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CONTRACT, PROMISE, AND THE RIGHT OF REDRESS

ANDREW S. GOLD*

ABSTRACT

This Essay reviews Nathan Oman's recent book, The Dignity of Commerce. The book is compelling, and it makes an important and original contribution to contract theory—a contribution that insightfully shows how markets matter. Yet, in the course of developing a market-centered justification for contract law, The Dignity of Commerce also downplays the significance of consent and promissory morality. In both cases, the book's argument is problematic, but this Essay will address questions of promissory morality. Oman contends that promise-based accounts struggle with contract law's bilateralism and with its private standing doctrine. Yet, promissory morality is a very good fit for these features of contract law if, instead of focusing on a promisor's moral obligations, we focus on a promisee's enforcement rights. When we look to the morality of enforcement, contract law and promissory morality are a close match. And, even if promissory morality cannot fully explain contract law, it can then be an important component of a successful explanation.

* Professor, DePaul University College of Law. I am grateful to Nate Oman and to participants at a conference on *The Dignity of Commerce* at William & Mary Law School for helpful comments. Any errors are my own.

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INTRODUCTION

*The Dignity of Commerce*¹ is a significant step forward for contract theory. With elegant arguments—even Shakespearean ones—Nathan Oman shows that contract law can be justified in a distinctive way.² Contract law can be justified through its support for markets.³ Adopting this insight, in turn, opens up a range of further insights about contract law doctrines, and it gives us genuinely new perspectives on legal policy. For example, it provides new insights into paternalism in contract law and its potential merits.⁴ It likewise provides an appealing basis for enforcing boilerplate.⁵ The book's thesis is illuminating.

The Dignity of Commerce, however, does not merely give us a new and fundamental reason to have contract law as an institution. The book also rejects consent theories, promise theories, and similar understandings of contractual obligations.⁶ From Oman's perspective, it seems consent and promise have relevance just to the extent they further valuable market institutions.⁷ And this strikes me as an error. *The Dignity of Commerce* intends to offer us *the* basis for contract law, but the book's argument is better understood to offer us *a* basis for contract law.⁸ It develops an important and valuable justification for contract law—a justification that until now has received far less attention than it merits—but still one basis among several.⁹

¹ See NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016).

² See *id.* at 1–8 (discussing Shakespeare's works and contract law).

³ See *id.* at 36–39.

⁴ See *id.* at 164–67.

⁵ See generally *id.* at 133–59.

⁶ See *id.* at 28–29 (rejecting consent theories); *id.* at 76–79 (rejecting promise theories of contract).

⁷ See *id.* at 76 (suggesting contract law should be organized around deontological morality “to the extent that doing so fosters a morality that supports market exchange”); *id.* at 142 (suggesting consent has “two subordinate roles” with respect to facilitating commerce and markets).

⁸ Or, if we subdivide contract types as some suggest, perhaps it gives us the justification for part of contract law. Cf. HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 7 (2017) (endorsing a contract law pluralism involving multiple contract types).

⁹ See generally *id.*; CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACT OBLIGATION* (1981) (arguing for a promissory justification of contract law); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269

The difficulty stems from the structure of Oman's argument. He questions the adequacy of alternative justifications for contract law, and often with very good reason.¹⁰ Yet, even if prominent non-market concerns (fairness, efficiency, moral rights, respect for promissory obligations) are incapable of providing stand-alone contract theories, this conclusion is not sufficient to demonstrate that a market justification is the only relevant basis for contract doctrine.¹¹ It is one thing to say that consent-based theories fail to adequately ground contract law (a valid point), or that promise-based theories fail to adequately ground contract law (also a valid point). It is quite a different thing to rule out the relevance of consent to a contract theory unless consent happens to advance markets. For example, even granting the book's premises, consent may still be a side constraint on legitimate contractual enforcement.¹² Similarly, promissory morality may help to make sense of contract law, even if we cannot look to promissory morality alone for a complete explanation of contract doctrine.

Although the consent issue is significant in its own right, I will focus here on promissory morality. Oman's work poses a series of challenges for promise theories of contract, in light of bilateralism and private standing concerns.¹³ As we will see, the morality of promising can easily meet these challenges. Indeed, the morality of promising is a more natural fit for private standing doctrine than Oman's preferred account. To see why requires a shift in emphasis, for promissory morality does not apply in the way that promise

(1986) (arguing for a consent-based justification for contract law); Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U.L. REV. 1, 3 (2009) (arguing for a transfer-based justification for contract law) [hereinafter Gold, *Property Theory*].

¹⁰ See OMAN, *supra* note 1, at 28–29 (questioning consent theory); *id.* at 76–79 (rejecting promise theory).

¹¹ I assume for purposes of this discussion that Oman is making an interpretive claim about contract law—that is, a claim that we should *understand* contract law in terms of a market justification, and not in other ways. If his argument is instead taken to make a normative claim that markets (even virtuous markets) ought to be our only concern at the expense of other moral concerns, the challenges for his approach would be substantially more difficult.

¹² In case this seems like a purely hypothetical viewpoint, it should be noted that this is a standard component of transfer theories of contract. Transfers are often thought to require consent, yet an individual's consent is not enough on its own to effectuate a transfer. See, e.g., Gold, *Property Theory*, *supra* note 9, at 26 (indicating why consent is not enough); *id.* at 31 (indicating consent is a necessary element).

¹³ See OMAN, *supra* note 1, at 114–26.

theorists often think.¹⁴ It is not the promisor's performance obligations that should be the focus of our attention when we try to explain and justify contract law. Rather, promises occupy a different role. The morality of promises is relevant for determining when a contracting party deserves a right of redress.¹⁵

The following sections will develop the significance of this view. Part I of this Paper will summarize Oman's critique of promise theories. As noted, this critique takes two forms: a bilateralism challenge, and a private standing challenge.¹⁶ Part II will situate these concerns within a broader account of corrective justice. With this backdrop, we can better see why promissory obligations are a problematic basis for explaining contract law. Part III will develop a redressive justice alternative. From this right-focused perspective, we can see how promissory morality plays an important role in contract law, and how promissory morality is a good match for both bilateralism and private standing. Part IV will discuss a remaining concern for a redressive justice account: the problem of legitimate enforcement. Only some breaches of promise are suitable for a coercive remedy. This Part will note several bases for thinking that contractual promises should fall into this category. In the process, this Part will also indicate why the consideration doctrine is an integral part of contract law doctrine. The final Part will then conclude.

I. THE REMEDIAL DEBATE

As noted, *The Dignity of Commerce* develops a bilateralism challenge and a private standing challenge.¹⁷ The bilateralism challenge is a standard feature of contemporary private law theory.¹⁸ As Ernest Weinrib, Jules Coleman, and others have emphasized, private law pairs a plaintiff and a defendant together, with interconnected rights and duties, wrongs and remedies.¹⁹ We might imagine deterrent sanctions that take from the defendant and give to the public fisc, or to a local charity. Or, as in New Zealand, we

¹⁴ See *infra* Part III.

¹⁵ See FRIED, *supra* note 9, at 14–17, 24–27.

¹⁶ See OMAN, *supra* note 1, at 114–26.

¹⁷ See *id.*

¹⁸ See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 13–23 (2001); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 63–66 (1995).

¹⁹ For analysis of this bilateral structure, see WEINRIB, *supra* note 18, at 63–66; COLEMAN, *supra* note 18, at 13–23.

might think that in order to address certain claims, plaintiffs should be able to draw on a fund.²⁰ Neither of these is the ordinary approach. Damages orders take from the defendant and give to the plaintiff, and this is built into the law's conceptual structure.²¹ Oman contends that this bilateralism is not only a problem for efficiency theories, but also a problem for promissory theories.²²

The second challenge concerns private standing. Private standing has become a prominent topic in recent years with the advent of civil recourse theory.²³ As civil recourse theorists emphasize, only certain parties get to sue.²⁴ It is simply not the case that anyone who is foreseeably harmed by a legal wrong can bring a claim. Furthermore, in the usual circumstance, not even the government has the privilege to initiate private suits against a defendant for wronging another private party.²⁵ Instead, the party that gets to bring suit is characteristically the party who was legally wronged, and only that party. As Oman notes, "nothing happens unless the promisee chooses to act."²⁶ On his account, this feature is also a hurdle for promissory theories.²⁷

A. *Bilateralism and the Expectations Remedy*

Before proceeding, it may be worth noting a definitional question. While the book references a "bilateralism" challenge for promissory accounts, its discussion centers on the idea that promissory accounts lack remedial fit.²⁸ It does not argue that remedies are

²⁰ For a helpful discussion of the New Zealand approach and its significance, see generally David Enoch, *Tort Liability and Taking Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 250 (John Oberdiek ed., 2014).

²¹ See OMAN, *supra* note 1, at 113–14.

²² *Id.* at 114–20.

²³ See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82–93 (1998) [hereinafter Zipursky, *Rights*] (discussing civil recourse theory).

²⁴ *Id.* at 82–85.

²⁵ See OMAN, *supra* note 1, at 123.

²⁶ *Id.* at 113.

²⁷ See *id.* at 117–26.

²⁸ Oman describes this as a bilateralism argument, which may indicate we are using different definitions of bilateralism. See *id.* at 117 ("Promissory theories have similar difficulties accounting for bilateralism and private standing."). As far as I can tell, his argument nonetheless focuses on remedial fit and not on the bipolar, structural features usually associated with bilateralism arguments in other settings.

going to the wrong party (or parties), or that a promissory account is otherwise in tension with contract law's bilateral structure. I am not certain Oman is actually making a bilateralism argument as the argument is usually characterized. The potential distinction need not detain us, however, if the book's argument succeeds. For, if *The Dignity of Commerce* is right, expectation damages are a stumbling block for promissory accounts regardless.

To make his case, Oman begins with Charles Fried's classic promissory account of contract law.²⁹ For Fried, "[t]he connection between contract and the expectation principle is so palpable that there is reason to doubt that its legal recognition is a relatively recent invention."³⁰ In Oman's view, Fried is too quick in thinking that expectation damages match up to what a promisor owes after breaching.³¹ Sometimes an apology will be the right response,³² and Oman is clearly right in these settings. At some point, we have probably all found ourselves forced to break a promise, often due to circumstances outside our control. Depending on our relationship to the other party, the seriousness of the promise, and the consequences of the breach, there are cases where an apology may be all that is required.³³

Nor is this the only sticking point. In some cases, expectation damages might be equivalent to performance—someone who fails to pay a debt of \$500 and then must pay \$500 in expectation damages falls into this category.³⁴ Yet, as Oman notes, there are many other cases in which a payment of expectation damages is quite distant from actual performance.³⁵ Services are often hard to replicate in a satisfactory way, and in these cases the promise principle and the expectation principle are not straightforwardly connected.³⁶ Once again, what the promisor owes as a matter of promissory morality could easily diverge from what the law provides for.

²⁹ *Id.*; see generally FRIED, *supra* note 9.

³⁰ FRIED, *supra* note 9, at 21.

³¹ See OMAN, *supra* note 1, at 117–19.

³² See *id.* at 117–18 (describing a convincing hypothetical fact pattern in which the author should apologize to his wife for breaking a promise rather than provide her with cab fare).

³³ See *id.* at 117.

³⁴ See *id.* at 118.

³⁵ See *id.* at 117–19.

³⁶ See OMAN, *supra* note 1, at 118–19.

The book also considers an alternative view that might explain the link between expectation damages and promises.³⁷ Perhaps, “promissory obligations continue to exist in some sense even after the initial promise has been broken, and it is this residual promissory obligation that creates the duty to pay expectation damages.”³⁸ Now this is an account that allows for real differences between initially promised performance and subsequently paid damages remedies:

On this view, expectation damages are simply the continuation of the initial promissory obligation. If I promise to deliver goods to you at a specified time and fail to perform, my promissory obligation has not come to an end. Rather, I remain obligated to do the next best thing or something of the like.³⁹

The Dignity of Commerce describes this as a “residual obligations theory.”⁴⁰ It also suggests that this theory fails.⁴¹ Importantly, in some cases the residual obligations that we owe do not “consist[] of a duty to pay money.”⁴² Here is Oman’s example:

Imagine that I am on the way to the airport to pick up my wife at 5:00 P.M., but through my own negligence I left late. At 5:15 P.M., I pull into the arrivals lane at the airport, and when I see my wife waiting at the curb, rather than stopping to pick her up, I roll down the window and toss out a wad of money as I speed by. Few would say that such actions demonstrate a mastery of promissory morality.⁴³

This conclusion is compelling, and, as a conference participant was quick to add, this promisor behavior seems also to not demonstrate a mastery of marriage. Throwing some money at a promisee is often not the next best thing to keeping one’s original promise.

B. Private Standing

Promissory theorists must also confront an additional objection. Oman contends that such theories cannot adequately make

³⁷ See *id.* at 118–19.

³⁸ *Id.* at 118.

³⁹ *Id.*

⁴⁰ *Id.* at 118–19.

⁴¹ See *id.* at 117.

⁴² *Id.* at 119.

⁴³ *Id.*

sense of private standing doctrine.⁴⁴ It is a standard feature of contract law that the only parties who may sue for contractual breach are those parties whose contract rights were actually violated (third-party beneficiary doctrine being an apparent exception to the rule).⁴⁵ In other words, random bystanders do not get to sue when they realize that Person A has violated the contractual rights of Person B. Nor, for that matter, does the State ordinarily enforce contract rights even when it becomes aware of a clear violation.⁴⁶ Only the promisee can sue.

It is not hard to see how this structure could pose concerns for a promise theorist like Charles Fried. As Fried recognizes:

The moral force of a promise cannot depend on whether the promisee chooses to “enforce” the promise. After all, what does it mean to enforce a promise in the moral sphere? I suppose one can demand its performance, but if there is a morally binding obligation under a promise, the existence of the obligation does not depend on a demand by the promisee—nor on his scolding the promisor, nor on his feeling resentment.⁴⁷

As Oman observes, these “comments seem at least potentially hostile to private standing.”⁴⁸ We might readily conclude that anyone, including the State, has an interest in seeing to it that the contractual promise is kept, whether or not the promisee demands it.

Under a certain reading of promissory morality, then, private standing looks like a troubling feature of contract law.⁴⁹ Indeed, Oman’s argument implicates a wider domain. Private standing is prominently featured in civil recourse theory, and standing doctrine may support a broader critique of corrective justice theories in general.⁵⁰ Whether our concern is tort law or contract law,

⁴⁴ See *id.*

⁴⁵ See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (AM. LAW INST. 1981).

⁴⁶ OMAN, *supra* note 1, at 116.

⁴⁷ See FRIED, *supra* note 9, at 41.

⁴⁸ See OMAN, *supra* note 1, at 120.

⁴⁹ See *id.* at 119–20.

⁵⁰ For civil recourse accounts that emphasize this feature, see, e.g., Jason Solomon, *Equal Accountability Through Tort Law*, 103 NW. U.L. REV. 1765, 1776–77 (2009); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 714–16 (2003); Zipursky, *Rights*, *supra* note 23. See also Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1891 (2011) [hereinafter Gold, *Moral Rights*] (noting standing doctrine challenge for corrective justice accounts). It should also be noted that corrective justice theorists

courts generally limit standing to the party who was wronged by the defendant, and third parties are ordinarily incapable of bringing suit even if they were foreseeably harmed.⁵¹ Any private law theorist that focuses primarily on the enforcement of moral obligations to correct a wrong must explain how standing doctrine is consistent with her approach. If promissory morality does not match well with this feature, it is at an explanatory disadvantage.

II. A CLOSER LOOK AT CORRECTIVE JUSTICE

The Dignity of Commerce's suggestion of a residual obligations theory resonates with the corrective justice tradition.⁵² In particular, it matches the account of corrective justice that John Gardner has recently developed.⁵³ For context, this Section will elaborate on that account. Unlike some of the other leading corrective justice accounts, Gardner's account does not claim that primary rights continue in existence after a breach of obligation.⁵⁴ Instead, a right holder acquires new secondary rights after suffering a wrong, and the wrongdoer takes on secondary obligations to do the next best thing to complying with her original obligations.⁵⁵ With this backdrop, we can better see what challenges a residual obligations theory faces, and better assess how serious those challenges are.

On Gardner's view, all norms of justice are allocative, in that they determine who gets how much of something and when.⁵⁶ For Gardner, however, corrective justice is a distinctive kind of justice

have responses available to them. See, e.g., Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U.L. REV. 163, 198–203 (2011).

⁵¹ Exactly who should count as a wronged party in these cases is a matter of some dispute. For a suggestion that third-party beneficiaries may count as wronged, see generally Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFF. 109 (2015). Others would say that, to be wronged, one's rights must be violated.

⁵² See OMAN, *supra* note 1, at 118–19 (describing a residual obligations theory).

⁵³ See John Gardner, *What Is Tort Law For? Part One: The Place of Corrective Justice*, 30 LAW & PHIL. 1, 46 (2011).

⁵⁴ Oman rejects the idea that primary promissory obligations “continue to exist” after a breach, and I agree. See OMAN, *supra* note 1, at 118–19. A key benefit to the picture of corrective justice Gardner develops is that it allows for this insight. Gardner, *supra* note 53, at 46.

⁵⁵ Gardner, *supra* note 53, at 46.

⁵⁶ For development of the view that justice is allocative, see *id.* at 6. See also H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 21–23 (2d ed. 2008) (offering this type of account).

because it involves “allocation back”—that is, the undoing of a transaction.⁵⁷ The presence of corrective justice norms in private law may then seem mundane. Legal norms of corrective justice are a commonplace part of tort law and contract law, given that these legal institutions undo transactions all the time. Such legal norms may also be explained in a number of ways.⁵⁸ The key question is, can we locate a *moral* norm of corrective justice that will justify these legal norms of corrective justice?

Gardner’s response to this challenge is based on an idea he calls the “continuity thesis.”⁵⁹ This thesis suggests that, all else equal, those reasons that justify a primary obligation will also justify a secondary obligation when the primary obligation has not been met.⁶⁰ Reasons for action are thus more persistent than obligations; such reasons may continue to exist even after an obligation is breached.⁶¹

Consider the following example, which Gardner uses to illustrate his theory:

I promise to take my children to the beach today, but an emergency intervenes and I renege on the deal. Let’s say I was amply justified in doing so. One of my students, let’s say, was in some kind of serious and urgent trouble from which only I could extricate him, and only by devoting most of the day to it. In spite of this ample justification for letting the children down today I am now bound, without having to make a further promise, to take them to the beach at the next suitable opportunity (if there is one).⁶²

⁵⁷ Gardner, *supra* note 53, at 9–10 (“Something has already shifted between the two parties. The question of corrective justice is not the question of whether and to what extent and in what form and on what ground it should now be allocated among them *full stop*, but the question of whether and to what extent and in what form and on what ground it should now be allocated *back* from one party to the other, reversing a transaction that took place between them.”).

⁵⁸ The allocation back structure is sufficiently abstract that it can be explained not only by Kantian and other deontological approaches, but also by economic accounts. See, e.g., Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEG. STUD. 187, 201 (1981) (explaining corrective justice in efficiency terms).

⁵⁹ Gardner, *supra* note 53, at 33.

⁶⁰ See *id.* A related norm is also described by Joseph Raz. See Joseph Raz, *Personal Practical Conflicts*, in PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS 172, 189–93 (Peter Baumann & Monika Betzler eds., 2004) (analyzing the continuity of reasons for action).

⁶¹ See Gardner, *supra* note 53, at 33.

⁶² *Id.* at 28.

Once the promised day is over, the original obligation vanishes along with it. The day at the beach has already passed—any future visit to the beach is at best a close substitute. A substitute performance will nevertheless be morally required.

While it may no longer be possible to meet the original obligation (which was either performed or not), “those reasons in favour of the action that contribute to its obligatoriness can each be conformed to more or less perfectly.”⁶³ It is still possible to conform, to some degree, to the reasons for action that supported the original obligation to take the children to the beach. As Gardner notes, “[e]very reason for action is potentially a reason for multiple actions.”⁶⁴ It may no longer be possible to take the children to the beach today, but it may be quite possible, and obligatory, to take the children to the beach on the next suitable occasion.⁶⁵

From this perspective, the original pre-breach obligation is simply gone. It ceases to exist. But there are new obligations now, and these obligations mandate corrective justice. This moral understanding of corrective justice norms, moreover, can justify the legal norms of corrective justice that we find in private law.⁶⁶ Because Gardner indicates that the next best thing obligation applies “all else ... equal,”⁶⁷ there is also room to take specific context into account without automatically assuming these secondary obligations take hold.

Notice, however, that this is a perspective on corrective justice that emphasizes the obligations of wrongdoers. We might wonder how such obligations can match up with the law, given that it is frequently the State that brings about a corrective outcome, and not the wrongdoer herself (or at least not voluntarily).⁶⁸ Gardner’s answer is a principle he calls “proposition (c),” according to which, corrective justice governs the conduct of “the person from whom the transfer back is to be made, *or another person acting on behalf of that person*.”⁶⁹ If we allow for vicarious agency, the State

⁶³ *Id.* at 30.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 33.

⁶⁶ *See id.* at 33–34.

⁶⁷ *Id.* at 33.

⁶⁸ *See id.* at 10.

⁶⁹ *Id.* at 10 (emphasis in original).

can bring about corrective justice when it makes contracting parties remedy their breaches.⁷⁰

With these pieces in place, we are now positioned to assess Oman's argument about a "residual obligations" account of contract remedies.⁷¹ In some respects, this corrective justice theory is versatile enough to respond to Oman's concerns. Because there is an "all else equal" proviso, the continuity thesis has the flexibility to deal with hard cases in which potentially conflicting reasons for action come into play.⁷² This theory can allow for cases where apologies are the right answer. Still, in other contexts Oman's point will nonetheless hold true—the next best thing, all things considered, will often be different from the law's expectations remedy.⁷³ To return to the airport example, throwing some money out the window is not going to be adequate as the next best thing, and while litigation settings do potentially change the moral context, they do not change it in so dramatic a fashion that expectation damages will be a consistent fit.⁷⁴

III. THE REDRESSIVE JUSTICE ALTERNATIVE

In prior work, I have argued that there is another difficulty with Gardner's approach.⁷⁵ It is not that Gardner has failed to capture moral norms of corrective justice—his account is quite successful as a moral theory. The difficulty is that, with limited exceptions, courts are not typically acting on behalf of wrongdoers when they order damages.⁷⁶ Proposition (c) is not going to help us then, because the State is not acting on behalf of wrongdoers at all. To the contrary, courts act on behalf of right holders in the

⁷⁰ See *id.* at 11.

⁷¹ See OMAN, *supra* note 1, at 118.

⁷² See Gardner, *supra* note 53, at 33.

⁷³ See OMAN, *supra* note 1, at 117.

⁷⁴ It might be argued that Oman's example is a special case, given that it involves the husband-wife relationship. Special relationships may alter our obligations of repair. Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 211 (1986) (noting that friends may owe each other less than full compensation after a wrong). That point, while accurate, is not enough to undermine Oman's broader insight that money is not always a natural fit when we break our promises. See OMAN *supra* note 1, at 117.

⁷⁵ See Andrew S. Gold, *A Theory of Redressive Justice*, 64 U. TORONTO L.J. 159, 160 (2014) [hereinafter Gold, *Redressive Justice*].

⁷⁶ See *id.* at 178.

ordinary case where they issue a damages order.⁷⁷ Moreover, the justice that governs right holders when they allocate back (or the State when it acts on behalf of such right holders) is not a mirror image of corrective justice.⁷⁸

When we recognize that the justice in private law reflects a right holder perspective, we can also see more clearly how promissory morality helps to explain contract law. The question of when a promisee can justly enforce a remedial right is not a question about the performance obligations of a promisor, at least not directly. Not all promises are enforceable, and not all legitimate cases of enforcement are a match for what the promisor owes. Figuring out when redress is just—and what remedies it calls for—requires us to figure out how a promisee's moral rights are structured. As we will see, these moral rights are a good fit for contract law doctrine, and the link between the morality of promises and the justice of legal outcomes can be a close one.

A. Redressive Justice Defined

Let's begin with our category of justice, for that starting point can determine which aspects of promises ought to matter. Allocation back is central to contract law, but allocation back also covers more territory than just cases in which a wrongdoer undoes her own wrong, or in which a third party such as the State acts on her behalf. There is conceptual space left over if we adopt proposition (c) (the proposition that corrective justice governs duty bearers or those acting on their behalf). After all, sometimes right holders undo the wrongs committed against them, and these right holders are often acting on their own behalf.⁷⁹ In addition, when third parties intervene, they are frequently attempting to help the right holder alone, and are not trying to assist the wrongdoer in complying with her duties.⁸⁰ These cases involve allocation back, but they do not involve corrective justice as Gardner defines it. They involve redressive justice: the type of justice that governs allocation back by a right holder, or by a party acting on the right holder's behalf.⁸¹

⁷⁷ See *id.* at 186.

⁷⁸ See *id.* at 187.

⁷⁹ See *id.* at 185.

⁸⁰ See *id.* at 199–200.

⁸¹ See *id.*

It is not hard to find divergence between corrective justice and redressive justice—they are not mirror images.⁸² In some contexts, corrective justice comfortably fits a given fact pattern, while redressive justice does not.⁸³ Ordinary promises provide clear illustrations. Suppose, for example, that I promise to have lunch with you on Monday and then break my word. You cannot force me to have lunch with you on Tuesday—that would not be a legitimate exercise of redressive justice, even though I am in the wrong. Yet, all else equal, I would owe an obligation to do the next best thing (lunch at the next available opportunity), and this obligation would sound in corrective justice. This is a case where corrective justice fits and redressive justice does not. In other contexts, both types of justice are applicable, but appropriate remedies diverge.⁸⁴ In yet other settings, the two types of justice will call for the same remedy—but this convergence is not guaranteed.⁸⁵

Authorship also matters for another reason—it has a bearing on our moral status.⁸⁶ Imagine that Allen and Beth work together in the same office. Allen has wrongfully taken Beth's coffee mug, converting it for his own use. Their colleague, Charles, is known for his absent-mindedness, and in the midst of talking to Allen he picks up the coffee mug and inadvertently places it on Beth's desk. In a case like this, Allen has now missed his opportunity to engage in corrective justice—the wrong's effects have simply been undone. In such a case, we should be glad that the mug was returned, but there is still cause for regret. Allen's moral ledger will inevitably look different because he has missed the opportunity to fix his own wrong.⁸⁷

⁸² *Id.* at 160.

⁸³ It is arguable that some unjust enrichment cases involve the reverse possibility: redressive justice may fit while corrective justice is questionable. For example, this view may apply if we adopt Stephen Smith's perspective on the morality of unjust enrichment law. See Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177, 2187, 2194–95 (2001) (assessing the enriched party's moral obligations and suggesting that party may have no duty to return a mistakenly shipped cow). For a discussion of this potential divergence, see Gold, *Redressive Justice*, *supra* note 75, at 190.

⁸⁴ See Gold, *Redressive Justice*, *supra* note 75, at 161.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ *Id.* at 193. This point may have bearing on our character more generally. Cf. TONY HONORÉ, RESPONSIBILITY AND FAULT 29 (1999) (contending that “[i]f actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character.”).

A similar point applies with respect to redress. If Beth successfully takes the mug back, that is a good outcome; but it is still true that Allen is in a different moral position.⁸⁸ Had he felt remorse and returned the mug himself, he would have done more to reverse his own wrongdoing, and he would be better for it.⁸⁹ There is always cause for regret when we commit a wrong—as Gardner notes, there is an inevitable rational remainder⁹⁰—but the proper extent of that cause for regret will vary depending on whether the author of an allocation back is the wrongdoer or someone else.⁹¹ The authorship question gets at a fundamental, substantive distinction between different types of justice in allocation back.⁹²

B. Promises and the Expectation Remedy

If we revisit the expectation damages remedy, focusing now on the right holder's side of the equation, we can see why Oman's critique misses the mark.⁹³ Yes, it is true that promisors may sometimes owe an apology rather than an ex post performance—but even in these cases promisees may be able to demand something more.⁹⁴ Imagine a promisor who breaks his word and says: “I’m sorry, can’t you give me a break?” The promisee then responds: “I accept your apology, but I still need you to do what you promised.” There is nothing incoherent in the promisee’s response, even if an apology was the appropriate thing for the promisor to offer, and even if it would have been better for the promisee to just accept the apology and move on. The promisee is free to be a stickler for her rights, and promissory morality often shows an asymmetry between what the promisor (and promisee) ought to do and what the promisee gets to demand.⁹⁵

⁸⁸ See Gold, *Redressive Justice*, *supra* note 75, at 193.

⁸⁹ *Id.*

⁹⁰ See Gardner, *supra* note 53, at 34–37 (indicating that we can never cancel out the fact that we have committed a wrong).

⁹¹ See Gold, *Redressive Justice*, *supra* note 75, at 187–88.

⁹² See *id.* at 195.

⁹³ Cf. OMAN, *supra* note 1, at 118–19.

⁹⁴ See *id.* at 118.

⁹⁵ Cf. Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U.L. REV. 299, 335 (2011) [hereinafter Zipursky, *Substantive Standing*] (“Relatedly, the existence of a right to demand ameliorative conduct does not entail the existence of a duty to supply ameliorative conduct absent such a demand.”).

Even if moral doubts counsel against a right holder obstinately insisting on her rights—perhaps for reasons of mercy or forgiveness—those concerns are not necessarily inconsistent with the right holder getting to stand on her rights.⁹⁶ Morality is often thought to allow for rights to do wrong, and a discretion to act wrongfully plausibly extends to promissory morality.⁹⁷ If we consider Oman's apology example, this is a setting where a contractual right holder, as a matter of promissory morality, may get to insist on a "next best thing" remedy, even though a more virtuous choice would be for him to accept the apology. When we shift from the perspective of the promissory wrongdoer to the perspective of the promissory right holder, the moral answer must take into account not only how the promisee ought to act, but how he should get to act. If the law takes into account moral rights to do moral wrong, a right holder may insist on far more than an apology even in settings where the apology ought to be accepted as sufficient.

It is likewise true that expectation damages may be a less than fully adequate substitute for performance in cases involving unique services.⁹⁸ But contracts that implicate unique services are also the kind of contracts that raise moral concerns about when a right holder should be able to legitimately coerce, and in what fashion.⁹⁹ It is not always morally acceptable for one private party to coerce another, and promissory morality has different things to say with regard to the conduct of right holders and duty bearers. Consider a case

⁹⁶ Whether the law should let people be sticklers for their rights or even assist them in doing so is a complex problem. For discussion of that question, see Dennis Klimchuk, *Equity and the Rule of Law*, in *PRIVATE LAW AND THE RULE OF LAW* 247 (Lisa Austin & Dennis Klimchuk eds., 2014); Andrew S. Gold, *Equity and the Right to Do Wrong*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* (Dennis Klimchuk, Irit Samet & Henry Smith eds.) (forthcoming).

⁹⁷ For helpful discussion of moral rights to do moral wrong, see generally JEREMY WALDRON, *A Right to Do Wrong*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, 63 (1993); David Enoch, *A Right to Violate One's Duty*, 21 *LAW & PHIL.* 355, 378–80 (2002); Ori J. Herstein, *Defending the Right to Do Wrong*, 31 *LAW & PHIL.* 343 (2011). Note that if courts are assisting in a right holder's morally wrongful conduct, this is not necessarily inconsistent with the idea that courts are doing justice. See Andrew S. Gold, *Justice, Redress, and the Right to Do Wrong*, in *EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT* 41, 60–61 (Simone Degeling & Jason NE Varuhas eds., 2017) [hereinafter Gold, *Right to Do Wrong*].

⁹⁸ See OMAN, *supra* note 1, at 119.

⁹⁹ Cf. Andrew S. Gold, *Consideration and the Morality of Promising*, in *EXPLORING CONTRACT LAW* 115 (Jason W. Neyers, Richard Bronaugh, and Stephen G.A. Pitel eds., 2009) [hereinafter Gold, *Morality of Promising*].

involving unique services, such as a famous artist who has promised to paint a portrait. If he breaks his word, something like expectation damages may be all that the promisee can legitimately coerce.¹⁰⁰ It would not be okay for the promisee to simply make the artist paint. When we break a promise, we often ought to perform after the fact, but it does not follow that a promisee should always be able to force us to perform.¹⁰¹ Depending on context, expectation damages may be the most that a promisee's moral enforcement rights will permit.

C. *The Standing Issue*

Now, it might be argued that there is still a difficulty here, because we still need to address the special standing that plaintiffs possess. Ordinarily, only contractual promisees can sue.¹⁰² Yet Oman's view that promissory morality does not match up with this standing doctrine is puzzling. Mainstream theories of promissory morality suggest that promisees do have a special standing to make demands on promisors.¹⁰³ Private rights of action parallel this feature of promissory morality; indeed, private rights of action are generally unavailable to individuals who lack this moral standing.¹⁰⁴ This suggests that promissory morality could be central to contract law.

For example, Margaret Gilbert's work on promissory morality suggests that promisees have a special standing not shared with the general population.¹⁰⁵ She imagines a case in which she has made a promise to the reader. On Gilbert's understanding, "If I were to allow that I owe you performance, then I would recognize that you have the standing to upbraid me for nonperformance, or to insist on performance. Before the fact you could pressure me, saying in effect: 'Give me that! It's *mine*!'"¹⁰⁶ Third parties may also have something to say, but she notes that their standing is importantly different:

¹⁰⁰ Nothing in the present Essay rules out the possibility of indeterminacy in the "next best thing" that a promisee can morally insist upon. The precise form that expectation damages take—as opposed to an equivalent collection of valuable assets—can be explained by institutional concerns such as accessibility and ease in measurement.

¹⁰¹ *See id.* at 125–26.

¹⁰² *See OMAN, supra* note 1, at 113.

¹⁰³ *See Gold, Morality of Promising, supra* note 99, at 124.

¹⁰⁴ *Cf. id.* at 116.

¹⁰⁵ *See* Margaret Gilbert, *Scanlon on Promissory Obligation: The Problem of Promisees' Rights*, 101 J. PHIL. 83, 83 (2004).

¹⁰⁶ *Id.* at 101.

It is true that a bystander could say, "Give her that! It's *hers*!" The case in which I command you to give me what is *mine* is special, however. The bystander's standing to command you to give it to me can be questioned. My standing surely cannot be questioned. In the bystander's case, the riposte "It's none of your business!" makes sense. In my case, it does not.¹⁰⁷

This phenomenon should be recognizable to many of us, including the reaction that, for bystanders, "it's none of your business."¹⁰⁸ The social practice of promising incorporates the idea that a promisee has a special standing, and promissory morality plausibly includes this same feature.

We can reach a similar conclusion if we build on Stephen Darwall's account of the second-person standpoint in morality.¹⁰⁹ Darwall's famous example involves a foot-stomping episode.¹¹⁰ When someone non-consensually stomps on your foot, this wrong has significance for anyone in the moral community; but it also implicates a specific relationship between the wrongdoer and the victim.¹¹¹ As Darwall explains:

In addition to there being weighty reasons against others stepping on your feet, indeed, in addition to members of the moral community having the standing to demand that people not step on your feet, if you have a right, then you have standing to make a special demand against people who might step on your feet—you have the authority to resist, claim compensation, and so on.¹¹²

Since promises are ordinarily understood to create moral rights in a promisee, it is not surprising that promissory morality should recognize this special standing in appropriate cases. Admittedly, one might see morality in general, or promissory morality in particular, from a different perspective. But if we are seeking to interpret contract law in light of conventional understandings of promissory morality, these accounts are serious contenders.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* 5 (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8–9.

¹¹² See *id.* at 18. A related point is developed in Stephen Darwall, *Law and the Second-Person Standpoint*, 40 *LOU. L.A. L. REV.* 891, 891–92 (2007). This perspective also appears more broadly in Joel Feinberg's account of a claim right. See Joel Feinberg, *The Nature and Value of Rights*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 143, 150 (1980).

If anything, promissory concepts are better situated to explain private standing doctrines than a market-based account, and especially so if private standing is linked to a form of attack on the defendant (as Oman argues that it is).¹¹³ *The Dignity of Commerce* explains private standing as a substitute for violent patterns of retaliation.¹¹⁴ This is a possible explanation, but unlikely.¹¹⁵ While one can bring a market justification together with a world in which contracting parties are tempted by bloody revenge, the two perspectives are an awkward fit. The average person confronted with a contract breach in today's world is likely to want payment, goods, or services—not vengeance.¹¹⁶ To the extent we focus on the way courts tend to think, it also seems doubtful that a substitute-for-bloody-revenge picture is what modern courts have in mind.¹¹⁷ A retaliation-based theory could be right, even so. That said, an account that explains private standing from the perspective of promissory morality is more straightforward, both as a matter of concepts and as a matter of judicial psychology.

IV. THE CHALLENGE FOR REDRESSIVE JUSTICE

There is still a lingering concern, but it is different from the concerns developed in *The Dignity of Commerce*. The reader may have noticed that much of the above discussion emphasizes a special standing to make demands. This kind of standing is certainly

¹¹³ See OMAN, *supra* note 1, at 128.

¹¹⁴ See *id.* at 127.

¹¹⁵ Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U.L. REV. 65, 71 (2011) [hereinafter Gold, *Taxonomy*].

¹¹⁶ See *id.* (“Ordinary contract breaches are poor cases for vengeance, especially where the breach may be inadvertent or hard to avoid. Indeed, even the notion of ‘getting satisfaction’ is a questionable fit for much of contract law.”). This is not to deny that some contractual breaches sting. See Tess Wilkinson-Ryan & David Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1005 (2010) (studying the psychological impact of contract breaches). Nor is it to deny that lawsuits are adversarial. Oman recognizes that the retaliation picture “may seem odd,” but emphasizes that “[p]eople experience litigation as an aggressive action.” See OMAN, *supra* note 1, at 126. This insight is accurate, but it is not enough to sustain the argument. Rights enforcement is aggressive but frequently not retaliatory, and in contract cases the aggression involved is a poor fit for retaliation.

¹¹⁷ Gold, *Taxonomy*, *supra* note 115, at 71.

an important moral feature, and recent work has emphasized the importance of a standing to make demands, or to complain about a wrong, for both tort law and contract law.¹¹⁸ For some, private rights of action may even be understood in light of this feature.¹¹⁹ Yet, on its own, a wronged party's standing to make demands is not a perfect fit for a standing to pursue coercive legal remedies.

The moral standing to make demands is a starting point, but it cannot be our endpoint because that type of standing is overinclusive. For example, an ordinary promise to have lunch creates moral obligations, and it does give the promisee a special standing to make demands if the promise is broken; but you don't get to force someone to have lunch with you if they refuse.¹²⁰ The plaintiff must also hold a moral enforcement right, and this right can't be demonstrated merely by showing that something is owed to her or that she gets to demand compliance after the fact.¹²¹ A redressive justice approach thus presents us with the following challenge: we must locate a basis for thinking that the plaintiff holds more than a moral right to a given outcome (e.g., a right to a promised performance) or even a right to demand that outcome.

¹¹⁸ See Zipursky, *Substantive Standing*, *supra* note 95, at 332 ("The more general point is that the fact of having been wronged by another generates not only a basis for complaining of having been wronged by the other, but also a basis for a demand for ameliorative conduct by the wrongdoer."); Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PENN. L. REV. 1131, 1133 (2016) (emphasizing a contract right holder's standing to complain about a wrong). This work also invites a clarification. Cornell appears to believe I support the idea that coercion is automatically available post-wrong. See *id.* at 1166, n.146 (distinguishing my account because "it is not clear ... that, absent a state institution like contract law, someone would have a right to coercively extract expectation damages; having been wronged does not automatically give a person the right to coerce"). But my central point is that having been wronged does *not* automatically give a person the right to coerce; the main question on my account is the question of when, as a contingent matter, this right to coerce will exist.

¹¹⁹ Cf. Zipursky, *Substantive Standing*, *supra* note 95, at 311.

¹²⁰ See Gold, *Morality of Promising*, *supra* note 99, at 127 ("A moral right to performance of a promise could mean the possessor of the right has standing to demand the other party meet the obligation, and to rebuke a failure to perform, or it could mean the possessor of the right has standing to demand performance and also, if performance is not forthcoming, to physically coerce the other party to meet the obligation.").

¹²¹ See *id.* at 124.

One way to determine that promissory rights are apt for coercive enforcement is to find that the rights at issue are ownership rights.¹²² If we have a proprietary (or at least property-like) interest in contractual performance, this suggests the kind of relationship that can support legitimate exercises of force.¹²³ People can forcefully protect themselves in self-defense cases, and they can also forcefully protect their property.¹²⁴ In fact, the doctrine of recaption of chattels extends this enforcement right to the ex post realm.¹²⁵ If someone steals your wallet from you, you can chase after them and rightfully grab it back. For many of us, this is morally legitimate conduct by the right holder.¹²⁶ It is, likewise, ordinarily considered a fitting exercise of State power when the State acts on our behalf to protect our property rights. If contract rights are proprietary, that is a *prima facie* basis for thinking enforcement is appropriate.¹²⁷

¹²² See, e.g., *id.* at 126. Another possibility is that the legal system's choice to provide for enforcement will help justify enforcement in appropriate cases. For example, even if contracts under seal (without consideration) would not be suitable for coercive remedies in a state of nature, they might be legitimately enforceable when a legal system has provided for this result, and the promisor has made a promise in light of that legal backdrop. That said, the moral analysis in such cases involves more than just the State's imprimatur. Questions of consent, for example, would still be relevant.

¹²³ See, e.g., Gold, *Property Theory*, *supra* note 9, at 46 (discussing this possibility).

¹²⁴ See, e.g., Zoë Sinel, *De-Ciphering Self-Help*, 67 U. TORONTO L.J. 31, 50–51 (2017) (discussing these types of self-help).

¹²⁵ On the theoretical questions raised by recaption doctrine, see Andrew S. Gold, *Private Rights and Private Wrongs*, 115 MICH. L. REV. 1071, 1074–76 (2017) [hereinafter Gold, *Private Rights*]; Sinel, *supra* note 124, at 46–51.

¹²⁶ This may depend, however, on whether one adopts a Kantian perspective on private law. Compare ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 146 (2009) (describing the Kantian view on unilateral choices regarding the entitlements of others), with Victor Tadros, *Independence Without Interests?*, 31 OXFORD J. LEGAL STUD. 193, 202–06 (2011) (critiquing this perspective). That said, I have doubts whether the Kantian account adequately fits private law doctrine. See generally Gold, *Private Rights*, *supra* note 125.

¹²⁷ This challenge has also been analyzed in terms of the harm principle. See, e.g., Stephen A. Smith, *Towards a Theory of Contract*, in OXFORD ESSAYS IN JURISPRUDENCE (FOURTH SERIES) 107, 120–29 (Jeremy Horder ed., 2000) (“On the right-creation view of contract, a contract creates what is in effect a property right in the promisee, albeit a property right in the performance of an act.”); STEPHEN A. SMITH, *CONTRACT THEORY* 72 (2004) (suggesting the import of

The question then is whether contract rights have the correct features to count as proprietary or property-like. We need something more than just a promisee's standing to demand performance or a remedy. Why think this added proprietary feature exists in the contractual setting? One answer draws on promissory morality itself.¹²⁸ Contracts generally involve conditional promises; these are promises that bind us to perform if their terms have been met but not before.¹²⁹ Suppose that these conditions have been met by a promisee's bargained-for conduct. Significantly, this places the promisee in a different relationship to the promise from the one she occupied before. She has acted on the promise, working to make its terms apply, and this changed relationship can implicate principles of just property acquisition.¹³⁰

Principles of just property acquisition will admittedly take different forms for different theorists.¹³¹ They are sufficiently contested that it is unlikely consensus will be reached, and I will not try to demonstrate which approach is best. Each approach is controversial, in some cases for good reason. What I hope to show for present purposes is simply that the structure of contractual relationships matches reasonably well with several of the leading approaches to property acquisition.¹³² Some candidates are developed below to help illustrate the core idea.

We might think that a Lockean approach based on a mixing of labor with the desired thing helps to explain why we should own a contractual performance.¹³³ This is a labor-desert theory, based on the interactions between the would-be owner and the acquired property. In Locke's famous language: "Whatsoever ... he removes out of the state that nature hath provided ... he hath mixed his labor with, and joined to it something that is his own, and thereby makes

owning rights to performance). Note also that Smith suggests a property-based account of contract rights without adopting a transfer theory; both promise theories and transfer theories may thus look to property theory for guidance.

¹²⁸ See, e.g., Gold, *Morality of Promising*, *supra* note 99, at 126.

¹²⁹ See RAZ, *supra* note 74, at 174–75 (noting the link between conditional promises and agreements).

¹³⁰ See Gold, *Property Theory*, *supra* note 9, at 5.

¹³¹ See *id.* at 34–42.

¹³² For further discussion, see *id.* See also *infra* text accompanying notes 133–47.

¹³³ See, e.g., Gold, *Property Theory*, *supra* note 9, at 34–35.

it his property.”¹³⁴ We may conclude that the promisee, having labored to attain the promised performance by acting to meet the promise’s terms, has mixed her labor with the acquired property—and therefore that she rightly owns the promised performance.¹³⁵

One could also rework a Lockean theory so that the “mixing labor” argument concerns the acquirer’s identification of his personality with the relevant thing.¹³⁶ As Karl Olivecrona notes, “We can have a feeling of things being so intimately connected with ourselves that they are part of our very selves. Being deprived of such objects represents something more than an economic loss. It is experienced as an attack on the personality itself.”¹³⁷ From this perspective, the contractual promisee may be understood to identify with the promised performance in light of her efforts to meet a conditional promise’s terms.¹³⁸

In some contexts, we might adopt a capture or first-possession theory of property acquisition.¹³⁹ Consider the case of a unilateral contract, where the first person to meet the terms of the promisor’s offer will obtain a right to a payment of \$1,000. In such a case, if Jane is able to meet the terms of the promise before anyone else, she has brought it under her control. In a sense, we can say that she has captured the promise, occupying a relation to it that is roughly analogous to the relation that an individual has

¹³⁴ See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT* (1681), reprinted in JOHN LOCKE: *POLITICAL WRITINGS* 261, 274 (David Wootton ed., 2003).

¹³⁵ It should be noted that some of the classic concerns with a “mixing labor” theory are less compelling in contractual contexts. For example, the contractual acquisition is not the result of a unilateral act as between the contracting parties. In addition, while the value of the promisee’s labor may be far less than the value of the thing acquired, in contract cases the *promisor* is the one who decided to allow for such an acquisition. For discussion, see Gold, *Property Theory*, *supra* note 9, at 35–37.

¹³⁶ See, e.g., *id.* at 37.

¹³⁷ See Karl Olivecrona, *Locke’s Theory of Appropriation*, 24 *PHIL. Q.* 220, 224 (1974). Jeremy Waldron expresses doubts about this approach. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 195 (1988) (noting that people sometimes identify with property owned by others). For a response in the contractual setting, see Gold, *Property Theory*, *supra* note 9, at 37 n.178.

¹³⁸ See Gold, *Property Theory*, *supra* note 9, at 38.

¹³⁹ For discussion of first-possession theories of property acquisition, see Richard A. Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221, 1224–25 (1979). See generally Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73 (1985).

when they capture a wild animal.¹⁴⁰ Unlike capturing an animal, however, the promise itself sets its own terms for what will suffice. The result, again, is a claim of ownership.

Alternatively, we might be drawn to a more Hegelian point of view—i.e., we might agree with an embodiment theory of acquisition.¹⁴¹ In that case, we are looking for a certain relation between the acquirer's will and the acquired object.¹⁴² From this perspective, we acquire something if that thing is now intelligible in terms of the acquirer's will; property is acquired when the acquirer's will is embodied in the thing acquired.¹⁴³ As Jeremy Waldron helpfully elaborates:

If the object is inanimate (say, a piece of marble formed into a statue) then the aspect of the object which may be understood only by reference to my will is one of its physical properties—its shape, for example. If the object is organic, then maybe it is not merely some property which is understood in this way but also some ongoing process in the object¹⁴⁴

This too is a kind of relationship that may come into existence where a promisee has met the terms of a contractual promise.¹⁴⁵ The promisee has worked her will on the promise by meeting its terms, and its bindingness is intelligible in light of her conduct.¹⁴⁶

Again, these are just candidate theories, and the reader may find more than one of them appealing—or perhaps be drawn to a different view altogether. The important point is that principles of just property acquisition that apply in other settings have analogues that operate in the setting of contractual promises.¹⁴⁷ In those contexts where a promisee has provided the contractually set form of consideration, the promise at issue has been made binding. Its

¹⁴⁰ See Gold, *Property Theory*, *supra* note 9, at 39 nn.183–84.

¹⁴¹ See G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 44, at 75–76 (Allan W. Wood ed., 1991).

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See WALDRON, *supra* note 137, at 364.

¹⁴⁵ See Gold, *Property Theory*, *supra* note 9, at 41.

¹⁴⁶ See *id.*

¹⁴⁷ The notion that one can own a contractual performance also has a long pedigree. See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* § 20, at 93 (Mary J. Gregor trans., 1991) (“By a contract I acquire something external. But what is it that I acquire? ... what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine.”).

terms have been met. This change in status does something more than simply activate a promise because it also has bearing on the set of rights held by the promisee.¹⁴⁸ It means that the promisee has an interest in performance that is different from the interest held by an ordinary, non-contractual promisee; it is legitimately enforceable at her option.¹⁴⁹ Consideration doctrine is thus a reflection of what it takes to justify enforceable promissory rights.¹⁵⁰

In supporting the consideration doctrine, this approach is also well within the mainstream. Granted, Oman contends that supporters of the consideration doctrine are few and far between.¹⁵¹ Yet the doctrine actually has a number of defenders,¹⁵² and the recent trend in contract theory favors the consideration doctrine, with accounts by Peter Benson,¹⁵³ Curtis Bridgeman,¹⁵⁴ Robin Kar,¹⁵⁵ Daniel Markovits,¹⁵⁶ and myself¹⁵⁷ all incorporating it.

¹⁴⁸ See Gold, *Property Theory*, *supra* note 9, at 40.

¹⁴⁹ See, e.g., Gold, *Morality of Promising*, *supra* note 99, at 126.

¹⁵⁰ See, e.g., Gold, *Property Theory*, *supra* note 9, at 62.

¹⁵¹ See OMAN, *supra* note 1, at 110 ("For understandable reasons, the doctrine of consideration has few defenders.").

¹⁵² See Peter Benson, *The Idea of Consideration*, 61 U. TORONTO L.J. 241, 268 (2011); Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 351 (2009); Gold, *Property Theory*, *supra* note 9, at 43; Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 761 (2016); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1420–21 (2004).

¹⁵³ See Benson, *supra* note 152, at 268 ("My argument, therefore, is simply that the promise-for-consideration relation, which actually constitutes contract formation, *can* be reasonably construed in terms of ownership and a transfer of ownership, and that it *must* be possible to so view formation if the law's characterization of expectation damages as compensatory is to be vindicated.").

¹⁵⁴ See Bridgeman, *supra* note 152, at 380–81 (noting that the consideration doctrine "makes perfect sense" if we view contracts as plans).

¹⁵⁵ See Kar, *supra* note 152, at 762 ("Contract as empowerment offers a novel and more compelling account of the consideration requirement than exists in the current literature.").

¹⁵⁶ See Markovits, *supra* note 152, at 1487–88 ("The consideration doctrine, and in particular the doctrine's formal emphasis on bargains, therefore serves as a useful touchstone for identifying obligations to which the collaborative view of contract applies.").

¹⁵⁷ See Gold, *Property Theory*, *supra* note 9, at 43 ("The doctrine of consideration reflects the need for a promisee to act upon the contractual promise such that its conditions are met. It is a means for a just acquisition of the promisor's future performance.").

These accounts draw on a number of different theoretical perspectives, with inspirations ranging from Hegel, to Rawls, to Locke, to Bratman.¹⁵⁸ Given the wide set of theories capable of justifying the consideration doctrine and the variety of resources they are able to build upon, we might even think that a good interpretive account of contract law needs to explain why the consideration doctrine makes sense.¹⁵⁹

It is not clear how the account in *The Dignity of Commerce* would address the full range of plausible justifications for the consideration doctrine, as the book's focus is elsewhere. In light of their unique features, each pro-consideration theory likely calls for its own response. For our purposes, the key insight is that the consideration doctrine is not only defensible, but defensible from a perspective that draws on promissory morality.¹⁶⁰ Historically, scholars who support a promise-based approach to contract law have been troubled by the consideration doctrine.¹⁶¹ Charles Fried's work is a good example, as is Seana Shiffrin's recent writing.¹⁶² If, however, promissory morality is approached from the perspective of a promisee's standing to enforce, the moral landscape looks very different. Doctrines that are hard to explain when we just look at a promisor's obligation to perform (or to remedy a non-performance) are more readily understood if we look at a promisee's enforcement rights.

¹⁵⁸ See Benson, *supra* note 152, at 267 n.58; Bridgeman, *supra* note 152, at 345; Gold, *Property Theory*, *supra* note 9, at 27; Kar, *supra* note 152, at 767 n.26; Markovits, *supra* note 152, at 1451.

¹⁵⁹ Cf. Bridgeman, *supra* note 152, at 380–81 (noting advantages to a theory that can explain the consideration doctrine). If no plausible theories were available, matters might be different. But given that the consideration doctrine is a core feature of contract law, the possibility that it can be explained from a variety of perspectives puts added pressure on those interpretive theories that are incapable of explaining it.

¹⁶⁰ I have suggested previously that these enforcement rights are a part of promissory morality. See Gold, *Moral Rights*, *supra* note 50, at 1891. One might contend that such enforcement is supported by principles of just property acquisition, and that the relevant moral principles are not promissory in nature. I am unsure how to draw an uncontroversial boundary between these subparts of moral reasoning. For present purposes, it should not matter if this analysis is considered a part of promissory morality as such, or the result of a different set of moral principles that incorporate the principles of promissory morality as part of their operation.

¹⁶¹ See FRIED, *supra* note 9, at 35; Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709–10 (2007).

¹⁶² See FRIED, *supra* note 9, at 21; Shiffrin, *supra* note 161, at 709–10.

CONCLUSION

Sometimes private law theories crowd out their rivals. If one begins with the idea that everything in private law has to be unified under a single principle, locating the most plausible principle may be a first step toward ruling out alternative theories based on other principles. Such unifying approaches need defending, however, and we need a basis for thinking that a proffered explanation has vanquished its rivals. The idea that contract law is justified by the value of virtuous markets does not give us any obvious reason for ruling out additional justifications. It may even seem to invite them, since contract law might advance virtuous behavior by other means as well. *The Dignity of Commerce* appears to leave room for other theories to succeed alongside it.

Note also that it is not enough to show that other theories fall short as complete justifications for contract law. Suppose that no other theory is up to the task. Even if there are no viable alternative theories that can justify contract law as a whole, it would not follow that non-market values become irrelevant to a proper understanding of contracts, or else relevant only when those values support markets. The absence of consent might operate as a side constraint, or at least as a concern to be balanced against reasons for supporting markets. Likewise, promises may help constitute contracts, even if promissory morality cannot justify contract law on its own. In order to fully understand contract law, we might need to figure out when promises are valid, what their scope is, and how they affect moral rights.

Consider the problem of consent. To give an extreme example, imagine a world in which virtuous markets could be advanced if a certain percentage of the public were beaten up to "convince" them to enter the right kind of contracts. This coercion is unacceptable, and the resulting agreements should not be enforceable. A principle that physically assaulting people is beyond the pale will hardly justify contract law as such—it does not have the right features to do that—but we can still think that such principles have bearing on whether a contract should count as valid. And we might think that this is, in part, because consent matters. Notice, moreover, that the merits of this view can be separated from our interest in market-based benefits. Many of us will conclude that such coerced contracts should lack validity irrespective of the effect on markets.

Promissory morality may be relevant in a different way. It is difficult to provide a convincing account of contract law that

just builds on promissory obligations to perform.¹⁶³ Yet it is quite possible to come up with theories of contract law that depend in part on features of promissory morality. One might think, for example, that contracts are best understood as a kind of transfer, and that valid promises are partly constitutive of contractual transfers.¹⁶⁴ On this view, a promise on its own simply isn't enough, but a promise in combination with other things may account for many of the law's features: the enforceability of contracts, the bilateralism of contract law, the expectation damages remedy, the special standing of contractual promisees, and even the consideration doctrine.¹⁶⁵

These points can be obscured by an understanding of corrective justice that centers on the obligations of wrongdoers to reverse their wrongs. Applied to contracts, a corrective justice picture tends to emphasize a promisor's duty to correct, and as Oman rightly explains, such promissory duties often look quite different from the expectation damages remedy.¹⁶⁶ In other words, it is not just that promissory morality is insufficient to fully justify contract law, but also that a promisor's performance obligations are a mismatch for the way that contract law functions.

Shifting to rights of redress can help solve this puzzle, and in a way that preserves many of the core insights in *The Dignity of Commerce*. A good theory of contracts may need to build on an account of justice between individuals.¹⁶⁷ Judges author opinions that indicate that private law is intended to provide justice for the parties in particular, with respect to their dispute. While corrective justice is not a convincing answer—in part for reasons that build on insights about promissory obligations—redressive justice is a very good fit. The question, then, is when a right holder should be able to undo the wrong she has suffered. In the case of contracts, the wrong is a contractual breach, and the response to that wrong tracks important features of promissory morality. Taking this kind of justice seriously, moreover, will often have a beneficial side effect: it will advance virtuous markets. Of course, advancing markets may also be an intended outcome. Intended or not, *The Dignity of Commerce* helps us to see why that outcome is so important.

¹⁶³ See OMAN, *supra* note 1, at 76.

¹⁶⁴ See, e.g., Gold, *Property Theory*, *supra* note 9, at 5.

¹⁶⁵ See *id.* at 6–7.

¹⁶⁶ See OMAN, *supra* note 1, at 117–19.

¹⁶⁷ This is true of most private law fields. For discussion of why, see Gold, *Private Rights*, *supra* note 125, at 1087–88.

