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Contract Law and Public Justification

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ABSTRACT

In *Justice in Transactions* and elsewhere, Peter Benson presents his theory of contract law, "contract as a transfer of ownership", as being capable of providing a public basis of justification for court decisions on contracts. In this article, I argue that Benson's theory of public justification of judicial decisions is a sort of consensus theory according to which public justification requires reasons shared by the justificatory constituency or members of the public. In Benson's case, certain reasons are taken as shared because they are constitutive of the practice of contract law. One of the main theses of the article is that, for Benson's theory of public justification to hold, the public justification must be composed only of those citizens for whom the practice of contract law as a whole is legitimate. The exclusion of other citizens (that is, those who regard contract law as illegitimate), however, does no greater damage to Benson's theory. In addition, I also argue that considerations about the public justification of judicial decisions do little to defend the thesis that contract as a transfer of ownership is the best interpretive theory of contract law.

KEYWORDS

Contracts; Public Justification; Public Reason; Benson; Interpretation

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INTRODUCTION

Peter Benson presents his theory of contract law,[1] — the theory of contract as a transfer of ownership, as a theory that provides a public basis of justification for contract law.[2] Benson points out the difference between the public justification of a certain area of law, such as contract law, and other kinds of public justification[3] — the public justification of the institutional system as a whole, or of what John Rawls designates as the "basic structure of society".[4] Nonetheless, the claim to justify contract law publicly means that, like other theories of this genre, Benson's theory concerns itself with justification for members of a certain public — the justificatory constituency or members of the public. Like other theories of this genre, Benson's theory is concerned with what is justified to members of a certain public, the members of the public.

Although there is nothing new in saying that coercion by the state must be justified publicly,[5] Benson is the only author I am aware of who applies public justification to contract law, and to private law in general.[6] It is also peculiar, therefore, that Benson claims that his theory is preferable to rival other theories — not because it offers a better interpretation of contract law; or because it is superior in terms of fairness; or any other substantial value; but because, unlike other theories, it offers a basis of justification for contract law.

This article has a dual objective. First, it aims to scrutinise Benson's theses on the public justification of contract law. In discussing public justification, Benson makes few references to the vast literature on the subject. I would like to demonstrate that certain refinements found in the post-Rawls literature help to illuminate Benson's claims about

[1] *See generally* Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 Osgoode Hall L. J. 273 (1995) [hereinafter Benson, *The Idea*]; Peter Benson, *The Unity of Contract Law*, *in* The Theory of Contract Law 118 (Peter Benson ed., 2001) (U.K.); Peter Benson, *Contract as a Transfer of Ownership*, 48 Wm. & Mary L. Rev. 1673 (2007) (Ger.); Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, 1 Issues in Legal Scholarship (2001); Peter Benson, *The Idea of Consideration*, 61 Univ. Toronto L. J. 241 (2011); Peter Benson, *Justice in Transactions*: A theory of Contract Law (2019) [hereinafter Benson, Justice in Transactions]; Peter Benson, *Outline of a Public Justification of Contract Law*, *in* Research Handbook on Private Law Theory 75 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) [hereinafter Benson, *Outline*].

[2] *See* Benson, Justice in Transactions, *supra* note 1, at 11: "[M]y aim . . . is to provide a public basis of justification for contract law . . .".

[3] *See id.* at 13: "[W]e must not simply assume that the public justification developed for one subject, such as political relations, is also immediately or directly applicable to some other, such as contract law . . .".

[4] Rawls defines the basic structure of society as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation". *See* John Rawls, *A Theory of Justice: Revised Edition* 6 (1999).

[5] *See* John Rawls, The law of Peoples: With "The Idea of Public Reason Revisited" 133 (1999) (discourses of judges in their decisions, especially of the Supreme Court, as part of the public political forum to which the idea of public reason applies).

[6] But for a recent account on the justification of legal rules also focused, like Benson's, on the idea of acceptability, see Stephen A. Smith, *Intermediate and Comprehensive Justification of Legal Rules*, *in* Justifying Private Rights 63 (Simone Degeling et al eds., 2021) (U.K.).

the public justification of contract law. More precisely, I will argue that Benson's theory is best interpreted as an exemplar of consensus theory. According to consensus theories of public justification, something is publicly justified if it is justified for reasons that members of the public share. I will also argue that, in Benson's case, the members of the public are citizens for whom contract law as a whole is legitimate.

Second, the article proposes a critique of Benson. I will argue against Benson's claims that considerations regarding public justification say little about the best interpretation of contract law. Only once the theory of contract as a transfer of ownership is a successful interpretive theory of contract law, will it provide a public basis of justification, but this is true of other theories as well.

Although Benson's theory of contract law is extensively commented on, less attention has been paid to the issue of public justification.[7] In particular, I am not aware of any works that have tried to scrutinise Benson's theses in light of the literature on public justification in general.[8] In this article, I propose to fill this gap.

The remainder of the article is organised as follows. Part 1 presents Benson's theory of contract law as a theory that serves as a public basis of justification. Part 2 draws on the literature on public justification to answer the following question: what kind of theory of public justification is Benson's theory anyway? My answer is that Benson's theory is best understood as a consensus theory in which the justificatory constituency is restricted to those people who accept contract law as legitimate. Part 3 contains my critique of Benson. In it, I make the case that almost any successful interpretive theory of contract law provides a public basis of justification. Furthermore, apart from the requirement of publicity (i.e., that a theory should offer criteria whose application by courts is easy to verify), there seems to be nothing about public justification that would lead us to prefer the theory of contract as a transfer of ownership against other theories. Thus, Benson's theory of contract law can offer a public basis of justification, but only because it is a successful interpretive theory, not the other way around.

[7] For some exceptions, see Aditi Bagchi, *Would Reasonable People Endorse a "Content-Neutral" Law of Contract?*, 17 Eur. Rev. Cont. L. 245, 248-51 (2021) (Ger.) (Benson's public justification fails because it employs too strong a conception of reasonableness); *see also* Martijn W. Hesselink, *Justice in Transactions: A Public Basis for Justifying Contract Law?*, 17 Eur. Rev. Cont. L. 231 (2021) (Ger.) (Benson's theory of public justification either imposes liberal values external to contract law, or it is incompatible with the priority that Rawls accords to the principles for the basic structure of society); *see* Felipe Jiménez, *Contracts, Markets and Justice,* 71 Univ. Toronto L. J. 144 (2021) (Benson's approach succeeds as a normative reconstruction of contract law practice, but the project of a public justification requires more distance from that practice).

[8] A first attempt of mine in this direction includes references to the author's work.

1. PUBLIC JUSTIFICATION IN CONTRACT LAW

According to Benson:

> [A] public basis of justification is appropriate, and needed when it is morally essential that individuals (and societies) find a shared normative basis, and point of view from which to explain and to justify among themselves the terms governing their interactions with each other. While a shared basis of justification may not be needed to validate one's individual moral, religious, or philosophical outlooks, it is necessary to legitimate the exercise of coercive power by citizens over each other when all count as free, and equal. This would be particularly so — as is the case with contract law — where interpersonal obligations are determined and coercively enforced even though the parties need not have deliberately intended to be so bound.[9]

In this Part, I will present how Benson accomplishes the task described in the passage above. My emphasis will be on how he thinks that a theory of contract law can provide a public basis of justification "where interpersonal obligations are determined, and coercively enforced". On the other hand, I will avoid, as much as possible, dealing with features of Benson's theory that do not eminently concern the *desideratum* of a public justification for contract law.[10]

Benson's theory — contract as a transfer of ownership — is an interpretive theory of contract law. Not every interpretive theory, however, claims Benson, is able to offer a public basis of justification. In order, also, to support publicly justified coercion by the state, an interpretive theory needs to make use of publicly available ideas, such as the ideas found in the doctrines applied by the courts in their decisions.[11] What an interpretive theory, as a public basis of justification, aspires towards is to bring to light principles or values implicit in these doctrines. It is also a question of demonstrating, as

[9] Benson, Justice in Transactions, *supra* note 1, at 12.

[10] Although Benson's emphasis is on the common law, he hints that his theses could also apply to civil law countries. This seems to hold particularly with regard to claims about public justification. While the theory of contract as transfer of ownership is an interpretive theory of a particular system of contract law (which may therefore not have the same success as other systems), Benson's remarks on public justification are more abstract, concerning the coercive practice of contract law in general (rather than a particular system of contract law). *See id.* at 29: "[E]ven though it is worked out for the common law in a judicial setting, the path taken by the proposed public justification may be relevant in developing a similar theoretical approach for other modern systems of contract law—most obviously, those belonging to the civilian tradition". Thanks to an anonymous reviewer for urging me to clarify this point.

[11] *Id.* at 14 (a public justification of contract draws its ideas "from legal doctrines publicly available to all . . .").

far as possible, that the different doctrines of contract law mutually support each other forming an "intelligible whole".[12]

For Benson, the theory of contract as a transfer of ownership meets these goals. In contrast to other theories — i.e., autonomy-based theories and economic theories — the theory of contract as a transfer of ownership avoids applying a criterion (such as autonomy or efficiency) that is external to contract law. In contrast, Benson's theory starts from a basic characteristic of contract law, namely, that "[a]ll systems of modern contract law present and justify their governing principles, standards, and rules as aiming, primarily, to do justice between the parties".[13] The theory of contract as a transfer of ownership manages to offer a public basis of justification because it appeals to an idea of justice between the parties, or transactional justice that is present in the main doctrines of contract law.

Other ideas that Benson's theory also considers as latent in contract doctrines (or present in the "public legal culture") serve to clarify what he understands as transactional justice. One of them is that of a certain conception of the person – designated by Benson as a juridical conception. According to this conception, contractors are treated as agents with the capacity "to assert their sheer independence from their needs, preferences, purposes, and even their circumstances".[14] The justice that contract law has in view is, therefore, a justice between agents characterised by their capacity for self-determination, and not by their needs, preferences, or circumstances. Therefore, it is a conception of justice that differs from other conceptions — in particular, conceptions of distributive justice - in which these same needs, preferences, or circumstances play a prominent role.[15]

[12] *Id.* (a public basis of justification "sees if and how the different contract doctrines and principles—as well as the ideas and values that they implicitly embody—are mutually supportive and fit together in one unified and intelligible whole"). *See also* Benson, *Outline*, *supra* note 1, at 76.

[13] Benson, Justice in Transactions, *supra* note 1, at 14.

[14] *Id.* at 369. Another moral capacity imputed to the parties is the capacity for reasonableness, or "an ability to recognize and accept the normative significance and implications of our independence, not only for ourselves but for others as well". *Id.* at 371.

[15] *See id.* at 27 (as a conception of justice is indifferent to needs and interests, transactional justice "must be conceived as wholly nondistributive in character").

Finally, another basic idea of contract law (and of private law as a whole), according to Benson, is the principle of liability for misfeasance only. According to this principle, private rights emanate from the capacity for independence (they are rights that are, therefore, indifferent to everything that does not concern the capacity for self-determination, such as needs and circumstances). And liability in private law is a liability limited to the violation of those rights.[16] Consequently, the mere disregard for the interests of others — as far as it does not constitute the infringement of a right, like refusing to contract with someone under a pressing need — is not a wrong. On the contrary, it is a mere case of nonfeasance and consequently, it does not engender liability. One of Benson's main aims is to demonstrate that contract law — in particular, the law of contract remedies — conforms to the principle of liability for misfeasance only.[17]

It is instructive how Benson differentiates his theory of contract as a transfer of ownership from other interpretive theories of contract law that fail, according to him, to provide a public basis of justification. The problem with other theories — such as welfarist or distributive justice theories — is that they assign a certain end to contract law. Teleological considerations are, however, incompatible with the "legal point of view", that is, with the fact that contract law is itself indifferent to the extent to which the interests of the parties are realised through the contract. Doctrines such as those of offer and acceptance, frustration and mistake are illustrative that, for contract law, it does not matter what the contracting parties actually wanted (or their particular conceptions of good), but only what they manifested.[18]

By postulating a certain good to be achieved through contracts, teleological theories contradict the limit of liability — liability only for misfeasance — that characterises private law:

[16] *See* Peter Benson, *Misfeasance as an Organizing Normative Idea in Private Law*, 60 Univ. Toronto L. J. 731, 733 (2010) (Can.): "[M]isfeasance restricts the fundamental imperative in private law to a prohibition against conduct, whether act or omission, that injures or interferes with a definite but limited kind of protected interest; namely, another's ownership right". More precisely, on the rights whose violation (misfeasance) results in liability, see *id.* at 737: "[T]he only legally recognized interests which the plaintiff can possibly assert vis-à-vis the defendant are her rights of bodily integrity and property".

[17] The seed of doubt was planted by Fuller and Perdue's famous article, Lon L. Fuller & William F. Perdue Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 Yale L. J. 52 (1936), 46 Yale L. J. 373 (1937). According to Fuller and Perdue, only policy reasons could explain the preference of the common law for the expectation damages remedy, which would grant the contracting party victim of contractual breach "something he never had". Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), *supra* note 17, at 53. By supporting the thesis that the contract transfers rights at the time of its formation (and regardless of the performance of the parties' obligations), Benson intends to demonstrate that Fuller and Perdue are wrong and that the remedy of expectations damages can indeed be understood as a compensation for the violation of a right. *See* Benson, Justice in Transactions, *supra* note 1, at 319-65.

[18] Benson, *The Idea*, *supra* note 1, at 307-08.

> Viewed from the standpoint of public justification, the reliance theory of Goetz, and Scott, the distributive approach of Kronman, and Posner's wealth-maximization share the same basic difficulty [. . .]. Each fails to recognize the limited idea of legal responsibility embodied in the common law distinction between misfeasance, and nonfeasance, a distinction that is presupposed throughout contract law [. . .]. Individuals are not obliged to preserve, or assist others, to meet their needs, or wishes, or to further their good. In contrast, each of the above welfare-based theories attributes to contract law the goal of bringing about the efficient, fair, or maximum satisfaction of transacting parties' needs. At bottom, then, each theory must postulate a qualified right to have one's needs recognized, and met. This makes them unsuitable as *public* justifications of contract.[19]

Another problem that afflicts some theories is that they offer criteria whose application requires a large amount of information or expertise that courts lack. Also for this reason, certain theories — Benson cites the examples of Kronman's theory, with his principle of Paretarianism,[20] and theories of the economic analysis of law — do not lend themselves to the public justification of contracts. To serve as a public basis of justification, therefore, a theory must not only be based on ideas present in the public legal culture — such as the ideas found in the main doctrines of contract law — but also offer criteria that courts can easily apply, and are therefore publicly available.[21]

2. WHAT KIND OF PUBLIC JUSTIFICATION?

Although Benson stresses the uniqueness of his theory of public justification,[22] this cannot entirely preclude comparison with other theories. In this section, I shall resort to the

[19] *Id.* at 309-10.

[20] *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 486 (1980) (enunciating the principle of Paretarianism, according to which contracts must be enforceable although one of the parties has taken advantage of the other, provided that the enforceability of these contracts is, in the long term, beneficial to the disadvantaged party).

[21] Benson, *The Idea*, *supra* note 1, at 310: "[I]nformation and procedures are required that are either unavailable, or too complex, or too uncertain for the theories to be applied successfully, and equitably in the institutional context of adjudication. Hence, they are unsuited to provide a public basis of justification". *See also* Benson, Justice in Transactions, *supra* note 1, at 13-14; Benson, *Outline*, *supra* note 1, at 78.

[22] *See* Benson, Justice in Transactions, *supra* note 1, at 13: "[A] public justification for contract has to be specifically worked out anew for contract law, taking into account not only its distinctive norms, and values as reflected in its main doctrines, and principles but also its specific role as but one part of a complete system of justice".

literature on public justification in general in order to ask what kind of public justification is envisioned by Benson.

A first clarification concerns the fact that justification, public or otherwise, can refer either to the legitimacy of the law of contracts, or any other, or to its authority (or both).[23] In asking ourselves about the legitimacy of contract law, what we want to know is whether that part of the law — or, more precisely, the coercion that is exercised under it — is morally permissible. This is a different question from the question of authority, which asks whether we have a duty to obey court decisions on contracts. These two questions — of legitimacy and authority — can be answered in different ways. We might, for example, claim that a certain judicial decision is not morally authoritative, i.e., not legitimate, but that we nevertheless have a duty to obey it, i.e., the decision is authoritative.

Now, it seems clear that Benson's theory is a theory about the legitimacy, not the authority, of contract law. Not only does Benson occasionally use terms like "legitimate",[24] but he never once suggests that a public basis of justification is a condition for state decisions to be obeyed. Contract law that is not publicly justified is, according to Benson, objectionable, which does not mean that we are authorised to disregard it.

Another issue is whether Benson's theory of public justification is a consensus or convergence theory.[25] Consensus theories are theories according to which public justification requires reasons that are shared by the members of the public. Convergence theories, by contrast, drop this requirement, usually contenting themselves with a law being justified to all members of the public, albeit for reasons that are not shared. Well, then, there is no doubt that Benson's theory is an example of consensus theory — although it is not simple to assess why the reasons Benson refers to are reasons common to members of the public. In any case, it is clear that, in appealing to ideas present — explicitly or implicitly — in contract law doctrines, what Benson has in view is public

[23] On the difference between legitimacy, and authority, *see* David M. Estlund, Democratic Authority: A Philosophical Framework 41 (Princeton University Press ed., 2008).

[24] *See e.g.*, Benson, Justice in Transactions, *supra* note 1, at 1-2: "For contractual obligation is always coercively enforceable obligation, and this, if it is to be legitimate, ought to be justified as a matter of justice and shown to be consistent with the freedom, and equality of the parties".

[25] On the difference between consensus, and convergence theories, *see* Fred D'Agostino, Free Public Reason: Making It Up As We Go 30 (1996). (U.K.):

> If both *A* and *B* share a reason *R* that makes a regime reasonable for them, then the justification of that regime is grounded in their *consensus* with respect to *R*. If *A* has a reason *RA* that makes the regime reasonable for him, *and B* has a reason *RB* that makes the regime reasonable for her, then the justification of that regime is based on *convergence* on it from separate points of view.

See also Kevin Vallier, *Convergence and Consensus in Public Reason*, 25 Pub. Aff. Q. 261, 262 (2011).

justification for reasons that members of the public (in some sense) share, and not for a mere convergence of reasons.

A final preliminary clarification concerns whether the requirement that Benson's theory applies to contract law is an exclusionary requirement, a restraint requirement, or both. In the first case (exclusion), Benson's theory would be satisfied that contract law is justified by public reasons. In the second (restraint), what the theory would prohibit is the supply of non-public reasons.[26] The two requirements must not be confused. Considering a non-public reason *RNP* — for example, a consequentialist reason — it is sufficient, for an exclusionary claim, that contract law can be justified only on public grounds—and therefore, independently of *RNP*. For a restraint requirement, by contrast, it is incompatible with the public justification that *RNP* be offered as a reason for deciding — even if the decision in question can be justified without resorting to *RNP*. In other words, whereas an exclusion requirement is concerned with the reasons that justify the exercise of coercion, what a restraint requirement has in view are the reasons offered for justification purposes — by certain authorities, or by members of the public.[27]

It seems safe to me to assert (although not as safe as in the previous cases) that public justification in Benson is based on a principle of exclusion, not restraint. I believe that Benson is, at best, only secondarily interested in judicial rhetoric, and that his thesis is therefore that the theory of contract as a transfer of ownership offers a public basis of justification. He does so by demonstrating that contract law can be justified with reasons arising solely from contract doctrines and the ideas latent in these doctrines. Judicial decisions offering reasons that are foreign to contract law, as is the case for Benson, for reasons of efficiency or distributive justice, could be a problem only because such decisions could misinform the public about the reasons why they are legitimate. Provided, however, that contract law, regardless of the rhetoric employed, is justified by public reasons, its legitimacy could be attested.[28]

Having made these clarifications, I would like to move on to the question that seems, to me, crucial for the characterisation of Benson's theory of public justification:

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[26] On the difference between exclusion and restraint, see Kevin Vallier, Liberal Politics and Public Faith 50 (2014).

[27] A famous example of restraint requirement is Rawls's duty of civility. *See* Rawls, *supra* note 5, at 55-56:

> [J]udges, legislators, chief executives, and other government officials, as well as candidates for public office, [must] act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political questions in terms of the political conception of justice that they regard as the most reasonable.

[28] In any case, there seems to me no doubt that Benson's theory contains at least an exclusion requirement. If, therefore, my above interpretation is wrong, this would only plague Benson with an additional problem, namely, that of explaining why, in addition to the exclusion of non-public reasons, public justification also imposes that public authorities exercise restraint as to the reasons that offer for their decisions.

in what sense are we to understand that the reasons of the theory of contract as a transfer of ownership are public? Especially, in contrast with the reasons of rival theories, such as the economic analysis of law or autonomy-based theories. We have seen that, like other consensus theories, Benson's theory subjects public justification to reasons that are commonly endorsed by the members of the public. In what sense, however, can the reasons of Benson's interpretive theory of contract law be deemed as reasons that are shared by the members of the public?

To claim that the reasons for the theory of contract as a transfer of ownership are public reasons because they are found in the major doctrines of contract law, and are therefore part of public legal culture (Benson's standard answer) only complicates the puzzle. It, essentially, invites us to ask why it is sufficient, in order for them to be public, that reasons can be deduced from existing law. Other consensus theories are treated as public reasons that members of the public accept. It is also common in consensus theories that the members of the public is idealised,[29] and not made up of the totality of citizens — for example, by excluding unreasonable citizens. Returning to Benson, what we are led to ask then is whether the reasons of the theory of contract as a transfer of ownership are, in some sense, reasons accepted by the members of the public, as well as whether, for the characterisation of this public, idealisations and exclusions are employed, and why.

Benson's answer to the first part of the question is, as it seems to me, the following: the reasons of the theory of contract as a transfer of ownership theory are shared by members of the public because everyone can or at least could intuit that these reasons stem from the main contract doctrines and ideas — such as that of liability for misfeasance only. This answer, however, comes up against cases like Eugene's (a fictional character I introduce here just for the purposes of argument). Eugene is an avid reader of Benson and is convinced that the theory of contract as a transfer of ownership is the best interpretation of contract law. He agrees, therefore, with Benson that considerations of transactional justice are the only ones capable of conferring intelligibility on contract law as a whole. Eugene, however, does not think that contract law in its current form is morally acceptable. For him, transactional justice is a false justice because it abstracts from the needs and circumstances (in particular, the disparity of forces) of the contracting parties.[30] How could we claim, then, that the reasons of the theory of contract as a transfer of ownership are Eugene's reasons?

[29] *See e.g.* Paul Billingham & Anthony Taylor, *A Framework for Analyzing Public Reason Theories*, 21 Eur. J. Pol. Theory 671, 673 (2022) (U.K.): "A key dimension along which public reason views vary . . . is in how they specify the constituency of reasonable citizens to whom acceptability, or justifiability, is required [. . .]. On every public reason view, this justificatory constituency is an idealized constituency".

[30] Benson argues for the moral acceptability of contract law in the second part of *Justice in Transactions*. We can say, in short, that Eugene is persuaded by the arguments of the first Part of this book (the interpretive theory), but not by those of the second one.

Two answers can be considered. The first consists in appealing to the *sui generis* character of the public justification of contracts in order to simply state that, contrary to other consensus theories, Benson's theory is satisfied by reasons for state decisions being part of the public legal culture — regardless, therefore, that these reasons are accepted by members of the public. This answer, however, is not very promising because it calls into question the plausibility of Benson's theory. Why should we insist that these reasons be public if they have nothing to do with the endorsement of those reasons by people subject to coercion? It does not seem easy to reconcile a common ground between theories of public justification, like respect for citizens,[31] with a theory that bases justification on reasons that are actually rejected by some members of the public.[32]

[31] For examples of theory in which public justification draws upon a principle of respect for citizens, *see* Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999); See also Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, PHIL. & PUB. AFF. 3 (2011) (U.K.).

[32] It is true that convergence theories do precisely this, but with the advantage that, in these theories, a law is legitimate only if it is justified for all members of the public—even though the reasons why a certain member of the public, *MPA*, has a law as justified may not be endorsed by another member of the public, *MPB*.

The second answer, which seems to me to be preferable, involves another of the questions referred to above: the question concerning the members of the public. Benson could stipulate that his theory of public justification is a theory about how to justify, publicly, the court decisions to people for whom the law of contract is legitimate,[33] thus excluding people like Eugene from the members of the public. The reasons for the theory of contract as a transfer of ownership would be reasons shared by the justificatory constituency (people like Eugene excluded) is because they are the reasons that flow from legal material (laws, precedents, etc.) that members of the public endorse or would endorse.[34] This second answer avoids the inconvenience of the first one — that regarding treating those reasons as public that are actually rejected by some members of the public — albeit, of course, at the expense of excluding from that public the people for whom contract law is not legitimate.[35]

One objection is that, so understood, Benson's theory of public justification would be circular, for it would be a theory about the legitimacy of contract law to citizens who already regard contract law as legitimate. Note, however, that there is a difference between the legitimacy of the practice of contract law and the legitimacy of some particular instance of coercion taking place within that practice. These are different things, for it is perfectly possible to consider a single exercise of coercion to be illegitimate without, at the same time, condemning the coercive practice as a whole.[36]

Another objection is that the move to exclude people like Eugene from public justification is regrettable because it is in relation to such people that the question of the

[33] I use "legitimate" above in the sense of "morally permissible". To consider contract law as legitimate (and to be part of the members of the public), it is therefore sufficient for citizens to consider the state morally authorised to institute contract law such as the current one, even though, for some of these citizens, contract law is not completely fair.

[34] In addition to excluding from members of the public people for whom contract law is not legitimate, the above interpretation involves the following idealisation: members of the public meet the necessary epistemic conditions to intuit the ideas that are present (explicitly or implicitly) in the main contract doctrines and that give unity to that part of the law. So, if Benson is correct in his interpretation of contract law, the reasons of the theory of contract as a transfer of ownership will be reasons accepted by this idealised audience.

[35] It is interesting to note that the reasons why members of the public regard contract law as legitimate do not have to be the same. In the Part (Part 2) of *Justice in Transactions* concerned with the legitimacy (Benson speaks of "stability") of contract law, Benson weaves arguments addressed to a varied audience: welfarists, moralists concerned with the binding force of promises, and advocates of distributive justice. *See* Benson, Justice in Transactions, *supra* note 1, at 397-413 (on the compatibility between contract law and promissory morality); 413-48 (on the compatibility between contract law and the market as a "system of needs"); 448-76 (on the compatibility between contract law and distributive justice). As Benson does not claim that the reasons given in this part of the book are public, it can be assumed that he is content with his readers agreeing that contract law is justified, albeit for different reasons.

[36] It is important to stress that Benson does not explicitly differentiate between the legitimacy of the practice of contract law and the legitimacy of a particular decision occurring within that practice. The article's thesis is not that the interpretation that makes use of this difference has a textual basis, but that it would be necessary for Benson's theory to circumvent the difficulty raised by the Eugene case. Thanks to an anonymous reviewer for urging me to clarify this point.

justification of contract law might seem most pressing. I agree that, as I am reconstructing it, Benson's theory of public justification is less ambitious than it could be. I see no other way, however, of reconciling the claim to offer a public basis of justification for contract law with the assertion that this same public basis can only come from a theory that is based on the ideas that are already incorporated (albeit implicitly) in the main doctrines of contract law. This is because the reasons provided by these ideas can only be shared by the members of the public if that public accepts the practice of contract law in general as legitimate. One way out would be to claim that some idealised version of the members of the public, indeed, accepts contract law as legitimate — which would imply treating people like Eugene as unreasonable or suffering from some cognitive deficit. Benson, however, does not advance this thesis.

According to the interpretation I am advocating, Benson's theory of public justification addresses an audience for whom contract law as a whole is legitimate. The question the theory sets out to answer is how individual decisions (e.g., judicial decisions) on contracts can be justified to the public. And the answer is that such decisions will be legitimate if they are justified by reasons that members of the public share. Finally, the reasons for the theory of contract as a transfer of ownership are shared reasons because they come from the main doctrines of contract law and from ideas implicit in those doctrines. I.e., reasons arising from legal material that members of the public see as legitimate by their own reasoning.

Let me explain. Suppose that, for whatever reason, Richard holds the practice of contract law to be justified — it might be, for example, that Richard accepts the principle of wealth maximisation and believes that contract law satisfies that principle. At first glance, the fact that contract law is legitimate might not seem to imply that the theory of contract as a transfer of ownership is accepted by Richard. Let us consider, however, that Benson is right in proclaiming that the theory of contract as a transfer of ownership is the theory that accounts for the ideas underlying the main doctrines of contract law. If this thesis of Benson is correct, then the ideas of the theory of contract as a transfer of ownership are constitutive of the practice that Richard regards as legitimate. But Richard cannot endorse the practice of contract law without endorsing the constitutive ideas of that practice. Thus, the reasons for the theory of contract as a transfer of ownership are Richard's reasons — they are, if not reasons that Richard currently endorses, reasons he would endorse after correctly interpreting contract law.

Let us go back to Eugene. One charge levelled against theories of public justification, that exclude certain people from members of the public, is that this exclusion is impossible to reconcile with the ground of public justification (be it liberty,

equality, or respect for citizens).[37] How does one defend a theory that proposes to justify coercion publicly and at the same time disregards the opinions of part of the citizens?

I believe, however, that in Benson's case, the manoeuvre of limiting the public justification would be defensible. In view of the fact that Benson's theory of public justification is a theory concerned with justifying coercion, the exclusion of citizens for whom contract law as a whole is not legitimate would be understandable. After all, what point would there be in trying to justify some particular instance of practice to people for whom the practice in question is (as a whole) corrupt? If, indeed, there are citizens for whom contract law is not justified, this is a problem for the justification of contract law but a problem we can temporarily set aside when dealing with the exercise of coercion by courts or other public authorities. It is not, in any case, a problem with which Benson's theory of public justification (as reconstructed above) sets out to deal.

I think, in summary, that the ambition of Benson's theory should be understood in the following way. Given that people who accept contract law as legitimate differ on the considerations on which specific issues should be decided,[38] what is it that is necessary in order, notwithstanding the divergence, for coercion to be justified for this restricted audience? The exclusion of people like Eugene from the public in question is not disrespectful and does not affront the equality and freedom of the citizens in question. This is for the simple reason that Benson's theory of public justification is not intended to pass a verdict on the legitimacy of contract law in general.

3. JUST ANOTHER INTERPRETIVE THEORY OF CONTRACT LAW?

In Part 2, I argued for how best to understand Benson's project on the public justification of contract law. We can now turn to the critique of this project. Is Benson's theory of public justification successful? The answer, it seems to me, is yes. I do not believe, however, that this is a significant achievement — in particular. I do not believe that, in presenting his theory of contract as a transfer of ownership as a public basis of justification, Benson has any advantage over rival interpretive theories. Let me explain.

[37] See, e.g., David Enoch, *Against Public Reason, in* 1 Oxford Studies in Political Philosophy 112, 122-23 (David Sobel et al. eds., 2015), exclusion of unreasonable citizens runs counter to the aim of reconciling authority with liberty and equality; Chad Van Schoelandt, *Justification, Coercion, and the Place of Public Reason,* 172 Phil. Stud., 1031, 1037-41 (2015), exclusion of citizens not committed to liberal values sets aside the interpersonal justification sought by theories of public reason in favour of impersonal justification.

[38] Or would accept, under certain ideal epistemic conditions. *See supra* note 34.

As seen in Part 1, there is, in fact, a sense in which the theory of contract as a transfer of ownership serves as a basis for contract law. Since the justificatory constituency is restricted to those people for whom the practice of contract law, in general, is legitimate, the reasons for transactional justice that the theory of contract as a transfer of ownership brings to light can, in fact, be taken as public reasons. I.e., reasons accepted by the members of the public. Because it excludes certain people — such as Eugene — from the public justification, it is not assured that Benson's theory can justify contract law to these people. This, however, is more than would be expected from a theory that deals with the legitimacy, not the practice, of contract law as a whole but only in particular instances of coercion taking place within that practice. It is no small feat that such a theory succeeds in demonstrating how these decisions can be publicly justified among people (for example, consequentialists and defenders of the morality of promises) who, although they regard contract law as legitimate, disagree profoundly about its value.

Yet, the success of the theory of contract as a transfer of ownership as a public basis of justice is tied to its success as an interpretive theory. This is because the kind of public justification that Benson has in view is that of a justification based on any theory that offers a successful interpretation of contract law. This is what we might understand as an interpretation that brings to light fundamental ideas found explicitly or implicitly in the main contract doctrines which are such that they present those doctrines as a unity or (to use Benson's expression) "intelligible whole". Any interpretive theory — and not just the theory of contract as a transfer of ownership — that fulfils this *desideratum* can claim the status of a public basis of justification.

Benson is perfectly entitled, of course, to claim that rival theories fail, and only the theory of contract as a transfer of ownership is a successful interpretive theory in the above sense. He does something like this when criticising other theories for neglecting the difference between misfeasance and nonfeasance, and the principle of liability for misfeasance only.[39] What we have here, however, is nothing more than an interpretive battle and one in which the alleged status of the public basis of justification does nothing to help the theory of contract as a transfer of ownership. On the contrary, it is only if the theory of contract as a transfer of ownership comes out as the best interpretive theory that it will be entitled to vindicate the status of a public basis of justification.

[39] Benson, *The Idea*, supra note 1, at 309-10. That the principle of liability for misfeasance only is a fundamental principle of private law is something with which, of course, not all interpreters agree. *See, e.g.*, Hanoch Dagan, *Two Visions of Contract*, Mich. L. Rev., May 2021, at 1247, 1260. (supporting the interpretation according to which the basic principle of contract law is that of self-determination, which implies "modest affirmative interpersonal obligations" between contracting parties).

Can Benson claim that his theory of public justification, at least, defines the criteria under which different interpretive theories are to be compared? In other words, if they are not enough to proclaim the theory of contract as a transfer of ownership as the correct interpretive theory, can Benson's remarks about the public justification of judicial decisions, at least, guide us in the search for the best interpretation of contract law? Possibly so, but I am not very optimistic about it. Consider, to begin with, two well-known arguments about the interpretation of private law. The first is that an interpretive theory is preferable, *ceteris paribus*, if it matches the rhetoric of judges, lawyers, and other practitioners — sometimes referred to as the "internal point of view".[40] Another argument is that we cannot lose sight of private law having a bilateral structure. Interpretive theories fail, according to this argument, if they cannot account for that structure.[41]

[40] The argument of the internal point of view could also apply to other areas of law, but it is more common, it seems to me, among private law interpreters. *See, e.g.*, Ernest J. Weinrib, The Idea of Private Law 16 (2d ed., 2012) (U.K.) (criticising functionalist theories for attention to the outcomes of court cases at the expense of "specific juristic reasoning, doctrinal structure, and institutional process from which these results emerge"); *See also* Stephen A. Smith, Contract Theory 29 (2004) (arguing that interpretive theories must explain the law "internally", that is, in ways that recognize that the explanations offered by judges for their decisions are, if not correct, at least of the right kind); *See* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing* John C.P. Goldberg& Benjamin C. Zipursky, *Seeing Tort Law From the Internal Point of View: Holmes and Hart on Legal Duties*,75 Fordham L. Rev. 1563, 1575 (2006) (advocating in favor of a duty-accepting conception of tort law based on "how ordinary citizens, lawyers, and officials talk and act in certain spheres").

[41] *See, e.g.*, Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L. J. 1233, 1241 (1988) (criticizing the economic analysis of law for being unable to explain a structural feature of tort law, namely that "[t]ort suits bring victim-plaintiffs together with injurer-defendants, and only within this structured context do questions regarding who should bear a particular accident's costs arise"); *See also Weinrib*, *supra* note 41, at x (incompatibility of the economic analysis of law with the "bilateral structure of the plaintiff-defendant relationship").

The question here is not how powerful these arguments are but whether Benson's theory of public justification helps us to know how powerful they are. Does the fact that we are interested in public justification give us any reason to privilege interpretive theories conforming to the internal point of view or to the bilateral structure of contract law? I do not see why we should. After all, other interpretive theories can also be based on ideas found (implicitly, at least) in the main doctrines of contract law. Suppose that the economic analysis of law is an example of a theory such as the latter (that is, a theory indifferent both to the internal point of view and the bilateral structure of private law). If, nevertheless, economic theory succeeds in demonstrating that efficiency is an idea underlying contract law as a whole, what reason would we have for denying this theory the status of a public basis of justification?[42]

What matters here, it should be noted, is not whether the economic analysis of law is right in treating efficiency as a latent idea in contract law. Nor is it that of knowing whether an interpretive theory can be successful despite diverging from the rhetoric of judges and lawyers, and treating the bilateral structure of litigation as a mere artifice for achieving ends external to the contractual relationship. The question is whether, in this case, such a theory could serve as a basis for public justification in Benson's terms. And the answer is yes. If efficiency reasons are constitutive reasons for the practice of contract law (that is, if efficiency explains why contract law is the way it is), then these reasons are reasons endorsed by citizens who regard contract law as legitimate. Or at least, they are reasons that these citizens would endorse if they engage in the interpretation of contract law.

And what about sceptical interpretive theories according to which, far from constituting a unity, contract law is a hodgepodge of doctrines drawing upon diverse and potentially conflicting ideas?[43] Is Benson right in saying that these theories are not fit to serve as a public basis of justification?

In this regard, it is convenient to differentiate the two theses. The first is that interpretive theories which reveal the object of interpretation as a coherent whole, all other things equal, are better (*qua* interpretive theories) than other theories. I will call

[42] Benson denies that the economic analysis provides a public basis for justification, but the reason seems to be simply that the economic interpretation of contract law is wrong. Like promissory theories, says Benson, economic theories "seek to account for contract law on the basis of norms, values, and criteria that are not only disconnected from but also at odds with the fundamental normative ideas implicit in its doctrines and principles". *See* Benson, Justice in Transactions, *supra* note 1, at 3. Advocates of promissory and economic theories, of course, disagree.

[43] See for a recent example, Thilo Kuntz, *Against Essentialism in Private Law Theory: Private Law as an Artifact Kind, in* Methodology in Private Law Theory (Thilo Kuntz & Paul Miller eds., forthcoming 2023) (manuscript at 2) (htttps://ssrn.com/abstract=4339372) (U.K.): "Private law accommodates and rests on a mixed set of norms and values with weights and relevance changing over time, rendering any partisan account ineffective".

this thesis of coherence. The second thesis is that only interpretive theories that reveal the object of interpretation as a coherent whole (if the object in question is the legal system) are able to serve as a public basis of justification (hereafter, I will refer to this second thesis as the thesis of public justification).

The coherence thesis seems plausible to me, but only because it contains the *ceteris paribus* clause. It would be more difficult to endorse a different and stronger version of this thesis according to which coherentist interpretive theories are better than other theories. At first sight, there are other interpretive goals (among them, the ability to explain the interpreted object) in the light of which a non-coherentist theory may occasionally perform better.

The question is whether the public justification thesis, if correct, would imply anything about the relationship between interpretation and the practice of coercion. Let us consider that Benson is wrong and that some non-coherent interpretive theory of contract law (let's call it *T*) is the best interpretive theory of contract law. One might think that if the best interpretation of contract law is the one that *T* offers, it is this interpretation, and not another, which should base the exercise of coercion. According to the public justification thesis, however, *T* is unable to provide a public basis for justification. Is it the case, then, of setting *T* aside in favour of an inferior interpretation of contract law, such as the interpretation of the contract as a transfer of ownership?

The answer, I believe, is yes, but provided the public justification thesis is correct. One problem, then, is that Benson says nothing in defence of the latter thesis. After all, why is unity of contract law necessary for public justification (and why is the unity in the question of contract law rather than law as a whole)? Let us suppose, again, against Benson, that the best interpretation of contract law reveals a commitment by this area of law to the distinct and potentially antagonistic ideals of independence (in the sense of Benson's juridical conception of the person) and autonomy. According to this interpretation, while, as Benson wants, certain parts of contract law are well explained by the idea of independence (these are the parts of contract law where the legal conception of person and the principle of liability for misfeasance only are vindicated), others, in contrast, aim at human flourishing in accordance with a theory of the good such as autonomy or self-determination. Well then, if this is the best interpretation of contract law, why would state coercion based on the idea of autonomy not be publicly justified? If autonomy is, as we are assuming, a constitutive idea of the practice of contract law, it seems that the same argument about the public justification of judicial decisions favouring coherentist theories would have to be extended to the present case.

A final point concerns the alleged incompatibility between public justification and interpretive theories — as is the case, according to Benson, of the economic analysis of law — which are difficult for courts to apply. Benson seems to consider that public justification requires not only that the reasons for coercion be shared but also that these reasons be easily verifiable by the public. And, this will not occur if the resolution of concrete cases has to be based on intricate rules or rely on too much information.[44]

The proposition that the reasons for decisions by public authorities should be, in addition to being shared, publicly recognisable — meaning that those decisions be based on rules whose application is easy to verify — is plausible. If this proposition is correct, then we must reject interpretations of contract law that cannot be translated into easily applicable criteria — *at least as a basis for concrete decisions*. The caveat is important because an interpretive theory that does not meet the requirement in question is not necessarily a bad interpretive theory — it might just not be the theory on which we would like judges and other public authorities to base their decisions. Furthermore, considerations about the publicity of reasons are unlikely to be decisive in favour of the theory of contract as a transfer of ownership. While more sophisticated versions of economic analysis may, indeed, prove inadequate for public justification, this will not necessarily be the case for all other consequentialist theories.

CONCLUSION

This article has been concerned with Benson's theory of the public justification of contract law. One of my main theses is that Benson's theory should be understood as a kind of consensus theory of public justification. As such, it is a theory that considers public reasons as the reasons constituting contract law according to the best interpretation of that area of law. But for these reasons to be, in fact, reasons accepted by members of the public, it is necessary to exclude from the public justification those citizens for whom contract law as a whole is not legitimate. Unlike other theories of public justification, where the exclusion of certain citizens from the public justification may seem suspect, I have argued that in Benson's case, this exclusion is defensible. Benson's intent is to demonstrate how particular instances of coercion can be justified by people who, while they accept the practice of contract law in general, disagree profoundly about the value of that practice.

[44] *See* Benson, *The Idea*, supra note 1, at 310; *See also* Benson, Justice in Transactions, *supra* note 1, at 13-14; *See* Benson, *Outline*, *supra* note 1, at 78.

The other main thesis advocated in the article is that Benson's account of public justification does little to favour Benson's theory of contract law — the theory of contract as a transfer of ownership — over other theories. The proposition that the theory of contract as a transfer of ownership provides a public basis of justification may be true, but only insofar as the theory in question is a successful interpretive theory of contract law. Certain arguments that could be used in favour of contract as a transfer of ownership as an interpretive theory — such as that it is a theory consistent with the judicial rhetoric or "internal point of view", and the bilateral structure of private law — simply seem to be beside the point. This is because nothing Benson says about public justification suggests that other theories - which find no echo in judicial rhetoric or treat the bilateral structure of litigation as a mere expedient — may not serve as a public basis of justification. Still, in this regard, the claim that only a coherentist theory of contract law, like Benson's, offers a public basis of justification seems unfounded. Thus, the only argument concerning public justification that could favour the theory of contract as a transfer of ownership over other theories — in particular, against theories containing criteria whose application by the courts is difficult to verify — is that of publicity. This is not, however, a decisive argument since the theory of contract as a transfer of ownership is surely not the only interpretive theory of contract law that can be easily applied by judges and other public authorities.