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ARTICLES

RECONCILING STRICT LIABILITY WITH CORRECTIVE JUSTICE IN CONTRACT LAW

Curtis Bridgeman*

INTRODUCTION

Over the last two decades scholars of justice theories have produced a revival in tort law. According to corrective-justice theorists, tort law is best explained entirely as a form of compensation for harms done by one individual to another. In their view, encouraging or deterring certain kinds of conduct are legitimate public-policy goals, but they have nothing to do with the justice of private law. They believe that tort law, and private law generally, are exclusively concerned with justice between individuals, or what Aristotle called "what is just in men's dealings with one another."¹ In this view, tort law can be explained entirely by the duty of injurers to compensate victims for their wrongful conduct, irrespective of what is best for society as a whole. Moreover, for nearly all corrective-justice theorists, this duty to repair is a moral obligation grounded in the fact that an innocent victim has suffered a harm as a result of an injurer's wrongdoing.²

More recently, some thinkers have begun to apply corrective-justice theory to contract law as well.³ But so far none of these early forays has

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dealt with a potentially embarrassing problem for anyone who would apply corrective-justice theory to contract: The doctrines of contract law do not seem to be concerned with wrongdoing at all. While tort law is centered on wrongdoing by individuals, whether intentional or negligent, contract law has a strict-liability standard of fault. Contracting parties are not expected merely to use their best efforts to perform, or even to use the best efforts that a reasonable person would use. Instead, they are simply expected to perform, and, if they do not do so, contract doctrine is generally uninterested in their reasons for not doing so, including reasons that might excuse them from a moral obligation to perform. Likewise, courts are equally uninterested in evidence that a party could have performed and chose not to for vicious reasons, as evidenced by the lack of a punitive damages remedy in contract. In short, it seems odd to say that contract law is a matter of corrective justice when contract doctrine does not ask any of the questions we typically ask about potentially wrongful behavior.

This Article examines how corrective-justice theory may explain the structure of contract law despite its lack of interest in the wrongfulness of breach in individual cases. The key is to understand, first of all, that some of the theories typically lumped together under the label of “corrective justice” differ in important ways. Most importantly for our purposes, corrective-justice theorists disagree about whether private law is, at its most fundamental level, focused on wrongdoing by the defendant or on a loss or other claim by the plaintiff. Although the term “corrective justice” is typically associated with the former, in other words with views that focus primarily on wrongdoing by the defendant, the latter group presents a powerful view that is distinct in a seemingly subtle yet crucial way. In particular, so-called “allocative” versions of corrective justice provide for the possibility that losses can be wrongful without being the result of wrongdoing, and that it is the aim of tort law to deal with such losses. My thesis is that by understanding corrective justice in such a way, we can make sense of contract law as a form of corrective justice despite its no-fault standard of liability. In particular, we should resist the temptation to think of contract law as addressing the wrongdoing of breaching a contract. Instead, contract law seeks to correct for the frustration of entitlements to performance, entitlements created at the time of contracting, and is generally indifferent to the wrongfulness of breach itself.

The Article will proceed as follows. In Part I, I will briefly review the early application of corrective justice theory to contract law. In Part II, I
will explain the division in tort theory among corrective-justice theorists between those who focus on wrongdoing and those who focus on wrongful loss. I will show that this dispute is not simply semantic hairsplitting, but rather reveals an important difference in approaches toward the goals of private law. Furthermore, I will demonstrate that regardless of which camp is correct about tort law, the "allocative" or "entitlement" theorists—those who focus on the wrongfulness of loss irrespective of the presence of wrongdoing—have (unwittingly, as it turns out) described the structure of contract law quite nicely. In Part III, I will review a few features of contract doctrine to illustrate how seeing contract law as protecting entitlements created at the time of contracting, rather than as addressing the moral wrongdoing of breach, explains much of our contract doctrine quite well. On the other hand, there is one doctrinal area that at first glance may seem to be a counterexample: the doctrine of impossibility or impracticability of performance, which I will discuss in Part IV. Although it may seem at first that the doctrine of impossibility/impracticability reveals a fault standard implicit in contract law by allowing parties an excuse for their nonperformance in situations where they would be morally excused, I will show that, properly understood, this doctrine actually reinforces rather than undermines the idea that contract law is best understood as correcting for the frustration of entitlements rather than as addressing the wrongfulness of breach. This Article will briefly conclude by pointing out important work that still remains for those who would apply corrective-justice theory to contract law.

I. CORRECTIVE JUSTICE, CONTRACT LAW, AND WRONGDOING

Most of the discussion of corrective justice in contract law so far has focused on a decades-old challenge to the very possibility of a corrective-justice account of contract law. In what is undoubtedly the most famous law review article written on contract damages, Lon Fuller and William Purdue argued that contract law must be a matter of distributive justice rather than corrective justice because of its entrenched remedy of expectation damages.4 Since expectation damages seek to place the non-breaching party in the position she would have been in had the contract been performed, even if that amount exceeds the costs she actually incurred in relying on the contract, Fuller and Purdue argued that such damages could not be merely compensatory. And since corrective justice seeks to go no further than compensation for losses suffered, the expectancy remedy must be justified, if at all, either as an indirect way of paying reliance damages or as serving some other purpose, such as distributive justice.

Ernest Weinrib and Peter Benson, the two leading corrective-justice theorists to address its application to contract law, separately try to meet Fuller and Purdue's challenge. Both argue that expectation damages are, in fact, compensatory and therefore fall under corrective justice, but not because they compensate for reliance damages. Rather, they argue that when a promisor breaches, the promisee is denied something to which she has a right. Weinrib and Benson disagree as to what exactly that right is—for Weinrib it is a right to the promisor’s performance while for Benson, it is a property right in the thing bargained for itself, at least as against the promisor. But both argue that the promisee gains a right at the time of contracting such that the promisor’s failure to perform causes the promisee a loss. Expectation damages appropriately compensate for this loss, and, as we have noted, compensation for loss lies at the very core of theories of corrective justice.

A problem remains, however. For even if one of these explanations of the compensatory nature of contract law is correct, neither Weinrib nor Benson has adequately explained why the promisor must compensate for the loss suffered by the promisee when the law holds promisors strictly liable for breach, that is, liable regardless of any consideration of fault on the promisor’s part. To be sure, if their accounts are correct, each breach of promise constitutes the impairment of a right in the promisee that provides good grounds for a claim against the promisor. But Weinrib, at least, has repeatedly and forcefully insisted that the application of corrective justice requires not just a violation of the victim’s rights but also a wrongdoing on the part of the injurer. For Weinrib, wrongfulness is “fully relational”; one only suffers a wrongful loss if the injurer is guilty of wrongdoing. Yet it is hard to see how liability for breach of contract

7. Weinrib, Punishment and Disgorgement as Contract Remedies, supra note 3, at 64-70.
9. Benson argues that “the mere failure to perform may reasonably be viewed as a wrongful retention of the thing, that is, as a wrongful taking possession of it.” Peter Benson, The Philosophy of Private Law, supra note 3, at 797. Such retention is per se wrongful, Benson argues, because of the rights to performance created at the time of contract. Benson is on the right track by treating contractual entitlements as analogous to property rights (indeed, Benson goes further and treats them as a species of property rights), but he does not explain why it is that a failure to perform is necessarily wrongful (as contrasted with an infringement of any other property right). That is, he does not explain how it is that in some cases the failure to perform, although actionable, can clearly be justified from a moral point of view. It is one thing to say that violations of rights to performance are per se actionable, another to say they are per se wrongful.
requires wrongdoing when the standard is strict liability. Under our strict-liability regime, a breach alone suffices for liability regardless of whether the breaching party was justified—morally or otherwise—in breaching. There simply is no inquiry into wrongdoing or justification.

At first glance, it may seem that the presence of wrongdoing in breach-of-contract cases goes without saying, at least for any noneconomic theory of contract law. When we say of someone that she has breached, it sounds prima facie as if we are accusing her of wrongdoing. Indeed, the challenge for some prominent justice theorists has been to explain not why contracts are binding, but rather why only some promises are legally binding contracts while others are not. In this respect, there seems to be too much moral justification on hand for the enforcement of promises.

Despite the prima facie wrongfulness of failing to keep promises, the law is generally not concerned with judging wrongfulness in breaches of contract. This lack of concern is evident in two ways. First, courts do not inquire into the justifiability of breach in a given case: Defendants are not allowed to defend on the grounds of a lack of wrongdoing. According to the Second Restatement of Contracts,

\[ \text{Contract liability is strict liability. It is an accepted maxim that } \textit{pacta sunt servanda}, \text{ contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated.} \]

The Second Restatement does go on to consider when "extraordinary circumstances" might warrant a departure from this rule. I would argue that even these exceptions generally do not presuppose a fault standard, but even if they did, it is enough for our purposes that they are rare exceptions. If corrective justice is to explain contract law, it must be able to account for the fact that, as a general matter, the law does not inquire into the justifiability of breach.

Secondly, the law is equally unconcerned with how willful and deliberate the breach may have been. Except in rare cases, courts are uninterested in whether the promisor could have performed and simply chose not to. It is a

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12. One intriguing possibility recently offered is that contract law does not really contain a strict-liability standard at all. See Stephen A. Smith, Contract Theory 376-86 (2004). Though that explanation would certainly make things easier for the corrective-justice theories of contract, for various reasons that I am unable to catalog here, I find it unpersuasive. For one quick response, see infra note 22.

13. Ernest Weinrib seems just to assume that breach of contract satisfies the wrongdoing element. See infra note 80 and accompanying text.

14. For an account that grounds contract theory in the moral obligation to keep promises, see Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981). For the criticism that Charles Fried’s view is incapable of distinguishing promises that are legally binding from those that are not, see Benson, The Unity of Contract Law, supra note 3, at 121.


16. Id. at 310.
well-established principle of contract law that punitive damages are not awarded for breach of contract, even if the breach is willful and deliberate.\textsuperscript{17} Most states recognize a cause of action for a bad-faith breach of contract in insurance contexts, but those claims sound in tort, and, in any case, are now limited to insurance contexts only.\textsuperscript{18} In short, neither plaintiffs nor defendants get the benefit of an inquiry into the justifiability of the promisor’s breach.

The challenge to the claim that breach entails wrongdoing predates even Fuller and Purdie’s argument that contract law does distributive, not corrective, justice. Oliver Wendell Holmes famously claimed that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”\textsuperscript{19} Holmes, of course, did not have corrective-justice theories in particular in mind, but rather was taking aim at any view that failed to build a wall between morality and the law. Whatever one thinks of Holmes’s version of realism as a general theory of law, it has been extremely influential in contract law, especially with respect to strict liability for breach. For example, Holmes is often cited for the proposition that punitive damages are not awarded in breach of contract cases no matter the cause of the breach.\textsuperscript{20} And contemporary economists such as Richard Posner cite Holmes as the inspiration for the idea that parties are free to breach whenever it is efficient to do so.\textsuperscript{21}

Thus, what at first glance might appear to be just conceptual hairsplitting from within the family of corrective-justice theorists could in fact be far more significant. If contract law is indifferent to wrongdoing, then it is not fundamentally concerned with correcting wrongdoing. Moreover, if contract law is indifferent to the reasons for breach, then one might imagine, with Holmes, that it is indifferent to performance altogether so long as damages are paid.\textsuperscript{22} Without moral standards and considerations of

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  \item \textsuperscript{17} See E. Allen Farnsworth, Farnsworth on Contracts § 12.8, at 194 (3d ed. 2004).
  \item \textsuperscript{18} For a brief history of the tort of bad-faith breach of contract, as well as an argument that Weinrib’s account of corrective justice might require an accounting of certain kinds of wrongdoing in contract, as well as punitive damages, see Bridgeman, supra note 3.
  \item \textsuperscript{19} Oliver Wendell Holmes, \emph{The Path of the Law}, 10 Harv. L. Rev. 457, 462 (1897).
  \item \textsuperscript{20} For example, a leading contracts treatise quoted Oliver Wendell Holmes: “If a contract is broken the measure of damages generally is the same, whatever the cause of the breach.” Farnsworth, supra note 17, § 12.8, at 195 (quoting Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903)).
  \item \textsuperscript{22} Stephen Smith has recently argued that contractual duties are disjunctive, but has drawn an opposite conclusion from this premise. Smith, supra note 12, at 376-86. Rather than concluding that contract is not concerned with wrongdoing, he argues that the fact that promises in contracts are promises either to perform (the primary duty) or to pay damages (the secondary duty—an important distinction Holmes does not make) shows that there really is no such thing as strict liability in contract. \textit{Id}. at 384-86. One may have good reasons for not performing, but since the only reason for not at least performing the secondary duty (paying damages) is insolvency then contractual remedies are really based on a fault standard. \textit{Id}. Smith’s arguments deserve more reply than I can give here, but suffice
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wrongdoing to help decide between performance and nonperformance, the way may be cleared for economists to fill the void with standards of efficiency. Corrective justice seems to have nothing to say about contract law. Indeed, Jules Coleman himself, one of the dons of corrective-justice theory in tort, gives up all of contract theory to “the market paradigm,” his own rational-choice model of law and economics.23

The tension between contract law’s indifference to wrongdoing and the apparent wrongfulness of breach can be reconciled once we appreciate the fact that saying that we are justified in holding people legally responsible for their promises and saying that they act wrongfully any time they breach are two different things. In what follows, I intend to argue that contract law can and should be conceived as consistent with principles of corrective justice, but without the standard account of breach as necessarily involving wrongdoing. Whatever its merits in tort theory, the wrongdoing requirement does not apply to breach of contract.

Some prominent corrective-justice accounts explain tort law as a means of ensuring that the costs of accidents are distributed fairly rather than as a system for policing wrongdoing by injurers. Jules Coleman,24 Stephen Perry,25 Arthur Ripstein,26 and Tony Honore27 all fall roughly into this camp, and we can usefully follow John Goldberg and Benjamin Zipursky in calling their views “allocative” theories of corrective justice.28 None of these theorists have had much to say about corrective justice and contract law, however, except for Coleman, who ironically argues that contract is best explained by the economic need to create and sustain markets.29 I will argue that this is a missed opportunity and that we can profitably describe the law of contract, perhaps even more so than the law of tort, as correcting for the frustration of legitimate entitlements and not as policing the wrongdoing that one may or may not be guilty of when one breaks a promise.

It is not my aim here to offer an entirely original theory of contract law. Peter Benson30 and Randy Barnett31 have already developed what might be

24. Id. at 324-26.
29. See supra note 23.
30. See Benson, Contract, supra note 3; Benson, A Reply to Fuller and Purdue, supra note 3; Benson, The Idea of a Public Basis of Justification for Contract, supra note 3;
termed "entitlement" theories of contract, in which contract law is understood to be concerned with the transfer and protection of property (or property-like) rights. Although my understanding of contract theory has been influenced by their work, neither of them has adequately addressed the question of wrongdoing in contract law. Indeed, their views seem to tend more toward a fully relational view of wrongful loss than toward the non-relational account I will lay out here. The difference is of vital importance for how we make sense of contract law. If, as I will argue, we conclude that contract law protects entitlements irrespective of the wrongfulness of the breach, then we are likely to take a very different view of particular contract issues like impossibility of performance and efficient breach. We must explain these issues not by the degree of wrongdoing in the promisor's conduct, but rather by the extent of the non-breaching party's entitlement and the promisor's corresponding legal duty to perform.

II. WRONGFUL LOSS WITHOUT WRONGDOING

Contract law's indifference to wrongdoing threatens to embarrass those who would argue that contract law can be explained as a form of corrective justice. According to many theorists, corrective justice aims to correct moral wrongdoing. Since contract law is not concerned with wrongdoing, even if we accept a justice-based account, it is not obvious how contract law could be explained by corrective justice. None of the theories mentioned above have adequately accounted for the insignificance of wrongdoing in contract law. It seems that either contract law cannot be explained by corrective justice or that the fully relational account of corrective justice is unsuited to explaining contract law.

In what follows, I will argue for the latter. What we need is an account of corrective justice that seeks to correct losses that are wrongful irrespective of whether they are the result of wrongdoing. I shall begin by examining the analogous debate between "relational" and "allocative" corrective-justice theorists of tort law. In this debate, relationalists argue that the point and purpose of tort law is to address certain forms of wrongdoing, and that the wrongful losses addressed by tort law cannot be understood as wrongful apart from the wrongdoing by the injurer that led to the loss. By contrast, allocative theorists maintain that tort law is primarily

Benson, The Philosophy of Property Law, supra note 3; Benson, The Unity of Contract Law, supra note 3.


32. Randy Barnett views contract as containing individual moral obligations, seemingly in line with a Weinribian, fully relational view of wrongful loss and wrongdoing. See infra,notes 97-119 and accompanying text. Although Benson does not discuss the issue of wrongdoing in contract law much, he does say that "breach is misfeasance, not nonfeasance." Benson, A Reply to Fuller and Purdue, supra note 3, at 51. He also makes clear that in contract law we judge "the promisor's conduct" in reference to his duty to keep his promises, what Benson calls a "duty of fidelity." Id. at 28.
concerned with wrongful losses, and wrongdoing is relevant only insofar as it identifies a particular injurer as responsible for the loss. A consequence of this view is that a duty to repair can be imposed as a matter of justice on persons who cause "wrongful" losses without having acted "wrongfully." A good starting point for us, then, will be to review briefly the debate about wrongdoing in tort law before returning to contract. Eventually, I will argue that the allocative view of wrongdoing and corrective justice explains contract law better than the relational view, even though the allocative theorists have shown no interest in applying their view to contract law.33

The most prominent advocate of the allocative view is Jules Coleman. Coleman's theory starts with the fact that there is a loss in the world whose cost must be borne by someone.34 The issue is whether there is some person other than the victim who, by virtue of his connection to the loss, should assume it.35 The fact that a loss is wrongful establishes that a victim has a right to compensation; the fact that an injurer is responsible in some appropriate sense for that wrongful loss establishes that he has a duty to compensate the victim for her wrongful loss. Coleman maintains that losses can be wrongful whenever rights are infringed by the actions of other agents, as opposed to, for example, when they are caused by natural disasters or by one's own mistakes. Injurers have a duty to repair the losses for which they can be deemed responsible.

What counts as responsibility in tort law is a contentious issue. Coleman, Perry, Ripstein, and Honoré all have different accounts of what makes a particular injurer responsible for the harms she caused. Indeed, in one sense even Richard Epstein's call for strict liability in tort law falls into this camp:

33. That is not to say that the allocative view provides a better explanation of tort law. This Article will remain neutral in that debate.
34. Jules L. Coleman, Second Thoughts and Other First Impressions, in Analyzing Law: New Essays in Legal Theory 257, 302 (Brian Bix ed., 1998) ("Tort law is about messes. A mess has been made, and the only question before the court is, who is to clean it up?").
35. Jules Coleman originally argued for the "annulment thesis," the view that tort law essentially concerns the annulment of wrongful losses. See Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349 (1992). But Weinrib, Stephen Perry, and others strongly criticized the annulment thesis for its failure to explain a fundamental feature of our tort-law system, that is the fact that the tortfeasor owes a duty to the victim that no one else owes. See Stephen R. Perry, Comment on Coleman: Corrective Justice, 67 Ind. L.J. 381 (1992); Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37, 39 (1983). The fact that the injurer caused the victim a wrongful loss changes the relationship between the injurer and victim so that the victim has a claim against the injurer above and beyond the claim he has against society at large. In light of this criticism, Coleman abandoned his annulment thesis in favor of what he called the "mixed conception of corrective justice." Coleman, supra note 23, at 311-24. The view was "mixed" in that it started with the fact that the wrongfulness of loss created an entitlement in the victim to reparation just as the annulment thesis had, but it went beyond the annulment thesis to recognize that injurers have a special duty to repair the wrongful losses of their victims that others do not have. Weinrib still claims that Coleman's "mixed" conception is not relational enough. See Ernest J. Weinrib, Non-Relational Relationships, supra note 10.
For him, causation alone is enough to make one responsible. But these debates between the grounds for responsibility in tort law need not plague us in contract law, since promisors freely assume responsibility by entering into a contract. Binding contracts create entitlements in the promisee, and any loss of those entitlements becomes the promisor's responsibility to repair. It is beyond the scope of this project to explain why contracts create entitlements, other than to appeal to the widely held intuition that individuals are generally free to assume obligations if they so desire. Instead, my aim here is to show how a consent theory of contract can be consistent both with principles of corrective justice and with contract law's indiffERENCE to wrongdoing.

The leading proponent of the relational view of corrective justice is Ernest Weinrib. Weinrib argues that corrective justice is essentially concerned with correcting wrongs rather than allocating losses per se. The relational view starts with the voluntary action of the wrongdoer rather than with the victim's wrongful loss. According to this account, when agents are guilty of wrongdoing (e.g., by being careless in a way that fails to respect the rights of others), corrective justice requires them to make good the harmful consequences of their wrongful act by repairing the losses their wrongdoing caused. For Weinrib, wrongfulness is fully relational: The wrongfulness of the loss can only result from wrongdoing by the tortfeasor. The injurer and victim are inextricably linked in a "bipolar" relation as "doer and sufferer of the same harm." Without wrongdoing, the loss is by definition not wrongful. For Weinrib, the whole point of compensation is to undo the consequences of a wrongful act.

Although as applied in tort law the dispute between Weinrib and Coleman will make a difference in only a small number of cases, some of those cases are quite telling for our purposes here. Since contract law, unlike most of tort law, has a strict-liability standard, it will be useful to see how the two competing visions of corrective justice differ in their views of strict liability in tort. Because Weinrib's theory requires wrongdoing as a necessary condition for the imposition of tort liability, he is obligated either to reject strict-liability doctrine or to argue that it covertly invokes notions of fault. For example, he justifies the rule of strict liability for injuries that are the result of ultrahazardous activities in this way. Weinrib argues that when one engages in an activity like blasting, we hold him responsible for the harms he causes regardless of how careful he was because the activity itself is so dangerous. But in some cases injurers are held to a strict-liability

38. Id. at 63-66.
39. Id. at 144; see also id. at 142-44.
40. See Weinrib, Non-Relational Relationships, supra note 10.
standard even though it is implausible to suppose they have acted wrongfully. Since such cases most closely parallel the structure of how the common law treats breaches of contract, it will be useful for our purposes to contrast how they are treated by the two competing theories of corrective justice.

The most famous example of a tort case where a court explicitly held an innocent injurer liable is *Vincent v. Lake Erie Transportation Co.* In *Vincent*, the Reynolds, a steamship owned by the defendants, was moored to the plaintiff's dock for the unloading of goods when a storm struck. Rather than attempting to sail away, the captain of the Reynolds elected to remain moored, and the crew even replaced lines holding the ship fast to the dock as they became worn or frayed. During the storm, the ship caused five hundred dollars worth of damage to the dock. The court rejected the plaintiff's argument that the defendants had acted negligently in staying moored. On the contrary, the court held that "those in charge of [the Reynolds] exercised good judgment and prudent seamanship." However, it also rejected the defendant's argument that its lack of negligence shielded it from liability for damage to the dock:

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such a person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Despite the lack of wrongdoing, the court held the defendant liable for the damages that its actions caused.

Under Coleman's view of corrective justice, the reasoning makes sense. First, the court distinguished the loss as wrongful since it was due to the defendant's action, as opposed to a situation where the ship, unmoored, was thrown up against the dock, or a situation where the lines became undone (without negligence) and the Reynolds drifted into another ship. In those cases, the loss would simply be "attributed to [an] act of God" rather than an action by the defendant, and the defendant would not be liable. Although the loss was "wrongful" in that the defendant's conduct did in fact cause a violation of the plaintiff's property rights, the action was justified by necessity and was therefore not a case of wrongdoing. Under

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42. 124 N.W. 221 (Minn. 1910).
43. *Id.* at 221.
44. *Id.*
45. *Id.* at 222.
46. *Id.* at 221.
47. *Id.* at 222.
48. *Id.*
49. *Id.* at 221-22.
50. *Id.* at 222.
Coleman's account, this apparent contradiction is no contradiction at all. For him, corrective justice is concerned only with compensating for wrongful losses. This loss was wrongful since it was the result of a violation (in this case, an intentional violation) of the plaintiff's property rights. And the defendant is responsible for the wrongful loss since its agents caused the loss. Whether the defendant's agents were justified in so causing the loss may matter when we are interested in making moral judgments, but since in Coleman's view that is not the point of corrective justice, it does not matter here.5

For Weinrib, this explanation clearly will not do. He argues that the case is not a matter of corrective justice at all, but rather one of unjust enrichment.52 While Coleman is almost certainly too dismissive of the idea that the case could be explained by principles of unjust enrichment,53 Weinrib's complex argument for unjust enrichment is problematic.54

51. The dissent in Vincent argued that because the plaintiff and defendant were in privity of contract, the plaintiff should have been required to bear the losses due to the storm so long as the defendant was not negligent. Id. (Lewis, J., dissenting). To simplify matters, thought experiments are often used to get around such worries, such as a case where a starving hiker breaks into a cabin and steals food to save his life. Coleman appeals to such examples. Coleman, supra note 23, at 332, 372. Weinrib acknowledges them as valid substitutes. Weinrib, The Idea of Private Law, supra note 2, at 198 n.66.

52. See Weinrib, The Idea of Private Law, supra note 2, at 196-203.

53. Coleman dismisses unjust enrichment as an explanation on the grounds that although the plaintiff was enriched by the contract, since he was guilty of no wrongdoing his enrichment could not be called unjust. He states,

There is no denying that injurers in cases like Vincent . . . gain as a result of infringing the rights of others. But the gain is the result of conduct that is justifiable or permissible. In wronging the victim, the injurer does the right thing. His gains are therefore justifiable ones. He is enriched by his conduct, but not wrongfully or unjustifiably so.

Coleman, supra note 23, at 372. This point is fine as far as it goes, but as Weinrib points out, not all unjust enrichment cases are based on wrongdoing by the defendant. For example, if the defendant has only passively received a benefit intended for the plaintiff (for instance, due to a mistaken delivery) she will be considered unjustly enriched and must disgorge that benefit to the plaintiff. See Weinrib, The Idea of Private Law, supra note 2, at 140-42.

54. Weinrib offers a sophisticated argument that includes the unsteady premise that Kantian right requires that preservation of property trumps use of property, with the result that, "[e]veryone's property is, as it were, encumbered by the servitude of being available for use to preserve someone else's property," Weinrib, The Idea of Private Law, supra note 2, at 201, but only so far as the value of the property preserved exceeds the value of the property used to preserve it. The value requirement, he maintains, is entailed by the requirements of respect for others as ends in themselves: Respecting others respecting their ownership rights. Such respect does not entail that we never violate those rights, but that we do so only in order to preserve property more valuable than what we destroy. Id. at 196-203. Even if this argument successfully provides a general explanation for what Weinrib calls "the incomplete privilege of using another's property to preserve one's own," id. at 196, it fails to explain Vincent. According to Weinrib, the owners of the Reynolds were unjustly enriched through the use of the dock. Id. at 198. He is right to point out that the enrichment could not have been through the value of the boat that was saved, since the boat could have been destroyed and its owners still would have been liable for the damage to the dock. Id. But if the enrichment were in the use of the dock, the proper measure of damages would be the value of a license to use the dock for the given time period, perhaps taking into account
Debates about unjust enrichment notwithstanding, *Vincent* is in many ways structurally similar to a breach-of-contract case once one accepts the idea that a breach of even an executory contract can result in a wrongful loss by the non-breaching party because the promisor's failure to perform denies the non-breaching party something to which it is entitled. Just as the plaintiff in *Vincent* had a right to the exclusive use and control of his dock, so too does a promisee have a right to performance. When the promisor denies the promisee that to which she is entitled under the contract, the promisor must compensate the promisee for the loss of that entitlement, even if every aspect of the promisor's conduct was justifiable. Furthermore, the promisor must do so even if he was morally justified in his failure to perform.

It is worth emphasizing that although this dispute only extends to a small subset of cases in tort law, it points to a fundamental disagreement about the very nature of corrective justice. For Coleman, corrective justice is not about correcting wrongdoing at all. As Coleman put it, "Annulling moral wrongs is a matter of justice: retributive, not corrective, justice. There is a legal institution that, in some accounts anyway, is designed to do retributive justice, namely, punishment."55

Weinrib's fully relational view, on the other hand, seeks to repair wrongs by undoing the consequences of those wrongs. Coleman56 and Stephen Perry57 criticize Weinrib's theory for failing to do exactly what it claims to be doing. They argue that correcting a wrong and compensating for a loss are two different things and that Weinrib fails to establish that compensating for a loss is either necessary or sufficient for correcting wrongdoing. Whether or not this criticism of Weinrib is valid in the context of tort law, it highlights a particular difficulty Weinrib faces in contract law. Since contract law does not even require wrongdoing to establish liability in cases of breach, corrective justice cannot be primarily concerned with correcting moral wrongdoing by undoing the consequences of morally wrongful acts if it is to explain contract law. Often in breach-of-contract cases there will be no wrongful acts at all. Therefore, if contract law is a matter of corrective justice, it must be so because it seeks to allocate wrongful losses in the way that Coleman described corrective justice in tort law.

Seeing the dispute this way sheds new light on the nascent debates about corrective justice and contract law. As Fuller and Perdue pointed out, it is not immediately obvious how expectation damages could be compensatory, and therefore it is understandable that corrective-justice theorists of contract

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56. See id. at 323-24.
have focused on this problem.\textsuperscript{58} It is also thus not surprising that Coleman, who thinks that corrective justice is first and foremost about allocating losses, would not offer a corrective-justice account of contract law. Even though unfulfilled entitlements are not as tangible as the injured bodies and damaged physical property that litter the landscape of tort law, and even though it is easy to understand how corrective-justice theorists of contract have thus far overlooked the need to explain contract’s indifference to wrongdoing, we usually think of breached contracts as broken promises, and therefore as wrongs. Nonetheless, contract law has to explain how it is that breaches create wrongful losses whether or not there is wrongdoing in the breach. The best explanation is that contract law protects the entitlements created by contracts and seeks to allocate the frustrations of those entitlements as the demands of justice dictate. Although that legal duty is most likely best understood as grounded in the general norm that promises must be kept, that does not mean that by awarding damages contract law is judging the promisor’s conduct. Indeed, contract law is generally not concerned with the promisor’s conduct after the contract is formed except insofar as the promisee has not received what she is entitled to receive under the contract. In fact, if the promisor, out of spite, refuses to perform but some third-party performs on his behalf, the promisee will have no cause of action.\textsuperscript{59} Coleman’s corrective-justice theory of tort law provides the best structure for explaining this feature of contract law.

In the next two parts, I will move away from abstractions about the general structure of corrective justice and look to particular contract doctrines. The structure for which I have argued has to be able to account for the way nonperformance is treated in actual cases. In particular, it has to be able to fit coherently with fundamental contract doctrine like the doctrine of consideration, offer and acceptance, and expectation damages. I will argue in the next part that the picture of contract law I have been sketching as a corrective for the frustration of entitlements created through contracting does explain these and other doctrines in a coherent way. It also has to be able to explain potentially lingering inquiries into whether or not the promisor is guilty of wrongdoing by virtue of his failure to perform, an issue I will address in Part IV.

III. CONTRACT DOCTRINE AND ENTITLEMENT THEORIES

Showing that contract law can be explained by corrective justice despite contract’s strict-liability standard is not enough. We must show that the solution—explaining contract as a system of compensating for frustrated

\textsuperscript{58} See supra notes 5-8 and accompanying text.

\textsuperscript{59} This assumes, of course, that the performance due is not particular to the promisor, such as a musical performance by a particular artist. Such exceptions have to do with the nature of the entitlement—an entitlement to enjoy a song sung by this particular person—rather than the nature of the promisor’s failure to perform, and therefore do not undermine the claim that contract law is concerned with the satisfaction of the promisee’s entitlement rather than the promisor’s failure to perform. See infra note 98 and accompanying text.
entitlements rather than as a response to wrongdoing—is also compatible with contract doctrine generally. Fully demonstrating such coherence is a task beyond the scope of this Article, but a brief survey is appropriate. In this part, I will offer a few examples of its fit. In the next part I will respond to the most likely doctrinal counterexample and explain why it is not a counterexample after all.

A. The Doctrines of Consideration and Offer-and-Acceptance

First of all, corrective justice better explains contract’s consideration doctrine than theories based on the morality of promise making. If contract law were primarily concerned with correcting the wrongdoing associated with promise breaking, then it would be hard to explain why it largely ignores gratuitous promises. Indeed, the most comprehensive promise-based theory of contract, offered by Charles Fried, struggles mightily with the consideration doctrine. Fried first dismisses the consideration doctrine as an objection to his theory because the doctrine is “too internally inconsistent to offer an alternative at all.” Perhaps recognizing that the consideration doctrine is simply too central to contract law to be so easily brushed aside, Fried goes on to propose alternative explanations, but ultimately concludes, remarkably, that

the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it.

Rather than give up on his theory that the backbone of contract is the moral duty to keep one’s promises, Fried retreats, at least for the moment, from giving an account of “positive” law to a complaint that specific contract doctrine fails to cohere with contract’s underlying principles.

It would be better if we could give an account of contract law’s fundamental principles that did not require us to ignore or complain about so central a doctrine as consideration, and viewing contract as an institution designed to distribute corrective justice does just that. The promise theory fails to explain the consideration doctrine because it focuses only on the actions of the promisor. A law truly based on the morality of promises would enforce gratuitous promises as well as those where there is consideration given by the promisee, because from the promisor’s point of view, the moral duty to keep the promise is present in both cases. The promise theory therefore cannot account for the fact that contract doctrine looks not just to the promisor, but also to the promisee. The entitlement

60. See generally Fried, supra note 14.
61. Id. at 28-39.
62. Id. at 35.
63. Id. at 37-38.
theory I have been describing, by contrast, starts with the promisee, and begins with the question of whether the promisee has a legal entitlement. The consideration doctrine focuses attention on whether the promisee has given anything up in exchange for the promise that would entitle the promisee to the promisor’s performance in a way that the promisor’s own mere moral obligation would not. The promisor’s promise is still necessary, of course, but only because of its role in creating a legal entitlement, a relationship between the promisee and promisor.

Peter Benson further explains the essential “bilateral” nature of the relationship between promisor and promisee in contract.64 Contract law requires both offer and acceptance, not just the consent of the promisee (which could be established by the offer alone).65 Just as in property law, when the recipient of a gift must in some way accept the gift in order to make the giver’s alienation of property complete, so too in contract law the acceptance by the promisee of a proposed bargain is necessary in order to transfer legal entitlements.66 A theory that focused solely on the moral obligations of the promisee cannot explain this added requirement.

B. Expectation Damages

The entitlement-based structure of corrective justice also better explains contract’s expectation damages remedy than does a relational view. Under Weinrib’s view, compensation damages are the appropriate remedy in tort law because, very roughly speaking, undoing the consequences of a wrongful act comes closest to undoing the act itself.67 But if contract law were a matter of this form of corrective justice, one would expect the damages for breach to be a measure of the consequences of that breach—in other words, one would expect reliance or restitution damages rather than expectation damages. Instead, contract law measures damages by the amount of the entitlement created at the time of contracting. The non-breaching party has a right to be placed in the position she would have been in had the promisor done what he promised to do. Expectation damages are based on this entitlement, rather than on undoing the consequences of a (potentially) wrongful act of breach.

Interestingly, Weinrib himself argues that contracts create entitlements to performance, entitlements based on the notion of Kantian rights.68
Expectation damages compensate for the frustration of those entitlements. But Weinrib’s account is unsatisfying in at least two ways relevant for our purposes. For one thing, this seems to be a marked shift from his explanation of remedies in tort law, even though Weinrib claims that the same theory of corrective justice explains all of private law.\(^6\) When discussing tort law, Weinrib argued that the appropriate response to the violation of a right is to undo the actual consequences of that violation.\(^7\) This argument lead to much criticism,\(^8\) but suppose Weinrib can answer these objections. In other words, suppose that the correct response to wrongdoing really is to undo the actual consequences of that wrongdoing. If that were so, then one of two things are likely to follow. Either contract law is not primarily concerned with responding to the wrongdoing of breach, or else damages would be measured by reliance—i.e., by restoring to the non-breaching party the consequences of the breach. Since the default remedy in contract is not reliance but rather expectation damages, then under Weinrib’s view it seems contract law cannot be primarily concerned with correcting wrongdoing.

Weinrib does argue that in contract the wrongdoing of breach is undone by “restoring to the promisee the value of the right infringed.”\(^9\) On reflection, however, we can see that expectation damages do not restore the value of the infringed right. When performance is due, the promisee is indeed entitled to performance (or an equivalent to its value). Yet that is not to say that she at one point held the value of the performance such that it can be restored to her. Weinrib notes that the value of performance is “something [the plaintiff] never had,”\(^10\) but he fails to distinguish between

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\(^7\) Id. at 114-36.

\(^8\) Id. For example, it is not clear why “undoing” the actual, physical consequences of an act, which after all depend on many contingent circumstances that have nothing to do with wrongfulness of the act, is the appropriate way to “undo” the wrongdoing in the act itself. Perry, supra note 25, at 478-88; see also Coleman, supra note 23, at 318-24. Consequences are often a matter of luck, which means that under the relational view the same action will warrant huge damage awards in some circumstances while warranting no damages in other circumstances. If tort law is supposed to address moral wrongdoing, it would be odd indeed that its response to wrongdoing depends so heavily on factors that have nothing to do with the moral worthiness of the action. Indeed, in some cases wrongdoing could lead to a net positive result, which begs the question whether the relational view would insist that even net positive consequences also be undone in order to address wrongdoing. Id. at 323 (imagining a case where a taxi driver, taking a fare to the airport, drives negligently, causing his fare to be hospitalized and thereby missing his flight, which, as it happens, crashes and kills everyone on board). In short, if we want to address wrongdoing, perhaps an apology would be a more appropriate response, or a jail sentence, or a fine unrelated to the actual harm caused. For an account of the problems associated with “moral luck” and tort law, see Goldberg & Zipursky, supra note 28. John Goldberg and Benjamin Zipursky distinguish between the problems caused by what they call “causal luck” and “compliance luck.” The objections to the fully relational view mentioned here center on causal luck.

\(^9\) Weinrib, The Idea of Private Law, supra note 2, at 140.

respecting and enforcing rights on the one hand, and restoring value on the other.\textsuperscript{74} The only value a court can restore to a promisee is the value she has spent, either through restitution or reliance. Such losses are caused by the promisor’s breach, and if we are to address the promisor’s breach by undoing its consequences, that restorative remedy is what we would expect. By contrast, what a court can and will do in a contract case is enforce her right to the value of the performance. Weinrib’s account of contract damages is not consistent with his account of tort damages and his general account of private law, in that his account of contract is focused on enforcing the legal entitlements at the time of contracting, rather than on undoing the actual consequences of wrongdoing.

I have already argued at length that contract law is not concerned with correcting wrongdoing in the first place. Yet despite his emphasis on the promisee’s entitlement to performance, on closer inspection it is clear that Weinrib is committed to the notion that contract law presupposes that it is wrong to breach one’s promises, and that contract law seeks to address this particular form of wrongdoing. For Weinrib, the source of the promisor’s duty to give the value of performance is the unjust infringement on the promisee’s right to performance.\textsuperscript{75} Weinrib notes rather blandly that one who breaches a contract “does something that is inconsistent with a plaintiff’s right.”\textsuperscript{76} It is clear, however, that Weinrib thinks that the reason the infringement on the plaintiff’s right is unjust is because it is the result of his breaching the contract, which for Weinrib is presumptively wrongful. Without wrongdoing, Weinrib argues, one cannot make sense of wrongful loss.\textsuperscript{77} Although he does not mention this when discussing contract damages directly, Weinrib later asserts (in a discussion of unjust enrichment) that “corrective justice . . . suppos[es] that breach of contract is a wrong.”\textsuperscript{78}

There are two very different kinds of explanation on the table. Is contract law best described by corrective justice in the sense that it gives people that

\textsuperscript{74} For an attempt to explain expectation damages using the framework provided by Weinrib, see Bridgeman, \textit{supra} note 3. The explanation depends on Weinrib’s controversial, to say the least, distinction between normative and factual loss. The article argues that such a distinction may explain how punitive damages could be compensatory, but at the cost of allowing for the possibility of punitive damages in rare breach-of-contract cases. This is a possibility Weinrib rejects not only for contract, but even for tort.

\textsuperscript{75} See Weinrib, \textit{Punishment and Disgorgement as Contract Remedies}, \textit{supra} note 3, at 60.

\textsuperscript{76} Id.

\textsuperscript{77} See generally Weinrib, \textit{Non-Relational Relationships}, \textit{supra} note 10.

\textsuperscript{78} Weinrib, \textit{Punishment and Disgorgement as Contract Remedies}, \textit{supra} note 3, at 74.

Weinrib makes the point in more forceful terms about the basis of restitution damages:

\begin{quote}
The basis of disgorgement in such cases is the sentiment that one should not profit from one’s wrong. The sentiment has obvious moral resonance. It treats the breach of contract as a wrong, that is, as an act that the promisor was morally obliged not to commit. By striking the gains of contract breach from the hand of the promisor, disgorgement gives teeth to the long-standing principle that promises are to be observed (\textit{pacta sunt servanda}).
\end{quote}

\textit{Id.} at 73.
which another private individual owes them as a matter of justice? Or is it the case that the injustice that grounds the plaintiff's recovery must, by definition, be rooted in the wrongdoing of the defendant, wrongdoing which is addressed by erasing its consequences? Weinrib seems committed to the latter. But that leaves him with the trouble of explaining not only contract's indifference to wrongdoing, which he says nothing about, but also why undoing the consequences of the wrongdoing (breach) is not the appropriate response in contract law as he argues it is in tort. The better response is that contract is not responding to the wrongdoing of breach at all, but instead simply enforces the promisee's entitlements. Expectation damages, which do not measure the consequences of breach, confirm that contract law is not best explained by the desire to correct morally wrongful breaches, but rather simply gives people that to which their contract entitles them irrespective of moral judgments about promise keeping.

C. The Alienability of Rights to Performance, and Third-Party Beneficiaries

In addition to such fundamental doctrines as consideration and offer and acceptance, many lesser doctrines point to an entitlement theory of corrective justice in contract law of the sort I have been describing, including trends that have developed since the days of classical contract law. Consider, for example, contract law's stance toward the assignment of contract rights. Initially the common law refused to recognize the transfer of choses in action, including contract rights.79 Today, however, "most contract rights are freely transferable."80 This is exactly the result we should expect if the fundamental purpose of contract law is to protect the promisee's legal entitlements. Rights to performance are analogous to rights to property. As Justice Holmes said in a well-known case,  

But when [the promisor] has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that as between the creditor and a third person the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a res incorporalis, it is not illogical to apply the same rule to a debt that would be applied to a horse.81

It is hard to see why a legal system primarily concerned with making parties fulfill their moral obligations to keep promises would treat the promisee as the holder of a property, or property-like, right. Allowing such

79. Farnsworth, supra note 17, § 11.2, at 64.
80. Id. § 11.2, at 63. Some are not, for example, those contracts where transfer would place a special burden or risk on the other party or in some way "materially change" the duty of the other party. Id. § 11.4, at 79. But these exceptions are easily explained by "a concern for the justifiable expectations of the obligor when making the contract." Id.
transferability is at the least not required by the moral obligation to keep one’s promises, and in fact requiring the promisor to deliver performance to a stranger may go beyond what the morality of promising would even allow.

In fact, contract law has moved not just from prohibiting the transfer of contract rights to allowing the transfer, but has gone further still; until now many contract rights are freely transferable despite the explicit agreement of the parties at the time of contracting that they should not be transferable. If the right to performance is a right to payment, article 9 of the Uniform Commercial Code (UCC) makes that right assignable no matter the intention of the parties toward assignment at the time of contracting.82 In other words, for most kinds of rights to payment, an agreement by the parties that a right to payment is unassignable, or unassignable without the obligor’s consent, is ineffective. Parties can freely alienate such rights just as they can most any property right.

Another doctrinal area that supports the notion that contract law is fundamentally concerned to protect property-like rights to performance is the treatment of third-party beneficiaries of contracts. Although the rights of third-party beneficiaries have a checkered history, in the United States it is now clear that the promisor and promisee can create rights to performance in third parties “by manifesting an intention to do so.”83 The third party can sue the promisor for performance despite the fact that the third party was not the recipient of the promise.84 Early cases required that the third party be a creditor beneficiary85 or at least be a close family member of the promisee.86 The rationale seemed to be that third parties who were made beneficiaries because they were owed money by the promisee (a creditor beneficiary) or owed some other general duty of care by the promisee (like the duty one has to take care of one’s offspring) had a strong enough claim in justice to sue for the performance of promises made

82. Article 9 holds as follows:
Except as otherwise provided . . . a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:
(1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or
(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.
U.C.C. § 9-406(d) (2003). It should be remembered that article 9 applies not just to the sale of goods, as article 2 does, but generally to the “sale of accounts,” id. § 9-109(a)(3), including most rights “to payment of a monetary obligation.” Id. § 9-102(a)(2). For exceptions, see id. §§ 9-109(d), 9-406(f), 9-407.
84. Farnsworth, supra note 17, §§ 10.2-.3, at 7-26.
85. See, e.g., Lawrence v. Fox, 20 N.Y. 268 (1859).
86. See, e.g., Seaver v. Ransom, 120 N.E. 639 (N.Y. 1918).
to satisfy such duties, even if the promise was not made to them directly.\textsuperscript{87} The modern rule, however, is not so limited: If the parties manifest an intent to confer a benefit, then the third party has a claim.\textsuperscript{88}

The rule that third parties can bring such claims fits well with the view for which I have argued, namely that contract law makes more sense as a system designed to compensate for the frustration of entitlements than as a system for the correcting of moral wrongdoing. Third-party beneficiaries are by definition not the recipient of the relevant promises. While a promisor may owe a duty to the promisee to keep his promise, it is at least unclear that he owes a duty to a third party not to break a promise made to the promisee. Even if we assume a Weinribian, fully relational view of wrongdoing according to which wrongdoing is wrongdoing to an individual,\textsuperscript{89} the wrongdoing of breaking one’s promise is a wrongdoing only to the promisee. It is far from clear how allowing a third party to bring a claim on that promise would correct the wrongdoing. On the other hand, if we see contracts as creating entitlements to performance, the picture becomes clearer. It makes perfect sense for the promisor and promisee to create an entitlement in a third party if they so desire, and thus transfer to that third party a right to performance. Enforcing such contracts is merely the recognition of that right to performance.

Further support for the view of contract rights as property-like comes from the law’s stance toward cases where the promisor and promisee would like to rescind their agreement making the third party a beneficiary. If the rights to performance were truly property-like rights transferred at the time of contracting, we might expect the transfer to be irrevocable without the consent of the third party. In the early landmark case of \textit{Lawrence v. Fox}, the dissent recognized this consequence and, starting from the premise that a promisee could obviously “countermand” his instructions, reasoned that third parties were not themselves entitled to sue, but rather that the promisor’s obligation remained in the hands of the promisee.\textsuperscript{90} Subsequent courts have followed suit, and now such rights do become irrevocable by even the promisee, at least once they have “vested.”\textsuperscript{91} Courts do disagree as to when they vest,\textsuperscript{92} but the fact that third parties could get such power at all is strong support for the view that contract law is concerned with protecting entitlements transferred through contracting, not correcting wrongdoing done by the promisor to the promisee.

\textsuperscript{87} Farnsworth, \textit{supra} note 17, § 10.2, at 7-11.
\textsuperscript{88} \textit{Id.} § 10.3, at 12-15; see Restatement (Second) of Contracts § 302 (1981).
\textsuperscript{89} See \textit{supra} notes 10-11 and accompanying text.
\textsuperscript{90} \textit{Lawrence}, 20 N.Y. at 276 (“[The promisee] had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant’s promise to pay according to the direction would have ceased to exist.”).
\textsuperscript{91} Farnsworth, \textit{supra} note 17, § 10.8, at 48.
\textsuperscript{92} \textit{Id.}
Finally, as Coleman pointed out about tort law, contractual obligations can generally be satisfied by anyone. If private law were a matter of addressing individual wrongdoing, we would expect that not only would defendants have a particular duty to make good the plaintiff’s loss that no one else has, but also that only the defendant could do so. Private law debts may be discharged by anyone, whereas at least some criminal debts (like jail time) can only be satisfied by the wrongdoer. When one party wrongfully injures another, giving rise to a tort claim, if a third party chooses to pay the victim on behalf of the injurer, the victim has no more claim on the injurer. This suggests that tort law is focused on the victim’s wrongful losses, since once those losses have been made whole the tort system has nothing else to say about the matter. The same is true for debts in contract law, except for contracts that are personal in nature. Those contracts can only be discharged by the promisor because of the nature of the performance promised, not because of any special emphasis on the moral wrongfulness of breach in such cases. Even for such personal contracts, damages for breach could be paid by anyone, and such payment would end the matter regardless of how wrongful the breach by the promisor was.

I have been arguing that certain basic doctrines in contract law fit quite well with the picture of contract law as compatible with corrective justice that I have been sketching, despite contract’s strict-liability standard. Not all doctrine fits so obviously, however. At first blush, for example, it might seem that the defense of impossibility or impracticability of performance is an indirect way of fielding inquiries into the moral justifiability of the promisor’s breach. If that were so, then arguably contract law would not be entirely a matter of strict liability. And if contract law is not really committed to strict liability, but instead is interested in whether breaching parties are in some sense at fault, then contract law may be more straightforwardly a case of corrective justice. In the next part, I will argue that these inquiries are not really inquiries into the justifiability of breach, but rather inquiries into the extent of obligations created by the contract. If I can explain even the impossibility doctrine as consistent with, and even supported by, my version of contract law as corrective justice, it will be powerful evidence that the view is on the right track.

IV. IMPOSSIBILITY OF PERFORMANCE

So far I have argued that according to the best interpretation of corrective justice contract law is primarily concerned with correcting the wrongful losses of entitlements that were gained through contracting rather than through correcting the wrongfulness of breach. Those entitlements are

93. See Coleman, supra note 23, at 327.
94. One’s duties to perform a contract that is personal in nature—e.g., when a noted artist is hired to paint a portrait—cannot be delegated without the consent of the promisee. See, e.g., Farnsworth, supra note 17, § 11.10, at 130.
primarily determined by the consent of the parties. Since this is so, we should be able to use this interpretation of corrective justice to make sense of the way contract law treats nonperformance. In what follows, I shall consider a particularly vexing type of non-performance: cases in which the defendant claims impossibility as an excuse. I will argue that the best interpretation of the impossibility cases is not that courts are excusing defendants from required performance, but rather that courts are struggling to find the extent of the entitlement that was transferred at the time of contracting. The more pressing question in contract law is not whether the party's nonperformance was excusable or justifiable, but rather whether performance was required under the circumstances at all.

Although one is generally not excused from performing a contract even when performance has become impossible, the law does recognize some exceptions to this rule. Performance will be excused if a subsequent law makes performance illegal, if the person who is to perform under a personal services contract dies or becomes disabled, or if the subject matter of performance is destroyed, for example, when a house to be repaired is destroyed or when crops or goods are destroyed before delivery. At first glance, such cases might appear to insert at least a limited fault standard into the law of contract. If the law allows someone to defend against a breach-of-contract claim by arguing that performance was truly impossible, it might be thought that this is so because there really is a fault standard in contract law after all. Letting someone off the hook when she is unable to perform implies that when the promisor is able to perform but does not, she is at fault. The impossibility doctrine, according to this way of thinking, is a result of the maxim that "ought" implies "can." Invoking that maxim presupposes the moral claim that if the promisor is able, he ought to perform, and conversely, when he is unable, he is not required to perform.

A closer look at the exceptions to the pacta sunt servanda principle shows that courts treat such cases not as cases of breach at all, and therefore the question of wrongdoing is not even considered. Instead, these cases are decided by inquiring into the question of under what circumstances the parties have consented to be bound. Or, to put the point into language that highlights how these cases are instances of what I have called the best interpretation of corrective justice, the courts must decide under what circumstances the plaintiff is entitled to the defendant's performance, such that a denial of that performance would be a violation of the plaintiff's rights.

The most famous impossibility case in which the defendant's nonperformance was excused is Taylor v. Caldwell. Taylor involved a contract for the use of a music hall. When the music hall burned shortly before the planned performance, the plaintiff, who had been preparing for the performance for some time, sued the owner for his failure to provide the

95. Id. § 9.5, at 624-32.
hall. The court held for the defendant on the grounds that the continued existence of the music hall was an implied condition of the contract.\textsuperscript{97} Since the implied condition failed to occur, the defendant was under no obligation to perform. He escaped damages not because the impossibility justified his breach, but rather because the conditions under which the contract was enforceable did not obtain. The idea of implied conditions drawn from \textit{Taylor} was for years used as an explanation for why performance was or was not excused due to impracticability or impossibility.\textsuperscript{98} The extent, however, to which implied conditions are meant to be expressions of actual (though unarticulated) intentions of the parties has been heavily debated.\textsuperscript{99} Critics argue that courts should openly seek a just allocation of losses without trying to divine the parties' "actual" intentions regarding matters the parties may have never consciously considered.\textsuperscript{100} More recently, courts have moved away from "fictions" about the parties' intentions in favor of more general concerns of justice, until what E. Allen Farnsworth calls a new "synthesis" on the topic has been formed.\textsuperscript{101} According to the new synthesis, as stated in the UCC Article 2, "[nonperformance] is not a breach of... duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made..."\textsuperscript{102}

The Second Restatement adopted similar language:

\begin{quotation}
Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language of the circumstances indicate the contrary.\textsuperscript{103}
\end{quotation}

Farnsworth argued that this "new synthesis is far removed from the reasoning in \textit{Taylor v. Caldwell}."\textsuperscript{104} Rather than naively searching for the intentions of the parties, it is claimed, the new rule more "candidly" seeks the requirements of justice.\textsuperscript{105}

In fact, it is not clear how the shift from talk of implied conditions to talk of basic assumptions changes anything. It certainly does not suggest a move to a distribution of losses based on what the court thinks would be just without regard to what the parties consented to at the time of bargaining. But to the extent that such language signals a willingness to

\begin{thebibliography}{10}
\bibitem{97} Id. at 312.
\bibitem{98} James P. Nehf, 14 Corbin On Contracts § 74.18, at 106-09 (Joseph M. Perillo ed., rev. ed. 2001); Farnsworth, \textit{supra} note 17, § 9.5, at 627.
\bibitem{99} Nehf, \textit{supra} note 98, § 74.18, at 107-13.
\bibitem{100} Id. § 74.18, at 108.
\bibitem{101} Id. § 9.5, at 632.
\bibitem{102} U.C.C. § 2-615(a) (2003).
\bibitem{103} Restatement (Second) of Contracts § 261 (1981).
\bibitem{104} Farnsworth, \textit{supra} note 17, § 9.6, at 633.
\bibitem{105} Id. § 9.6 at 634.
\end{thebibliography}
take a broader view of the role of parties' intentions and consent, the shift is both justified and coheres well with the way I have argued corrective justice explains contract cases. For example, as Arthur Corbin put it,

> Courts must interpret the words and acts of the parties [in cases where impracticability or impossibility is alleged] to determine their probable meanings and intentions as expressed to each other. Judges then decide the legal operation of those words and acts, with the understanding that this will vary in light of subsequent events and that it is dependent upon the prevailing mores and expectations of the relevant contracting community. Through judicial decisions in individual cases, tentative working rules develop in this area as in others at common law, and they are continually tested and re-examined in the light of the sources from which they are drawn: the customs, business practices, and prevailing mores of the time and place.\(^{106}\)

Thus, even if parties never expressly addressed possible events such as the destruction of the concert hall, the court is justified in ascribing intentions to the parties for such cases based on the relevant norms and practices of the community.\(^{107}\) Meanings are not a purely individual matter. Just as a party is not entitled to keep an intention private and then claim protection based on that intention later, so too the parties' mutual agreement will be interpreted in light of relevant customs, norms, and practices both of the parties and of the community. The Taylor decision can be justified not as a rewriting of the contract (and subsequent forcing of new terms onto the losing party), but rather as an interpretation of the agreement the two parties made. Even Farnsworth, who was hostile to the implied condition rule of Taylor, recognized that contracts should be interpreted in light of basic assumptions even though "[t]he assumption may be tacit; a party may be said to have an assumption even though the party is not conscious of alternatives, as one who walks into a room may assume that it has a floor without giving thought to the matter."\(^{108}\)

A good example of this reasoning in action can be found in Justice Benjamin Cardozo's opinion in *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*\(^{109}\) In that case, the defendant, a distributor, had promised to deliver 1,500,000 gallons of molasses from a particular sugar refinery to the plaintiff in shipments spread out over the warm-weather season.\(^{110}\) During the time period of the contract, however, the refinery did not operate at full capacity and only produced 485,848 gallons, of which the defendant was able to procure and deliver 344,083 gallons.\(^{111}\) The defendant argued that

\(^{106}\) Nehf, *supra* note 98, § 74.18, at 112.

\(^{107}\) The court may be justified in looking to the norms of both the legal and nonlegal community, depending, among other things, on the sophistication of the parties. See Barnett, *The Sound of Silence*, *supra* note 31, at 885-97.

\(^{108}\) Farnsworth, *supra* note 17, § 9.6, at 640.

\(^{109}\) 179 N.E. 383 (N.Y. 1932).

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 384.
“its own duty to deliver was proportionate to the refinery’s willingness to supply, and that the duty was discharged when the output was reduced.” Cardozo agreed with the way the defendants posed the issue, but disagreed about which circumstances the duty included.

The inquiry is merely this, whether the continuance of a special group of circumstances appears from the terms of the contract, interpreted in the setting of the occasion, to have been a tacit or implied presupposition in the minds of the contracting parties, conditioning their belief in a continued obligation.

Accepting that test, we ask ourselves the question: What special group of circumstances does the defendant lay before us as one of the presuppositions immanent in its bargain with the plaintiff? The defendant asks us to assume that a manufacturer, having made a contract with a middleman for a stock of molasses to be procured from a particular refinery, would expect the contract to lapse whenever the refiner... chose to diminish his production, and this is in the face of the middleman’s omission to do anything to charge the refiner to continue. Business could not be transacted with security or smoothness if a presumption so unreasonable were at the root of its engagements.

The question is not one of whether the defendant’s breach can be excused, but rather whether the defendant has a duty under these circumstances at all. The issue is one of interpretation, not of grounds for excuse.

Applying this rule, Cardozo admitted that the defendant’s duty would not extend to situations where the refinery was destroyed, there was a failure of the sugar crop, the intervention of war, or perhaps even labor strikes. But in this case, the defendant assumed a duty to perform so long as the refinery was able to perform and could easily have protected against their reduced output by securing a contract with the refinery binding it to perform. Had they done so, they could even have made their duty to the plaintiff contingent on the refinery’s fulfilling that contract. But without these other circumstances, the most reasonable interpretation of the contract is that the defendants assumed the duty to perform at least so long as the refinery was able to produce the molasses because both parties operated under the assumption at the time of contracting that the refinery would continue to produce the required amount. Rather than characterizing its decision as a refusal to excuse the defendant’s failure to perform, the court declined to “import [...] into the bargain this aleatory element.” No excuse was needed because the conditions requiring performance occurred.

The lesson from this brief survey of impossibility cases is twofold. First, although it may seem at first that courts are making moral judgments in

112. Id.
113. Id. (citations omitted).
114. Id.
115. Id.
116. Id. at 385.
breach-of-contract cases by calling some breaches morally excusable, in fact courts are doing no such thing. Rather than judging whether a breach is morally excusable, they are judging whether a breach has occurred at all. This is consistent with contract law's standard of strict liability. Secondly, when determining whether there has been a breach, courts look to the extent of the entitlement created by the mutual consent manifested by the parties. Rather than deciding these cases based on what happened up until the time for performance that may or may not have excused performance, courts look to the most reasonable understanding of what the parties did at the time of contracting. This approach reinforces the idea that contract law can be explained as a practice of compensating parties for the entitlements that they gain through contracting, and not as a way of compensating them for an arguably tort-like wrongdoing of breach. In short, the impossibility cases are an example of how contract can be corrective without having a fault standard.

CONCLUSION

I began by claiming that there is a gap in the corrective-justice literature on contract. Corrective-justice theories seek to explain private law as compensation for wrongful losses of some sort, yet contract law does not seem to be concerned with wrongdoing at all. I have argued that this gap can be filled so long as we have an appropriate conception of corrective justice. In particular, corrective justice can explain contract law so long as it is the sort of corrective justice that recognizes that not all wrongful losses are the result of wrongdoing. Contract law is not concerned with wrongdoing, but that does not mean that its primary aim is not to correct wrongful losses. We can explain contract law as a system of correcting for the losses of entitlements that were created through the practice of contracting, and we can do so without harm to contract's strict-liability standard.

It is appropriate to reiterate in conclusion the limitations of my present claim. The argument I have presented here is largely structural, and I have said virtually nothing about the source of the entitlements created through contracting. This should not be surprising. Corrective justice is an account of second-order duties of repair, and it presupposes that there is an underlying account of the relevant first-order duties. One might object that corrective-justice theory thereby threatens to be trivially true in that it is arguably compatible with any set of first-order duties, and thus with any theory of contract law. If so, corrective justice could hardly claim to


explain contract law completely in any meaningful sense. But saying that corrective justice presupposes an underlying theory of first-order duties does not mean that it is compatible with just any articulation of those duties. As indicated earlier, I myself am optimistic that consent theories provide the best account of the content of the underlying obligations associated with the practice of contracting, and I am also optimistic that some form of a consent theory is most compatible with the structure of corrective justice. This, however, is not the place for that argument. My aim here has been simply to show that despite its indifference to wrongdoing, contract law is at least as open to a corrective-justice explanation as tort law.


119. It is worth noting that this is really an objection against corrective theories in general. If successful, it likely undermines such theories in tort as well as contract.

120. Coleman, supra note 117, at 32.