

Justifying Racial and Gendered Contract in Europe*

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1 Introduction

Martijn Hesselink's *Justifying Contract in Europe* (hereafter: JCE) is deservedly praised as a thought-provoking book. JCE promises a critical lens on normative stakes and justifications of contract in a context where scholarship tends to be celebratory of contract law's function and accomplishments.¹ The book contains diagnostic and remedial ambition in the discussion of fundamental questions of European contract law. Diagnostically, JCE's critical discussion of 'leading contemporary political theories' intends to improve an understanding and articulation of 'what exactly is wrong with existing European contract law rules'. Remedially, JCE aims to assist in our envisioning of pathways towards 'alternative futures' that contain more just, more democratic contract law.² In this contribution, I critique JCE's diagnostic and remedial ambitions: does it assist in the envisioning of more just alternative futures?

Hesselink's selection of leading theories is a starting point for the assessment of JCE's diagnostic abilities. Of course, and as this journal issue shows, different readers will wonder about choices around what political theories and which political theorists are positioned as 'leading'. Such choices of inclusion and exclusion are, of course, inevitable and Hesselink anticipates such framing criticisms in the book.³ What stands out is the comparatively elaborate reflection on the proper place of 'feminism' in JCE.⁴ Noting the plurality of feminisms, *i.e.*, there is not one single 'feminist' political philosophy, feminisms get disbursed and discussed under the various other leading theories.⁵ A secondary explanation for the book's approach to feminism can be found in the footnotes, where Hesselink places a critical note on how this framing may be biased based on social privilege, notably white male privilege.⁶ But what happens in JCE after this reflection on framing 'feminism' in

* Much gratitude to all who enrich my thinking on social justice and contract, especially my feminist colleagues at the Ohio State University and Bureau Clara Wichmann. Thanks to the readers and editors for comments, especially Mirthe Jiwa and Niels Graaf.

1 Aditi Bagchi, 'Public Justice and Private Consent', in *Research Handbook on Private Law Theory*, eds. Hanoch Dagan and Benjamin C. Zipursky (Cheltenham: Edward Elgar Publishing, 2020). Martijn W. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford: Oxford University Press, 2021), 4.

2 Hesselink, *Justifying Contract in Europe*, 4.

3 Hesselink, *Justifying Contract in Europe*, 7-8.

4 Hesselink, *Justifying Contract in Europe*, 7-8.

5 Some feminists identify and interpret this move as a political act of aggression and epistemic injustice, see Mirthe Jiwa in this issue.

6 Hesselink, *Justifying Contract in Europe*, 7, footnote 11.

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light of its plurality and the potential salience of white male privilege? The answer matters, not because (some) feminists may desire to see *more* feminist justifications of contract, but because, I argue, the sorts of justifications we are encouraged to see make structural forms of injustice invisible. Such invisibility is a serious obstacle to diagnostic and remedial potential.

Several observations stand out. First, to the extent that JCE makes space for feminist voices in the framing of injustice, JCE remains firmly within white feminist territory. Intersectional feminist theorizing on justice, democracy, and freedom that centres on, for instance, gender and race is largely absent from consideration. Intersectionality is treated (non-intersectionally) as a ‘subject’ relevant to European contract law but plays little role in the discussion of justification itself. In fact, intersectionality is structurally excluded from doing that analytical work in JCE. Such exclusion is visualized in the grid structure of the book: ‘6x6=36 boxes’. This structure does not invite or even allow the reader to see the possibility of intersectional analyses. Second, the critical note on the relationship between social privilege and JCE’s framing raises a question about the book’s disengagement with the relationship between social privilege and justification. For instance, alongside the approach to intersectional feminist scholarship, the impressive bibliography on normative political and legal theory includes very few scholars who centre various forms of (intersecting) social privilege in questions of justice, democracy, and freedom.⁷

In this contribution I focus on the disengagement with racial and gender privilege, because these were among those elevated by Hesselink in the footnotes. What allows for this disengagement? The answer offers not only a critical reflection on JCE, but also on the field of political and legal theory that JCE engages and reconstructs. In the remainder of this critique, I address these two points in turn.

2 Intersectional Feminist Diagnostics

JCE’s introduction signposts engagement with ‘the various feminist strands in normative political and legal theory’ in discussion of the fundamental political questions. In Chapter 7 we see an example of how feminisms are brought into discussions on commodification and inalienability with the example of gestational services and surrogacy contracts.⁸ The framing of feminist concerns around gestational services happens centrally through the work of Radin and Anderson. The discussion of Anderson’s work forefronts spheres of valuation, and the valuation of goods in the context of communities of valuing: ‘(...) valuing happens by “embedding” a good in a set of social practices.’⁹ Radin’s work focuses on

7 Intersectional scholarship engages a wide range of intersecting social privileges and oppressions, I merely highlight gender and race as illustrations here.

8 Hesselink, *Justifying Contract in Europe*, 340.

9 Hesselink, *Justifying Contract in Europe*, 372-373.

pragmatic compromises that result in ‘incomplete commodification’ and ‘permit[s] only unpaid surrogacy’.¹⁰

Intersectional feminist work, however, brings in different frames and elevates other sets of concerns about surrogacy arrangements as contracts. For instance, through intersectional analyses, surrogacy may be praised for its liberating potential from heteronormative patriarchal norms around parenthood.¹¹ At the same time, there is well developed critique regarding surrogacy’s relation to interlocking gender and racial systems of oppression. Dorothy Roberts, for instance, writes extensively on the gendered and racial politics of reproductive technologies.¹² In early work, she theorized the relation between reproductive technologies and gendered and racial oppression, which moved the conversation from the commodification of the ‘womb’ to commodification of the genetic tie and the problematic biological notion of race.¹³

Roberts argued that feminists like Anderson and Radin ‘miss an important aspect of the practice when they criticize it for treating women as fungible commodities’ precisely, because ‘[a] Black surrogate is not exchangeable for a white one’.¹⁴ Robert’s point is that the harms of surrogacy cannot be understood and articulated without understanding how race impacts (de)valuation of humans in the real world. Such an intersectional feminist approach not only shapes how we view questions of reproductive justice, but – crucial for JCE – how we understand the meaning of contractual freedom when it comes to surrogate arrangements.

The point is not that the book fails to mention Roberts (or other particular scholars), but that feminist intersectional works are structurally missing from JCE’s substantive discussion of leading theories which inform how we approach the fundamental questions in JCE’s modelling of contract justification. Intersectional feminisms appear to be excluded under the headings of leading political philosophers, legal theorists, as well as under the heading of leading feminists. Such exclusions are also striking when we ask: *who* gets to voice and shape the concerns about contract’s justification? JCE offers extensive engagement with an impressive bibliography of predominantly, white male scholars. With impressive interpretative labor, JCE offers us insights into how they may view the question of surrogacy arrangements. In that context the omission of black feminist works on this topic stands out as something other than a justified matter of

10 Hesselink, *Justifying Contract in Europe*, 377-378.

11 This conversation, for instance, brings in various issues around surrogacy, including sex, gender, sexuality: Darren Rosenblum and Noa et al., ‘Pregnant Man?: A Conversation’, *Yale Journal of Law and Feminism* 22, no. 2 (2010): 207-242.

12 Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Books, 1999); Dorothy Roberts, ‘Privatization and Punishment in the New Age of Reprogenetics’, *Emory Law Journal* 54 (2005): 1343; Dorothy Roberts, ‘Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?’, *Faculty Scholarship at Penn Law* (2009): 783; Dorothy Roberts, ‘Why Baby Markets Aren’t Free’, *UC Irvine Law Review* 7, no. 3 (2017): 611.

13 Roberts, *Killing the Black Body*, 279.

14 Roberts, *Killing the Black Body*, 279.

selection. Adding boxes in JCE's grid, for instance, does not offer a remedy for this particular exclusion. In the grid, intersectional work can only be approached non-intersectionally – as if, for instance, gender, race, sexuality, class, ability injustices only matter to some and only arise in some instances. That is, visibility of issues of injustice approached intersectionally can only be of marginal relevance to justification. Thus, the disappointment is not with incompleteness of contract's justifications and contestations (completeness is an impossible standard even for a scholar of this calibre), but about the modelling of a conversation that purports to present the most important views on the most fundamental issues in which intersectional scholarship can find no place. The potential for demarginalization is undermined from the start.

For a book that aims – at least in part – to promote an improved diagnostic understanding of 'what exactly is wrong' with contract law in Europe the insights of intersectional feminist works are valuable far beyond the question of surrogacy. If JCE has the ambition to make visible the sorts of social injustices that disadvantage the 'most vulnerable' intersectional feminist insights are pertinent to contract's foundational pillars that direct its scope and definition. Justifications of contract are justifications of separations and distinctions between 'economic', 'social', and 'natural' relations that support and maintain social provision and economic order. Such insights can reveal not only how devaluation of gendered and racialized people, care, and social reproductive labor comes with contract's approval, but also how justification is itself gendered and racialized (see next section). If 'those who are at the intersection of various vulnerable social groups'¹⁵ are indeed an urgent concern of justice in contract, intersectional feminist scholarship has much 'leading' to say about the meaning of liberty and contract's justification.

JCE's clear explanation for these omissions is found in the observation that 'a political discourse on intersectionality in European contract law is entirely lacking'¹⁶ and that in the framing of the book the focus lies on 'the main public justifications and contestations of European contract law that have already been put forward in the political and academic debates'.¹⁷ On the one hand, a critical question comes to mind. Namely, when, where, and by whom are such justifications and contestations expected to enter and elevated in discourse?¹⁸ Should a book like JCE, one that starts with a radical democratic and pluralistic hunch, not be more radically inclusive of the plurality and diversity of perspectives on justice, democracy, and freedom?

15 Hesselink, *Justifying Contract in Europe*, 307.

16 Hesselink, *Justifying Contract in Europe*, 307.

17 Hesselink, *Justifying Contract in Europe*, 7.

18 As Mills states: 'anybody can work on anything', but '(...) in practice, (...) identity makes a difference.' In Charles W. Mills, 'Theorizing Racial Justice', *Tanner Lecture* (2020), 12. This observation points to the descriptive correlation between the presence of (white) women and the systemic analysis of gender in philosophy, and conceptual whiteness in the absence of scholars of color. Identity makes a difference in many ways, and women scholars of color have good reasons to be dissuaded from doing work on gender and race under the current conditions of European legal academia.

On the other hand, the political discourse on intersectionality in European contract law is entirely lacking. If we read JCE as reconstruction of this discourse, then critical observations around the disengagement with gender and racial injustice are not so much occasioned by this book but also by the fields of (white male) political philosophy and legal theory in which academic attempts at justification of contract are entangled. What allows for this continued disengagement with gender and racial injustice and what are its consequences?

3 Social Privilege and Epistemic Injustice

A disconnection between contract theorizing and theorizing of gender and racial injustice is often explained by the idea of a division of labor between public and private law.¹⁹ When contracts are viewed solely as *private* transactions subject to personal morality, gender and racial injustice can be bracketed as (urgent) matters to be dealt with elsewhere and by someone else. Of course, JCE rightly does not treat contract as 'private' in this sense and instead addresses concerns of social justice in contract such that this private/public distinction offers no principled reason for exclusion. Instead, the decentring of race and gender appears not the result of a division of labor but mirrors a similar disengagement in the 'leading political theories' selected for discussion.

For explanations and consequences of such disengagement we may turn to scholars like Charles Mills, who extensively discussed the disengagement with racial injustice in political philosophy. His work aims to demystify the presumed raceless endeavor and commitment to egalitarianism of (non-gendered, non-racialized) persons that lies at the heart of liberal political philosophy.²⁰ To the extent that liberal-egalitarian theory confronts racism, he argued, it is often framed as an abhorrent, exceptional mistake and deviation from an otherwise just basic structure. Mills shows that the consequence of such colorblind approaches to liberal justice is the conceptualization of justice that justifies racial hierarchy. His arguments on race mirror some feminist endeavors to uncover patriarchal biases in perceptions of the social and political order.²¹ Both strands of critical approaches to freedom and justice problematize diagnostic and remedial ambitions in JCE that proceed through a selection of gender and race neutral 'leading political theories'. Unlike the structural difficulty of including intersectionality, such gender- and race-based criticisms are merely omitted in the book, while engagement would have strengthened the discussion. Without it, we are left to wonder whether the 'leading' justifications of contract included in JCE are merely justifications of racial

19 This explanation is offered for exclusions of all forms of systemic justice, see: Aditi Bagchi, 'Distributive Justice and Contract', in *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Letsas, and Prince Saprai (Oxford: Oxford University Press, 2014).

20 Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1999), 16.

21 Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988). Both approaches that single out race or gender as leading have been critiqued by intersectional scholars. See for instance: Kathryn T. Gines, 'Black Feminist Reflections on Charles Mills's "Intersecting Contracts"', *Critical Philosophy of Race* 5, no. 1 (2017): 19.

and gendered contract. If so, it does not support our confidence in envisioning more just alternative futures based on them.

Again, the absence of these critiques in JCE merely mirror a similar disengagement in political philosophy and legal theory more broadly. Social privilege and epistemic injustice offer some insights into continued disengagement. Mills, for instance, observes an epistemology of ignorance when it comes to race and racial hierarchy which plays out in the context of the demographical whiteness of the field of political philosophy.²² White privilege itself is obscured from view for the dominant (white) group as a structural feature of racial hierarchy that privileges whiteness. Striking is Mills' depiction of the 'otherworldliness' of white political philosophy that marginalizes historic injustices and 'ignores the basic political realities'.²³ The point is that social privilege does not necessarily carry with it epistemic privilege – social perceptions regarding society's functioning.²⁴ Such epistemologies of ignorance – when at work in political philosophy or in the legal discipline – result in dominant intellectual traditions that take exclusions of gender and race centred work and gendered and racialized scholars for granted.²⁵ This is not (just) a matter of lopsided representation. Rather, the problem is justice itself: 'the idea that we might sometimes, or even routinely, be committing epistemic injustice in our theorising of social justice'.²⁶ If these epistemologies of ignorance are at work in the theorizing of social justice (and other normative stakes), they are at work in the theorizing of contract that relies on these political philosophical foundations. The resulting questions for JCE are not (solely) about the influence of gender and racial privilege on the classification of feminism (as Hesselink remarks in the footnotes). Rather, concerns about the influence of social privilege go to the heart of attempts at justifying contract in Europe.

4 Remedial Ambitions and Contract's Alternative Futures

How and where could engagement with gender and racial injustice take place in a book like JCE? The previous section suggest that it would be hard to include intersectional feminism among the political theories discussed in JCE's structure, although intersectional interlocutors could be made more visible in discussions on various specific contract questions and concerns. Other avenues to addressing gender and racial injustice could take place in a more critical engagement of notions of justice, democracy, and freedom. Liberal-egalitarian theories of justice – notably

22 Mills, *The Racial Contract*, 18; Charles W. Mills, 'White Ignorance', in *Black Rights/White Wrongs* (New York: Oxford University Press, 2017).

23 Mills, *The Racial Contract*, 11; Carol Pateman and Charles W. Mills, *Contract and Domination* (Cambridge: Polity Press, 2013).

24 Rebecca Mason, 'Two Kinds of Unknowing', *Hypatia* 26, no. 2 (2011): 294-307.

25 Mills, 'Theorizing Racial Justice', 43.

26 Mills, 'Theorizing Racial Justice', 42; Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, *Epistemic Injustice* (Oxford: Oxford University Press, 2007); Miranda Fricker, 'Epistemic Injustice and the Preservation of Ignorance', in *The Epistemic Dimensions of Ignorance*, eds. Rik Peels and Martijn Blaauw (Cambridge: Cambridge University Press, 2016).

Rawls – are prominently discussed in JCE, but concerns of social privilege in the theorizing of such justice are not addressed.

Granted, interpretative labor is required to extend the implications of such critique to contract. Like Rawls and many other political philosophers, critiques based in gender and race say nothing much about contract law. Yet, the legal structure that enforces exchanges plays an important role in the political and social order, and in achieving and maintaining a (more) just society. There are points of connection through which such critique of liberalism could be extended to justifications of contract. For instance, Mills contrasts his theorizing of racial justice with liberals (notably other Rawlsians) who start their story with an egalitarianism that translates into the presumption of a corresponding economic egalitarianism in the initial distribution of material advantage and disadvantage. Rules on exchange that are justified through private consent (e.g., contract law) are then imagined sustaining and reproducing this equality and justifying any resulting inequality.²⁷ Similarly, rules on exchange that are justified on race neutral terms of freedom, democracy, and justice, are understood to sustain a colorblind egalitarian social order. The mechanisms through which the specifics of racial concerns are dissolved into the neutral and general structures of egalitarian concerns (e.g., of domination and exploitation) then relegate racial injustice to the margins of exceptionality – bad intentions, bad actors, and bad apples.

Theorists like Mills start with White supremacy, viewing this economic ordering as a way to ‘secure and legitimate the privileging of those individuals designated as white/persons and the exploitation of those individuals designated as nonwhite/subpersons’.²⁸ In this constellation, there is a more pressing concern to engage contract as a structure that maintains status quo privilege and oppression and to engage its mainstream justifications as pathways of state enforcement of unjust accumulated wealth (private property) and its transfer (contract). For Mills, liberal justifications of contract that are established on racial terms maintain status quo as White supremacy. Of course, this normative strategy that arises from centring race, invites intersectional insights through a critical engagement of the separation of race from gender, class, sexuality etc.

In short, intellectual engagement with gender and racial injustice in the justifications of contract can take multiple forms through which a more radical reconsideration of contract becomes possible and visible. Such engagement could give those participating in political and legal discourse in Europe reason to reconsider the relevant normative stakes of contract. Part of JCE’s strength and contribution is precisely in revealing divergence, and its ramifications, between ideas of justice, democracy, and freedom that underly contract law arguments. But

27 Mills, *The Racial Contract*, 32. Mills starts with racial hierarchy, while Pateman starts with patriarchy. Intersectional scholars start with the understanding that these systems of privilege and oppression are interlocking.

28 Mills, *The Racial Contract*, 32-33.

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through the disengagement with gender and racial justice, readers could misread just how deep divergence between remedial ambitions for contract really are.