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2021

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Article

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Would Reasonable People Endorse a ‘Content-Neutral’ Law of Contract?

<https://doi.org/10.1515/ercl-2021-0012>

Abstract: This essay raises two challenges to Peter Benson’s compelling new account of contract law. First, I argue that Benson’s use of the concept of reasonableness goes beyond the Rawlsian account to require that we impute to others a capacity to transcend their contingent circumstances in the context of contractual choice. In fact, our choices in contract are driven by external contingencies and it is only reasonable to take those constraints on other people’s choices into account. Second, I contest Benson’s related claim that contract law should be, and largely is, content-neutral. I argue to the contrary that the justice of a society depends on the cumulative outcomes from market transactions, and the justice of transactions depends on the justice of the institutional matrix of which transactional law is one part.

Keywords: contract law, distributive justice, unconscionability, consideration, content-independence, democratic legitimacy

Peter Benson’s *Justice in Transactions* is a sweeping treatment of contract law that illuminates its core doctrines and principles. Moreover, unlike other ambitious theories in private law, his has democratic aspirations: He aims to explain this body of law in a way that justifies it to its users. Other scholars that have taken the position that the specific principles that animate contract law are wholly separate from other political principles tend implicitly to exempt contract law from the most basic democratic requirement of public justification; or perhaps, those scholars neglect public justification as a basis for legitimacy.¹ Benson, by contrast, frames his entire project as a justificatory account. He aims to justify contract to all kinds of people, all

¹ For a discussion of the democratic deficits in contemporary contract theory, see M. Hesselink, ‘Democratic contract law’ 11 *European Review of Contract Law* 81 (2015).

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the kinds that belong to a liberal democratic polity, and who have a stake in how it bears down on those who make legally enforceable agreements. He addresses us all as ‘reasonable people’ who should recognize ourselves in the people that he takes contracting parties to be, and who can be expected to endorse the way in which we are expected to relate to one another in the eyes of contract law.

Who are reasonable people? Reasonableness, Benson writes, is the ‘ability to recognize and accept the normative significance and implications of our independence, not only for ourselves but for others as well.’² Interestingly, Benson does not stress independence from other people, at least not foundationally. Instead, he argues that

we can in reflection ... stand back and distinguish ourselves from as well as reject the force of any and all ... *desires, needs, characteristics, and circumstances* as reasons for doing what we otherwise judge to be morally unacceptable ... If we were inherently and inevitably tied to anything in particular, including even the desire to preserve ourselves, we could not view ourselves—or be viewed by others—as morally accountable choosing selves in the first place. Instead, we would figure as mere passive carriers of this or that feature, desire, need, or situation. Thus, we recognize that we have the reflective power and capacity to take up a point of view in which we consider ourselves and others as units of responsibility not inevitably bound by but rather as *independent from any and all of these factors* as immediately given to us.³

This statement of what reasonableness entails seems consistent with the Rawlsian perspective which posits as our first moral power our capacity to recognize the demands that other people make on us irrespective of our individual conceptions of the good.⁴ However, Benson’s use of the concept of reasonableness turns out to trade on a related idea of independence that elides our capacity to reflect on our obligations to other people independent of our (or their) individual commitments with a more general capacity to transcend contingent constraints even in our rational decision-making. There is a tension between Benson’s celebration of our ability to rise above contingent, ultimately cognitive barriers to reasonableness, on the one hand, and our ability to pursue our avowedly contingent purposes in the material world, on the other. This tension, I fear, is truly of his making. That is, there is no inherent tension between our ability to look beyond our parochial interests in the context of moral deliberation and our ability to overcome contingent barriers to our individual projects. In fact, the former independence strikes this reader as an important starting point for most moral theories while the latter is straightforwardly mythical. The tension in Benson’s account results from his

² P. Benson, ‘Justice in Transactions: A Theory of Contract Law’ [hereafter JT] 371.

³ JT 370 (emphasis added).

⁴ J. Rawls, *Political Liberalism* 41 (1993).

implication that reasonable people attempting to exercise the first kind of independence will project the latter kind onto other people, especially their contracting partners.

While being reasonable surely requires that we look beyond our own life projects to give appropriate weight to the projects of others, it does not imply a descriptive power to pursue our individual projects notwithstanding the material constraints in our way. That is, perfectly reasonable people can lack the capability (if it is helpful to use a word other than 'capacity') to pursue their life projects and their constraints belie the image of the contracting person that Benson projects: someone that rises above all the contingencies in her life to act on her adopted purposes. Benson implies that respecting the freedom and independence of contracting parties requires deferring collectively (as a society) and individually (as their contracting partners) to the choices we make, notwithstanding the material constraints that drive those choices. Of course, Benson never denies that these constraints are out there. He is surely well-aware of them, as he demonstrates in his discussion of unconscionability. He also describes contract terms as determined by the contingent aims of contracting parties. But while Benson acknowledges that we are motivated by contingent *factors*, he implies that we have the power to transcend contingent *constraints* that do not inform but only impede our rational ends. We do not. Almost all of our choices in contract are the product of such constraints. So deeply embedded are they in our experience of the world that they cannot actually be teased apart from our preferences, or what we seek in contract. We not only do not transcend material contingencies, they make us up. The constraints that animate our transactional lives are manifest in the terms we 'choose'.

Although Benson takes his task to be an elaboration of contract law that participants in the practice can accept, because people are not independent of their circumstances, many if not most people will not recognize themselves in his theory of contract.⁵ Although he is right to address them in principle, I worry that the ideals and predicates of his theory would not resonate. It is precisely because it is both true that people are obligated to entertain the perspective of others *and* that we are not able to actually transcend our constraints by virtue of any moral power that liberalism requires that political institutions manage those constraints collectively. Contract is an important space in public life in which material constraints on our lives are generated and exact their restraint. If people could act independently of their circumstances in the way Benson envisions, we might plausibly endorse the moral bubble that Benson would have contract be. But because those circumstances drive every aspect of contract and are the primary object of politics, contract is squarely in the domain of political justice.

5 Benson aims to allow participants to recognize themselves in just this way. JT 369.

My exploration of this problem will proceed in two parts. First, I will discuss Benson's use of the concept of reasonableness and suggest that he is not ultimately using it in the Rawlsian sense. While reasonableness in moral deliberation requires giving people equal moral weight irrespective of whether they share one's conception of the good, Benson takes such reasonableness to require, in the context of contract, that we project onto others independence from worldly constraints. We are not independent in that way and reasonableness does not require that we assume that others are.

In the second part of this essay, I will discuss Benson's related claim that contract law should be, and largely is, content-neutral. In particular, Benson rejects contract rules that are engineered to favor certain outcomes over others. Such indifference to outcomes is incompatible with most principles of political justice, which regulate the cumulative outcomes of private transactions. I will suggest that, precisely because reasonableness in political morality requires protecting people from the arbitrary contingencies that threaten their well-being and their fair share of the gains from social cooperation, we cannot accept a morally insular law of contract. The justice of transactions depends on the broader realization of political justice through a tightly woven fabric of social institutions.

1 Individual Constraints in Contract

While the independence that undergirds the Rawlsian concept of reasonableness stems from the need for cooperation and mutual regard, it seems in Benson's theory to relate closely to a very different moral interest in recognition of our freedom by others. But while the moral capacity to understand what we *owe* others grounds our obligations to others, the moral interest in freedom generates rights we hold *against* them.

Again, the conception of reasonableness that Benson expressly invokes requires that we rise above our particular commitments to afford due respect to all people, regardless of how they figure in our own life projects and regardless of whether they share our conception of the good. It is a force toward some minimal cosmopolitanism in a diverse polity, and in contract it demands the two-sidedness imposed by the doctrine of consideration. If our views about what we owed each other were entirely mired in our particularistic interests and commitments, we would act as if others' value turned only on how they stood in relation to us. We might regard ourselves as entitled to their performance without having bound ourselves in return. It is because we have to understand the projects of others as having equal standing before our common institutions that we cannot expect those institutions to cater to our interests alone. Benson elegantly argues that the

doctrine of consideration captures something quite fundamental here. Why should the state enforce an obligation (that the state had not separately designated as mandatory) if that obligation was not incurred in return from some reciprocal obligation of another? The reciprocity of a single bargain loosely parallels the reciprocity that Rawlsian liberals expect of social institutions. Just as individual transactions must bind and serve both parties, institutions that make up the basic structure must bind and serve all members of the political community.

Reasonableness thus underwrites not only the doctrine of consideration but also the vast regulative impulse in liberalism. Of course, regulation of social institutions is not the only political practice to fall out of the moral capacity for reasonableness. But it is not a trivial implication. Once we understand that others have equal standing to ourselves, and that their contingent circumstances do not entitle them to more or less from a moral point of view, Rawls at least expects that we will agree that institutions will afford significant priority to managing those contingencies.

Reasonableness does very different work for Benson. He seems to take for granted that distributive justice imposes significant demands on other social institutions, but reasonableness in contract is only passively protective. It is not just that it is more cabined, or presumed to be a segmented concept with different content depending on its sphere of application.⁶ Again, reasonableness for Benson stems from our capacity for independence. To understand the kind of independence that Benson projects on to contracting parties, we should look to his idea of freedom, which is about independence too. Benson writes that 'it must be possible for me to express my inward power of independence externally in the here and now and in this external existence for me to be vulnerable to imposition and injury.'⁷ The possibility of freedom's external existence explains the moral principle of bodily integrity, or why it is a juridical wrong for anyone to impose on my body.⁸ From there it is only a few steps to property, which is a further extension of this interest in external manifestation of the possibility of freedom.⁹ The transfer of rights by contract confers property interests in promises, and their interests in vindicating those property interests is the ultimate extension of their freedom.

Freedom connects back up with reasonableness in contract because, on Benson's view, it is only reasonable that we mutually respect the external manifestations of our freedom, including contractual rights. Our obligation to respect the rights of others in contract, like the state's criteria for enforcing those rights,

6 JT 156.

7 JT 374.

8 JT 375.

9 JT 377.

does not and should not 'depend on their moral, religious, or philosophical outlooks and the like. To the contrary, prior to contract formation, parties are viewed for purposes of contract law as wholly independent and free vis-à-vis each other, at liberty to act as they wish.'¹⁰ Here independence casts a wider net than in the discussion of reasonableness cited earlier. Independence does not just entail looking beyond parochial interests in ascertaining what we owe others; it characterizes our situation in contract and we are asked to respect it in others by allowing them to decide for themselves how to proceed in the context of transactions. Benson describes contracting parties as independent in this way because he regards recognizing such independence as reasonable; but the features he ascribes are not actual. Reasonableness may require that we and the state both act *as if* parties are at liberty to act as they wish but this presumption draws us into an attitude that treats them as if they are in fact able to do so. But parties are not usually at liberty to contract on terms other than the ones they 'choose'. They are not usually 'free' *not* to contract in any sense that is meaningful to them. If reasonableness requires that we do not treat others well only because the contingent facts of their lives depart from our own, on its face it would be *unreasonable* for a contracting party to ignore the circumstances of their partner's choice to contract.

What would it mean for contract if we were to insist that parties regard each other with genuine reciprocity? What would follow were we to assume that parties are morally independent in the sense that each is entitled to her own ends and may not be subjugated to the projects of others? It might demand far more inquiry into the circumstances of contract than any regime of contract now undertakes. It would likely constrain contracting parties far more than the doctrine of consideration does, which requires only that there be two sides without any interest in how the content of those sides relate. Unconscionability, which Benson describes as interest in exchange value where consideration attends only to use value, would swallow the edifice it is now asked to help hold up from the periphery. It is actually quite hard to imagine a law of contract that takes reciprocity seriously, or understands reciprocity as a deeply demanding concept in the way that it is understood outside of contract.

The only reason that reasonableness does not make for a very different law of contract is that reasonableness does not apply to contract as a single institution but disciplines it together with a variety of other institutions that decide who gets what and how much. The web of market and welfare institutions in which contract operates is essential to its legitimacy. Those institutions enable contract to operate

10 JT 14.

without either parties to contract or the state in its capacity as adjudicator attempting to realize reasonableness in every bargain.

Reasonableness in contract, like reasonableness outside contract, obligates as much as it entitles. If we combine the demands of reasonableness with the reality of ubiquitous social constraint, contract law can hardly stamp its approval on bargains by virtue of the thin two-sidedness that flows from the doctrine of consideration. Contingencies are not merely characteristic of life projects, they are the impediments that shape what individuals want from each bargain. They are burdens that reasonableness demands that we share. If we are not to share them in contract, justice requires that we manage them through other institutions. The reasonableness of contract then depends on the work of those sister institutions and can hardly be understood as conceptually distinct.

2 Political Constraints on Contract

While, in Benson's account, the freedom of individuals to contract on terms that advance their particular conceptions of the good slips from a moral principle into an implicit, descriptive assumption, the normative independence of contract from other social institutions that Benson posits is no mere observation but a clear imperative. Benson not only defends the 'content-neutrality of contract'¹¹ but affords the content-neutral rights under such a regime lexical priority over fair equality of opportunity and the difference principle.¹²

Even if Benson were *describing* freedom of contract as a practice in advanced, postindustrial democracies, he would be only half-right. After all, there are many bodies of regulation that restrict freedom of contract in particular transactional areas. Most of the contracts into which we enter in our lives are heavily regulated to the point where general contract law applies only at the margins—think of employment agreements, consumer contracts, and leases. Benson does not directly critique those bodies of regulation but they seem to be at odds with any freedom to express or affirm independence by way of contract. People may agree to a variety of transactions that courts will refuse enforce notwithstanding compliance with the requirements that Benson sets out. Moreover, courts are not content-neutral in their adjudication of contract. I have argued elsewhere that substantive reasonableness does and should inform contract interpretation, bringing private

11 JT 130.

12 JT 459.

agreements into affirmative alignment with relevant public policies where the written language of those agreements is ambiguous.¹³

Still, within the adjudicative body of contract law, whether under common law or most civil codes, Benson's account captures the most salient features of the practice we observe. Courts are primarily concerned to uphold expectations under contract without worrying about the contingent constraints to which contracting parties were subject at the time of either agreement or performance. Unconscionability is often regarded as normatively critical but, at least in common law countries, it is a functionally small doctrine. It does not alter the landscape of contract practice to any substantial degree.

But again, Benson does not just describe contract law as content-neutral. He argues that it should be, that it would violate transactional justice for principles of political justice to contaminate the law of contract. He does not claim that there can be no boundaries on contract, as where agreements implicate the interests of third parties. But he argues that courts should not impose policy-infused defaults into contract interpretation, defaults that do not derive from the intentions of the parties with respect to their own transaction. He specifically rejects legal economic justification for some defaults on grounds of efficiency or other social welfare considerations.¹⁴ In fact, Benson sees contracts as mostly complete and thus in no need of active interpretation intended to close gaps. 'Whether the parties might have chosen different or additional, better or more fully worked-out terms to achieve their goals is thus of no concern to contract law once there is just something of value for something else.'¹⁵ A contract is only incomplete if a court could not identify parties' rights and obligations by reference to Benson's reasonable transactional framework.¹⁶

Of course, Benson does not deny that the multitude of contracts together make up a market. But he sees 'contract and market [as] each relatively autonomous and distinct in their own right'. Contract law is not designed with an eye to the market it produces, 'it merely recognizes the existence of a market dynamic as an independent, self-sustaining, and ongoing reality, which has its own internal functions and goal-orientation.'¹⁷ The principles of contract law in his picture are selected with apparent indifference to the resulting market – without any concern for

¹³ A. Bagchi, 'Interpreting Contracts in a Regulatory State' 54 *University of San Francisco Law Review* 35 (2019).

¹⁴ JT 23.

¹⁵ JT 130.

¹⁶ JT 131.

¹⁷ JT 447.

whether that market is efficient and also without any concern for how that market ultimately distributes entitlements.

What could justify such indifference to the consequences of contract? As suggested above, reasonableness demands that people take into account the morally arbitrary factors that constrain other members of their political community, not least their direct contracting partners. On the Rawlsian account, to which Benson appears sympathetic, it is unreasonable to allow such arbitrary factors to drive the distribution of primary goods when we would not wish to be the victim of a harsh lottery of life ourselves. While the law of contract does not have to directly mitigate the effects of morally arbitrary facts on our life chances, its legitimacy depends on its operation within a structure that successfully complies with the demands of distributive justice. Indeed, even apart from distributive justice, it is one of the central tasks of the state to promote the well-being of its citizens, and arguably economic resources are essential to well-being. A just state thus requires institutions that promote well-being and ensure resources are fairly allocated. Because the justice of transactions depends on the justice of the institutional mix of which it is a part, it cannot generate entitlements that take priority over the political principles that ensure the justice of the basic structure as a whole.¹⁸

One argument for why we might wish to insulate contract is that, though contract might fall within the basic structure of society, it is also the primary site for certain valuable moral practices that would be compromised by contract's regulation of general political principles. For example, many people might feel this way about the institution of family.¹⁹ Like the rules of market transactions, the organization of families and their internal dynamics also implicate social justice. Nevertheless, the arm of politics does not consistently reach all the way down to the family sphere. This might be because many people tend to share an ideal of family as separate.

Benson does not make exactly this kind of argument with respect to contract because he does not claim that transactional justice preempts other principles of justice; he claims that the latter do not apply to contract at all. Moreover, most scholars who think about contract this way probably subscribe to something like a promissory theory, which Benson rejects. But the very idea of preemption, as a weaker version of Benson's separation thesis, is not tenable. It is not obvious that family should be exempt from political principles of equality, for example, and in

¹⁸ For arguments that the basic structure should be understood to include contract law, see K. Kordana and D. Tabachnick, 'Rawls and Contract Law' 73 *George Washington Law Review* 598 (2005) and S. Scheffler, 'Distributive Justice, the Basic Structure and the place of private law' 35 *Oxford Journal of Legal Studies* 213 (2015).

¹⁹ Rawls seems to rely on such an argument. See Rawls, n 4 above, 137 (1993).

fact its claim to insularity has been eroded over time. The insularity of the family unit has survived as much as it has because of deeply felt intuitions that the conceptions of the good held by many people in even contemporary society are incompatible with a full extension of political principles to the family. There is no reason to think that we share a similar protective attitude toward contract. Reasonable people do not and would not take contract to be a sphere of human activity insulated from ordinary politics. To the contrary, while most people value their family experiences as essential to their life meaning, most people regard their market transactions as instrumental toward ends that we fully recognize to be within the purview of state regulation. The state is thoroughly engaged in promoting wealth production and in allocating the income and wealth that is produced. There is nothing alien about its involvement in those projects and our experience of contract is bound up with the larger business of regulated economic activity.

3 Conclusion

One way to understand Benson's position is that, because he does not aim to offer a philosophical defense of contract, he does not bear the burden of reconciling his theory of contract with a political theory like Rawls' theory of justice. He might instead be excavating the deep structure of our collective understanding of contract on terms that are intelligible to us. But Benson goes farther than that. He does not merely describe the principles that animate contract law as we know it. He wants to describe it in a way that is not only familiar but also appealing; after all, its democratic justification rests on the hypothetical endorsement of participants in the practice. That is one of the great virtues of Benson's methodology but it also makes it hard to reconcile an insular account of contract principles with prevailing political philosophies in liberal democracies today, which prioritize the justice of the basic structure and regard contract entitlements as contingent on that background structure, rather than as basic liberties that have institutional priority.

One might do the following thought experiment to get at the nature of Benson's project. If a regime were to abandon the present regime of contract in favor of a menu of contracts from which parties can choose, would Benson object? What if a regime were to require that a regulator pre-approve all contracts? What if gifts were enforceable just as contracts are, or if 80% of agreements were unenforceable because they lacked the equivalency that Benson regards as the basis for non-unconscionability? I suspect that Benson would not wish to say that all these regimes are unjust from the standpoint of transactional justice. Transactional justice, he might respond, simply lacks a sphere of operation in societies like

these.²⁰ That is to say, those alternative states of the world are just not what he is talking about. But if Benson's account does not affirmatively disallow these radical changes to the existing system, how can it offer a basis for rejecting smaller movements in the direction of these alternative institutional states?

The object of public justification is not only to offer legitimacy to a regime but also to offer guidance on its future direction. It should inform public discourse about how we enforce transactions. Benson rejects some doctrinal developments and academic recommendations, such as the legal economic move to infuse interpretation with public policy goals. If it turns out that the regime as we know it would be unrecognizable without that kind of policy intervention, then I think Benson would be critical of the resulting system for that reason; he would not simply dismiss such a regime as a change in the topic of conversation. Similarly, if it turned out that regulators constrain parties' ability to transact on a variety of terms on the theory that individuals do not advance their own interests over time, I take it this would be an important drawback of the transactional regime on Benson's account. He would not dismiss those regulatory constraints as irrelevant to his account of transactional justice.

In that case, Benson must grapple with the major features of our system as we know it which does not accord with his view that contract law is animated by its own species of justice. He cannot expect that people in the same democracies that gave rise to those regulatory systems would endorse the insularity he defends, even to the extent that insularity indeed characterizes contract law as we know it. A theory that aims to justify contract in the eyes of its users will need to take the subjection of contract to general political principles as foundational. Users of contract that know it first-hand as the often harsh and always morally arbitrary mechanism by which goods are allocated cannot accept a principle of transactional justice that claims priority or even exemption from more general principles that govern the allocation of basic goods. A theory of contract law that looks to offer a public justification for it must take as its starting point the overwhelming rejection of transactional insularity in modern democracies. It will need to cast a critical eye on just that claim to content-neutrality that Benson seeks to vindicate.

20 This response would parallel the response of corrective justice theorists to a social insurance model of accident law, that provides compensation to victims through a system unrecognizable as tort law. See J. Coleman, *Risks and Wrongs* 403 (1992).