THE INTERNAL AND EXTERNAL ANALYSIS OF CONCEPTS

*Randy Barnett**

In "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory,"[1] Peter Benson criticizes my presentation of a consent theory of contract,[2] in part, on the ground that it "refers only to the *empirical* facts of the requirements of human needs and fulfillment. Like [Charles] Fried's [account], his conception of the consensual basis of a contract does not preserve the required standpoint of *abstraction*."[3] On this basis he concludes that my approach fails to "provide an *adequate* elucidation of a nondistributive conception of contract."[4]

By explaining contractual obligation as intelligible ownership based in a relation of wills, independent of the content of those wills, Professor Benson's approach can be viewed as formal or abstract. In contrast, my account of a consent theory of contract has been twofold: (a) by understanding contractual obligation as arising when persons *manifest an intention to transfer alienable rights*, a consent theory of contract (as compared with other available theories) helps us to better understand and sometimes to modify such problematic contract doctrines as the objective interpretation of consent, promissory estoppel, specific performance, and undisclosed agency; (b) this criteria of contractual obligation plays an important social function and is ignored at our peril. Benson does not address the first more explanatory and reformatory aspect of my presentation of a consent

* Professor and Norman and Edna Freehling Scholar, Illinois Institute of Technology, Chicago-Kent College of Law. In preparing this essay, I greatly profited from discussions with Jules Coleman, Dale Nance, and Dennis Patterson to whom I wish to extend my thanks.

[1] Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077 (1989).

[2] I elaborate my views of contract in Barnett, Contract Scholarship and the Reemergence of Legal Philosophy, 97 Harv. L. Rev. 1223 (1984) (reviewing E. Farnsworth, Contracts (1982)); Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269 (1986) [hereinafter "A Consent Theory"]; Barnett, Contract Remedies and Inalienable Rights, 4 Soc. Phil. & Pol'y 179 (1986); Barnett, Squaring Undisclosed Agency Law with Contract Theory, 75 Cal. L. Rev. 1969 (1987); and Barnett & Becker, Beyond Reliance, Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443 (1987). A condensed and revised version of this approach appears in Barnett, Rights and Remedies in a Consent Theory of Contract, in Liability: New Essays in Legal Philosophy (R.G. Frey & C. Morris, eds. forthcoming).

[3] Benson, supra note 1, at 1112 n.57 (emphasis added).

[4] Id. at 1079 n.2 (emphasis added).

HeinOnline -- 11 Cardozo L. Rev. 525 1989-1990

theory of contract; it is the second of these two aspects of my presentation that he characterizes as empirical and insufficiently abstract.

Professor Benson takes a Hegelian approach that I, quite frankly, am not qualified to evaluate from within so I will not try. In this essay I will assume *arguendo* that both Hegelian legal theory and Benson's use of it are sound. However, without questioning either the merits of his analysis or the methodology he employs, I think that elaborating a distinction between internal and external conceptual analyses will permit me to put both his presentation and his criticism of mine in perspective.

I.

Concepts are the tools by which we come to understand and operate in the world in which we find ourselves.[5] Viewed thus as tools, there are two distinct ways to understand or analyze concepts or, if you will, two distinct modes of conceptual understanding: the internal and the external. To the extent that one of these modes of analysis is "sound" or "valid"—that is, it is capable of revealing useful information about the subject at hand—its soundness or validity does not necessarily exclude the possible validity of the other.

To appreciate the difference between the external and internal modes of conceptual understanding, consider an analogy to another kind of tool. For example, if we came across an electric drill lying on a table we might appreciate its merits in (at least) two ways. On the one hand, we could analyze it internally by opening its case and examining how it is constructed, how each of its component parts (e.g., the motor, gears, and switches) relates—in a sense, necessarily—to the others. By "abstracting" the drill from its external context, we could understand how the drill works from the inside. On the other hand, we could analyze the drill externally by seeing what it does (e.g., drills holes) and based on this, could figure out what it is good for (e.g., building a cabinet). This mode of analysis moves away from pure abstraction and returns the drill to the context in which it normally resides.

As I have described them so far, the internal and external modes of analyzing or understanding an electric drill may be considered to be purely descriptive or "value free." But this is not the only way to view the matter. We may turn our internal analysis in a normative direction by asking whether the internal design of the drill is elegant

[5] For a detailed elaboration of this view of concepts see S. Toulmin, Human Understanding: The Collective Use and Evolution of Concepts (1972).

HeinOnline -- 11 Cardozo L. Rev. 526 1989-1990

or efficient as compared with other drill designs; we may turn our external analysis in a normative direction by asking whether the drill is effective for certain drilling purposes, or, indeed, whether drilling holes (or constructing cabinets) is a good thing for persons to do. The mere fact that, from an internal perspective, a drill "should" be used for drilling—that is what drills are for—does not entail that, from an external perspective, any given drill "should" be so used. To change the analogy, the fact that an internal analysis of a gun reveals that it is "good" for shooting bullets, does not entail that it is "good" to use a given gun or any gun whatsoever for this purpose.

As tools by which we come to understand the world, concepts have the same internal and external dimensions that I have attributed to the electric drill. On the one hand, we may examine a concept "from the inside" as it were, by identifying its constituent parts and their internal relation to each other. When doing so we may be said to "abstract" the concept from its external role or function—the way in which the concept is used by real persons in real institutions and the actual consequences of such use. The internal perspective is particularly useful when dealing with the central features of extremely basic concepts like property and contract that contain so many constituent parts. Indeed, in my view, contract is just one of several constituent aspects of the concept of property.[6]

On the other hand, we may take the internal operation of a concept as given and examine its external function. We may try to determine as best we can how a concept functions in context. As with the electric drill, each of these conceptual perspectives can have both a descriptive and a normative dimension. The internal construction of a fundamental concept can be inelegant and "contradictory" in the sense that different internal aspects are found to be at a cross purposes to each other—assuming, of course, that working at cross purposes inhibits rather than enhances the overall value of the concept, which is not always the case. Or the use of a concept can result in consequences that, from an external perspective, are normatively undesirable.

Which type of conceptual perspective is superior or, to put the question a bit differently, more *fundamental*? Perhaps it depends on our interest in or our reasons for analyzing a concept. Would we say that the internal or abstract analysis of an electric drill is superior to an external or functional analysis without reference to why we are analyzing the drill? Or would we not say that each mode of analysis

6 See Barnett, A Consent Theory, supra note 2, at 291-300.

HeinOnline -- 11 Cardozo L. Rev. 527 1989-1990

is essential for a full understanding of the drill; that an analysis that consisted solely of either an internal or an external perspective, however excellent, was somehow incomplete or inadequate? We surely would not say that an internal analysis of an electric drill was *inherently* more fundamental than an external analysis (or the reverse).

The internal analysis of a tool is not wholly independent of the external perspective. When judging the internal operation of the electric drill we are influenced by our sense of what it is good for. We can, of course, abstract from such functions and see only how the motor, switches, and gears combine to turn the drill bit, but we can only fully appreciate why these parts are arranged in one way or another when we have some understanding of the purpose for turning the bit. For example, if we know a drill is going to be used for drilling holes in wood we may judge the internal mechanism of a drill differently than if it is going to be used to turn a sanding disk, and still differently if we know it is going to be used for driving screws. Conversely, taking the internal structure of the drill as given, our appreciation of a drill's external function is influenced by the knowledge revealed by an internal analysis. For example, by diverging so drastically from an internal view of what a drill is good for, it would normally not be good from an external perspective to use a power drill to write poetry.

In this regard as well, the conceptual tools we use to understand our environment are not unlike the tools we physically use to alter it. Our internal analysis of such concepts as tort or contract is influenced by the uses to which such concepts are put. How else can we fully understand, for example, the statute of frauds, or any formal barrier to the enforcement of consent? Viewed strictly internally, consensual transfers of rights may be the *sine qua non* of contract. But viewed from the outside as a tool by which persons are able to exchange property rights, we can better understand why it is that certain formal requirements are "necessary"—in a functional, not logical sense—if the law of contract is to do its job of protecting and facilitating consensual transfers of rights, even though this may occasionally mean that a consensual transfer will go unenforced.

This suggests that the concept of "necessity" itself has two distinct dimensions—a logical dimension and a functional dimension. Logical necessity corresponds to the abstract relations between concepts or the constituents of concepts. Functional necessity corresponds to the external dimension of concepts. What makes a proposition logically necessary is both beyond the scope of this essay

HeinOnline -- 11 Cardozo L. Rev. 528 1989-1990

and my ken.[7] Of importance here is the fact that what is considered by some philosophers to be merely "contingent" and not logically necessary may still be functionally necessary. Propositions (or institutions) that are functionally necessary are contingent insofar as they may no longer be necessary if the empirical facts of the world changed, but so long as the empirical facts of the world do—and for functional reasons must—remain as they are, such propositions are in their own way as "necessary" as those that are abstract.

Given the possibility of engaging in either an internal or an external mode of conceptual analysis, why might it be useful to pursue more than one mode of conceptual analysis at the same time?[8] If concepts are the tools by which we understand ourselves and our world, we critically analyze our concepts because we want to obtain a better understanding than our current repository of concepts supplies. We attempt to improve our conceptual understanding to discover which of our previously held beliefs about the world are wrong—or at least inferior to other ways of looking at things. Yet the fact that some of our previously-held beliefs were wrong or inferior also concedes that any of our presently-held beliefs and the underlying conceptual structure that supports our beliefs may be mistaken or deficient. This is to say no more than any mode of conceptual analysis is potentially fallible in that even a generally sound mode of analysis can yield an erroneous or inferior conclusion.

How then do we reach conclusions with any degree of confidence, in light of our knowledge that, however we try to reach a conclusion, we may be wrong? To put the issue another way, at any given time, how do we justify having any confidence that the conclusions presently recommended by our conceptual analysis (whether external or internal) are correct—that is, superior to any other available conclusion? The answer to the problem of confidence cannot come from "within" a particular analysis itself, for any mode of analysis simply recommends the conclusion it recommends. Confidence must come from a confirmatory mode of analysis that is different from and "outside" (but not necessarily "above") the one that is our favorite. That is, we must compare the results recommended by our favorite mode of analysis with those recommended by other modes of analysis that have also proved to be worthwhile or sound. It is only the *convergence* of multiple sound modes of analysis—the more the better—

[7] See generally Hamlyn, Contingent and Necessary Statements, in 2 Encyclopedia of Phil. 198 (P. Edwards, ed. 1967).

[8] I discuss this issue at greater length in Barnett, The Virtue of Redundancy in Legal Thought, Clev. St. L. Rev. (forthcoming).

on a single conclusion that can engender confidence that this conclusion is superior to its rivals. In this way, if both an internal and external analysis of contract reveal that consent is essential to contract then we can be more confident of this conclusion than if it is supported by either mode of analysis standing alone.

Significantly, this discussion of the value of redundant modes of analysis presupposes that different modes of analysis will sometimes produce different results. For if all sound modes of analysis always reached the same result we could be content to rely on only one of these modes of analysis and it would not matter which. Indeed, given completely convergent results, it would be extremely wasteful to engage in multiple modes of analysis. The inherent limitations of any mode of analysis, however valuable it may be, ensures that different sound modes of analysis will occasionally differ in results. What then do we do when competing modes of analysis, each of which we have reason to respect as sound, return different conclusions?

The first thing we do is use caution. We must acknowledge that we are on shaky ground. As I have discussed elsewhere, there are a number of ways that we can achieve convergence when conflicts between modes of analysis emerge.[9] For example, we can recalculate to see if we used a given mode of analysis correctly. Or we can reconsider either or all of the conflicting modes of analysis to determine if improvements in our methodologies are warranted. In this way, the existence of a conflict between modes of analysis is itself quite valuable. Such conflicts reveal areas of our understanding that, in comparison with those matters about which we are more confident, we have reason to question. Scarce intellectual resources may then be committed to solving the problems identified in this way. Only relative doubt induced by such conflict is likely to motivate us to reexamine our methods as well as our conclusions and thus over time enable us to evolve increasingly powerful modes of analysis.

Of course, the conflict among modes of analysis may not yield to even the most intense scrutiny. As in science, we may need to await the development of ideas in some other discipline that may be decades or even centuries away. In which case it is useful to know that this problem should be prominently "bracketed" so that others may return to it when our intellectual "technology" or tools improve. In the meantime, we can commit our intellectual resources to other problems that will yield more readily to the tools presently at our disposal.[10]

[9] See id.

[10] I discuss other ways we cope with intractable conflicts in the interim, in id.

HeinOnline -- 11 Cardozo L. Rev. 530 1989-1990

II.

In his criticism of my writings on contract, Professor Benson distinguishes starkly between an "empirical" and an "abstract" mode of analysis and strongly favors the latter.[11] He thereby signals that he is engaged in what I would characterize as an internal analysis of the concept of contract. In contrast, the second aspect of my analysis of contract in general—and consent in particular—is more akin to what I have been calling an external or functional analysis, although I have not sought in my writings to stay rigorously on one side of this distinction or the other.

While Professor Benson does not explicitly employ any such distinction, he may very well be willing to accept it. Ernest Weinrib, who applies a very similar methodology to tort theory, expresses a quite comparable (though not entirely the same) distinction between "intrinsic" and "extrinsic" relations among the components of tort law:

> Relationship can be understood in two ways. In an extrinsic relationship the elements are conceived as originally standing outside one another as independent entities that are then contingently joined. . . . [T]heir joinder does not represent an inner necessity of their own but the result of an outside pressure. In contrast, the parts of an intrinsic relationship are originally intertwined with one another, so that they are incomprehensible apart from the relationship that they constitute.[12]

Elsewhere, Weinrib refers to his own intrinsic theory of torts as

> internal in every respect. It operates from within tort law, in that it starts from the features that are indispensable to our notion of tort law and makes sense of tort law's conceptual and instrumental structure. It draws on the coherence that is internal to a sophisticated legal system. The intrinsic ordering it proposes as the law's intelligibility represents the most internal form of understanding for the aspects of an integrated whole. It locates a notion of doing and suffering internal to tort law. And it explicates doing and suffering without reference to any extrinsic goals.[13]

Weinrib and presumably Benson might well then accept my characterization of their abstract approaches as "internal," but both would likely reject my suggestion that what I call the functional or external perspective has anything like an equal status. Weinrib, for

---

[11] See Benson, supra note 1, at 1112 n.57.

[12] Weinrib, Causation and Wrongdoing, 63 Chi.[-]Kent L. Rev. 407, 444-45 (1987).

[13] Weinrib, Understanding Tort Law, 23 Val. U.L. Rev. 485, 525 (1989).

HeinOnline -- 11 Cardozo L. Rev. 531 1989-1990

example, refers pejoratively to the extrinsic perspective of tort law as "instrumentalism" and says it:

> both is alien to tort law and makes the elements of tort law alien to each other. Instrumentalism starts with goals that are independent of tort law and subjects tort law to explanations that make nonsense of its conceptual and institutional structure. The conventional ordering of instrumentalism hacks tort law into discrete elements that it cannot coherently reassemble.[14]

Professor Benson also uses the term "instrumental" when criticizing Charles Fried.[15]

If, however, it makes sense to claim, as I have in this essay, (1) that concepts are tools by which we understand and operate in the world in which we find ourselves; (2) that concepts, like other tools, can themselves be analyzed both internally and externally; (3) that these analyses both influence, reinforce, and check one another; (4) that Professor Benson's abstract analysis of contract is an internal analysis of the concept of contract; and (5) that my functional analysis of contract is (mainly) an external analysis of the concept, then his characterization of my account as "inadequate" is correct, but misleading. For it suggests, wrongly in my view, that because a strictly external perspective on contract law lacks the abstract or internal dimension and is therefore incomplete, an entirely abstract or internal analysis is superior in some fundamental way.

Conversely, it would be equally misleading of me to suggest that Professor Benson's account of contract is inadequate because it is merely abstract and is insufficiently empirical or contextual. If it is true that concepts may be properly understood *both* from an internal and external perspective, then neither perspective alone is entirely "adequate" or sufficient to account fully for any particular concept including the concept of contract; both perspectives are necessary to a thorough conceptual understanding. And both perspectives are sufficient to understand a concept only if these two modes of analysis taken together are the only ways of analyzing concepts. Of course, depending on our purposes for understanding any given concept, there may be other perspectives that are valuable as well. For example, we may examine the psychological aspect of concepts.

There is no sin in specializing in one mode of analysis or another. The division of labor yields benefits in intellectual as in other pursuits.

---

[14] Id.

[15] See Benson, supra note 1, at 1105 ("Where a justification is formulated in instrumental terms, as is Fried's, the necessity of the means is dependent upon and is limited by the necessity of the end.").

HeinOnline -- 11 Cardozo L. Rev. 532 1989-1990

Yet it is usually a mistake in the intellectual arena, as in others, to erect one's chosen specialty to an exalted status or, to put the matter in more familiar terms, to insist that one's chosen mode of analysis is more "fundamental" than all others. It may very well be that there is a particular order in which certain modes of analysis ought to be used. For example, in developing our conceptions of rights we may begin with an historical analysis of those rights that have evolved in the common law. Next we may subject these "legal" rights to the critical scrutiny provided by moral rights analysis. Finally, we may project the operation of those rights that survive such critical scrutiny by employing a consequentialist mode of analysis. After this, we might well return to a historical inquiry to see if our refined understanding of rights changes our interpretation of the historical evidence previously examined, and so on.[16] Which of these modes of analysis is the most fundamental? The first that provides the grist for the mill, or the critical modes of analysis that separate the wheat from the chaff? Are not all functionally necessary? While I cannot prove that one mode of analysis is never more fundamental than any other, I doubt that, given the reasons we engage in conceptual analysis in the first place, this is a useful way of describing the relationship among competing modes of analysis.[17]

III.

In Part I, I described what may be called a "checks and balances theory of knowledge" for it closely resembles the reason why the framers of the Constitution of the United States favored dividing power into the three branches of the federal government and between the federal government and the states. Knowing from their recent experience that even representative bodies can act out of interest or passion rather than out of an impartial assessment of the common good, the framers decided to create competing agencies of power at the federal level with the idea that, if they all concurred in a given result, then there was some reason to be confident in that result; if,

[16] See Barnett, Forward: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses, 12 Harv. J.L. & Pub. Pol'y 611 (1989). There I use the idea of competing modes of analysis to put the perceived conflict between historical, moral rights, and consequentialist approaches to law in perspective.

[17] I confess to having used such terminology on occasion. See, e.g., Barnett, A Consent Theory, supra note 2, at 294. "The process of contractual transfer cannot be completely comprehended . . . without considering *more fundamental* issues, namely the nature and sources of the individual entitlements and the means by which they come to be acquired." (emphasis added). Elsewhere in the same work I used terminology that is more congenial to the views I express here. See id. at 299. "[C]ontractual obligation arises from a consent to a transfer of entitlements and is thereby *dependent* on a theory of entitlements" (emphasis added).

HeinOnline -- 11 Cardozo L. Rev. 533 1989-1990

however, any branch dissented then the wisdom of the action was called into question (though not perhaps fatally). As between the federal and state governments, because each agency of power could reach mistaken or corrupt outcomes it was good to have competing agencies of power to whom to turn in case of emergency.

Of course, this is itself an "external" analysis of the separation of powers and of federalism (albeit crude). To understand how separation of powers works, one must analyze it internally as well—to see of what it consists. Similarly, a checks and balances theory of conceptual understanding is also external. It is not metaphysical. It neither explains how modes of conceptual analysis operate nor why they seem to be valuable ways of understanding the world in which we find ourselves. In this way, like the consent theory of contract that Professor Benson describes as inadequate, the checks and balances approach to competing modes of conceptual analysis is not comprehensive. And this brings me to my final point.

To say something valuable about something is hard enough. No one can say everything about something (or for that matter something about everything). It is therefore almost never sufficient grounds for *rejecting* any given approach merely to point out that it fails to say all there is to say about something (or even that it errs in some respects). Rather, we reject an approach because it has been shown that it is of so little value in understanding the subject at hand, as compared with other available approaches, that we had best leave it alone in the future. Surely this can also be said about some modes of analysis. Astrology is a popular example of a completely worthless or unsound mode of analysis, but Newtonian physics is a less extreme example of a methodology that had—and still has—some explanatory power. To the extent that Newtonian physics was rejected it was not because it was believed to be entirely wrong, but because it was believed to be inferior to other modes of analysis in handling the problems of concern to the discipline of physics.[18] Is a functional analysis of so little value in understanding (and reforming) the discipline of law and the subdiscipline of contract law that we had best ignore it from now on in favor of an exclusively abstract mode of analysis? If the answer is no, an exclusively abstract approach is itself inadequate to a complete understanding of contractual obligation.

Professor Benson is probably correct then in describing my approach to the concept of contract as inadequate, but we can now see why such a claim is much less than it initially appears. I cannot know

[18] On the crucial role that disciplines play in the evolution of conceptual understanding, see S. Toulmin, supra note 5, at 133-260.

HeinOnline -- 11 Cardozo L. Rev. 534 1989-1990

the precise intention behind his choice of this term. He may mean "inadequate" as I do, in the sense that *no* valuable mode of analysis is ever completely adequate or self-sufficient. Evidence for this interpretation can be found in his discussion of Hegel's Philosophy of Right:

> In short, Hegel's claim is that the priority of abstract right is an essential feature of the priority of right itself. At stake in the issue of priority, then, is a claim neither that abstract right exhausts the meaning of right *nor that it is a more adequate embodiment of right than are the other stages,* but only that it is the conceptually necessary beginning point in the elucidation of the sequence of the shapes of right.[19]

Or he may mean, as most usually do when they use such terms and as the general tenor of his article suggests, that my account of contract is inferior to the account he provides. If he intended the latter judgment he may still be right. But if I am correct in claiming that both an external and internal conceptual analysis are necessary to obtain the fullest possible understanding of contract and that Professor Benson's account of the concept of contract is purely internal, then he probably is not.

---

[19] Benson, supra note 1, at 1151 (emphasis added).

HeinOnline -- 11 Cardozo L. Rev. 536 1989-1990