

Articles

A PROPERTY THEORY OF CONTRACT

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By a contract I acquire something external. But what is it that I acquire? Since it is only the causality of another's choice with respect to a performance he has promised me, 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.[†]

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[†] IMMANUEL KANT, THE METAPHYSICS OF MORALS § 20, at 93 (Mary J. Gregor trans., Cambridge Univ. Press 1991) (1797).

INTRODUCTION

Kant was right—when we enter into a contract, we acquire ownership of another person’s deeds. Yet contract discourse rarely recognizes actions as property.¹ This Article shows how thinking of contracts in property terms supports core features of contract doctrine that other theories are incapable of explaining.

Developing a coherent theory of contract doctrine in its entirety is notoriously difficult. Arguably, it is impossible.² However, viewing contracts as a transfer of ownership over future actions renders coherent a large swath of contract law—from formation doctrines, to consideration, to remedies. Property concepts bring order to an otherwise ill-fitting collection of doctrinal pieces. Equally important, understanding contracts as transfers of property offers normative guidance for how the law should develop prospectively.

Recently, contract theorists have suggested that the right to contractual performance can be characterized in property terms.³ Unfortunately, their explanations have significant normative and conceptual weaknesses. Legal scholars often distinguish contract rights from property rights rather than note their similarities.⁴ And, although courts frequently describe contracts

¹ This may reflect longstanding skepticism in the philosophical literature on property. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 181 (1988) (questioning whether actions can be owned). It may also stem from the view that property must involve an *in rem* right, good against the world. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001) (distinguishing contract rights from property rights because property rights are *in rem* and “bind the rest of the world”) (internal quotation omitted).

² See Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647, 1661 (2007) (“I do not assert that Contract *could* not be based on either autonomy or consequentialist bases alone; I assert that Contract doctrine is too imprecise to support the argument that either perspective, or for that matter, even an accommodation of both perspectives, could do anything like explaining Contract.”).

³ See, e.g., STEPHEN A. SMITH, *CONTRACT THEORY* 72 (2004) [hereinafter SMITH, *CONTRACT THEORY*] (suggesting that a promissory theory of contract must explain “why a promisee can fairly be regarded as *owning* a right to the promisor’s performance of the promised act”); Stephen A. Smith, *Towards a Theory of Contract*, in *OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES* 107, 123 (J. Horder ed., 2000) [hereinafter Smith, *Towards a Theory of Contract*] (“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.”); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 68 (2003) (describing Kantian view that a promisee “has acquired the promise itself”); cf. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118, 134 (Peter Benson ed., 2001) [hereinafter Benson, *Unity of Contract Law*] (suggesting the right to performance is “proprietary in character and therefore fully compatible with the idea of a transfer of ownership”). Benson, however, concludes that it is the “thing promised,” and not the performance itself, which is owned upon contract formation. See *id.* at 134–36.

⁴ For example, J.E. Penner contends that contract should not be considered a species of property given the difficulty in separating contract rights from the promisor’s personality. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 123 (1997) (“For us, these are all ‘personality-rich’ relationships: while we can notionally regard the object of the right, the contractual relation . . . as ‘things’, they are not the right kind of things for property given the way we understand them.”); see also Merrill & Smith, *supra* note

as a form of property, there is little judicial explanation of what makes contracts property-like.⁵ At present, the idea that contracting parties *own* performance rights is undertheorized.⁶

This Article offers a new, rights-based theory of contract obligation that builds on ownership concepts. It suggests that the right to performance of a contract is best understood as a special type of property—property in a promisor’s future actions.⁷ Contracts can be seen as a transfer of the right to a future action, dependent upon principles of just property acquisition recognized in other settings. The means of this transfer is the promisee’s satisfaction of the terms of a conditional promise.

Suppose I agree to walk your dog next week in exchange for ten dollars. Why should this agreement be potentially enforceable, while a mere promise to walk your dog would not be enforceable? If damages are owed due to a breach of the agreement, why should they be expectation damages? There are a variety of explanations one might look to—ranging from the morality of promising, to reliance, to efficiency—when answering these questions. This Article, however, suggests that the key element is your acquisition of a proprietary interest in my future action, the walking of your dog.

Reconceptualizing contracts in this way allows for a theory that comports with two basic features of the private law: the harm principle and the

1, at 787 (“The duty to respect the property of others (and other interests such as bodily security and privacy of others) has an impersonality and generality that is qualitatively different from duties that derive from specific promises or relationships.”). Others have noted, however, that even contracts involve rights that apply against the public at large. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S410 (2002) (“In general, contract rights, like property rights, are ‘good against all the world’ inasmuch as any third party who intentionally interferes with a contractual right commonly faces liability for tortious conduct to the holder of the right.”). For further discussion of Penner’s view, see *infra* notes 209–229 and accompanying text.

⁵ See, e.g., *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1003 (1984) (citing *Lynch v. United States*, 292 U.S. 571, 579 (1934), for the proposition that “valid contracts are property within meaning of the Takings Clause”); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923) (“If, under any power, a contract or other property is taken for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable.” (emphasis omitted)).

⁶ In this regard, it is not enough to simply note that contract rights are protected in similar ways to property rights. See Smith, *Towards a Theory of Contract*, *supra* note 3, at 123 (“To suggest that a parallel may be drawn between contract and property does not of course show that contract is actually similar to property, much less that this similarity in any way legitimates contract law.”).

⁷ Although the rationale presented in this Article is new, the idea that contracts allow another’s future actions to be owned has historical antecedents. For an early example of this idea, see Joseph Story, *Natural Law*, in JAMES MCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION app. 1, at 321 (1971) (“Another great object of society is the protection, not only of property in *things*, but of property (if we may say so) in *actions*. A great portion of the business of human society is founded upon contracts, express or implied . . .”). A similar claim is found in Kant’s writings. See *supra* note † and accompanying text (describing acquisition of a promisor’s “deed”).

normative structure of corrective justice.⁸ Both criteria are considered fundamental to an understanding of contract grounded on the internal, judicial understanding of the law. Prior theories have fared poorly under these constraints.

The harm principle suggests that the state should not interfere with an individual's liberty unless that individual has harmed or is about to harm another individual.⁹ Put in contract terms, this principle requires a theory to show how a moral obligation to keep one's promises can be transformed into a legal right held by the promisee, such that enforcement of the contract prevents a harm.¹⁰ Enforcement of ordinary promises resembles morality legislation, designed to make people do good, rather than harm prevention.¹¹

Corrective justice calls for the rectification of wrongs committed by one individual against another.¹² Judicial remedies of this sort are not intended to create incentives, but instead to address what the parties deserve. Within this framework, the duty of the wrongdoer corresponds to the right of the victim, and the wrongdoer's responsibility to remedy the wrong she committed corresponds to the amount of the victim's loss. To be consistent with this idea of justice, contract remedies must do more than respond to a harm to the nonbreaching party; the remedy selected should match the amount of harm caused by the wrong.

The harm principle and corrective justice, however, are dependent on a normative baseline. In explaining contractual obligations consistent with the above criteria, this Article builds on the foundation that each individual has rights of self-ownership.¹³ This premise provides a normative grounding for the discussion that follows. Starting from the premise that individuals own their bodies, this Article argues that individuals own their actions, including their future actions. Ownership of one's actions, and their transferability, follows naturally from a robust theory of self-ownership.

Assuming that an individual owns his actions, the question remains how that individual can transfer ownership to anyone else. Individuals have

⁸ It should be noted that the argument set forth in this Article is a normative one and not solely an effort to provide the best or most coherent interpretation of existing law. The harm principle and the corrective justice approach may in fact be core features of the current law of contract—a good argument can be made to that effect—but the theory developed below does not depend on that premise.

⁹ See JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., 2003) (1859) (“That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”).

¹⁰ See SMITH, CONTRACT THEORY, *supra* note 3, at 69 (“Enforcing promises qua promises is said to be inconsistent with this principle because a promissory obligation is fundamentally an obligation to benefit another rather than an obligation not to harm another.”).

¹¹ For a discussion of this concern, see Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982) (book review).

¹² See *infra* notes 38–44 and accompanying text for further discussion of this idea.

¹³ This claim is famously associated with John Locke. See JOHN LOCKE, *The Second Treatise of Government*, in POLITICAL WRITINGS OF JOHN LOCKE § 27, at 274 (David Wootton ed., 1993). An in-depth discussion of the self-ownership premise is set forth in Part I.C, *infra*.

a moral obligation to keep their promises, but this obligation on its own does not justify a performance *right* in the promisee.¹⁴ A transfer of property would explain how a promisee acquires a right in performance, but only if thinking in transfer terms is itself justifiable. Why should others have a right to the promisor's actions? The answer to this question depends on the efforts of both the promisor and the promisee.

As a starting point, a contractual transfer requires the consent of the promisor out of respect for the promisor's self-ownership. In other words, transfers must be voluntary.¹⁵ Something more is needed in order for a promisee to acquire an interest in the promisor's actions that merits legal protection. The key element in the creation of contractual obligations is that contractual promises are contingent upon intentional acts of the promisee.

A conditional obligation is what allows for a completed transfer of rights. When the promisee has performed, he has acted upon the contractual promise, causing its terms to come into effect. It is this action of the promisee, in conjunction with the utterance of the promise, which gives the promisee a property interest in the content of the promise.

Under several prominent theories of property acquisition, it is possible to acquire external things through interacting with them. Contract is fundamentally about the combined effect of a promisor's consent and a promisee's acts.¹⁶ The promisee's satisfaction of a contractual promise's conditions is analogous to the way in which individuals take rightful possession of physical property.¹⁷ Meeting the promise's conditions is a means of taking possession of the promised performance.¹⁸ That possession, in turn, justifies enforcement of the contract.

Core features of contract law reflect this normative relationship. The need for the promisor's consent is reflected in contract formation doctrines, as well as in the doctrines of undue influence and duress. The doctrine of consideration reflects the need for the promisee to acquire performance

¹⁴ See *infra* Part II.A.

¹⁵ See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (assessing the role of consent in contractual obligation).

¹⁶ Cf. Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 296 (1995) [hereinafter Benson, *Public Basis*] (“[T]he consent of one party to alienate his or her right to another cannot by itself give the other party that right. The second party must also manifest an intention of the requisite kind; an intention to acquire the right.”).

¹⁷ Cf. Smith, *Towards a Theory of Contract*, *supra* note 3, at 124–29 (analogizing contract formation to theories of property acquisition). Although Smith rejects a Lockean labor theory, see *id.* at 124, I will suggest that Locke's framework actually fits this context well. See *infra* Part III.B.1.

¹⁸ The analogy to first possession cases is a close one. The primary difference in this context is not the nature of the property acquired, but rather the fact that the actions are already owned by another individual. In this respect, my argument differs substantially from Stephen Smith's perspective. Smith begins with the idea that the performance right is a type of property created through contract, not previously owned by the promisor. See Smith, *Towards a Theory of Contract*, *supra* note 3, at 124–25 (describing the role of property theory in creating rights).

rights through acting to meet the promise's conditions. Bilateral executory contracts and unilateral contracts can both be explained in this way. In addition, in cases of breach, the expectation remedy is understandable in corrective justice terms. Expectation damages are compensation for the promisor's dispossession of the promisee's ownership of performance.¹⁹ Thus, this theory explains contract doctrine in areas that have proven difficult for other approaches.

Part I of this Article introduces some basic normative assumptions, which will inform the later discussion. Two criteria provide guidelines for assessing a successful rights-based contract theory: first, the harm principle, and second, the idea of corrective justice. Both are implicit features of the common law and provide an important means to measure the success of a contract theory.

This Part also suggests a normative baseline for contractual obligations. A theory of contracts based on the ownership of property in actions requires an appealing explanation for recognizing these ownership rights. This understanding can be traced to the intuition that individuals have self-ownership. A self-ownership norm provides a means to see one's actions as subject to transfer and provides a foundation for the subsequent discussion of how transfers occur.

Part II illustrates why other contract theories have had difficulty supporting a rights-based explanation of contract obligations. This Part assesses the strengths and weaknesses of several leading theories, including promissory, reliance, and transfer theories of contract obligation. This Part suggests that a transfer theory is the best general approach, but also that prior transfer theories provide inadequate justifications for contract obligation.

Part III shows how a transfer of the right to one's future actions can justly occur. This Part draws on principles of property acquisition and adapts them to contractual transfers. The key to an enforceable obligation is that a promisee has worked to bring a conditional promise into effect by meeting its terms. The end result is that the promisee comes to deserve the promised performance.

This Part also reviews several of the major doctrinal implications that follow under a property-based approach to contract performance. For example, an emphasis on principles of property acquisition supports the doctrine of consideration. Both unilateral contracts and bilateral executory contracts can fit within this understanding as well. In addition, applying the

¹⁹ A property theory also calls into question several existing contract doctrines. Thus, the theory in this Article is ultimately normative and not just interpretive. Interpretive theories of contract law seek to provide a coherent, intelligible principle to understand existing doctrine. See SMITH, CONTRACT THEORY, *supra* note 3, at 5 (describing such theories). It is hoped that a property theory like the one described in these pages provides a helpful means to understand contract doctrine. However, if the principles described below are accepted, they may call for some changes to contract doctrine in addition to explaining current practices.

expectation remedy is consistent with the promisee's ownership of contractual performance.

Part IV reviews potential challenges to a property theory. These include conceptual objections to the transferability of a performance right and objections based on the norm against providing specific performance. In each case, it is demonstrated that a property theory is conceptually and normatively plausible.

Part V discusses areas in which a property theory is relevant to further development in the common law of contracts. This Part also explains the importance of this theory for scholarship that seeks to reconcile rights-based theories of contracts with efficiency norms.

I. AUTONOMY THEORIES OF CONTRACT LAW

Much of the debate over contract theory has centered on two overarching perspectives: economic theories and what are often referred to as "autonomy theories" (also known as rights-based or deontic theories).²⁰ Economic theories of contract law tend to take an *ex ante* approach, focusing on the prospective effects of contract doctrine.²¹ This is a consequentialist perspective, concerned with the goal of efficiency. There is no clear-cut definition of autonomy theories, which often start from disparate normative premises. However, autonomy theories generally take an *ex post* approach, focusing on the just adjudication of disputes based on an assessment of preexisting rights.²²

²⁰ See Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 689 (Jules Coleman & Scott Shapiro eds., 2002) (describing these two types of contract theory). For reasons discussed later in this Article, there are differences between an emphasis on autonomy and an emphasis on ownership rights. See *infra* Part IV.C. Because the phrase "autonomy theory" is well recognized, I will use that language. Other approaches, not discussed here, include pluralistic theories, which draw on a mix of different values. See Kraus, *supra*, at 687 n.1 (describing such theories). As Kraus notes, such theories face their own difficulties. *Id.* ("The challenge for these theories . . . is to explain how their explanations and justifications can be defended in the absence of a master principle for ordering the competing values they invoke."). Some theorists also adopt a relational approach, which focuses on advancing a good intrinsic to contractual agreements. See, e.g., DORI KIMEL, FROM PROMISE TO CONTRACT (2003); SMITH, CONTRACT THEORY, *supra* note 3; Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004). In addition, Curtis Bridgeman has recently offered a planning theory of contracts. See Curtis Bridgeman, *Contracts as Plans* (Fla. State Univ. Coll. of Law Pub. Law Research Paper No. 303, 2008), available at <http://ssrn.com/abstract=1097632>.

²¹ See Kraus, *supra* note 20, at 701 ("[E]conomic theory treats common law adjudication, especially of hard cases, as the effective equivalent of legislating new legal rules. It therefore analyses the legal rules at stake in common law adjudication from an *ex ante* perspective by focusing exclusively on the prospective effects of judicial decisions.").

²² See *id.* at 701 ("Deontic theory regards common law adjudication as properly confined to deciding disputes exclusively on the basis of pre-existing rights and duties."); see also Benson, *Public Basis*, *supra* note 16, at 283 (suggesting that the "tension between welfare and autonomy values" is "inescapable").

For purposes of this Article, an autonomy theory will be understood as a theory of contracts that focuses on justice between the parties to a contractual dispute, rather than focusing on the broader prospective effects of a chosen contract doctrine. Elucidating the rights of the specific parties before the court is central to this understanding.

Autonomy theories—at least some of them—also seek reasons for respecting contract rights that can be expressed in nonteleological terms.²³ From this perspective, recognition of contract rights is not based on the likelihood of increasing future freedoms or producing some other individual or social good. Instead, this view suggests that contract obligations are deserving of respect regardless of whether they tend to produce other benefits. It is often suggested that this nonteleological approach reflects the internal perspective of contract law—the point of view recognized by legal participants.²⁴

It is beyond the scope of this Article to settle the debates between economic and autonomy theorists of contract law.²⁵ That has proven to be a Sisyphean task. At this stage of the debate, it is unlikely that a compelling autonomy approach would win the day against a committed economic theorist's views, or vice versa.²⁶ The intention here is to improve upon existing autonomy theories on their own terms. Whether or not autonomy theories are desirable as such will be largely bracketed.

At the outset, then, it may be helpful to elaborate on the normative framework that undergirds most autonomy-based contract theories—the present Article included. Two normative premises in particular have come to guide this approach. One is that courts should follow the “harm principle.” Another related premise is that contract enforcement should comply with corrective justice. These two norms are standard features for autonomy theories of contract, and they are pervasive in common law reason-

²³ See, e.g., Benson, *Public Basis*, *supra* note 16, at 309 (supporting the use of a nonteleological approach to justify contracts). As Benson indicates, there are autonomy theories that are teleological in approach. See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1103 (1989) [hereinafter Benson, *Abstract Right*].

²⁴ See Benson, *Public Basis*, *supra* note 16, at 309 (suggesting that teleological theories “make relevant, and indeed, central, considerations that are without significance from a legal point of view”).

²⁵ For recent contributions in the contract setting, see, for example, SMITH, *CONTRACT THEORY*, *supra* note 3; MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993); Benson, *Abstract Right*, *supra* note 23; Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007).

²⁶ That is, unless the results under both approaches can be shown to converge, or if both approaches can be situated within a hierarchy of norms. For discussion of how these disparate approaches might coexist, see Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, in *SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY* 420 (Ernest Sosa & Enrique Villanueva eds., 2001).

ing.²⁷ An additional norm—self-ownership—also plays a central role in this Article. A brief summary of each follows.

A. The Harm Principle

Autonomy theories have struggled to show why the enforcement of contracts is more than the mere enforcement of morality or social policy. The concern is that courts, when they provide contract remedies, should be remedying infringements of rights and not simply seeking results that are in some sense morally “good.”²⁸ This is an application of a norm known as the “harm principle.”

The harm principle was famously set forth by John Stuart Mill and suggests that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁹ The principle follows readily from a legal theory that views autonomy as an important guideline. As Joseph Raz notes: “The harm principle is a principle of freedom. The common way of stating its point is to regard it as excluding consideration of private morality from politics.”³⁰ Under this restriction, judicial remedies would not be proper if their function were to rectify a promisor’s personal failings. Charity, for example, is a moral duty, but the harm principle suggests it should not be a legal obligation.

For some, the harm principle is justified from a utilitarian perspective; for others, it is a rights-based norm.³¹ The meaning of “harm” is also debated. The harm principle has many guises, and commentators tend to disagree as to what should count as harm.³² For private law purposes, however, the harm principle is often understood to address acts that harm, or will cause harm, to an individual’s rights.³³

²⁷ This is not to say that all judicial reasoning incorporates these principles. Judicial reasoning often takes a prospective approach to legal doctrine. See Kraus, *supra* note 25, at 334–35 (suggesting that judges might recast efficiency reasoning in deontic terms).

²⁸ *But cf.* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 712 (2007) (suggesting that law “must be made compatible with the conditions for moral agency to flourish”).

²⁹ Mill, *supra* note 9, at 13.

³⁰ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 413 (1986).

³¹ For discussion of the harm principle from both utilitarian and rights-based perspectives, see Smith, *Towards a Theory of Contract*, *supra* note 3, at 109–10, 110 n.7. Smith notes that a Kantian misfeasance/nonfeasance distinction can be used to express the harm principle. *Id.* at 110 n.7.

³² For example, Dori Kimel accepts the version of the harm principle endorsed by Joseph Raz, but applies it to contract law differently from Raz. See KIMEL, *supra* note 20, at 104–09.

³³ See SMITH, *CONTRACT THEORY*, *supra* note 3, at 72 (“[W]hat matters for the purpose of law is whether individuals’ rights have actually been infringed.”). Along similar lines, Peter Benson suggests the importance for an explanatory account of demonstrating that the promisee has rights which merit legal coercion. Benson, *Public Basis*, *supra* note 16, at 293.

Under the common law version of the harm principle, it is only appropriate for a court to get involved if the promisor's action wrongs the promisee by violating his rights—rights that legitimize enforcement.³⁴ From an internal perspective, courts frequently recognize this limitation.³⁵ Where corrective justice requires courts to remedy wrongdoing—or more broadly, to correct a wrong—the harm principle addresses the contexts in which such judicial action is appropriate. Not every improper act involves an infringement of rights.

This is not to say that courts always recognize the harm principle when enforcing contracts, or that all theorists accept its requirements.³⁶ An autonomy-based approach, however, generally must contend with this view of the harm principle, at least as a starting point. This Article joins other autonomy theorists in accepting the premise that contract remedies are only appropriate in those cases where the promisee can justifiably be said to possess rights that would be violated by nonperformance.

Assuming the harm principle is applicable, this still leaves open the scope of appropriate judicial responses. In theory, a slight harm could provoke a severe sanction, while a gross injury could produce a judicial slap on the wrist.³⁷ Neither outcome is precluded by the harm principle itself. Rather, the proper fit between harm and remedy is a question of corrective justice.

B. Corrective Justice

The idea of corrective justice is central to private law decisionmaking and is often traced to Aristotle.³⁸ This form of justice seeks to correct wrongs committed by *A* against *B* by requiring *A* to compensate *B* in the amount of *B*'s loss.³⁹ In cases where *A* possesses something which belongs

³⁴ It should be noted that a primary concern here is whether a case implicates enforceable *moral* rights. This is not just a question of legal rights previously recognized by courts or legislatures. If a promisee has an enforceable moral right to performance, this would be relevant for harm principle purposes. For a discussion of the idea that some moral claims against others are congruent with the use of force, see H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 178 (1955).

³⁵ For a discussion of the harm principle in terms of an “inconsistency” objection to promise-based liability, see Smith, *Towards a Theory of Contract*, *supra* note 3, at 110.

³⁶ Some suggest that contract law is an area where the harm principle should not apply. See, e.g., J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 *LEGAL THEORY* 325, 352 (1996).

³⁷ See Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 *LEGAL THEORY* 313, 332 (2002) (“In Mill’s canonical defense of such a principle, the principle sets a necessary condition of justified restraint of liberty but says nothing as to what measures ought to be taken when this condition (and possibly others) is satisfied.”).

³⁸ ARISTOTLE, *THE NICOMACHEAN ETHICS*, bk. V, ch. 7 (J.E.C. Weldon trans., 1987).

³⁹ The relevance of *A* paying for *B*'s loss—as opposed to paying a fine—is significant for explanatory contract theories. Efficiency theories of contract have struggled to explain why the payment of those damages must go to the party that suffered the loss, in the amount of the loss suffered. See Nathan

to *B*, corrective justice would require *A* to restore that thing to *B*. For example, if *A* stole a car from *B*, corrective justice would require the return of the car or its equivalent in value.

Distributive justice, in contrast, is concerned with the ideal distribution of resources across a population.⁴⁰ While corrective justice rectifies wrongdoing as between the parties to a dispute, distributive justice deals with allocations of resources across a group based on a distributive criterion.⁴¹

Liability under a corrective justice approach views the parties as correlative situated—the plaintiff and defendant have corresponding rights and duties.⁴² The plaintiff is entitled to the right that the defendant infringed and therefore has a corresponding entitlement to a remedy that restores that right or its value.⁴³ Likewise, the defendant has a duty not to infringe upon the plaintiff’s right and has a corresponding duty to undo the injustice he caused.⁴⁴

Contract enforcement is usually understood to implicate corrective justice, at least when it is viewed in remedial terms.⁴⁵ Contract law is occasionally described in distributive justice terms,⁴⁶ and distributive justice sometimes may play a role in a judicial determination of whether to enforce a contract.⁴⁷ In many contexts, economic analysis may also explain case

B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 851–59 (2007).

⁴⁰ See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 351 (2002) (“Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions. Distributive justice, on the other hand, deals with the sharing of a benefit or burden; it involves comparing the potential parties to the distribution in terms of a distributive criterion.”).

⁴¹ See *id.* at 351–52 (“Distributive justice admits any number of parties because, in principle, no limit exists for the number of persons who can be compared and among whom something can be divided.”).

⁴² See Weinrib, *supra* note 3, at 59.

⁴³ See *id.* at 60.

⁴⁴ See *id.*

⁴⁵ Law and economics approaches have tended not to apply the corrective justice rubric. Cf. Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 127 (2000) (“While corrective justice theory can give us a way of talking about what to do when the relevant baseline is infringed, it cannot tell us what baseline ought to be selected as relevant.”). One might also focus on rights, wrongs, and recourse without adopting a corrective justice account. Cf. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L. J. 695 (2003) (explaining tort law in such a way).

⁴⁶ See, e.g., Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (suggesting that rules of contract law can legitimately be used to implement distributive goals).

⁴⁷ Along these lines, Melvin Eisenberg suggests procedural unconscionability doctrine may be a means “to prevent the state from shifting wealth to the party who is in the wrong.” Melvin A. Eisenberg, *The Theory of Contracts*, in THE THEORY OF CONTRACT LAW, *supra* note 3, at 206, 259.

outcomes.⁴⁸ But corrective justice principles best explain the bilateral nature of contract remedies.⁴⁹

As Ernest Weinrib notes, this concept of justice is not instrumental.⁵⁰ In most cases, contract law solely focuses on the relation between the promisor and the promisee. From an ex post perspective, courts typically understand their role as rectifying the harm to the plaintiff in the amount of that harm. Corrective justice is a means of respecting both the promisor's and promisee's rights.⁵¹ This perspective is also adopted here as a criterion for assessing theories of contractual obligation.

Endorsing a corrective justice rubric does not on its own resolve many of the controversial issues in contract law. Corrective justice is far too general a concept.⁵² In order to determine what remedies are appropriate, it is necessary to define the baseline rights against which corrective justice will function.⁵³ In addition, other norms may override the requirements of corrective justice.⁵⁴ The interrelation between this type of justice and other social values is complex and subject to continuing disagreement.

There are nevertheless practical consequences to adopting a corrective justice focus. In general, distributive justice and welfare concerns fade into the background if corrective justice is to be coherent.⁵⁵ To the extent that

⁴⁸ In fact, economic accounts are praised as explanations of private law in part because of how well they fit with case outcomes. See, e.g., Kraus, *supra* note 25, at 357.

⁴⁹ There are important differences among corrective justice approaches, however. See generally Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 *FORDHAM L. REV.* 3013, 3020–26 (2007) (describing distinctions between “relational” and “allocative” approaches to corrective justice). This Article will not address this debate but is probably more consistent with an “allocative” view.

⁵⁰ Weinrib, *supra* note 3, at 61 (“This internal connection between the right and the remedy precludes instrumental conceptions of remedial policy. From the standpoint of corrective justice the remedial issue never involves inquiring into the prospective disadvantage to be imposed on the defendant in order to achieve a desirable social goal—even if the social goal in question is the protection of the plaintiff's right or the deterrence of defendants from infringing such rights upon.”).

⁵¹ It is an interesting question whether corrective justice is implicit in an autonomy theory, or whether instead autonomy is a separate value which merely correlates to corrective justice in practice. See Oman, *supra* note 39, at 870 (suggesting autonomy may be “itself nested within the principle of corrective justice”).

⁵² Richard Craswell has offered sustained critiques of corrective justice approaches on this basis. E.g., Craswell, *supra* note 45, at 121–28; Richard Craswell, *Expectation Damages and Contract Theory Revisited* 1, 19–22, (Stanford Law Sch. Pub. Law and Legal Theory Research Paper Series, Paper No. 925980, 2006) [hereinafter Craswell, *Expectation Damages*], available at <http://ssrn.com/abstract=925980>.

⁵³ See SMITH, *CONTRACT THEORY*, *supra* note 3, at 147 (“Corrective justice is meant to explain (secondary) duties to repair rather than (primary) duties not to cause wrongful losses. Primary duties must be explained on other grounds.”).

⁵⁴ In particular, the affordability of achieving corrective justice in any and all cases may simply render its application impracticable. Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 *J. LEGAL STUD.* 49, 76 (1979).

⁵⁵ Ernest Weinrib endorses a particularly strong claim of this type. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 73 (1995). I think both corrective and distributive justice can be relevant when assess-

corrective justice is accepted as a guideline, the law typically presumes that the precontractual allocation of rights is a just one, and courts that follow this approach tend to exclusively focus on the perceived rights and duties of the specific parties before them.⁵⁶

C. *The Self-Ownership Thesis*

The harm principle and corrective justice are basic normative criteria against which an autonomy theory should be measured. They cannot fully justify an autonomy theory on their own, however. For the harm principle to be satisfied, there must be an adequate account of how a harm was suffered. Similarly, corrective justice is not a helpful explanation of contract law absent a baseline conception of existing rights and obligations. To describe contract enforcement as rectifying a promisor's wrongdoing requires an account of why the promisee should possess rights corresponding to the applicable remedy.⁵⁷

This Article later indicates how a promisee acquires ownership of a promised contractual performance. I suggest that, in practice, a contract is a transfer of the promisor's ownership of her own actions to another individual. By providing consideration consistent with the contractual terms, the promisee can justly acquire the promisor's future actions. A subsequent breach of contract would then violate the promisee's property rights.

A significant premise that supports this argument is the normative claim that a promisor has rights in himself or herself that can become the rights of others. The acquisition of contractual performance depends on the idea that individuals have strong rights of self-ownership and, relatedly, that they have a property interest in their own actions. Autonomy theories need not adopt a self-ownership perspective, but it is an integral part of a property-based understanding. The idea of self-ownership and its implications are elaborated below.

1. *The Idea of Self-Ownership.*—The idea of self-ownership is a longstanding and powerful theme in property law and in political theory. It has often been proclaimed as a given. John Locke provides a famous example of the self-ownership thesis. In his words:

ing contract law, but some applications of a distributive justice framework would conflict with the idea of corrective justice as a structure for private law remedies.

⁵⁶ See Benson, *The Unity of Contract Law*, *supra* note 3, at 123 (“[T]he analysis of consent—and, in particular, the principles of contract formation, the liberty to contract or not as one sees fit, and so forth—do not seem immediately amenable to characterization in terms of distributive justice.”).

⁵⁷ In other words, corrective justice depends upon other norms in order to function. See Craswell, *supra* note 45, at 125 (“To be sure, the corrective justice argument may still be formally correct in the sense that *once we have defined the relevant baseline*, we may then say that any breach that moves the promisee below that baseline violates corrective justice Clearly, though, it is the other theory—the one that defines the relevant baseline—that is doing the normative work.”).

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say are properly his.⁵⁸

Self-ownership has modern proponents as well, and its recognition spans a variety of legal perspectives.⁵⁹ This continued currency of self-ownership in legal theory is understandable. A self-ownership premise provides a normative grounding for tort law,⁶⁰ lends support for several theories of property acquisition,⁶¹ and—as will become apparent—explains core features of contract law.⁶²

For many of us, the idea that we have a property in our person is simply foundational. It is how we think of our bodies, and is closely tied to our self-conception. Furthermore, it is a rights-based understanding, not solely an expectation. We do not think we own our bodies based on teleological premises, in hopes of some other benefit down the line. Our bodies are ours because we intuitively understand it as correct to view them that way.

Despite its popularity, however, it should be noted that self-ownership is not a consensus position.⁶³ The idea is deeply controversial, and it is difficult to demonstrate that self-ownership is the correct point of view.⁶⁴ Crit-

⁵⁸ LOCKE, *supra* note 13, ¶ 27, at 274. The related idea of owning one's labor had an early American proponent in James Madison. See James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266–68 (R. Rutland & T. Mason eds., 1983) (describing the property “that individuals have . . . in the labor that acquires their daily subsistence”). Similarly, Grotius had stated that “liberty in regard to actions is equivalent to *dominium* in material things.” See RICHARD TUCK, NATURAL RIGHTS THEORIES 60 (1979) (quoting GROTIUS, DE IURE PRAEAE COMMENTARIUS).

⁵⁹ Compare ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 172 (1974) (discussing “the classical liberals’ notion of self-ownership”), with Peter Vallentyne, *Left Libertarianism and Private Discrimination*, 43 SAN DIEGO L. REV. 981, 985 (2006) (describing the positions held by “left-libertarians”).

⁶⁰ See Epstein, *supra* note 54, at 50 (“Every personal injury action . . . rests on an unspoken assumption that each person owns his own body.”).

⁶¹ Most famously, Locke’s theory of acquisition builds on the idea of self-ownership. For a modern variation, see Samuel C. Wheeler III, *Natural Property Rights as Body Rights*, 14 NOUS 171 (1980).

⁶² For another recent discussion of self-ownership in conjunction with contract rights, see CHARLES FRIED, MODERN LIBERTY 69–70 (2007).

⁶³ For a well-developed critique of the self-ownership thesis as a normative requirement, see G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 229–44 (1995). Cohen accepts the possibility of self-ownership as an idea, but argues against this thesis and in favor of an egalitarian position. *Id.* Other recent critical treatments include J.W. HARRIS, PROPERTY & JUSTICE 182–97 (1996) (suggesting that references to self-ownership are rhetorical and prove too much if accepted); STEPHEN R. MUNZER, A THEORY OF PROPERTY 41 (1990) (suggesting that individuals do not own their bodies, but instead have limited property rights in their bodies); and PENNER, *supra* note 4, at 206 (suggesting that the significance of self-ownership is indeterminate). Cf. WALDRON, *supra* note 1, at 177–80 (suggesting that Locke’s theory of self-ownership involves ownership of one’s person, rather than ownership of one’s body).

⁶⁴ It is also difficult to demonstrate that self-ownership is incorrect. Cf. COHEN, *supra* note 63, at 209 (“The concept of self-ownership is not identical with the thesis of self-ownership: the latter might be false, while the former, being a concept, cannot be false, save where ‘false’ is used, floridly, to mean

ics have challenged the idea both conceptually and normatively.⁶⁵ Furthermore, acceptance of the self-ownership thesis need not commit anyone to the view that self-ownership trumps other values. Self-ownership, if accepted, may be a largely empty concept if the idea of ownership provides a weak source of rights.⁶⁶ The rights that should correspond to this ownership are themselves contested, particularly as applied to the human body.⁶⁷ How far ownership rights should extend given other values is discussed later in this Article.

By now, the normative debate over self-ownership has reached a stalemate. Although it has able critics, the self-ownership thesis has endured: it is just as difficult to disprove the self-ownership thesis as it is to demonstrate it, and the intuition that we own our bodies—and that this ownership matters—persists. Disagreements over the desirability of seeing our rights in terms of self-ownership involve incommensurable viewpoints. As with corrective justice, this Article assumes the appropriateness of the self-ownership conception, while recognizing that not all will adopt it as an acceptable norm.

2. *Implications for Transferability of Actions.*—As Locke’s language suggests, ownership of one’s actions is a natural extension of the concept of self-ownership.⁶⁸ In fact, under a Lockean theory of property acquisition, ownership of actions comes prior to ownership of external, physical property—it is through mixing one’s labor with external things that they are acquired. The thought that self-ownership includes ownership of actions is implicit in the concept. To own something is ordinarily to own rights of use, and this includes use of one’s body.

incoherent, or inconsistent, or irredeemably vague, or irremediably indeterminate.”). Despite opposition to the self-ownership thesis as an appropriate way to view individual rights, Cohen concludes the concept is coherent. *Id.* at 210–28.

⁶⁵ For an insightful discussion of both conceptual and normative arguments against self-ownership, see generally *id.* at 209–44.

⁶⁶ See Alan Ryan, *Self-Ownership, Autonomy, and Property Rights*, in PROPERTY RIGHTS 241, 248 (Ellen Frankel Paul et al. eds., 1994) (“[W]e can see one reason why talk of self-ownership may be misguided. Those who so talk presume an agreement on what ownership entails that does not exist.”).

⁶⁷ For example, there is a continuing debate as to whether body parts should be subject to sale or only to donation. For important contributions, see, for example, MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 149–67 (2006) (assessing the benefits of a market for body parts); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in PROPERTY RIGHTS, *supra* note 66, at 259 (presenting a qualified case against the marketability of body parts).

⁶⁸ See Catherine Valcke, *Locke on Property: A Deontological Interpretation*, 12 HARV. J.L. & PUB. POL’Y 941, 983 (1989) (“In Section 27, Locke does not seem to consider one’s ownership in one’s labor as a *derivative* of one’s ownership in one’s person. Rather he sees one’s ownership of one’s labor as simply one *dimension* of one’s ownership in one’s person.”); cf. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 388 (2003) (“The essence of Locke’s ‘mixing labor’ argument is that an individual *exclusively owns* his life and his labor—such things are, in the Latin used by Grotius and Pufendorf, an individual’s *suum*—and that labor extends this moral ownership over things appropriated from the commons.”).

While the idea of owning actions is uncommon in modern discourse, it is not novel. Natural law theorists historically described our actions in terms of property.⁶⁹ In Grotius' words, "liberty in regard to actions is equivalent to *dominium* in material things."⁷⁰ The thesis that our actions are our property is also prominent in James Madison's thought: Madison spoke of individuals' property "in their actual possessions, in the labor that acquires their daily subsistence, in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares."⁷¹

To say that we own our actions does not inherently mean that we may transfer them. There is a strong intuition that individuals should be able to use their bodies as they see fit. Standing alone, this intuition might mean that people have extensive rights to exclusive use of their bodies, without having any transfer rights whatsoever. A norm of transferability calls for further analysis of the ownership concept.

Ownership is notoriously difficult to define.⁷² Despite the vagueness of ownership as an idea, however, many of us have intuitions about the meaning of ownership in the abstract, and transferability is a basic feature of these intuitions.⁷³ In fact, transferability is one of the core elements in the traditional idea of property.⁷⁴ For Blackstone, "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or

⁶⁹ See Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136–37 (1990) ("Joseph Story wrote of property not only 'in things, but of property . . . in actions.'" (quoting Story, *supra* note 7, at 321)).

⁷⁰ Tuck, *supra* note 58, at 60; see also Karl Olivecrona, *Locke's Theory of Appropriation*, 24 PHIL. Q. 220, 226 (1974) ("Grotius and Pufendorf spoke of an individual's actions as if they were things. One's future actions were included in the *suum* and could be disposed of like physical objects.").

⁷¹ See Madison, *supra* note 58, at 267–68. For further discussion of Madison's *Property* essay, see generally Underkuffler, *supra* note 69, at 134–38. Although the precise meaning of this essay is open to differing interpretations, Madison's view that property extended beyond physical objects to cover intangible rights is evident. See Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 203–04 (1999).

⁷² The classic analysis of what ownership means is that of Professor Honoré. See A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961). As he indicated, there are a variety of incidents that correspond to rights of ownership, and no specific incident is required. See *id.* at 112–13. One means to address this definitional problem is to look to family resemblances among the collections of rights and liberties that correspond to ownership in a given society. See J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 784–85 (1996) (discussing this option). In the present case, the setting of self-ownership affects the analysis, however, since self-ownership is generally joined with specific ideas of individual rights.

⁷³ See, e.g., MUNZER, *supra* note 63, at 49–50 ("[T]ransferability is a highly important feature of property as usually understood.").

⁷⁴ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 58–59 (1985) ("What then are the rights of ownership? To this question the traditional answer given by both common law and civil law systems is that the rights of ownership in a given thing consist in a set of rights of infinite duration, good against the rest of the world: with three separate incidents: possession, use, and disposition.").

diminution, save only by the laws of the land.”⁷⁵ The right of disposition, or transfer, is fundamental.

Given transferability of property as a general matter, the relationship we have to ordinary things we own is readily extended to our bodies. On this view, rights to use your body correspond to rights to use other owned things, such as a plot of land. Starting from the premise that as an owner of your body you have body rights comparable to the rights that full owners of other kinds of property have, a transferable property interest in your actions readily follows.⁷⁶

The transferability of subparts of property is familiar to property law. Severance of a parcel of real property into its component rights and liberties produces additional types of property, which can then be transferred to others.⁷⁷ For example, an easement is a type of use right that is conventionally identified as property. An owner of land can rightfully subdivide her property and provide an easement to a third party. If bodies are treated analogously, a partial property interest—constituting a right to an action—could be transferred as well.

Viewing one’s body as a form of property can thus have significant implications. Expansive conceptions of self-ownership recognize a variety of body rights, each of which is transferable.⁷⁸ In Part IV.C, I suggest some limitations to this idea of transferability. Departures from full self-ownership are appropriate. However, a self-ownership conception, incorporating the ownership of actions, provides a normative starting point for further analysis of the contractual relation.

A robust view of self-ownership allows for a justification of contract obligations that is consistent with the harm principle. It also indicates how standard contract remedies are consistent with corrective justice. As the next Part shows, this is a significant step in developing an explanation of contractual obligation. Several of the leading autonomy theories of contracts have been unable to get past these hurdles.

II. A BRIEF REVIEW OF LEADING CONTRACT THEORIES

In order to understand the contribution of a property-based theory of contract, it must be placed in the context of theories that have come before.

⁷⁵ See 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

⁷⁶ See KARL OLIVECRONA, LAW AS FACT 290 (2d ed. 1971) (describing Grotius’ view that “[t]he whole doctrine of promises and contracts is based on the theory of the transference of part of one’s liberty”).

⁷⁷ This allows for ownership rights in parcels of property that look quite different from what was originally owned. See EPSTEIN, *supra* note 74, at 61 (“[T]he key is the right of disposition, by which the original rights of use and possession can be transferred, pooled, and divided at the pleasure of buyer and seller, donor and donee, mortgagor and mortgagee, and so on.”).

⁷⁸ See, e.g., Vallentyne, *supra* note 59, at 985 (2006) (describing implications of full self-ownership).

Each of the leading autonomy theories has appealing elements and addresses basic features of contractual obligation. However, they also struggle with significant features of contract law. Accordingly, a review of these theories is helpful both to highlight the insights they offer and to illustrate the continuing challenges that autonomy theories face.

As noted, the harm principle and the idea of corrective justice are important standards for an autonomy theory of contracts. They have also turned out to be problematic. For example, although it is a common approach for autonomy theories, corrective justice poses a conundrum from a remedial perspective. Assuming that most contract law is, and should be, a matter of corrective justice, contracts raise a very basic problem of doctrinal fit: Why does contract law provide for an expectation remedy?

Lon Fuller and William Perdue famously suggested that an expectation remedy overcompensates promisees for the harm they have suffered in cases of breach.⁷⁹ Rather than provide for expectation damages, the law could as easily provide damages based on detrimental reliance.⁸⁰ Arguably, the harm suffered via a breach is the loss due to reliance, not loss of the right of performance.⁸¹ If so, expectation damages could be a windfall from a corrective justice perspective. Contract theorists have since viewed Fuller and Perdue's concern as a basic challenge for a successful explanation of contract doctrine.

An expectation remedy makes sense if the promisee actually has acquired an existing right to the promised performance at the time of breach. In that case, a breach would deprive the promisee of something she already owned. Expectation damages—or specific performance—would merely make the promisee whole. Just as it is appropriate when someone has their property stolen for courts to require the property's return or its equivalent in damages, the expectation remedy in contract law would then be necessary to correct the wrong.⁸²

But absent consequentialist reasoning, it is not a simple task to indicate exactly why the law should recognize one person's rights to another's fu-

⁷⁹ L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 52–53 (1936) (suggesting, with respect to expectation damages, that “in this case we ‘compensate’ the plaintiff by giving him something he never had”).

⁸⁰ *See id.* at 58 (suggesting that there would be “no necessary contradiction between the will theory and a rule which limited damages to the reliance interest”).

⁸¹ *See id.* at 56 (“In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle’s terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation.”).

⁸² *See* Craswell, *supra* note 45, at 122 (“That is, if the good that is ‘stolen’ is the performance that was promised under the contract, it would seem that the proper remedy is either to deliver the performance itself (the remedy of specific performance), or to deliver the value of that performance (expectation damages).”). As Craswell notes, however, there are significant challenges for a property-based idea of contract obligation, such as justifying the decision to view contract rights as property. *Id.* at 122–124.

ture performance.⁸³ It is a common enough intuition that such rights are acquired, and the idea of acquisition is certainly reflected in judicial rhetoric.⁸⁴ Explaining why this should occur, consistent with principles of individual autonomy, has been a lasting puzzle.

Each of the major autonomy theories has failed to provide an adequate justification for core contract doctrines like the expectation remedy, while at the same time avoiding counterintuitive premises. The expectation remedy is not the only area of difficulty, moreover. Either these theories are inconsistent with the harm principle or corrective justice, or else they rely upon legal fictions. Not all accounts of contract law seek to comply with the harm principle or corrective justice, but a successful autonomy theory should do so.

Despite these weaknesses, several leading noneconomic theories of contract assist in framing the issues that a successful autonomy theory must resolve.⁸⁵ Each of these theories has conceptual or normative flaws, but they provide valuable insights into the sources of contract obligation. Some of these advances make a significant contribution to a property theory of contracts.

A. Promissory Theories

Contracts can be seen as legally binding promises. After all, promises are a basic component of contract formation—parties cannot initiate a contract without at least one promise to perform. Promissory theories build on the moral significance of these promises to explain contract obligations, and in the process explain the expectation damages remedy.⁸⁶ Expectation damages represent the value of the promise.

One of the most famous promissory theories is Charles Fried's account in his book, *Contract as Promise*.⁸⁷ Fried recognizes that something more is required for contract liability than the mere intent to invoke reliance in an-

⁸³ The practice of expectation damages can also be difficult to explain from an economic perspective. See, e.g., Markovits, *supra* note 20, at 1492 (“The connection between expectation damages and efficiency is not, however, quite perfect. For example, expectation damages, even in conjunction with a mitigation principle, can induce inefficient overreliance.”).

⁸⁴ Cases involving assignment of contract rights to third parties provide an example of property-oriented language in contract settings. See, e.g., *Portuguese-Am. Bank of S.F. v. Welles*, 242 U.S. 7, 11 (1916) (Holmes, J.) (suggesting that it is “not illogical to apply the same rule to a debt that would be applied to a horse” with respect to an alienation of a creditor’s rights). For discussion of this link between rights to performance and rights to property, see Bridgeman, *supra* note 49, at 3031–32.

⁸⁵ It should be noted that the theories described below—promissory, reliance, and transfer theories—are not the only significant noneconomic theories. For examples of other theories, see sources cited *supra* note 20.

⁸⁶ See, e.g., SMITH, *CONTRACT THEORY*, *supra* note 3, at 59 (suggesting that expectation damages are “consistent with regarding contracts as promises”).

⁸⁷ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

other.⁸⁸ Instead, Fried contends that contract obligations are grounded in the importance of keeping one's promises. More precisely, what contract obligations require is the intentional invocation of a promissory convention.⁸⁹

Promising, in Fried's view, should be seen as a device that free individuals "have fashioned on the premise of mutual trust, and which gains its moral force from that premise."⁹⁰ Breaking a promise violates this trust, and is comparable to lying.⁹¹ Under Fried's theory, values of individual autonomy and trust support legal enforcement of the contractual promise.⁹²

Fried's description of why we should keep promises is persuasive, but it never adequately demonstrates why a promisee's legal rights are implicated when contractual promises are broken. A basic objection to promise-based liability is the harm principle.⁹³ As noted above, this principle suggests that the coercive power of the law should only be used to prevent harm.⁹⁴ Although there is a strong moral grounding to Fried's conception of contract obligation, promissory theories do not cohere with this norm of private law relationships, which looks to enforce duties only where there are corresponding enforceable rights held by others.⁹⁵

The harm principle cannot be squared with contract theories that are justified solely by promissory duties because no inherent connection exists between breaking promises and the enforceable rights of promisees. The duty to keep a promise is relevant as to what a promisor *ought* to do, but does not show that a promisee would suffer a harm in the legal sense if courts left contracts unenforced (or, even assuming a harm, that the promisee would be harmed in the amount of the expectation interest). This dif-

⁸⁸ See *id.* at 11 ("We need to isolate an additional element, over and above benefit, reliance, and the communication of intention. That additional element must *commit* me, and commit me to more than the truth of some statement.").

⁸⁹ *Id.* at 16.

⁹⁰ *Id.* at 17.

⁹¹ See *id.* at 17.

⁹² Fried is careful to distinguish this theory from utilitarianism. See *id.* at 15–16.

⁹³ See *supra* notes 28–37 and accompanying text.

⁹⁴ As Stephen Smith suggests, "[k]eeping a promise, like giving to charity, is praiseworthy—but a failure to do so should not in itself, be of concern to the law." SMITH, *CONTRACT THEORY*, *supra* note 3, at 69–70; see also Benson, *Public Basis*, *supra* note 16, at 293 (suggesting Fried's account "does not explain how the obligation to keep a promise is construed as something other than a merely ethical duty").

⁹⁵ It should be noted that ordinary promises may be said to create moral "rights" in the limited sense that a promisee can justifiably demand performance and even rebuke a promisor for failing to perform. However, it is not generally thought that ordinary promises render it morally permissible for a promisee to physically force performance when the promisor does not meet his obligations. For discussion of this distinction, see Margaret Gilbert, *Scanlon on Promissory Obligation: The Problem of Promisees' Rights*, 101 J. PHIL. 83, 89 (2004). See also Benson, *Public Basis*, *supra* note 16, at 293 (emphasizing the importance to contract law of enforceable rights). The rights with which the law is concerned usually are understood to be enforceable as a moral matter, and this Article focuses on rights which justify such coercion.

ficuity plagues theories that focus solely on the morality of keeping one's word.

A potential answer would look to teleological premises. Individual autonomy is a guiding principle for Fried's theory.⁹⁶ Enforcement of promises arguably increases autonomy because it permits individuals to pre-commit themselves in certain contexts. Enforceable contracts add an option for promisors. This response encounters a different problem.

The pursuit of increased autonomy runs into a temporal difficulty—the reason a promisor's freedom of choice would increase at one point in time is because it has decreased at another point in time. If the goal is to enhance autonomy, it is unclear why the current autonomy of the promisor—his preference to act contrary to a previous commitment—deserves less respect than his previous preference to act in accord with the commitment.⁹⁷

Ultimately, ordinary promises are not enforceable, and a promissory theory of contract must distinguish ordinary promises from contractual ones. This is not an easy distinction to make on promise-based principles. Unfortunately, Fried's promissory theory does not adequately explain why a moral duty of the promisor should translate into a legal right held by the promisee.⁹⁸ Invoking the convention of promising, even in conjunction with values of autonomy and trust, does not bridge this conceptual gap.⁹⁹

A rights-based autonomy theory must provide an account of why a contractual promisee is thought to acquire a right to the promisor's performance—why is a contract different from an ordinary nonenforceable promise? By focusing on the creation of moral duties in the promisor without developing a full account of corresponding rights in the promisee, promissory theories tend to offer an incomplete normative basis for legally enforceable contract obligations.

⁹⁶ See FRIED, *supra* note 87, at 7 (“[M]orality requires that we respect the person and property of others, leaving them free to make their lives as we are free to make ours.”); *id.* at 16 (“The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust.”).

⁹⁷ See Benson, *Abstract Right*, *supra* note 23, at 1115–16 (questioning Fried's view that a former expression of choice should prevail over later choices); Eisenberg, *supra* note 47, at 233 (same).

⁹⁸ See Smith, *Towards a Theory of Contract*, *supra* note 3, at 109 (“Enforcing promises *qua* promises is enforcing a duty to benefit others, and thus is inconsistent with J. S. Mill's harm principle . . .”).

⁹⁹ Note that the existence of a social convention in this context does not solve the problem. See SMITH, *CONTRACT THEORY*, *supra* note 3, at 71 (“The underlying flaw in Fried's argument is the idea that societal conventions should be legally enforced.”). As Smith notes, there are conventions, such as bringing a dinner gift for a host, that do not produce wrongs when they are flouted. *Id.* Smith has suggested an alternative, promise-based justification for contractual obligations. Smith emphasizes the intrinsic good of the contractual relationship as a justification for contractual obligations. *Id.* at 74–76. Given space limitations, it is not possible to do justice to Smith's argument in these pages. For an important response to Smith's promissory theory, however, see Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 26 L. & PHIL. 531 (2007).

B. *Reliance Theories*

Reliance theories approach contract law from the opposite direction, focusing on the interests of the promisee.¹⁰⁰ The idea is that detrimental reliance, rather than the intentions of the promisor, calls for legal enforcement of contract obligations.¹⁰¹ Like promissory theories, this type of analysis can be grounded in a conception of individual rights. Given the common understanding that a promisee's reliance on the contract matters and that the promisee's reliance corresponds to a harm, there is an intuitive appeal to a reliance theory.

An initial stumbling point for reliance theories is in explaining which cases of reliance merit compensation. It seems inadequate to say that promises are binding simply because they are relied upon.¹⁰² Something to narrow the applications for reliance is required, such as a reasonableness standard. The concept of "foreseeable" or "justifiable" reliance is a vague one, however, and these restrictions ultimately depend on the conventions of the society in which the contract is made.¹⁰³ Given suitably developed conventions, this problem need not be insurmountable, but the concept of justifiable reliance tends to be indeterminate.

A more fundamental problem with a reliance theory is that the normative connection between reliance and a contract is often debatable. Reliance may exist in cases where the defendant never entered into a voluntary obligation.¹⁰⁴ For example, an individual might communicate a plan to perform a future act, but never make a promise. It may even be that an individual

¹⁰⁰ Important examples of scholarship that focuses on reliance include P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); and Fuller & Perdue, *supra* note 79. For discussion and criticism of Atiyah's particular treatment of reliance, see Raz, *supra* note 11, at 923–27. Reliance theories have waxed and waned in popularity. A discussion of their history is provided in Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996).

¹⁰¹ See Barnett, *supra* note 15, at 274 ("A reliance theory is based upon the intuition that we ought to be liable in contract law for our assertive behavior when it creates 'foreseeable' or 'justifiable' reliance in others, in much the same way that we are held liable in tort law for harmful consequences of other acts.").

¹⁰² See FRIED, *supra* note 87, at 19 ("[R]eliance on a promise cannot alone explain its force: There is reliance because a promise is binding, and not the other way around."); cf. SMITH, *CONTRACT THEORY*, *supra* note 3, at 79 ("The question is whether such reliance is the key to explaining contract law—as reliance theories assert—or whether it is merely the by-product of an obligation justified on other grounds.").

¹⁰³ As Barnett explains, a reliance theory "ultimately does no more than pose the crucial question that it is supposed to answer: is this a promise that should be enforced?" Barnett, *supra* note 15, at 275. Note also that even foreseeable reliance may not suffice without a promise or some other additional factor. See SMITH, *CONTRACT THEORY*, *supra* note 3, at 81 ("No advocate of reliance-based liability would suppose that if I say that I intend to teach contract theory next year and then do not teach it, I should be legally liable to students who reasonably and foreseeably relied on this statement.").

¹⁰⁴ As Joseph Raz has noted, promises are by nature voluntary obligations, entailing a state of mind in order for a promise to be made. Raz, *supra* note 11, at 930 ("It is essential to the definition of voluntary obligations not merely that the state of mind of the agent is relevant to the justification of his obligations, but that it provides a positive reason for regarding the obligation as valid.").

induces reliance without being in a position to know he has done so. At the same time, contracts are often enforced where there has been no reliance.

Read broadly, reliance theories raise the possibility of liability where the promisor has not committed any blameworthy action.¹⁰⁵ If so, this can be a troubling result. The point of corrective justice is to correct a wrong or some form of wrongdoing. Without wrongdoing, it is unclear why reliance justifies a remedy. As Fried questions, “[W]hy should my liberty be constrained by the harm you would suffer from the disappointment of the expectations you choose to entertain about my choices?”¹⁰⁶

If we avoid focusing on the promisor’s perspective, a reliance theory would not reflect the common normative intuition that contract obligations should be voluntary. As Randy Barnett has emphasized, individual autonomy not only calls for freedom to contract, but freedom from contract.¹⁰⁷ Absent a limiting criterion external to the reliance concept, reliance theories could cause promisors to face contractual liability in cases where they did not consent to the terms imposed. For an autonomy theory, this would be problematic.

Furthermore, reliance theories do not fit comfortably with basic features of contract enforcement. Assuming that the harm in cases of a breached contract is the damage resulting from the plaintiff’s reliance, it would make sense to compensate for the losses due to that reliance.¹⁰⁸ Instead, plaintiffs may seek expectation damages. The idea that promisees have a right to performance of the contract is a foundational premise of contract law. If we accept this premise—and adopt a corrective justice perspective—then a reliance theory conflicts with core features of contract obligation.¹⁰⁹

¹⁰⁵ Cf. SMITH, *CONTRACT THEORY*, *supra* note 3, at 86 (“A reliance-based duty is not fundamentally a duty to ensure that others are not made worse off; it is a duty to pay money to persons who have, through no fault of the person subject to the duty, become worse off as a result of their reliance.”).

¹⁰⁶ FRIED, *supra* note 87, at 10. Fried focuses his skepticism on the idea that promises are no more than a statement of intention. *Id.* at 10–11. The argument against liability may be stronger in cases where a promise is not at issue. See SMITH, *CONTRACT THEORY*, *supra* note 3, at 87 (“Looked at from the defendant’s perspective, it appears unfair to hold the defendant liable for the consequences of changing her mind, given that she never made a promise.”). If, however, it is the promise which is supplying the obligation, then the need for reliance is called into doubt. Cf. *id.* at 80 n.47 (“[I]f it is accepted that, by promising, a promisor gives up the right to change her mind, then changing one’s mind after making a promise is wrong full stop, regardless of reliance.”).

¹⁰⁷ Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 828 (1992) (“Freedom of contract entails both freedom to contract—the power to effect one’s legal relations by consent—and freedom from contract—the immunity from having one’s right to resources transferred without one’s consent.”).

¹⁰⁸ See Peter Benson, *Contract*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 24, 28 (Dennis Patterson ed., 1996) [hereinafter Benson, *Contract*] (“[I]f the reliance interest is the basis of contractual liability, why use expectation rather than reliance damages as the proper measure of recovery?”).

¹⁰⁹ A reliance theory is also in tension with the idea that the promisee can acquire an entitlement to performance when the contract is entered into. See Benson, *The Unity of Contract*, *supra* note 3, at 175

C. *Transfer Theories*

Another possibility is a transfer theory, which suggests that contracts should be enforced because the promisee has acquired her rights from the promisor. This perspective has recently reemerged in contract scholarship, but transfer theories of contract law have a long historical pedigree.¹¹⁰ The basic idea is that the promisee has rights to performance because the contract has effected a transfer of entitlements originally belonging to the promisor.

A transfer theory holds the potential for avoiding the weaknesses of both promissory and reliance theories. It circumvents the harm principle objection because, if a successful transfer has occurred, the failure to perform can be said to violate rights that now belong to the promisee.¹¹¹ It also answers Fuller and Perdue's challenge. If the promisee successfully acquired rights to the promisor's performance, then in cases of breach the expectation measure of damages is simply compensation for that lost performance.¹¹²

The leading explanations of how transfers occur take several different forms. Each of these offers additional insights for an autonomy-based conception of contract obligation, improving on prior efforts. Although the transfer concept is longstanding, the development of a coherent transfer theory is still continuing with respect to modern legal doctrine. Two leading transfer theories, those of Randy Barnett and Peter Benson, are discussed below. My own theory builds on their work, but, as will become apparent, it also differs in key respects.

1. Barnett's Approach.—Randy Barnett's theory of contracts locates the source of contract obligation in the promisor's consent to a legal obligation. This approach is distinct from a promissory theory, despite a surface resemblance. Where Fried is concerned with the implications of an intent to invoke the convention of promising, Barnett is concerned with the significance of a promisor's consent to a legally enforceable transfer.¹¹³

("Reliance-based analysis cannot view the promise or representation as one side of a transfer of rights between the parties. Thus, there can be no intrinsic connection between reliance-based liability and the expectation principle, taken as a principle of compensation.")

¹¹⁰ See Benson, *Contract*, *supra* note 108, at 41–42 (tracing the early history of transfer theories).

¹¹¹ See SMITH, *CONTRACT THEORY*, *supra* note 3, at 99 ("Transfer theories are not vulnerable to the harm principle objection If I transfer a right to performance to you, you *own* this right; if I fail to perform, I have interfered with your property rights.")

¹¹² See *id.* at 100 ("[T]ransfer theories have a ready explanation for the main features of contract remedies: if the plaintiff owns the defendant's performance, then expectation damages and specific performance are appropriate remedies. If you steal or break my property, it is right that you should give me back my property or compensate me for its full value."); see also *infra*, Part III.C.2 (explaining how a property theory of contracts is consistent with the expectation remedy).

¹¹³ I have doubts that the norm of contract enforcement requires consent to *legal* enforcement, but Barnett is correct that consent is fundamental to contract. One disadvantage of Barnett's theory is that it apparently requires a legal system to be in place in order to fully explain contract enforcement. I would

Barnett begins his analysis by indicating the importance of individual entitlements to contract law.¹¹⁴ He suggests that contract law involves a valid transfer of preexisting entitlements and that such a transfer requires the transferor to give consent.¹¹⁵ Under this theory, “[l]egal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.”¹¹⁶

A shift from promise to consent to legal obligations offers an explanation for why courts apply an objective standard when interpreting contract language, rather than insisting on strict compliance with the subjective intent of the promisor. A properly functioning system of legal entitlements requires the boundaries of these entitlements to be ascertainable to the affected parties.¹¹⁷ As Barnett indicates, the other party to a transaction will not have all the information that may be available to a court seeking evidence of subjective intent after the fact.¹¹⁸

Barnett’s focus on precontractual individual entitlements is an important contribution to contract theory. The underlying system of property recognition affects what can be properly transferred in the first place, and it also indicates how the process of transfer can go awry. Contracting parties

suggest that the sense people have that breaching a contract is wrongful would apply even without legal conventions. Cf. Eisenberg, *supra* note 47, at 248 (suggesting, in light of social propositions, that “a promisee is reasonable in relying on a promise even if he does not know that a relied-upon promise is legally enforceable”).

¹¹⁴ Barnett, *supra* note 15, at 291–300. In Barnett’s view, “the consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements.” *Id.* at 299.

¹¹⁵ *Id.* at 297 (“[C]ontract law concerns enforceable obligations arising from the valid *transfer* of entitlements that are *already vested* in someone . . .”). The prior ownership of these entitlements gives consent a central place under Barnett’s theory. See *id.* (“[T]he valid *transfer* . . . is what makes consent a moral prerequisite to contractual obligation.”).

¹¹⁶ *Id.* at 300.

¹¹⁷ *Id.* at 302.

¹¹⁸ *Id.* at 305. Melvin Eisenberg has questioned whether Barnett’s understanding of consent is what consent is ordinarily understood to mean. Eisenberg, *supra* note 47, at 233 (“Barnett’s usage, however, varies from the normal meaning of consent. Consent is a subjective, not an objective, concept.”). In Eisenberg’s view, a consent requirement conflicts with the standard principles of interpreting contractual language based on objective meaning. However, objective legal standards are often used to infer a subjective state of mind. See Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 427–28 (2007) (describing examples of this approach in corporate law). In addition, there is an important line to be drawn between intent to promise and intent as to a promise’s meaning. For further discussion of this latter issue, see *infra* notes 161–162.

may not transfer what they do not properly own.¹¹⁹ Thus, contracts are not binding where the promised performance is illegal.¹²⁰

In addition, an entitlement-based conception also offers a normative limit on when transfers can occur. Assuming that the promisor is a rightful owner of the property at issue, the promisor's consent to a transfer is a necessary element of a just transfer.¹²¹ Unless they are culpable in some way, owners of entitlements are not generally subjected to transfer of their entitlements unless they have chosen to donate or exchange their property.

In light of these features, Barnett's theory is appealing. But it is also an incomplete justification for contractual obligation. A major weakness in Barnett's theory is that it focuses on only one required consent, that of the transferor.¹²² This is only half of the picture. Ordinarily, transfers of entitlements require the consent of the transferee as well.¹²³

As Peter Benson has noted, exchanges involve two intentional acts: “[F]or there to be a completed gift or exchange, something more is required than just the transferor's act of alienation. The transferee must also take possession of the transferred object for there to be acquisition.”¹²⁴ A promisor's consent to an alienation of legal rights can create a moral duty to perform on the promisor's part. But the existence of this moral duty does not adequately explain why the *promisee* should possess enforceable rights to the promisor's performance. As with Fried's promissory theory, Barnett fails to explain why a moral duty should correspond to enforceable rights in another party.¹²⁵

¹¹⁹ Cf. Barnett, *supra* note 15, at 292 (“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—that is, the area of legal theory that specifies what rights individuals have and the manner by which they come to have them.”).

¹²⁰ Cf. *id.* at 290 (noting that process-based theories cannot explain why “agreements to perform illegal acts should not be enforceable”). Since illegal acts are not an entitlement of the promisor, they may not be transferred.

¹²¹ See *supra* note 107.

¹²² Another concern for Barnett's theory is the suggestion that it may suffer from a circularity problem. See TREBILCOCK, *supra* note 25, at 184 (“[O]bjective theories of intent risk some of the same problems of circularity that Barnett attributes to reliance or welfare theories—that is, do parties understand certain language to have particular legal connotations because the law says so, or does the law attach certain legal connotations to particular language because the parties believe that the language has these connotations?”). The theory of consent described in this Article, however, is not dependent upon legal conventions for its force.

¹²³ See Benson, *Unity of Contract Law*, *supra* note 3, at 148 (noting “the fundamental idea that a transfer of right requires two parties and two acts of will: There must be alienation and appropriation”).

¹²⁴ Benson, *Public Basis*, *supra* note 16, at 296; see also Benson, *Contract*, *supra* note 108, at 41–42 (describing the elements of a transfer). Benson also claims that Barnett's theory “does not preserve the required standpoint of abstraction.” Benson, *Abstract Right*, *supra* note 23, at 1112 n.57. Barnett has responded to this feature of Benson's argument in Randy Barnett, *Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990).

¹²⁵ This concern arises even if the consent is understood as a consent to a legal obligation. In Benson's view, this sole consent amounts to alienation without appropriation. As Benson suggests, “While

Even if an individual has consented to legal enforcement, it is important to explain why a withdrawal of that consent wrongs the promisee. Barnett's theory helps justify the enforcement of contracts given a preexisting law of contracts, but it does not explain why contracts are justifiably enforced in the first place. Why would contracts merit enforcement if the law did not already enforce them? Something additional is required if we seek an explanation of why the promisee has an interest in performance that would render nonperformance unjust to the promisee.

2. *Benson's Approach.*—Peter Benson, by contrast, offers a transfer theory that does link the consent of the promisee to the consent of the promisor. In this respect, his argument adds a feature missing from Barnett's analysis. Like Barnett's theory, Benson's explanation also relies upon consent as a defining feature of contract doctrine.¹²⁶ However, a successful transfer is not made under Benson's understanding unless there are consents by both parties.¹²⁷

Benson's early work in contract theory is largely based on Hegel's theory of contracts,¹²⁸ but his recent writing reaches similar conclusions by applying Rawls's idea of a public basis of justification.¹²⁹ For Benson, a public basis of justification for contract means that the justification "addresses individuals in their role as parties to voluntary and involuntary transactions in which they figure as bearers of rights and correlative duties that may be coercively enforced."¹³⁰ The description below focuses on this more recent, Rawlsian formulation.

Benson bases this understanding of the public justification of contract law on three private law principles. First, he suggests there should be no liability for nonfeasance, only for misfeasance.¹³¹ Second, the law should

a promise made with this intention [to bring the promisor under a full obligation to perform] may certainly create a relation of trust with the promisee . . . this will not be enough to identify it as a relation of correlative rights and duties which can be coercively enforced." Benson, *Public Basis*, *supra* note 16, at 297; *see also id.* ("There may thus be a moral duty to keep the promise without a correlative right to its performance. Such a promise is analogous to an alienation of property that is not followed by appropriation.").

¹²⁶ *See* Benson, *Unity of Contract Law*, *supra* note 3, at 148 (indicating that one can only appropriate from another "with the other's consent").

¹²⁷ Benson, *Public Basis*, *supra* note 16, at 296; *see also* SMITH, *CONTRACT THEORY*, *supra* note 3, at 100 ("For a transfer to take place, both the transferor and the transferee must intend to bring about the transfer.").

¹²⁸ *See, e.g.*, Benson, *Abstract Right*, *supra* note 23.

¹²⁹ *See* JOHN RAWLS, *POLITICAL LIBERALISM* 223–27 (1993) (explaining the idea of a public justification). Examples of Benson's use of this framework include Benson, *Public Basis*, *supra* note 16, at 305; and Benson, *Unity of Contract Theory*, *supra* note 3, at 123–24.

¹³⁰ Benson, *Public Basis*, *supra* note 16, at 305.

¹³¹ *Id.* at 316. As used, this distinction should not be confused with the distinction sometimes drawn between acts and omissions. *See* Benson, *Contract*, *supra* note 108, at 27 (giving examples of acts that count as nonfeasance, such as "attracting a business competitor's customer," and omissions that

adopt a juridical conception of the person. That is, the powers of individuals “must be specified in a way that does not give intrinsic moral standing to their needs or purposes,” and they are to be viewed as subjects “with a capacity to have, acquire, and exercise rightful possession for and by themselves.”¹³² Third, transactions are not to be understood as cooperative ventures, but rather as an “interaction between two parties, which . . . can result in the acquisition of or interference with individual rightful possession.”¹³³

The explanation of how a contractual transfer occurs under this rubric is complex. Benson indicates that a transfer requires assent on the part of both promisor and promisee.¹³⁴ This concept is reasonably familiar under the doctrine of offer and acceptance.¹³⁵ But despite Benson’s emphasis on the legal point of view, the means by which he suggests a transfer occurs will sound substantially less familiar to lawyers.

As Benson notes, the promisor’s and promisee’s assents must be temporally sequenced in practice.¹³⁶ In his view, one can only accept an offer if the offer comes before the acceptance. Benson also suggests a contractual transfer necessarily requires that the transferred thing is never unowned.¹³⁷ Under his theory, there must be a continuity of ownership in order for the transferee to acquire the promised thing with the transferor’s consent.¹³⁸ The will to alienate must coincide with the will to appropriate.

Given these premises, Benson’s argument gives a nuanced and fascinating account of contract law. However, where Barnett’s theory fails to account for a necessary symmetry in contract formation—the dual consents required of promisor and promisee—Benson calls for an artificial degree of contractual symmetry. Benson does more than suggest that the promisor’s consent must mirror the promisee’s consent. He calls for a radical balance within the contract: an equivalence of exchange.¹³⁹

count as misfeasance, such as “failing to warn another of danger in a situation of justified detrimental reliance”).

¹³² Benson, *Public Basis*, *supra* note 16, at 316.

¹³³ *Id.* at 317. *But cf.* Markovits, *supra* note 20, at 1517 (suggesting that the parties to contracts form “a collaborative community”).

¹³⁴ Benson, *Unity of Contract Law*, *supra* note 3, at 129 (“[I]n addition to alienation by the first party, there must be appropriation by the second.”).

¹³⁵ *See id.* at 138–53 (describing how offer and acceptance fit into Benson’s contract theory).

¹³⁶ *Id.* at 129; *see also* WEINRIB, *supra* note 55, at 137 (“[T]he two acts must be temporally disconnected, because simultaneous offers are mutually independent acts that do not bind the parties to each other.”).

¹³⁷ Benson, *Unity of Contract Law*, *supra* note 3, at 129–30.

¹³⁸ *Id.* at 129.

¹³⁹ Part of the difficulty for Benson’s theory is that he seeks a nonteleological conception of contract that provides for equivalence of exchange. This is hard to do. There are, of course, well-known alternative conceptions, but not ones that comply with Benson’s purported restrictions. *Compare, e.g.*, James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981), *with* Benson, *Contract*, *supra* note 108, at 43 (describing Gordley’s theory as teleological).

A continuity of ownership enables Benson to take into account the wills of both promisor and promisee. Alienation is part of the original owner's exercise of ownership rights. In Benson's words: "Appropriation by the second party in accordance with continuity implies . . . that the thing is appropriated *at the same time* the owner exercises his or her right of ownership by alienating it."¹⁴⁰ In this way, both the consent of the promisor and of the promisee play a role in a contractual transfer.

In Benson's view, the only way to meet this continuity requirement, however, is if the contractual consideration "figures as equal in value to the promise."¹⁴¹ In this way, the contracting parties "have at the beginning and at the end of the transaction something that is the same."¹⁴²

The difficulty here is that a contract requirement of simultaneous ownership of one and the same thing is counterintuitive. Although one may choose to think of transfers in terms of mutual ownership of the exchanged property, it is unclear why this mutual ownership should be considered part of the logic of transfers generally. And assuming such a condition, it is unclear how the problem of mutual ownership is solved by equating two different "things" as one identical thing in terms of value.

In fact, Benson's understanding of the doctrine of consideration, which calls for an exchange of "two qualitatively different things,"¹⁴³ is in tension with his idea of continuity, which calls for each party's contribution to be identical. And, in practice, the law does not recognize that a transferred object is owned by transferee and transferor, but rather views it as first owned by one party, and then, when the proper conditions are met, owned by the other.

Benson also suggests a presumption that the parties intend to exchange equal value.¹⁴⁴ Yet there is little reason to think that a transferor or transferee would anticipate equal economic value as a decisive feature of an exchange. It is common, and not especially troubling, for each contracting party to anticipate that she got the better end of the bargain.¹⁴⁵ We do not usually think that the only true contracts involve cases where both parties intend their offerings to be equal.¹⁴⁶

¹⁴⁰ Benson, *Unity of Contract Law*, *supra* note 3, at 130.

¹⁴¹ *Id.* at 189.

¹⁴² *Id.*

¹⁴³ *Id.* at 183.

¹⁴⁴ *Id.* at 190–91.

¹⁴⁵ See Barnett, *supra* note 15, at 284 n.59 ("In fact, exchange occurs because both parties *ex ante* perceive the value of the goods to be exchanged as unequal. Each subjectively perceives the good or service offered by the other to be of greater value (to an unknowable extent) than what they are willing to trade for it.")

¹⁴⁶ But see Benson, *Unity of Contract Law*, *supra* note 3, at 190 ("This presumption of an intention to transact for equal value is supremely regulative: everyone, just in virtue of his or her role as contracting party, is presumed as a reasonable person to have this intention.")

Ultimately, a co-ownership of two qualitatively different things that count as one identical object is hard to recognize in actual exchanges. Benson apparently employs a legal fiction. Perhaps there are good policy reasons to have a legal doctrine of this sort, but a purported strength of Benson's theory is his refusal to justify contract doctrine in consequentialist terms.¹⁴⁷ To consider such policy issues also requires grappling with long-standing debates over the proper scope of the unconscionability doctrine.¹⁴⁸ Since the fiction at issue is counterintuitive and its substantive benefits are debatable,¹⁴⁹ Benson's principle of equivalence in exchange is a significant weakness for his theory.¹⁵⁰

D. Summary

The above examples indicate the difficulties faced by a contract theory that seeks to comply with the harm principle, to reflect corrective justice, and to provide a coherent, nonconsequentialist rationale for legal obligation. However, these proposed theories also provide valuable contributions for developing a transfer framework for contract obligation.

The arguments outlined above suggest the following conclusions: First, if individual autonomy is to be a guideline, contract law should provide for the promisor's consent to be bound. Second, a promisor's mere consent is not enough to justify enforcement. Promises, and even the consent to be bound, do not implicate a promisee's right to enforcement; they solely im-

¹⁴⁷ See Benson, *Public Basis*, *supra* note 16, at 334 (suggesting that a public basis of justification of contract "does not give standing to any teleological considerations").

¹⁴⁸ This need not be a flaw. However, Benson is seeking to justify unconscionability without making use of external, noncontractual justifications. See Benson, *Unity of Contract Law*, *supra* note 3, at 123 ("[Contract theory] should also investigate whether there is an interpretation of contractual fairness that fits with the apparently non-distributive aspects of contract.").

¹⁴⁹ Indeed, this counterintuitive aspect seems to vitiate the public basis of justification for Benson's theory. Benson seeks a "conception of contract that is latent in the public legal culture," *id.* at 124, but equivalence in exchange is not latent in the way unconscionability is enforced or reasoned in many courts of law. Cf. William Lucy, *Philosophy and Contract Law*, 54 UNIV. OF TORONTO L.J. 75, 105–06 (2004) (questioning Benson's understanding of the "legal point of view"). Moreover, the idea that market value should be able to meet Benson's requirement of equality is itself questionable. See James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW*, *supra* note 3, at 265, 317 ("[I]t seems impossible to get from equality in value as a concept in the mind of the parties to equality in market value as a criterion of fairness.").

¹⁵⁰ An additional question raised by Benson's theory is whether the transfer it describes fits with the internal understanding of performance rights. Under Benson's approach, the thing transferred is not the performance itself, but rather the object delivered by performance. In contrast, Ernest Weinrib has recently drawn on Immanuel Kant's theory of contracts to explain contractual transfers in terms of performance obligations. See Weinrib, *supra* note 3, at 65–70; see also WEINRIB, *supra* note 55, at 136–40 (discussing contract obligations from a Kantian perspective). Under a Kantian analysis, it is the performance itself which the promisee acquires. However, Weinrib's understanding of contracts is in many respects akin to Benson's, with similar strengths and weaknesses. See WEINRIB, *supra* note 55, at 137 n.27 (indicating that Weinrib's discussion of several contract doctrines largely follows Peter Benson's work). Notably, Weinrib also adopts a requirement of equivalency in exchange. See *id.* at 138–39.

plicate the promisor's moral duty to perform. A successful autonomy theory should explain a transfer of rights in a way that reflects the interests of both promisor and promisee.

III. CONTRACTS AS A TRANSFER OF PROPERTY IN THE PROMISOR'S ACTIONS

Contracts involve a bilateral relationship between individuals. Under a property-based view, the crux of this relationship is the parties' interaction with the contractual text. From the promisor's perspective, consent is a necessary element. Contractual consent, however, takes the form of a conditional promise to be bound. This form of promise is significant. For the promisee, the conditional nature of the text is the means by which an otherwise moral obligation can become enforceable.

As this Part explains, it is the pairing of the promisor's and promisee's acts that results in a transfer of ownership. When a promisee successfully meets the conditions of the promise, he justly acquires a property interest in the promised performance. In other words, the promisee acquires property in the promisor's future actions through his relation to the promise's terms.

This theory offers an alternative to the existing transfer theories of contract. Its first supporting premise will be the idea of self-ownership. This normative foundation grounds contract rights in a type of property. Given a robust understanding of self-ownership, certain body rights should be transferable if the original owner provides consent. These body rights include the right to perform future actions, the core of a contractual transfer.

This Part then explores principles of just acquisition to determine how a promisee might legitimately acquire an interest in a promisor's future actions. The possibility that actions are transferable does not explain when it is appropriate to consider them as having been transferred. Principles of just acquisition clarify how a promisee can acquire ownership of a promisor's performance. In turn, this analysis demonstrates that a variety of legal doctrines, including the objective interpretation of contracts, the requirement of consideration, and the standard expectation remedy, are all justifiable in transfer terms.

A. Contracts as Consensual Transfers

Because individuals own their bodies, it makes sense in the abstract that they should be able to transfer rights to future actions they may perform. That said, self-ownership also means that such transfers should be voluntary. One puzzle of contract obligations is to explain how the rights of transferees to insist on performance can be made consistent with the rights of transferors to decide on a future course of action.

Part of what allows a transfer to occur is a promise. In order for an individual to be obligated to act according to a contract's terms, she must

consent to this obligation.¹⁵¹ This respects the promisor's preexisting entitlements under a self-ownership norm. The difficulty is that, as we have seen in the discussion of promissory theories, a mere promise does not justify legal enforcement if courts are to respect the harm principle.

Notably, contractual promises are not like regular promises in that contracts generally involve promises that are contingent on the actions of others.¹⁵² In the case of a contractual promise, an obligation is not triggered and does not vest until the promisee has met the promise's terms.¹⁵³ In order for the promisor's consent to exist, the promisee must have acted to meet the promise's terms.¹⁵⁴

This use of a conditional promise proves significant. Before elaborating on this idea further, however, the implications of a consent requirement merit further discussion. The meaning of consent suffers from an ambiguity between subjective and objective understandings, which must first be resolved.¹⁵⁵

In order to justify a limit on a promisor's self-ownership, consent includes a subjective element.¹⁵⁶ At a minimum, consent means the promisor intended to communicate that the obligation set forth in the promise, whatever it might be, should be binding.¹⁵⁷ Otherwise, a promisee's claim of a

¹⁵¹ Some commentators have drawn distinctions between promises and consent. *See, e.g.*, Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 121 (1981). However, a promise may also be considered a form of consent. *See* ATIYAH, *supra* note 100, at 177 (“[P]romising may be reducible to a species of consent, for consent is a broader and perhaps more basic source of obligation.”). When the phrase “consent” is used in this Article, it will usually refer to a voluntary obligation that takes the form of a conditional promise. A promisor that takes on the obligation to perform a future act under a contract has implicitly also consented to the promisee's possession of a right to that performance if the contract's conditions are met.

¹⁵² Raz has also emphasized this feature of promises in the context of agreements. *See* Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 202–03 (1984). Raz suggests that the right to make conditional promises is “derivative of the general right to promise.” *Id.* at 202.

¹⁵³ FRIED, *supra* note 87, at 47 (“Where the promise is conditional, . . . until the condition is fulfilled A is not bound in law by the obligation of a promise.”).

¹⁵⁴ Peter Benson expresses a similar idea. *See* Benson, *Public Basis*, *supra* note 16, at 297 (“[T]he expressed consent to alienate must already contain, explicitly or by necessary implication, a request for a return manifestation of consent to appropriate, without which there is no intention to transfer ownership or to invest the transferee with a right.”).

¹⁵⁵ *See* Barnett, *supra* note 15, at 299 n.121 (setting forth both subjective and objective definitions).

¹⁵⁶ *Cf.* Smith, *CONTRACT THEORY*, *supra* note 3, at 61–62 (“[S]ubjective intentions are what count in determining whether a promise was made at all: a promise cannot be made without intending to make a promise.”).

¹⁵⁷ *Cf. id.* (contending under a promissory account of contract law that a contractual promise requires intent to make a promise). The importance of subjective intent might seem to be in tension with the objective approach to contract interpretation. As Smith indicates, however, the minimum subjective element needed for promising does not require courts to look for a subjective understanding with respect to the meaning of the contract. *Id.* at 61–62, 174. Also, it should be noted that courts might use objective measures as the best available means to locate subjective intentions. *Cf.* Barnett, *supra* note 15, at 305 (“A consent analysis is genuinely interested in the actual intentions of the parties, but we never have direct access to another individual's subjective mental state.”).

duty to perform under the contract would not stem from the promisor's self-ownership rights, but solely from the promisee's reliance. In fact, it would violate the promisor's self-ownership rights to enforce contractual terms without at least this degree of subjective assent.¹⁵⁸

Promisors are not like tortfeasors: their rights and duties are not altered through wrongful acts, but through voluntary transfers.¹⁵⁹ In order for a contract to justly produce a change in the promisor's rights, the promisor must at least intend that the promise she expressed will bind the promisor if its conditions are met.¹⁶⁰ She must freely enter into the agreement. By the same token, only the terms of the promise limit the promisor's rights pursuant to contract because the promisor consented to only those terms. New terms should not be added because of the happenstance that an agreement was reached.

On the other hand, the consent element does not preclude an objective interpretation of the contract consented to.¹⁶¹ A consent requirement does not mean that courts must be concerned with the subjective intentions and understandings of the promisor regarding the value of the contract or her goals as to what it will accomplish. It also does not mean that the promisor's subjective interpretation of the contract language should be decisive.¹⁶²

An expression of consent is a voluntary action, which has objective meaning given the context in which it was made. This objective meaning is crucial to the promisee's ability to take possession of contractual performance, for promisees can only respond to the external evidence of the promi-

¹⁵⁸ See also Barnett, *supra* note 15, at 297 (“[C]ontract law concerns enforceable obligations arising from the valid *transfer* of entitlements that are *already vested* in someone, and this difference is what makes consent a moral prerequisite to contractual obligation.”). But note that this level of consent may extend to contracts where a contracting party has very little knowledge regarding the agreement's content. Cf. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 636 (2002) (“Suppose I say to my dearest friend, ‘Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.’ Is it categorically impossible to make such a promise?”).

¹⁵⁹ See Barnett, *supra* note 15, at 297 (making this distinction); see also FRIED, *supra* note 87, at 2 (“[T]he will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism.”). For a recent suggestion that contract law possesses both power-conferring and duty-imposing characteristics, see generally Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 *N.Y.U. L. REV.* 1726 (2008).

¹⁶⁰ Note that an intentional failure of this minimal level of consent could justify a fraud claim or support an estoppel claim. I am not arguing that a promisor's failure to subjectively consent to any obligation whatsoever precludes the promisee from acquiring rights based on compliance with a contractual text.

¹⁶¹ See SMITH, *CONTRACT THEORY*, *supra* note 3, at 62 (“In interpreting a promise, as in interpreting normal communications, the aim is not to determine what the promisor intended, but what the promise actually *meant*—which is determined ‘objectively.’”); see also *id.* at 273 (“[I]t would be inconsistent with the necessarily public and interpersonal nature of promising (or agreeing) to suppose that promissory obligations are grounded in the inner wills of promisors.”).

¹⁶² See *supra* note 157 for discussion of the divide between intent to promise and intent regarding meaning.

sor's state of mind.¹⁶³ The contractual expression of consent is the focal point of the promisee's actions in acquiring the performance entitlement. Assuming no fraud, a subjective failure to consent should offer a defense, however.¹⁶⁴

There are pragmatic reasons for an objective reading of consent when courts assess contract formation. As an evidentiary matter, courts may conclude that subjective intentions are best determined by reference to the objective meaning of the words used.¹⁶⁵ But the decision to enter a contract in the first place should be voluntary if the promisor's autonomy is to control.

The next step is to consider how a promisee can acquire a promised act of performance. Contract theory on this question is less well developed.¹⁶⁶ A comparison to other contexts in which property acquisition occurs suggests an answer to this question.

B. *Theories of Just Property Acquisition*

Several prominent theories of property acquisition can be adapted to the problem of acquiring a promisor's acts. The promisee's relation to the promisor's expression of consent once the contract conditions are met bears a substantial resemblance to other contexts in which individuals are thought to rightfully acquire property in a thing. The major differences in the contractual context are that the thing acquired is of an unusual type, and that it is neither unowned nor owned in common at the time of acquisition.

Interestingly, multiple justifications for viewing contracts as a transfer of property converge. There are a variety of angles from which the promisee's actions in meeting a conditional promise's terms can qualify as a just acquisition. And, although these principles of acquisition are being applied to unconventional settings, the norms at issue should be just as relevant for contract-based property as elsewhere.

1. *Labor*.—Broadly speaking, the process of meeting a promise's terms resembles the initial acquisition of physical property through an individual's labor. Where a contract is binding, the promisee has acted to meet the promise's requirements, creating the conditions under which it has force as an obligation. Until the contract's conditions are met, the promisor has not bound herself. The conditional promise thus requires the promisee to labor in order to bring about the promised performance. The promisee

¹⁶³ Cf. Benson, *Public Basis*, *supra* note 16, at 295 ("For Barnett, the test ensures that, at the time of transacting, the transferee can ascertain whether or not the transferor has indeed parted with his or her right and has thereby changed the enforceable boundaries between them.").

¹⁶⁴ For a recent analysis of the role intent plays in contract formation, see Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007).

¹⁶⁵ For further discussion of this perspective, see *supra* note 118.

¹⁶⁶ An exception is Smith, *Towards a Theory of Contract*, *supra* note 3, at 120–29 (discussing theories under which a property-like interest in contract performance could be created by drawing on an analogy to property acquisition theories).

justly acquires this performance through working to bring the promise into effect.

This is a labor-desert theory of acquisition. John Locke propounded the best-known theory of this type. Locke describes how a person can acquire property through this process as follows: “Whatsoever . . . he removes out of the state that nature hath provided . . . he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”¹⁶⁷ One way of explaining our sense that the promisee deserves the promised performance is to note that the promisee’s labor, aimed at attaining the promised act, merits recognition of ownership because his labor has been joined together with the acquired property.

Locke’s theory is a much-debated means of acquisition when applied to physical property, with several well-known weaknesses. It is useful to examine how the standard critiques of a labor theory hold up in the contractual setting.

One hurdle for a labor theory of acquisition is to explain why a unilateral act of the acquirer should bind the rest of the world.¹⁶⁸ This hurdle is particularly difficult for Locke because he starts with the premise that the physical world is owned in common prior to its acquisition through an individual’s labor.¹⁶⁹ Even if we adopt the common law view that such physical objects are initially unowned, as Richard Epstein suggests, it is still a challenge to explain why a unilateral action should create obligations for millions of other individuals.¹⁷⁰

In the case of contract, this difficulty of unilateral action is resolved with respect to the contracting parties. The acquisition does not result from a unilateral act. It is unnecessary to rely on the concept of hypothetical consent—as some theorists have done to explain initial property acquisition—as actual consent supports a contractual acquisition pursuant to the contract’s terms.¹⁷¹ In addition, from the perspective of third parties, the obligations postcontract remain in many respects the same.¹⁷² Members of the

¹⁶⁷ LOCKE, *supra* note 13, ¶ 27, at 274.

¹⁶⁸ See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1228 (1979) (“The essence of any property right is a claim to bind the rest of the world; such cannot be obtained, contra Locke, by an unilateral conduct on the part of one person without the consent of the rest of the world whose rights are thereby violated or reduced.”). *But see* A. John Simmons, *Original-Acquisition Justifications of Private Property*, in PROPERTY RIGHTS, *supra* note 67, at 63, 83 (suggesting examples of the unilateral imposition of rights and obligations that are “both familiar and widely accepted”).

¹⁶⁹ See Epstein, *supra* note 168, at 1229 (discussing this feature of Locke’s views).

¹⁷⁰ See *id.* at 1230 (noting that the premise that property is initially unowned does not resolve the problem of unilateral action binding others).

¹⁷¹ Cf. WALDRON, *supra* note 1, at 176 (“Locke faces the challenge which, as we saw earlier, was posed by Samuel Pufendorf: he has to explain ‘how a bare corporal Act’ such as labouring on an object ‘should be able to prejudice the right and power of others’ without their consent.”).

¹⁷² An exception would involve tortious interference with a contract. Attempting to entice someone away from performance of their contractual duties implicates restrictions on third parties that would not exist in a precontractual context. However, this is a relatively limited restriction on third-party rights in

public are not free to interfere with the promisor's liberty and possessions, before or after the contract. Third parties would generally be concerned to know that a particular thing is owned at all, rather than concerned with who owns it.¹⁷³

Another argument against Lockean theories is that they allow the acquirer to have ownership rights that extend beyond the value of the labor expended or beyond the portion of the thing with which the labor was "mixed."¹⁷⁴ For example, an individual might expend a few minutes' worth of labor on a twenty-acre tract of fertile land—is this enough to acquire the entire tract? What if this individual only worked on one acre, leaving the remaining acres fallow?

In cases of contract, a similar argument could be advanced. Thus, Stephen Smith has suggested that Lockean theories do not fit well as an explanation of contract obligations because the promisee may acquire performance rights based on very slight consideration.¹⁷⁵ Many contracts require a great deal of a promisee but many, of course, do not.

Consent answers this argument as well. Where there is minimal consideration, the *promisor* has decided that a mere peppercorn is sufficient for a claim to be staked to the promised performance. Just as a statute may determine that a small amount of labor is enough to acquire a piece of land, the promisor's words may determine that a precise quantity of effort is the necessary amount for the promisor to part with property in her future actions. The question is one of authority. Some level of labor is required in order to give the promisee an independent interest in the promised actions—otherwise the promisor may change her mind about performing

comparison to other well-accepted acquisition contexts. Cf. Roderick Bagshaw, *Inducing Breach of Contract*, in OXFORD ESSAYS IN JURISPRUDENCE, *supra* note 3, at 131, 132–33 (analogizing creation of an obligation in this context to other settings where third parties are made subject to property-based obligations). Note also that the inquiry required of third parties in order to avoid liability may be limited in this setting. See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1166 & n.215 (2003).

¹⁷³ See PENNER, *supra* note 4, at 82 ("Who owns is irrelevant as long as someone does. The truth embodied in the idea of passing title is the fact that Blackacre remains the same property as it is transferred from one owner to the next because, as far as the duty-owners are concerned, it is the same property."); see also Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 623 (2008) (discussing the duties of nonowners); Smith, *supra* note 172, at 1117 (same).

¹⁷⁴ See WALDRON, *supra* note 1, at 190 ("[A]n exclusive right to the whole of the improved object amounts to something more (and certainly more valuable) than an exclusive entitlement to one's own labour. Since this extra—the value of the raw materials—originally belonged in common to everyone, we may ask why the claims of others are defeated to this additional extent?").

¹⁷⁵ Smith, *Towards a Theory of Contract*, *supra* note 3, at 125 ("It seems clear that a desert-based procedural theory will not illuminate contract law. The things that a promisee needs to do in order to create a contract are not the sorts of things which could show that the promisee merits or deserves contractual rights, at least if merit and desert are understood in their normal sense. Extensive contractual rights can be obtained through doing nothing more than saying 'I agree'.")

without wronging the promisee—but the promisor effectively determines the amount that is required for this interest to come into existence.

There is also a conceptual challenge for labor theories. Locke has been criticized because it is not literally possible to “mix” labor with physical objects.¹⁷⁶ A similar critique would apply in the contractual context, perhaps with greater force. It is not literally possible to mix labor with a promise or with the promisor’s future action. Although the promise exists in the present, it is not the same type of thing as labor, rendering it hard to imagine how the promise and labor can mix.

In order to make sense of Locke’s argument, he cannot be taken literally.¹⁷⁷ Mixing labor with a thing is a metaphorical endeavor. Here again there is a parallel to physical property contexts. Labor may take a piece of land out of the state of nature, turning it into a useful source of crops. Labor can also take a proffered act of contractual performance out of its prior status as one among many available exercises of liberty and turn it into the subject of a promissory obligation. Although the future act itself is not altered, its relation to the world is.

It is also possible to reconceptualize Locke’s theory of “mixing” labor by treating it as a reference to the acquirer’s identification of his personality with the relevant thing. This is Karl Olivecrona’s approach. As he 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.¹⁷⁸

This view treats the acquirer’s efforts as creating a link between the acquirer’s personality and the acquired thing.¹⁷⁹

¹⁷⁶ Jeremy Waldron has developed this argument at length. See WALDRON, *supra* note 1, at 184–91.

¹⁷⁷ See *id.* at 187 (“[I]n the case of labouring on an object, there are not two things to be brought into relation with one another but only one thing and an action that is performed on it.”).

¹⁷⁸ Olivecrona, *supra* note 70, at 224. In response to this suggestion, Waldron asks: “What about cases where people identify themselves with resources belong to others—for example, when a man identifies with the house he has been occupying on a monthly lease?” WALDRON, *supra* note 1, at 195. While this question is legitimate, the concern it raises is resolved by the existence of consent in a successfully formed contract. The concern Waldron raises here is better addressed to reliance theories of contract, which do not necessarily build upon the promisor’s consent.

¹⁷⁹ Corporate entities present a special set of concerns. It should be noted that some theories of property acquisition will work better than others when extended to contracts between corporate entities. For example, corporations do not have emotions, and this affects principles of acquisition based on identification with the acquirer’s personality. Although a full treatment of this issue exceeds the scope of this Article, it merits additional discussion. A property theory can justify the enforcement of intercorporate contracts, but the analysis is more complex. For a helpful analysis of how these contracts pose a challenge to autonomy theories, see generally Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101 (2005).

A similar type of relationship can be conceived of in cases of contracts. Suppose that a promisee, Jane, has chosen to alter her life's course, laboring to meet the conditions of a contractual promise. In doing so, she will now feel that this promised performance is something of hers. She worked for it and now identifies with it. Admittedly, such identification is a subjective matter, and contracts are rather abstract things for purposes of extending one's personality.¹⁸⁰ The point is that "mixing" labor with things can be made conceptually plausible when recast in these terms.

A promisee acts with respect to the promised performance, intending to make it hers based on the promisor's consent. The promisee's understanding is a particular instance of a broader normative intuition. This relation of action to object is sufficient to produce an understanding that something rightly belongs to us even if the thing owned does not quite reach the level of an intimate part of ourselves. We experience the thing as ours. Although such understandings do not permit individuals to own whatever things they happen to identify with, this sense of ownership carries significant normative weight. In cases like contract, where the promisor has also consented to the obligation, a theory of identification is more compelling.

2. *Capture or Creation.*—Labor-desert theories respond to the common intuition that when people interact with external things, they may do so in such a way that those things become "theirs." In the above analysis, the emphasis was on the promisee's relationship to the promisor's future actions. The object acquired was assumed to be the promised performance. Focusing on the conditional promise itself provides another means to explain contractual transfers. A promisee has a personal interest in the promise, not just in the value of the promised consideration. He relates to the words of the contract.

In some instances, for example choses in action, this relation of owner to promise is especially pronounced. For example, if you take physical possession of a bearer bond, you are thought to own the bond and consequently to have the rights that the bond represents.¹⁸¹ With ordinary contracts, especially oral contracts, this relation of owner to promise may be less obvious, but one can still discern a possessory relationship between the promisee and the promise. The contract may not always be physically possessed in the manner of a bearer bond, but the promisee may, in a sense, take possession of the obligation, with similar normative consequences.

¹⁸⁰ Cf. HARRIS, *supra* note 63, at 223 ("A claim to ownership based on personhood-constituting must be psychologically plausible if it is to deserve respect, and its plausibility diminishes to the extent it is idiosyncratic.").

¹⁸¹ See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 582 (2005) ("Bearer bonds and many negotiable instruments . . . pay a sum of money to the bearer of the instrument—the paper itself contains the right to receive the money, rather than merely serving as evidence of a debt."). Bell and Parchomovsky capture the idea that the bearer bond is itself property.

Kant's language captures this idea of owning an obligation. In his words: "By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become enriched . . . by acquiring an active obligation on the freedom and the means . . . of the other."¹⁸² This conception of owning the promise itself offers an additional means to describe the acquisition process.

Some examples resemble a capture. In cases of unilateral contracts, the promise may be open to the world. In such instances, the promisee in a sense has brought the promise under her control by complying with its terms first.¹⁸³ By acting to meet a condition precedent, the promisee acquires the promisor's consent—it is no longer open to the whims of the promisor and no longer subject to withdrawal without infringing the promisee's rights.

To illustrate, consider a unilateral contract, where the first person to meet the terms of an offer has a right to \$100. If Jane meets those terms before anyone else, she can claim that this is now "her" promise, that it has been brought under her control.¹⁸⁴ She is the one described by the promise's terms who has made its language applicable to the facts under consideration. Its terms can no longer cover anyone else.¹⁸⁵

More generally, one can also recognize that the promisee has labored to acquire the promised act, but that the actual "thing" the promisee has changed by her labor is the conditional promise contained in the contract.

¹⁸² KANT, *supra* note †, § 20, at 93. For a more recent expression of this idea, see Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 5 n.16 (2007) ("A promise is property, like a call option that can be traded on a futures market and may actually be embodied in a piece of paper.").

¹⁸³ Cf. Epstein, *supra* note 168, at 1224–25 (describing a first-possession theory of property acquisition); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (discussing a first-possession theory). The classic case is *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805). Admittedly, the publicity element implicit in first-possession theories is somewhat different in the contractual context, as the property at issue is already owned. See Benson, *Unity of Contract*, *supra* note 3, at 133 (discussing how the thing to be appropriated "is already subordinated to its owner in a way that can be apparent to a second party"). As Stephen Smith has noted, however, neither promissory nor reliance theories of contracts adequately explain the enforcement of unilateral contracts premised on the promisee's performance of a stated condition. SMITH, *CONTRACT THEORY*, *supra* note 3, at 183–85. A property theory like the one in this Article offers an explanation, to the extent the promisee's actions parallel property acquisition norms in other settings.

¹⁸⁴ For a similar insight, see Benjamin L. Fine, Comment, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1142 (1983) (comparing the obligee in a contractual relationship to "the pursuer of a wild animal who has significantly advanced towards capture"). Fine's view of the relation between contracts and property is distinct from the one in this Article, but the intuition that capture norms apply is suggestive.

¹⁸⁵ Note that contracts under seal are not addressed by the property theory in this Article. I agree with Ernest Weinrib that such contracts "are creations of positive law, which for instrumental purposes makes available a means of juridically binding oneself." See WEINRIB, *supra* note 55, at 138 n.30. The legal treatment of relational contracts may also diverge from this theory for instrumental purposes.

In this sense, contracts may also involve acquisition through property creation.¹⁸⁶ The promise represents an interest in the underlying performance, and this future action is transferred from the promisor, not created. But a successful contract—one in which the terms of a conditional promise are met—is brought into existence by the intentional acts of the promisee. This gives the promisee a proprietary interest in performance as co-author of a binding promise.¹⁸⁷

By having an interest in the promise, the promisee also has an interest in the underlying thing consented to: the promised performance. As with a bond or a deed to land, the written obligation signifies ownership of what it describes. In this way, a property right in the promisor's future acts is transferred, although the means is by creation of an obligatory promise. Owning a promise is, effectively, to own the actions that the promise calls for.

3. *Embodiment.*—In addition, it is possible to recast the acquisition process by borrowing from concepts of acquisition developed by Hegel. A Hegelian theory of contract law is distinct from the one described in this Article in several major respects.¹⁸⁸ But Hegel has described the acquisition of property in a way that may assist in conceptualizing why it is just for an individual who meets a promise's conditions to have rights to performance.

Hegel's theory of property acquisition emphasizes the relation between the acquirer's will and the acquired thing.¹⁸⁹ According to Hegel:

A person has the right to place his will in any thing. The thing thereby becomes mine and acquires my will as its substantial end (since it has no such

¹⁸⁶ Note, however, that if one adopts a Lockean approach, not all commentators agree that Locke viewed property acquisition in terms of property creation. See, e.g., Olivecrona, *supra* note 70, at 226 (“In no case do [Locke's] examples of appropriation of movable things imply that a man has created an object by his work.”). The idea that creating something can merit recognition of property rights is nevertheless a common intuition. For further discussion of this type of acquisition theory, see WALDRON, *supra* note 1, at 198–201.

¹⁸⁷ The acquisition of property based on its creation—for instance, authorship—is often discussed with respect to intellectual property. For discussions of intellectual property in natural law terms, see, for example, Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (providing a natural rights theory of intellectual property based on Locke's theory of natural law); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1978–80 (2006) (discussing the role played by natural law theory in shaping copyright law). But see Seana Valentine Shiffirin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001) (suggesting Lockean theory does not support intellectual property rights).

¹⁸⁸ As noted, the present theory does not comport with Hegel's actual theory of contracts. For recent efforts to explain modern legal doctrine in light of Hegel's contract theory, see, for example, Benson, *Abstract Right*, *supra* note 23; and Alan Brudner, *Reconstructing Contracts*, 43 U. TORONTO L.J. 1 (1993).

¹⁸⁹ See, e.g., G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT ¶ 44, at 75 (Allan W. Wood ed., 1991) (1820).

end within itself), its determination, and its soul—the absolute right of appropriation which human beings have over all things.¹⁹⁰

It may be claimed that a thing has been acquired if it is now intelligible only in light of the acquirer's will.¹⁹¹ We might share the intuition that property is acquired when the acquirer's will is, in a sense, embodied in the relevant thing.¹⁹²

Jeremy Waldron provides helpful examples of this idea in cases where an acquirer has brought about a physical change in an object:

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 object¹⁹³

As Waldron notes, an embodiment principle of acquisition has certain advantages over Locke's labor theory: "We do not have to insist (as Locke has to) that the willed actions are actually present *in* the product, only that the condition (and, of course, the value) of the product is such as to be intelligible only by reference to the will that shaped them."¹⁹⁴ This idea of embodiment can be extended to the contractual setting.

When we view the contractual obligation, we see that the promisee's meeting of the promisor's conditions alters the nature of the promise. A conditional promise with its conditions unmet is only binding in a hypothetical world. Once the conditions are met, the promise becomes binding according to its own terms. A promisee can thus embody his will in the promise by working to change it from a contingent moral obligation to an actual, noncontingent duty. The meaning of the promise is now only fully intelligible in light of the promisee's having met its conditions.

The promise shifts from something that might oblige to something that does oblige, just as an unsigned law is different from one with a President's signature. A promisee will naturally think of the promise as "his" now that the promisee has met its requirements because the promisee's efforts made

¹⁹⁰ *Id.*

¹⁹¹ See WALDRON, *supra* note 1, at 365 (discussing this idea); *cf.* MUNZER, *supra* note 63, at 69 ("To grasp the importance of causing physical changes in external things it is necessary to see why Hegel requires that the embodiment of a person's will be recognizable by others. The root idea . . . is that property is an intersubjective concept.").

¹⁹² See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982) ("Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.'").

¹⁹³ WALDRON, *supra* note 1, at 364.

¹⁹⁴ *Id.* at 365; *see also id.* at 364 ("Notice again that we are not required to believe here that my actions or my will literally enter into or become part of the object on which I work. In Hegel's account, the important thing is that the gap between the subjectivity of the will and the perceived externality of the objects of the world has been bridged.").

the promise applicable to actual contingent facts and gave it force. And, at the same time that the promisee has worked to create the performance obligation, the promisor's consent to be bound limits the promisor's interest in what has been promised.¹⁹⁵ Given this backdrop, it is reasonable for the would-be acquirer to stake a claim to ownership.

4. *Summary.*—There are a number of contending theories for a principle of just acquisition of ordinary, physical property. People hold a spectrum of views about how we come to rightly possess things subject to ownership, ranging from a labor theory, to identification, to embodiment of the will. The above discussion adapts these principles of acquisition to contract-based property. The fit may not be perfect. Yet it is not necessary to accept any of these theories in their precise shape, so long as the reader shares the sense that a promisee deserves to own a contractual performance because he has successfully met the conditions of a conditional promise.

Principles of property acquisition map onto contractual obligations with little difficulty. Each of the above suggestions recognizes that when a promisor has met the terms of the contract, the promisor has a new relation to the promise and to the promised performance. He now has a proprietary interest in performance. Because of this relation, the promisor's duty is no longer simply a moral one with no correlative rights attached. Failure to perform wrongs the promisee by depriving the promisee of his property.

In addition, if the above conceptions of acquisition capture the norms of a contractual transfer, the norms involved should apply even absent positive law. Legal conventions are relevant, but not necessary, to the obligatory nature of contracts. Just as an individual would be wronged if assaulted, even prior to positive law, a promisee would be wronged if he had met the terms of a conditional promise and the promisor refused to perform in full.¹⁹⁶

¹⁹⁵ Cf. HEGEL, *supra* note 189, ¶ 65, at 95 (“It is possible for me to *alienate* my property, for it is mine only in so far as I embody my will in it. Thus, I may abandon (*derelinquiere*) as ownerless anything belonging to me or make it over to the will of someone else as his possession—but only in so far as the thing [*Sache*] is *external in nature*.”). Note also that Hegel takes a very broad view of what can be external for these purposes. See *id.* ¶ 43, at 74–75 (describing how certain internal attributes may be given an external existence); see also PENNER, *supra* note 4, at 176 (discussing Hegel's approach).

¹⁹⁶ A full analysis of when courts should provide legal remedies for such violations of moral rights is beyond the scope of this Article. However, this normative question underlies much of the private law. For a helpful discussion suggesting how legal wrongs may be connected to enforcement, see generally Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002). Zipursky contends that private rights of action can be understood in terms of an obligation of the state to provide a right of redress to individuals who would otherwise have rights of redress through self-help. *Id.* at 643–44. In my view, Zipursky's theory can be adapted to address the types of contract-based wrongs described in this Article. For further analysis, see generally Andrew S. Gold, *Consideration and the Morality of Promising*, in EXPLORING CONTRACT LAW (Jason W. Neyers, et al. eds.) (forthcoming 2009).

C. *Explanatory Benefits*

Many of the doctrinal implications of a property theory of contracts are broadly consistent with current contract law and offer a means to better explain that law. Accepting a transfer-based approach does not require radical changes to existing law, nor does it impose counterintuitive requirements on contract enforcement.

For example, the requirement that a promisor consent in order for a transfer to occur supports several contract defenses. Failure of consent corresponds to a variety of legal excuses for nonperformance, including the doctrines of duress, undue influence, lack of majority, mental incompetence, and fraudulent inducement.¹⁹⁷ In each case, the promisor's consent is considered inadequate due to the promisor's questionable competence or lack of a voluntary choice.

As developed below, a property theory also justifies several doctrines that have historically been more difficult to explain. For example, one can see the doctrine of consideration and the expectation remedy as an integral part of contractual obligation. In addition, different types of contract, including unilateral contracts and bilateral executory contracts, also fit comfortably within a transfer framework.

1. Consideration Doctrine.—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. Both unilateral and bilateral contracts—including bilateral executory contracts—fit within this conception. While autonomy theories have sometimes had difficulty with the consideration doctrine, consideration is a core feature of the theory described in these pages.

In the case of unilateral contracts, a promisee's performance is just as much a means to acquire an interest in a conditional promise as it would be in other contractual settings. The absence of a preexisting relationship between promisor and promisee is irrelevant to its validity, and a formal statement of acceptance is unnecessary. The promisee relates directly to the promise and acquires the obligation by meeting its terms.

The ability to explain bilateral executory contracts is also a strength. Critics of promissory theories—and by extension transfer theories—make their strongest case in the context of bilateral executory contracts.¹⁹⁸ With

¹⁹⁷ See Barnett, *supra* note 15, at 318 (describing how these types of defenses fit with a consent theory).

¹⁹⁸ See, e.g., P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 4 (1979) (“The protection of mere expectations cannot (it is suggested) rank equally with the protection of restitution interests . . . or reliance interests A person whose expectations are disappointed, but who suffers no pecuniary or other loss from the failure to perform a promise, has surely a relatively weak claim for complaint or redress.”).

such contracts, there may be no reliance whatsoever, and the harm in nonenforcement may appear to be slight if not nonexistent.¹⁹⁹

Charles Fried has provided a good example of such an agreement:

I enter your antique shop on a quiet afternoon and agree in writing to buy an expensive chest I see there, the price being about three times what you paid for it a short time ago. When I get home I repent of my decision, and within half an hour of my visit—before any other customer has come to your store—I telephone to say I no longer want the chest.²⁰⁰

A contract of this type might be enforced even if the breach occurred just moments after formation. Such contracts resemble liability on a mere promise.

The executory contract has thus raised difficult challenges for autonomy theories. Executory contracts pose the concern that contract enforcement violates the harm principle. Fried's antique shop example naturally poses the question: how would the shop owner suffer a harm if the chest is not purchased? Unlike the situation where one party has performed their promised half of a bargain by, for example, delivering an object, the executory contract is seemingly binding prior to either party physically providing the promised thing. It is questioned whether consideration exists in these instances.²⁰¹

The longstanding legal enforceability of contractual promises cannot be used to show that there is adequate consideration in such cases of executory contracts. Because the whole point is to figure out if such contracts *ought* to be enforceable in the first place, the legal enforceability of a promise is unavailable as a supporting premise.²⁰²

Nevertheless, executory contracts can be consistent with the doctrine of consideration without falling into circular reasoning. An explanation of how this can occur was suggested over a century ago by James Barr Ames. Ames noted that there is “[a] difference between the act of a party and legal result of the act.”²⁰³ A promise is sufficient as an act—a change of position—separate and apart from its legal consequences.

¹⁹⁹ In addition, as Joseph Raz notes, many promises that are relied upon would be considered binding prior to the existence of the reliance. Raz, *supra* note 11, at 924.

²⁰⁰ FRIED, *supra* note 87, at 18.

²⁰¹ Cf. P.S. ATIYAH, *ESSAYS ON CONTRACT* 28 (1986) (“[T]he requirement of consideration or, at least, the satisfaction of that requirement, in the case of the wholly executory contract, is one of the puzzles of the common law.”).

²⁰² See Benson, *Unity of Contract Law*, *supra* note 3, at 160 n.52 (describing the vicious circle that arises if a promise is required to be legally binding in order to count as consideration for another promise, when the legal enforceability of this first promise depends on the status of the other promise as consideration); cf. SMITH, *CONTRACT THEORY*, *supra* note 3, at 181 (“The usual explanation given by those who defend the promissory model is that a contract in which each party agrees to do something for the other party is a pair of conditional promises. . . . The difficulty with this suggestion is that if each promise is conditional on the other, neither party is under an obligation to do anything.”).

²⁰³ See James Barr Ames, *Two Theories of Consideration*, 13 HARV. L. REV. 29, 32 (1899).

Viewing promises as consideration is thus consistent with the transfer theory described in this Article. Although the obligatory force of a mere promise is different from the force of a legally enforceable contract term, it is still a type of obligation, and more importantly, it represents a change of position for the promisee. Promises create moral duties of performance and as such can be a type of consideration.

To put things differently, even if courts as a rule did not enforce bilateral executory contracts, it would be unjust for the promising parties in such cases to not live up to their word. A conditional promise is only binding when its conditions are met. Here, each party's promise acts upon the other party's promise by meeting its conditions; each promise makes the other promise's terms obligatory. Mutual promises can thus produce a transfer of property interests, akin to the transfer that occurs in cases where a promisee has physically accomplished her half of an agreement.²⁰⁴

For transfers of physical property, the process is simpler than it is for transfers of future actions. A transferor can often place a physical object in a transferee's possession and abandon his own interest.²⁰⁵ This ease of transfer reflects the ability of the transferee simply to take possession of a physical object.²⁰⁶ For example, one can do more than just promise to give a hat to another person: one can physically hand the hat over. This process does not work for future actions, which by their nature are not physically available at the time of the contractual agreement.

Consideration is thus integral to successful contractual transfers. Absent consideration, or provisions of positive law, a promisee cannot attain an interest in another person's future actions in the same manner that an individual can attain an interest in a physical thing. But in cases where con-

²⁰⁴ Several commentators have suggested that the theory described in this Article could also support the existence of a transfer if the promise was merely conditioned on acceptance, as long as the promisee accepted the promise. Others question whether acceptance alone can enable an act of appropriation by the promisee. See Benson, *Unity of Contract Law*, *supra* note 3, at 156 ("The consideration would consist here simply in the promisee's evaluation of and reaction to the promise; it represents nothing more than the effect which the promise, with its anticipated benefit, has upon the promisee."). A major difficulty with recognizing transfers based on acceptance of promises conditioned on acceptance is that ordinary promises are often thought to require acceptance in order to be morally obligatory. See FRIED, *supra* note 87, at 43 (discussing the importance of acceptance to promising). However, an accepted promise that was conditioned on acceptance is almost indistinguishable from an ordinary promise that has been accepted, and the latter category of promise is generally understood to fall short of a transfer. Despite these concerns, there is an important line-drawing problem raised by this hypothetical, and it merits further inquiry.

²⁰⁵ Cf. PENNER, *supra* note 4, at 84–85 (explaining the process by which "should anyone wish to pass his title to anyone else, all he must do is abandon it to him in circumstances where that other is well placed to take possession of it").

²⁰⁶ Cf. Benson, *Public Basis*, *supra* note 16, at 296 ("[F]or there to be a completed gift or exchange, something more is required than just the transferor's act of alienation. The transferee must also take possession of the transferred object for there to be acquisition."); Benson, *Unity of Contract Law*, *supra* note 3, at 129 (noting distinctions between physical transfers and contracts).

sideration is provided—even in the form of a promise—a promisee can acquire contractual performance through principles of just acquisition.

2. *Expectation Damages.*—The corrective justice criterion is also consistent with viewing contracts as a transfer of property in the promisor's future actions. The expectation remedy becomes a means of correcting the wrong committed. When courts seek to put a promisee in the position she would have been in if the promise were performed, this is consistent with the promisee owning the promised performance.

Once the content of a promise is understood to be the property of the promisee based on a successful completion of the promise's conditions, corrective justice calls for a remedy that either provides the promised performance or its equivalent in value. Assuming a reliance measure would be less than the expectation measure, the reliance measure provides an incomplete recovery for damages suffered. The expectation measure compensates for the harm that results when the promisee does not receive the performance he or she acquired.

Moreover, tort law also reflects this property-based understanding of contractual performance. Some theories of property emphasize the distinction between in personam and in rem rights. Contracts are often distinguished from property because of their in personam aspect. In certain contexts, however, it is apparent that the right to performance of a contract is good against the world, not just against the promisor.²⁰⁷ As Richard Epstein has argued, remedies for wrongly inducing a breach of contract are comparable to the ostensible ownership cases recognized in other settings.²⁰⁸

The fit of these formation and remedial doctrines with a theory of property transfer suggests that a transfer-based understanding comports with the core intuitions of the common law of contracts. Contract theorists have struggled to find an explanation that incorporates consideration and expectation remedies, as well as unilateral and bilateral contracts, into its conception of contractual obligation. In this respect, the theory developed in these pages is not only normatively plausible, but also provides a useful interpretive account of existing contract doctrine.

IV. POTENTIAL CHALLENGES FOR A PROPERTY THEORY

Notwithstanding the interpretive benefits, the framework for transfers described in the last Part relies on several ideas that may prove controversial. Some question whether a contractual performance is a “thing” suitable

²⁰⁷ In addition, Curtis Bridgeman has suggested that the transferability of contract rights, and also third party beneficiary doctrine, indicate an analogy between contracts and property. See Bridgeman, *supra* note 49, at 3031–33. However, it should be noted that in contexts where contract enforcement involves third parties, there is also greater formalism and standardization, reflecting the distinct expectations of this class of legal actors. See Smith, *supra* note 172, at 1186–88.

²⁰⁸ Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 19–20 (1987).

for ownership. Others question whether performance can be the subject of a transfer as transfers are ordinarily understood. It may also be asked whether the judicial tendency to order damages rather than specific performance conflicts with the idea of owning performance rights. Each of these concerns will be addressed in turn.

A. The “Thinghood” Objection to Owning Performance

An initial challenge stems from common perceptions of what can be owned. Property is often thought to address legal relations to physical objects. In some cases, intangible property is also recognized. However, property is not typically described in terms of ownership of an individual’s acts. The standard instances of legal property thus raise the question whether a transfer theory of contract is consistent with intuitions of *what* is properly subject to ownership.²⁰⁹

J. E. Penner’s recent scholarship offers insights into the source of this concern. Legal scholars often think of property as a “bundle of rights,”²¹⁰ but there are other ways to think about property. Penner concludes that paying attention to the way individuals relate to objects they own also offers insight into the norms of property law.²¹¹ This emphasis on the objects of property tracks a basic intuition of most non-lawyers: the idea that property involves rights in relation to things.²¹²

²⁰⁹ An alternative critique suggests the morality of property is different from the morality of contract, in light of differences in the way rights are enforced in these two contexts. Along these lines, Peter Alces notes the judicial tendency to strictly enforce real property rights, even if a property owner is being unreasonable in insisting on her rights. In contrast, courts seem more willing to “do equity” in contracts cases. See Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 506, 543–49. There are several potential responses. For one, the morality of enforcing property rights may vary across different property contexts. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1890–94 (2007). In addition, if a contract is clear enough, courts are willing to enforce contract terms which it would otherwise be unreasonable to insist upon. See Alces, *supra*, at 548 n.260. This suggests contract interpretation is involved in the enforcement question. As Richard Craswell has noted, “to determine what remedy is entailed by a propertized theory of remedies, we need to determine what property rights were transferred in the first place.” See Craswell, *Expectation Damages*, *supra* note 52, at 24. Distinctions between the enforcement of conventional property rights and contractual property rights may exist based on judicial understandings of the implicit terms of a contractual agreement. Finally, it should be noted that the theory in the present article is normative and not solely explanatory. If the morality of contracts diverges sufficiently from the morality of property, this could be a reason to reform contract law; it need not be evidence that a property theory is wrong on principle.

²¹⁰ For a review of this theory and its influence, see Penner, *supra* note 72, at 712–14.

²¹¹ *Id.* at 724 (“[T]he bundle of rights picture obscures more than it illuminates, confusing the boundaries between property rights and other normative relations, and presenting without foundation the view that we can have a workable idea of property without having a workable idea of the ‘things’ that can be owned.”).

²¹² See LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 11–12 (2003) (discussing the “layman’s view that property is ‘things’”); Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) (“Most

Penner's suggestion is that, in order to have a workable idea of property, "a workable idea of the things that can be owned" is necessary.²¹³ He emphasizes the importance of having some idea of what "things" are generally available for ownership, given that cases regularly arise where new forms of potential property are at issue.²¹⁴ Absent a theory of which "things" can be owned, analysis of these potential property interests offers little conceptual guidance.²¹⁵

Yet Penner's explanation of the idea of property presents a challenge for the theory described in this Article. According to Penner, the objects of contractual relations do not have the features of those "things" that are owned as property.²¹⁶

Penner's theory is that, in order for an object to count as property, it must meet a "separability thesis." This thesis is as follows:

Only those 'things' in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.²¹⁷

The first part of the separability thesis captures the idea that transferability is a key element of property. Although one may own something that is not transferable,²¹⁸ transferability, or at least potential transferability, is an important feature.²¹⁹ Things that are hard to imagine transferring are not objects susceptible to property ownership.

In this way, Penner can treat one's talents and capabilities as nonproperty.²²⁰ Relations with regard to things that are "personality-rich" in this sense do not fit the standard intuition of property ownership, nor does the

people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*.").

²¹³ Penner, *supra* note 72, at 724.

²¹⁴ *Id.* at 715–22 (describing the difficulties posed by cases which involve novel questions of whether something should be considered property).

²¹⁵ *Id.* at 721–22 (suggesting the "bundle of rights" thesis perpetuates "a fairly loose and malleable 'definition' of property, which provides no real help in applying the term 'property' to something like news or body parts").

²¹⁶ PENNER, *supra* note 4, at 112–13 (describing differences between contract rights and property rights).

²¹⁷ *Id.* at 111.

²¹⁸ *See id.* at 113 ("[I]t is not inconceivable that one might own untransferable property."); *see also* MUNZER, *supra* note 63, at 49 (noting that property rights are not invariably transferable).

²¹⁹ *See* MUNZER, *supra* note 63, at 49–50 ("[T]ransferability is a highly important feature of property as usually understood.").

²²⁰ *See* PENNER, *supra* note 4, at 112 ("A necessary criterion of treating something as property, therefore, is that it is only contingently ours; we must somehow show why it is ours because it might well not have been; nothing similar need be said about those things with 'necessary links with particular persons', like our talents, our personalities, our friendships, or our eyesight.").

law ordinarily treat them as property.²²¹ As applied to a person's talents, abilities, or friendships, this is a helpful insight.

However, Penner argues that it is not merely the contingent nature of the rights at issue that makes a thing suitable for ownership as property, but also that the object under consideration "*might just as well be someone else's*."²²² In this way, he distinguishes contract rights from property rights. With the exception of certain choses in action, such as debts or securities, contract-based rights are often personality-rich.²²³ Penner concludes that labor is not separable from the person doing the laboring.²²⁴

Although the separability thesis is illuminating, this Article suggests it should not preclude thinking of contracts in property terms. It is true that contract rights differ from other candidates for status as property. For example, in many cases the rights held by a promisee may not be given to a third party—these rights are only transferrable with the promisor's consent. But it is far from clear that contracts involve things that are so linked to one's personality that they should not be considered potential property.

Our relation to objects may shift depending on context. Penner notes that the property status of a limb or an organ changes depending on whether its severance from the human body is contemplated.²²⁵ People don't tend to think of a person's kidney as property while they are walking down the street. In contrast, one may think of a kidney as property when it has been removed, or is going to be removed, for donation to a relative. Separability

²²¹ See *id.* at 113–14 (“What makes it impossible to conceive of certain rights as property rights, such as the right not to be murdered and a great many other rights which are not without distortion called body rights . . . is that one can not conceive of how such rights could be *separated* from one—they are the constitutive rights that being a person entails having.”). Penner's distinction could also be justified in consequentialist terms. Cf. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905–06 (1987) (“A better view of personhood should understand many kinds of particulars—one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.”). That said, I would question whether a limited ownership of actions, as described in this Article, is more dehumanizing than a legal system that would prevent such ownership. The premise of this Article is that even standard, conventional contracts qualify as an instance of transferring future actions.

²²² PENNER, *supra* note 4, at 112.

²²³ See *id.* at 115–18 (discussing the issues raised by choses in action); *id.* at 130 (suggesting for choses in action that “[b]y removing . . . considerations about property to the realm of valuation, the right itself is stripped down to a right to a ‘thing’, a piece of the wherewithal of another, the value of which fluctuates with the value of that wherewithal just as the value of any other piece of property may fluctuate.”).

²²⁴ In Penner's view, linking contracts and property confuses both subjects. *Id.* at 91 (“Believing that contract conceptually requires the exchange of property rights of some kind leads to believing that all benefits of whatever kind are species of property, which gives rise to the absurd belief, among others, that one's labour is something one owns.”).

²²⁵ *Id.* at 121 (describing this circumstance).

from the self is important to our understanding of what can be owned. Nevertheless, even intimate things can be separated in this fashion.²²⁶

In an analogous way, successful contracts can achieve separability. Even if we do not ordinarily consider our future actions to be property, our relation to these actions changes in contemplation of a contractual transfer.²²⁷ The promisor's future action, assuming a contract was successfully formed, is no longer a matter of freely choosing without consequences. A contract, taken at face value, typically gives a promisee a right to performance of the offered promise, subject to the promisee meeting certain conditions. For better or worse, we can easily think of our labor as belonging to someone else.²²⁸

There often is a close connection between a person's labor and her self, but this connection will vary from case to case. Many standard forms of physical, transferable property *are* experienced as extensions of our selves.²²⁹ Body parts are certainly closely attached to our selves—for that matter, even a person's hair could be tightly bound to personality. These items, however, may subsequently be seen as external from our selves despite their former closeness.

The connection between objects (including actions) and a human personality is often contingent, and this feature is central to contractual obligations. Some personality-rich things cannot be transferred, and we may not even think of them as capable of being owned. Talents and friendships fit into this category. Other personality-rich things are readily transferred. A personality-rich starting point does not mean that future actions are incapable of being owned and transferred.

B. *The Conceptual Objection to Transfers of Future Acts*

Alternatively, a critique could be based on our intuitions about how transfers work. For example, Stephen Smith is a proponent of the idea that contracts enable promisees to acquire a property-like interest in the prom-

²²⁶ See MUNZER, *supra* note 63, at 53 (“[P]arts of one’s body seem very intimate, and yet the power to transfer them is a property right. Again, the right of publicity sometimes covers aspects of a person that are intimately tied to his or her conception of self, but it is nevertheless a property right.”).

²²⁷ Cf. HEGEL, *supra* note 189, ¶ 43, at 74–75 (“Knowledge, sciences, talents, etc. are of course attributes of the free spirit, and are internal rather than external to it; but the spirit is equally capable, through expressing them, of giving them an external existence [*Dasein*] and *disposing* of them . . . so that they come under the definition [*Bestimmung*] of *things*.”). But see PENNER, *supra* note 4, at 122 (“[T]he ‘separability’ criterion is weakly instantiated by labour because labour is constituted by our intentional actions which form part of our life history, and therefore our identity.”).

²²⁸ Indeed, in agency relationships, the acts of the agent are frequently attributed to the principal. If we are determining how the law treats personality-rich “things” as a descriptive matter, then it seems that the law often contradicts Penner’s view.

²²⁹ Margaret Radin has noted that certain pieces of personal property can be constitutive of an individual’s identity, and yet there is little doubt that these are property. See Radin, *supra* note 192, at 959–61 (discussing items such as “a wedding ring, a portrait, an heirloom, or a house”). In fact, as Penner himself notes, “fungible” items may also be constitutive in this way. See PENNER, *supra* note 4, at 206.

ised performance.²³⁰ In that respect, his theory parallels the one offered in these pages. However, Smith makes an elegant argument against using transfer theories to support this result. He suggests the rights that are allegedly transferred by means of a contract are not rights that the promisor originally owned.²³¹ This suggests a problem of fit for transfer-based theories, because the transferee receives something different from what the transferor originally possessed.

An excerpt from Smith's argument provides a helpful illustration of the problem. As he explains:

To be sure, if I agree in a contract to hand over the keys to my house to Jane next Friday I did, prior to making the contract, have the right to hand over my keys to Jane next Friday. One of my rights of ownership is the right to alienate that right. More generally, I have the right, subject to not infringing other people's rights, to do what I like with my keys next Friday. But this is not the right that I have supposedly transferred in my contract. According to the transfer theory, Jane's right is not a right to do whatever she wants with my keys next Friday but rather a right to the performance of my promise.²³²

The concern is that the promisee possesses something different post-contract from what the promisor originally owned before the agreement went into effect. The promisee acquires a right to insist on performance, while all that the promisor owned, originally, was the right to hand over the keys, among other potential choices.

Smith's example suggests that transfer theories are confused as to what is being transferred. The right to insist on handing over the keys was never owned by the promisor. People do not have rights against themselves. At first glance, this argument seems quite powerful. How can it be that a promisor is transferring an entitlement, when the promisor does not initially have the right to performance claimed by the promisee?

Smith is correct that something has changed through the process of contracting, such that a promisee possesses rights that are quite different from any of the promisor's rights prior to the contract. The implications of Smith's argument, however, extend well beyond contract issues. In fact, they extend to transfers in general.

²³⁰ SMITH, *CONTRACT THEORY*, *supra* note 3, at 72 ("To avoid the harm principle objection, a promissory theory must explain why a promisee can fairly be regarded as *owning* a right to the promisor's performance of the promised act."); Smith, *Towards a Theory of Contract*, *supra* note 3, at 123 ("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.").

²³¹ Smith, *Towards a Theory of Contract*, *supra* note 3, at 120 ("The rights that contracting parties are, according to the transfer theory, meant to be transferring are rights they do not own."); *see also* OLIVECRONA, *supra* note 76, at 283 ("If I borrow a sum of money from another person and promise to pay it back, the creditor is said to acquire the right of claiming payment from me. In no sense is this right held to exist beforehand.").

²³² Smith, *Towards a Theory of Contract*, *supra* note 3, at 120.

As J.E. Penner has indicated, transfers of property involve a change in rights. As he explains, “The only thing that is clear when I give property to you is that you now stand in the equivalent normative position *vis-à-vis* the thing I gave you to the one I just did. Your rights are equivalent to mine.”²³³ The transferor becomes one of the many nonowners against whom rights are held, and in this sense we may say that rights are “created” against the transferor, rather than transferred. This “creation” of rights nevertheless does not defeat the common understanding that a *transfer* can occur.

Assume that I own a ten-acre plot of land and that this plot allows for a variety of uses that I could choose among. I decide to divide my property in half, and transfer to Ann an interest in the eastern half of the property. Under these facts, I could freely walk from one end of the property to the other before the transfer. But after the transfer, I am no longer free to engage in a variety of activities that now constitute trespasses or nuisances. Ann has thus acquired rights against me that I did not originally possess. Prior to transferring the land, I could not trespass against myself, or be a nuisance to myself. As this example suggests, a transfer of an interest in property can effectively create rights in the transferee that were never held by the transferor.

Returning to Smith’s example above, the would-be transfer of the keys to Jane implicates the same creation and extinction of rights that all transfers implicate with respect to the original owner. Smith is correct that, before the contract with Jane, I have a privilege or liberty to decide next Friday what I will do with my keys. However, I also have rights that others not improperly interfere with my ultimate choice regarding the keys. One thing I can insist upon is that others not prevent me from giving the keys to Jane. What has changed postcontract is that now, I am like one of those others who might prevent my giving the keys to Jane. Jane, the promisee, can insist that I do nothing to prevent the handing over of the keys. Rights that I held that are inconsistent with the transferred rights are extinguished.

The relevant point is that a transfer of a physical object involves the acquisition of certain rights against the transferor that previously did not exist with respect to the transferor. There is no reason why a similar change should not occur with respect to a transfer of an action, once actions are seen as transferable. Where the original owner of an action would not violate his rights in himself by choosing to exercise his liberty and act differently, this very same choice may result in a violation of property rights once the action is owned by another person.²³⁴

²³³ PENNER, *supra* note 4, at 147.

²³⁴ Some property theories emphasize the right to exclude. It is an interesting question whether the contractual relation can be understood in terms of a right to exclusion. *Cf.* Hansmann & Kraakman, *supra* note 4, at S410 (“In general, contract rights, like property rights, are ‘good against all the world’ inasmuch as any third party who intentionally interferes with a contractual right commonly faces liability for tortious conduct to the holder of the right.”). If the promisor is thought of like a third party, then it is also possible to think of the promisee’s rights against the promisor in these terms.

Under Smith's example, if I have the freedom to do a variety of things next Friday with my keys (for example, leaving them on the table), but I transfer to Jane my action of giving her the keys, I have also provided Jane with a right that I not act inconsistently with giving her the keys. My available options next Friday have been restricted. Jane's right follows naturally from a transfer of my action—giving her the keys—and this right does not mean that a transfer as such is a conceptual impossibility. Change in ownership of a future action alters the original owner's liberty interests and results in a right held by the new owner.

The conceptual objection that contracts do not fit with the nature of a transfer because new rights are created fails. A different type of objection considers whether the remedies typically provided by courts for breaches of contract are consistent with the idea that contracts result in ownership of the promised performance.

C. The Rarity of Specific Performance

Accepting that transfers of actions are a conceptual possibility, it may appear that contractual performance should be mandated by the courts. Especially when one's understanding of contract obligations is premised on property ownership, injunctive relief would appear to be an obvious remedy.²³⁵ Instead, courts frequently provide expectation damages, rather than specific performance.

This poses a distinct challenge for contract theories that assert ownership of the promised performance. As Dori Kimel notes:

[S]pecific performance is the remedy that aims at granting the innocent party precisely what she bargained for, whereas expectation damages merely aim at compensating her, albeit fully, for not receiving what she bargained for. At best, excuse the pun, it is a second best. So why not opt for the best?²³⁶

A contract theory grounded in corrective justice would seem to call for the remedy that best makes the promisee whole, rather than the closest substitute.²³⁷

²³⁵ See Eisenberg, *supra* note 47, at 221–22 (“Another basic normative idea that Benson finds in contract doctrine is that when a contract is formed, each party has a legal right to possession of the performance promised by the other. If that were the case, however, a party to a contract would be entitled not merely to damages on breach, but to specific performance . . .”).

²³⁶ KIMEL, *supra* note 20, at 95.

²³⁷ There are other contexts in which a party receives less than the full expectation measure. A reliance remedy addresses a distinct harm from contractual breach, or else may represent a second-best remedy. Restitution, as Charles Fried indicates, is not technically a contract enforcement principle. FRIED, *supra* note 87, at 26 (“Promise and restitution are distinct principles. Neither derives from the other, and so the attempt to dig beneath promise in order to ground contract in restitution (or reliance, for that matter) is misconceived.”); cf. SMITH, CONTRACT THEORY, *supra* note 3, at 329 (distinguishing contract principles and unjust enrichment principles, and concluding that they do not conflict when properly understood because they address different questions).

It might be argued that contracts actually involve disjunctive promises to either perform the promised acts or to pay damages for a failure to perform.²³⁸ Certainly, contracting parties can enter into such disjunctive obligations. But, as a general description of what parties intend, or even as an interpretation of the public meaning of contract language, this explanation seems inadequate.²³⁹ Frequently, agreements do not assert that damages may be substituted for performance, and there is a general belief that promisors owe a duty to perform the promised acts.

Some of the leading explanations for why courts choose damages instead of specific performance can be squared with a corrective justice framework. For example, it may be that successful monitoring and implementation of a specific performance remedy against a noncompliant defendant would be quite costly and perhaps ineffective.²⁴⁰ The institutions set to administer justice may offer second-best measures, given limited budgets and time constraints. In such instances, it is still plausible to view the corrective justice approach in aspirational terms. The end remains corrective justice, but the means are constrained by pragmatic considerations.

It appears there is more involved, however, especially if we are concerned with the internal perspective in this area of law. Courts evince a genuine distaste for forcing the promisor to perform a service contract. As Anthony Kronman describes this legal point of view: “[E]ven a contract of short duration that calls for the performance of routine and unobjectionable tasks is a contract of self-enslavement and therefore legally unenforceable if it bars the employee from substituting money damages for his promised performance.”²⁴¹ Many commentators, myself included, are uncomfortable with the idea that an individual could be forced to perform tasks she does not want to, absent criminal forfeiture of rights.²⁴²

²³⁸ Randy Barnett takes this approach as a means to address the issue of inalienable rights. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, in *PHILOSOPHY & LAW* 179, 197 (Jules Coleman & Ellen Frankel Paul eds., 1987) (“[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.”).

²³⁹ See SMITH, *CONTRACT THEORY*, *supra* note 3, at 402 (“It just seems implausible, as a matter of fact, to regard contracting parties as having agreed, in the typical case, to disjunctive obligations to perform or compensate.”).

²⁴⁰ See Anthony T. Kronman, *Specific Performance*, 45 *U. CHI. L. REV.* 351, 373 (1978) (“There is another common explanation for the reluctance of courts to enforce private injunctive agreements: the specific enforcement of contracts . . . entails special administrative costs which normally can be avoided under a money damages rule, and private individuals should not be allowed to shift the special costs associated with this form of relief to the taxpayers who subsidize the legal system.”). Note, however, that Kronman questions this view. *Id.* at 373–76.

²⁴¹ Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 779 (1983).

²⁴² See SMITH, *CONTRACT THEORY*, *supra* note 3, at 401 (noting “the idea, common to both common and civil law regimes, that directly enforcing personal service contracts is undesirable because it is intrusive of personal liberty”).

It is therefore worth asking whether a judicial tendency to avoid regularly providing specific performance can be reconciled with a corrective justice understanding of contract remedies. Risks of judicial error and administrative cost concerns are only a partial explanation for the manner in which contract obligations are enforced. Are additional explanations available?

Dori Kimel has recently suggested an additional possibility. Kimel adopts an extension of the harm principle to questions of remedies.²⁴³ He then discerns the following norm:

[W]hen it comes to remedies for breach of contract, the harm principle, assuming that it is compatible in the first place with the imposition of legal obligations in order to prevent or redress the harm which is loss of bargain, counsels against the employment of the more intrusive remedy whenever the award of a less intrusive remedy could redress this harm just as effectively.²⁴⁴

Applying this premise, he suggests that “accepting the harm principle entails that specific performance should be awarded only when the less intrusive remedial measure, the award of (expectation) damages, could not fully redress the harm caused through violation of the right.”²⁴⁵

Assuming the harm principle extends this far, however, Kimel’s response does not cover all cases in which courts refuse to require performance. The difficulty with Kimel’s argument is that, in practice, damages are not truly equivalent to specific performance for all contracts.²⁴⁶ Suppose, for example, that the services called for by the contract are unique services, only capable of being performed by one individual. A standard market valuation might undercompensate the promisee.²⁴⁷ Courts may still refuse to mandate specific performance, yet Kimel’s version of the harm principle would not apply to such cases.

The necessity cases in tort law provide a means to answer this puzzle. As these cases indicate, it is unjust in certain contexts to preclude a nonowner’s interference with property rights.²⁴⁸ For example, it would be wrong to prevent a drowning man from rescuing himself, despite a need for

²⁴³ KIMEL, *supra* note 20, at 103–09 (suggesting that the harm principle can be applied to the selection between expectation damages and specific performance).

²⁴⁴ *Id.* at 104.

²⁴⁵ *Id.*

²⁴⁶ See Kronman, *supra* note 240, at 366 (“When the subject matter of a contract is unique, the risk is greater that the promisee’s money damage remedy will be undercompensatory.”).

²⁴⁷ Cf. Bell & Parchomovsky, *supra* note 181, at 587 (“Often, owners develop sentimental relationships with assets protected by property rights, such that their ‘reserve price’ (the price at which they would be willing to sell the object) is substantially in excess of the market price.”). As Bell & Parchomovsky note, not all cases of gaps between market price and reserve price are irrational. See *id.* at 569. For a unique service, a rational gap in value is plausible. See Kronman, *supra* note 240, at 366 (noting a greater risk of undercompensation for unique services).

²⁴⁸ The classic example of this fact pattern is *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

trespass in order to do so. At the same time, it can be unjust not to award compensation for the damage to property. As will be developed below, autonomy values support parallel considerations in the specific performance setting.

The idea that property entitlements can only be justly acquired and possessed subject to other basic rights is longstanding in natural law thinking. For example, Locke's theory of property acquisition was subject to a proviso that appropriation by labor is only acceptable "at least where there is enough and as good left in common for others."²⁴⁹ As Jeremy Waldron has recently suggested, Locke's writings support a requirement that property owners must not prevent others from taking what they need to survive.²⁵⁰ This limit is part of the substructure of property rights.

A right to autonomy implicates this type of limitation. When an individual's autonomy falls below a certain level, or is limited in a certain manner, it can be inherently unjust.²⁵¹ Note that this understanding of autonomy is not equivalent to self-ownership; instead, autonomy values trump self-ownership rights in certain contexts.²⁵² In theory, an individual could have full self-ownership rights and little autonomy; an individual could also have substantial autonomy and limited rights of self-ownership.

In a case of would-be self-enslavement, there is an external, noncontractual value that rightly precludes the contract altogether.²⁵³ However, the right to autonomy also circumscribes the ownership of actions even in cases where the actions at issue are subject to transfer. Should a promisor conclude that she is simply unwilling to perform the act transferred to the promisee, she may change her mind and repossess the promised performance. We may say that the right to *reassert* control over one's actions is inalienable, and this alters the strength of contract-based possession such that it must give way to the promisor's interest in acting differently.²⁵⁴

This does not mean that the promised future act was never successfully transferred, nor that the obligation of the contractual promise is anything

²⁴⁹ LOCKE, *supra* note 13, ¶ 27, at 274.

²⁵⁰ Jeremy Waldron, *Nozick and Locke: Filling the Space of Rights*, in NATURAL RIGHTS LIBERALISM FROM LOCKE TO NOZICK 81, 88–97 (2005). A similar limit on what natural law permits individuals to own can be found in Grotius's property theory. See STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY 47 (1991) (suggesting that for Grotius "[t]he right of necessity to use things belonging to another is thus no more than a limit on the natural extent of property, since it captures those cases where the private owner's advancing of his own interests infringes the rights of another").

²⁵¹ For a useful discussion of the important features of personal autonomy, see generally RAZ, *supra* note 30, at 369–78. Raz suggests that autonomy includes "three distinct components: appropriate mental abilities, an adequate range of options, and independence." *Id.* at 372.

²⁵² For example, if self-ownership were construed to permit transfer of any and all body rights, it could in theory produce slavery by consent. Autonomy values preclude this outcome. For discussion of how the autonomy value is inconsistent with slavery, see *id.* at 377.

²⁵³ See *id.* at 377–78 (discussing the importance of independence to autonomy).

²⁵⁴ Note that this is not the same as claiming that one's actions are inalienable.

less than full performance. Instead, it means that the autonomy interest of the promisor is strong enough that she should be permitted to take the property from the promisee. Rights can still exist even if they are defeasible. Just as the public's need can justify eminent domain if the government pays compensation, the importance of autonomy can justify the promisor's assertion of will over her own body if the promisor pays damages.²⁵⁵

Jules Coleman's analysis of corrective justice provides a helpful framework for understanding how corrective justice functions in this setting. As Coleman suggests, a loss is wrongful for corrective justice purposes "if it results either from *wrongdoing* or a *wrong*."²⁵⁶ "Wrongdoing" falls outside a norm of behavior, while a "wrong" in this context is simply an invasion of rights.²⁵⁷ So defined, a wrong can occur in cases where a tortfeasor's acts are actually appropriate as a normative matter.

Coleman explains as follows:

If I act contrary to your right, then I wrong you *whether or not I am justified in doing what I did*. I may dock my boat at your slip to protect my family from an impending storm even if I have no right to do so without your permission. Suppose you refuse me permission. Then it is possible that I could be justified in my action even though it is invasive of your rights.²⁵⁸

Such cases involve an infringement of rights, but they are not "wrongdoings" because they are justifiable. Note that the tortfeasor's action in Coleman's example, while morally permissible, would not mean that any damage to the property interests involved should go uncompensated.²⁵⁹

In contract cases where the promisor decides not to perform despite having successfully transferred a property interest in performance to the promisee, this breach is an infringement of the promisee's rights. It involves commission of a wrong, and corrective justice calls for the promisee's loss to be rectified. But, in light of the role autonomy plays in circumscribing the promisee's interest in performance, the nonperformance is a permissible trespass by the promisor.

The promisee often can suffer a harm, though perhaps only minimally, when a court chooses damages over specific performance. Yet there is an autonomy principle at stake that restricts the means of corrective justice.

²⁵⁵ Richard Epstein has suggested a parallel between the law of eminent domain and necessity cases in tort law. See EPSTEIN, *supra* note 74, at 109–10.

²⁵⁶ Jules L. Coleman, *Corrective Justice and Property Rights*, in PROPERTY RIGHTS 124, 128 (Ellen Frankel Paul et al. eds., 1994).

²⁵⁷ *Id.* at 129.

²⁵⁸ *Id.* The issue of a justified wrong is discussed at length in JULES L. COLEMAN, RISKS AND WRONGS 292–302 (1992); see also *id.* at 371–72 (suggesting in such cases that "[t]he injurer gains as a consequence of her creating a wrongful loss in others, but her gain is not a wrongful one").

²⁵⁹ For further discussion of Coleman's view of corrective justice in the contract setting, see Bridgeman, *supra* note 49, at 3023–26. Bridgeman indicates that this account can explain why contract doctrine provides for strict liability in cases of breach.

Payment of damages represents an exercise of corrective justice within limits set by the autonomy value. It may be unjust for the promisor not to recognize the promisee's ownership of the promised act, yet it would be more unjust not to recognize the promisor's right to autonomy.²⁶⁰

V. IMPLICATIONS OF A PROPERTY THEORY

As noted, many of the most basic features of contract law are consistent with the idea of a transfer of future actions. Providing an adequate justification for these doctrines is a significant step forward for contract theory. Even so, there are contract doctrines that cannot readily be derived from the idea that contracts involve a transfer of property. In some cases, a property theory is indeterminate as to outcomes. In other cases, the applicable contract doctrine is in apparent tension with the promisor's or promisee's rights. In these latter cases, a property theory can make an important normative contribution to the further development of contract law.

Certain doctrines are hard to derive from the approach in this Article, but can be reconciled with its normative premises. For example, the mailbox rule for acceptance of an offer is not mandated by a transfer theory, but it may be readily harmonized with its corrective justice understanding of contract enforcement.²⁶¹ Some method for resolving the questions answered by the mailbox rule must be selected, and once selected, corrective justice remains relevant. Barring extreme cases, statutes of limitations and evidentiary rules are also ancillary to the normative structure of contract law. Such rules indicate that other, noncontractual values play a role at the margins.

In some instances, contract remedies are hard to explain in purely corrective justice terms. For example, the rule in *Hadley v. Baxendale*²⁶² respecting consequential damages is not an obvious product of corrective justice.²⁶³ Under *Hadley*, compensation is limited to those damages that

²⁶⁰ See COLEMAN, *supra* note 258, at 298 ("The underlying moral claims may be that the injurer is justified under certain conditions in appropriating another's property and the victim is entitled in justice to repair in the event she suffers a loss as a consequence of the injurer's conduct."). For a different take on these issues in the contract setting, see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 18 (1989) ("[I]t is a vast leap from the narrow confines of the necessity cases to the far broader proposition that there is some general right to violate property or contract rights solely if there is some willingness to pay the owner's loss."). I agree with Friedmann that there is in fact an entitlement to performance, but would suggest nevertheless that the necessity cases offer important insights for the contract enforcement context.

²⁶¹ These types of rules are difficult for all autonomy theories to justify. For example, a theory like Charles Fried's cannot point to any features of promissory obligations which specify the mailbox rule in its standard form. Cf. FRIED, *supra* note 87, at 52 (describing the mailbox rule as a "rule of convenience"); Craswell, *supra* note 25 at 522 (noting that Fried recognizes the applicability of other values than individual autonomy in this context).

²⁶² 9 Exch. 341 (1854).

²⁶³ Arguably, the decision in *Hadley* suggests that the law is not merely concerned with rectifying contract losses in their full amount if we assume that performance is owned by the promisee. Cf. SMITH,

naturally flow from the breach of a contract or to damages in the reasonable contemplation of the parties.²⁶⁴

A limit on remote consequential damages may be implicit in the law of obligations, as Stephen Smith suggests.²⁶⁵ Alternatively, it may be a tacitly understood term in the parties' agreement. Yet the precise rule in *Hadley* is not clearly specified by the contractual principles described in these pages. This does not mean that an autonomy theory is incorrect as a normative framework, but it does indicate the potential explanatory limits of such a theory.²⁶⁶

However, a property theory of contracts also suggests guidelines for reform of existing doctrine. If a court gives the promisee rights that were not included in the promised performance, the promisor's autonomy is infringed. If the promisor can avoid obligations that were successfully acquired by the promisee, the promisee has been dispossessed of actions he owns. Legal doctrines that have these effects should either be justified in terms of values that trump the norms of contractual transfers, or else reconsidered.

For example, excuses for nonperformance based on factual developments that occur after contract formation can reverse a transfer of entitlements. In certain instances, postformation excuses can amount to a taking of the promisee's interest in the promised performance. On the other hand, these excuses may also be incorporated into the contract's terms, meaning that no infringement of the promisee's rights would occur. The key question is whether such excuses of performance *were* so incorporated.²⁶⁷

From a transfer perspective, the doctrines of mistake, frustration of purpose, and unconscionability cease to be necessary features of contract doctrine. They may be grounded in the objective meaning of a particular contractual text,²⁶⁸ or explained in terms of administrative costs,²⁶⁹ or per-

CONTRACT THEORY, *supra* note 3, at 426 (“[I]t is assumed that the rule is evidence that, contrary to the traditional understanding, contract law does not actually enforce promises, or if it does, that it does this only in a weak sense.”).

²⁶⁴ 9 Exch. at 354.

²⁶⁵ See SMITH, CONTRACT THEORY, *supra* note 3, at 427 (suggesting that the remoteness rule is “a general question for the law of obligations”). It has been questioned whether Smith's response is adequate. See Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1498 (2005).

²⁶⁶ Cf. Oman, *supra* note 39, at 865 (suggesting that the duty to mitigate and the requirement that consequential damages be reasonably foreseeable “suggests that in at least some cases of conflict, economic efficiency is being allowed to trump concerns about autonomy”).

²⁶⁷ For an analysis of this type regarding the impossibility doctrine, see Bridgeman, *supra* note 49, at 3034–39.

²⁶⁸ An effort in this direction has been attempted. For an explanation of mistake and frustration of purpose as implied-in-fact terms, see SMITH, CONTRACT THEORY, *supra* note 3, at 297–306. One might further argue that these doctrines are now implied based on their wide recognition in existing contract law, even if they would not be properly recognized were courts operating on a blank slate.

²⁶⁹ For example, although unconscionability is often seen in moral terms, it may be recast as a pragmatic doctrine. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. &

haps accounted for by overarching social values,²⁷⁰ but they are not implicit in a contractual obligation as such. Once it is seen that contract obligations do not depend on the existence of these doctrines, their normative justification must come from other sources.

These implications are significant and merit a more extended treatment. It is worth exploring just how completely existing contract law can be reconciled with a property theory of contract obligations. Part of this inquiry would turn on an analysis of how contractual text ought to be interpreted. The significance of owning a promised action is dependent on a determination of the promise's content.²⁷¹

Likewise, it is worth exploring the degree to which external, noncontractual values should affect the implementation of contractual terms. The nature of contractual obligations leaves some questions unanswered, suggesting room for judicial discretion. In addition, more basic values may defeat otherwise legitimate contract rights.²⁷²

One proposed means to explain contract law more completely is to combine different types of theory. Recently, scholars have begun searching for ways to reconcile autonomy theories with efficiency theories.²⁷³ Neither approach is viewed as adequate on its own to fully explain and justify contract doctrine.²⁷⁴ Instead, each approach may fully explain parts of contract law. Even if the precise details of certain contract doctrines—for example, the mailbox rule, consequential damages, and mitigation requirements—cannot be readily specified by an autonomy theory, an autonomy theory may supply the fundamental requirements for contract enforcement.

ECON. 293 (1975). In Epstein's view, in its ideal form, "the unconscionability doctrine protects against fraud, duress and incompetence, without demanding specific proof of any of them." *Id.* at 302. As noted, formation-based defenses like duress are acceptable reasons for nonenforcement, because they go to the question of the promisor's consent. If Epstein is right, then unconscionability doctrine can be reconciled with a property theory based on an assessment of the probability of judicial accuracy.

²⁷⁰ For example, this Article presents a theory of contracts that serves the ends of corrective justice. However, Anthony Kronman has argued that "considerations of distributive justice . . . *must* be taken into account if the law of contracts is to have even minimum moral acceptability." Kronman, *supra* note 46, at 474. An argument in favor of a contract-related doctrine on a distributive justice basis—such as an argument in favor of unconscionability doctrine—might suggest that distributive justice values require the doctrine, whether or not distributive justice is internal to contract obligations as such.

²⁷¹ This point has been made powerfully by Richard Craswell. See Craswell, *Expectation Damages*, *supra* note 52, at 20–21.

²⁷² It is also worth considering what implications a property theory of contract may have for regulatory actions. The UCC, for example, may be reassessed in terms of property norms. The argument set forth in this Article is limited to the common law of contracts, and is structured around common law principles, but it could provide resources for inquiries into other contract-related areas.

²⁷³ See, e.g., Kraus, *supra* note 26; Oman, *supra* note 39, at 863–74.

²⁷⁴ See Kraus, *supra* note 26, at 436 ("[E]fficiency theories have a comparative advantage over autonomy theories as practical, applied theories, and autonomy theories have a comparative advantage over efficiency theories as foundational normative theories.").

Whether autonomy theories can be combined coherently with efficiency and other consequentialist approaches is still an open question.²⁷⁵ It is far from clear that these quite distinct perspectives will converge, and it is also uncertain whether proponents of one or the other perspective could ever accept the compromises implicit in a joinder. For example, a corrective justice account of contract law would be unlikely to accept reliance damages as the sole remedy for contract breaches, even if it were demonstrated that a reliance remedy would be more efficient.

Assuming a pluralistic theory combining autonomy and efficiency concerns is feasible, a property-based understanding contributes in two important respects. The first contribution relates to the norms that autonomy theories usually seek to meet. Autonomy theories have suffered from an inability to meet the requirements of the harm principle, to fit the corrective justice framework, or to avoid reliance on legal fictions. This is not a slight failing, and it has cast doubt on the merits of these approaches.

If an autonomy theory is viewed as lexically prior to an efficiency theory, the autonomy contribution should be described in a normatively appealing, coherent way. A property theory, as described in these pages, offers a reasonable means to reconcile contract enforcement with both the harm principle and corrective justice.

The second contribution involves the substantive distinctions among autonomy theories. Notwithstanding a shared grounding in respect for individual liberties, different autonomy theories produce different mandates. For example, Peter Benson contends that unconscionability doctrine is an inherent part of contractual obligation.²⁷⁶ The theory described in this Article suggests that unconscionability doctrine is permissible, but unnecessary for contracts to bind. On the other hand, this Article indicates that the doctrine of consideration is an integral feature of a binding agreement. Charles Fried's promissory theory suggests it is not.²⁷⁷ In other words, selection among autonomy theories has explanatory and normative consequences.

CONCLUSION

Contracts involve a bilateral relationship between individuals. The crux of this relationship is the parties' interaction with a conditional promise. A promisor's consent is necessary to a contractual obligation. However, contractual promises also depend on the acts of the promisee, and it is

²⁷⁵ See Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 503 (1979) ("[T]here is no systematic way within a system of rights to take costs and benefits into account in some 'straightforward' way even if we desired to do so.").

²⁷⁶ See Benson, *Unity of Contract Law*, *supra* note 3, at 201 ("No less than the principles of contract formation, unconscionability is an essential step in defining the voluntary for the purposes of contract law.").

²⁷⁷ See FRIED, *supra* note 87, at 35 (critiquing the consideration doctrine as an alternative to his promissory theory).

this feature that makes contracts binding. Applying principles of just property acquisition, a promisee who successfully meets the conditions of a contractual promise takes ownership of the promised performance itself. The result is a transfer of property in the promisor's future actions.

A property-based understanding does not mean a second "death of contract."²⁷⁸ Property doctrine is no more likely to absorb contract law than tort doctrine. Property in actions and property in other things share certain features, but they also implicate different legal results. Instead, the idea of owning performance provides a stronger justification for the basic structure of contract law.

This source of obligation clarifies the nature of contractually based duties. Contracts are most comprehensible when seen as transfers, rather than purely promissory obligations. The duty to keep one's word is a moral duty, not a legal one. Contracts provide something more that justifies a legal obligation. In contrast to promise-based liability, the norms of transfer respect the rights of both promisee and promisor without engaging courts in the regulation of private morality.

Several basic normative premises provide a foundation for assessing contracts in these terms. Some of these assumptions implicate the proper role of courts. These include the harm principle and corrective justice as guidelines for private law adjudication. Other norms are concerned with the types of freedom individuals are entitled to have. Self-ownership is an important reason to permit individuals to transfer rights in their future actions.

While it is desirable to adopt a theory of contracts that satisfies the above norms, contract theories also seek a degree of fit with existing doctrine. In this respect, core features of contract doctrine have proven hard to explain. Doctrinal fit is an additional benefit of viewing contracts under a property rubric.

For example, the doctrine of consideration has been difficult for autonomy theories to justify. A transfer of entitlements explains the role of consideration. Consideration should be understood as a fundamental aspect of contractual obligations; providing consideration is how the promisee comes to deserve ownership of the promised performance. Similarly, expectation damages have been a puzzle for reliance-based theories. Again, this Article accounts for this remedy. Expectation damages reflect the promisee's ownership of performance.

It is not feasible to bring all of contract law within one unified theory. Recognizing that contracts are grounded in the ownership of our future actions, however, resolves many of the problems faced by prior theories. It offers a new way of explaining how contracts are different from ordinary promises, and it indicates why contract enforcement is consistent with corrective justice.

²⁷⁸ GILMORE, *supra* note 100, at 95 (suggesting that contract law would be absorbed by tort law).