

## CONTRACT THEORY ON AND OFF THE GRID

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One more word about giving instruction as to what the world ought to be. Philosophy in any case always comes on the scene too late to give it.<sup>1</sup>

## INTRODUCTION

FIFTY years ago, development assistance generally involved funding for capital-intensive industrial and agricultural projects, increased education, and introduction of modern technology.<sup>2</sup> In that era, both development scholars and practitioners understood that a society's institutions play an important role in facilitating economic growth.<sup>3</sup> Generally, institutions were not treated as instruments that could be engineered, however.<sup>4</sup> Today, the principal international development organizations consider "building institutions for markets" a priority.<sup>5</sup> According to the staff of the

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<sup>1</sup> Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right* 12 (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

<sup>2</sup> See 1 Devesh Kapur et al., *The World Bank: Its First Half Century 177-78* (1997); Gerald M. Meier & Robert E. Baldwin, *Economic Development: Theory, History, Policy* 410-16, 431 (1957); Willard L. Thorp, *Development Assistance Efforts and Policies, 1964* Org. for Econ. Co-operation & Dev. 54-61; Arthur Smithies, *Rising Expectations and Economic Development*, 71 *Econ. J.* 255, 255 (1961).

<sup>3</sup> Eugene R. Black, *The Age of Economic Development*, 70 *Econ. J.* 266, 267 (1960) ("There must be a code of laws which places contracts among producers above arbitrary political action."); Charles Wolf, Jr., *Institutions and Economic Development*, 45 *Am. Econ. Rev.* 867, 867-68 (1955).

<sup>4</sup> See, e.g., Frank H. Knight, *Discussion*, 47 *Am. Econ. Rev. (Papers & Proc.)* 18, 20 (1957) ("Institutions, I repeat, are more or less explained historically rather than scientifically and are little subject to control." (commenting on Kenneth E. Boulding, *A New Look at Institutionalism*, 47 *Am. Econ. Rev. (Papers & Proc.)* 1 (1957))). Exports of Western legal codes in the name of institutional development did occur following the Second World War. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 *Am. J. Comp. L.* 163, 163-64 (2003).

<sup>5</sup> World Bank, *World Development Report 2002: Building Institutions for Markets* iii (2002) ("Addressing the challenge of building effective institutions is critical to the Bank's mission of fighting poverty. We recognize the central importance of institutions in the development process through the Comprehensive Development Frame-

World Bank, “[w]ithout land-titling institutions that ensure property rights, poor people are unable to use valuable assets for investment and income growth[,]” and “[w]ithout strong judicial institutions that enforce contracts, entrepreneurs find many business activities too risky.”<sup>6</sup>

Construe institutions broadly enough, and the view that they play an important role in economic growth now seems to be part of the mainstream of development economics. Whether formal government institutions are required is a separate question.<sup>7</sup> Michael Trebilcock and Jing Leng explore the extent to which connections between formal legal institutions and economic growth are supported by empirical evidence.<sup>8</sup> Looking at the case of contract enforcement, Trebilcock and Leng are not convinced that a connection has been shown:

[T]he existing empirical evidence specifically examining the correlation between a country’s economic growth and the state as a credible third-party enforcer of contracts suggests a strong correlation only in the financial sector: better contract enforcement appears beneficial in facilitating financial intermediation. This correlation does not provide strong or unambiguous corroboration of the contract-formalist position more generally, beyond the truism that most rich countries have sophisticated formal contract law and enforcement regimes and many, if not most, poor countries do not. This could equally be said of many other

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work . . . .”); see also Int’l Monetary Fund, *World Economic Outlook* April 2003: *Growth and Institutions* 116 (2003) (“Weak institutions impede growth and undermine the implementation of sound macroeconomic policies. IMF-supported programs, therefore, often include measures designed to address institutional weaknesses . . . .”); Report of the High-Level Panel on Financing for Development, U.N. GAOR, 55th Sess., Agenda Item 101, at 7, U.N. Doc. A/55/1000 (June 26, 2001) (“No country can expect to achieve equitable growth, or to meet the International Development Goals, unless it focuses on building effective domestic institutions and adopting sound policies . . . .”).

<sup>6</sup> World Bank, *supra* note 5, at iii.

<sup>7</sup> See James E. Rauch, *Getting the Property Rights to Secure Property Rights: Dixit’s Lawlessness and Economics*, 43 *J. Econ. Literature* 480, 480 (2005).

<sup>8</sup> Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 *Va. L. Rev.* 1517–18 (2006).

differences between rich and poor countries, indicating little about what is a cause or what is a consequence of development.<sup>9</sup>

The referees of the development agenda, however, seem comfortable moving ahead with institution building without waiting to view the tape.<sup>10</sup>

Suppose that an effective regime of formal contract law does have the potential to promote economic growth in a developing country. On what basis is the adoption of an institution of contract law justified in a society without an established tradition of Western legal institutions?<sup>11</sup> In this Essay, I consider whether contemporary theories of contract law provide significant guidance in addressing that question. I discuss a number of prominent approaches in the absence of a dominant school of contract theory in legal scholarship.<sup>12</sup> I suggest that these contemporary theories tell us very little about the proper content, desirability, or legitimacy of contract law in societies other than those in which Western private law institutions are already well established.

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<sup>9</sup> Id. at 1536.

<sup>10</sup> The views of the New Institutional Economics reflected, for example, in recent reports by the World Bank and International Monetary Fund, are similar to those expressed in the law and development literature of the 1960s. See, e.g., David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *Yale L.J.* 1, 6–7 (1972) (characterizing one perspective within the “core conception” of law and development scholarship as the view that “institutions such as contract and private property rights . . . promote[] the development of markets and hence economic growth”). Although the law and development movement of the 1960s was briefly supported by funding from the United States Agency for International Development, at that time this funding was largely independent of the agenda of development economics and, in any event, U.S. government funding was transitory. See, e.g., John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *Am. J. Comp. L.* 457, 457–60 (1977); Trubek, *supra*, at 3 (“[S]ince development research has not viewed law as a major aspect of society, it has left the study of law and development primarily to the lawyers.”) (footnote omitted); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wisc. L. Rev.* 1062, 1065.

<sup>11</sup> I use the terms “West” and “Western” in this Essay simply to designate the North American, Western European, and Oceanic common and civil law jurisdictions from which the private law theorists discussed here take statements of legal doctrine.

<sup>12</sup> See, e.g., Peter Benson, *Contract*, in *A Companion to Philosophy of Law and Legal Theory* 24, 24 (Dennis Patterson ed., 1999).

## I. CHARLES FRIED

Charles Fried maintains that contract law is based on the promise principle.<sup>13</sup> The promise principle holds that a person has a moral obligation to keep a promise because, in making the promise, a person deliberately employs a social convention that supplies a means of causing another person to expect that the promise will be kept.<sup>14</sup> John Rawls appeals to the same principle in formulating his theory of justice.<sup>15</sup> Rawls explains the promise principle as an application of the principle of fairness. According to Rawls, the principle of fairness holds that when a person has voluntarily accepted the benefits of a just institution, he becomes obligated to conform to the rules of that institution.<sup>16</sup> In Rawls's account, the social practice of promising is subject to a public system of rules specifying that if one promises to do something, one will do it, subject to certain exceptions.<sup>17</sup> This rule of promising "is not itself a moral principle but a constitutive convention."<sup>18</sup> A convention exists "when it is more or less regularly acted upon[.]" and a convention, or more generally, an institution, is just if it provides a rational means to appropriate ends and is consistent with the equal liberty of the participants.<sup>19</sup> Rawls's moral principle, then, is that a promise is to be kept if it is made in accord with a just social practice of promising.<sup>20</sup>

It is plain to Fried that there exists a convention of promising that functions to create an expectation of performance;<sup>21</sup> Fried apparently assumes that this convention is just. Rawls concludes that a just practice of promising should exist; the task of explaining his theory of justice does not require him to take a more definite position.

The existence of a social convention of promising suitable for justifying contract cannot be taken for granted in a society without

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<sup>13</sup> Charles Fried, *Contract as Promise* (1981).

<sup>14</sup> *Id.* at 16–17.

<sup>15</sup> See *id.* at 137 n.10, 138 n.16; John Rawls, *A Theory of Justice* 303–04 (rev. ed. 1999).

<sup>16</sup> Rawls, *supra* note 15, at 301.

<sup>17</sup> *Id.* at 303.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* at 303–04.

<sup>21</sup> See Fried, *supra* note 13, at 13–14.

traditional Western legal institutions. As Rawls's analysis of promising makes clear, establishing the promise principle requires more than the existence of some convention of promising. The circumstances in which a promise creates expectations, and the nature of the exceptions to those expectations, are also important.<sup>22</sup> The lack of a reliable institution of contract in a society indicates that, to the extent the society has a convention of promising, that convention differs in significant respects from those familiar to developed societies in the West.

Even if promises are not legally enforced, it is possible that they are generally performed, perhaps on account of social norms or networks.<sup>23</sup> There are likely to be many examples in the developing world, however, in which this is not the case. For example, there may be a practice of promising that is highly restrictive; one that does not extend to strangers. Or there may be a practice that extends even to the commercial realm but is corrupt. Rawls notes that "unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind."<sup>24</sup> Rawls does not regard the practice of promising as intrinsically just, recognizing that "[t]here are many variations of promising . . . ."<sup>25</sup>

Fried's theory of contract does not provide a basis for adopting or reforming contract law in a society that lacks the right kind of social practice of promising. Possibly, a suitable convention could be inculcated. Fried appears to believe that "morality can mandate that there be a convention with certain general features,"<sup>26</sup> but he does not explain how such a mandate would be executed. In any event, until the convention gained acceptance, a regime of contract would have to be justified on other grounds. Presumably, for Rawls, an important component of fashioning a contract regime in any society would include an examination, and perhaps reform, of the practice of promising in light of principles of justice. Rawls

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<sup>22</sup> Rawls, *supra* note 15, at 303–04.

<sup>23</sup> See, e.g., Trebilcock & Leng, *supra* note 8, at 1537–72.

<sup>24</sup> Rawls, *supra* note 15, at 302.

<sup>25</sup> *Id.* at 304.

<sup>26</sup> Fried, *supra* note 13, at 138 n.11.

provides only some very brief and general observations about what a just institution of promising would look like, however.<sup>27</sup>

## II. THOMAS SCANLON

Thomas Scanlon denies that the legitimacy of contract law turns on the existence of a social practice of promising.<sup>28</sup> Scanlon maintains instead that contract law grounded in the following principle is “morally permissible”:

It is permissible legally to enforce remedies for breach of contract that go beyond compensation for reliance losses, provided that these remedies are not excessive and that they apply only in cases in which the following conditions hold: (1) *A*, the party against whom the remedy is enforced, has, in the absence of objectionable constraint and with adequate understanding (or the ability to acquire such understanding) of his or her situation, intentionally led *B* to expect that *A* would do *X* unless *B* consented to *A*'s not doing so; (2) *A* had reason to believe that *B* wanted to be assured of this; (3) *A* acted with the aim of providing this assurance, by indicating to *B* that he or she was undertaking a legal obligation to do *X*; (4) *B* indicated that he or she understood *A* to have undertaken such an obligation; (5) *A* and *B* knew, or could easily determine, what kind of remedy *B* would be legally entitled to if *A* breached this obligation; and (6) *A* failed to do *X* without being released from this obligation by *B*, and without special justification for doing so.<sup>29</sup>

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<sup>27</sup> See Rawls, *supra* note 15, at 303–04 (“In general, the circumstances giving rise to a promise and the excusing conditions must be defined so as to preserve the equal liberty of the parties and to make the practice a rational means whereby men can enter into and stabilize cooperative agreements for mutual advantage. Unavoidably the many complications here cannot be considered.”).

<sup>28</sup> T.M. Scanlon, *What We Owe to Each Other* 310–11 (1998) [hereinafter Scanlon, *What We Owe to Each Other*]; T.M. Scanlon, *Promises and Contracts*, in *The Theory of Contract Law* 86, 98–99 (Peter Benson ed., 2001) [hereinafter Scanlon, *Promises and Contracts*].

<sup>29</sup> Scanlon, *Promises and Contracts*, *supra* note 28, at 105.

It is evident from the context that Scanlon also assumes that enforcement is part of “a system of law that is tolerably fair and efficient.”<sup>30</sup>

According to Scanlon, the moral principle he describes is valid, since no one could reasonably object to it.<sup>31</sup> Scanlon argues that promisees would favor the principle because they value assurance. Promisors would also favor it because it is in their interest to be able to accommodate promisees. Further, the costs to promisors of avoiding being subject to the principle are insubstantial.<sup>32</sup> Scanlon describes the appeal of assurance as a combination of obtaining “a certain confident state of mind” that performance will occur, as well as obtaining the promised performance itself.<sup>33</sup>

Scanlon does not claim that his principle explains most of the prominent features of contract doctrine. He concedes, for example, that the principle does not necessarily compel the requirement of consideration, although he thinks consideration may be an acceptable means of implementing aspects of the principle.<sup>34</sup> Rather, Scanlon formulates the principle to provide a rationale for expectation damages or specific performance in suitable cases, a rationale

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<sup>30</sup> Id. at 100 (“[T]he coercive power of the state may be used to force [a person] to compensate [a counterparty] for [a] loss, provided that [the] law authorizing this is established and applied in a system of law that is tolerably fair and efficient.”). This assumption appears in Scanlon’s earlier discussion of a different, related principle, but the argument for Scanlon’s contract principle is based, in part, on the earlier discussion. See id. at 108–10.

<sup>31</sup> See id. at 89, 107–08. Scanlon’s most general formulation of his contractualist principles “holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement.” Scanlon, *What We Owe to Each Other*, supra note 28, at 153. Scanlon’s notion of reasonable rejection does not admit a simple summary; his explanation includes lengthy discussions of “the idea of reasonableness[,]” “the standpoints from which a principle can be rejected,” and the nature of reasons that derive from such a “standpoint.” Id. at 241. Scanlon disavows providing explication that would “begin with a clear specification of the possible grounds for reasonably rejecting a principle . . . and with a specified method for determining the relative strength of these grounds that allow us to reach conclusions about reasonable rejectability without appeals to judgment.” Id. at 217–18. Although, in Scanlon’s view, the grounds for reasonably rejecting a principle cannot be reduced to the effect on the person’s well-being, it is sufficient for following the present discussion that “components of well-being figure prominently as grounds for reasonable rejection . . . .” Id. at 214–15.

<sup>32</sup> Scanlon, *Promises and Contract*, supra note 28, at 101, 108.

<sup>33</sup> Id. at 95.

<sup>34</sup> Id. at 106–07.

that some scholars maintain is a crucial element of a successful theory of contract.<sup>35</sup> Scanlon does not attempt to show, however, that awards of expectation damages in any existing legal system necessarily track the qualifications embedded in his principle. Further, as Richard Craswell points out, “[w]hat Scanlon has really provided is a demonstration that almost *any* remedy can be justified” under appropriate circumstances,<sup>36</sup> not just expectation damages, since Scanlon’s principle is only limited to remedies that are not excessive.

Although Scanlon’s contract theory is formulated in very general terms, it does not appear to furnish a basis for introducing a system of contract law outside its traditional habitats. As Daniel Markovits observes, whether it is reasonable to reject a principle depends on context, or ought to.<sup>37</sup> Perhaps Scanlon’s defense of his contracts principle is plausible, holding all else equal, against the background institutions of a typical developed economy. It is not possible, however, to evaluate the strength of his arguments, hold-

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<sup>35</sup> See, e.g., Benson, *supra* note 12, at 55 (“The simple but decisive question for contract theory still awaits a satisfactory answer: can the long and well-established legal view that expectation damages are distinctive of contract . . . be justified . . . ?”); Stephen A. Smith, *Towards a Theory of Contract*, in *Oxford Essays in Jurisprudence* 107, 121 (Jeremy Horder ed., 4th ser. 2000) (“[A]ny plausible theory of contract . . . must . . . show[] that the content of the promisee’s right is a right to the *performance* of an undertaking.”).

<sup>36</sup> Richard Craswell, *Against Fuller and Purdue*, 67 U. Chi. L. Rev. 99, 114 (2000).

<sup>37</sup> See Daniel Markovits, *Making and Keeping Contracts*, 92 Va. L. Rev. 1325, 1364 (2006) (“Although [Scanlon] sometimes presents the assessment of the burdens and benefits associated with these rules as measured against a baseline in which there is *no* rule of agreement-keeping, the appropriate comparison, for the purposes of the harm-based theory, is of course a baseline established by some *alternative* rule of agreement-keeping.”); Scanlon, *What We Owe to Each Other*, *supra* note 28, at 214. (“[A] sensible contractualism, like most other plausible views, will involve a holism about moral justification: in assessing one principle we must hold many others fixed. This does not mean that these other principles are beyond question, but just that they are not being questioned at the moment.”). Jules Coleman takes a similar position in his account of the relationship between tort law and corrective justice: “[A]lthough corrective justice is private justice . . . whether or not it imposes obligations between . . . parties depends on other social, political and legal practices. This . . . is a controversial, but I think inescapable truth about corrective justice. It may be true of other moral principles as well.” Jules L. Coleman, *Risks and Wrongs* 404 (1992); see also *id.* at 394–95 (“[W]hether or not corrective justice imposes moral reasons for acting will depend on prevailing legal and social practices.”) (emphasis omitted); Jules L. Coleman, *The Practice of Corrective Justice*, in *Philosophical Foundations of Tort Law* 53, 69 (David G. Owen ed., 1995) [hereinafter Coleman, *Corrective Justice*].

ing other things equal, in a typical developing society. If other things are not kept fixed, then the set of principles that includes Scanlon's contracts principle may be objectionable for reasons that favor a different set of principles that does not include Scanlon's contracts principle.<sup>38</sup> Background institutions in a developing society generally will be very different than those of a developed society. For example, at a stage when the basic principles of private law are in play in a particular developing economy (when even the question whether the Western model of private law is to be adopted may be open), a tolerably fair and efficient system of law may not exist. It seems that Scanlon's principle of contract could reasonably be rejected—or is inapplicable—on that basis alone, since Scanlon's argument relies on the existence of a system of law that is reasonably fair and efficient.<sup>39</sup>

It is not clear that Scanlon thinks he has formulated, or could formulate, a justification for contract that would be robust enough to guide a society in which Western legal traditions are not established. In fact, in a discussion of the moral dimensions of privacy, Scanlon recognizes the limitations of his method:

In societies which have different forms of commerce, or in which different ideas of personal dignity prevail, people will generally have different reasons for wanting forms of protection of the sort that rules of privacy provide. When this is so, the sets of rules that no one could reasonably reject . . . will be different.<sup>40</sup>

Similar considerations apply to the rules governing economic arrangements in developing societies.

### III. MELVIN EISENBERG

According to Melvin Eisenberg, contract law should satisfy the objectives of the parties to a "promissory transaction" by applying the "best possible rules," with what is best to be determined in light

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<sup>38</sup> Cf. Scanlon, *Promises and Contracts*, supra note 28, at 89 ("So they have [a] strong prima facie reason to reject a principle offering any less protection against manipulation than [an alternative principle] would provide.").

<sup>39</sup> See, e.g., *id.* at 101, 108.

<sup>40</sup> Scanlon, *What We Owe to Each Other*, supra note 28, at 341.

of “all relevant moral, policy, and empirical propositions . . . .”<sup>41</sup> This principle does not appear to limit the application of Eisenberg’s theory to particular legal or political traditions, because it amounts to the maxim that contract law should be good. To provide content to the principle, however, Eisenberg looks to social morality: “moral standards that . . . can fairly be said to have substantial support in the community, can be derived from norms that have such support, or fairly appear as if they would have such support.”<sup>42</sup> Although Eisenberg believes that the degree of community acceptance of moral standards is not decisive, he considers it unlikely, in the case of contract law, that true moral standards are inconsistent with social morality.<sup>43</sup> In some tension with this, he also asserts that appeals to social morality are appropriate because the dictates of true morality are often unclear. Eisenberg further believes that the validity of the moral principles relevant to contract law is often determined by social morality, because contract law should generally protect the contracting parties’ reasonable expectations. What counts as a reasonable expectation is informed by social morality.<sup>44</sup>

In a developing economy, there may not be a consensus of expectations with respect to contracts; community norms relevant to contract may not exist. Or, established norms may be incompatible with what developed economies with Western legal cultures would recognize as contract law. Therefore, in a developing economy, one cannot be confident that true morality and social morality largely coincide in the domain relevant to contract. Eisenberg’s applied version of his contract theory is not enlightening about the role of contract outside the context of a legal system in which the institutions of contract law are already firmly established.

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<sup>41</sup> Melvin A. Eisenberg, *The Theory of Contracts*, in *The Theory of Contract Law*, supra note 28, at 206, 241.

<sup>42</sup> Id. at 245.

<sup>43</sup> Id. at 245–46.

<sup>44</sup> Id. at 246.

## IV. PETER BENSON

Inspired by John Rawls's account of public reason,<sup>45</sup> Peter Benson presents a public justification of contract law that seeks to distill essential legal principles solely from authoritative statements of doctrine—leading cases and canonical legal scholarship.<sup>46</sup> A public justification of legal doctrine, as Benson understands it, cannot be grounded in any ideology that is not described in authoritative legal sources.<sup>47</sup> A contract theory divorced from extralegal ideology provides contracting parties with “a shared and reasonable standpoint from which to ascertain and determine the justice of their interactions[,]” even if their normative perspectives are otherwise incompatible.<sup>48</sup> Within a liberal conception of justice, locating this shared perspective is necessary to demonstrate the legitimacy of the coercive aspect of law.<sup>49</sup> As Rawls explains, a democratic society must confront the likelihood that citizens have different normative perspectives. Although it might be possible to establish the legitimacy of a system of law in terms of each reasonable normative perspective, Rawls suggests a somewhat different approach: finding a “political conception of justice” that is compatible with, but not derived from, all the reasonable normative perspectives within society.<sup>50</sup> A public justification plays the role of such a conception for Benson's theory of contract.

Benson develops a conception of contract as the transfer, at formation, of the right to an external object or a service. Benson considers the conception of contract formation as a present transfer to be essential to justifying expectation damages as compensa-

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<sup>45</sup> See John Rawls, *Political Liberalism* 212–54 (1993); Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 *Osgoode Hall L.J.* 273, 284 (1995).

<sup>46</sup> Peter Benson, *The Unity of Contract Law*, in *The Theory of Contract Law*, supra note 28, at 118, 124.

<sup>47</sup> See Benson, supra note 45, at 305–06 (“If a normative idea or matter of fact is not suitable for application in [a civil suit before a court of law], it cannot be part of the public justification.”).

<sup>48</sup> *Id.* at 306.

<sup>49</sup> *Id.*

<sup>50</sup> John Rawls, *The Law of Peoples* 31–32 (1999) [hereinafter Rawls, *The Law of Peoples*]; see also John Rawls, *Political Liberalism* xlv (Expanded ed. 2005) [hereinafter Rawls, *Political Liberalism*]. Jody S. Kraus, *Political Liberalism and Truth*, 5 *Legal Theory* 45, 45–51 (1999), contains a useful discussion of this approach integrating a range of Rawls's work.

tory<sup>51</sup> (and considers a rationale for expectation damages to be a crucial element of a contract theory<sup>52</sup>). Prominent doctrinal features of contract law, such as offer and acceptance, consideration, and unconscionability, are construed as incidents of a transfer of rights.<sup>53</sup>

While Benson develops his contract theory at length, he concedes that, in its present state, the theory does not establish a reason for establishing or maintaining an institution of contract law within any society.<sup>54</sup> He also is not prepared to suggest how his theory might be extended in that direction. Thus, Benson does not indicate the relevance of a regime of contract law, even for the traditional common law jurisdictions from which he draws his articulations of doctrine.

There is another reason that Benson's theory is incapable of providing guidance regarding the nature of a legitimate contract regime in a developing society: a public justification of contract law cannot provide a framework for the introduction, or large-scale reform, of the institution of contract law. At least, the theory cannot function as a public justification. In Benson's account, public justification is the rear guard, rationalizing a legal order only after it has crystallized.<sup>55</sup> A public justification is not feasible unless existing doctrine is "settled and appears complete."<sup>56</sup> Even at that stage of doctrinal evolution, there is no assurance that a set of doctrines is capable of serving as the basis for a public justification.<sup>57</sup> Benson

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<sup>51</sup> See Benson, *supra* note 45, at 319; Benson, *supra* note 46, at 126–27, 136–37.

<sup>52</sup> See Benson, *supra* note 45, at 317–18; Benson, *supra* note 46, at 153 (“[T]he availability of expectation damages[] is definitive and distinctive of contract.”).

<sup>53</sup> See Benson, *supra* note 46, at 169, 191–92, 195.

<sup>54</sup> See *id.* at 203.

<sup>55</sup> See *id.* at 124 (“The fact that the authoritative public articulation of the doctrines and principles of contract is now settled and appears complete makes possible for the first time a public basis of justification.”).

<sup>56</sup> *Id.*; see also Peter Benson, *Philosophy of Property Law*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 752, 757 (Jules Coleman & Scott Shapiro eds., 2002) (“[A] public justification starts with principles, doctrines, and values that are pervasive and settled in different parts of the legal and political culture of a given society . . .”) (emphasis omitted).

<sup>57</sup> See Benson, *supra* note 46, at 138 (“There is no guarantee in advance that the doctrines as ordinarily formulated and understood can be so justified.”). William Lucy argues that it is not evident, even in the Commonwealth, that existing doctrine is settled on the points considered by Benson. William Lucy, *Philosophy and Contract*

does not suggest any route other than public justification for establishing the legitimacy of contract law, however.<sup>58</sup> It is unclear, therefore, on what basis a society lacking a satisfactory settled institution of contract could legitimately establish one.

Rawls describes the idea of public reason, which is the model for Benson's concept of public justification, as furnishing ground rules applicable to the resolution of fundamental political questions.<sup>59</sup> Rawls emphasizes the function of public reason in "a well ordered constitutional democratic society."<sup>60</sup> Presumably, the natural domain of Benson's public justification is the same type of society. Rawls describes other types of societies besides the democracies of reasonable liberal peoples: decent peoples, outlaw states, and societies burdened by unfavorable conditions and benevolent absolutisms.<sup>61</sup> For some of these categories, determining the legitimacy of private law institutions may not be imperative, or even coherent. But the legitimacy of contract institutions in a society aspiring to be a well-ordered constitutional democracy would seem to be on equal footing with the legitimacy of the institutions in a well-ordered constitutional democracy. Benson's theory of contract, however, even in fully developed form, would not provide the groundwork for the transition.

Before Benson embarked on his project to provide a public justification for private law,<sup>62</sup> he began a philosophical account of contract deploying undiluted Hegelian logic. Benson's original theory influenced Ernest Weinrib's analysis of contract in Weinrib's the-

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Law, 54 U. Toronto L.J. 75, 105–07 (2004) (reviewing *The Theory of Contract Law* (Peter Benson ed., 2001)).

<sup>58</sup> Benson states that a public justification for contract would provide a theoretical perspective that, "[f]or a liberal conception, . . . is essential to making the coercive operation of the law legitimate" and mentions no other perspective that might do so. Benson, *supra* note 45, at 306.

<sup>59</sup> See Rawls, *supra* note 45, at 214 ("[P]olitical values alone are to settle such fundamental questions as: who has the right to vote . . .").

<sup>60</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 765 (1997), *reprinted in* Rawls, *The Law of Peoples*, *supra* note 50, at 131.

<sup>61</sup> Rawls, *The Law of Peoples*, *supra* note 50, at 4.

<sup>62</sup> Benson has also written on a public basis for justification of tort law and property. See Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in *Philosophical Foundations of Tort Law*, *supra* note 37, at 427, 432; Benson, *supra* note 56, at 752–59.

ory of private law.<sup>63</sup> The object of Benson's earlier work was to show that an account of contract derived from principles of autonomy could not incorporate distributional concerns.<sup>64</sup> That detailed and lengthy account, like Benson's more recent work, covers just the preliminary stage of Benson's agenda for a complete theory of contract: "the intelligibility of contractual obligation."<sup>65</sup> The justification for an institution of contract is not attempted.<sup>66</sup> Consequently, Benson's earlier work on the theory of contract is no more informative on the question of the legitimacy of introducing or reforming contract law institutions.

#### V. JAMES GORDLEY

James Gordley explains contract law in Aristotelian terms—inspired by the work of sixteenth- and seventeenth-century scholars who applied ethical principles of Aristotle and Thomas Aquinas to the study of Roman law. From an Aristotelian perspective, the role of contract law is to allow persons "to obtain the goods and services [they] need[] to live a good life . . ."<sup>67</sup> The appropriate rules of contract law are those that are consistent with this purpose, and law may refuse to enforce a contract that would seriously "detract from the sort of life a human being ought to live."<sup>68</sup>

According to Gordley, the Aristotelian tradition recognized two types of contracts: to make gifts and to exchange.<sup>69</sup> Gordley describes a contract of exchange as "an act of voluntary commutative

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<sup>63</sup> See Ernest J. Weinrib, *The Idea of Private Law* 137 n.27 (1995).

<sup>64</sup> See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 *Cardozo L. Rev.* 1077, 1148, 1198 (1989).

<sup>65</sup> *Id.* at 1151 (emphasis omitted). This is the stage of abstract right. See *id.*

<sup>66</sup> See *id.* at 1151–52; see also *id.* at 1149 ("The sequence comprises abstract right, morality, the family, civil society, and the state, and it represents the increasingly comprehensive and complex fulfillment of the free will as a normative reality."). Benson provides a sketch of some implications of the preliminary analysis for distributive justice in Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515, 612–24 (1992), but does not mention connections to contract law institutions.

<sup>67</sup> James Gordley, *Contract Law in the Aristotelian Tradition*, in *The Theory of Contract Law*, supra note 28, at 265, 309.

<sup>68</sup> *Id.* at 280.

<sup>69</sup> James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* 287, 352 (2006).

justice.”<sup>70</sup> Commutative justice is respected if the price term in an exchange is fair; generally, the prevailing price in a competitive market is fair.<sup>71</sup>

Gordley explains that commutative justice serves distributive justice by preserving the distribution of income.<sup>72</sup> In the Aristotelian tradition, ideally a democracy would distribute resources equally, perhaps with all resources owned in common.<sup>73</sup> But all things considered, including motivation, the end of allowing people to lead good lives may best be advanced by allowing private property and tolerating a degree of inequality in property ownership.<sup>74</sup> In Gordley’s account, although the existing distribution of wealth might be unjust, redistribution is not a legitimate purpose of a contract of exchange. “[I]f the distribution of wealth is unjust,” he asserts, “it should be changed by a social decision, rather than by individuals who go about redistributing wealth on their own, and by a centrally made decision, rather than transaction by transaction.”<sup>75</sup> The Aristotelian tradition does sanction redistribution of wealth by individuals in the case of a promise to make a gift that exhibits the Aristotelian virtue of liberality.<sup>76</sup> Gordley does not directly defend the position that redistributions of wealth are illegitimate in the context of contracts of exchange;<sup>77</sup> he explains the distinction be-

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<sup>70</sup> Id. at 361.

<sup>71</sup> See Gordley, *supra* note 67, at 310. Gordley also interprets courts’ refusals to preserve certain terms in contracts in terms of commutative justice. Id. at 318.

<sup>72</sup> “To paraphrase Aristotle only slightly, commutative justice operates on the principle that no one should gain by another’s loss.” James Gordley, *Equality in Exchange*, 69 Cal. L. Rev. 1587, 1589 (1981); see also Gordley, *supra* note 69, at 12, 363.

<sup>73</sup> Gordley, *supra* note 67, at 286, 287.

<sup>74</sup> See id. at 286–87, 298; see also James Gordley, *The Moral Foundations of Private Law*, 47 Am. J. Juris. 1, 3 (2002) [hereinafter Gordley, *Moral Foundations*].

<sup>75</sup> Gordley, *supra* note 67, at 308; see also Gordley, *supra* note 69, at 352, 362–63.

<sup>76</sup> Gordley, *supra* note 67, at 298. “Liberality did not simply mean giving money away. According to Aristotle, it meant giving ‘to the right people, the right amounts, and at the right time, with all the other qualifications that accompany right giving.’” Gordley, *supra* note 69, at 292; see also id. at 296 (“Donative promises should be enforced when they are likely to move wealth from those who acknowledge they have too much to those who have too little.”).

<sup>77</sup> Gordley writes, “In order to see what implications Aristotle’s ideal has for contract law, the reader is asked to grant, at least for argument’s sake, that redistributions of wealth among citizens should be avoided unless they are part of a program designed to redistribute wealth more justly.” Gordley, *supra* note 72, at 1591. He adds that “[t]he program for redistributing wealth may, of course, leave considerable room for individual initiative”; acceptable individual initiative includes certain charitable

tween gift and exchange contracts in terms of its historical pedigree.<sup>78</sup> Gordley's discussion of why certain commitments to give a gift should be enforced, however, implies that in contractual exchanges, there is too much uncertainty about the merits of a wealth transfer to justify enforcement, at least when a transfer of wealth by contract is manifest.

Gordley would tolerate enforcement of many agreements that do not serve proper ends; at some point, however, the defects of an agreement are so severe that the agreement cannot be respected.<sup>79</sup> Gordley offers no normative or positive principles to identify a threshold at which a court stops enforcing a contract. He appears instead to endorse the proposition that the achievement of sound laws must rely largely on the exercise of the Aristotelian virtue of prudence by lawmakers and judges: "[F]or Aristotle and Aquinas, systematic reasoning is not the only way that people can tell what rules are appropriate. . . . Prudence enables [people] to see that certain actions are right, even though they cannot explain why."<sup>80</sup>

Like Benson, Gordley does not attempt to provide a justification for contract even in the West—except to the extent that Gordley suggests that, on account of the asserted explanatory power of the principles of the Aristotelian tradition, the burden of proof falls on

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contributions and gifts but apparently no redistribution effected through contracts of exchange. *Id.* at 1591 n.18.

<sup>78</sup> See, e.g., Gordley, *supra* note 67, at 297–99; James Gordley, *Enforcing Promises*, 83 *Cal. L. Rev.* 547, 551–55 (1995) [hereinafter Gordley, *Enforcing Promises*]. Gordley does not assert a direct historical connection between common law case law and the Aristotelian traditions. See *id.* at 559 (“[M]ost of the common law doctrines of contract formation were developed in the 19th and early 20th centuries when Aristotelian philosophy was all but forgotten.”). He evidently perceives that the principles were “glimpsed . . . indistinctly.” See Gordley, *Moral Foundations*, *supra* note 74, at 6 (“I . . . do not see how principles of efficiency can explain why the law is as we find it unless these principles actually shaped the law. They can have done so only if the jurists who shaped the law glimpsed these principles, however indistinctly.”); see also *id.* at 20.

<sup>79</sup> See Gordley, *supra* note 67, at 280–82.

<sup>80</sup> James Gordley, *The Universalist Heritage*, in *Comparative Legal Studies: Traditions and Transitions* 31, 32–33 (Pierre Legrand & Roderick Munday eds., 2003) (“People with [good judgment in framing rules and good judgment in deciding cases] can frame a rule well or decide a case well, even though they may not be able to explain systematically why the rule is well framed or the case rightly decided.”) (footnote omitted).

those who would deny the merits of those principles.<sup>81</sup> In particular, Gordley neither defends the Aristotelian virtues of liberality and commutative and distributive justice that play the central role in his contract theory, nor explicates the foundation of an Aristotelian account of contract: the nature of the life that a human being should live. Gordley focuses instead on showing that contract law is based on discriminating between right and wrong promissory purposes, in contrast to legal theories derived from ethical traditions in which “one cannot say that some choices are normatively better than others.”<sup>82</sup> Gordley believes, however, that “the same choices are not always right or wrong for everyone. People are different and so are their circumstances.”<sup>83</sup> But Gordley does not proceed to explain how to recognize what is right under the circumstances. Because of the omissions in Gordley’s account, his theory cannot determine the path to contract in developing countries, or whether the path would be worth following.

#### VI. MICHAEL TREBILCOCK

In his own writing and in joint work, Michael Trebilcock shows an appreciation for both the theoretical foundations of contract law and the role of legal institutions in economic development.<sup>84</sup> Tre-

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<sup>81</sup> See Gordley, *supra* note 69, at 5 (“Those who are hostile to [the Aristotelian] tradition should explain . . . how a misguided philosophy gave rise to [Aristotelian principles].”). Gordley is also not committed to a distinctive role for contract law as a means of allowing the members of a society to achieve the purpose of living a good life. For example, in discussing the rules governing promises to make a gift, Gordley notes that although such a promise is not enforceable at common law in the absence of reliance, the same result generally can be achieved through trust law. Gordley, *supra* note 67, at 300. Gordley attributes no significance to whether the result is reached through contract or trust. Moreover, in contrast to Benson, Gordley does not feel constrained to square his theory with the doctrines stated by authoritative cases. See, e.g., Gordley, *Enforcing Promises*, *supra* note 78, at 614 (“If we are to explain our own cases, our doctrines should look more like those of continental law, and indeed, more like those of continental law long ago.”).

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> See, e.g., Michael J. Trebilcock, *The Limits of Freedom of Contract* (1993) [hereinafter Trebilcock, *Limits*]; Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 *Mich. J. Int'l. L.* 99, 101–03 (2004); Michael J. Trebilcock, *What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development*, in *The Law and Economics of*

bilcock's normative model for contract law places significant weight on utilitarian considerations, but incorporates concern for autonomy, communitarian values, and distributive justice, as well.<sup>85</sup> He gives some structure to this eclectic base by assigning different institutions special roles in vindicating particular values.<sup>86</sup>

Trebilcock's work on development illustrates that a utilitarian perspective does not assure endorsement of the adoption by developing countries of formal contract institutions in the Western legal tradition. Trebilcock and Leng, for example, accept economist Avinash Dixit's view that "it is not always necessary to create replicas of Western-style state legal institutions from scratch; it may be possible to work with such alternative institutions as are available, and build on them."<sup>87</sup> Trebilcock and Leng note that the kind of coordination and allocation of resources that can be conducted through formal contracts can also be done by government direction and through transactions that are not enforced by law.

Given the current state of empirical knowledge, Trebilcock and Leng are not committed to the application of Western-style contract law as a catalyst to economic growth. They nevertheless emphasize the importance of private law institutions in supporting a broader institutional framework capable of vindicating political freedom and civil rights.<sup>88</sup> Like the other contract theorists surveyed here, however, they do not supply a political theory that would establish the legitimacy of contract law institutions in a developing economy that lacks Western legal traditions.<sup>89</sup> In an article

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Development 15, 40–44 (Edgardo Buscaglia et al. eds., 1997); Trebilcock & Leng, *supra* note 8.

<sup>85</sup> See Trebilcock, *Limits*, *supra* note 84, at 248; see also *id.* at 257 ("These programmes would be sensitive to both distributive justice and communitarian values, while avoiding the negative welfare consequences of . . . protectionist policies . . .").

<sup>86</sup> See *id.* at 248 ("[I]t seems important that we try to think clearly about an appropriate institutional division of labour for vindicating these values, recognizing that they all command legitimate adherence.").

<sup>87</sup> Trebilcock & Leng, *supra* note 8, at 1579 (quoting Avinash K. Dixit, *Lawlessness and Economics* 14 (2004)). This is consistent with Trebilcock's conclusion in *The Limits of Freedom of Contract* that "the welfare implications of alternative legal regimes, even within an efficiency perspective, are often highly indeterminate." Trebilcock, *Limits*, *supra* note 84, at 246.

<sup>88</sup> Trebilcock & Leng, *supra* note 8, at 1579.

<sup>89</sup> In earlier work, Trebilcock concludes not only that welfare considerations are inconclusive in providing support for a particular legal regime, see Trebilcock, *Limits*, *supra* note 84, at 245, but also that "autonomy values, without extensive further expli-

with Ronald Daniels, Trebilcock gives priority to achieving a procedurally oriented rule of law, in which the legitimacy of the content of law is secondary to realizing a legal order that “compli[es] with explicit, general, and validly enacted rules.”<sup>90</sup> Daniels and Trebilcock maintain that “whatever one’s substantive conception of a just legal system or its component parts might be, it is difficult to imagine any normatively coherent or defensible substantive conception of a just legal system that is not predicated on the pre-existence of a procedurally just conception of the rule of law.”<sup>91</sup>

### CONCLUSION

Legal rules can spread from one jurisdiction to another, sometimes by force, sometimes by invitation. Aspects of Western European civil law can be traced to Roman law.<sup>92</sup> There have been considerable efforts to cultivate Western-style legal institutions in developing economies and transition economies.<sup>93</sup> The comparative law scholar Alan Watson concludes that “legal rules move easily and are accepted into the [host] system without too great difficulty.”<sup>94</sup> According to Watson, “This is so even when the rules

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cation, do not readily yield a set of clear, normative implications for what kind of legal constraints should be imposed on the private ordering process.” *Id.* at 244.

<sup>90</sup> Daniels & Trebilcock, *supra* note 84, at 105.

<sup>91</sup> *Id.* at 107.

<sup>92</sup> See, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* 95 (2d ed. 1993) (“For example, the contract of sale in the whole Western world, Common law countries and Civil law countries alike, is fundamentally that which existed at Rome in the later 2nd century A.D.”); James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 *Yale L.J.* 1841, 1846 (1996) (“[B]oth the study and the practical use of Roman law spread, though at different rates and in very different ways, into all parts of transalpine Europe; and by the later sixteenth century, Roman law was in heavy use all through the Continent.”); *id.* at 1853; see also Inga Markovits, *Exporting Law Reform—But Will It Travel?* 37 *Cornell Int’l L.J.* 95, 95 (2004) (“As far as we can look, the migration of legal concepts, practices, and institutions has been a commonplace occurrence all around the world . . .”); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 *Am. J. Comp. L.* 195, 201–02 (1994) (reviewing *The Reception of Continental Ideas in the Common Law World 1820–1920* (Mathias Reimann ed., 1993)); Esin Özücü, *Turkey: Change Under Pressure*, in *Studies in Legal Systems* 89, 89 (Esin Özücü et al. eds., 1996) (“The present Turkish legal system is the product of strong movements of law across frontiers. These movements were from Switzerland, Germany, France and Italy.”).

<sup>93</sup> See Berkowitz et al., *supra* note 4, at 163–64.

<sup>94</sup> Watson, *supra* note 92, at 95–96.

come from a very different kind of system. . . . [M]any legal rules make little impact on individuals, and . . . very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness.”<sup>95</sup> Other scholars emphasize that the viability and benefits of a transfer of legal rules cannot be taken for granted.<sup>96</sup> In any case, there is a substantial literature addressing the practical dimensions of the transfer of laws between jurisdictions.

The justification for introducing particular Western private law institutions, however, seems to be neglected. None of the contract theories reviewed here provides a justification for contract in a developing society or suggests a means of fashioning a justification. This limitation is not confined to prominent theories of contract. Jules Coleman, who provides a meticulous theory of tort law in terms of corrective justice, does not claim to have yet provided a justification of tort law in any setting:

[E]ven if tort law is best explained by corrective justice and corrective justice is an important and independent moral ideal, it does not yet follow that tort law represents a justified—let alone a morally required—institution. Its desirability or defensibility depends on the place we wish to accord in our public life to the values implicated in corrective justice; on whether or not those values can be expressed better in other institutional arrangements; and on other, similar considerations.<sup>97</sup>

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<sup>95</sup> *Id.* at 96.

<sup>96</sup> See, e.g., Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1, 27 (1974); John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 *Stan. J. Int'l L.* 357, 368–69 (1981); see also Berkowitz et al., *supra* note 4, at 189 (“[A]ttempts to use Western law as a tool to promote socioeconomic development after the former colonies had become independent fared not much better [than transplants imposed under colonialism] . . . . Ten years later we . . . can hardly avoid the conclusion that the same recipe has failed again.”); Markovits, *supra* note 92, at 110. Formal enactment of Western private law rules does not in itself significantly advance legitimacy under any of the theories reviewed here. For example, Fried’s theory depends on the existence and nature of a convention of promising, not formal rules. Eisenberg emphasizes social morality and the reasonable expectations of contracting parties, which may not conform to formal rules that have not been effectively enforced. Benson’s theory focuses on formal rules but, like Gordley, his theory does not address legitimacy.

<sup>97</sup> Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 5 (2001) (emphasis omitted).

It is not clear how many of the theories of contract law that, unlike Benson's or Gordley's theory, purport to justify contract law would satisfy Coleman's standard for justification even with respect to a developed Western state. But these theories clearly do not meet that standard with respect to developing ones. Elsewhere Coleman states that "the fundamental question of practical reason is: what ought I do?"<sup>98</sup> The question of what ought to be done with respect to the institution of contract presents itself much more dramatically in the case of developing economies than the developed economies of the West. The contract theories examined above, however, are not instructive with respect to the more pressing question.

Perhaps the legitimacy of private law institutions is a luxury or a low priority in economic development. Thomas Nagel considers an argument along those lines in an analogous context. Weighing the consequences of increasing the authority of international institutions, Nagel suggests that "the most likely path toward some version of global justice is through the creation of patently unjust and illegitimate global structures of power that are tolerable to the interests of the most powerful current nation-states."<sup>99</sup> He reasons that "[o]nly in that way will institutions come into being that are worth taking over in the service of more democratic purposes, and only in that way will there be something concrete for the demand for legitimacy to go to work on."<sup>100</sup>

Nagel observes that individual nation states typically follow a trajectory from illegitimate institutions to demands for legitimacy.<sup>101</sup> Nagel does not, however, defend the position that the establishment of illegitimate institutions is tolerable because it provides an opportunity for the emergence of just institutions. He recognizes, for example, that a transition to legitimate institutions is not inevitable.<sup>102</sup> For similar reasons, the position that illegitimate

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<sup>98</sup> Coleman, *Corrective Justice*, supra note 37, at 53.

<sup>99</sup> Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113, 146 (2005).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 145–46.

<sup>102</sup> See *id.* at 146 ("Unjust and illegitimate regimes are the necessary precursors of the progress toward legitimacy and democracy, because they create the centralized power that can then be contested, and *perhaps* turned in other directions without being destroyed.") (emphasis added); *id.* at 147 ("[I]f we accept the political conception, the global scope of justice will expand only through developments that . . . introduc[e]

private law institutions are acceptable during some transitional phase of a nation's development might be defensible, but it is not axiomatic.

Brian Bix maintains that a contract theory should aspire to explain at most "a single legal system at a particular period of time . . . ."<sup>103</sup> Even if this statement is an exaggeration—Bix admits that there may be "more general principles, general purposes or general tendencies that may cause different sets of rules and principles to converge"<sup>104</sup>—conceivably, the correct justification for an institution of contract in developed economies of the West is not capable of justifying an institution of contract law in developing societies. I do not resolve that question here, but I suggest that it is a significant one.

Some approaches to justification may not lend themselves to evaluating the introduction of legal institutions from one society into another. To take a prominent example from political philosophy, Aaron James maintains that "Rawls . . . assume[s] . . . that all reasoning about what social justice requires of us begins from existing practices."<sup>105</sup> Although James concludes that "there is little reason, short of overall assessment of Rawlsian justice, why beginning from existing practices manifests any obvious and objectionable form of bias," James is more persuasive in showing that Rawls's approach of beginning from an existing practice does not completely preclude "creat[ing] new practices as a matter of justice" than in demonstrating the absence of significant bias against doing so.<sup>106</sup> An approach to justification that begins from existing practices may be better suited to endorsing or rejecting existing practices and suggesting directions for reform than to justifying discontinuous transformations of legal institutions.

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effective but illegitimate institutions to which the standards of justice apply, standards by which we may *hope* they will eventually be transformed.") (emphasis added).

<sup>103</sup> Brian H. Bix, Contract Law Theory 28 (Univ. Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 06-12, 2006), available at <http://ssrn.com/abstract=892783>. Bix actually takes the harder line that even within a single jurisdiction, the rules that traditionally have been grouped under the heading of contract law generally do not constitute a distinctive field. See *id.* at 30.

<sup>104</sup> *Id.* at 36.

<sup>105</sup> Aaron James, Constructing Justice for Existing Practice: Rawls and the Status Quo, 33 *Phil. & Pub. Aff.* 281, 284–86 (2005) (addressing the body of Rawls's work, including *A Theory of Justice* and *The Law of Peoples*).

<sup>106</sup> *Id.* at 285–86, 314.

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The benefits of economic development might furnish an independent justification for some institution that enforces exchange. It would not necessarily follow, however, that any institution holding out some prospect of enhanced economic growth is justified. If economic considerations are not by themselves sufficient justification for contract law in the West, they may be insufficient in the developing world,<sup>107</sup> particularly when the connection between contract and growth is so uncertain.

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<sup>107</sup> Alan Schwartz and Robert Scott contend that welfare maximization should be the sole principle governing the law of contracts between businesses organized as corporations, or limited or professional partnerships. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L.J.* 541, 544–45 (2003). Their argument relies on effective enforcement of antitrust and environmental laws and the absence of distributional concerns due to the diversified portfolios held by most business owners, including corporate shareholders, *id.* at 546, 555–56, conditions not manifest in a typical developing economy. Schwartz and Scott concede that there are “troublesome” objections to basing contract doctrine only on economic considerations in the case of contracts between parties other than the businesses they consider. *Id.* at 545. It follows from this that not even Schwartz and Scott are prepared to defend the position that contract in the West can be justified by economic considerations alone.