Routledge
Taylor & Francis Group

Jurisprudence
An International Journal of Legal and Political Thought

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjpn20

Two questions for private law theory

Felipe Jiménez

To cite this article: Felipe Jiménez (2021) Two questions for private law theory, Jurisprudence, 12:3, 391-416, DOI: 10.1080/20403313.2021.1908015

To link to this article: https://doi.org/10.1080/20403313.2021.1908015

JURISPRUDENCE
2021, VOL. 12, NO. 3, 391–416
https://doi.org/10.1080/20403313.2021.1908015

Routledge
Taylor & Francis Group

Two questions for private law theory

Felipe Jiménez*

University of Southern California Gould School of Law, Los Angeles, CA, USA

ABSTRACT
This article claims that private law theorists ought to bear in mind the distinction between wholesale questions about the best interpretation or justification of legal institutions, and retail questions about their internal operation – in other words, the distinction between questions about legal institutions and questions within them. This distinction has been obscured in part of recent private law theory, as recent discussions involving monism, pluralism, and private law adjudication show. The article explores these theoretical discussions and identifies some of their shortcomings. It also argues that, given the institutional character of private law, the distinction is plausible, and that – while it already underlies some contemporary discussions – it should be given much more salience, given the important contribution it could make to an adequate methodology in private law theory.

KEYWORDS
Private law theory; methodology; pluralism; coherence; adjudication

1. Introduction

How should we build theories of private law? This article claims that, in answering this question, we should bear in mind the distinction between two types of questions: wholesale questions about the best interpretation or justification of legal institutions, and retail questions about their internal operation – in other words, the distinction between questions *about* legal institutions and questions *within* them. This distinction is by no means new.[1] It is implicit in the work of several private law theorists and is sometimes explicitly referred to.[2] But it has also been obscured in much of recent private law theory,[3] and has

CONTACT Felipe Jiménez fjimenez@law.usc.edu

*For comments and discussions of previous versions of the paper, I thank Scott Altman, Richard Brooks, Hanoch Dagan, Meirav Furth-Matzkin, John Goldberg, Manuel González, Greg Keating, Brigitte Leal, María Guadalupe Martínez, Paul Miller, Crescente Molina, Marcela Prieto, Rebecca Stone, Sergio Verdugo, Fred Wilmot-Smith, Moran Yahav, Benjamin Zipursky, two anonymous reviewers, and participants at the North American Workshop on Private Law Theory (VII) at the University of Western Ontario. I also thank Aigerim Saudabayeva for valuable research assistance. The central ideas contained in this paper were first developed during my graduate studies at New York University between 2014 and 2018 and are reflected in Chapter 1 of my dissertation, The Pluralism of Contract: A Theory of Contract Law (NYU JSD Dissertation, May 2018). I am particularly thankful to my advisors Liam Murphy and Lewis Kornhauser for multiple conversations and comments on drafts of that chapter.

[1] It is based on the more general distinction between questions about the justification of practices and the justification of actions within them. John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3.

[2] See, e.g., Jules Coleman, *The Practice of Principle* (Oxford University Press 2003) 36 n 20; John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1; Andrew S Gold and Henry E Smith, 'Sizing up Private Law' [2020] University of Toronto Law Journal; Liam Murphy, 'Purely Formal Wrongs' in Paul Miller and John Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford Private Law Theory, Oxford University Press 2020); Henry E Smith, 'Modularity and Morality in the Law of Torts' (2011) 4 Journal of Tort Law.

[3] See Parts 3–5.

not been articulated and justified in a systematic way. In this article, I attempt to provide a more systematic account of the distinction between questions about and within legal institutions in private law theory. More importantly, I argue why, if we want to make progress in understanding private law, we should reclaim the distinction and make it a central part of private law theory. I make this argument somewhat inductively, by focusing on three recent topics in private law theory: the debate between monism and pluralism (Part 2); the requirement of coherence (Part 3); and the relationship between private law theory and adjudication (Parts 4 and 5). In the process of engaging with these debates, I will begin to suggest the distinction between the two types of questions as a means to overcome theoretical disagreements in private law theory. The full articulation of the distinction will come in Part 6.

In making the argument for the distinction, I am assuming that legal concepts and practices are social constructions, which are open for people to conceptualise in different ways.[4] Legal practices, like social practices in general, do not exist independently of the way we think and talk about them. Instead, they depend on the language we use to describe them.[5] Concepts do not simply describe our social practices. They also structure them.[6]

Thus, I do not mean to claim that the distinction I have alluded to is a true analysis of the concept of private law, or an accurate description of the social kind private law. Instead, I argue that things would go better, in terms of our own understanding, if we saw private law this way.[7] While it might be naive to think that ordinary people will change their conception of private law simply because legal theorists urge them to do so,[8] the same is not true for theorists' own conceptions. Reading, critically evaluating, and potentially accepting other theorists' arguments about private law is, at least in principle, part of what private law theorists are supposed to do. From this perspective, this article argues that private law theorists have good reasons to think about private law in terms of the distinction between questions *about* and *within* legal institutions. This is, in a sense, a change from the current *status quo* in private law theory, which sometimes neglects the distinction. But the distinction is nevertheless a familiar one.

Private law theorists usually distinguish between different types of theories about private law. The clearest taxonomy, offered by Stephen Smith, distinguishes between descriptive, interpretive, and normative theories.[9] In terms of the familiar notions of *fit* and *justification*,[10] these theories could be seen – somewhat simplistically – as a progression: descriptive theories are all about fit (providing an accurate picture of private law as it is); normative theories are all about justification (providing a moral argument about how private law should be); and interpretive theories fall somewhere in between (providing a normatively attractive reconstruction that coheres, as much as possible, with the

[4]Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25 Oxf J Leg Stud 493, 496. Of course, there is a limit to this. Some proposals might simply be implausible if they diverge too much from ordinary or specialized usage or the historical practices of the relevant community.

[5]Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25 The Review of Metaphysics 3, 24. See also John R Searle, *The Construction of Social Reality* (Simon and Schuster 1995) 27.

[6]Sally Haslanger, 'What Are We Talking About? The Semantics and Politics of Social Kinds' (2005) 20 Hypatia 10, 13.

[7]For an insightful critical analysis of this strategy in general jurisprudence, see Liam Murphy, 'Better to See Law This Way' (2008) 83 NYU L Rev 1088.

[8]ibid 1101.

[9]Stephen Smith, *Contract Theory* (Oxford University Press 2004).

[10]Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

actual private law). Throughout this article, unless I explicitly refer to one kind of theory, I will refer to private law theories in general – whether they are descriptive, normative, or interpretive. The structural distinction between questions about private law institutions and questions within them applies independently of the type of perspective one takes towards them.[11]

To motivate my argument, in the following section I turn to what, superficially, might seem an entirely different topic: the debate between monism and pluralism about private law. That debate, and particularly the dominant preference for monistic theories of private law, has been largely influenced by an inability to distinguish between theoretical questions *about* private law institutions and questions about what goes on, or should go on, *within* those institutions.

2. Monism and pluralism

Monism is the notion that values can be reduced to a single normative criterion. In private law theory, monist views argue that there is a central and exclusive moral foundation of private law, tort law, contract law, etc.

The appeal of monism is clear. Focus on a single normative criterion is both intellectually and morally attractive. In the case of the economic approach to private law, the attraction is also a matter of professional comfort: it makes sense for social scientists to favour a single and precise decision-making procedure to figure out what to do.[12] Monism reduces complexity. It transforms substantive normative disagreements amongst values into questions of instrumental rationality,[13] or at least into interpretive disagreements about the nature of a single value. In private law, moreover, pluralism seems, at least *prima facie*, unprincipled and unable to predictably guide adjudication.[14]

Pluralists see monism as a problematic form of moral reductionism and argue for the existence of diverse – and sometimes conflicting – values,[15] which are part of our everyday moral experience.[16] But this is just a pre-theoretical intuition. It could be the case that philosophical reflection leads us to conclude that our moral experience and our social practices reflect an underlying monistic structure.

A full defence of value pluralism would exceed the purposes of this paper. But pluralism about private law institutions (i.e., the notion that there are multiple justificatory principles underlying those institutions)[17] seems at least *prima facie* plausible. First, private law has developed over centuries. From a diachronic perspective, it is quite likely that the values underlying its rules, doctrines, and institutions have changed –

[11]The main exceptions to this general approach will be my discussions about monism and pluralism (part 2) and transparency (part 5).
[12]Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1995) 44.
[13]Isaiah Berlin, 'Does Political Theory Still Exist?' in *Concepts and Categories: Philosophical Essays* (Pimlico 1999) 149.
[14]See more on this below (Part 3).
[15]Gregory S Alexander, 'Pluralism and Property' (2011) 80 Fordham L Rev 1017, 1020.
[16]ibid 1035. For this claim made specifically in relation to the law of contracts, see Melvin Eisenberg, 'The Theory of Contracts' in Peter Benson (ed), *The Theory of Contract Law* (Cambridge Studies in Philosophy and Law, Cambridge University Press 2001) 240–41; Daniel Markovits and Alan Schwartz, 'Plural Values in Contract Law: Theory and Implementation' (SSRN Scholarly Paper, 26 December 2018) 5. In a similar vein (focusing on the connection between contract law and markets), Nathan B Oman, 'Markets as a Moral Foundation for Contract Law' (2012) 98 Iowa L Rev 183, 187.
[17]Roy Kreitner, 'On the New Pluralism in Contract Theory' (2012) 45 Suffolk U L Rev 915, 915.

and continue to do so – through a process of cumulative accretion.[18] Simply put, we have inherited rules, doctrines and institutions from a long historical tradition. Those rules and institutions have been applied by multiple generations of judges and scholars, and in that process have regulated an extremely diverse set of interpersonal activities. Our current practices of private law have inherited the values and underlying purposes embedded in the legal materials and norms we have inherited. Moreover, since legal institutions follow a certain tradition and a path-dependence, it is not just that new values replace old ones: many of the past values and purposes will continue to be part of the ongoing practice. The case of contract law is, in this sense, paradigmatic. While discussing the central doctrines of the law of contracts, we are also discussing the legal thought of Domat, Pothier, Grotius, and Pufendorf,[19] the philosophical conceptions of Vitoria, Molina, Lessius, and Aquinas,[20] and the doctrinal innovations of Cardozo and Holmes – all of which reflect the values and moral and political conceptions of their times and cultures. It would be surprising if this long and historically contingent path could be reinterpreted in terms of a single value.[21]

Admittedly, this argument has much greater weight regarding descriptive and (to a lesser extent) interpretive theories than when applied to normative theories. If our purpose is to prescribe how private law institutions should be, why would the fact that those institutions have reflected a plurality of moral concerns so far have any bearing on how the institutions should go forward? This is a reasonable concern, but we should not overstate it. Part of what it means for an argument to be prescriptive or normative is a certain degree of divergence from existing practices. Yet, at the same time, moral thinking about legal institutions does not take place in an ahistorical vacuum, but is instead part of a collective and ongoing tradition of deliberation, dissent, and reflection in and around those practices.[22] More importantly, while there is no exact rule dictating how far a prescriptive theory of a legal institution might diverge from that institution as it actually exists and still be a theory of the institution (rather than a proposal for its abolition or replacement),[23] at a minimum a prescriptive theory of private law (or contract law, or property law, or tort law, etc.) ought to give us normative directions as to how to reform *this* institution, with its structure and history. A purely prescriptive theory of private law, one that could plausibly ignore the structure and history of private law, is an impossibility: it is a theory of something else. At least in this limited sense, interpretive theory is always a necessary prelude for prescriptive or normative theory. Which means that even normative theory has to reflect, to some

[18]On this dimension of value pluralism, see Horacio Spector, 'Value Pluralism and the Two Concepts of Rights' (2009) 46 San Diego L Rev 819, 820–21. See also Martín Hevia and Felipe Jiménez, 'La Forma Del Derecho' (2017) 15 Int J Const Law 578, 582.

[19]Felipe Jiménez, 'Against Parochialism in Contract Theory: A Response to Brian Bix' (2019) 32 Ratio Juris 233, 237–38.

[20]See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1992).

[21]Admittedly, it is also possible that the evolution and historical path of differentiation between different areas of law has led to a certain institutional division of labour between them. Whether this is true, however, remains an open question. Moreover, judges typically develop their adjudicative tasks across doctrinal divisions, and the boundaries between doctrinal areas are permeable and contested. Because of this, even if some areas of private law have ended up being *mostly* committed to one particular value, there will be other values at play, at least at the margins of each doctrinal area. This is enough to sustain my claim that pluralism is at least *prima facie* plausible. I thank Robin Kar for pressing me on this point.

[22]Michael Walzer, *Interpretation and Social Criticism* (Harvard University Press 1993) 21. See also Felipe Jiménez, 'Legal Principles, Law, and Tradition' (unpublished manuscript).

[23]Liam Murphy, 'Contract and Promise' (2007) 120 Harvard Law Review Forum 10, 10.

extent, the historical contingency, path-dependence, and cumulative accretion of values, standards, and attitudes that characterise private law.

Even at any specific point in time, private law governs a vast array of interpersonal relationships and situations. Given this diversity, it is plausible to think that different values might be at stake in different types of situations and transactions.[24] In the case of contract law, for instance, and at a very high level of generality, it is plausible to think that values like individual autonomy might be more salient in contracts between individuals, while efficiency concerns might be stronger in contracts between sophisticated firms.[25] Similarly, in the case of property, the justification for rights *in rem* regarding personal housing vis-à-vis outsiders is, plausibly, quite different from the justification of similar rights regarding marital property relationships between spouses.[26] The divergent array of situations to be regulated by these private law institutions remains relatively fixed even under normative theories about the content they should have – again, as long as they purport to be theories about private law as opposed to theories about the abolition or replacement of private law with something else.

Moreover, law is the vehicle of politics, and as such it is tainted by political struggle and divergences about value judgments,[27] and unprincipled and messy compromises. It is unlikely that such divergences and struggles would not be reflected in the *corpus* of legal materials. The foundations of private law institutions seem to reflect more the contingent interaction of multiple normative concerns than a necessary monistic foundation.[28] And whatever normative proposals might be incorporated in the future of private law institutions, they will operate against this messy background.

Accounting for the historical contingency of private law and the diverse array of relationships and situations it governs might make theoretical reconstruction of the field messier and untidy. It might also mean that normative proposals will inevitably operate against this messy background. But embracing monism to correct for this messiness could involve a reductive simplification of the complexity of moral experience and legal institutions to a single and impoverished dimension.[29]

Some theories of private law attempt to incorporate plural values within a monistic framework. In order to illustrate the problems of even this inclusive type of monism, I will focus on Kaplow and Shavell's theory in *Fairness versus Welfare*, which, starting from a welfarist position, attempts to incorporate non-economic concerns by resorting to a capacious understanding of welfare.[30]

The central claim in Kaplow and Shavell's argument is that social decisions should be based exclusively on maximising individuals' welfare, whilst ignoring notions of fairness, justice, and rights.[31] Kaplow and Shavell employ a comprehensive account of welfare,[32]

[24]This point plays a central role in Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017).
[25]Ethan J Leib, 'On Collaboration, Organizations, and Conciliation in the General Theory of Contract' (2005) 24 QLR 1, 3.
[26]Alexander (n 15) 1042.
[27]Joseph Raz, 'The Relevance of Coherence' (1992) 72 BU L Rev 273, 292.
[28]Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press 2019) 3.
[29]Regarding some versions of law and economics, see Martha Nussbaum, 'Flawed Foundations: The Philosophical Critique of (a Particular Kind of) Economics' in Aristides Hatzis and Nicholas Mercuro (eds), *Law and Economics: Philosophical Issues and Fundamental Questions* (Routledge 2015) 24.
[30]Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2006).
[31]ibid xvii, 3.

which recognises not only individuals' material wellbeing, but their aesthetic fulfilment, their feelings for other individuals, and anything else they might value.[33] Consistently with this, Kaplow and Shavell admit that individuals might have a taste for fairness, in the sense that their wellbeing improves when their conceptions of fairness are reflected in legal rules and institutions.[34] This 'taste for fairness' is incorporated into individuals' preference functions, along with other tastes such as 'a taste for art, nature, or fine wine'.[35] Because of this, fairness concerns play a role in normative analysis, but only the extent that the relevant population has these concerns.[36] In this way, a monistic concern with welfare can accommodate, through its consideration of all of individuals' preferences, a diverse set of normative values – as long as they are actually held by the relevant population.[37] Thus, normative concerns can matter not because they are *values*, but because they are *valued*.

This *strategy of incorporation*,[38] however, fails. Indeed, the strategy obscures the relevant differences between preferences and judgments[39] (or what Sen calls 'commitments'[40]), and misunderstands the role that rights, duties, justice, and other 'fairness' concerns play in individual decisions and social policy.[41] By seeing all individuals' concerns about public policy as part of their extended preference ordering, which includes all of their tastes and wants, Kaplow and Shavell ignore that we typically think of tastes and wants as something that should be treated differently from normative judgments.[42] The strategy of incorporation distorts this difference. Individuals are, at least to some extent and barring situations of manipulation, sovereign over their preferences (say, about what ice cream is better), but not over their judgments.[43] When we disagree about whether abortion should be a crime, we do not think individuals are sovereign over their judgments, so that once they say 'I think abortion should be a crime' there is nothing else to ask. Instead, when we face such disagreements we expect and are expected to give reasons that could have a claim over all of us and, eventually, could lead people to change their views. Such an attitude towards preferences over ice cream would be absurd.[44] Conflicts between normative judgments are not solved like conflicts between preferences.[45] We value and care about different things, and we do so in different

[32]ibid 18.
[33]ibid 4.
[34]ibid 11.
[35]ibid 21.
[36]ibid 431.
[37]One important problem that I ignore here is that, in principle, there is no reason to assume that preference satisfaction is necessarily equivalent to maximizing welfare. On this, see Itai Sher, 'How Perspective-Based Aggregation Undermines the Pareto Principle' (2020) Politics Philosophy & Economics 10–11 (forthcoming).
[38]Lewis Kornhauser, 'Preference, Well-Being, and Morality in Social Decisions' (2003) 32 The Journal of Legal Studies 303, 307.
[39]ibid 309.
[40]Amartya Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 Philosophy & Public Affairs 317, 326.
[41]Kornhauser (n 38) 310.
[42]ibid 316.
[43]ibid 318. See, similarly, Kimberly Kessler Ferzan, 'Some Sound and Fury from Kaplow and Shavell' (2004) 23 Law and Philosophy 73, 96–97.
[44]Perhaps here we could also offer reasons. If you ask me why I prefer vainilla to chocolate ice cream, I could offer as a reason for that preference the fact that I like the flavor of vanilla better. But that would be the end of it. No further justifications could be offered, and engaging in deliberation about this reason in terms that presuppose intersubjective standards would seem pointless. Normative discussions have a different structure.
[45]Kornhauser (n 38) 317.

ways.[46] We use different standards to evaluate different states of the world; and the relevance of those standards might be differently important in different contexts.[47] Treating these different standards and criteria as belonging to the same category ends up flattening the normative landscape, and distorting the different evaluative attitudes and considerations that might play a relevant role in the evaluation and justification of legal institutions.

Because of this, even *inclusive* monism cannot escape the fact that different relevant values and judgments can conflict. In fact, *Fairness versus Welfare* precisely shows this. Kaplow and Shavell claim that welfare should be the only normative criterion for policy analysis because pursuing fairness as an independent normative value – that is, independently from individuals' *taste for fairness* – would diminish welfare.[48] Strictly speaking, however, this is trivially – tautologically – true.[49] Because of this, Kaplow and Shavell's argument would also count as an argument against welfare, since, definitionally, any independent concern for welfare would undermine fairness.[50]

Thus, perhaps a more effective strategy is recognising that we care *both* about fairness and welfare, and that when we care about fairness we do so not only because of its impact on our welfare.[51] As a consequence, we will face trade-offs and moral conflicts,[52] which will not be solved by simply lumping together and adding up everything we care about. *Value* does not only answer to *valuing*.[53]

At least in principle, then, it seems that a pluralistic account might fare better in terms of accounting for private law's historical contingency and the vast array of relationships it regulates, as well as in its ability to account for our evaluative attitudes towards private law.

Kaplow and Shavell's theory is just one example of a single-value account of private law. Another familiar example of monism in private law is Weinrib's theory of corrective justice.[54] These theories – and other monistic accounts – are extremely different. Of course, an argument against Kaplow and Shavell's version of monism does not count as an argument against every form of monism. Still, the shortcomings in Kaplow and Shavell's argument are instructive because they show how even deliberate attempts to include a diversity of normative concerns within monistic frameworks tend to fail. While Weinrib's and others' corrective justice views will of course not be affected by the exact same problems, they are still impacted by the central concerns that make pluralism a plausible view of private law's foundations: historical path-dependence, the contingency of private law institutions, and the diverse array of relationships governed by private law.

[46]Anderson (n 12) 5.
[47]Alexander (n 15) 1038.
[48]Kaplow and Shavell (n 30) 52, 58.
[49]Jules L Coleman, 'The Grounds of Welfare' (2003) 112 Yale Law Journal 1511, 1524.
[50]ibid.
[51]See Sen (n 40).
[52]Nussbaum (n 29) 19.
[53]John Gardner, 'Tort Law and Its Theory' (SSRN Scholarly Paper, 23 May 2016) 5.
[54]See Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012).

3. Pluralism and coherence

Instead of continuing to discuss other monistic views, I want to explore why, despite the difficulties it faces (at least at a *prima facie* level), monism seems so attractive in private law theory. There might be many explanations for this. As I explain below, one conjecture is that monism is attractive because pluralism is perceived to generate risks of unpredictable, ad hoc, and unprincipled adjudication.[55] Indeed, at least for some monistic views the underlying motivation seems to be the fear that a pluralistic view of private law's foundations would lead to incoherence in adjudication and could make 'the life of the law too unruly'.[56] Underlying this view, there seems to be an assumption or belief that whatever is true about private law's foundations must be true about private law's internal operation. Starting from that notion, a maximally coherent – and ideally monistic – theory of private law seems optimal.

The demand for coherence could be weak or strong. In its weak form, coherence requires theories of private law that present consistent or non-contradictory accounts.[57] If this were all that is meant by coherence, then of course the requirement would be warranted and should be employed in the evaluation of any theory of private law. But a strong demand for coherence goes further. It states that theories should reconstruct private law as a unified normative practice,[58] with all its parts flowing from a single master principle.[59] In its strong form, coherence requires monism.

Intermediate positions are also possible. Smith, for instance, admits that perfect unity appears unattainable, but argues that a good theory would be able to show most of the elements of contract law as traceable to a single principle.[60] Thus, while he seems to endorse a weak version of coherence, allowing for the existence of some pluralism regarding penumbral or outlier cases, he does prefer monistic theories to pluralistic ones, on coherence grounds, regarding the *core* of the practice.

Other scholars demand more in terms of coherence. Weinrib, for instance, argues that there must be a strong coherence in the way in our interpretation and justification of the rules, doctrines, and institutions that structure private law relationships,[61] in order to render those relationships intelligible.[62] If those relationships are not intelligible, then courts cannot interpret transactions in terms of their immanent formal rationality, giving public expression 'to the meaning of right',[63] and satisfying their sole purpose of being the agents of corrective justice.[64]

[55]Similarly, Saprai (n 28) 15.
[56]Markovits and Schwartz (n 16) 6.
[57]Andrew S Gold, 'Internal and External Perspectives: On Methodology in the New Private Law' (SSRN Scholarly Paper, 28 April 2019) 13.
[58]Smith, *Contract Theory* (n 9) 11.
[59]ibid 11–12. Admittedly, this is a simplification. Somewhere between mere non-contradiction (weak coherence) and complete monism (strong coherence), one could think of pluralistic accounts complemented with ordinal rankings between values, or principled mechanisms for resolving trade-offs. However, the simplified categorization serves the purposes of my argument well enough.
[60]ibid 13.
[61]Weinrib (n 54) 29–44.
[62]ibid 42–44.
[63]ibid 105.
[64]ibid 65.

I will turn to Weinrib's views below, but now I will focus on the coherence concern as it has been expressed, in less abstract terms, by Robert Stevens. Stevens argues that pluralistic conceptions of private law

> cannot be true (…) in relation to a legal system which makes any sense. Law is not like minestrone soup. One cannot simply add together a number of disparate ingredients and hope to get a satisfactory result. In many cases, seeking to construct a rule which will lead to the maximisation of wealth (…) will give a quite different result from a rule based upon our moral rights one against another (…). One cannot be a bit of a utilitarian or a half-hearted Kantian, and it is certainly impossible to try and be a combination of the two. Attempting to form a view as to what the law of torts specifically or private law in general is about is unavoidable. Why would they be worth considering as distinct topics if they are not "about" something or other? A "mixed" theory is not a theory at all.[65]

This is what strong coherence demands: all private law (or at least all contract law, or all tort law) has to be understood as based on a single value. Otherwise, legal practice might become unpredictable and the distinctiveness of private law or tort law would be lost.

For Stevens, the problem is also theoretical. Monism is a requirement for a theory to be a theory at all. Pluralism would be intrinsically problematic at the theoretical level. It would constitute an acknowledgment of theoretical failure, because pluralism – in Smith's words – 'is not really a theory, but rather a conclusion that no single "theory" of contract law can explain everything'.[66] But demanding so much in terms of coherence seems somewhat implausible, unless we want to say, for example, that H.L.A. Hart's theory of punishment[67] or G.E. Moore's theory of value[68] are not theories at all. Pluralism is not necessarily a theoretical failure. Moreover, it is consistent with strategies of principled integration between values, such as vertical integration[69] or lexical priority,[70] which could make a pluralistic theory more structured and able to balance different values.[71]

Finally, the claim that 'one cannot be a bit of a utilitarian or a half-hearted Kantian, and it is certainly impossible to try and be a combination of the two', seems unwarranted. The idea that morality can be reconciled and retraced to one single source or metric seems at least debatable.[72] While value monism in morality could turn out to be true, it cannot be adduced without further argument as a reason against pluralistic theories of private law, or in favour of a strong requirement of coherence.

The crucial issue at this point, however, is the idea that a pluralistic theory would be a problem because it would lead to incoherent adjudication. After all, Stevens' main

[65]Robert Stevens, 'The Conflict of Rights' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart Publishing 2009) 140–41.
[66]Smith, *Contract Theory* (n 9) 159.
[67]HLA Hart, *Punishment and Responsibility* (Oxford University Press 2008).
[68]GE Moore, *Principia Ethica* (Courier Corporation 2012).
[69]Jody S Kraus, 'Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy' (2001) 11 Philosophical Issues 420, 422.
[70]Under lexical priority, in any case of conflict between values, one value would be chosen over the other. Nathan B Oman, 'Unity and Pluralism in Contract Law' (2004) 103 Mich L Rev 1483, 1505.
[71]At some point, a strategy of integration might transform a pluralistic theory into a monistic theory. It's an open question —on which I remain agnostic—at what point precisely that happens, but I do think that just acknowledging that other values, reasons, or ends matter besides the main or central justification of a legal institution is not enough to make a theory pluralistic.
[72]Thomas Nagel, 'The Fragmentation of Value' in *Mortal Questions* (Canto Classics, Cambridge University Press 2012) 131–32.

concern is that, if we accepted pluralistic theories about private law, then judges would lack clear criteria to decide cases, because of the inevitable conflict between different types of moral concerns.[73] Under this view, pluralism would lead to *ad hoc* and unprincipled judicial decisions, threatening the rule of law.[74]

But whether a pluralistic theory of, say, contract law's foundations, must lead to unprincipled or unpredictable adjudication depends on what type of relationship holds between the theory of private law and the theory of adjudication. The crucial question is whether we should distinguish between questions *about* the foundations of private law and questions *within* private law (such as those faced by adjudicative institutions). Stevens' concern seems to suggest that we should not: that if pluralism about private law is correct, then judges must engage in first-order reasoning about plural values. But if we made the distinction, pluralism could be just a theory of, e.g., contract law's foundations, with a very limited role to play in the actual adjudication of contractual disputes. The same could be said in other areas of private law. In all of them, we are able to make the distinction between questions about the justification or the optimal structure of private law institutions, and questions that are answered within the already existing scheme of rules, concepts, and doctrines that constitute the institution. We might want to make some connections between these two different types of questions, and perhaps we might have substantive reasons to rely on answers to questions about the justification, value, or optimal structure of private law in order to answer questions within the already existing institutional scheme. But there is no reason to think that we *must* do so. The distinction is intelligible, and we could use it as a means to separate foundational questions about private law from questions that take place within its institutions. Under this distinction, Stevens' concerns about pluralism's tendency towards unpredictability or incoherence could be addressed without necessarily abandoning pluralism about private law's foundations. Thus, pluralism's plausibility requires disentangling questions about private law's foundations from questions about private law adjudication. Given monism's *prima facie* shortcomings, this seems like an attractive possibility.

4. From theory to practice

The problem with the suggestion of the preceding paragraph is that it seems to go against a common view about the role that legal theory is supposed to play in adjudication. Again, it seems we have become used to the idea that theories of private law (or of law, generally) occupy the same logical space as adjudication, or at least that the two are intimately connected. Thus, contrary to my suggestion, we cannot see pluralism only as a theory of private law's foundations, without implementing it in the adjudication of private law disputes.

No theory portrays this view better than Dworkin's. For Dworkin, particularly in *Law's Empire*, legal theory is not a distinct enterprise from legal doctrine but is instead the general part of the theory of adjudication.[75] Legal theory is the 'silent prologue' to

[73]Stevens (n 65) 140–41.

[74]See, for a response to this criticism, Hanoch Dagan, 'Private Law Pluralism and the Rule of Law' in Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014).

[75]Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press 1992) 47; NE Simmonds, 'Imperial Visions and Mundane Practices' (1987) 46 The Cambridge Law Journal 465, 469.

every judicial decision.[76] The idea is that legal theory provides the general framework that supports the judge's work in adjudicating disputes; conversely, every judge needs at least an implicit jurisprudential view in order to make adjudicative decisions. Under this view, whatever goals or normative foundations provide the justification for legal institutions[77] should also play a decisive role in their everyday operation. Dworkin made a sustained effort to argue why this view of adjudication was better than the old-fashioned view that judges and lawyers should tackle hard legal questions 'by using conventional doctrinal methods to demonstrate their specifically *legal* meaning as revealed in cases and statutes',[78] and by just *applying the law* and leaving ethical and political questions aside.[79] It would be pointless to try to offer a critique of that view here. Still, Dworkin's was a contentious jurisprudential position. Hart and Raz responded to it;[80] and the history of late twentieth century legal positivism, with its internal disagreements between inclusive and exclusive positivism, is in a sense the history of the way in which positivists responded to Dworkin's critique.[81]

Even if it was a contentious view, there is a semblance of this view about the relationship between theory and adjudication that seems to be quite common in private law theory. True, many theorists disagree with Dworkin's specific views about the nature of law, the structure of judicial reasoning, and with his overall views about legal interpretation. However, there is a narrow sense in which Dworkin did capture a general conception that seems to be widely shared particularly in North American legal culture, including private law theory.[82] That general conception is that there is an intimate connection, if not an identification, between the concerns of legal theory and those of legal adjudication.

Under a relatively weak version of that conception, private law theory provides materials that can be brought to bear on the tasks of adjudicative institutions deciding private law disputes – particularly in hard cases. Jeffrey Lipshaw, for example, quite plausibly claims that contract theory has practical implications, because its findings 'might guide judges in resolving hard cases of conflicting doctrine'.[83] But some theorists go further. For example, Aditi Bagchi has claimed that '[v]alues do not merely justify the enterprise of contract … [but] are invoked self-consciously by litigants and pursued purposefully by judges'.[84] From this perspective, not just in hard cases, but in the course of applying the rules of contract law in general, judges should bear in mind the justice of the outcomes they achieve.[85]

[76]Dworkin, *Law's Empire* (n 10) 90.
[77]While Dworkin would make a central distinction between policy and principle, I ignore that distinction because of its irrelevance to the argument offered here. On the distinction, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 84.
[78]ibid 2.
[79]Dworkin, *Law's Empire* (n 10) 114.
[80]See HLA Hart, *The Concept of Law* (Clarendon Press 1994) 238–76; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 The Yale Law Journal 823; Joseph Raz, 'Dworkin: A New Link in the Chain' (1986) 74 California Law Review 1103.
[81]See Fernando Atria, *La Forma Del Derecho* (Marcial Pons 2016) 29–48.
[82]See Gardner, 'Tort Law and Its Theory' (n 53) 1.
[83]Jeffrey M Lipshaw, 'Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin' (2008) 21 Can J L & Jurisprudence 399, 399.
[84]Aditi Bagchi, 'Contract as Procedural Justice' (2016) 7 Jurisprudence 1, 33. For my critical analysis of Bagchi's position, see Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2020) 2020 Utah Law Review 1121.
[85]Bagchi (n 84) 29–30.

Many, though not all,[86] versions of law and economics seem to hold a similar view about the relationship between theory and practice. Posner's pragmatism, for instance, is clearly based on the notion that, since law should increase social welfare, judges should make their decisions on the basis of all-things-considered judgments about social welfare.[87] In the case of contract law, there is a long tradition that, based on the notion that contract law is justified in terms of economic efficiency, argues that courts should decide the type and measure of remedies for breach of contract on the basis of what remedy would be efficient.[88] In tort law, similarly, welfarist assumptions about tort law's foundations typically lead to welfarist approaches to the adjudication of tort disputes.[89]

Although (or perhaps because) this view about the relationship between theories of private law and private law adjudication is common, it has rarely been explicitly defended. One of the few who have explicitly defended it is Jody Kraus.[90] In a nutshell, Kraus's argument is that theories of private law should be able to determine the outcomes of adjudication. It is not enough for theories to simply provide a moral justification of adjudicative outcomes in general, without explaining how the relevant theory determines the outcomes.[91] The reason for this is that adjudicative decisions are backed by the threat of state coercion, and therefore, theories of private law should have as their essential purpose to justify such threats in each instance.[92] The task of the theory is to provide a justification for each and every judicial outcome; the theory must determine the adjudication of actual disputes.[93]

According to Kraus, in general terms, normative theories should demonstrate that specific state actions (such as judicial decisions) are supported by justificatory reasons that determine those actions. In this sense, there has to be a connection between the justificatory theory of private law and the outcomes of private law adjudication.[94] The theory that justifies the doctrine must also give us an explanation of how that doctrine,

[86]Among the exceptions, see, e.g., Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale LJ 541.

[87]Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2009) 58–59.

[88]See, e.g., Richard RW Brooks, 'The Efficient Performance Hypothesis' (2006) 116 The Yale Law Journal 568; Richard Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1987–88) 61 S Cal L Rev 629; Melvin A Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 Cal L Rev 975; Daniel A Farber, 'Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract' (1980) 66 Virginia Law Review 1443; Gregory Klass, 'Efficient Breach' in Gregory Klass and others (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014); Anthony T Kronman, 'Specific Performance' (1978) 45 The University of Chicago Law Review 351; Daphna Lewinsohn-Zamir, 'The Questionable Efficiency of the Efficient-Breach Doctrine' (2012) 168 Journal of Institutional and Theoretical Economics 5; Alan Schwartz, 'The Case for Specific Performance' (1979–80) 89 Yale LJ 271; Thomas S Ulen, 'The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies' (1984) 83 Michigan Law Review 341.

[89]See, e.g., Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2006) ch III.

[90]Jody S Kraus, 'Legal Determinacy and Moral Justification' (2006) 48 Wm 1773. As noted above, Aditi Bagchi makes a similar argument, although in a weaker and to my mind much more persuasive version, in Bagchi (n 84). If I interpret her correctly, Bagchi argues that judges should apply the legal rules of contract law while keeping in mind contract law's moral foundations. She does not claim, as Kraus seems to do, that these moral foundations should determine case outcomes by themselves. Moreover, Bagchi's focus is the theory of adjudication, while Kraus makes a methodological argument in favor of determinacy as an evaluative criterion for theories of private law. Because of this difference, I engage more with Kraus's argument here, where my concern is methodology (broadly understood). But I have discussed Bagchi's argument in Jiménez, 'A Formalist Theory of Contract Law Adjudication' (n 84).

[91]Kraus, 'Legal Determinacy and Moral Justification' (n 90) 1773.

[92]ibid 1774–75.

[93]ibid 1784.

[94]ibid 1777.

so justified, leads to case outcomes.[95] A theory can only justify private law it if provides reasons that determine outcomes in private law adjudication.[96]

Thus, if one takes the liberal requirement of public justification seriously, a theoretical justification of private law must demonstrate that the express judicial reasoning of private law provides public reasons justifying, and determining, case outcomes.[97]

However, if the purpose of the theory of private law is to identify reasons that determine judicial outcomes, it is unclear why we would bother to have private *law* at all. In other words, it is unclear why we would have statutes, precedents, restatements, codes, and the complicated web of concepts and doctrines that constitute private law, if a good justificatory theory would be able to determine case outcomes.[98] We could perfectly go from the adequate justification to case outcomes. Authoritative legal materials seem unnecessary, or even an obstacle to adequate decision-making.

Now one more charitable way to characterise Kraus's position could use the terms he has used to describe the methodological disputes between deontic and economic theories of contract law.[99] Kraus sees the role of justificatory theories of private law as one concerned primarily with case outcomes rather than with doctrinal statements.[100] The former, and not the latter, constitute the data that a theory needs to be able to justify (both retrospectively but, as we have seen, prospectively).

So, the correct interpretation of Kraus's argument sees it not as an implausible call for private law theory to ignore legal materials, doctrines and concepts; but rather as the claim that a good theory should provide an explanation of how its own account of those materials can explain most case outcomes. For instance, one could say that the economic analysis of private law is a good theory because it can provide an explanation of case outcomes, an explanation that – while stated in terms that differ from those available in the legal materials – does not simply ignore legal materials. Instead, the explanation provides an alternative account of the specialised *meaning* of those materials, one that is implicit in judges' usage of them and is able to explain and justify case outcomes.[101] What's relevant, in other words, is not the actual reasoning offered by judges, but its deep structure – of which they might simply not be aware.[102]

In Kraus's view, this is necessary because the alternative to an explanatory account that connects the justification of the practice to case outcomes is an account that, like corrective justice and promissory theories, is unable to provide determinate guidance to judges in the future, and is unable to explain case outcomes of the past.[103] This is a problem because, all else being equal, express judicial reasoning is better at justifying the use of state coercion in the extant case if it can actually determine the outcome it leads to.[104]

[95]ibid 1777–78, 1784.
[96]ibid 1783.
[97]ibid 1785.
[98]Kraus's response would likely be that I am placing too much hope on legal materials' ability to dictate outcomes. I return to this potential response below.
[99]Jody S Kraus, 'Philosophy of Contract Law' in Jules L Coleman and others (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (1st edn, Oxford University Press 2004).
[100]Making this distinction, ibid 691–94.
[101]This is how I interpret Kraus's powerful argument in Jody S Kraus, 'Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis' (2007) 93 Va L Rev 287.
[102]On the possibility and value of a system in which judges might be relatively self-deceived or ignorant about the actual operation of their own activity, see Scott Altman, 'Beyond Candor' (1990) 89 Michigan Law Review 296.
[103]Kraus, 'Transparency and Determinacy in Common Law Adjudication' (n 101) 304.
[104]ibid 306.

The greater the ability of a justification to determine an outcome, the greater its justificatory force.[105]

I think Kraus might be right in his criticism about the indeterminacy of some deontic theories.[106] Still, it is unclear why the right response to this possible shortcoming is to take on the challenge of providing 'a complete account' of private law reasoning. An alternative would be to limit the ambitions of private law theory by taking on board the distinction between questions about and within private law institutions. From that perspective, instead of aiming to provide a complete account of private law reasoning, it might be enough to provide an account of that reasoning's moral foundations. This leaves space for an ostensible gap between the theory of private law and private law outcomes: the justification of private law need not be employed in the decision of each specific dispute (even if we ought to try to show how the justification of private law can be connected with case outcomes in this more indirect way).[107] Perhaps, the underlying problem is the ambition to produce a complete account of private law reasoning – particularly given the fact that such reasoning starts from and is mediated by a thick web of legal materials, concepts, and doctrines.

Of course, whether, as Kraus argues, an economic perspective is able to explain and justify case outcomes, given the common law's historical evolution and the specialised usage judges have tended to give to its originally deontic terms, is an open question.[108] But it is unclear why an adequate theory *must* be able to explain and justify case outcomes.

The reason could be a claim about legal indeterminacy, particularly in hard cases.[109] The notion would be, simply, that in hard cases legal materials do not provide determinate answers, and thus we need a theory than can provide them. According to Kraus, economic theories can fulfil that role. After all, economic theories approach hard cases as opportunities to use adjudication as a means of legislating new legal rules.[110]

If this is true, and adjudication in hard cases is just like legislation,[111] then it is unclear why we need a theory that aims to justify private law. Instead, it seems, what we need is a purely normative theory about how private law should be, a theory providing specific prescriptions, and not just a general justification of the practice. However, offering a prescriptive blueprint for the optimal design of private law is not part of what a theory that attempts to interpret or justify private law needs to do. From this perspective, Kraus's criticism of interpretive theories seems misguided. Moreover, if judges should legislate in hard cases, instead of a theory of the legal practice, all they seem to need is a procedure to decide what is best, all things considered. This, precisely, is how Richard Posner characterised his judicial philosophy towards the end of his judicial career:

[105]ibid 310.
[106]Regarding Coleman's corrective justice account of tort law, ibid 316.
[107]Here, I am assuming as true that, as Kraus assumes, a theory that explains and justifies case outcomes *ex post* is, at the same time, a theory that determines case outcomes *ex ante*. See Kraus, 'Transparency and Determinacy in Common Law Adjudication' (n 101) 302.
[108]ibid.
[109]Sometimes Kraus hints at this. See, e.g., ibid 300.
[110]Kraus, 'Philosophy of Contract Law' (n 99) 701.
[111]I don't think it is, or that it should be.

> "I pay very little attention to legal rules, statutes, constitutional provisions," Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?"[112]

Indeed, Posner had what he thought was an adequate theory of how private law should be, which could also provide determinate decisions. Therefore, it is unsurprising that he thought the first thing he ought to do as a judge is to 'forget about the law'. The law, if you have an adequate theory that fully determines case outcomes, is an obstacle.

This, however, is precisely the problem. Kraus's requirement that private law theories determine case outcomes is inconsistent with the very way in which the institutional practice of private law is structured: through authoritative legal materials that guide and constrain decision-making. Given that private law is characterised by the existence of those materials, it is unclear why the task of a theory of private law would be to determine case outcomes, or to be some kind of decision device for adjudicators. Certainly, some theorists might want to make the theory of adjudication transparent vis-à-vis private law's foundations; they might want judges to legislate and treat hard cases as opportunities to do so; in certain areas of private law, adjudication might be less constrained by legal materials or require more help from normative or justificatory theories; and we might want to offer theories that are up to these tasks. Perhaps we might want judges to grasp the deeper principles embedded in the practice and to use them when they discharge their duties. But these are all controversial substantive positions about adjudication, not methodological demands properly addressed at theories of private law. Moreover, these positions are premised on the existence of legal materials; they all seem to depend on the indeterminacy of legal materials in certain cases, or their inadequacy to fully constrain adjudication. Those views about legal materials might be true; but they do not erase the existence of the intricate web of rules, precedents, doctrines and concepts that constitute private law. They are just claims about the nature and limits of those materials.

If, on the contrary, one takes the structural fact that private law is built on the basis of authoritative legal materials seriously, then the distinction between a theory of private law (which justifies, evaluates, or prescribes the design of those legal materials) and a theory of adjudication (which justifies decisions made on the basis of those materials) becomes much more compelling. The structure of private law itself – and the fact that it rests on a complex set of authoritative legal materials that govern adjudication – gives us at least a *pro tanto* reason in favour of the structural distinction between questions about private law and questions within private law (including those answered by judges when adjudicating private law disputes).

5. From practice to theory

5.1. From private law adjudication to private law theory

In principle, it could seem that non-instrumentalists about private law would be keen to highlight the distinction between questions about the justification of private law and the

[112]Adam Liptak, 'An Exit Interview With Richard Posner, Judicial Provocateur', *The New York Times* (New York 11 September 2017) <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> accessed 19 September 2017.

justification of actions and decisions within it. Indeed, non-instrumentalists have claimed, precisely, that many legal economists and instrumentalists more generally fail to take law's self-understanding seriously,[113] and that they ignore the 'autonomy of private law'.[114]

However, non-instrumentalists have also tended to downplay the distinction between private law theory and private law adjudication. As noted above, Posner argued that the central question of adjudication is not how to decide cases on the basis of pre-existing doctrine, but rather to reach optimal decisions, all-things-considered. Weinrib's theory, for instance, could not be further from this view – his theory is a philosophically robust response to it. But, like Posner (and Kraus), Weinrib also seems to think that private law theory and private law adjudication are in the same logical space. The only difference is that, for him, the relationship goes in the opposite direction. While instrumentalists would say that a good theory determines how judges ought to decide cases, Weinrib would argue that a good theory follows closely and never exceeds from the internal structure of private law adjudication.

While this difference is substantively important, the background picture is still similar. Weinrib famously argued that 'the purpose of private law is to be private law'.[115] By this, he meant that the justification of private law is provided by its own internal logic and structure. As a consequence, Weinrib claims that 'functionalism' is problematic because of its assumption that law and politics are inextricably linked, to the point that law has no autonomous justificatory structure.[116] Under this functionalist view, Weinrib writes, 'the considerations that count as reasons in the forum of law are no different from the considerations that count as reasons in the arena of politics'.[117] While Weinrib rejects the subordination of private law to politics, his own view is that that what holds true for private law adjudication holds true for the wholesale interpretation or justification of private law. More specifically, Weinrib's theory is based on the notion that, given that judges should only consider a limited type of reasons for their decisions when adjudicating private law disputes, these are the only relevant reasons in private law, generally.[118] By taking this view, Weinrib ends up having a similar structural picture to the one held by the 'functionalists' he was arguing against – that there is no relevant distinction to make between justificatory reasons that are relevant for judges when adjudicating disputes and justificatory reasons relevant for the general practice.[119]

Something similar can be said of Benson's argument about public justification.[120] For Benson, such a justification should address individuals as parties to a civil suit before a judicial institution, and invoke ideas that are suitable for application in this institutional setting.[121] Thus, for Benson, the only reasons that should be part of a public justification of the law of contracts are the reasons that judges can consider when adjudicating

[113]See, e.g., Stephen Smith, 'Taking Law Seriously' (2000) 50 The University of Toronto Law Journal 241.
[114]Weinrib (n 54) ch 8.
[115]ibid 5.
[116]ibid 7.
[117]ibid.
[118]John Gardner, 'The Purity and Priority of Private Law' (1996) 46 The University of Toronto Law Journal 459, 463–64.
[119]ibid 465.
[120]I say more about Benson's account in Felipe Jiménez, 'Contracts, Markets, and Justice' (2021) 71 University of Toronto Law Journal 144.
[121]Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33 Osgoode Hall L J 273, 306.

disputes. The claim seems to be that, since the judge can only consider type X reasons, then private law can only be publicly justified on the basis of X. Again, this seems to reject the distinction between reasons justifying a practice and reasons justifying decisions within that practice.

This type of view is not limited to Toronto formalists. In a metaphysically more modest way than Weinrib, Benjamin Zipursky has argued that theories that attempt to provide an account of private law must also provide an account of the principles and concepts embedded in the practice. In his view, functional theories like the economic analysis of tort law might be methodologically problematic because they 'will not necessarily capture the concepts embedded in it'.[122]

Zipursky is right in noting that functionalist or instrumentalist theories of tort law will not *necessarily* capture and give an adequate account of the internal discourse of the practice. More strongly, functionalist or instrumentalist theories will have a harder time than non-instrumentalist and deontological theories of private law explaining the internal discourse of the practice. After all, the internal discourse of the practice is, precisely, a discourse that traffics in non-instrumentalist and deontological terms: right, wrong, obligation, liability, and so on.[123] Thus, functionalist and instrumentalist views will have to provide an explanation for this discourse that will be less direct and more complicated than that offered by non-instrumentalist theories.[124]

Zipursky's own answer is that functional and instrumentalist explanations that do not provide an analysis of the concepts embedded within the legal practice 'fail to provide the core of what an account of the law must give'.[125] The underlying idea is that an analysis of the concepts embedded in the legal materials is required to identify the content of the legal practice; and that an account of that content is part of what a theory of the legal practice should do.[126] Understanding an area of law, from this perspective, requires understanding, 'from within', the inferential and discursive practices of those involved in it.[127] While understanding the goals and functions the practice serves is valuable, this is not the same as 'an internal mastery' of the concepts and principles embedded in that practice.[128]

Surely there is an important difference between explaining the purposes, goals or functions of a certain legal practice and being able to act within that practice with mastery. And, like Zipursky, I would forcefully argue that adjudicators, when acting in their institutional roles, should ask how their decisions flow from the concepts and principles embedded in the legal materials, and not how they best serve the functions and goals of the legal practice.[129]

However, the fact that a judge can or should only consider a limited domain of reasons for her decision on a dispute does not mean that these are the only relevant reasons

[122]Benjamin Zipursky, 'Pragmatic Conceptualism' (2000) 6 Legal Theory 457, 459.
[123]Kraus, 'Transparency and Determinacy in Common Law Adjudication' (n 101) 289.
[124]As Zipursky notes, this might be achieved through different strategies, including second-best and path-dependency arguments. See Zipursky (n 123) 464–65.
[125]ibid 465.
[126]ibid 466.
[127]ibid 473.
[128]ibid 474.
[129]ibid. In fact, I make an argument precisely among this lines for contract law adjudication in Jiménez, 'A Formalist Theory of Contract Law Adjudication' (n 84).

involved in the whole practice.[130] It is strange to think that the constraints on the institutional position of the judge must communicate to the whole justificatory structure underlying private law. After all, there is a plurality of perspectives different agents could take regarding private law. The justificatory constraints that each of these agents may face will depend on their institutional roles. Courts might be constrained by their role as law-appliers and adjudicators. Acting in this role, courts are, at least generally, supposed to apply pre-existing legal rules and doctrines. It is unclear why those constraints would apply to the theorist who is precisely asking whether and why such rules, and the concepts and practices embedded in them, are justified, what their moral value is, etc.

5.2. Transparency: reflective and explanatory

One specific way in which the constraints that apply to private law adjudication have been transferred to private law theory involves the claim that private law theorists ought to provide a *transparent* account – an account that shows that the reasons that judges claim for their decisions are the *actual* reasons for those decisions. In more specific terms, this criterion of transparency asks how well a theory accounts for the internal explanation of private law. Smith explains the criterion of transparency in terms of a theory's ability to account for the 'legal' and 'internal' explanation of contract law,[131] and to show that 'the reasons legal actors give for doing what they do are their real reasons'.[132] Transparency is particularly applicable to judges' discourse: a transparent theory would be able to account for the reasons that judges give in order to justify their decisions.[133] The transparency criterion applies with particular strength to interpretive theories, which attempt to provide the best justificatory reconstruction of the actually existing rules and institutions of private law.[134] On the contrary, normative theories are not particularly impacted by this criterion. Given that – as I have noted above – prescription might significantly depart from the practice as it exists, there is in principle no reason why the normative theorist should be constrained by judicial and doctrinal discourse. Thus, most of the discussion in this section applies most obviously to interpretive theories.

Under the transparency criterion, economic theories of private law seem to be particularly problematic as interpretive theories. The most important objection to economic theories, according to Smith, is that they must see contract law as 'hiding its own foundations'.[135] A similar critique is raised against economic theories of tort law by Coleman. For him, 'the economic model fails as conceptual analysis … because it ignores … the actual inferential practices of participants in tort institutions'.[136] The claim is that an economic account of private law, based on notions of efficiency, aggregate welfare, and optimal incentives, is inconsistent with a doctrinal structure built around the notions of rights, duties, and wrongs.

[130]Gardner, 'The Purity and Priority of Private Law' (n 110) 465.
[131]Smith, *Contract Theory* (n 9) 24–25.
[132]ibid 24.
[133]ibid 25.
[134]Smith, *Contract Theory* (n 9).
[135]ibid 132.
[136]Coleman, *The Practice of Principle* (n 2) 25.

Transparency could mean that any adequate theory should itself use the language and concepts of legal practice, explain the law in 'recognizably legal' terms, or in terms that at least work through legal concepts in explaining *particular* rules and decisions.[137] Under this reading, 'accounting for the internal explanation of private law' would entail replicating it, or at least reaching it through more abstract terms or by using terms that are amenable for use in private law adjudication.[138] On the other hand, transparency could mean that theories need to consider the language and concepts of legal practice – that they cannot simply ignore them. From this latter perspective, 'accounting for the internal explanation of private law' would entail explaining the role or function of that internal explanation. These two approaches, which we can respectively call *reflective* and *explanatory* transparency,[139] are both opposed to an account that treats internal explanation as illusory or ideological. Arguably, most private law theorists would think that the idea that judges are either lying or self-deceived about what they do would be an inadequate justification and an implausible description.

Most advocates of transparency seem to have something stronger in mind, however, when they reject economic theories based on the notion of transparency. Indeed, economic theories do not completely ignore the internal dimension of private law – they just explain such dimension in 'external' terms. They provide an explanation of the internal structure that is not expressed in terms reflected in, or amenable to be part of, that structure. But still the explanations consider and try to account for that structure. It thus appears that what I have called explanatory transparency is not enough. Only accounts that reflect, are consistent with, or could be part of the language of the practice are acceptable. Because of this, in Smith's view efficiency theories are inappropriately external to contract law, because they rely on a conceptual apparatus that considerably diverges from that used by legal officials.[140]

5.3. Explaining legal doctrine

Even assuming the language of the practice is the one that Smith and Coleman claim it to be,[141] it is hard to see why a functionalist or instrumentalist theory providing an account of the inferential practices and doctrines of private law that does not replicate them and is not amenable to be part of that discourse would be problematic. Going back to Weinrib's, Benson's, and Zipursky's concerns, it is unclear why theories about private law should be elaborated in terms that replicate or deepen the doctrinal language that is a central part of the institution's operation.

[137]Smith, *Contract Theory* (n 9) 28.
[138]ibid 132–33.
[139]Smith makes a parallel distinction between weak, strong, and moderate versions of the transparency criterion. ibid 26–29. In my view, Smith's classification is not helpful because of the internalist, almost psychological terms in which he explains it. For instance, I do not think that it is useful to think that what sets apart different theories of contract law is their different degree of commitment to the view that judges 'sincerely believe' that the reasons they voice are the 'actual' reasons for their decisions. Instead, what seems to be relevant is how closely an adequate theory should follow the doctrinal language, whether that language is psychologically honest or not.
[140]ibid 132–33.
[141]Some authors think it is not. Morgan argues, for instance, that 'instrumental reasoning is thoroughly characteristic of English contract law. Therefore, the transparency criterion does not provide a reason to reject instrumental accounts of contract law outright.' Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 5. See also Dan Priel, 'The Justice in Unjust Enrichment' (2013) 51 Osgoode Hall Law Journal 813, 823.

On the contrary, a theory can explain doctrinal and judicial reasoning without replicating them in its own conceptual apparatus or aiming to provide concepts that could become part of it. For example, one could claim that contract law strives for the maximisation of wealth and explain the doctrinal and judicial apparatus as an institutional architecture devised to achieve that end. One could similarly argue that, while tort law strives to reduce the total cost of accidents, the rights-based doctrines and bilateral structures of tort doctrine and tort adjudication are an optimal institutional structure to achieve that end. Of course, an instrumental interpretation of these practices could turn out to be wrong. For the interpretation to be correct, the instrumentalist should also explain why the reasons that best justify the practice are different from those routinely used by its main participants. But if such an explanation failed, this would not be the case because the theory is not transparent. Explanatory transparency is fulfilled by functional theories,[142] because explanatory transparency only requires that whatever theories we develop do not ignore private law doctrine and reasoning, and consider them as part of the *explanandum* that needs to be accounted for. This is precisely what functional explanations of the deontic language of private law doctrine do.

A demand for a higher degree of transparency is unjustified. It excludes from the range of admissible theories any theory that is not put forward in the very same terms of the theorised practice, or in terms closely similar to them. A theory that complies with explanatory transparency takes doctrinal statements seriously,[143] as a legitimate *explanandum* to be accounted for by the theory.

Why, then, do theorists like Coleman and Smith (as well as Weinrib and Zipursky) reject economic theories as hopelessly 'external', as ignoring the actual practice they purport to analyse? The reason is again the tendency to neglect the distinction between justifying legal rules, rights, and obligations, and justifying adjudicatory decisions involving such rules, rights, and obligations.[144] Given that we are dealing with legal practices characterised by a dense web of materials, concepts, and doctrines, quite the opposite to what Coleman and Smith argue could be true: the justification of the practice could even be *opaque*, at least sometimes, with regards to the justification of decisions within it.[145]

This explains why a requirement of what I have called reflective transparency puts almost any kind of theoretical approach under pressure – including non-instrumentalist theories.[146] Indeed, it is not common to see judges talking about Aristotelian corrective justice or Kantian right. And it is unlikely that they would or should start talking in such a way. These theories, just like instrumentalist ones, try to account for doctrinal

[142]Another example of an attempt at explanatory transparency would be Jody Kraus's claim that judges use 'deontic' terms with a specialized, consequentialist meaning. Kraus, 'Transparency and Determinacy in Common Law Adjudication' (n 101) 299–300.

[143]As Kraus highlights with regards to economic analysis. See Kraus, 'Philosophy of Contract Law' (n 99) 691.

[144]Nathan B Oman, 'Consent to Retaliation: A Civil Recourse Theory of Contractual Liability' (2011) 96 Iowa L Rev 529, 566–67, 570.

[145]This opacity should not be surprising at all. After all, it is a characteristic feature of legal rules that they at least sometimes displace, or exclude from consideration, their underlying normative foundations. In Razian terms, if rules are taken seriously as such by their users, they are exclusionary reasons. On this, see Larry Alexander, 'Can Law Survive the Asymmetry of Authority?' (2000) 19 QLR 463, 465–67; Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 35–48.

[146]For instance, Weinrib's private law theory would score quite poorly in terms of reflective transparency. Morgan (n 141) 27.

and judicial reasoning, and to provide an explanation for them within their own constructions.[147] They comply with explanatory transparency, but do not merely reflect the doctrinal apparatus. What they attempt to do, just like instrumental theories – albeit in a radically different way – is to make claims about the underlying foundations of legal institutions. They try to uncover what is implicit in the practice,[148] and therefore distinguish, even if implicitly, between the practice's internal operation and its theoretical examination.[149] True, their answer to the two questions might be intimately connected for substantive reasons. One might say, for instance, that while we can distinguish the two levels of justification, this is only because the first level refers to abstract justice and the second level to the determination, by judicial institutions, of what abstract justice requires. Under this view, answering questions within legal institutions would require, in any instance, referring to the justificatory questions about the point of the legal institutions.[150] Perhaps, from a different starting point but in a similar vein, a legal realist could claim that in times of social change and given shifts in social understandings, conscientious adjudicators will have to resort to first-order moral foundations to refine the existing law.[151] And perhaps this closer relationship between theory and practice counts in favour of these types of views vis-à-vis other views that maintain a stricter separation between the two spheres. These, however, are substantive claims about the relationship between the answers to the two types of questions I have referred to – and claims that therefore presuppose the distinction between them, and cannot be introduced as methodological objections to certain types of theories on 'transparency' grounds.

Thus, it could be the case that functionalist and instrumentalist theories of private law are less persuasive than corrective justice, civil recourse, or promissory theories. But the latter types of theories do not have a better claim in principle to be able to explain and justify our practices. They might be able to do it in ways that are closer to the language and conceptual apparatus of our practices, and perhaps this counts for something.[152] Maybe instrumentalist theories that don't coincide with the language of the practice face important justificatory burdens, or face potential legitimacy problems given the potential mismatch between the reasons justifying the institution and the reasons given by its participants when acting within it.[153] But it is an open question whether these potential problems affect all instrumental accounts, and to what extent, if they exist, they undermine the plausibility of instrumentalist theories.

[147]Priel (n 141) 825.
[148]Weinrib characterizes his theory in precisely these terms. Weinrib (n 54) 19–20.
[149]Or, as Gold suggests, between 'the justifications for legal institutions (…) [and] the legal reasoning that operates within those legal institutions.' Gold (n 57) 15.
[150]See, e.g., Christopher Essert, 'Property and Homelessness' (2016) 44 Philosophy & Public Affairs 266, 269–71.
[151]See Hanoch Dagan, 'The Real Legacy of American Legal Realism' (2018) 38 Oxford Journal of Legal Studies 123, 134–35.
[152]See Gardner, 'Tort Law and Its Theory' (n 53) 14.
[153]At the extreme, an instrumental justification for a non-instrumental discourse and conceptual practice could become a form of Government-House utilitarianism. But this is not a necessary implication of instrumentalism about the practice, given that it could perfectly be the case that we are collectively aware of this mismatch between it and the internal discourse of the practice. On Government-house utilitarianism, see Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana Press 1985) 108–10.

6. A way out

Remember how we got here. Monism about private law faces important challenges, but it nevertheless has had important appeal in private law theory. My conjecture was that this might be explained by private law theorists' concerns about unpredictability in adjudication, as shown in Stevens's argument against pluralist theories. This fear is based on a picture of the relationship between private law adjudication and private law theory. This picture sometimes goes in one direction, demanding from private law theory to direct judicial practice and even determine case outcomes; and sometimes in the other, asking from private law theory to replicate or conform with judicial discourse.

Against this view, I have suggested that we should think of private law theories as operating at a different logical and justificatory level from the doctrinal and judicial levels, as trying to articulate an account *of* the practice. For that purpose, they need to explain what happens *within* it, including doctrinal reasoning. But demanding of private law theory to determine case outcomes or to replicate the linguistic and conceptual apparatus of the practice is to miss the distinction between looking at private law externally as a system of rules, and internally at its operation on the basis of such rules.

Thus, a potential way out of the problems faced by pluralism and some of the disagreements that characterise private law theory is to take private law's *legal* character seriously, and to accept that what is said about private law as a legal institution will not necessarily have a direct impact on adjudication, and – conversely – will not have to be bound by the discourse and conceptual apparatus of judicial practice. This distance between theory and practice might be somewhat unsatisfying. But it is the natural consequence of realising that judges' decision-making is mediated by a dense set of legal materials that contain principles, rules, and doctrines.

Thus, if we want to incorporate the legal and therefore formally authoritative character of private law within private law theory and take it seriously (and in this way at least clarify some of the problems I have explored above), we need to start thinking about it somewhat differently. This is precisely where the distinction I have been alluding to comes in. We should think about private law in terms of Rawls's well-known distinction between the justification of a practice and the justification of particular actions and decisions within it;[154] between 'justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules'.[155] The distinction captures two perspectives towards legal institutions, which lead to a parallel distinction between questions *about* and *within* legal institutions.[156]

The distinction is well-known and familiar to all the theorists I have discussed, but is usually obscured or left aside in these theoretical discussions. The distinction captures a more general phenomenon which other distinctions, like the contrast between the internal and external perspectives, also capture.[157] To engage in a legal practice is to

[154]Rawls (n 1). I am not the first to suggest that this distinction could be useful to clarify our understanding of contract law. See, for instance, Rick Bigwood, *Exploitative Contracts* (Oxford University Press 2003) 75–76; Oman, 'Consent to Retaliation' (n 144) 570. For a general perspective on the applicability of the distinction to legal institutions, see Fernando Atria, 'La Relevancia Del Derecho Civil (a Propósito de Barros, "Tratado de Responsabilidad Extracontractual")' (2006) 8 Revista de Estudios de la Justicia 219; Fernando Atria, 'Jurisdicción e Independencia Judicial: El Poder Judicial Como Poder Nulo' (2004) 5 Revista de Estudios de la Justicia 119.
[155]Rawls (n 1) 5.
[156]Atria, 'Jurisdicción e independencia judicial' (n 154) 121.
[157]See Hart, *The Concept of Law* (n 80).

follow certain formal and authoritative standards that mark that one is *inside* it. Just like someone who did not follow those standards would be 'out' of the institution (think, for instance, of a judge who deliberately ignores the rules of the Statute of Frauds in a contract involving an interest in land), someone who is not part of the practice can perfectly ask why we should have those standards and not others (in this example, why should we have a Statute of Frauds for contracts involving interests in land). There is a central difference between questions about the value, justification, or optimal structure of private law institutions, and questions answered within the complex set of doctrines and materials that constitute those institutions.

The two different types of questions posed by Rawls could very well be associated with different institutional actors. Legislators, regulators and judges in cases of first impression (although in these cases we can think of several constraints that come with the office), as well as theorists, typically think *about* legal institutions: respectively, about how to design and reform them, and about how to understand, justify, and evaluate them.[158] Lawyers, jurists, and judges in ordinary cases, however, at least when they are occupying their institutional roles, think *within* legal institutions: they ask questions about the correct interpretation and implications of their structuring rules.

The distinction disaggregates questions of justification, opening up the feasibility of pluralistic, yet coherent, positions about legal institutions.[159] Such positions are at least plausible in private law, as recent instrumentally oriented defences of formalism in contract interpretation[160] and economically oriented accounts of property law's formal doctrinal structure,[161] as well as some of Posner's writing on corrective justice,[162] suggest. But the distinction is structural, and it is compatible with different substantive answers to the different questions. Thus, whatever instrumentalists and non-instrumentalists might want to say about the foundations of private law or about adjudication can be said within this framework that separates questions about legal institutions and questions asked within them.

Moreover, the distinction is compatible with different relationships between its components. Some might want the overall justification of legal institutions to play a relevant, or even fundamental, role in the application of its rules, as Kraus argues. In other cases, we might want greater degrees of separation. Thus, the distinction does not necessarily lead to what Rawls calls the *practice conception* of rules. Under this conception – unlike the *summary conception*, which sees rules as mere rules of thumb – rules establish an institutional practice that specifies new forms of activity. The rules are, themselves, justified by underlying principles, but the latter do not lead directly to the justification of particular decisions within the practice structured by those rules.[163] I do not claim that the existence of legal rules immediately marks this radical distinction between the

[158]The questions, from this perspective, are typically political in nature, rather than merely or purely juridical.
[159]As the one Rawls defended in the realms of promise and punishment. In both of them, '[o]ne reconciles the two views by the time-honored device of making them apply to different situations.' Rawls (n 1) 7.
[160]See, for all, Schwartz & Scott, 'Contract Theory and the Limits of Contract Law' (n 86); Alan Schwartz and Robert E Scott, 'Contract Interpretation Redux' (2010) 119 Yale LJ 926.
[161]See Henry E Smith, 'On the Economy of Concepts in Property' (2012) 160 University of Pennsylvania Law Review 2097; Henry E Smith, 'The Persistence of System in Property Law' (2015) 163 University of Pennsylvania Law Review 2055.
[162]See Richard Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 The Journal of Legal Studies 187.
[163]Rawls (n 1) 24.

two questions of justification. In fact, to get – using Rawls's examples – from practices of punishment and promise to conceptions of adjudication or moral obligation, we need substantive normative arguments. The same is true in the case of private law: that we *can* distinguish between different questions about, say, contract or tort law, does not necessarily entail specific (or different) answers to those questions. We might want to claim, like Kraus, that the theory that justifies private law should also be used as a device for adjudicating disputes. This is a normative argument about adjudication that must be made – and that can perfectly be made within the framework I am proposing.

Similarly, the best justification of private law might be based on the 'internal' notions of right, wrong, breach, negligence, etc., like Smith, Coleman, Weinrib, Benson, and Zipursky would argue. Perhaps, the best theory of private law might lead us to see adjudicative and doctrinal discourse as an instantiation of the more abstract normative concerns that lie at the foundation of the practice; or the justification of private law as based on normative concerns that are also reflected in the doctrinal discourse. Whether any of this is the case is an open question that turns on substantive normative and interpretive arguments, which can also be entirely accommodated within the two-tier structure suggested here. Thus, the distinction I have alluded to offers a useful way out of some of the disagreements in private law theory identified in this paper.

Let me now suggest why, beyond being useful, the distinction is also plausible given how our practices of private law are. Think about the case of contract law. Contract law grants individuals deontic powers, that is, powers to create legal rights and obligations.[164] Thus, contract law does not simply regulate a pre-existing practice of exchange or promise.[165] Something similar can be said of the law of torts or property. These regimes do not just regulate pre-existing brute facts like accidents and physical control over objects. They also re-describe those facts in a way that creates new *institutional* or legal characterisations and concepts, such as negligence, ownership, etc.,[166] which themselves stand in systematic relationships to other institutional facts and concepts.[167]

In the case of contract law, when a legal system declares certain agreements of exchange or promises enforceable, it generates legal rights, duties, and roles that arise from legal regulation, all of which would not exist as such without contract law. Once contract law generates an institutional concept of *contract*, the existence of an enforceable contract (and of the duties generated by it) is a matter of institutional fact.[168] To say that

[164]I take the term *deontic powers* and its explanation from John R Searle, 'What is an Institution?' (2005) 1 Journal of Institutional Economics 1, 10.

[165]I say it does not *simply* regulate a preexisting practice because I do not want to deny the obviously true claim that there is meaningful conduct of exchange independently of contract law. The point is that contract law does not simply acknowledge these preexisting practices and regulate them. It takes parts of those practices and gives them an institutional meaning they would completely lack if there were no law of contracts. Moreover, as Scanlon's discussion shows, this 'constitutive' role of contract law is true independently of whether we hold a conventionalist or non-conventionalist account of promising. See Thomas M Scanlon, 'Promises and Contracts' in Peter Benson (ed), *The Theory of Contract Law* (Cambridge Studies in Philosophy and Law, Cambridge University Press 2001) 99.

[166]Of course, the practice can track pre-legal moral notions and normative views, as would arguably be the case in property. But even if this is what it does, the transition from pre-legal moral notions to legal concepts is a transition from open-ended and more or less amorphous moral ideals into institutionally dependent, specified, and determined legal institutions. This is, I think, a fairly Kantian point. See Martin Stone, 'Legal Positivism as an Idea about Morality' (2011) 61 University of Toronto Law Journal 313, 317–18; Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109 Harvard Law Review 1535.

[167]Searle, *The Construction of Social Reality* (n 5) 35.

two persons have entered into a contract, that a certain agreement or promise is a contract, that the meaning of a certain clause is A, B, or C, etc., is to apply legal rules, standards, principles, and doctrines.[169]

Similarly, in the case of property law, relationships of ownership, exclusive control, and so on, are premised on a structure of legal rules and institutions that establish these normative relationships. Asking questions about who owns what turns on institutional facts about the laws regulating property in the instant jurisdiction.

The point is not merely semantic. The issue at stake is not whether we label a certain behaviour as 'contracting', 'exchange', or 'promise', in the case of contract law, or a certain relationship as 'ownership', 'control', or 'possession', in the case of private law. The point is rather that private law institutions are constitutive of the institutional concepts associated with contracting and ownership, and give rise to sets of behaviours, roles, and legal rights and obligations that do not exist as such without it.[170] Regulating exchange and control of things by contract and property law, then, establishes a new *legal* normative order that is governed by those legal rules – which, again, does not deny that pre-institutional phenomena, such as promises, exchange, or material possession, occur without law.[171]

This is important because, once legal practices are up and running and the conduct regulated by them assumes this institutional dimension, the two questions of justification suggested by Rawls become evidently applicable.[172] Legal institutions entail the possibility of distinguishing between questions formulated *within* the institution and questions *about* it.[173] We should not ignore that possibility when engaging in discussions about private law theory.

[168]On this, see GEM Anscombe, 'On Brute Facts' (1958) 18 Analysis 69; Neil MacCormick, 'Law as Institutional Fact' in *An Institutional Theory of Law* (Springer Netherlands 1986) vol 3, 50–51; John R Searle, 'How to Derive 'Ought' From 'Is'' (1964) 73 The Philosophical Review 43. On the view of legal systems as institutional artifacts, see Luka Burazin, 'Can There Be an Artifact Theory of Law?' (2016) 29 Ratio Juris 385; Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40 Monash U L Rev 737.

[169]Of course, the application of these rules and doctrines might be more or less sensitive to questions about the justification of the institution. Whether that is the case, however, will depend on substantive considerations pertaining to questions about legal interpretation and the theory of adjudication.

[170]This is all neatly captured by Searle's notion of 'status.' See Searle, *The Construction of Social Reality* (n 5) 44. I am not the first to suggest the relevance of institutional status for private law institutions. On property, see, e.g., Eric R Claeys, 'Property, Concepts, and Functions' [2019] BC L Rev 1, 39–40.

[171]See Searle, *The Construction of Social Reality* (n 5) 50. By saying that contract law establishes a new *legal* normative order I do not mean to say that this legal order has *robust* normativity. Whether that is the case depends on moral and political considerations that go beyond the mere existence of contract law. What I do mean with this is that contract law's legal norms give rise to legal positions, rights, and obligations that would not exist as such without these norms. This is entirely compatible with saying that those positions, rights, and obligations are morally irrelevant, or at odds with the *real* moral rights and obligations of the parties. On the notion of robust normativity and its opposition to merely formal normativity, see David Enoch, 'Is General Jurisprudence Interesting?' (2015) <https://ssrn.com/abstract=2601537> accessed on 23 May, 2020.

[172]The distinction tracks a real and important trait of those practices: that one can ask questions about those practices and within them. However, I am doubtful as to whether the Rawlsian scheme makes sense with regards to extra-legal practices, such as promising. For a powerful argument against its applicability to promising, see Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford University Press 1999) 299.

[173]Atria, 'Jurisdicción e independencia judicial' (n 154) 121. Note that the point is not that there is a necessary radical distinction between legal rules and their underlying rationales or justifications. It could be that the application of (some) legal rules do require asking questions about normative foundations. But even in these cases we can, and usually do, make the distinction between the two levels.

7. Conclusion

That legal rules and the legal institutions they engender can generate distinct questions, *about* them and *within* them, might seem an intuitive and even innocuous observation. Yet, many private law theorists have sometimes obscured or ignored it. Because of this, private law theory has assumed an image of the practices and institutions it theorises that stands in the way of fruitful theoretical discussion.

Although the distinction has been sometimes overlooked, many of the most thoughtful reconstructions of private law presuppose it or can be reinterpreted in its terms. For instance, Ripstein sees his theory as trying to make the law of torts 'intelligible, to show how the characteristic modes of reasoning, the questions asked, and the inferences permitted or refused fit into an integrated pattern',[174] a task which is entirely compatible with asking what function or role that set of practices might perform. And Peter Benson has helpfully distinguished between an articulated theory of contract as a juridical relationship arising out of contract doctrine and a theory about the role of contract law in civil society.[175]

In all, this paper attempts to bring the distinction to the fore and use it as an important corrective to some of the theoretical excesses and rhetorical exaggerations that are sometimes common in private law theory. John Gardner once noted the 'strange polarisation of theoretical work on private law'.[176] The field has been packed with what Dagan and Dorfman call 'misleading dichotomies'.[177] With the rise of what some have called the 'New Private Law',[178] private law theory could move towards less polarisation and to resolve some of the standard substantive disagreements that characterise the field. The argument presented here, however, suggests that the current stalemates in private law theory are not just a matter of substance. They are also a matter of perspective – or, rather, of assuming that only *one* perspective, or *one* question, is relevant for understanding and theorising our legal practices. Against this perspectival monism, I have argued that we might profit from disentangling different questions about private law institutions, questions that are suggested by the very structure of those institutions.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[174]Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) xi.
[175]Peter Benson, 'The Unity of Contract Law' in Peter Benson (ed), *The Theory of Contract Law* (Cambridge Studies in Philosophy and Law, Cambridge University Press 2001) 203–04.
[176]John Gardner, 'Dagan and Dorfman on the Value of Private Law' (2017) 117 Columbia Law Review Online 179, 180.
[177]Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 Columbia Law Review 1395, 1400.
[178]See, e.g., Gold (n 57); John CP Goldberg, 'Pragmatism and Private Law' (2012) 125 Harv L Rev 1640.