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Constraint without Closeness: A New Picture of Cooperation

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Jules Salomone-Sehr, [Cooperation: With or without Shared Intentions](#), 132 **Ethics** 414 (2022).

Contract scholars have offered competing accounts of the contractual relationship. In one space, scholars disagree about what it means for contract to be relational. How does the legal agreement relate to any background understandings? To what extent do parties incorporate community norms or trade practices into their agreements? In another scholarly space, scholars disagree about the best way to characterize what is going on in contract at a more basic level. Is contract a species of ordinary promise with the full weight of the moral practice, a collaboration between the parties that serves shared ends, or a formal exchange that is an alternative to more personal relationships (or some combination thereof)?

Daniel Markovits used the literature on shared intention and cooperation in his article, *Contract and Collaboration*.¹ He proposed that “parties to contracts share ends in the contracts, and treat each other as ends through the contracts, even when the contracts involve nothing more than self-interested exchange.”² He argued that contracts are joint intentional activity but not shared cooperative activity, because parties are not ordinarily presumed willing to help each other out without compensation.³ Still, the element of promise, in Markovits’ view, adds something further: Each party “adopts the success of certain intentions of the other party as her own ends” and “give[s] the other authority over her intentions.”⁴ He calls this collaboration.

Jules Salomone-Sehr does not write about contract directly (though he discusses intra-firm relations that are presumably contractual). Nevertheless, in his recent article, *Cooperation: With or without Shared Intentions*, Salomone-Sehr offers still another understanding of the contractual relationship. His idea of cooperation without shared intentions captures a conceptual combination that has eluded contract theory, and it is different than the idea of cooperation used by Markovits. Cooperation as Salomone-Sehr understands it is more distant than many leading philosophical accounts of contract but also more substantively demanding than most contract theorists allow. That is, he manages to achieve a separation between two axes along which characterizations of contract might differ: the degree of intimacy or tightness—let us call it *closeness*, on the one hand, and the scope of substantive obligation, or unavoidable *constraint*, on the other. Theories that recognize more stringent obligations between contractual parties tend to paint a picture of contracting parties as more closely bound in a common, or at least, mutually-regarding enterprise. Theories that take more seriously the doctrinal status of contract as an “arms-length” relationship tend to recognize fewer substantive and remedial obligations separate from those expressly adopted by the parties. Salomone-Sehr offers a way to think about how contract can generate significant mandatory obligations between people who do not intend or in fact enter close relations.

Salomone-Sehr’s immediate purpose is to establish that we can “act together in a cooperative manner even when we do not share relevant intentions about our activity, and we may well fail to cooperate even when we act together in ways that satisfy some intention we share.” (P. 416.) Cooperation is more distant and implies a thinner kind of coordination than does shared intentions. Cooperation does not require that parties “commit themselves, not even roughly, to achieving the same goal or following the

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same plan.” (P. 422.) In particular, those who play particular roles within an organization or firm can be content “with fulfilling the various obligations and responsibilities carried by their specific roles.” (Pp. 422-23.) Salomone-Sehr’s account of cooperation here seems to track well the experience of many employees who do not (and do not regard themselves as obligated to) adopt the ends of their employers and only aim to fulfill the specific responsibilities they were assigned.

At the same time, Salomone-Sehr’s account of cooperation recognizes substantive constraints on the idea of cooperation that most contract theorists do not recognize with respect to the contractual relation (with important exceptions, such as Hanoch Dagan and Avihay Dorfman). Salomone-Sehr argues that “cooperation consists in coordinated activities whose parties do not undermine the others’ agency, for instance, through coercion or exploitation.” Certain relations of power or domination cannot qualify as cooperative. He defends the Agency Condition, according to which agents cooperate only if none of them “has undermined, or attempted to undermine, their co-participant’s agency as part of the execution of” their cooperative exercise. (P. 439.)

If cooperation so understood is a model for understanding contract, this approach implies that parties do not necessarily undertake to advance the ends of their counterparts separate from specific obligations properly read into their agreement. But both at the outset of contract and throughout performance, they must sustain the agency of the other party, or their capacity to make choices that advance their own interests and values. If contract is to be regarded as cooperative, transactional rules will constrain the terms available to parties without assuming or imposing closeness. It will take more work to ascertain what regulation of contract would render it a cooperative activity so understood.

1. Daniel Markovits, *Contract and Collaboration*, 113 **Yale L. J.** 1417 (2004).
2. *Id.* at 1450-51.
3. *Id.* at 1456-57.
4. *Id.* at 1461-62.

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