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Liability and responsibility

Essays in law and morals

Edited by
R.G. FREY and CHRISTOPHER W. MORRIS
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then this temptation, too, should be avoided. The traditional view of contracts was that custom and common practice were generally sound. Repeat players do not make mistakes on provisions so critical to their personal welfare.

Chapter 5

Rights and remedies in a consent theory of contract

RANDY E. BARNETT

INTRODUCTION

> The mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of non-performance. To be enforceable, the promise must be accompanied by some other factor. . . . The question now to be discussed is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?[1]

Which interpersonal commitments are properly enforceable as contracts? When contract theorists and philosophers treat this question, they commonly assume that the institution of contract somehow depends on the institution of promise-keeping. They think that contractual duties are species of the general duty to keep one's promise. I think this approach is wrong, both descriptively and normatively. I think that Arthur Corbin was right to insist that to "be enforceable, the promise must be accompanied by some other factor. . . ." The other factor, by assumption, is extraneous to the promise itself. Moreover, if by a "promise" we mean a commitment to act or refrain from acting at some time in the future, then a contractual duty can exist even where there is no promise – as with an immediate transfer of entitlements.

In this essay, I identify this factor as the "manifested intent to alienate rights" which I shall refer to as "consent."

1 A. Corbin, Corbin on Contracts § 110, at 490 (1963).

Consequently, I call this a "consent theory of contract."[2] A consent theory posits that contractual obligation cannot be completely understood unless it is viewed as part of a broader system of legal entitlements. Such a system specifies the substance of the rights individuals may acquire and transfer, and the means by which they may do so. Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent.

In Part I, I explain how a consent theory fits within a broader view of individual entitlements. In Part II, I elaborate the definition of "consent" that is employed in a consent theory. In Part III, I describe the presumptive nature of consent in contract law. In Part IV, I discuss how the distinction between alienable and inalienable rights plays a vital role in determining the appropriate form of remedy for breach of contract.

I. ENTITLEMENT THEORY AND CONTRACT

A. Entitlements as the foundation of contractual obligation

The function of an entitlements theory based on individual rights is to define the boundaries within which individuals may live, act, and pursue happiness free of the forcible interference of others. A theory of entitlements specifies the rights that individuals possess or may possess; it tells us what may be owned and who owns it; it circumscribes the individual boundaries of human freedom. Any coherent theory of justice based on individual rights must therefore contain principles that describe how such rights are ini-

2 This chapter is taken with considerable revision from two articles in which I further explained this approach. Parts I–III are based on Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269 (1986) [hereinafter A Consent Theory]. Part IV is from Barnett, Contract Remedies and Inalienable Rights, 4 Soc. Phil. & Pol'y, Autumn 1986, at 179 [hereinafter Contract Remedies].

tially acquired, how they are transferred from person to person, what the substance and limits of properly obtained rights are, and how interferences with these entitlements are to be rectified.[3]

These constituent parts of an entitlements theory comport substantially with the traditional categories of private law. The issue of initial acquisition of entitlements in real and chattel resources is dealt with primarily in property law; tort law concerns the protection of and proper limits on resource use; and contract law deals with transfers of rights between rights-holders. Each category contains its own principles of rectification for the breach of legal obligations. Viewing contract law as part of a more general theory of individual entitlements that specifies how resources may be rightly acquired (property law), used (tort law), and transferred (contract law) is not new.[4] And, of course, the actual historical development of these legal categories has not perfectly conformed to the conceptual distinctions that an entitlements approach suggests. But this approach has long been neglected as a way of resolving some of the thorniest issues of contract theory and doctrine.

According to an entitlements approach, rights may be unconditionally granted to another (a gift), or their transfer may be conditioned upon some act or reciprocal transfer by the transferee (an exchange). Contract law concerns the ways by which rights are transferred or alienated. Accordingly, the enforceability of all agreements is limited by the rights people have and by the extent to which these rights are capable of being transferred from one person to another. Whether a purported right is genuine or can be legitimately transferred is not an issue of contract theory only, but is one that may also require reference to the underlying theory of entitlements. The explanation of the

3 *Cf.* R. Nozick, Anarchy, State and Utopia 150–53 (1974).

4 *See, e.g.*, A. Simpson, A History of the Common Law of Contract (1975); P. Atiyah, The Rise and Fall of Freedom of Contract 16 (1979); M. Horwitz, The Transformation of American Law, 1780–1860, at 162 (1977).

binding nature of contractual commitments is derived from more fundamental notions of entitlements and how they are acquired and transferred.

The subjects of most rights-transfer agreements are entitlements that are indisputably alienable. In such cases the rules of contract law are entirely sufficient to explain and justify a judicial decision. However, as will be discussed in Part IV, in rare cases – such as agreements amounting to slavery arrangements or requiring the violation of another's rights – contract law's dependence on rights theory will be of crucial importance in identifying appropriate concerns about the substance of voluntary agreements. For example, agreements to transfer inalienable rights – rights that for some reason cannot be transferred – or to transfer rights that for some reason cannot be obtained, would not, without more, be valid and enforceable contracts.[5] The process of contractual transfer cannot be completely comprehended, therefore, without considering more fundamental issues, namely the nature and sources of individual entitlements and the means by which they come to be acquired.

B. The social function of individual rights

Legal obligations may be enforced by the use or threat of legal force and this dimension of force requires moral justification. The principal task of legal theory, then, is to identify circumstances when legal enforcement is morally justified. Entitlements theories seek to perform this task by determining the individual legal rights of persons – that is, those claims of persons that may be justifiably enforced.

Any concept of individual rights must assume a social context.[6] If the world were inhabited by only one person, it might

5 Other bases of obligation are possible besides contractual obligation, however, such as those recognized under the law of tort and restitution.

6 I discuss the subject of entitlements at greater length in Barnett, Pursuing Justice in a Free Society: Part One – Power vs. Liberty, Crim. Just. Ethics, Summer/Fall, 1985, at 50.

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make sense to speak of that person's actions as morally good or bad. Such a moral judgment might, for example, look to whether or not that person had chosen to live what might be called a "good life." Yet it makes no sense to speak about this person's rights. The need for rights arises from the moment individuals live in close enough proximity to one another to compete for the use of scarce natural resources. Some scheme of specifying how individuals may acquire, use, and transfer resources must be recognized to handle the conflicts over resource use that will inevitably arise. Certain facts of human existence make certain principles of allocation ineluctable. For example, it is a fundamental human requirement that individuals acquire and consume natural resources, even though such activity is often inconsistent with a similar use of the same resources by others.

conflicts

property

"Property rights" is the term used to describe an individual's entitlements to use and consume resources – both the individual's person and her external possessions – free from the physical interference of others. Today, the term "property rights" tends to be limited only to rights to external resources. Traditionally, however, it referred to the moral and legal jurisdiction a person has both over her body and over external resources.[7] The exact contours of a proper theory of rights need not be specified here. We need only recognize that *some* allocation of rights to resource possession and use is an unavoidable prerequisite of human survival and of human fulfillment and that, once allocated, at least some rights must be alienable.

A theory of contractual obligation is the part of an entitlements theory that focuses on liability arising from the wrongful interference with a valid rights transfer. Until such an interference is corrected – by force if necessary – the distribution of resources caused by the interference is unjust. Justice normally requires that this situation be corrected to bring

7 *See, e.g.*, J. Locke, An Essay Concerning the True Original Extent and End of Civil Government, in Two Treatises of Civil Government ch. V § 27 (1690) ("every man has a *property* in his own *person*").

resource distribution into conformity with entitlements. In sum, contract law, according to an entitlements approach, is a body of general principles and more specific rules the function of which is to identify the rights of individuals engaged in transferring entitlements. These rights are then used to justify physical or legal force to rectify any unjust interference with the transfer process.

C. *Consent as the moral component of contract*

To identify the moral component that distinguishes valid from invalid rights transfers, it is first necessary to separate moral principles governing the rightful acquisition and use of resources from those governing their transfer. Rights are the means by which freedom of action and interaction is facilitated and regulated in society, and thus the rights we have to acquire previously unowned resources and to use that which we acquire must not be subject to the expressed assent of others. Although societal acquiescence may be a practical necessity for rights to be legally respected, no individual or group need actually consent to our appropriation of previously unowned resources or their use for our rights to morally vest. Similarly, principles governing rights transfer should be distinguished from principles governing resource use. Tort law concerns obligations arising from interferences with others' rights. A tortfeasor who interferes with another's rights (rather than obtaining a valid transfer of those rights to herself) is liable because of that interference, not because she consented to be held liable for her actions. A tortfeasor can be said to forfeit (as opposed to alienate or transfer) rights to resources in order to provide compensation to the victim of the tort.[8]

In contrast, contract law concerns enforceable obligations arising from the valid transfer of entitlements that are *already vested* in someone, and this difference is what makes consent

8 *See* J. Feinberg, Rights, Justice, and the Bounds of Liberty 238, 239–40 (1980); Kuflik, The Inalienability of Autonomy, 13 Phil. & Pub. Affs. 271, 275 (1984).

a moral prerequisite to contractual obligation. The rules governing the transfer of property rights perform the same function as rules governing their acquisition and those specifying their proper content: facilitating freedom of human action and interaction in a social context. Freedom of action and interaction would be seriously impeded, and possibly destroyed, if legitimate rights-holders who have not acted in a tortious manner could be deprived of their rights by force of law without their consent.

Of course, I can only summarize here the many reasons why viewing consent as the moral basis of contractual obligation – a view that is sometimes called "freedom of contract" – is so important to the operation of the enterprise of entitlements. These reasons cluster around two distinct dimensions of the consent requirement. The first dimension of consent may be called "freedom *to* contract." Viewing the rights-holder's consent as normally sufficient to transfer alienable rights enables persons to exchange entitlements to resources when, on their judgment, they can put the resources they obtain to better use than the resources they transfer. It also permits persons to make gratuitous transfers when they judge that under the circumstances the recipient can put the resource to better use than they can.

The second aspect of consent may be called "freedom *from* contract." Rights to resources may not be taken without obtaining the consent of the rights-holder. By rendering persons' control over resources immune from forced transfers, the requirement of consent permits persons to plan and act in reliance on their future access to their rightfully held resources. Moreover, the requirement of consent mandates that others take the interests of the rights-holder into account when seeking to obtain her rights. Only a requirement of consent can ensure that the welfare of the rights-holder is properly included in another's allocational decision making. And the requirement of consent at the level of individuals is what makes possible the generation of market prices that convey invaluable information about relative scarcity and

competing uses for resources in a form that may – indeed must – be taken into account when choices concerning scarce resources are made.

Although it is not altogether novel to suggest that consent is at the heart of contract law,[9] this view did not ultimately prevail among modern contract theorists and philosophers who largely adopted a promissory definition of contract.[10] Perhaps because promising is but a special instance of consent,[11] the prevailing equation of contract with promise[12] is what has blinded the profession to the more fundamental theoretical role of consent. Moreover, that contractual obligation arises from a consent to alienate rights and is thereby dependent on a theory of entitlements or property rights is also largely overlooked.[13] Yet it is certainly a commonly held and plausible conception of ownership that owning resources

9 *See* M. Ferson, The Rational Basis of Contracts and Related Problems in Legal Analysis 60 (1949); *id.*, Fiction vs. Reality, in re Contracts: A Survey, 7 Vand. L. Rev. 325 (1954); Green, Is an Offer Always a Promise? 23 Ill. L. Rev. 95 (1928).

10 *See, e.g.*, Restatement (Second) of Contracts § 1 (1979): "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." For an example of the typical modern insistence on the promissory nature of contracts, *see* E. Farnsworth, Contracts § 1.1, at 4 (1982).

Because a consent theory embraces more than the enforcement of promises, the most appropriate terms to describe contracting parties might be "transferor" and "transferee." For convenience, however, the more conventional terms "promisor" and "promisee" will still occasionally be used here.

11 *See* P. Atiyah, Promises, Morals, and Law 177 (1981) ("Promising may be reducible to a species of consent, for consent is a broader and perhaps more basic source of obligation").

12 *See, e.g.*, C. Fried, Contract as Promise (1981).

13 *But see* Cheung, Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements, 12 J.L. & Econ. 23 (1969); Evers, Toward a Reformulation of the Law of Contracts, 1 J. Libertarian Stud. 3 (1977); Friedman, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504 (1980); Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472 (1980); Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 523.

gives one the right to possess, use, and consensually transfer the rights to them free from the forcible coercion of others.

II. DEFINING CONSENT

A. Consent and the objective theory of contract

At first blush, a consent theory of contract may appear to some to be a version of a "will theory." A will theory bases contractual obligation on the fact that an obligation was freely assumed. Understanding the fundamental differences between the two approaches, therefore, will assist an appreciation of the comparative virtues of the consent theory. A theory that bases contractual obligation on the existence of a "will to be bound" is hard-pressed to justify contractual obligation in the absence of an actual exercise of the will. It is difficult to see how a theory that bases the enforceability of commitments on their willful quality can justify enforcing objectively manifested agreements when one of the parties did not subjectively intend to be bound. Yet the enforcement of such agreements is, and has always been, widely accepted. In contrast to a will theory, a consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal relationship between objective and subjective considerations in contract law.

The concept of rights or entitlements is a social one whose principal function is to specify boundaries within which individuals may operate freely to pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity. The boundaries of individual discretion that are defined by a system of clear entitlements serve to allocate decision-making authority among individuals. Vital information is thereby conveyed to all those who might wish to avoid disputes and respect the rights of others, provided they know what those rights are. Potential conflicts between persons who might otherwise vie for control of a given resource are thus avoided. Therefore, to fulfill its social func-

tion, entitlements theory demands that the boundaries of protected domains be ascertainable, not only by judges who must resolve disputes that have arisen, but, perhaps more importantly, by the affected persons themselves before any dispute occurs.

In contract law, this informational or "boundary-defining" requirement means that an assent to alienate rights must be *manifested* in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of assent that is accessible to all affected parties, the aspect of a system of entitlements that governs transfers of rights will fail to achieve its main function. At the time of the transaction, it will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected. Without such communication, parties to a transaction (and third parties) cannot accurately ascertain what constitutes rightful conduct and what constitutes a commitment on which they can rely. Disputes that might otherwise have been avoided will occur, and the attendant uncertainties of the transfer process will discourage reliance.

Although requiring the consent of the rights-holder as a condition of a valid transfer of rights is absolutely vital for the reasons discussed in Part I, whether one has consented to a transfer of rights under such a regime, however, generally depends not on one's subjective opinion about the meaning of one's freely chosen words or conduct, but on the ordinary meaning that is attached to them. If the word "yes" ordinarily means *yes*, then a subjective and unrevealed belief that "yes" means *no* is generally immaterial to a regime of entitlements allocation. Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.

Given that the function of a rights theory is to facilitate human action and interaction in a social context by defining the boundaries of permitted actions and resolve competing claims, a coherent rights theory should allocate rights largely on the basis of factors that minimize the likelihood of generating conflicting claims. In this regard, objectively mani-

fested conduct, which usually reflects subjective intent, provides a sounder basis for contractual obligation than do subjectively held intentions. Evidence of subjective intent that is extrinsic to the transaction and was unavailable to the other party is relevant, if at all, only insofar as it helps a court to ascertain the objective meaning of certain terms.

What exact meaning must a court conclude was conveyed by a promisor to a promisee to find that a contractual commitment was incurred? If consent is properly thought of as objective or "manifested" assent, what is it that must be assented to for a contractual obligation to arise? It is not enough that one manifests a commitment to perform or refrain from doing some act. Such a manifestation would be nothing more than a promise[14] and contract theory searches for the "extra" factor that, if present, justifies the legal enforcement of a commitment or promise. The entitlements approach sketched above specifies that consent to a transfer of rights is this factor.

The consent that is required is a *manifestation of an intention to alienate rights*. In a system of entitlements where consent to transfer rights is what justifies the legal enforcement of agreements, any such manifestation implies that one intends to be legally bound to adhere to one's commitment. Therefore, the phrase "a manifestation of an intention to be legally bound"[15] neatly captures what a court should seek to find before holding that an enforceable transfer of alienable rights has been effected.

B. The proper limits of the objective approach

A consent theory also explains the limits of the objective approach – why the objective interpretation of a party's acts

14 *See, e.g.*, Restatement (Second) of Contracts § 2 (1979) ("A promise is a manifestation of intention to act or refrain from action in a specified way, so made as to justify a promisee in understanding that a commitment has been made").

15 *Cf.* Green, Is an Offer Always a Promise?, 23 Ill L. Rev. 301, 302 (1928); Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale L.J. 621, 646 (1919).

will yield, at times, to proof of a different subjective understanding of one or both parties. To find the presence of consent, what matters is the meaning that is generally attached to some given word or conduct indicating assent – a meaning to which both parties have access. In contract law, this generalized meaning therefore becomes the presumptive meaning.[16] The presumption can be rebutted, not by reference to the promisor's subjective intent in performing the consenting acts, but either by proof of any special meaning that the parties' behavior reveals they held in common,[17] which would negate the social function of accepting the generalized meaning, or by the promisor's proof that the listener did not actually understand the "reasonable" meaning to be the intended meaning. A promisee is not "justified" in relying on the ordinary meaning of a promisor's words or deeds where a special meaning can be proved to have been actually understood by both parties. Similarly, the enforcement of the "reasonable" meaning serves no constructive purpose where it was not the promisee's actual understanding. The boundary-determining function of a rights analysis simply does not require that such reliance be protected or such a meaning enforced.

Further, permitting a promisor to contest whether a promisee did in fact rely upon the objective meaning does not jeopardize the boundary-defining function of contract law in a consent theory. Assuming that a promisor can prove such an allegation, the reliance that the objective approach is designed to protect is nonexistent, and permitting such proof would provide few opportunities for fraud. In this regard a consent theory conforms to the traditionally accepted interpretation of the objective theory.[18]

This analysis also explains why the misuse of a particular term by party *A* who was unaware of its ordinary meaning would not bind *A* if it could be shown that *B*, the other party,

16 *See* Restatement (Second) of Contracts § 201 comment a (1979).
17 *See id.* § 201 comment a.
18 *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 392, 105 S.W. 777, 780 (1907).

was made aware of this mistake by the circumstances of the transaction.[19] Proof of this occurrence would show that the normal boundary-defining function of an objective approach designed to protect parties in *B*'s position had been satisfied by *B*'s actual knowledge of *A*'s meaning. A consent theory, therefore, explains both why parties are free to shift away from the ordinary meanings of words or deeds either intentionally or inadvertently, and why, if a shift by both cannot be shown, the ordinary or objective meaning will govern.

Persons generally use conventional words and actions to convey their intentions with a considerable degree of accuracy. Because of this, only in very unusual circumstances will the outcome of an objective approach based upon the ordinary and natural meaning of words and other assertive conduct differ from that of a subjective approach. Most cases would come out the same in either event. But unlike a will theory, a consent theory – because it is based on fundamental notions of entitlements – can explain both why we generally enforce the objective manifestation of consent when it differs from subjective intent and the exceptions where evidence of subjective intent will prevail.

III. DETERMINING CONTRACTUAL OBLIGATION IN A CONSENT THEORY

A. Establishing the prima facie case of consent

Richard Epstein has suggested that legal principles used to determine obligation can best be thought of as presumptive in nature.[20] Any such presumption of obligation, however, may be rebutted if other facts are proved to have existed that undermine the normal significance of the prima facie case. Such responses or "defenses" to the prima facie case are themselves only presumptively compelling. They in turn may be rebutted by still other facts alleged by the person

19 *See* Restatement (Second) of Contracts § 153 (1979).
20 *See* Epstein, Pleadings and Presumptions, 40 U. Chi. L. Rev. 556 (1973).

seeking relief. In this way the principles or elements that determine legal obligation come in "stages."[21]

In a consent theory, absent the assertion of a valid defense, proof of consent to transfer alienable rights is legally sufficient to establish the existence of a contractual obligation. Consent is prima facie binding both because of its usual connection with subjective assent (which protects the autonomy of the promisor) and because people usually have access only to the manifested intentions of others (which protects the reliance of the promisee and others as well as the security of transactions). There are two ways to manifest one's intention to be legally bound.[22] The first is to deliberately "channel" one's behavior through the use of a legal formality in such a way as to convey explicitly a certain meaning – that of having an intention to be legally bound – to another. This is the formal means of consenting. The second and, perhaps, more common method is by indirectly or implicitly conveying this meaning by other types of behavior. This is the informal means of consenting.

1. Formal consent. For a considerable part of the history of the common law, the principal way of creating what we now think of as a contractual obligation was to cast one's agreement in the form of a sealed writing.[23] The emergence of assumpsit as the principal action of contractual enforcement required the development of a doctrinal limitation on the enforcement of commitments – that is, the doctrine of consideration.[24] This development eventually resulted in the ascendancy of the bargain theory of consideration, which had the unintended consequence of creating doctrinal problems

21 *See* Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. 949 (1985).

22 The analysis presented in this section has been greatly expanded and refined in Barnett & Becker, Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443 (1987).

23 *See* A. Simpson, *supra* note 4, at 88–90.

24 The Statute of Frauds, passed in 1677, was another such limitation. *See id.*, at 599–600.

for the enforcement of formal commitments where there was no bargained-for consideration. Notwithstanding their ancient history, formal commitments, such as those under seal, came to be thought of as "exceptions" to the 'normal' requirement of consideration. Expressions such as "a seal imports consideration" or is "a substitute for consideration" became commonplace.[25] In a climate of opinion dominated by notions of "bargained-for consideration" and "induced reliance," when there is no bargain and no demonstrable reliance to support enforcement, formal promises have had an uncertain place in the law of contract.

A consent theory of contract, however, provides the missing theoretical foundation of formal contracts and explains their proper place in a well-crafted law of contract. The voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in the most unambiguous manner possible. Formal contracts ought to be an "easy" case of contractual enforcement, but prevailing theories that require bargained-for consideration or induced reliance would have a hard time explaining why. For example, when there is no separate bargained-for consideration for making an offer irrevocable for a certain period of time, a bargain theory of consideration would have a difficult time explaining the enforceability of "firm offers" which require neither consideration nor detrimental reliance for enforcement to be obtained.[26] In a consent theory, by contrast, there need be no underlying bargain or demonstrable reliance for such a commitment to be properly enforced.

The same holds true for nominal consideration and for false recitals of consideration. A consent theory acknowledges that, if properly evidenced, the exchange of one dollar or a false recital by the parties that consideration exists may fulfill the channeling function of formalities, whether or not any

25 *See, e.g.*, In re Conrad's Estate, 333 Pa. 561, 563, 3 A.2d 697, 699 (1938); Aller v. Aller, 40 N.J.L. 446 (1878); *cf.* Crane, The Magic of the Private Seal, 15 Colum. L. Rev. 24, 25–26 (1915).

26 In sales contracts, firm offers are enforceable without consideration by U.C.C. § 2–205 (1977).

bargained-for consideration for the commitment in fact exists. If it is widely known that the written phrase "in return for good and valuable consideration" means that one intends to make a legally binding commitment, then these words will fulfill a channeling function as well as, and perhaps better than, a seal or other formality. The current rule that the falsity of such a statement permits a court to nullify a transaction because of a lack of consideration[27] is therefore contrary to a consent theory of contract.

2. *Informal consent.* Consent to transfer rights can be express or implied. Formal contracts expressing consent to transfer alienable rights pose no problem for a consent theory. The enforcement of informal commitments where evidence of legally binding intentions is more obscure, however, has plagued contract law for centuries. In such agreements courts must infer assent to be legally bound from the circumstances or the "considerations"[28] or "causa"[29] that induced the parties' actions.

(a) Bargaining as evidence of consent. Within a consent theory, the fact that a person has received something of value in return for a promise may indeed indicate that this promise was an expression of intention to transfer rights. Moreover, in some circumstances where gratuitous transfers are unusual, the receipt of a benefit in return for a promise should serve as objective notice to the promisor that the promise has been interpreted by the other party to be legally binding.[30]

27 *See* Restatement (Second) of Contracts § 71 comment b (1979); *see, e.g.*, Schnell v. Nell, 17 Ind. 29, 32 (1861); Shepard v. Rhodes, 7 R.I. 470, 475 (1863). *But see* Restatement (Second) of Contracts § 87(1)(a) (1979).

28 On this archaic usage of the word "consideration," see A. Simpson, *supra* note 4, at 321.

29 For the possible parallels between consideration and the civilian concept of "causa," *see* Mason, The Utility of Consideration – A Comparative View, 41 Colum. L. Rev. 825, 825–31 (1941).

30 The duties, if any, the receipt of a nongratuitous benefit imposes on the recipient are beyond the scope of this essay, except to note that such receipt may manifest the recipient's intent to be legally bound to a contemporaneous commitment.

Although the existence of a bargain or other motivation for a transaction may be good evidence of the sort of agreement that has been made, in a consent theory the absence of consideration does not preclude the application of legal sanctions if other indicia of consent are present. So if it can be proved, for example, that a party voluntarily consented to be legally bound to keep an offer to transfer rights open, to release a debt, to modify an obligation, or to pay for past favors,[31] the lack of bargained-for consideration will not bar enforcement of these kinds of commitments in a consent theory.

Where bargaining is the norm – as it is in most sales transactions – there is little need for the law to require explicit proof of an intent to be legally bound, such as an additional formality, or even proof of the existence of a bargain. In such circumstances, if an arm's-length agreement to sell can be proved, there presumptively has been a manifestation of intent to be legally bound. For this reason, the Uniform Commercial Code's stricture that "[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract,"[32] is entirely consonant with a consent theory.

(b) Reliance as evidence of consent. A consent theory also identifies those circumstances where the presence of reliance provides an adequate substitute for the traditional requirement of consideration. If the primary function of consideration is to serve as one way of manifesting assent to be legally bound, and not as a necessary element of the prima facie case of contractual obligation, then reliance and consideration may sometimes be functionally equivalent. Expenditures made by a promisee in reliance on the words and conduct of the prom-

31 These are examples given by Charles Fried as hard cases for traditional consideration theory. *See* C. Fried, *supra* note 12. Note that in real cases of this kind, formalities adequate to indicate consent are often present.

32 U.C.C. § 2–204 (1977).

isor may prove as much about the nature of this transaction as the existence of consideration, especially where the reliance is or should be known to the promisor.

Suppose that *A* makes a substantial promise to *B* – for example, a promise to convey land. The promise while clear may be ambiguous as to its intended legal effect. Does *A* intend to be bound and subject to legal enforcement if she reneges, or is she merely stating her current view of her future intentions? Now suppose that *B* announces to *A* his intention to rely on *A*'s promise in a substantial way – for example, by building a house on the land – and that *A* says nothing. Suppose further that *B* commences construction and observes *A* watching in silence. It would seem that under such circumstances *A*'s ambiguous legal intent has been clarified. By remaining silent in the face of reliance so substantial that *B* would not have undertaken it without a legal commitment from *A* – *A* could not reasonably have believed that *B* intended to make a gift to her of the house – *A* has manifested an intention to be legally bound.[33]

In this manner, a promisor's silence while observing substantial reliance on the promise by the promisee can manifest the promisor's assent to the promisee. In a consent theory, if consent is proved, then enforcement is warranted even if a bargain or a formality is absent. In sum, bargained-for consideration and nonbargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound. In any case, the absence of either bargained-for consideration or reliance will not bar the enforcement of a transfer of entitlements that can be proved in some way – for example, by a formal written document or by adequate proof of a sufficiently unambiguous verbal commitment.[34]

33 *See, e.g.*, Greiner v. Greiner, 293 P. 759 (Kan. 1930); Seavey v. Drake, 62 N.H. 393 (1882); Roberts-Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922). In each of these cases, the promisor remained silent in the face of substantial reliance on a promise to convey land. The courts granted relief despite the lack of bargained-for consideration.

34 It is not being suggested here that such prophylactic measures that

B. Contract defenses: rebutting the prima facie case of consent

Consent, either formal or informal, is required to make out a prima facie case of contractural obligation. This means that, in the absence of an "affirmative" defense to the prima facie case of contractual obligation, the manifested intention of a party to transfer alienable rights will justify the enforcement of such a commitment. Traditional contract defenses can be understood as describing circumstances that, if proved to have existed, deprive the manifestation of assent of its normal moral, and therefore legal, significance. These defenses may be clustered into three groups, each of which undermines the prima facie case of consent in a different way.

The first group of defenses – duress, misrepresentation, and (possibly) unconscionability[35] – describes circumstances where the manifestation of an intention to be legally bound has been obtained improperly by the promisee. The manifestation of assent either was improperly coerced by the promisee or was based on misinformation for which the promisee was responsible. The second group – incapacity, infancy, and intoxication – describes attributes of the promisor that indicate a lack of ability to assert meaningful assent. The third group – mistake, impracticability, and frustration – stem from the inability to fully express in any agreement all possible contingencies that might affect performance. Each describes those types of events (a) whose nonoccurrence was arguably a real, but tacit assumption upon which consent was based, and (b) for which the promisee should bear the risk of occurrence.[36] Each type of defense thus is

serve an evidentiary function - such as a statute of frauds, a parol evidence rule, or certain formal requirements - are inappropriate in a consent theory. This issue is discussed in Barnett & Becker, *supra* note 22, at 470–85.

35 For analyses of unconscionability that would place it in this category of defenses, *see, e.g.*, Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975); Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

36 In this third group of defenses, the consent was not improperly induced by the promisee, and the person giving consent was capable

distinguished by the way it undermines the normal, presumed significance of consent. But all valid contract defenses describe general circumstances where the appearance of assent tends to lack its normal moral significance.

These traditional contract defenses function in a consent theory, as they do currently, to preserve the actual voluntariness of rights transfer in those comparatively rare cases where consent has been improperly coerced or where we are willing to acknowledge other circumstances, such as misinformation, that vitiate the presence of consent. This refusal to enforce some instances of apparent assent does not, however, reflect a retreat to a subjective will theory. It remains true that an objective manifestation of intent to be legally bound is sufficient to give rise to an enforceable commitment. The only qualification is that this objective manifestation must have been voluntary.

IV. CONTRACT REMEDIES AND INALIENABLE RIGHTS

A. Remedies for breach of contract

Traditionally, the common law has distinguished between legal relief and equitable relief. Legal relief was relief available in "courts of law." Equitable relief was extraordinary relief originally available from the King, then from the King's Chancellor, and finally from the Chancery courts or "courts of equity."[37] Legal relief for breach of contract normally takes the form of money damages. Equitable relief normally consists either of specific performance or an injunction – that is,

of doing so. This, in part, may help explain why courts are quite receptive to arguments by the promisee that the promisor assumed the risk of the mistake, impracticability, or frustration. *See* E. Farnsworth, *supra* note 10, §§ 9.3–.4, 9.6–.7, at 659–61, 666, 684–86, 692–94.

37 *See* D. Dobbs, Handbook on the Law of Remedies 24–34 (1973); E. Farnsworth, *supra* note 10, at 818–24. These were not, however, the only court systems that coexisted in England. *See* H. Berman, Law and Revolution 10 (1984).

the party in breach may be ordered to perform an act or to refrain from performing an act.

The present rule governing legal and equitable remedies for breach of contract can be simply stated: Legal relief – money damages – is available as a matter of right. Equitable relief – specific performance or injunction – is available upon a showing by the party seeking enforcement that legal relief is somehow "inadequate."[38] Put another way, money damages are the presumptive form of remedy for breach of contract. Specific performance orders and injunctions are exceptional forms of contract remedies.[39]

In this section, I explain why a consent theory of contract undercuts the traditional rule favoring money damages and supports a presumption in favor of specific performance – unless the parties have consented to money damages instead. The principal obstacle to such an approach is the reluctance of courts to specifically enforce contracts for personal services. In what follows, I suggest that the philosophical distinction between alienable and inalienable rights bolsters this historical reticence because a right to personal services may be seen as inalienable. If, however, the subject matter of a contract for personal services is properly confined to an alienable right to money damages for failure to perform, specific enforcement of such contracts is no longer problematic. I also consider whether contracts for corporate services are like contracts for personal services in that they may properly be

38 The actual historical picture may not be quite this clear-cut. For one thing, medieval English common law courts may not have had as strong a preference for money damages as is commonly assumed. *See* F. Pollock & F. Maitland, The History of English Law 595 (1898). For another, during most of the medieval period, the effective remedy for breach of most contracts in the common law court was enforcement of a penal bond. *See generally* A. Simpson, *supra* note 4, at 88–125. Thus, every sort of obligation could be reduced to a monetary one or a "debt" by the party in breach. Beginning in 1283, a debtor's liability to pay could be enforced by imprisonment; see *id.*, at 87.

39 For a fuller description and excellent assessment of the present law governing this subject, *see* Kronman, Specific Performance, 45 U. Chi. L. Rev. 351 (1978); Schwartz, The Case for Specific Performance, 89 Yale L.J., 271 (1979).

enforced only by money damages, or whether performance of corporate services can be made the subject of a valid rights transfer and judicially compelled in the same manner as contracts for external resources.

B. Inalienable rights

As was discussed in Part I, a property rights conception of entitlements suggests that rights are best construed as enforceable claims to acquire, use, and transfer resources in the world – as claims to control one's person and external resources. As was discussed in Part II, a consent theory of contract specifies that an enforceable transfer of rights requires the satisfaction of at least two conditions: (1) The *subject* of a contract – as opposed to its object (or purpose) – must be a morally justifiable right possessed by the transferor that is interpersonally transferable, or "alienable"; (2) the holder of the right must *consent* to its transfer. Thus, commitments will generally be enforced only if they manifest to the promisee the promisor's assent to transfer alienable rights.

The fact that there must be a consent to transfer *alienable rights* suggests that the issue of contractual enforceability could potentially turn on one of two inquiries into the subject matter of the contract. First, are the rights that are allegedly being transferred to the promisee in fact held by the promisor? Second, are the rights that are the subject of a purported transfer agreement the *kinds* of rights that can be transferred? The second of these inquires involves the distinction between alienable and inalienable rights, a distinction that has been widely discussed in recent years.[40] To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to an-

40 Much of the recent legal literature was stimulated by Calabresi & Melamed's seminal article, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089–1128 (1972).

other.[41] Such a claim must be distinguished from a claim that a right is forfeitable. As one philosopher has noted, "[a] person who has forfeited a right has lost the right because of some offence or wrongdoing."[42]

Elsewhere I have discussed four reasons why consent might be insufficient to extinguish or transfer certain rights.[43] In this essay I shall confine my discussion to a reason for inalienability that is peculiar to a regime of property rights: namely that, within such a scheme, certain of these rights literally cannot be transferred. If rights are enforceable claims to control resources in the world and contracts are enforceable transfers of these rights, then, when control of a resource cannot in fact be transferred, a right to control the resource also cannot be transferred.

Suppose that *A* consented to transfer partial or complete control of his body to *B*. Absent some physiological change in *A* (caused, perhaps, by voluntarily and knowingly ingesting some special drug or undergoing psychosurgery)[44] there is no way for such a commitment to be carried out. True, *A* could conform his conduct to the orders of *B*, but, his agreement notwithstanding, he would still retain control over his actions and would willfully have to act so as to conform his actions to *B*'s orders. Because *A* cannot in fact transfer the control of his body to *B*, despite the alleged

41 *See* McConnell, The Nature and Basis of Inalienable Rights, 3 Law and Phil. 43 (1984).

42 *Id.*, at 28. *See also* J. Feinberg, *supra* note 8, at 240–42; and D. Meyers, Inalienable Rights: A Defense 13–15 (1985).

43 *See* Barnett, Contract Remedies, *supra* note 2, at 186–94.

44 Arthur Kuflik offers these examples to undercut this type of argument for inalienability. *See* Kuflik, *supra* note 8, at 281 ("This suggests that the impropriety of an autonomy-abdicating agreement has more to do with the impropriety of autonomy-abdication itself than with some general fact that we have no right to make commitments we know we will be unable to keep"). But arguments based on impropriety and one based on the impossibility of such agreements are not mutually exclusive. Kuflik's examples only show that this reason for inalienability is *limited* to those commitments to alienate the future control over one's person which are not made possible by mind-altering drugs, brainwashing techniques, or psychosurgery.

transfer of a right to control from *A* to *B*, *B* would in fact be forced to rely on *A*'s actual control of his body to carry out *B*'s orders.[45] *B*'s "control" of *A*'s body would, then, be metaphorical rather than actual. This is not to say that force is ineffective in getting slaves or servants to obey the orders of their putative masters but, rather, that force would be unnecessary if the actual control of servants' bodies could be transferred to the masters as specified by the terms of the agreement.

So?

This distinction between alienable and inalienable, transferable and nontransferable rights corresponds to the distinction recognized in civil law countries between contracts "to give" and contracts "to do."[46] The former kind of contract transfers a right to control external resources; the latter calls for some future act involving the use of one's person. Surely, the former kind of transfer is possible. What is *my* house or car could equally well be *your* house and car. But bodies are different from other kinds of things. What is *my* body cannot literally be made *your* body. Because there is no obstacle to transferring control of a house or car (of the sort that is unavoidably presented when one attempts to transfer control over one's body), there is no obstacle to transferring the right to control a house or car.[47] But if control cannot be transferred, then it is hard to see how a right to control can be transferred.

yes it is. that's what prism does.

45 Similarly, a promise to undergo a dependency-inducing procedure would be an unenforceable attempt to transfer an inalienable right: the right to control whether or not to submit to the operation. But third parties might have no right to forcibly interfere with someone who voluntarily undergoes such a procedure. (The claim, for example, that members of religious "cults" may rightfully be kidnapped and "deprogrammed" is properly controversial.) A person who voluntarily submitted to such a procedure (assuming that such a procedure actually worked) might be committing a nonfatal kind of "suicide" (zombicide?) and the "master" or guardian *would* then become legally responsible for his ward.

46 *See* B. Nicholas, French Law of Contract 149 (1982); Treitel, Remedies for Breach of Contract, *in* 7 International Encyclopedia of Comparative Law 13 (A. Mehren, ed., 1976).

47 Transferring ownership in animals may be seen as presenting a special difficulty. Cannot animals refuse the orders of the master? But the problem of control here is less than meets the eye. The second owner gets no more control and hence no more rights than those held by the original owner. Suppose the promisor attempted to transfer the right to a horse that would cuddle up with you in bed. Unless the first owner actually possessed such a horse, the *right to this kind* of horse could not pass. While the failure to tender this kind of horse would not alone constitute a breach of contract, the possibility of an action for fraud or breach of warranty remains. In contrast, the issue of inalienable human rights concerns the rights an individual *retains* despite the fact that consent to transfer these rights may have been expressed. Therefore, the truly analogous problem with animals is whether or not sentient animals themselves have rights – inalienable or otherwise – in the first place, an issue that is well beyond the scope of this treatment.

same as w/ person. Begs the Q.

So?

It will not do to argue that such a right to control is transferable because a putative master can obtain legal enforcement of the agreement. Such a claim is a *non sequitur* in an entitlement theory. According to entitlement theories, we do not have rights because our claims are in fact enforced. Rather, our claims are enforced because we can demonstrate that we have rights. Nor would an award of money damages for breach of contract to perform services in the future necessarily entail that a right to the services themselves had been alienated. Rather, as will be discussed below, such a claim could be as well accounted for by saying that it is the right *to the money* – an indisputably alienable right – that has been conditionally transferred; the condition being the nonperformance of the services.

which dep. on whether they are may be enforced!

Suppose, now, that the agreement between *A* and *B* was recast to read that *A* transfers to *B* "the right to use force against *A* to compel *A* to conform his conduct to *B*'s commands." It would appear that since it is possible for *B* to use force against *A*, the right to use force can be transferred as well and, therefore, this agreement is not barred by reason of impossibility (though it might be subject to other difficulties). Upon closer inspection, however, such an agreement does not escape the problem of attempting to transfer a right of control which cannot in fact be transferred.

yes.

If *B* has the right to use force against *A*, then *A* may not rightfully resist. But *B* has the right to use force against *A*

only if such force can be justified. Such force may be justified if *A* consented or appeared to consent (and did not change his mind) – for example, if *A* and *B* were prize fighters or stunt men, or if *A* was a masochist. The crucial question, however, is not whether *A*'s consent to the use of force by *B* justifies *B*'s actions, but whether *A*'s prior consent can limit his right to withhold consent in the future when he has a change of heart.

Suppose that, after promising to perform services and granting to *B* the "right" to use force to compel performance, *A* thinks better of it and revokes his consent. When *B* (or a court) attempts to enforce *B*'s commands, may *A* rightfully resist? The argument that *B* may rightfully use force against *A* entails that *A* no longer has a right to resist *B* because, by his agreement, *A* consented to transfer this right to *B*. This is so because, had *A* retained his right to resist B, then *A* would be acting both rightfully and wrongfully should he resist *B* and such a conflict of rights is barred by the compossibility feature of an entitlements theory.[48] That is, there would be a conflict between *A*'s right to resist and *B*'s right to use force against *A* and the requirement of compossibility requires it be possible for all valid rights to be exercised simultaneously.

Yet *A*'s agreement notwithstanding, *A* retains his ability to resist *B*. Just as *A* cannot alienate his right to the future control of his person because his ability to control his person cannot literally be transferred, *A* cannot have transferred or lost his right to resist when he retains his ability to resist.[49]

48 For a discussion of the role of compossibility in property rights theory, *see* R. Nozick, *supra* note 3, at 199; Steiner, The Structure of a Set of Compossible Rights, 74 J. of Phil. 767 (1977); Barnett, *supra* note 6, at 58.

49 True, as above, *A* can voluntarily submit to procedures which would eliminate his ability to resist (although it is very hard to imagine the value to a master of a slave who had lost the power to physically resist violence). The harder question would then be, in the unlikely event that *A*'s ability to resist had been alienated, could others rightfully go to *A*'s defense? This issue would perhaps be best governed by principles of guardianship. *See* Kuflik, *supra* note 8, at 275; Barnett,

Therefore, if *A* may still rightfully resist *B*, then *B* cannot have acquired the right to use force against *A*, since such a right would also impose on *A* a contradictory duty to refrain from resisting.

True, when *A* transfers alienable rights to *external* resources to *B*, *A* loses his right to resist *B*'s use and enjoyment of these resources notwithstanding the fact that *A* retains his ability to resist *B*'s use. But with such an agreement *A* transfers to *B* the "right to use and enjoy the external resources" and it is this right that renders *A*'s subsequent resistance wrongful. *A* loses his right to resist *B*'s use and enjoyment of the resource in question, not because he transferred his right to resist, but because such resistance would interfere with *B*'s right to control the resource. In sum, it is *A*'s consent to transfer an alienable right that renders any subsequent resistance by him wrongful, not his consent to transfer his right to resist. And there is no barrier to transferring the right to control the resource to *B* because *B*, no less than *A*, is capable of exercising such a right.

We can now see why an agreement to transfer *A*'s "right to resist *B*'s use of force" to *B* fails. First, such a rights transfer purports to transfer a right to resist when it is quite impossible for *B* to exercise *A*'s ability to resist; and second, there is no other alienable right to control resources being legitimately transferred that would render *A*'s subsequent resistance wrongful. The only other rights transfer that would render *A*'s resistance wrongful would be the transfer of *A*'s right to control his body and this right, for reasons discussed above, is inalienable. And if *A* retains his right to resist *B*, then, notwithstanding any agreement between *A* and *B*, the requirement of compossibility mandates that *B* may not rightfully use force against *A*. Although this analysis may seem suspiciously complicated, its conclusion should not be surprising, for a "right to resist the force used by another" is simply a specialized instance of the right to control one's person – a right that cannot be alienated.

supra note 6, at 69 (briefly discussing the concept of guardianship in a Liberty Approach).

The implications of this analysis may appear far-reaching.[50] The enforceability of *all* commitments to perform personal services in the future appears to have been undercut. When a promisor who has promised to perform services in the future refuses to perform, because no right to performance has been transferred to the promisee by the promise, no right of the promisee is violated by nonperformance. But, as will be considered below, the actual consequence of such analysis is only to limit the remedy for nonperformance of personal service commitments to money damages.

Anthony Kronman has argued that legal prohibitions of slavery, though permissible, are "paternalist."[51] But, although arguments for inalienable rights may be paternalist, this need not be so. Surely the account just provided is not paternalist. No one may rightfully interfere in the consensual sacrificial conduct of a competent adult – as a parent may interfere with a child – simply because the intermeddler thinks he knows what is best for the individual making the sacrifice. Rather, when a right is viewed as inalienable, the law should not specifically enforce an agreement to transfer such a right when the original rights-holder thinks better of it.

Inalienable rights define a category of decisions about which competent adults may rightfully override *their own* previously expressed preferences. Where *ex ante* consent and *ex post* consent are the same, there would be no breach of contract. Restrictions on alienability, then, are really rules concerning which of two inconsistent expressions of assent by the same party determines the rights of both parties to

50 Note, however, that the analysis just presented neither stems from nor supports a view that the only rights we have are those which we are able to assert – that "might makes right." The analysis of inalienability in the text claims only to describe a feature of those rights which we (arguably) have: some of these rights may be alienated or transferred, others of them may not be alienated because they cannot be. What rights we have and how we come to have them is another story requiring additional analysis. *See* Barnett, *supra* note 6. I thank Emilio Pacheco for bringing this issue to my attention.

51 *See* Kronman, *supra* note 13, at 774–76.

an agreement. With alienable rights, *ex ante* consent transfers rights to control resources and binds the transferor *ex post*; with inalienable rights, a right to control resources is never transferred by consent, so *ex post* consent takes precedence over *ex ante* consent. In sum, the most salient characteristic of inalienable rights may be that, while a rights-holder may *exercise* her inalienable rights for the benefit of others, a rights-holder may never surrender the privilege of changing her mind about whether to exercise such rights or not.[52]

According to the analysis presented here, which rights are alienable and which are not? The alienability of rights wholly or partially to control the future use of one's person has been called into question. The transfer of even limited rights of bodily control is barred in principle by the literal impossibility of transferring control over one's person. On the other hand, because it is possible to transfer control of external resources, consent to transfer a right to control such resources does not pose the same difficulties as consent to transfer the right to control one's person. Except in the most rare and extreme of circumstances, rights to external resources are alienable.[53]

C. *Choosing between damages and specific performance*

A consent theory of contract permits us to distinguish between the *subject* of a contract – that is, the particular rights

52 *Cf.* J.S. Mill, On Liberty 125 (Lib. of Lib. Arts ed., 1956) ("there are perhaps no contracts or engagements, except those that relate to money or money's worth, of which one can venture to say that there ought to be no liberty whatsoever of retraction"). Extreme situations warranting different treatment can always be hypothesized. For example, may a pilot be forcibly compelled to complete a journey he has contracted to fly and be prevented from parachuting out of a plane? The endangerment involved in the example, however, introduces a tortious element. The better analogy would be to ask whether a pilot who safely lands a plane short of completing a designated route can be compelled to finish the trip.

53 Other reasons for inalienability of otherwise alienable external property have been suggested, but space constraints prevent me from considering them here. *See, e.g.*, Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985); Epstein, Why Restrain Alienation? 85 Colum. L. Rev. 970, 973–90 (1985).

being transferred from one party to the other – and the *object* (or objective or purpose) of a contract – that is, what the parties are trying to accomplish by transferring the rights that are the subject of the contract. For reasons just discussed, only alienable rights may be the subject of an enforceable rights-transfer agreement. In this section, the problems traditionally associated with specifically enforcing contracts for personal services will be shown to stem from the fact that inalienable rights may improperly be construed as the subject, rather than the object, of such contracts. In contrast, the specific performance of contracts for corporate services gives rise to no such problem.[54]

1. *Contracts for external resources.* The first kind of contract involves consent to transfer rights to possess, control, and use identifiable external resources, whether land or goods. Because rights to external resources are presumptively alienable, such rights may be made the subject of an enforceable rights transfer.

If *A* contracts to "sell" a piece of land or some good like a car to *B*, most people would expect that when the contract is executed *B* has a right to the specified land or car. Therefore, when this is the normal expectation and intention, the normal or presumptive remedy for breach of contract in such a case should be that *B*'s newly acquired rights to the land or car are respected – he gets the land or car if he still desires to receive it.[55] If not, he may elect to receive money dam-

54 This essay does not exhaust the subject of inalienable rights, nor that of the proper choice of contract remedies. Contracts to provide employment, for example, do not easily fit into any of the three categories of contracts discussed in this essay. Determining whether such a contract may permissibly be specifically enforced might turn out to require a more extended discussion of inalienable rights.

55 This category corresponds to the category of contracts to give (*donner*) in French law. *See* text accompanying *supra* note 46. Consistent with the analysis in the text, French law grants specific performance as a matter of right. *See* B. Nicholas, *supra* note 46, at 211; Treitel, *supra* note 46, at 13.

ages.[56] The common law apparently once granted a comparable right of replevin to buyers of goods, but, interestingly, this right appears to have been conceived of as arising from property law, not contract law.[57] A consent theory of contract says that such an agreement would ordinarily be enforced.

Of course, *A* and *B* need not agree to transfer the right to the land or car itself. They might instead include an express provision in their original contract that would rebut the normal meaning of such contracts and limit recovery for breach to money damages. The *object* of such contract ~~might be~~ to secure possession or delivery, but its *subject* would be a conditional transfer of a right to compensation for nonperformance rather than the right to the resource itself.

2. *Contracts for personal services.* What should happen if *A* breaches a commitment to provide personal services by refusing to perform as agreed? Can a commitment by *A* to *B* that *A* will do something (or refrain from doing something) for *B* constitute a valid contract? If the right to the future control of one's person is inalienable, then the personal services in question cannot be the subject of a valid rights-transfer agreement. Therefore, if a promise to provide personal services is only a commitment to exercise an inalienable right, then it is unenforceable. By breaching his promise to *B*, *A* may commit a morally bad act. He has not, however, committed a legally cognizable wrong.

56 *See* Dawson, Specific Performance in France and Germany, 57 Mich. L. Rev. 532 (1959). It is arguable that, in some cases, sellers might be permitted to show why buyers should not get the thing contracted for. For example, if a fungible replacement good is easily available to the buyer on the market, but performance would be an extreme hardship on the seller, then where the contract is silent on the form of relief, the seller might be liable only for money damages. Where these circumstances can be shown to exist, and in the absence of an express clause, it may no longer be safe to presume that sellers would have consented to specific relief. In contrast with the traditional rule, however, the burden of proof is placed on the appropriate party: the party in breach. For arguments against this defense *see* Schwartz, *supra* note 39, at 289 n.

57 *See* F. Kessler & G. Gilmore, Contracts: Cases and Materials 1000 (2d ed. 1970).

Alternatively, a contract "to provide personal services" might accurately be construed as a commitment to transfer alienable rights to money damages (or other alienable resources) on the condition that specified personal services are not performed as promised. Such an agreement would not purport to transfer the inalienable right to a person's services. Rather, such an agreement would (conditionally) transfer alienable rights to the money that would satisfy the judgment; it would be enforceable in the event that the condition was satisfied – that is, in the event that services were not performed as agreed. In essence, the actual commitment in an enforceable agreement to provide personal services would be: "I'll do X for you and, if I fail to perform, you will have the right to money damages from me."

While the *object* or purpose of such a contract for personal services would be to assure that one party will exercise his inalienable rights in a certain way some time in the future, the actual *subject* of such a contract would be the transfer of alienable right to the money. "Every obligation to do or not to do (*de faire ou de ne pas faire*) resolves itself into damages in the case of non-performance by the debtor."[58] Thus, if *A* consents to a legally binding commitment to personally paint *B*'s picture, then no matter what the contract specifies, *B*'s only right is to money damages (specific enforcement of the transfer of the money)[59] – even if *A*'s performance is unique or monetary damages are inadequate for some other reason. When construed in this manner, enforcing contracts for personal services would not constitute an exception to a presumption in favor of specific performance for the breach of any contract. In the event of a failure to perform a personal services contract, the conditional transfer of the right to the

Ga. Civ. Code?

58 French Civil Code, art. 1142, as it appears in B. Nicholas, *supra* note 46, at 210.

59 What the contract specifies might influence which *measure* of money damages is used. For an explanation of the various possible measures of contract damages, *see* Cooter & Eisenberg, Damages for Breach of Contract, 73 Cal. L. Rev. 1432 (1985); Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52 (1936).

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money is the subject of the contract and it is this alienable right that is specifically enforced.

Limiting the proper subject of contract for personal services to money damages (which will be specifically enforced) produces legal results which are entirely consonant with the common law's traditional reluctance to grant specific relief for breach of personal services contracts. A consent theory of contract and a proper distinction between alienable and inalienable rights both explains and justifies what now appears to be an *ad hoc* "public policy" exception.

3. *Contracts for corporate services.* At first blush, it may appear that if Firm *A* legally commits itself to provide corporate services involving individual labor to a consumer or another firm, such a contract should be governed by the same rule that applies to contracts for personal services. There is, however, an important difference. If Firm *A* breaches its contract to provide services, it need not be the case – and, in fact, it is quite unlikely – that the reason for the breach is the unwillingness of the employees of the firm who are personally to provide the services to perform. Rather, what has likely happened is that, for one reason or another, the owners or managers of Firm *A* have found it inexpedient to honor their commitment. They might, for example, have found a more profitable opportunity elsewhere, or something may have occurred to make performance more costly to them than they had anticipated.

If the undesirability of performance to the owners or management of a firm, not the reluctance of the workers supplying their labor, accounts for the decision to breach, a court may still be faced with practical problems of administering a decree of specific performance. It will not, however, confront the issue of involuntary servitude that plagues the specific performance of personal services contracts. True, as with personal service contracts, the services of the employees cannot be the subject of a valid contract because such services consist of the employees' exercise of their inalienable rights. And if an employee breaches his contract to perform services

for the firm, he would only be liable to the firm for money damages. Unlike contracts for personal services, however, the subject of a valid contract for corporate services need not be limited to the payment of money damages for failure to perform as agreed. The following series of examples illustrates that another morally permissible construction exists as well.

First, suppose that *A* wishes to have his house painted and is unable or unwilling to paint it himself. *A* can contract with individual *B* that *B* will paint the house – that is, *B* commits herself to compensate *A* if she fails to paint the house. If *B* breaches this contract to provide personal services, she is liable only for money damages. Suppose, instead, that *A* decides to buy Firm *C*, which is a house painting company. As the owner of Firm *C*, *A* may then order its painters to paint his house. (If any painter refuses to do so, then that painter may have breached whatever employment contract she has with Firm *C* and, if so, she is liable to the firm for money damages.) This may mean that Firm *C* might have to pass up the opportunity to contract with *D* to paint *D*'s house. As the new owner of the company, the right to make this decision now belongs to *A*.

Now, suppose *A* thinks that it is both too much trouble and too expensive to buy a painting company merely because he wishes to have his house painted. The only right of ownership that *A* really wants is the right to order the employees of Firm *C* to paint his house. To secure this and only this right, instead of buying Firm *C*, *A* contracts with it to paint his house. The principal difference between the two transactions is that a direct purchase of Firm *C* gives *A* many more rights (and risks) in addition to the right to direct the firm's painters to paint his house – rights which he neither desires nor can afford to purchase. A contract for corporate services, on the other hand, may transfer only the narrow right to direct the employees to paint his house, which *A* desires, and nothing more. A court order that Firm *C*'s employees paint *B*'s house is no different from *A* issuing this order as the owner of the firm. While one person cannot own another

person, a person can own a share of a firm. This suggests that where *A* contracts to buy corporate services from Firm *C*, *A* might have acquired a (very limited) kind of ownership right to the resources *of the firm*.

Whether *A* has in fact acquired such a right depends entirely on the construction given the terms of the contract. The agreement might have given *A* only a right to money damages for breach; or it might instead have specified that *A* gets the same right to have Firm *C*'s employees directed to paint his house that he would have acquired by buying the company and becoming its owner. No matter which form of relief the parties agree to, however, there is no moral problem of the sort that exists with specifically enforcing personal services contracts.

Suppose, now, that the contract is silent on the issue and there exists no trade custom governing this issue.[60] An important reason exists for favoring specific performance of a contract for corporate services, provided that the victim of the breach is an individual (as opposed to another firm). Purchasers who are legally unsophisticated – that is, unfamiliar with the legal background rules governing the choice of remedy – most likely assume when they contract for performance from a firm that, because performance is what they bargained for, performance is what they get if there is a breach. If the legal background rule governing the choice of remedies awarded only money damages, then such persons – who are by assumption ignorant of this legal background – would be most unlikely to insist on an express clause to the contrary. Their silence would not, then, reliably indicate assent to the terms provided by the legal background rule. By interpreting this silence as assent, courts in such cases

60 Determining the appropriate gap-filling technique in a consent theory when the parties are silent on an issue merits further consideration. The analysis of this issue that follows in the text should be considered as tentatively offered. For an insightful exploration of this important problem from a "bargaining theory" perspective, *see* the following essay in this book. See also Ayres & Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87 (1989).

would likely be giving firms a beneficial term they had not paid for.

In contrast, a firm in the business of regularly providing corporate services is, by virtue of its past experience (or legal counsel), very likely to be aware of the prevailing background legal rule and, should it wish not to be bound by this rule, it can try to insert in the contract an expressed provision to the contrary – that is, a term that mandates money damages only. This suggests that when a contract to provide corporate services that is silent on the issue of remedy is breached by the service provider,[61] and the victim is an individual (not another firm), a court should, at the request of the victim of the breach, order specific performance. Service providers might arguably be permitted to oppose a request for specific performance by showing that the services they provide are readily available elsewhere and performance is for some reason an extreme hardship. But, as with contracts for external resources, the recognition of such a defense would be controversial.[62]

In sum, when the purchaser of corporate services is an individual consumer, the reverse of the traditional rule governing contract damages should apply and specific performance should be favored. Providers of corporate services who wish to limit their liability to monetary damages would have to attempt to insert a clause to this effect in their contracts. A presumption of specific performance when the recipient of corporate services is an individual forces the party with better access to the background rule (the firm) to educate the less knowledgeable party by its bargaining behavior.

D. Summary of remedies in a consent theory

The traditional approach to remedies for breach of contract is that only money damages are available to the victim as of

61 The provider of "corporate services" is by definition a firm. When the service provider is an individual, rather than a firm, this is a contract for *personal* services for which only money damages for breach of contract should be obtained.

62 See *supra* note 56.

right. Specific performance is an exceptional form of relief available only when money damages are inadequate. Even when damages are inadequate, however, a contract for personal services will not be specifically enforced. A consent theory of contract suggests the following rule to govern the choice of remedies for breach of contract: The only enforceable agreements are those which consensually transfer alienable rights; all such agreements should presumptively be specifically enforced.

Where a contract transfers the right to *external resources*, then a transfer of these resources should be ordered by a court. If parties do not wish this result, they may agree – or, if they are silent, trade custom might establish – that only monetary damages will be due for failure to deliver a promised resource. Since a right to *personal services* is inalienable, persons wishing to enhance the reliability of a promise to perform personal services by means of a contract may accomplish this object by making a transfer of alienable rights (to money or other property) conditional on nonperformance. Upon failure to perform the desired services, the rights transfer could be specifically enforced. Where a contract calls for the provision of *corporate services*, the subject of the contract may either be a right to money damages or a limited right to control the firm. Since both of these rights are potentially alienable, when either right is transferred, a court may order a firm to specifically perform the obligation incurred. Where the purchaser of corporate services is an individual, a court should (at least) presumptively award specific performance.

CONCLUSION

My purpose in developing a consent theory of contract is not to end discussion of contract theory or doctrine, but rather to permit the ongoing discussion of contractual obligation to emerge from its longstanding intellectual cul-de-sac and begin traveling a more productive course. If the "death of contract" movement is a product of a disillusionment with and

abandonment of both the will theory of contract as a distinct source of contractual obligation and the bargain theory of consideration as the means of formally distinguishing between enforceable and unenforceable exercises of the will, the "resurrection of contract" is a recognition of contract law's proper function as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlements.

A consent theory of contractual obligation views certain agreements as legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights. This approach accurately captures what is at stake when individuals seek to exchange or bestow entitlements that they have acquired or will acquire; it explains the most fundamental aspects of contract law; and it solves previously vexatious theoretical problems. A better theoretical understanding of contractual obligation should ultimately result in rules and principles of contract that better facilitate the important social need to make and rely upon enforceable commitments.[63] These and other promises of the consent theory await future performance.

63 For other implications of a consent theory for contract doctrine, *see* Barnett & Becker, *supra* note 22; Barnett, Squaring Undisclosed Agency Law with Contract Theory, 75 Cal. L. Rev. 1969 (1987).

Chapter 6

A bargaining theory approach to default provisions and disclosure rules in contract law

JULES L. COLEMAN,
DOUGLAS D. HECKATHORN,
AND STEVEN M. MASER

I. THE PROBLEM

Legal rules facilitate as well as constrain human freedom. H.L.A. Hart captures the difference between these two functions of law by distinguishing between primary and secondary rules.[1] Primary rules impose obligations and thereby constrain behavior. Secondary rules empower individuals to create relations that confer rights and impose duties.[2] Thus, the criminal law constrains individual liberty; the law of contracts enhances it.

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1 H.L.A. HART, CONCEPT OF LAW (1961).

2 Hart is not always consistent in drawing the distinction. He characterizes secondary rules as power conferring. Some confer power on private individuals, others authorize officials. Unfortunately, the rule of recognition, which for Hart is the signature of a legal system, is a secondary rule, but it confers power on no one.