKE THE FORM OF LAW SERIOUSLY?

Law is a distinctive mode of governance.¹⁶ Part of the value of legal institutions is that, in the distinctive way in which they order and channel human behaviour, they help us achieve things that it would be harder to achieve without them. All of this is well known, and there is not much to gain from exploring it further, except perhaps to note that, at least in this limited sense, no one will deny that law is an instrument that helps us achieve certain things.¹⁷

Thus, there is at least a very uncontroversial way in which private law is an instrument.¹⁸ Even Weinrib, who famously claimed that private law is like love, in that it is its own end,¹⁹ says this on the basis of a judgment that private law, as it exists, implements abstract right and corrective justice.²⁰ Taking this into account, the intrinsic value of private law, for Weinrib, is connected to its embodying and authoritative determination of these substantive moral requirements. Private law is thus valuable because of something it does, even if that is the determination and enforcement of our interpersonal obligations or the juridical manifestation of an immanent justificatory structure of rights and duties. The thinkers we usually characterize as instrumentalist make a further claim beyond simply saying that private law is a tool. Their claim is that the value of private law as a tool does not lie in the moral dimension of interpersonal private interaction or in the

15 See Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016); Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) [Weinrib, *Idea of Private Law*].

16 See Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964) at 96; John Gardner, 'The Supposed Formality of the Rule of Law' in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 195 at 206–7.

17 Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law* (Oxford: Oxford University Press, 1979) at 226.

18 For a defence of this uncontroversial form of instrumentalism, see Leslie Green, 'Law as a Means' in Peter Cane, ed, *The Hart-Fuller Debate in the 21st Century* (Oxford: Hart Publishing, 2010) 169.

19 Weinrib, *Idea of Private Law*, supra note 15 at 6.

20 Perhaps the only exception to this would be the claim put forward by John Gava, that we should be faithful to common law doctrine and to the purity of its traditional rules. John Gava, 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25 UQLJ 253. See, critically, Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge, UK: Cambridge University Press, 2013) at 19–21.

juridical structure of the private law relationship but, rather, in the social effects that private law produces.²¹

If the uncontroversial view that law is a tool – whether to authoritatively and impartially settle and determine interpersonal rights or to maximize social welfare – is correct, then the law ought to be kept in proper working order. Like a hammer, a car, or any other instrument, law is at its most effective whenever it is in its best possible shape. Thus, we should attempt to make sure that legal categories are consistent, that we have a clear sense of which types of legal rules apply to which types of situations, that we have a structured taxonomy of legal categories and concepts, and so on. This is an important part of the social contribution of traditional doctrinal scholarship.²²

This motivation for taking law's forms and structures seriously has a lot going for it. And this motivation, I believe, underlies the common view that legal reasoning and the distinctive features of governance through law are something worth preserving. In other words, as long as we believe that law is valuable (whether because it contributes to social welfare or because it determines and settles our moral rights or something else), then we should care about preserving the law and keeping it in good working condition. This means protecting and reinforcing the specifically legal forms of discourse and avoiding their dissolution into purely moral reflection. It means taking legal categories, rules, and doctrines seriously, as something worth studying 'in their own terms' (11). It means taking legal doctrine seriously because doing so helps us to understand law better,²³ and an adequate understanding of law in the hands of those who work with it makes it a better tool for whatever purposes it serves. On the contrary, allowing law to become purely unmediated moral reflection, failing to elaborate and rationalize its concepts and doctrines, and so on, reduces the effectiveness of law as a tool for social governance and replicates moral disagreement precisely in areas where we need coordination.

From this perspective, a project like Benson's is obviously valuable: it aims to provide a comprehensive theoretical reconstruction of the central institutions and doctrines of the common law of contracts from within. If we want to preserve law's value as a tool, then getting a better understanding of its central institutions and how they fit together in their own terms is a worthwhile project. When we fail to take legal forms and structures seriously, law becomes unclear and disorganized, and the benefit of governance by rules that law offers becomes less attainable. The process of vulgarization of classical Roman law, as described by some Roman law scholars,²⁴ suggests something along these lines. I am not interested

21 See Liam Murphy, 'The Practice of Promise and Contract' in Gregory Klass, Prince Saprai & George Letsas, eds, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014) 151 at 154.

22 See Richard Posner, 'The Decline of Law as an Autonomous Discipline: 1962–1987' (1987) 100:4 Harv L Rev 761 [Posner, 'Decline of Law'].

23 Stephen Smith, 'Taking Law Seriously' (2000) 50:2 UTLJ 241 at 249 [Smith, 'Taking Law Seriously'].

24 See Ernst Levy, *Pauli Sententiae: a Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law* (Ithaca, NY: Cornell University Press, 1945); Carlos Sánchez-Moreno Ellart, 'Law, "Vulgar"' in *The Encyclopedia of Ancient History* (Sussex, UK: Wiley Blackwell, 2013) 1.

here in whether the historical assessment that classical Roman law underwent a process of vulgarization is correct.²⁵ Instead, I am interested in the idea of vulgarization as an expression of the concern for maintaining law in proper working order. According to the literature on vulgarization, vulgarized Roman law was characterized by ‘fuzzy thinking,’ ‘conceptual confusion,’ and ‘oversimplification.’²⁶ Vulgar Roman law was in a state of conceptual disorder,²⁷ avoided conceptual distinctions,²⁸ lacked clear-cut legal categories,²⁹ and was flooded with conscious or unconscious misinterpretations of legal sources.³⁰ For these scholars, vulgarization is a process by which legal categories are confused; the construction of legal concepts and categories is based on broadly moral criteria, and legal thought is subordinated to policy and practical goals.³¹ A vulgarized law is thus ‘crude,’ ‘averse to carefully elaborated concepts,’³² and ‘governed by sentiment rather than analytic logic.’³³ With the vulgarization of law, legal categories are lost, and they are replaced by misinterpretations and adulterations of legal sources.³⁴

Now this whole lore about vulgarization obviously suggests the question of what, precisely, is so problematic about the misinterpretation and deterioration of legal concepts and structures. In some sense, the talk about ‘carefully elaborated concepts’ and maintaining the integrity of legal concepts and taxonomies might sound too close to a fetishization of law. There is a lot one could say about this, but I will limit my comments to a few points.³⁵ A well-articulated and stable body of legal doctrine facilitates adjudication and legal advice. Legal doctrine – and its construction by judges and scholars – is valuable because it shows the law in its clearest light and provides adjudicators and lawyers with a clearer understanding of the rules and institutions of law. From this perspective, there is certainly value in legal scholarship that tries to elaborate, clarify, and organize legal materials in a cogent way. Some commentators have overstated the point,³⁶ and, undoubtedly, we should be wary of

25 For some doubts, see Tony Honoré et al., ‘Roman Law and Procedure’ *Oxford Research Encyclopedia of Classics* (Oxford: Oxford University Press, 2016), online: <<https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-3618>>.

26 Edgar Bodenheimer, ‘The Influence of Roman Law on Early Medieval Culture’ (1979) 3:1 *Hastings Intl & Comp L Rev* 9 at 13.

27 Ernst Levy, *West Roman Vulgar Law: The Law of Property* (Philadelphia, PA: American Philosophical Society, 1951) at 40 [Levy, *West Roman Vulgar Law*].

28 Sánchez-Moreno Ellart, *supra* note 24 at 2.

29 Levy, *West Roman Vulgar Law*, *supra* note 27 at 39.

30 *Ibid* at 2.

31 Alejandro Guzmán Brito, *Derecho Privado Romano* (Santiago, Chile: Editorial Jurídica de Chile, 1996) at 47–9. Cited in Fernando Atria, ‘La hora del derecho: los “derechos humanos” entre la política y el derecho’ (2003) 91 *Estudios Públicos* 45 at 62. See also Levy, *West Roman Vulgar Law*, *supra* note 27.

32 Bodenheimer, *supra* note 26 at 12.

33 *Ibid* at 13.

34 Max Kaser, *Roman Private Law* (Pretoria, South Africa: University of South Africa, 1984) at 5.

35 Here, I reiterate an argument made previously in Felipe Jiménez, ‘La teoría del derecho de contratos y su relación con la dogmática’ (2017) 44:2 *Revista Chilena de Derecho* 395 at 401–2.

36 See e.g. Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992) 91:1 *Mich L Rev* 34.

doctrinal stability stifling legal innovation. Still, specifically doctrinal scholarship makes an important contribution to effective adjudication and legal advice.

Second, a formalized system of legal doctrine makes decision making simpler and less costly. Formal reasoning is extremely cost-effective.³⁷ Legal concepts and distinctions ‘can be stored and made available for a great number of decisions,’ producing an informational redundancy that reduces complexity and facilitates decision making.³⁸ A clear and cogently articulated set of doctrines contributes to law’s ability to stabilize and reinforce individuals’ normative expectations.³⁹ This explains why legal academia needs legal and doctrinal analysis.⁴⁰ As Richard Posner argues, doctrinal scholarship plays a crucial functional role that more sophisticated forms of external scholarship cannot possibly play.⁴¹

Moreover, the rule of law, the specific virtue of legal governance, depends on clear legal doctrine and legal concepts. A core or central element in the classical treatments of the rule-of-law ideal is the notion of comparative justice or treating like cases alike.⁴² Distinguishing like from unlike in adjudication depends on the classificatory schemes we use, on classifying the rule to be applied or the facts that are disputed as belonging to one category or other.⁴³ By determining and giving content to what counts as alike and unlike, the taxonomical approach of most doctrinal scholarship plays an important role in facilitating the rule of law.⁴⁴ It facilitates coherence and at least a humble form of justice⁴⁵ as well as predictability, which itself protects autonomy⁴⁶ and social welfare. Finally, there is a certain connection between legal doctrine and access to justice. Cogently reasoned and clearly articulated law facilitates prediction and legal advice. As Peter Birks argues, injustice ensues when the victims of injustice have to settle disputes because of needlessly uncertain legal standards.⁴⁷

If at least of some of this is true, trying to build an account of the central doctrines and institutions of the law of contracts, starting from legal materials and

37 PS Atiyah & Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1991) at 25.

38 Niklas Luhmann, *Law as a Social System*, translated by Klaus Ziegert, edited by Fatima Kastner & Richard Nobles (Oxford: Oxford University Press, 2004) at 340.

39 *Ibid* at 473.

40 Richard Posner, ‘The State of Legal Scholarship Today: A Comment on Schlag’ (2008–9) 97 *Geo LJ* 845 at 854.

41 Posner, ‘Decline of Law,’ *supra* note 22 at 777.

42 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 237ff [Rawls, *Theory of Justice*]; Jeremy Waldron, ‘Does Law Promise Justice’ (2001) 17 *Ga St U L Rev* 759 at 775.

43 Smith, ‘Taking Law Seriously,’ *supra* note 23 at 244.

44 Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge, UK: Cambridge University Press, 2008) at 212.

45 Aleksander Peczenik, ‘Can Philosophy Help Legal Doctrine?’ (2004) 17:1 *Ratio Juris* 106 at 107–8.

46 See Nigel E Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984) at 95–6.

47 Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *UWA L Rev* 1 at 97.

doctrines themselves and taking them seriously, seems like a sensible task. This is the intuition from which a juridical project like the one that Benson undertakes to develop at the beginning of *Justice in Transactions* gets its purchase.

B LEGAL DOCTRINE AND LEGAL THEORY

We thus need sound and stable conceptual categories and legal taxonomy.⁴⁸ Taking legal structures seriously and building a cogent theory of the central concepts of contract law is a socially valuable enterprise. But it is unclear why, and to what extent, a cogent reconstruction of those concepts would have to rely on a philosophical account of contract doctrine. As Birks wrote in a different context,

Blackstone described law as the highest branch of the study of ethics. That is right. But law has additional burdens. A principal difference between law and moral philosophy is that, while philosophers can debate and disagree, law must make up its mind. For law supposes judges deciding cases day by day, deeply affecting the lives of ordinary citizens. And like cases have to be decided alike. Sensitivity and flexibility have to be reconciled with stability and consistency.⁴⁹

One way to put this point is that there are at least two different ways in which one can take legal structure seriously. Following Dan Priel, I will call them doctrinalism and conceptualism.⁵⁰ These two approaches do not typically exist in a pure form, but their comparison as ideal types is useful here. In simple terms, a doctrinalist view takes the forms and structures of law seriously because it starts from legal materials from which general principles are derived. A conceptualist view takes the form and structures of law seriously because it sees law as the instantiation of an abstract notion of right or reason.⁵¹ Both types of views take legal forms seriously, but they do so in a different way.

Again, even if we assume that law instantiates abstract moral notions or enforces a natural or pre-legal dimension of morality, most of the details of those notions will be settled and determined by legal materials.⁵² If we go back to the notion that we should take legal structures seriously and start from the law because this approach contributes to law's instrumental value, it is this latter task of settling legal details and figuring out legal doctrine's specific determinations that matters the most and in which lawyers ought to be experts.⁵³ Precisely, sometimes judges complain that there is an excessive fixation with theoretical sophistication in contemporary legal scholarship, to the detriment of doctrinal legal expertise. In Chief Justice John Roberts's words,

[p]ick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or

48 Ibid at 4.

49 Ibid at 4–5.

50 Dan Priel, 'Two Forms of Formalism' in Andrew Robertson & James Goudkamp, eds, *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019) 165 at 165.

51 Ibid at 168.

52 Charles Fried, 'Artificial Reason of the Law or: What Lawyers Know' (1981) 60 Tex L Rev 35 at 37.

53 Ibid at 57.

something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.⁵⁴

Others have echoed these views,⁵⁵ and the alleged disconnection between legal theory and legal practice has even led to satirical exercises.⁵⁶ I do not find the idea that legal scholarship's primary aim is to serve the practising bar and judges particularly persuasive.⁵⁷ As Weinrib writes, '[t]he university exists as a locus for the study of law not for the sake of the legal profession, but because law is a component of the intellectual inheritance of civilization.'⁵⁸ Still, if the motivation to take the forms and structures of law seriously and to start from the law is that this contributes to law being in proper working order, then specifically doctrinal scholarship (and not what I, following Priel, have called conceptualism) is what we need.

Now, of course, legal rules and doctrine should be morally evaluated and criticized. And building philosophically ambitious theories to do so is a way of taking law's forms seriously. Still, Benson's project sometimes seems to sit in an uncomfortable middle ground. Like the doctrinalist, Benson takes the law's categories seriously and aims to provide a compelling reconstruction of them. But, like the conceptualist, Benson also sees these categories as the reflection of a deeper philosophical structure best conceptualized from the perspective of Hegel's legal philosophy. Of course, Benson's account is not purely conceptualist. It is thoroughly aware of the common law's historical trajectory,⁵⁹ and it takes into account the specific contours of contract doctrine in a way that other non-instrumentalist theories of private law have not. Still, at times, the theory seems too wedded to doctrinal peculiarities (like consideration) and not philosophically ambitious or abstract enough. But, at other points, the theory seems too abstract and divorced from legal specificities to provide any meaningful guidance for someone interested in learning about legal doctrine.

In some ways, Benson's middle way is a strength. While *Justice in Transactions* does not offer an account of the details and minutiae of legal doctrine, it genuinely helps us understand contract doctrine better, and might guide more specific doctrinal treatments of specific legal issues in the future. At the same time, the book's account is philosophically sophisticated and connects the doctrinal structure with larger questions about human freedom, justice, and market interactions. On the other hand, the middle way is also somewhat unstable. The theory is not fully embedded in the nitty-gritty of legal materials in order to provide an orderly structure for the judge or the legal practitioner, like a traditional treatise would do. At the same time, it does not go fully in the direction of philosophical reflection

54 Chief Justice of the United States John G Roberts, Jr, Interview at Fourth Circuit Court of Appeals Annual Conference (25 June 2011), online: <www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>. Cited in Orin S Kerr, 'The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria' (2015) 18 Green Bag 251 at 251.

55 Edwards, supra note 36.

56 See e.g. Dennis W Arrow, 'Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated' (1997) 96:3 Mich L Rev 461; Kerr, supra note 54.

57 Similarly, see Smith, 'Taking Law Seriously,' supra note 23 at 248.

58 Ernest J Weinrib, 'Can Law Survive Legal Education?' (2007) 60:2 Vand L Rev 401 at 403.

59 And, hence, it is not affected by the ahistorical character that Priel sees in some conceptualist approaches to private law. Priel, supra note 50 at 174.

about the justification, evaluation, and reform of the legal institution of contract. It stays close to legal doctrine and does not take enough distance from its subject matter to be able to generate a morally attractive theory of contract law. This latter aspect might be particularly problematic if the project is one of providing a public justification of the law of contracts. I turn to this point in the following part.

III *Contract theory and public justification*

Hegel's influence can be traced throughout Benson's book.⁶⁰ Consistently with this Hegelian influence, Benson stresses that his approach attempts to provide a 'public justification' for the law of contracts (see, for example, xii, 12–15, 26–7, 468–76). Indeed, from a Hegelian perspective, law must be public, or transparent, 'in the ... substantive sense that the rational basis of the laws that issue from it is clearly articulated and accessible to all citizens.'⁶¹ For Hegel, the state and its law are only justified if they can be endorsed by reasonable individuals.⁶² The idea of public justification is not peculiar to Hegel. The notion that legal institutions should be publicly justified is a key ideal of liberal democratic societies.⁶³ According to this notion, all aspects of the social structure should be made acceptable to reasonable individuals,⁶⁴ a demand that is based on the fundamental moral idea of equal respect for persons.⁶⁵ From this perspective, then, a good moral argument for the justification of contract law as an institutional practice should be based on, or at least compatible with, this foundational liberal commitment to equal concern and respect and with its implication that we should be concerned with people's acceptance of legal institutions. Because of this commitment, a liberal justification of the legal institution of contract law should convey contract law's value to reasonable citizens in general.

One might be tempted to see the need to justify contract law from this perspective as the upshot of the correctness of a liberal conception. One could say that a broadly liberal political conception, based on the fundamental moral idea that persons deserve equal respect, is the correct conception of political morality and not just the view that most people happen to endorse.⁶⁶ Or perhaps one could simply say that a broadly liberal democratic order is the one we happen to inhabit – at least until recently – and so we might as well try to make sense of contract law

60 See e.g. the entry for 'Hegel, G.W.F.' in the book's index (600).

61 Frederick Neuhouser, *Foundations of Hegel's Social Theory* (Cambridge, MA: Harvard University Press, 2009) at 138. See also Jerry Z Muller, *The Mind and the Market: Capitalism in Western Thought* (New York: Knopf Doubleday, 2007) at 141.

62 Lisa Herzog, *Inventing the Market: Smith, Hegel, and Political Theory* (Oxford: Oxford University Press, 2013) at 141.

63 Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2010) at 3.

64 Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37:147 *Philosophical Q* 127 at 128.

65 Charles Larmore, 'The Moral Basis of Political Liberalism' (1999) 96:12 *J Philosophy* 599 at 602–7. Similarly, see David Miller, 'In What Sense Must Political Philosophy Be Political?' (2016) 33:1–2 *Soc Philosophy & Policy* 155 at 174.

66 Similarly, see Charles Larmore, *The Morals of Modernity* (Cambridge, UK: Cambridge University Press, 1996) at 146–7.

and its place within this larger institutional framework. Somewhat in between, we could take public justification as a requirement of democratic legitimacy.

No matter what the impulse for a public justification is, however, the requirement of public justification does not impose the need to show that we live in the best of possible worlds and that contract law is exactly as it should be. It is enough to show that this kind of practice is morally valuable for reasonable citizens who are committed to liberal democratic values. Importantly, public justification is not just about acceptability. A persuasive and attractive public justification would not just show that the practice is acceptable. It would also succeed at showing contract law in its morally best light. The argument, from this perspective, is not just about what makes the practice morally bearable. It is about what makes it morally worthwhile. But it must start from the practice that we actually have.

Benson assumes precisely this starting point. The terms of the public justification must be available to all citizens (13, 14). But there is an important difficulty here. While I have referred to the public justification of the practice or the institution of contract law, Benson usually refers to the public justification of the contractual relation as construed by contract law's principles and doctrines (13). This is an important distinction. To explain why, let me cite Benson's own account of public justification:

In keeping with this idea of public justification, the terms and reasoning of the justification must be open to view as well as common, available, and reasonably acceptable to parties generally. The justification is thus public only inasmuch as it is something that all parties can reasonably and identically be expected to share. Accordingly, the basic terms of the justification cannot rest on empirical or conceptual arguments that are beyond educated common sense or are too complex and controversial. Moreover, the interpretation, assessment, and application of the relevant considerations must be within the competence of the particular institutions tasked with doing this. (13)

Note that, in this paragraph, Benson makes two distinct claims. One is that the public justification must be shareable by all parties and be 'common, available, and reasonably acceptable.' The second claim is that the interpretation and application of the considerations involved in the public justification must be within the competence of specific institutions: courts. But these are two very different claims that, in fact, are to some extent in tension with each other. The reason why these two claims regarding public justification are in tension is that the closer we get to an articulation of a public justification of contract law as a legal institution that might be shared by all reasonable citizens, the further we are from a justification of the contractual relation that can be put to use by adjudicative institutions.

Benson writes that his theory aims 'to develop a moral account that is true to the analysis of contract doctrines ... and that also is acceptable as a liberal conception of justice in transactions for the purposes of a public basis of justification' (319). The project is indeed to find a public justification but one 'that is specifically worked out for contract law' (367) and, therefore, one that – as Benson once put it – can address individuals as parties in contractual interactions, with correlative rights and duties, as they are portrayed by legal discourse.⁶⁷ Public

67 Benson, 'Idea of a Public Basis,' *supra* note 3 at 305.

justification must draw ‘on basic normative ideas that are explicitly or implicitly present in the public legal culture, and more specifically, in its principles and doctrines of contract law.’⁶⁸ The articulation of the public justification needs to ‘disclose a legal point of view ... remaining internal to the law.’⁶⁹

This is, precisely, the source of the difficulty. We might want to figure out whether legal materials give rise to a normatively coherent account of contractual relationships. We might want to ask whether once those materials are applied there is something to be said for the moral value of the type of relationship that they structure. And we might want to employ whatever theoretical construction arises from these questions as a guide to contract adjudication. If that is what we want, then Benson’s approach – remaining internal to the law and relying on contract doctrine – is of course quite sensible. However, a public justification of contract law as a legal institution would assume a broader perspective, taking more distance from the practice that needs to be justified and the internal implications of the legal materials because it is, after all, the entirety of the institution that requires justification. Moreover, since it is the entirety of the institution that requires justification – and not just the contractual relationship as it is constructed by the pertinent legal materials and doctrines – the justification is addressed to citizens in general and not just to contractual parties (470).

As such, the public justification of contract law as an institution should connect the internal discourse of contract law with broader moral and political principles which can be understood and shared by reasonable citizens in general. A public justification of contract law as an institution needs to be political, not merely juridical. It should offer normative arguments about contract law and about why it is morally justified to spend scarce resources and coerce individuals for the purposes of this practice. The justification should thus be an exercise directed at each and every reasonable citizen. As such, instead of using the technical and arcane conceptual apparatus of contract doctrine, public justification needs to resort to shared normative values and to the vernacular discourse of democratic politics.⁷⁰

The difference between a public justification of the conception of the contractual relationship as constructed by legal materials and a public justification of the institution of contract law responds to a deeper structural feature of legal institutions. I am referring to the fact that we can look at legal institutions from the outside, as institutions which we interpret, evaluate, and justify, and from the inside, as institutions within which we live and that govern our behaviour.⁷¹ It is an open question whether, and why, the task of public justification is one addressed primarily at

68 Ibid.

69 Ibid at 306.

70 ‘[J]ustification is argument addressed to those who disagree with us, or to ourselves when we are of two minds. ... Being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common. Ideally, to justify a conception to someone is to give him proof of its principles from premises that we both accept, these principles having in turn consequences that match our considered judgments. Thus mere proof is not justification. A proof simply displays logical relations between propositions. But proofs become justification once the starting points are mutually recognized.’ Rawls, *Theory of Justice*, supra note 42 at 580–1.

71 See Felipe Jiménez, ‘Two Questions for Private Law Theory’ (2019), online: <<https://papers.ssrn.com/abstract=3452909>>.

parties to contracts and to litigants in contractual disputes, acting within the system of contract law, as opposed to one addressed at reasonable citizens in general who want to know whether they should support that system and whether the financial costs and coercion involved in it are in some sense warranted.

Whether one chooses one or the other view – or, as it seems most reasonable to me, a mix between the two – is not without consequence for the type of justification one builds and for what, precisely, one ends up justifying. Benson’s focus on the contractual relationship and contractual parties as, respectively, the subject and addressees of the public justification is not necessarily unwarranted or mistaken. But the fact that this choice is not made explicit and justified is an important ambiguity in Benson’s overall project and its status as a theory of contract law’s public justification.

IV *Contracts, markets, and justice*

Part of the task of justifying contract law requires asking what role it plays alongside other institutions and how it fits together with the normative commitments that those other institutions reflect. The last part of *Justice in Transactions* addresses this issue, which I discuss in this part.

A CONTRACT LAW AND MARKETS

In recent years, private law theorists have increasingly turned their attention toward the relationship between contracts, markets, and morality.⁷² This trend should be unsurprising given the connection between the market orientation of contemporary societies and the relevance of contracts as a mode of economic organization. Under a relatively common view of that relationship, state law, and contract law specifically, stabilize and make market interaction possible⁷³ and, in this way, facilitate market exchange, its valuable economic effects, and the socialization process they generate.⁷⁴ This is an important part of the institutional role played by the law of contracts, and one of the great contributions of *Justice in Transactions* is that it combines the non-instrumental, internal theory of contract that it articulates with this institutional role and contract’s position in this wider context (394). The question that Benson asks, from this perspective, is whether a

72 Roy Kreitner, ‘Voicing the Market: Extending the Ambition of Contract Theory’ (2019) 69:3 UTLJ 295 at 296. For some examples of this trend, see e.g. Erik Encarnacion, ‘Contract as Commodified Promise’ (2017) 71 Vand L Rev 61; Daniel Markovits, ‘Contract and Collaboration’ (2004) 113 Yale LJ 1417; Nathan B Oman, ‘Markets as a Moral Foundation for Contract Law’ (2012) 98 Iowa L Rev 183; Nathan B Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* (Chicago: University of Chicago Press, 2017) [Oman, *Dignity of Commerce*].

73 As Herzog writes (in reference to Hegel), ‘for freedom to be realized in a stable social whole, there needs to be a dimension of society in which individuals are not putting their own interests first, but are willing to accept the freedom of others and the maintenance of the social whole as values in themselves.’ Herzog, *supra* note 62 at 137.

74 On this feature of markets on the Hegelian view, see Muller, *supra* note 61 at 156. For a more general argument along these lines, see Oman, *Dignity of Commerce*, *supra* note 72 at 43, 132.

juridical conception of contract as transfer of ownership is stable given that it interacts with, and provides an institutional support for, market interaction (395–6).

The juridical conception articulated by Benson is a self-standing conception which is independent from promissory morality, distributive considerations, and, more importantly in this context, economic norms (396). But this juridical conception is just one part of a full characterization of contract in contemporary liberal democracies. To make this point, Benson makes a suggestive distinction between ‘contract as relation’ and ‘contract as institution’ (413), a distinction that parallels the distinction I have made above between the justification of the contractual relationship as constructed by legal materials and the justification of contract law as a legal institution. From the perspective of this distinction, markets are the realization of the juridical conception as a system of commercial exchange (413). Thus, the notion of contract as an institution further develops Benson’s juridical conception of contract and sees contract law as an institutional system of public norms supporting the needs of market actors (414–15).

Now the fact that the juridical conception of contract can be expanded and integrated with a more systemic account of market interaction does not entail, on Benson’s account, that economic considerations govern over, or ‘correct,’ the purely juridical conception. Instead, the non-economic, purely legal conception of contract makes economic exchange possible, and so it coexists with (instead of being absorbed by) the peculiarly economic factors that are relevant from the perspective of economics (415). Here, Benson’s account echoes the views of classical social theorists like Émile Durkheim, for whom the central question was how a society characterized by market exchange could still be stable and cohesive.⁷⁵ Benson writes:

[M]y point here is that the first step in explaining the relation between the transactional conception of contract and markets involves making clear that a market presupposes definite *noneconomic* norms and constraints, which, I have suggested, are elaborated and justified on the basis of the transactional conception of contract, independently from economic considerations. Thus whatever is inherently part of this transactional conception – whatever the latter comprises and includes when it is fully worked out – is, and must be, presupposed by the purely economic market processes and mechanisms of decentralized price-driven coordination. ... On this view, the juridical conception of contract doctrines and principles is not only independent from, but lexically prior to, the elucidation of market relations. (417)

Thus, the claim is that the juridical conception of contract has lexical priority over the economic understanding of market exchange. The reason for this is that market exchange must rest on non-economic norms and constraints.

Something like this must be right, particularly in contemporary, anonymous, and cosmopolitan market societies. This borders on restating the obvious, but we should bear in mind that, without thick social links grounding interpersonal trust or strong reputational sanctions between repeat players, non-simultaneous commercial exchange between risk-averse, self-interested individuals is impossible unless there is some constraint on their action. One potential constraint, as Thomas

⁷⁵ Jens Beckert, *Beyond the Market: The Social Foundations of Economic Efficiency* (Princeton, NJ: Princeton University Press, 2009) at 84.

Hobbes famously argued, is state coercion.⁷⁶ Since coercion is expensive, however, the internalization of moral norms of promise keeping might also be a valuable alternative.⁷⁷ The latter would be, precisely, a form of non-economic constraint.

Benson's own solution is the juridical conception of contract. This is an interesting alternative because the juridical conception is both a reconstruction of the coercive institution of contract law and a potential source of moral constraints to the extent that agents believe the juridical conception is in some way morally binding. There is some plausibility to the view that this juridical conception could be a non-economic constraint on market exchange, particularly once the legal system is up and running. In that setting, it is reasonable to assume, the rules and doctrines of contract stabilize market interaction both because of coercion and because of the potential internalization of its rules. To this extent, Benson's observation is entirely correct.

Nevertheless, it is unclear why the juridical conception would have to be lexically prior to the economic perspective. For instance, we might care about having robust markets and producing their economic effects quite independently from having law at all. While contract law might help us in generating and structuring such markets, it is not necessary. In fact, markets can exist without contract law. If we already have law, and we can build a juridical conception like the one Benson offers, perhaps the juridical conception ends up being the non-economic constraint that stabilizes the market. But this is not enough to show that the juridical conception enjoys lexical priority. In the absence of law, the function performed by the juridical conception might very well be performed by other non-economic constraints that are nevertheless not juridical, such as the internalization of purely moral standards of promise keeping. Even once we have contract law up and running, (a) these alternatives might be preferable along some dimension to the juridical conception, and (b) we might want to improve upon the juridical conception's ability to provide a non-economic constraint and basis for market exchange. Because of this, if our primary concern is to structure a market to produce beneficial economic consequences, it could perfectly be the case that we ought to do without contract law or at least that we ought to reform contract doctrine to make it more consistent with this purpose. While Benson is right in highlighting that the market might need a non-economic set of constraints, there is no reason to think that this role can only be played by contract doctrine or that this entails that contract doctrine is lexically prior to economic concerns and should therefore be immune from reform on the basis of such concerns.

It is certainly true that, as Benson argues, the institutional dimension of contract law at play in market interactions does not require incorporating actual

76 Thomas Hobbes, *Leviathan*, edited by Edwin Curley (Indianapolis, IN: Hackett Publishing, 1994) at 84–5.

77 As Cooter writes, '[i]nternalized morality prompts spontaneous obedience and perfects private enforcement.' Robert Cooter, 'Models of Morality in Law and Economics: Self-Control and Self-Improvement for the Bad Man of Holmes' (1998) 78 BUL Rev 903 at 904. See also Felipe Jiménez, 'Una crítica a la idea de incumplimiento eficiente desde el Derecho de Contratos' (2017) 29 Revista Chilena de Derecho Privado 99.

parties' economic wants and concerns (434–5) and that one can distinguish between contract law and the market as two different domains that support each other (445). But this statement does not necessarily imply that the theoretical reconstruction of contract law should not incorporate economic considerations. Benson's answer could be that, while contract law reflects the reasonable, economic and market concerns reflect the rational. Contract law simply establishes standards of relational interaction between independent agents, and the market is the system where those standards are actualized and are brought into action on the basis of the parties' wants and needs (445–6).

The only quarrel I would have with this answer is that there is no reason to suppose that the best justification of contract law's structure of rights and obligations must be its reflection of the reasonable instead of its facilitation of the rational – that is, its facilitation of market exchange and the satisfaction of agents' economic needs. Benson, of course, would disagree. As he writes,

[t]he rights and duties (as well as powers) of contract law can no more fulfill the function of prices in the economic sense than prices can plausibly be viewed as communicating principled judgments of justice. There is a genuine institutional division of labor between law and economy and the failure to follow through on and to respect this necessarily distorts and undermines the inherent legitimacy of both. Thus it cannot be the aim of contract law to fashion, or even to influence, exchanges so that they enable parties jointly to obtain their substantive satisfactions (and welfare) more efficiently. For the same reason, and contrary to much current theoretical orthodoxy, it cannot be an intrinsic goal of contract law to 'reduce transaction costs' for the parties. The direct application of economic considerations to contract law cannot be part of a public basis of justification for contract. (447)

There are two distinct ideas here. One idea is the notion, alluded to by Benson toward the end of this paragraph, that the 'direct application of economic considerations to contract law cannot be part of a public basis of justification for contract.' The other idea is that, because of the institutional division of labour between contract law and the market economy, contract law's aim cannot be to contribute to the maximization of the parties' welfare or to the reduction of transaction costs. It is important to bear in mind that these are two distinct ideas because, while the direct application of economic considerations to contract law might be problematic, an indirect application of these considerations might not be a problem for a public justification of contract. In fact, one might very well think that part of the project of public justification should require connecting the non-economic discourse, rules, and doctrinal structure of contract law with the economic concerns that, for most people, plausibly underlie our collective interest in enforcing contracts.

B CONTRACT LAW AND DISTRIBUTIVE JUSTICE

The final part of Benson's book deals with the connection between the transactional conception of contract that he articulates in the first part of *Justice in Transactions* and considerations of distributive justice. In this aspect, Benson argues for a division of labour between the principles that regulate the basic structure of society and preserve background justice and free contractual transactions between individuals, which take place against the backdrop of the basic structure (448).

The idea builds upon Rawls's work⁷⁸ and resembles similar arguments made in the past by Arthur Ripstein in tort law⁷⁹ and by Martín Hevia in the law of contracts.⁸⁰

Private law theorists disagree about the division of labour, its normative justification, and its consistency with the broader Rawlsian framework. Kevin Kordana and David Tabachnick argue that, from a Rawlsian perspective, the entirety of the legal system is subject to the demands of distributive justice.⁸¹ Contract law is 'one of the many *loci* of distributive justice.'⁸² Others, like Anthony Kronman, have argued that many standard doctrines of contract law must rely on some theory of just distribution.⁸³ At a greater level of abstraction, Liam Murphy has held a claim with a much broader scope: '[A]ll fundamental normative principles that apply to the design of institutions apply also to the conduct of people.'⁸⁴ Somewhere in between these positions, Samuel Scheffler has argued that private law as a whole is not excluded from the basic structure and the demands of distributive justice.⁸⁵ More specifically, he has argued for a requirement of weak distributivism, according to which contract law (a) cannot violate, and should help to secure, the basic liberties of the first Rawlsian principle of justice; (b) should not go against the fair equality of opportunity aspect of the second principle; and, most importantly, (c) should avoid worsening the economic position of the worst off members of society.

Beyond these constraints, contract law can be determined by other principles distinct from distributive justice⁸⁶ and should indeed give space for individuals and associations to follow their own values and norms.⁸⁷ In a similar vein, other authors have argued that, while the division of labour is warranted,⁸⁸ contract law does have distributive effects and, therefore, that the regulation of those effects inevitably falls under the rules of contract law.⁸⁹ Thus, while contract law is not directly in charge of distributive justice and is subject to its own normative concerns, there is still space to be concerned about its distributive impact in the design and

78 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2013) at 269.

79 Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 *Fordham L Rev* 1811.

80 Martín Hevia, *Reasonableness and Responsibility: A Theory of Contract Law* (Dordrecht: Springer, 2013).

81 Kevin A Kordana & David H Tabachnick, 'Taxation, the Private Law, and Distributive Justice' (2006) 23:2 *Soc Philosophy & Policy* 142 at 143. See also Kevin A Kordana & David H Tabachnick, 'On Belling the Cat: Rawls and Tort as Corrective Justice' (2006) 92 *Va L Rev* 1279 at 1286.

82 Kevin A Kordana & David H Tabachnick, 'Rawls and Contract Law' (2005) 73 *Geo Wash L Rev* 598 at 600. See also Aditi Bagchi, 'Distributive Justice and Contract' in Gregory Klass, Geoge Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2015) 193.

83 See Anthony T Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale LJ* 472.

84 Liam Murphy, 'Institutions and the Demands of Justice' (1998) 27:4 *Philosophy & Public Affairs* 251 at 251 [Murphy, 'Institutions'].

85 Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35:2 *Oxford J Leg Stud* 213 at 219.

86 *Ibid* at 222.

87 *Ibid* at 226.

88 Josse Kljnsma, 'Contract Law as Fairness' (2015) 28:1 *Ratio Juris* 68 at 77.

89 *Ibid* at 79.

evaluation of its rules. In this aspect, contract law is just like any other regulatory regime that has an important impact on the distribution of goods and services.

Benson's own view could be summarized as follows. The juridical conception does not establish a baseline of acquired rights that poses a limit to distributive justice. The juridical conception is not libertarian. It is only concerned with the formal capacity for ownership (and transfer), not with its actuality (451). Nevertheless, Benson argues, contract law is itself a complete framework of non-distributive and transactional standards that does not require supplementation by distributive considerations (457). Thus, the juridical conception of contract is prior to distributive justice but does not prevent the state from ensuring that the systemic effects of contractual activity are consistent with background justice (467). The motivation for this view is that, as participants in social institutions, people are entitled to demand that those institutions generate a fair distribution of burdens and benefits which can elicit voluntary cooperation. This can only be accomplished against a backdrop of distributive justice (454). While the formal equality of contract law allows individuals to participate in voluntary exchange, distributive justice ensures that they do so on a fair basis that allows them to fulfil their personal purposes and satisfy their needs (456). In this process, distributive justice should not be applied directly in the course of contractual disputes but, rather, should operate in a systemic way through, for instance, the system of tax and transfer.

I generally agree with most of Benson's argument for the division of labour between institutions in charge of distributive justice and the law of contracts. At the same time, I tend to think that there is no principled reason for excluding contract law from the realm of social justice broadly understood and that social justice concerns might be particularly relevant for certain domains of contractual activity. Perhaps, as some legal economists have argued, pursuing distributive justice through contract law would face important issues of feasibility and institutional competence.⁹⁰ And, undoubtedly, there seems to be a rather stark contrast between the structure of contract law adjudication and distributive justice. Contract law adjudication is eminently bipolar: it faces promisor and promisee, plaintiff and defendant.⁹¹ In contrast, distributive justice is by no means bipolar; the demands it makes are collective,⁹² and they must be satisfied by all of us.⁹³ It seems morally arbitrary to impose the costs of securing distributive justice on one of the particular parties facing a contractual dispute. But I fail to see why these considerations of feasibility and moral arbitrariness would be an argument against *ex ante* general regulation of contractual markets or against a general interpretation of the admittedly non-distributive doctrines of contract law as a means to indirectly achieve distributively just outcomes. As Josse Klijnsma argues, while it is true that

90 Louis Kaplow & Steven Shavell, 'Should Legal Rules Favor the Poor: Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income' (2000) 29 J Leg Stud 821 at 821. For a more nuanced argument, see Morgan, *supra* note 20 at 148–60. Cf Chris Sanchirico, 'Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View' (2000) 29:2 J Leg Stud 797.

91 Weinrib, *Idea of Private Law*, *supra* note 15 at 114–44.

92 Murphy, 'Institutions,' *supra* note 84 at 257.

93 *Ibid* at 291.

specific contracts should not be subject to the demands of distributive justice, and that the moral responsibility of complying with these demands should not fall on contractual parties, it is still the case that contract law has distributive effects.⁹⁴

There is no escape from regulating such effects, even if that regulation takes place through general prospective rules and is rightly seen as a collective demand better fulfilled by the state when promulgating such rules. This is something our current practices duly recognize. Think, for instance, of the regulation of interest rates in consumer markets, of minimum wages in employment contracts, and of the ways in which their legal regulation might affect distributive outcomes. Any theory which denied the relevance of economic justice concerns for contract law would not be an interpretation of our existing practices but, rather, a normative claim to replace them for something different and closer to nineteenth-century contract law. Thus, while we might admit that there is a certain division of labour between contracts and the general institutions in charge of distributive justice, this division seems to be the upshot of the structure of contract law adjudication and its efficacy at dealing with distributive justice. It does not seem to rest on a principled incompatibility between distributive justice and contract law.

V Conclusion

I have raised some questions about the theoretical status of Benson's account of contract law. I have argued that, while the theory starts from the valuable intuition that law should be taken seriously, it sits in a middle position between traditional doctrinal reconstruction and full-blown philosophical reflection about the justification and evaluation of contract law. This middle position is a valid approach, but it comes at a cost – it is not sufficiently detached from doctrinal peculiarities to offer a general, abstract theory of the institution capable of justifying it, but it is too detached to contribute to the everyday operations of legal participants. I have also argued that Benson's focus on the contractual relationship – as opposed to the whole institution of contract law – puts some pressure on the project of public justification. Finally, I have also formulated some doubts about Benson's account of the relationship between his juridical conception of contract, on the one hand, and markets and distributive justice, on the other.

I have made these arguments from a somewhat uneasy position. I identify with the overall project of taking the forms and structures of law seriously and of reclaiming the distinctiveness of legal discourse and connecting it to broader questions of political morality. My own inclination, still, is that this can be done without abandoning the instrumentalist intuition underlying most of contemporary economic contract theory: that the moral value of contract law as an institution derives mostly from its contribution to social welfare, broadly understood. Independently of my own theoretical inclinations, *Justice in Transactions* is a book that will demand attention, study, and critical engagement from contract theorists. The book is an extraordinary achievement, and contract theory will be all the better for it.

94 Klijnsma, *supra* note 88.