2013

Faculty Spotlight Journal 2013

Fordham Law Communications

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LINCOLN CENTER | NEW YORK CITY

FacultySpotlight
JOURNAL 2013

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FacultySpotlight
JOURNAL 2013

Volume 3 | 2013

Fordham Law School

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FOREWORD

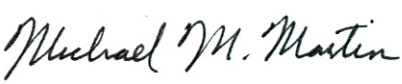
Dear Colleagues:

In this third volume of Fordham Law's *Faculty Spotlight Journal*, we highlight the scholarly work of four of our professors who are experts in diverse areas of private law. Private law is concerned foremost with relationships among individuals, and in these pages, you will see how our scholars are critically examining all manner of these relationships, including those among friends, strangers, neighbors, between an employer and employee, and other important configurations of discrete actors.

Often, private law unfairly takes a backseat to the behemoths of public law: constitutional law, administrative law, and criminal law. Supreme Court cases about our nation's founding document or media coverage of the latest sensational criminal trial can overshadow what some may argue is the dry landscape of contracts, torts, and property law.

These scholars belie that facile thinking. Theirs is a territory fertile with complex questions, provocative situations, and uncommon nuance. Their original ideas and thoughtful research provide a sophisticated, academic level of drama that is the envy of their peers. Perhaps more important, they bring this excitement to the classroom. Fordham Law scholars are not detached elites; they are dedicated professors whose enthusiasm for teaching is matched only by the mastery of their subjects.

I hope you find the scholarship in the following pages as compelling as we here at Fordham Law do. We are proud to call our professors leaders in legal academia.



Michael M. Martin
Dean and University Distinguished Professor of Law

INTRODUCTION

Fordham Law's private law professors represent the best academic traditions of the Law School. They are passionate teachers and distinguished scholars. Their work places them at the forefront of their respective fields. In the coming years, their already strong reputations will become only more esteemed as they continue to produce scholarship that is essential for teaching and understanding all facets of the law.

Aditi Bagchi plumbs the depths of contracts to reveal a perspective not readily seen by casual observers. Her work examines contract as a type of promise, and she deftly illustrates how this idea can inform many types of agreements, both legally binding and not. As one of the Law School's newest full-time faculty members, Bagchi contributes immensely to the current conversation in contract law and enriches the classroom experience with her boundless energy and formidable intellect.

Nestor Davidson brings a wealth of experience from both the public and private sectors to his keen analyses of property law. His interest in the social implications of property offer a fascinating viewpoint that bridges the fields of psychology, economics, and law. Davidson's dedication to his research and his belief in its wide-ranging import motivated him to found the Law School's Urban Law Center, a nexus for understanding how property law, and the legal system more generally, affects contemporary urbanism.

Ethan Leib's novel scholarship brooks no conventional thinking. His work in contracts, constitutional law, and legislation reconsiders what is possible in our government, our courts, and among ourselves. His book *Friend v. Friend* examines the possibility of legal recognition of friendship. His scholarship dealing with consumer form contracts argues that the current judicial system has tools it hasn't been using often enough to deal with these new agreements. "A Fiduciary Theory of Judging" proposes a radical re-establishing of a judge's relationship to the people. Throughout his scholarship, Leib explores complex issues and offers provocative solutions.

Benjamin Zipursky is a renowned expert in tort law. Having coined the term *civil recourse theory*, Zipursky has achieved an enviable level of acclaim among his peers. His theory is widely acknowledged as one of the leading approaches to tort law in the country and internationally. Civil recourse theory rejects the other two dominant theories of torts—corrective justice and law-and-economics—by focusing on redressing legal wrongs. Zipursky's colleagues have rightly praised the theory as one of the most important interventions in contemporary theory of tort law.

Sheila R. Foster
Vice Dean
Albert A. Walsh '54 Chair in Real Estate, Land Use and Property Law

Aditi Bagchi

A rising star in a foundational subject, **Associate Professor Aditi Bagchi** applies a multidisciplinary perspective to contract law.

Prior to Fordham Law, Bagchi taught courses in Contract, Labor Law, Intention and the Law, and Distributive Justice and Private Law at University of Pennsylvania Law School. Before teaching, she served as a clerk for Judge Julio Fuentes in the U.S. Court of Appeals for the Third Circuit and worked in the litigation department at Cravath, Swaine & Moore LLP. She holds degrees from Harvard (A.B. in government and philosophy), Oxford (M.Sc. in economic and social history), and Yale (J.D.).

Bagchi writes in contract theory. She studies the nature of contractual obligation and its implications for the interpretation of agreements. Much of her recent work concerns the effect of background inequality on the formation and enforcement of contract. She has a related interest in the comparative political economy of contract, corporate, and labor law.

Bagchi's current projects exemplify her range of interests. "Parallel Contract" proposes a framework for interpreting contracts by a single entity with multiple other parties in which background terms are presumptively constant. "Contract as Procedural Justice" sets forth a typology of contract (pure, perfect, imperfect) and defends one meta-view of the institution. "Voluntariness and Contract Interpretation" re-examines the voluntary character of contractual obligation and its implications for enforcement. "The Political Economy of Mandatory Terms" contrasts ex ante and ex post modes of contract regulation and identifies environmental factors that cause a given jurisdiction to prefer one regulatory style over the other. Finally, in a book chapter on Contract and Distributive Justice, Bagchi rejects the categorical exclusion of questions of distributive justice from the ambit of contract law.

Bagchi's recent publications have already developed some of these themes. In "Separating Contract and Promise," she reassesses the relationship between contract and promise. Promises are usually made within the context of existing relationships. They are freely made and freely kept. Contracts are typically entered at arm's length. Their purpose is unlike that of private promise, and the governing norms are different too. Bagchi suggests that appreciating these differences will allow us to better mark the appropriate domain of contract law.

In "Managing Moral Risk: the Case of Contract," Bagchi wrestles with the problem of moral luck in the context of contract. She points out the possibility of managing "moral risk" and suggests that we do it already. We manage moral risk when we take into account the possibility that our actions might result in serious harm to others for which we would be morally responsible, and adjust our conduct accordingly. Bagchi identifies several ways in which the choice of contract terms is morally risky but argues these are not salient to us in part because, through background social institutions, we collectively attenuate the harm we each can do to our contracting partners.

Bagchi argues that we are subject to moral risk in the course of performing our agreements as well. We manage that risk through contract law itself: Subjecting ourselves to contract enforcement motivates us not to harm our contracting partners when it might otherwise be in our interest to do so.

Excerpts

Separating Contract and Promise

38 Florida State Law Review 707 (2011)
Excerpt in *Perspectives on Contract Law* (Randy Barnett, ed. 2009)

Contract has been conceptualized as a species of promise. Most famously, Charles Fried has argued that contracts should be enforced because they are promises.[1] More recently, Daniel Markovits has defended a theory of contract that takes contract to be a special case of promise,[2] and Seana Shiffrin has suggested ways in which the obligations of contract and promise diverge, a problem only because those subject to contractual obligations are ostensibly also subject to the norms of promise.[3] As Shiffrin and others have pointed out, "U.S. contract law represents that a contract is an enforceable promise" and "[t]he language of promises, promisees, and promisors saturates contract law" and its surrounding literature.[4]

Treating contractual promise as a kind of promise highlights certain important aspects of contracting, including the communication of a commitment to future action and the delegation of partial authority over future conduct to another person. Contract and promise do not uniquely share those features; one might communicate a commitment to future action that is not intended to benefit the person to whom the commitment is communicated, and the communication might not amount to either contract or promise. Similarly, one might delegate authority over some future decision upward or downward without it amounting to either contract or promise. Contract and promise also differ in fundamental ways that I will explore in this Article. But it is clear that contract and promise on their face seem to belong to some family, even if each simultaneously has equally close or closer relations with other kinds of acts.

Perhaps because of their familial relations, the similarities between contract and promise are too easily assumed and often overemphasized. The result has been to obscure essential differences between legally binding and everyday, or what I will call "private," promises. The moral character of a private promise depends on the fact that it is not only freely made but also freely kept. Most contractual promises are not intended to have and (by definition) do not have this voluntary character.[5]

My goal in this Article is not to catalogue the various similarities and differences, as though to demarcate the fuzzy boundaries of the circle of contract as it is situated in a larger circle of promise. Nor do I purport to have discovered a logical incompatibility between contract and promise; indeed, I take for granted that contract is a species of promise. Rather, I will argue that, in an important sense, contract and private promise are in tension with one another. My aim is to demonstrate a natural tendency on the part of contract, when layered on promise, to undermine the value of private promise. The reasons for enforcing contract are sometimes taken to be derivative from the reasons to keep one's promise, or the reasons to support an institution of promise are taken to be reasons to support an institution of contract. Contractual obligation is then thought to reinforce promissory obligation. But private promises which are given the status of contract are not thereby elevated. A private promise marked as contractual actually loses (at least some of) its promissory quality. The reasons for keeping and relying upon a private promise are in part replaced, rather than merely augmented, by the reasons for keeping and relying upon a contract.

In most contracts, one of the two following scenarios is likely: In the first, the agreement between contractual promisor and contractual promisee is not taken to be an exchange of private promise, and thus the law readily recognizes it as a contract. In the second, because the agreement between the promisor and promisee is of a character that the law is reluctant to imbue with legal status, the parties must go out of their way to signal that theirs is a legal rather than a private affair. In both scenarios, the promisor essentially opts out of the private practice of promising when she assigns to a third party the authority to coerce performance of her promise. Similarly, the promisee essentially opts out of the practice of promising by demanding or accepting that what would otherwise be a private promise is instead converted to a legally binding commitment.

Why does contract begin where private promise ends? Because the objective reasons that apply to promisor and promisee are replaced once what was a promise is subject to legal intervention. In making a private promise, a promisor ordinarily creates a sufficient reason to perform the content of her promise: the very fact of her promise.[6] To the extent she simultaneously creates a second sufficient reason—liability in the case of breach—the first reason does not work, or there is no way for the independent sufficiency of the first reason to manifest itself objectively.

Similarly, when making a private promise, the promisor gives the promisee ground for belief that the promisor will perform: again, the fact of promise. To the extent the promisee is given independent assurance of performance, she cannot objectively rely on the fact of promise alone. Because private promises, but not all promises, are intended not only to assume obligation but to communicate the reordering of interests in which that obligation consists, it is important for the reasons created by private promise to do observable work for both promisor and promisee.

Some contractual promises coexist with private promises of the same content. But their coexistence is uneasy, because invoking the specter of the law undermines the moral commitment contained in a promise from the perspective of both promisor and promisee. The content of that commitment is possible only within a close personal relationship. It entails a combining of interests that were previously separately held by promisor and promisee. In a private promise, the promisor undertakes to give the promisee's relevant interests weight equal to or greater than her own. Contract, by contrast, turns on the separateness of these interests. The specter of legal liability creates a reason for performance that stems from the separateness rather than the unity of interests between promisor and promisee. A sincere intent on the part of the promisor to perform for reasons unrelated to legal obligation does not dissipate this tension any more than a sincere intent on the part of the more powerful party in a dispute to resolve that dispute fairly would render her unilateral decision just.

The tension between contracting and private promising is evident when one considers which commitments usually take the contractual form. The typical contract is a commercial, arm's length bargain, and those are the agreements the law most readily recognizes as contractual. The law is reluctant to enforce commitments made within the context of personal relationships, i.e., in precisely those contexts in which one would expect private promise to reign. To the extent contract liability—and not the unity of interests accomplished by promise—might either motivate the promisor to perform or assure the promisee of performance, any accompanying personal promise is corrupted.

My aim is not to characterize private promise as more valuable than contract, but rather to suggest that by appreciating the difference between them, we can better mark the appropriate domain of contract law. I hope to offer an account of the relationship between contract and private promise that better accounts for everyday practice and intuition, as well as existing law. But as our practices and intuitions regarding promise vary considerably, and as the principles motivating various legal rules are ambiguous, my purpose is also to offer an attractive model of contract's relations with related promissory practices with which we can critically assess doctrine. We can then refine doctrine to better support valuable moral practices and to undermine morally repugnant ones.

To a large extent, existing rules already wisely limit the application of contract law to most private promises. Where overlap with the domain of private promise is justified, as in the regulation of marriage, appreciating the tension between private and legal promise may help explain why the justified extension of contract has been difficult to achieve in practice.[7] It also suggests that we can mitigate the conflict between private and legal promise by minimizing their overlap. This can be done in part by limiting the remedies for breach to ones that the private promise did not contemplate. In the context of personal relationships, this justifies the award of reliance damages rather than either expectation damages or specific performance. Reliance damages redress the injury inflicted by breach of the promise, in which the state may have a legitimate interest, but do not have the effect of either coercing performance or rendering the promisee indifferent to performance.

In other contexts, the distinction between private and legal promise calls for an expansion of the domain of contract. For example, promises made in the context of radical inequality in power, as in most employment circumstances, are often located outside the law. A promisor with vastly superior bargaining power need not promise in the contractual form in order to induce the desired conduct by the promisee; the promisor has no incentive to submit the unequal relationship to legal authority. "Downward" promises between hierarchically situated persons are not easily enforced by the state. Thus, performance of those promises usually remains at the discretion of the promisor. Such promises are false private promises. To the extent we see the depersonalization of the employment relationship as an important achievement of the liberal market economy, this account clarifies one task of contract law: the displacement of private promise in the realm of employment. Contract law should bend over backwards to bring such promises into the fold.

Managing Moral Risk: the Case of Contract

112 Columbia Law Review 1878 (2011)

Moral luck describes the effect that events outside our control have on the normative upshot of our actions, or at least how others credit and blame us for those actions.[1] Our ordinary actions are subject to ordinary luck, in that events outside of our control determine whether those acts ultimately increase or decrease our wealth, well-being, or happiness. These ordinary actions are also subject to moral luck, in that events outside of our control determine whether these actions improve or detract from our standing as moral agents. Ever since Bernard Williams and Thomas Nagel first introduced the concept of moral luck, scholars have debated whether it exists and, if so, how devastating it is for longstanding conceptions of morality.[2] Legal scholars have debated whether the concept of moral luck poses fundamental challenges for tort law[3] and criminal law.[4]

This Essay considers how we deal with moral luck—not theoretically, or psychologically, but in the course of individual and collective action. Accepting that moral luck is indeed a fundamental challenge to the common

and deeply held belief that morality ought not to be subject to luck, it suggests that political and legal practices already limit the ways in which, as Williams and Nagel argue, moral standing is in fact subject to luck. Just as individuals navigate uncertainty as to the material outcomes of their actions when they choose to take ordinary risks, they anticipate the uncertain moral repercussions of their actions when they assume what this Essay calls moral risk. This Essay proposes that legal rules and other institutions help manage the risk that actions of contracting parties will result in negative moral responsibility.

The law helps manage moral risk in contract. Background institutions—such as distributive tax and transfer regimes, mandatory insurance and insurance regulations, and bankruptcy protections—provide a social safety net, or social insurance, that tempers the material risks that individuals face in the labor and capital markets.[5] This has the effect of attenuating the range of outcomes that contracting parties may experience, that is to say, background institutions limit the consequences of individual transactions, or their cumulative effect, on each of the contracting parties. For example, when the system works, an employer can set employment terms with reference to the labor market without worrying about whether compensation will be adequate to support a decent standard of living for a given employee in light of her particular, evolving needs. By lowering the stakes of contract, background institutions mitigate the moral risk to each party that her dealings with others will render her responsible for their misfortunes.[6]

While background institutions reduce the risk that contracting on a given set of terms will result in negative moral responsibility, contract law itself helps mitigate the risk that post-contract events will make it rational for a party to breach or request modification. By opting into contract, parties help frame the choices they may face should circumstances make breach attractive to them or cause the other party to request modification. Choosing contract over extralegal promise, and thereby subjecting themselves to the prevailing regime of contract remedies, limits the economic harm that parties might later be tempted to inflict should they pursue their economic interests at the expense of their contracting partner. For example, a factory owner who promises to deliver widgets to a retailer by a fixed date may learn of an opportunity to redirect her resources to a more lucrative order. In the classic efficient breach analysis, an expectations damages award will usually cause the producer to breach his initial promise to deliver widgets if and only if her increased gains from the alternative widget contract exceed the losses of her initial contracting partner, which she will have to cover.[7] But one may also characterize the damages rule as making it possible (and easy, relative to other possible default rules) for the factory owner to manage, at the time of her initial promise, the moral risk that she will later be tempted to break that promise. By entering a legally binding commitment subject to the expectation damages rule, she makes it less likely that she will inflict economic loss on her contracting partner should new opportunities arise that cause her to regret their initial contract. The economic harm that the availability of damages protects against may not constitute the core harm that results from ordinary promise breaking, but it is the key harm of concern in connection with breach of commercial promises.[8] In tying parties' hands through contract, the law not only facilitates credible commitments among business partners but also keeps their material and moral interests in rough alignment.

The contract law doctrine of impracticability makes it easier to decide—from a moral point of view—how to respond to another party's request to modify contract terms. Contract makes it possible for a party to escape their obligations in those cases where the other party's refusal to modify would be most damaging to them, which in turn makes it difficult for the other party to avoid modification in circumstances where it would be most morally appropriate.[9] The result is to make less morally hazardous the decision whether to acquiesce to a request for a modification of the original agreement. For example, if a contractor seeks a price adjustment due to unforeseen difficulties that would subject her to a substantial loss at the contract price, a homeowner may acquiesce to an appropriate adjustment in part because the homeowner's legal

remedies should the contractor breach are at least uncertain.[10] Contract rules governing changed circumstances—rules that the homeowner and the contractor adopted by entering a contract and by not specifying alternatives where possible—relieve the homeowner of the choice to impose substantial losses on the contractor. The psychological consequence of one's ability to manage moral risk is to temper the moral salience of decisions in contract.

This Essay does not suggest that social policy or contract law itself is directly motivated by a desire to manage moral risk. Complicated institutions are variously motivated, and perform a still greater variety of pragmatic and moral functions. The purpose of this Essay is to explain the notion of moral risk, locate it in the practice of contract, and demonstrate how it is already managed by existing institutions. Moral risk generally, and in the context of contract in particular, has been easy to overlook precisely because of the background work of large social and legal institutions that are usually associated with other purposes. When those institutions effectively limit the harm done to others, individuals are less likely to dwell on those potential harms in the course of everyday decisions, including choices made in the course of contract.

Part I describes the problem of moral luck and the possibility of managing moral risk. Part II considers whether moral luck can survive consent by the very person whom one is "at risk" of wronging. Part III identifies the ways in which moral risk operates in both contract formation and contract performance. Finally, Part IV discusses how social institutions and contract law in particular help manage moral risk. Part V concludes.

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IB. Taking Moral Risks

This Section begins with two observations about the operation of moral luck. First, moral luck is not necessarily a matter of luck per se, but rather luck from the perspective of the individual upon whom it acts in a given instance. Discussion of moral luck is generally focused on natural luck, that is, noninstitutionally generated or controlled sources of luck, such as whether a pedestrian embarks on an ill-fated street crossing, whether a child drowns in running water, or whether a gun misfires.[11] But moral luck is often traceable to factors that are morally arbitrary in their particular interventions in the lives of individuals, but are in fact systemic.

For example, whether one hits a person as a result of reckless driving is, in part, a function of natural luck, but the full outcome of one's recklessness—which the concept of moral luck acknowledges as relevant to its ultimate moral salience—will turn on traffic laws, traffic enforcement, pedestrian norms, the healthcare system, and the insurance or other benefits available to those dependent on the victim. All of these latter factors are morally arbitrary from the standpoint of an individual's agency, but they help determine whether the driver has committed a minor or grievous wrong. What is notable but generally overlooked is that none of these factors is truly arbitrary. Each is the function of collective decisions about how social institutions should function. Some, but not all, of the relevant institutions are engineered by legal rules.

The second observation about moral luck is that, precisely because moral luck is pervasive, where the potential moral upshot of an action is especially salient, one anticipates its uncertain effect on one's act. Individuals anticipate this uncertainty much as they anticipate—and incorporate into their decision to act—other uncertainties relevant to the merits of their actions. Such considerations include whether one is likely to succeed in accomplishing an act as envisioned and what its amoral consequences could be. Examples of moral luck in the literature tend to be cases of bad moral luck that hit a moral agent like lightning (suddenly, someone runs into the street, rendering everyday negligence morally shattering), or good moral luck that goes unacknowledged (everyday negligence occurs, no one is killed, and no lucky stars are thanked).[12] But

moral luck normally operates at less extreme frequencies: The outcomes of our actions are unknowable, but the fact of uncertainty is known and appreciated.[13]

As a result, moral uncertainty is a factor in decision-making by moral agents. This insight is lost upon, or perhaps uncomfortable for, those committed to the priority of moral principles in decision-making, since that priority might be mistaken to require that no action that may result in unjustified wrong to another is permissible. But most people understand moral duties to require less; one must not impose unreasonable risks on others.[14] When a reasonable risk results in great harm to another, however, it is the insight of the concept of moral luck and related literature that one is nevertheless morally on the hook, or at least regarded as such by both oneself and others.[15] The result is that even when one acts reasonably, one acts knowing that one may commit wrongs, or at least incur negative responsibility. Individuals deliberately act in ways that expose them to moral luck, and this conscious negotiation of moral luck may be called moral risk taking.

Moral risk taking is the knowing undertaking of actions that may or may not result in moral opprobrium, which is to say, most actions. But the term should connote more conscious risk taking than the more fundamental concept of moral luck may allow. Every act is subject to moral luck. But only some actions are properly understood as entailing moral risk. When one takes moral risk, one understands that by engaging in an act or activity one is at risk of committing moral wrongs, and that fact of risk is part of one's ordinary calculations in deciding whether to undertake the activity, how often, and with what care.

C. The Possibility of Managing Moral Risk

If one bites the bullet and accepts the existence of moral luck, it cannot be denied that luck matters to moral judgments. But one can maintain that luck ought not to matter. That is, it is morally attractive to minimize the extent that luck determines the moral quality of actions. To concede that luck matters is not to concede that it is not a matter of degree, and that whether its role is greater or smaller matters morally. The Kantian picture of morality is attractive in part because it draws on the intuition that an individual should be able to control her moral status. This may be an ideal that cannot be actualized, but it also serves as a guiding principle that weighs in favor of promoting certainty. Certainty is created by developing protective mechanisms, whether private insurance, social insurance, or safety belts. All of these make the accidents we cause less calamitous for those we injure. They truncate the wild card variable of outcome in moral judgments of action.

…

Note that the idea that one can mitigate moral risk follows from the critical insight that outcomes matter to the moral character of action. A moral framework in which the morality of an action turns entirely on the agent's mental state—will, intention, or purpose—does not allow for social instruments to elevate or detract from individual morality (except, perhaps, through the inculcation of virtue). But moral luck paints a picture of morality in which outcomes matter morally to the agents that set in motion causal chains culminating in those outcomes. This opens the door to the possibility that the state enhances individual morality (with or without that purpose) not through persuasion or incentives, but through policies that make the potential negative consequences of certain kinds of individual action more predictable and less devastating. Consider Williams's well-known early example of the moral luck of the artist Gauguin: The moral character of Gauguin's abandonment of his family depends not just on how his art turns out, but also on what befalls his family. A welfare state that renders his absence emotionally but not financially disastrous would mitigate the magnitude of his wrong. Similarly, if the moral character of leaving a baby in a running bath depends on whether the baby survives, safe baby bath seats that make it less likely that water will ever reach the baby's mouth could make less terrible the baby's brute luck and also dampen her caregiver's bad moral luck.

That moral luck can be reduced seems counterintuitive only because the concept of moral luck has not fully dislodged the Kantian notion that morality is immune to the vagaries of the tangible world. But moral luck is only a problem to the extent that it has chipped away at that picture, and it is precisely to that extent that moral luck is open to mitigation by the banal instruments available in the concrete world of contingency, including instruments of law. One can use law to mitigate the moral risks that one assumes.

The real question is when and how the law should attempt such mitigation. As a general matter, because moral wrongs and moral responsibility arise in the context of injury to others, moral luck is the wrongdoer's counterpart to her victim's brute luck. Thus, because individuals are responsible for less calamity when calamities are prevented, institutions that mitigate brute bad luck similarly mitigate the moral luck of those whose actions set in motion the course of events that would otherwise have ended in calamity. Straightforward reduction of brute luck is unproblematically morally attractive; the dilemmas relate largely to cost. But sometimes the attainable alternative to reducing aggregate brute luck—and corresponding moral risk—is to distribute brute luck more evenly. For example, the law may reduce the aggregate loss associated with accidents that cause disability by promoting employment opportunities and nondiscrimination against disabled persons (thus limiting avoidable waste of human capabilities), but it cannot totally eliminate the economic loss associated with some disability. A welfare state that pools the (substantial) residual economic loss through a broadly funded benefits program effectively pools the brute luck that each of us may be in a disabling accident. Similarly, it may be undesirable (or prohibitively expensive) to prevent individuals from suffering economic loss as a result of contracts in which they assume risks that subsequently materialize. But it may be morally attractive (and possibly economically beneficial, though that is not of concern here) to limit the severity of those losses through the tax code and bankruptcy, or the personal consequences of such losses through the welfare state. Either policy response effectively pools the brute luck of individuals in contract and thereby mitigates the moral risk of their contracting partners.

Of course, there are many reasons to pool brute luck. There are reasons of distributive justice, and there are humanitarian reasons stemming from the imperative to reduce suffering and improve the quality of individual lives quite apart from how those lives compare to those of others. But most institutions can serve more than one function at the same time; good reasons for pooling brute luck coexist with good reasons for mitigating moral risk. This Essay's claim is not that one can explain the existence of any particular institution by reference to the desire to manage moral risk, but rather that one can understand some institutions as performing such a function. Some background social institutions systematically mitigate moral risk by pooling brute luck across all residents. One can opt into and use other institutions, like contract, as a tool with which to manage individual moral risk. The centrality of outcomes to the operation of most legal rules may clash with an ideal of pure moral agency, but it also makes possible a brand of collective agency that improves the quality of individual moral lives.

Endnotes

Separating Contract and Promise

1 See generally CHARLES FRIED, CONTRACT AS PROMISE (1981).
2 See Daniel Markovits, Contract and Collaboration, 113 YALE L.J. 1417, 1448 (2004) (arguing that "[c]ontract presents a special case of promise" and that contract is a "class of promises").
3 See generally Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 HARV. L. REV. 708 (2007).
4 Id. at 721.
5 [citation omitted]
6 [discussion omitted]
7 My argument for avoiding the enforcement of private promise addresses only "promissory" theories of promissory estoppel, not reliance-based theories. Reliance, or harm-based, considerations are among the public policy reasons that should motivate enforcement of certain kinds of private promise.

Managing Moral Risk: the Case of Contract

1 See THOMAS NAGEL, MORTAL QUESTIONS 24–38 (Canto ed. 1991) (defining concept of moral luck and exploring challenge it poses for Kantian moral theory); Bernard Williams, Moral Luck 20–39 (1981) (same). Together, these works introduced the concept and founded the literature on moral luck.
2 [citation omitted]
3 [citation omitted]
4 [citation omitted]
5 [citation omitted]
6 See infra Part IV (suggesting background institutions mitigate moral risk inherent in contract formation by providing social safety net).
7 [citation omitted]
8 [citation omitted]
9 See Restatement (Second) of Contracts §§ 89, 261–68 (1981) (outlining circumstances under which performance of promise is difficult or impossible). Section 261 holds that a party's obligation may be discharged if 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." Id. § 261.
10 Consider a contractor who asks a homeowner to increase the contract price to $12,000 from $10,000 because the poor state of the existing plumbing will require a variety of pipes to be replaced before the planned work can proceed. The expected duration of the work was not specified in the written agreement. The contractor may have been in a better position to appreciate the significance of existing conditions, but the homeowner was in a better position to know of conditions behind a wall. It is therefore unclear whether the contractor could successfully avoid the contract on the grounds of mistake of fact or some variety of changed circumstances. The possibility that the contractor may escape liability for breach makes it more likely that the homeowner will acquiesce to some modification that pools the harms associated with the poor quality of the existing plumbing.
11 [citation omitted]
12 [citation omitted]
13 [citation omitted]
14 [citation omitted]
15 [citation omitted]

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The Political Economy of Mandatory Terms

Voluntariness and Contract Interpretation

Parallel Contract

Contract as Procedural Justice

Contract and Distributive Justice (invited book chapter for PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, eds. G. Klass, G. Lestas & P. Saprai, OUP)

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Unequal Promises, 72 UNIVERSITY OF PITTSBURGH LAW REVIEW 467 (2011)

Separating Contract and Promise, 38 FLORIDA STATE LAW REVIEW 707 (2011) (excerpt in PERSPECTIVES ON CONTRACT LAW (Randy Barnett, ed. 2009))

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Nestor Davidson

Property law scholarship has been experiencing a significant revival in recent years. Prominent among the current generation of property scholars is **Professor Nestor Davidson**, whose incisive scholarship on property, land use, local government law, transactional lawyering in the public-private context, and affordable house law and policy has earned him a reputation as one of property law's most original thinkers.

Davidson came to Fordham Law from the University of Colorado Law School, where he won the Jules Milstein Faculty Writing Award in 2008 and established the Property Works in Progress Conference, a recurring event that allows top property law scholars from around the world to share their scholarly work. At Fordham Law in November, Davidson launched the Urban Law Center, a locus for understanding and affecting the legal system's place in contemporary urbanism. Before becoming a professor, Davidson practiced with the firm of Latham & Watkins and served as Special Counsel and Deputy General Counsel at the U.S. Department of Housing and Urban Development. He earned his A.B. from Harvard and J.D. from Columbia.

In "Property and Relative Status," Davidson argues that status—that is, relative rank or position—has been largely ignored by legal scholars examining property. It's no shock that status signaling through property is something that is closely associated with the upper strata of society, but Davidson explains that mass consumer culture has spread the status-associated quality of things to nearly every level of society. Davidson contends that property law might serve as a coordination mechanism—a method by which to moderate and even control the harms that can flow from the link between status signaling and property.

"Property's Morale" offers an alternative view of the expectations with which people approach property and the resultant apprehensions that might cause people to hesitate to invest, labor, or do a variety of other things that we classically associate with property. According to Davidson, the prevailing psychological portrait of expectations—that property law must protect settled expectations and that changes in law risk unsettling said expectations—has considerable intuitive allure as well as merit. But he contends that the portrait is distinctly incomplete. Davidson suggests that when uncertainty arises there are those who will be overly cautious precisely because the legal system will not be responsive. His article delineates this alternative psychological portrait, one that suggests a very different kind of expectation for the institutions of property to respect. Focusing merely on negative reactions to state actions that cause economic adjustments is, at best, a reductionist view of what expectations people might have when engaging with property. Davidson proceeds with the idea that dynamic, legal transitions responding to the alternative anxieties—unexpected market failure, external forces overwhelming the value of investments, undermined places in the community—have the chance to produce signals of positive legal change. Such change might be as encouraging as the deterrents that have been so well established: morale benefits every bit as distinct as the demoralization costs that have traditionally dominated the literature on property law and legal change.

Excerpts

Property and Relative Status

107 Michigan Law Review 757 (2009)

The iPod Nano comes in several colors, which for a time included dull industrial silver, as well as bright blue, green, pink, jet black, and red. Savvy iPod owners understood at a glance that these colors corresponded to amounts of memory—the black Nano, for example, having twice or four times as much as the silver—and, not surprisingly, to how much each model cost.

Suburban communities have long regulated land use to privilege single-family housing, typically with large minimum lot sizes, generous setbacks, and extensive floor-area requirements. Although this tends to generate an affluent homogeneity decried by planners and scholars, people are increasingly willing to take on unsustainable levels of debt and commute distances that would once have seemed unthinkable to be able to say that they live in such communities.

What do iPod colors and homes in far-flung, exclusionary suburbs have in common? Each is an example of the ubiquitous role that property plays in signaling relative status.[1] Despite a wonderful flowering of theoretical and empirical property literature in recent years, legal scholars have largely ignored this critical aspect of property. This Article accordingly brings to the fore status signaling through property, exploring its implications for contemporary property theory, and explaining the underappreciated role that the design and operation of property law plays in both reinforcing and undermining property's hierarchical signaling tendencies.

To understand these dynamics, begin with the proposition that property operates on several levels at once. On one level, property serves basic functions that are so familiar that we rarely pause to take note. Money enables exchange and investment; food provides sustenance; books entertain and inform; buildings shelter a myriad of significant and trivial aspects of life; and so forth. But all of these things—indeed all property, tangible and intangible—work in other ways at the same time. Property forms an underlying and important aspect of the self, helping to shape personality and individual autonomy. On yet another level, property serves as the connective tissue for communities, defining mutual obligations and setting the boundaries of social relations. All of this is well recognized and the bulk of our contemporary thinking about property falls roughly along these lines.

Property, however, does something else equally fundamental: it *communicates*.[2] In particularly potent ways, what we possess broadcasts information about who we are and, most importantly, who we are in relation to one another.[3] Most people are quite adept at sending and deciphering these signals, which can vary across cultures and contexts, often shifting rapidly in their significance and particular meaning. Thus, beyond practicality, personhood, and community, property plays an overarching role in shaping and reinforcing economic, social, and cultural hierarchies. Jet-black iPods and exurban McMansions might be great for playing music and keeping the rain out at night. They might also help us remember songs that are particularly meaningful in our family or play out the rituals of our neighborhood's daily life. But a large part of why these things exist in the particular way they do—and the value we place on them—comes from the status they are commonly understood to confer.[4]

This status signaling relates to but is ultimately distinct from the underlying material differences property generates.[5] An unavoidable consequence of any system of private property is that some individuals and groups will inevitably have more property than others. Much can be said about the particular patterns of inequality that flow from the structure of property rights at any given time and, conversely, the limits of redistribution consistent with any basic conception of private property. But property relates to hierarchy in a separate sense in the way that material possessions are not only unequally distributed, but also used to mark and reinforce status boundaries. A house in one neighborhood that is "objectively" quite similar to a house in another neighborhood in terms of square footage, distance to work, and other amenities may nonetheless carry entirely different social and cultural messages as a marker of status. Such signaling can be accurate or inaccurate, conscious or unconscious, with complex cultural, gender, and other variations—but the signal is an overlay onto actual material differences, and merits examination as a distinct phenomenon.

The concept of property as a signal for social hierarchy has an intellectual history stretching back to some of our foundational thinking on property and society. And status signaling through property continues to generate significant scholarly interest, sparking a rich contemporary literature in fields as diverse as psychology, sociology, anthropology, and economics, as well as in specialized areas such as consumer and cultural studies. This interdisciplinary scholarship, although grounded in somewhat incongruent methodological commitments and theoretical assumptions, can be read at the appropriate level of abstraction to yield several related insights. First, people communicate, in part, through consensually understood symbols that gain their meaning through the way people interact around those symbols. In this communication, property serves as an important locus for symbolic meaning. In a related vein, people tend to compare themselves to others as a way to understand themselves. Here again, property serves as a particularly powerful source of information for that comparison. And this comparative communication has clear and often negative consequences for people's incentives and behavior around property.[6]

These insights form a core framework for understanding status signaling through property that has direct lessons for contemporary property theory, offering both a more complete descriptive account and new grounds for normative concern. People's propensity to use property to signal status and the consequences of the resulting status races have long been seen as problematic in the popular imagination. Indeed, recognition of the moral anxiety these dynamics produce is at least as old as the biblical injunction against coveting your neighbor's possessions.[7] But unpacking this concern significantly complicates the central discourses that shape contemporary property theory, presenting potentially troubling counterpoints to what are often optimistic narratives in legal scholarship.

For visions of property that focus on incentives and resource allocation, status signaling can distort the function that property rights are said to serve. If people seek particular kinds of property and transact around property to satisfy what Richard McAdams calls relative preferences,[8] this may over-incentivize the production of, or investment in, status-related resources. These kinds of incentives perennially risk misallocation, both between the choice to invest resources in property and the choice not to, and between status-related versus non-status-related resources within the realm of property. Likewise, status races around property may obstruct bargaining about property because relative status may be as important to the parties as any underlying material benefits to be obtained by the exchange. And to the extent that property is invoked as a proxy for utility maximization—material resources as a measure of welfare—the shifting preference satisfaction generated by comparisons through property may undermine welfare gains associated with the accumulation of property. Simply put, there is increasing evidence that beyond a basic level, more property does not necessarily yield more well-being.

Next, status signaling also complicates any unalloyed veneration of property's role in shaping and bolstering individual identity. If a central aspect of property is the competition and instability that flows from defining one's sense of self by comparison to the possessions of others—a protean measure at best—then property may have as much potential to warp personhood as to foster it. The need to match or conform to or even react against the property of others can entangle this role for property in an ever-changing and in many regards inauthentic feedback loop. Status signaling through property may accordingly invest people's relationship with material things with a potentially dysfunctional regard for other people's property.

Finally, the very interconnectedness reflected in social-relations conceptions of property may reinforce the institution's capacity to fuel competitive consumption and undermine the communitarian benefits of property. If individuals are deeply conscious of the possessions of others, particularly those in relatively similar material circumstances, the links that property creates may serve as an engine for the communication of comparative positioning. Between communities, moreover, status signaling through property can widen the gulfs material inequality generates. It may be, then, that the more we are bound together through property, the more problematic relative status becomes.

Just as legal scholars have left the phenomenon of status signaling through property under-theorized, scholars in other disciplines have been generally uninterested in the role law plays in that phenomenon. In reality, there are a number of intersections between status signaling and the legal institution's ground-level design. Property law at times gives state sanction to, or provides the legal underpinnings for, the hierarchical tendencies at work in status signaling. This is evident in intellectual property, land use, real estate, and mortgage law, among other areas, where law variably reifies status, gives it shape, or provides the conditions to facilitate status races.

Conversely, law at times makes status more fluid, creating anxiety but also opportunity. Ambivalence about status signaling is evident in the structure of property doctrines such as rules on restraints against alienation, limits on commodification, involuntary transfers through eminent domain and adverse possession, and other areas where a change in legal relations corresponds to a change in symbolic meaning. In each of these areas, as the law loosens the grip of status, it also provides tools for new hierarchies to emerge.

It is important to avoid the simplistic temptation to think that tinkering with the structure of property can significantly change underlying individual and cultural norms.[9] Nonetheless, recognizing the intricate intertwining of doctrine and status signaling suggests that the design of property law may be a way to temper some status races. Scholars have largely focused on tax or penalty approaches—in essence reducing the fuel available for status races. It might also be possible to regulate the signals that property sends, but this would be a challenging role for the state. Property law, however, might serve as a coordination mechanism, serving as a kind of firebreak for status spirals. With appropriate caution, then, sensitivity to the status signaling consequences of doctrinal design can provide a lens through which to mold changes in property law to moderate what is normatively troubling about the phenomenon.

In the end, it should hardly be surprising that status signaling is bound up in why people seek property, how people allocate property, and what people do with property once they have it. It may, however, be counterintuitive that this aspect of property is gaining in significance. Status signaling through property has traditionally been associated with the upper strata of society—the top hat and tuxedo-wearing dandies so often associated with Thorstein Veblen's leisure class.[10] However, our contemporary mass consumer culture has spread the status-associated expressive qualities of things to almost all levels of society.[11] The mass nature of this competitive consumption draws on and at the same time feeds a deep well of status anxiety, even (and perhaps especially) in times of economic crisis.[12]

Property's Morale

110 Michigan Law Review 437 (2011)

Property law's approach to the life of the mind is unbalanced. One of the most enduring arguments deployed in favor of strong property rights is the imperative to protect the "settled expectations" of property holders.[1] This reflects the prevailing, often visceral, idea that the values inherent in our system of property—rewarding investment, promoting exchange, bolstering individual identity, and fostering community—are best served by long-term stability in a legal regime on which people can rely.[2] Concern with protecting expectation has taken root both in constitutional property law as well as in a variety of traditional doctrinal areas of property.[3]

Lurking beneath arguments for property's valorization of expectation lays a set of psychological assumptions about the anxieties that are sparked by legal transitions.[4] Changes in the law, for example, may raise fears of general instability—if the law changes now, the law may similarly and in unforeseen ways change again. Moreover, there is something palpably troubling about the unfairness of a process under which the state intentionally picks winners and losers. Finally, when the majority harms the property of a minority in a way that does not even out over time, such majoritarian abuse tells other owners that they, too, might be singled out. Frank Michelman famously labeled the disincentives flowing from legal transitions that unsettle expectations "demoralization costs."[5]

This compelling portrait of the psychology of expectations has been widely influential in legal theory and doctrine,[6] and has considerable merit.[7] It is, however, distinctly incomplete. As the aftermath of the recent economic crisis has painfully evinced—in which ordinary investors retreated from committing capital[8] and housing markets locked up in part because potential buyers were concerned about further market shocks[9] —other long-term concerns are vitally important when people decide whether and how to approach property. These concerns reflect anxieties that mirror what demoralization assumes. Thus, some people fear that when uncertainty arises, the legal system will not be responsive. Likewise, some people need to know that when circumstances change, there will be a fair process of adjustment. And those facing private exclusion at the hands of a majority may be concerned with whether there will be an adequate remedy. These animating anxieties essentially focus on whether law will respond or stand idly by when events beyond the control of owners threaten the value of their property.[10] For some people, then, it is the very risk that a legal transition might not be forthcoming that will cause them to be cautious.

This landscape of concerns finds support in behavioral and psychological literature on decision-making and risk. Experimental and observational work, for example, has documented that people tend to respond to certain negative events by overcompensating toward risk aversion. Psychological research on procedural justice has further underscored that perceptions of fairness and systemic legitimacy are important determinants when people contemplate engaging in an activity. And there is empirical support for the proposition that signals of exclusion, explicit and implicit, can disincentivize and marginalize those receiving such signals, again making them hesitate before committing.

This alternative psychological portrait suggests—and it is the work of this Article to delineate—a very different kind of expectation for the institutions of property to respect. As much as people worry about instability, unfair singling out, and majoritarian exploitation, people are also concerned about responsiveness, fair adjustment, and inclusion. In other words, some people are motivated to engage with property not because they take comfort that the law will not change but rather because they know at the outset that the system will be flexible. As a result, legal transitions can communicate to those people that the boundaries of risk

inherent in property have reasonable limits; that society will, however imperfectly, provide processes to mediate competing property interests; and that the system of property will protect those perceived to be outsiders. In short, for some people, demoralization costs have an underappreciated obverse in what this Article calls "morale benefits."

Descriptively, sending signals that resonate for expectations of flexibility is an important part of what the legal system is doing unintentionally much of the time when it muddies supposedly crystalline rules.[11] In any number of areas, legal institutions are confronted with changed circumstances arising from new understandings of harm or new opportunities, and the law shifts to accommodate these changes, even at the cost of unsettling previous reliance. This dynamism in property is often understood to reside in the realm of ex post adjustment and reinterpretation of rights. But these shifts can also be understood as sending an ex ante signal to those who value flexibility—an important psychological consideration to bolster confidence.[12]

Understanding morale's role leads to a broader palette of interests for courts to consider when approaching questions of expectation. The prevailing focus on one type of expectation and the demoralization that follows its transgression present a fundamentally inaccurate picture of the "ingrained habits of mind"[13] that inform the choices people make in approaching property. A more balanced perspective would not render reliance on legal rules less salient but would mean that courts evaluating the costs and benefits of legal transitions would recognize the inherent tradeoffs in choosing traditional expectations of certainty over expectations of flexibility. Similarly, a morale lens can illuminate otherwise puzzling aspects of regulation that are as much about signaling responsiveness and systemic strength as they are about correcting specific market failures.

Normatively, recognizing that morale benefits counterbalance demoralization costs gives a conceptual vocabulary for reshaping our understanding of expectations. Any owner can potentially be not only the victim but also the beneficiary of legal change, and the legal system should recognize the inherent reciprocity of expectations that this implies. Accordingly, the ex ante signal of flexibility, rather than being orthogonal or even adverse to the structure of decision-making about property, may stand at the legal system's core.

This Article, in short, argues for a recalibration that recognizes the ways in which both stability and dynamism are important at the outset when people engage with property. This understanding points toward a richer vision of what is necessary to foster confidence in the conditions under which work, investment, and creativity are rewarded; personal and community attachments take place; and the rest of what our property system seeks to encourage can flourish.[14]

…

Classically, property regimes create incentives to act and produce more property, which is a core justification for creating expectations of stability and then respecting them.[15] There is a tendency among some commentators to assume that people have fairly uniform instincts about property and will thus react uniformly to signals of legal change.[16] However, focusing on negative reactions to state actions that cause economic adjustments is at best a reductionist view of what expectations people might have when engaging with property.

The alternative anxieties suggest that when people contemplate working, investing, attaching, or joining a community they may be relying not only on the expectation that they will be left alone. People may also need to know that if markets fail in unexpected ways, external forces overwhelm the value of their investment, or those with whom they have become bound up through property undermine their place in the community, some avenue will exist for adjustment and response. Given that dynamic, legal transitions that respond to these concerns have the potential to generate signals of positive legal change as motivating as the disincentives that have been so well recognized—morale benefits every bit as distinct as demoralization costs.[17]

…

Recognizing morale benefits has theoretical consequences for the dichotomy between up-front certainty and after-the-fact flexibility, adding a new variable to the ex ante expectationalist calculus.[18] A critical question in legal transitions that affect property is how to distribute the costs of redirecting economic resources.[19] In answering this, it is important to pay attention not only to the opportunity costs of those dispirited by change but also to the benefits of those motivated by responsiveness.[20] The standard tradeoff has long been seen as a conflict between individual harm and social gain, which is true, conceptually.[21] But instead of weighing only the disappointment suffered by those "disturbed by the thought that they themselves may be subjected to similar treatment,"[22] the signal of flexibility sent to other owners or those potentially engaging with property bears consideration as well.

The kind of security that boosts morale through signals of responsiveness similarly provides a new way to assess the perennial tension between rules and standards—crystals and mud—in the property context.[23] Expectationalism classically privileges the crystalline side of the ledger in property,[24] and ex post adjustment embodies supposedly hard-to-plan-for standards.[25] There has been a decided shift in the discourse toward the rule-oriented end of this perennial balance,[26] but the ex ante value of the communication of a stable landscape only responds to a part of what owners may expect. The possibility for morale benefits underscores that the existence of standards may itself be a critical motivator where the need for adjustment may reasonably be anticipated.[27]

To be concrete, just as some legal transitions are likely to raise particularly significant demoralization costs,[28] it is possible to imagine contexts where morale benefits may be especially salient. For example, during periods of volatility, particularly where systemic risk is hard to manage (as in the aftermath of a general economic crisis), responsiveness may be particularly important. In that context, intervention that adjusts property rights may incentivize people contemplating engagement who are overly risk averse in reaction to market failures.

Similarly, signals of flexibility may resonate where property arrangements are likely to be long lasting and transaction costs are likely to undermine the ability to bargain for flexibility when needed. Thus, a lender who understands that the foreclosure practices of other lenders may undermine the value of their collateral and also realizes that there will be times when there is no practical market mechanism to influence that negative spiral may draw comfort from the fact that the government can provide a firebreak if necessary. Collective action problems are endemic to property, and the signal that there is a reasonable prospect that the legal system will find a way to facilitate solving those problems may be an important variable in deciding whether to undertake a given risk.

Finally, in situations where property is particularly embedded in a web of connected relations, as with the decision to join a partnership or a neighborhood, it may be critical to know that there will be an avenue for intervention, if needed, in the event of overly risky or invidious actions by others closely linked through property. Owners may feel vulnerable to exogenous risks where interconnection is most palpable, and knowing that the legal system can respond to ensure equal treatment may be an important ex ante consideration.

In many conflicts, traditional expectations of stability may outweigh any expectations on the other side, but there will also be circumstances when the opposite is true. Moreover, the types of people and institutions that might respond to the inducement offered by morale benefits may differ from those who would be demoralized by legal change. This can be a function of cultural preconceptions but also can reflect the sophistication and resources someone brings to bear in approaching property. It may be, then, that individuals contemplating putting their retirement in mutual funds or purchasers for whom homeownership may be

a rare and tremendously fraught transaction would be more motivated by the signal of a responsive legal system than hedge fund managers who essentially evaluate risk for a living. And there may be reasons why those with relatively little property feel the risk of the loss of that property more pointedly. In short, for some people, in some contexts—and perhaps more than might seem intuitively obvious at first blush—witnessing legal change can be reassuring, not destabilizing.

Endnotes

Property and Relative Status

1 Status is a notoriously expansive term, so it bears a moment to clarify at the outset how this Article employs it. Status in ordinary usage can simply, and neutrally, mean state or condition. Henry Maine, by contrast, famously associated status with the concept of a rigid place in society and the legal order, from which Western society has supposedly experienced progressive movement to "free agreement" as the basis for social relations. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 163–65 (photo. reprint 2007) (Frederick Pollock, ed., 10th ed., Henry Holt & Co. 1906). This Article, however, deploys status in a third sense—status as relative rank or position. For convenience, then, the Article will generally use "status" as a shorthand for this idea of comparative status.

2 See Carol M. Rose, Introduction: Property and Language, or, the Ghost of the Fifth Panel, 18 YALE J.L. & HUMAN. 1, 3–11 (2006) (discussing property as an expressive endeavor).

3 Property, of course, communicates many messages that are not related to status or hierarchy. See MARY DOUGLAS & BARON ISHERWOOD, THE WORLD OF GOODS 4, 9 (1979) (discussing the wide array of gestalt meanings that possessions can communicate, including finality, respectability, and privacy).

4 Property must be understood here both in the sense of material and intangible goods—the objects of property law—as well as property law itself. C.B. Macpherson, The Meaning of Property, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 2 (C.B. Macpherson ed., 1978) ("In current common usage, property is things; in law and in the writers, property is not things but rights, rights in or to things."); see also id. at 6–9. While it is the objects of property law that most often reinforce status, in a variety of ways property law itself drives status-related dynamics. Indeed, even where status signaling is primarily a question of material culture—the resource rather than the rules governing that resource—property law directly affects how that material culture is formed and relevant resources allocated.

5 See MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF 30 (1981) ("[S]tatus—or the ability to control meaning in one's community—has become, to a certain extent, independent of other sources of control and has taken on a life of its own. Wealth, political power, talent or physical prowess are still the stuff from which status is made, but one can maintain or even gain status by manipulating its symbols for one's own purposes. This is where the importance of things as status symbols lies."). In contemporary culture, status plays out across a variety of dimensions, although property remains an important definitional force.

6 The drive to make interpersonal comparisons and the tendency to do so through property are by no means universal or inherent in the sense that these aspects of personality and social interaction manifest themselves similarly (or even at all) in all individuals and all cultures. Moreover, there are important gender, age, life-cycle and other variations to these dynamics, as will be explored below.

7 Deuteronomy 5:21 (New Revised Standard Version) ("Neither shall you desire your neighbor's house, or field, or male or female slave, or ox, or donkey, or anything that belongs to your neighbor.").

8 Richard H. McAdams, Relative Preferences, 102 YALE L.J. 1 (1992).

9 See Kenneth R. Minogue, The Concept of Property and Its Contemporary Significance, in NOMOS XXII: PROPERTY 3, 8 (J. Roland Pennock & John W. Chapman eds., 1980) ("The simple idea that it needs only a change in some external thing (such as the structure of property rights) to transform the human condition is superstition lurking behind many treatments of the subject.").

10 THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Martha Banta ed., Oxford Univ. Press 2007) (1899).

11 JULIET B. SCHOR, THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER 7–19 (1998).

12 For a sample of the slew of recent popular accounts of current anxieties around status, see, for example, ALAIN DE BOTTON, STATUS ANXIETY 3–4 (2004), which describes status anxiety as "[a] worry so pernicious as to be capable of ruining extended stretches of our lives, that we are in danger of failing to conform to the ideals of success laid down by our society and that we may as a result be stripped of dignity and respect; a worry that we are currently occupying too modest a rung or are about to fall to a lower one," and NAN MOONEY, (NOT) KEEPING UP WITH OUR PARENTS: THE DECLINE OF THE PROFESSIONAL MIDDLE CLASS (2008).

Property's Morale

1 As John Lovett recently noted, "[M]ost property law observers would apparently agree that much, if not all, of property law is designed to create stable environments in which people can exercise predictable control over the tangible and intangible objects of value in their world and to exchange those objects within stable and predictable parameters." John A. Lovett, Property and Radically Changed Circumstances, 74 TENN. L. REV. 463, 475–76 (2007). But see Christopher Serkin, Existing Uses and the Limits of Land Use Regulations, 84 N.Y.U. L. REV. 1222, 1275 (2009) (arguing that "the history of property law in this country is the history of promoting increasingly intensive uses" of land, chattels, and ideas, as well as that the "guiding principle has not been maintaining stability but rather encouraging productivity").

2 Arguments for stability of expectations in the design of property law have played out across a variety of theoretical approaches. With utilitarian roots stretching back to Bentham and others, see Carol M. Rose, Property as the Keystone Right?, 71 NOTRE DAME L. REV. 329, 330–31 (1996), the argument finds contemporary expression in accounts of optimal ex ante incentives for investment as well as the information cost minimization and network benefits of stable entitlements. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 40 (8th ed. 2011); Abraham Bell & Gideon Parchomovsky, A Theory of Property, 90 CORNELL L. REV. 531, 538 (2005); Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 64 (2000). Focus on expectations has echoes as well in accounts that emphasize the need for stability to foster personal attachment to property, see Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 977 (1982), and undergirds some strains of relational approaches to property, reflecting the normative value of legal stability at the community level. See, e.g., Bradley C. Karkkainen, Zoning: A Reply to the Critics, 10 J. LAND USE & ENVTL. L. 45, 64–78 (1994); Eduardo M. Peñalver, Property as Entrance, 91 VA. L. REV. 1889, 1894 (2005).

3 For example, the extent to which legal transitions transgress owners' "distinct investment-backed expectations" is a central element of the prevailing Penn Central test for regulatory takings. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). Protecting expectations has also been invoked as a baseline for acceptable change to property rights under the Due Process Clause. See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring). Courts also regularly invoke expectations in certainty in nonconstitutional areas of property such as servitudes, trusts and estates, landlord-tenant law, and water law.

4 Legal transitions broadly refer to situations where changes in law raise the question of possible invalidation or compensation for existing entitlement holders beyond the strict retroactive application of new law. See, e.g., Holly Doremus, Takings and Transitions, 19 J. LAND USE & ENVTL. L. 1, 3, 11–12 (2003); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509, 515–16 (1986); Kyle D. Logue, Legal Transitions, Rational Expectations, and Legal Process, 13 J. CONTEMP. LEGAL ISSUES 211, 211–12 (2003). This Article likewise considers a variety of situations in which changes in law are understood to cause economic or other harm to property holders.

5 Demoralization costs, as Michelman describes them, reflect both direct "disutilities" from the realization on the part of an owner harmed by a legal transition that he will not be compensated and also, in a tone redolent perhaps of a Shirley Jackson short story, "the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion." Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214 (1967).

6 Michelman's concept of the demoralization engendered by legal transitions has had tremendous influence both on property theory and on the role of expectations in constitutional doctrine. See WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141–42 (1995) (noting that Michelman's account has "dominated the academic discussion of the takings issue for more than a quarter century"); Serkin, supra note 1, at 1255 (discussing the account's enduring influence and role in providing the intellectual foundation for the regulatory takings test that Justice Brennan articulated in Penn Central). For other Supreme Court takings cases invoking Michelman's analysis, see, for example, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992), and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982). The influence of Michelman's account has not been limited to real property. See, e.g., Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281, 322 (1970) (arguing that given creators' reliance on existing copyright law, "[t]he 'demoralization' costs of undermining these expectations may be considerable").

7 It is important to note at the outset that Michelman's exegesis of demoralization focuses on the question of compensation for legal transitions. However, the concept of demoralization has grown beyond this context and is now regularly invoked as an argument against flexibility in property.

8 There are obvious costs to venerating stability, and a number of scholars have challenged the normative implications of invocations of settled expectations in property law, emphasizing the need for the legal system to adjust property interests over time. E.g., EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 11 (2010) (emphasizing property's "need for dynamism, its ability to change and to fluctuate according to shifting norms, values, and social realities"); Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 61 (1964) ("The essence of property, as we actually use the term, is not fixity at all, but fluidity."). See generally GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 30–42 (1997) (discussing dialectics of stability and dynamism in early American property thought).

9 The risk of a significant pullback from equity markets by ordinary investors has been in the news in the wake of the recent economic crisis, even as overall equity prices have stabilized. See, e.g., Adam Shell, Could Investors Fleeing Stocks Become a Lost Generation?, USA

TODAY, Sept. 2, 2010, at 6A (discussing equity investor skittishness and fears of another "lost generation" of investors as with the Great Depression and the recession of the early 1970s); Robert J. Shiller, The Survival of the Safest, NEW YORK TIMES, Oct. 3, 2010, at BU7 ("In a broad sense, damage to morale—which John Maynard Keynes called 'animal spirits'—surely ranks as one of the most important reasons for the American economy's persistent weakness.").

10 See Editorial, Housing on the Brink, NEW YORK TIMES, Sept. 3, 2010, at A20 (discussing "paralysis in the housing market" as "reluctant buyers obviously outnumber willing ones"); Joe Nocera, Widespread Fear Freezes Housing Market, NEW YORK TIMES, Aug. 28, 2010, at B1 ("Essentially, every participant in the housing market has a reason to be afraid. And that fear is paralyzing.").

11 Cf. LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 184–87 (2009) (disaggregating the value in homeownership into consumption value, gains and losses internal to an owner's own investment, and gains and losses that reflect forces outside the household's control).

12 Cf. Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 578–79 (1988) (describing how crystalline rules have been muddied by "exceptions and equitable second-guessing," requiring courts or legislatures to later adopt new crystalline rules). Just as expectations in certainty refers to a range of reliance interests in existing rules, "expectations in flexibility" as this Article uses the phrase reflects related concerns about the anticipation of responsiveness, the fairness of adjustment, and assurances of equal treatment.

13 To be clear, not every legal transition will signal in the same way to the same people. Context, culture, the particular channels of communication, and the nature of the audience clearly matter. Moreover, some people may be more likely to respond to certainty, while others may be more likely to respond to flexibility. Thus, though some changes in the law may resonate more in terms of demoralization and others may resonate more in terms of morale, many have the potential to signal both.

14 Michelman, supra note 5, at 1209.

15 It is perhaps a truism that "property law—like all law—is based on assumptions about human behavior and cognition and emotion," Jeremy A. Blumenthal, "To Be Human": A Psychological Perspective on Property Law, 83 TUL. L. REV. 609, 611 (2009), but those assumptions are deeply influential and bear examination nonetheless. Indeed, in recent years there has been a wonderful flowering in scholarship exploring psychological aspects of property. E.g., Jeanne C. Fromer, A Psychology of Intellectual Property, 104 NW. U. L. REV. 1441 (2010) (drawing on literature exploring the psychology of creativity to distinguish creativity in science and engineering from artistic creativity); Jonathan Remy Nash & Stephanie M. Stern, Property Frames, 87 WASH. U. L. REV. 449 (2010) (drawing on experimental data involving cognitive framing to argue that framing property in "bundle of rights" terms and forewarning of limitations can decrease resistance to restrictions); Stephanie M. Stern, Residential Protectionism and the Legal Mythology of Home, 107 MICH. L. REV. 1093, 1099–1120 (2009) (citing psychological research to challenge prevailing conceptions of the role of home as property for personhood). For an overview of recent trends in this literature, see Jeremy A. Blumenthal, A Psychological Perspective on Property Law, 83 TUL. L. REV. 601 (2009).

16 See CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 55–56 (1994) (noting that the reason property gives people the expectations that form the basis for demoralization is that respect for such expectations is thought to generate more aggregate resources and goods); cf. Logue, supra note 4, at 215–20 (discussing transition policy as a question of private incentives). See, e.g., Merrill & Smith, supra note 2.

17 Expectationalist arguments shaped around responsiveness, fair process, and inclusion may have some traction in areas of intellectual property as well. After all, some creation of property in ideas involves concerns not only about reaping gains, but also about the environments in which creative output will live. Knowing that a work of art will be part of a system of creativity that balances the creator's interests with the need to support and contribute to other artistic work may be an important motivation and, if so, may be an important signal for the legal system to reinforce.

18 To model this based on Michelman's formula would involve adding a variable—M for "morale benefits"—to the equation. Under Michelman's calculus, for governmental actions where benefits (B) exceed costs (C), the action should not be taken if B – C is less than either demoralization costs (D) or settlement costs (S) (in mathematical terms, if (B – C) < min(D, S)). Fischel, supra note 6, at 146 (translating Michelman's argument into this formula). If this threshold is crossed, determining whether compensation should be paid requires taking the lower of S or D (so, act and compensate if (B – C) > S and S < D; act but do not compensate if (B – C) > D and D < S). Id. Adding M, then, would yield a threshold calculus of (B – C) < min((D – M), S) and a compensation calculus of (B – C) > S and S > D – M versus (B – C) > (D – M) and (D – M) < S. As noted, the concept of demoralization has expanded beyond the carefully delineated box in which Michelman placed it, morphing into a general concern about the destabilizing signal to the property system of legal transitions, compensated or not.

19 Michelman, supra note 5, at 1169 (noting that when "a social decision to redirect economic resources entails painfully obvious opportunity costs," the question is "how shall these costs ultimately be distributed among all the members of society"). This sentiment echoes the oft-stated proposition that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). For a discussion of the Armstrong principle and distributive norms in takings theory, see Nestor M. Davidson, The Problem of Equality in Takings, 102 NW. U. L. REV. 1 (2008).

20 Any argument that perceptions of risk should influence the nature of the legal response—for fewer exercises of eminent domain given the calculus of demoralization costs, for example, or conversely for a more consumer-oriented foreclosure regime given the calculus of morale benefits—has to further contend that perceptions of risk are not fixed and are subject to response. Cf. Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. REV. 630, 636 (1999) (discussing consumer risk perceptions as "determined or altered by the market contexts being analyzed").

21 And the "givings" or "windfall" literature has highlighted an element of the reverse of this proposition—namely, that when the state acts in a way that creates what might be called a "painfully obvious" benefit, there are arguments from efficiency and justice that would allow

society to socialize that gain. See, e.g., Abraham Bell & Gideon Parchomovsky, Givings, 111 YALE L.J. 547, 579 (2001); Eric Kades, Windfalls, 108 YALE L.J. 1489, 1496–97 (1999).

22 Michelman, supra note 5, at 1214.

23 See Rose, supra note 16; see also Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976).

24 Carol Rose stated as follows:

> If, as Jeremy Bentham said long ago, property is "nothing but a basis of expectation," then crystal rules are the very stuff of property: their great advantage, or so it is commonly thought, is that they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests.
>
> Rose, supra note 16, at 577 (footnote omitted).

25 Id. at 603 ("We call for mud and exceptions only later, after things have gone awry. . . ."). The rules versus standards debate tends to overstate questions of predictability and uncertainty. In practice, standards are applied within the confines of precedent, and rules can be distinguished.

26 See, e.g., Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. REV. 1719 (2004); see also HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 38–40 (2011) (discussing the resurgence of exclusion as "the regulative idea of private property" in the contemporary discourse). This is not to say that the ex ante perspective is ineluctably bound to rules and the ex post to standards—that is certainly not the case as a practical matter. Rather, it is simply to note that in the discourse of expectation and the calculus of the costs of legal transitions, the crystalline aspects of property law tend to take primacy.

27 In addition to altering the decisional calculus for legal transitions from a utilitarian perspective and placing counterweight on property's continued emphasis on the ex ante value of sharp, rule-like approaches, recognizing morale benefits can shift the valence of reliance in the Rawlsian terms in which Michelman reframed his analysis. It cannot be lightly assumed that when standing behind the veil of ignorance, potential owners might not contemplate that they would be in a position to benefit from active intervention and give some moral weight to a system that not only allows that intervention but also signals its potential in times of uncertainty.

28 Michelman, in a typology that anticipated much of the subsequent doctrinal development in regulatory takings, highlighted the particular psychic harms flowing from physical occupation of property, interference with "sharply crystallized, investment-backed expectation," and contexts where the benefits of a given public action are unclear. Michelman, supra note 5, at 1226–35.

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Ethan J. Leib

If the law makes accommodations for traditional family structures, why can't it be friendlier to friendships? As a noted expert in constitutional law, legislation, and contracts, **Professor Ethan J. Leib** recognizes the irony and challenges any conventional legal thinking. His most recent book, *Friend v. Friend: Friendships and What, If Anything, the Law Should Do About Them* (Oxford University Press), deftly probes the benefits of legal recognition of friendship. Three recent articles deal with timely public law subjects: one in the *Journal of Political Philosophy* examines fiduciary principles in political representation; another in the *California Law Review* applies the fiduciary principle to the activity of judging within democracies; and the third in the *University of Chicago Law Review* explores whether elected judges should be interpreting statutes differently from their appointed colleagues.

Before joining the Fordham Law faculty, Leib was a Professor of Law at the University of California–Hastings, served as a Law Clerk to Chief Judge John M. Walker, Jr., of the U.S. Court of Appeals for the Second Circuit, and worked as an Associate at Debevoise & Plimpton LLP in New York. He received a B.A., J.D., and Ph.D. from Yale, as well as an M.Phil. in political thought and intellectual history from Cambridge. His scholarship has appeared in such prominent journals as the *UCLA Law Review, Northwestern University Law Review,* and the *Yale Law Journal*. He has also written for broader audiences in the *New York Times, USA Today,* and the *Washington Post*, among other publications.

In "What Is the Relational Theory of Consumer Form Contract?" Leib searches for a more comprehensive approach to consumer form contracts, particularly those online. He suggests that the iterative loss of formalities (i.e., clicking links, scrolling too quickly, closing pop-up windows) complicates notice and consent issues. Leib contends there is no longer a "cautionary" moment for the consumer; in the past consumers paused before stamping signet rings or dipped their pen into an inkwell prior to signing a tactile agreement. According to Leib, professors who teach the law of form contracts have difficulty shoehorning these mass documents into the texture of doctrine that has traditionally accompanied more carefully negotiated agreements. Leib asserts that finding a comprehensive and systematic judicial approach to these instruments—which he says embarrass courses in contracts, as well as legal doctrines—is as urgent now as ever.

"A Fiduciary Theory of Judging" sheds new light on the basic structure of and justifications for liberal democracies, by anchoring the role of the judge in a centuries-old rubric that governs trusting relationships. Leib maintains there is a lack of conceptual clarity regarding the judge's relationship with "the people," and poses the following question: Are judges best considered "representatives" of the people in some form? The article outlines the argument for a judge-as-fiduciary model, which Leib says underscores, supports, and advances features of both judicial independence *and* judicial constraint, re-establishing a fundamentally democratic relationship between governed citizens and their judicial governors. According to Leib, a satisfactory theory of judging that adequately accounts for the diverse, and oftentimes conflicting, responsibilities of judges has yet to be uncovered.

Excerpts

What Is the Relational Theory of Consumer Form Contract?

In *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Jean Braucher, John Kidwell & William Whitford eds., Hart Publishing, forthcoming 2013)

One of the most puzzling and embarrassing facts about contract law and contracts scholarship in the United States is that neither has found a consistent way to treat the real contracts of our lives: standardized consumer form contracts.[1] We are all consumers and enter form contracts daily, more or less. Yet we teach, apply, and reinforce the law of contract in ways that keep it basically unsettled about one of the most common contractual practices our own consumers—litigants, clients, and students—experience. I have a hard time explaining to my students why the law has not fully reckoned with this most common contractual modality. Scholars have, of course, spilled much ink on the subject as a matter of theory. But when law professors teach the law of form contracting, they can barely keep a straight face as they try to shoehorn the consumer form contract into the texture of doctrine that occupies the course. Every case is an opportunity to reinvent the wheel, using a wide variety of spokes, usually built for different models of bicycle.

Admittedly, it is possible that we don't need a specialized law of consumer form contracts for the courts to apply. Maybe there is no problem in need of a solution.[2] We have muddled by for centuries with form contracts and we haven't yet rendered doctrinal analysis completely irrelevant—nor have we destroyed our ability to get our consumer needs met, legal uncertainty notwithstanding. Although the variety of tools available to courts for adjudicating disputes about form contracts is hardly systematic, the interaction of the common law, the market, and regulation by legislatures and agencies has produced a world where we perhaps only rarely have truly grotesque contract terms that screw the consumer. Moreover, the consumer probably knows that whatever those unread terms are, only a self-sabotaging company would rely upon them in an age where each consumer has a direct feed to thousands of "friends" who read her tweets, blog posts and Facebook updates about her displeasure with companies' customer service.[3] No company can prey any longer on those who don't read *Consumer Reports* or the federal and state reporters because we all see information all the time about company performance on Yelp! and other free comprehensive review fora.[4] Watching the early successes of Elizabeth Warren's work in overseeing form contracts in the financial products area[5] gives us a sense that even if we aren't fully paying attention, someone is actually representing our interests as consumers.

Notwithstanding this plausible story about there being no story to report with respect to consumer form contracts, it is likely that e-commerce has upped the ante from the early days of form contracting. We probably enter more and longer form contracts than we did before complicated terms could be hidden in scroll boxes no one scrolls through or behind links no one clicks. Companies probably have gotten savvier at contracting around regulations, capturing agencies that are supposed to be regulating them, circumventing common law limitations, and choosing their own laws, whether through form contracts that choose governing law or limit who may serve as the adjudicator of any dispute under the contract. The people who have the resources to shop for terms and/or complain are likely those who are getting better deals under their form contracts, leaving most people worse off and implicating equity and distributional concerns.[6] The progression (or regression) from short-term sheets in proverbial "plain English" that were actually signed to long forms in legalese that one gets in junk-mail folders, to box-top licenses, to shrink-wrap "agreements," to "pay now, terms later" offerings, to click-through "agreements," to browse-wrap "notifications" of terms has probably shifted some of the

ground, rendering consumers stunningly passive in their reception of terms. There is no "cautionary" moment[7] as there once was when we got to use our signet rings (or even our fancy ballpoints) to seal a deal. Even though deals have been offered by stronger parties to weaker parties on take-it-or-leave-it bases for a long while, the iterative loss of formalities probably exacerbates notice and consent issues. Clicking "I agree" is more like clicking a remote control's channel change button than it is a channeling function.[8]

The Supreme Court's recent decision in *AT&T Mobility v. Concepcion*[9] reminds us that there are still some pretty disempowering terms that make their way into the forms that purport to bind us as consumers, ones that really do infringe on one of the most basic rights we have as consumers: the right to turn to a local and public legal system when we feel we have been abused or cheated.[10] To be sure, we have unconscionability limits, clauses that are unenforceable because of "public policy," and some rules requiring conspicuousness and specific disclosure about particular terms to render them enforceable. But it is hard to resist the urge for a more comprehensive approach—an approach that allows us never to forget that it is a consumer form contract that courts are expounding.[11]

Although the ambition may seem grand, we must keep it in perspective. By now, virtually everyone agrees that courts can only fix bad consumer form contracts in marginal cases where some consumer (or his motivated class action lawyer[12]) really pushes the issue and the form provider decides not to settle for one reason or another, notwithstanding reputational incentives to do so. Many recognize that a systematic legal approach to consumer form contracts probably needs to come from legislatures and administrators, not the common law.[13] As Macaulay has taught us, contract law barely applies to consumers because it has largely been displaced by statutes and regulation.[14] Yet, those laws and regulations will have to be implemented by judges, and, given certain public choice and political economy realities,[15] it remains useful to help judges nudge the common law to confront these contracts of our lives. The feedback from these cases can help the regulators of the future too.[16] Even those sympathetic to law-and-economics approaches to consumer form contracts can often agree that "a measure of special legal treatment for standard form contracts is appropriate on economic grounds."[17]

But should anyone turn to relational contract theory to furnish a judicial approach for this special legal treatment? Let's be frank: Relationalism hasn't obviously had huge successes in changing the way judges do their work, at least in the U.S. Still, some features of relationalism have been vindicated through doctrine and have then been incorporated into prevailing neoclassical contract practice, like generalized good faith obligations and the fragmentation of the scope of contract law, which has parceled off sales, insurance, property, and products liability into their own bodies of law. Given that the reigning neoclassical paradigm had something to learn from relationalism's basic prescriptions, it is worth taking a fresh look at relationalism's approach to consumer form contracts to see if contract law might be further fragmented, enabling it to develop a targeted approach to the consumer form contract context. The nature of what that approach might look like hasn't been fully worked out; it is my intention here to mine relationalism to see if we can't find a more comprehensive and systematic judicial approach to these instruments. Doing this now—45 years after the publication of Stewart Macaulay's early effort to get to the bottom of the consumer form contracting problem from a relationalist perspective and nearly three decades after the publication of Ian Macneil's relationalist inquiry into the problem—seems as urgent as ever.

A Fiduciary Theory of Judging

101 California Law Review ____ (forthcoming 2013) (with David L. Ponet & Michael Serota)

There are some fundamental questions of jurisprudence that have been with us from time immemorial. Cardozo started the modern conversation about the role of the judge in American democracy,[1] but no one has been able to complete it. We have yet to uncover a satisfactory theory of judging that adequately accounts for the diverse, and oftentimes conflicting, responsibilities judges possess. Recent national controversies over judicial ethics at the Supreme Court, campaign contributions in state judicial elections, and the role of public opinion in judicial interpretation only underscore the growing urgency of clarifying the role of the judge.[2] What are the qualities of a good judge? What are the relevant normative guideposts for a judge in a democracy that should constrain or inform interpretation? What are the sources of ethics for judicial behavior and performance? This Essay seeks to break some new ground on these fundamental inquiries by proposing a fiduciary theory of judging.

Here are some of the quandaries that need to be addressed by a theory of the judge in a democracy. We know that judges owe certain duties to the litigants before them, and that they also have some responsibility to "the state" for implementing its laws. But responsibility to "the state" is impersonal—and the citizens of a democratic state may also reasonably demand from their judges direct attention and responsiveness. Democratic governance ultimately consists of a series of relationships between rulers and ruled, so even if judges routinely think of our government as one of laws and not persons,[3] self-government means precisely that laws must be traceable to citizens. It is, canonically, for judges to "say what the law is," but judges speaking the law must be held accountable if their rulings stray too far from the will of the people who authorize the judiciary to exercise this power. Yet, how to think about the nature of this accountability – thereby reconciling the principle of judicial independence with that of democratic responsiveness – is perplexing exactly because we lack a developed democratic theory of judging.

Although judiciaries exist in all democratic systems, there is a surprising lack of conceptual clarity regarding the judge's relationship with "the people." Are they best considered "representatives" of the people in some form, or are they "agents" for the legislature – the real democratic representatives? Better yet, perhaps judges can be understood as "trustees" of a kind: independent but constrained by loose precedent and the authorization to try to develop standards slowly over time, subject to impeachment or elections for accountability. It's also possible that the judicial role consists of elements of each of these ideas, in a constellation that has yet to be fully articulated. But can a judge be all three at once? Perhaps the answers to these questions are contingent upon whether the judge is presented with a constitutional, statutory, or common law question. And does the fact that a judge is elected or appointed, or is part of the state or federal system, change the analysis at all?

Of course, it may be that there is no unified field theory of the judge. Federal appointed judges with life tenure may differ materially from purely elective state judiciaries, who may differ from appointed judiciaries subject to retention elections. Supreme Court judges may differ from appellate judges under their charge, who may differ from trial judges.[4] An attempt to describe the judicial role in sufficiently general terms to encompass judicial responsibility in a democracy may, then, be a quixotic endeavor. Yet such a project remains worthwhile, possible, and of perennial interest. We pursue that quest in this Essay, suggesting an interpretive framework that can refine thinking about the nature of judicial action, while providing guidance on specific practical applications, such as judicial ethics and judicial interpretation.

In what follows below, we argue that there is a satisfying normative vision of the judicial role that can orient members of the judiciary – and the academics who study them – lost in this thicket. By turning to the principle of fiduciary relationships, we uncover a new perspective from which we can better understand the judicial role. Translating the fiduciary principle of the private law into a set of obligations for actors in the public law is well-grounded theoretically[5] and has historical provenance in the framing of the U.S. Constitution.[6] Once we effectuate that translation for judges in the political system, the Essay offers insight into what it means to be a judge in a democracy: the judge-as-fiduciary framework both confirms features of judgeship that seem obvious and central to the job, while providing a useful normative benchmark that can help guide some of today's most controversial debates about the judiciary. By rooting the role of the judge in a centuries-old rubric that governs trusting relationships, this Essay sheds new light on the basic structure of and justifications for liberal democracies.

This Essay proceeds as follows. Part I introduces the private law fiduciary principle and explores the virtues of thinking of public officials as public fiduciaries. Part II then applies the principle of the public fiduciary to the judiciary, arguing that the fiduciary model adequately captures key features of the judicial role; it also explores for whom judges are fiduciaries and when, as well as whether elected judges occupy a fiduciary status similar to that of their unelected counterparts. Finally, Part III focuses on the obligations that bind judicial fiduciaries. The judge-as-fiduciary model, we will argue, underwrites a judicial duty to avoid conflicts of interest (the duty of loyalty); it reinforces a duty to take care in deciding cases (the duty of care); it explains a basis for judicial immunities (an outgrowth of the duty of care); it suggests disclosure, accounting, and candor duties; and it likely requires judges to consider the people's views about matters of public concern.

This last lesson of the judge-as-fiduciary model can help adherents of various forms of "popular constitutionalism" understand the mechanism by which judges may – as part of their appropriate judicial role – remain responsive to social movements and public opinion. Popular constitutionalists routinely argue that judges often follow the "court of public opinion" as a positive matter, but they have been less clear about the ways in which the partnership between the people and judges ought to function. The public fiduciary obligation of "deliberative engagement" illuminates the mechanism by which public opinion can become a legitimate source of authority.

Ultimately, the judge-as-fiduciary model we elaborate here underscores, supports, and advances features of both judicial independence and judicial constraint. Although the methods of judicial appointment, cycles of partisan entrenchment, impeachment threats, and judicial elections seem to be independent sources of and causes for judicial accountability, once the judge is understood to be a fiduciary, all of these traditional accountability mechanisms can be seen in a different light: as part of a matrix designed to enforce judicial fiduciary obligation. The judge-as-fiduciary model, most importantly, re-establishes a fundamentally democratic relationship between governed citizens and their judicial governors.

Endnotes

What Is the Relational Theory of Consumer Form Contract?

1 I focus here upon consumer form contracts rather than form contracts or "boilerplate" generally. O Ben-Shahar (ed), BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Cambridge, Cambridge University Press, 2007). Some B2B (business-to-business) form contracting raises similar concerns—but for the current paper, I am isolating consumer form contracts; I leave to others to analyze when B2B contracts should be treated similarly.

2 E.g., O Ben-Shahar, The Myth of the "Opportunity to Read" in Contract Law (2009) 5 EUROPEAN REVIEW CONTRACT LAW 1, 16 (arguing that customers want to be exploited through form contracts).

3 C Gillette, 'Rolling Contracts as an Agency Problem' (2004) 2004 WISCONSIN LAW REVIEW 679; and L Bebchuck and R Posner, 'One-Sided Contracts in Competitive Consumer Markets' (2006) 104 MICHIGAN LAW REVIEW 827 (together suggesting that companies may try to enforce unread terms only against opportunistic consumers who are trying to prey on the goodwill of the sellers or are trying to abuse companies' overly cautious standard practices by seeking favorable treatment they do not "deserve").

4 This fact might mitigate subsidization concerns by democratizing access to information about company performance under their contracts, leaving less of a worry that only sophisticates will benefit from better information. E.g., Ben-Shahar, 'The Myth' (n 2) (arguing that "it might well be that the advantages secured by [contract] readers would be cross-subsidized by non-readers' by providing consumers with an 'opportunity to read')."

5 E Warren, 'Unsafe at Any Rate' (2007) 5 DEMOCRACY: A JOURNAL OF IDEAS 8; O Bar-Gill and E Warren, 'Making Credit Safer' (2009) 57 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1.

6 Bar-Gill and Warren, 'Making Credit Safer' (n 5).

7 L Fuller, 'Consideration as Form' (1941) 41 COLUMBIA LAW REVIEW 499.

8 C Knapp, 'Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts' (2006) 40 LOYOLA OF LOS ANGELES LAW REVIEW 96, 117 n 71.

9 *AT&T v Concepcion*, 131 S Ct 1740 (2011).

10 One certainly needs to be industry-sensitive before making pronouncements about what sellers do in their forms, since forms seem to vary substantially by industry. D Schwarcz, 'Reevaluating Standardized Insurance Policies' (2011) 78 UNIVERSITY OF CHICAGO LAW REVIEW 1263; see also A Newitz, Dangerous Terms: A User's Guide to EULAs (White Paper, Electronic Frontier Foundation, 2005) (available at www.eff.org/wp/dangerous-terms-users-guide-eulas) (highlighting the many 'dangerous' terms that are still often found in consumer form contracts).

11 R Barnett, 'Consenting to Form Contracts' (2002) 71 FORDHAM LAW REVIEW 627, 639.

12 That lawyer might be motivated for pecuniary or ideological reasons; some legal services providers for indigent consumers don't actually work for the promise of large fees. Suspicion of plaintiffs' lawyers seems to drive at least some of the resistance to regulating form contracts through judicial review.

13 A Leff, 'Unconscionability and the Crowd—Consumers and the Common Law Tradition' (1970) 31 UNIVERSITY OF PITTSBURGH LAW REVIEW 349; A Leff, 'Contract as Thing' (1970) 19 AMERICAN UNIVERSITY LAW REVIEW 131; L Kornhauser, 'Unconscionability in Standard Forms' (1976) 64 CALIFORNIA LAW REVIEW 1151. There is some reason to worry about whether government regulation can dramatically improve the quality of terms in consumer form contracts. A Katz, 'Standard Form Contracts' in P Newman (ed), NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Houndmills, Palgrave Macmillan, 1998); I Macneil, 'Bureaucracy and Contracts of Adhesion' (1984) 22 OSGOODE HALL LAW JOURNAL 5, 25 ('The question is always: if the public bureaucrats get in there and mess with this … contract of adhesion, can the business still deliver the goods?').

14 S Macaulay, 'Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes' (1989) 26 HOUSTON LAW REVIEW 575.

15 Macneil, 'Bureaucracy' (n 13) 25.

16 The likelihood of the U.S. following the European Union's Unfair Terms Directive is, however, infinitesimal. J Winn and M Webber, 'The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants' (2006) 62 BUSINESS LAWYER 209; see Council Directive 93/13/EEC of 5 April 1993 (available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT).

17 Katz, 'Standard Form Contracts' (n 13).

A Fiduciary Theory of Judging

1 See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

2 There has been a resurgence of interest in theories about judicial character and role. See AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008); RICHARD A. POSNER, HOW JUDGES THINK (2008); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2009). For an engaging review of Powell, Posner, and Farber & Sherry, see Paul Horwitz, Judicial Character (and Does It Matter), 26 CONST. COMM. 97 (2009).

3 See, e.g., Marbury v. Madison, 5 U.S. 137, 163 (Cranch 1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."). For a stunning book-length meditation on this issue, see PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997).

4 For an important argument that statutory interpretation practices should differ among courts, calibrated to judicial hierarchy, see Aaron-Andrew P. Bruhl, Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court, 97 CORNELL L. REV. 433 (2012). For an earlier meditation on whether there can be unified theory in light of judicial hierarchy, see Barbara Herman, Comment on Gavison, 61 S. CAL. L. REV. 1663, 1663-64 (1988) ("If social role defines judicial virtue, one might well ask whether there is enough unity in the role across courts to provide useful content to the term 'good judge.' If there are radical differences, then there is room to question the transitivity of virtue from lower to higher courts."). The complexities that arise on account of judicial hierarchy and bureaucracy are not worked out in what follows. We expect to pursue these features of the judicial system in future work. It suffices to note here that our theory of judging pitched at a relatively abstract level will both be challenged and further supplemented by practical design considerations that are central in constructing a functional judicial system that spans thousands of people in a bureaucracy trying to dispense justice and the rule of law.

5 For some recent work that uses fiduciary obligation as a framework for public law and public officeholders, see Ethan J. Leib & David L. Ponet, Fiduciary Representation and Deliberative Engagement with Children, 20 J. POL. PHIL. 178 (2012); EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2012); Evan J. Criddle, Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking, 88 TEX. L. REV. 441 (2008); Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. REV. 117 (2006); and Evan Fox-Decent, The Fiduciary Nature of State Legal Authority, 31 QUEEN'S L.J. 259 (2005). In some sense, all this work is a spin on Paul Finn's earlier insights. See Paul Finn, The Forgotten "Trust": The People and the State, in EQUITY: ISSUES AND TRENDS 131 (Malcolm Cope ed., 1995); Paul Finn, Public Trust and Accountability, 3 GRIFFITH L. REV. 224 (1994). For some warnings about the perils of this translation exercise, see Ethan J. Leib, David L. Ponet, & Michael Serota, Translating Fiduciary Principles into Public Law, 126 HARV. L. REV. F. ___ (forthcoming 2013).

6 See Robert G. Natelson, Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders, 11 TEX. REV. L. & POL. 239, 245 (2007); Robert G. Natelson, The Constitution and the Public Trust, 52 BUFF. L. REV. 1077 (2004); E. Mabry Rogers & Stephen B. Young, Public Office as a Public Trust: A Suggestion the Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard, 63 GEO. L.J. 1025 (1974-75).

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Benjamin C. Zipursky

Fordham Law's acclaimed tort expert, **Professor Benjamin Zipursky**, is a nationally recognized legal scholar whose nuanced understanding of tort theory has earned him appearances on PBS *NewsHour* and in the *Los Angeles Times*, the Associated Press, and other prominent media. A leading scholar in torts, jurisprudence, and legal ethics, Zipursky has published more than 40 articles and chapters on subjects ranging from punitive damages and duty in tort law to the varieties of pragmatism within legal philosophy.

Zipursky is Fordham Law's Associate Dean for Research, and he holds the James H. Quinn '49 Chair in Legal Ethics. He has taught as a Visiting Assistant Professor at Columbia, Harvard, and Vanderbilt. He obtained degrees from New York University School of Law (J.D.), the University of Pittsburgh (Ph.D., M.A.), and Swarthmore College (B.A.).

In "Substantive Standing, Civil Recourse, and Corrective Justice," Zipursky uncovers a philosophical problem buried in the law of fraud. Drawing a strong comparison between fraud and the law of defamation, he points out that a plaintiff has no claim in libel without a defendant's statement about him or her, what common law refers to as a statement "of and concerning" the plaintiff. Zipursky offers the example of a woman whose husband's fidelity has been publicly questioned in a newspaper article. The woman, believing her husband's innocence, sues the paper. Because her claim lacks the "of and concerning" element, her case will be dismissed under the common law of libel, regardless of evidence one way or the other. After all, the article was written about her husband, not about her. Similarly, with fraud, the plaintiff has no claim unless she is at what Zipursky refers to as "the patient end of the wrong." If you loan your child money that he in turn uses to purchase counterfeit art that has been sold to him as legitimate, you can't pursue the pernicious art dealer because you were not the one defrauded. According to Zipursky, the answer to the philosophical problem—or at least the possible solution—is a principle of civil recourse: A person who has been legally wronged is entitled to an avenue of civil recourse against the wrongdoer; it just might not be considered fraud.

In "Palsgraf, Punitive Damages, and Preemption," Zipursky suggests that in order to understand private law—going beyond an appreciation of its salutary functions and its limits—we must also consider the concepts entrenched in the law and the structures, institutions, and languages that compose these concepts. Zipursky names this heightened view "pragmatic conceptualism," which he has applied (along with Harvard Law Professor John Goldberg) to a wide array of problems in tort law over the past 14 years. He limits the article's focus to three problems in tort law, which Zipursky seeks to solve with his pragmatic conceptualist methodology. Using specific cases for each example, Zipursky demonstrates that courts and commentators have been so flummoxed that they have often been rendered incoherent, silent, or deadlocked. The confusion, posits Zipursky, is a result of the failure to recognize not just the importantly public aspects of tort law but also the distinctively private side of the common law of torts.

Excerpts

Substantive Standing, Civil Recourse, and Corrective Justice

39 Florida State University Law Review 299 (2011)

Contemplating fraud (theoretically, not practically) was the beginning of my thinking about civil recourse and relational wrongs, for there is a philosophical problem buried in the law of fraud that I came across as a practicing lawyer in 1993. Fraud doctrine contains a rule stating that a plaintiff has no cause of action in fraud without proof that he or she relied upon the fraudulent representation of the defendant. The intuitively obvious explanation of the rule is that a person has not been defrauded by the defendant, even indirectly, unless he or she acted because of being deceived by the defendant's fraudulent representation or concealment. A claim for fraud is essentially predicated on the idea that one was defrauded by the defendant.

Tort scholars and corporate law scholars know that this rule has kinks in it, some old and some new, some in the common law and some in common law descendants such as federal securities fraud (which softens reliance by fraud-on-the-market doctrine). Since 1993, I have written a lot about those kinks; most notably, my coauthors John Goldberg and Tony Sebok and I have together written a whole article on the place of reliance in fraud, and much of it focuses on the kinks in the rule. However, since the beginning I have maintained the view that the rule basically still exists in quite a strong form, and that, except in consumer law (and perhaps even there), the exceptions do not swallow the rule. More to the point, whatever change has occurred goes no distance in persuading me that the rule was simply a mistake or tort doctrine's crude way of making another point. My sense then and my sense now is that the reliance rule carves at the joints of a cogent notion of a claim for fraud.

And yet the reliance rule is a problem for instrumentalist theories and for a range of noninstrumentalist theories, too. Deterrence, compensation, and fairness rationales give the reliance requirement no place at all or a highly contingent and frequently defeated place. Rosen v. Spanierman, an unremarkable Second Circuit case from 1990, is a good example. The plaintiff provided money to a couple so that they could buy a special piece of art on the occasion of their wedding. The couple bought a work of art from an art dealer who represented it as an authentic work by an accomplished artist, which it turned out not to be. The plaintiff sued the dealer for fraud but lost because the plaintiff did not rely on any representations by the dealer. From a deterrent, compensatory, and fairness point of view, the result seems wrong. But while the plaintiff may have been harmed, she was not defrauded.

I have always conceptualized the point as follows: Fraud is a wrong, and a wrong is a doing of a sort that has two ends to it—in classical terms, an agent end and a patient end. The patient end of the wrong of fraud involves being deceived by the misrepresentation of the defendant. If this piece of the picture is absent, then what is in front of the court in the plaintiff's lawsuit is not a well-formed version of the tort of fraud. There may be some other wrong with the defendant's conduct on the one end and the plaintiff's injury on the other. Or, it may be that we should rethink or expand what we want to understand fraud to be. Or, it may be that we want to stick some provisions into the law so that one gets to recover money even though one has not actually been defrauded. There is nothing odd about a court starting with the presumption that it is not going to do any of the variations above; that it simply wants to know whether it has a common law fraud

claim in front of it. And, if that is in fact the question the court is exploring, then the answer is that plaintiff reliance is required.

. . .

All of this I decided before I even entered the legal academy. It was my good fortune that when I began teaching law at the University of Pittsburgh, I was asked to teach a course on defamation and privacy, for the law of defamation turned out to help me with this new research project. A plaintiff does not have a claim in libel unless the defendant made a statement about him or her—"of and concerning" the plaintiff, as the common law puts it. So, imagine a woman in small town U.S.A. whose husband is the coach of the girls basketball team at the high school. The town newspaper publishes a story saying that the husband has been having sex with the girls on the team. If the wife—who accepts her husband's avowals of innocence—sues the newspaper on the ground that its false and libelous statements have caused her to be emotionally tormented and shunned in her town, she will be subject to a motion to dismiss under the common law of libel, regardless of any evidence regarding the truth or falsity of the story. That is because her claim is missing the "of and concerning" element.

This struck me as yet another case illustrating a basic feature of the law: A plaintiff does not have a libel claim unless she herself was defamed; that she was foreseeably injured by the defendant's defamatory statement is not enough. Libel, like fraud, is a two-ended wrong, and a plaintiff has no claim unless she is at the patient end of the wrong, and that means the defendant's defamatory attack must have been a defamatory attack upon her. . . .

I saw that Palsgraf is in negligence law what the reliance and "of and concerning" cases are in fraud and defamation: The defendant must have breached a duty of nonnegligence owed to the plaintiff; negligent conduct injuring the plaintiff is not enough. As I began to lay out what I regard as many of the most difficult doctrinal problems in negligence law, I saw that many of them involved essentially the same puzzle. An investor who loses money because an accountant breached a duty of care owed to his client could not (until the past few decades) recover from the accountant, because the accountant did not breach a duty of care owed to the defendant. The requirement of a nexus between breach and duty within negligence law is the analogue of reliance in fraud and "of and concerning" in defamation.

The general rule of which each of these is an instance (I came to believe) is the rule that a plaintiff does not have a tort claim against a defendant whose tortious conduct injured her unless the defendant's conduct was wrongful relative to the plaintiff in the manner specified under the law of the tort in question.

I coined a term to help articulate this idea: "substantive standing." The idea is that every tort has a requirement that the defendant's conduct be wrongful relative to the plaintiff in a particular way: reliance in fraud, "of and concerning" in defamation, breach-duty nexus in negligence, possessory interest in property torts, and so on.

. . .

[W]hat is the justification for requiring substantive standing?

What seemed capable of solving the problem was a principle of civil recourse: A person who has been legally wronged is entitled to an avenue of civil recourse against the wrongdoer. Blackstone's and Locke's major statements on private law each contain what are fairly regarded as antecedents of the same idea, embraced from a normative point of view, more than a doctrinal one. . . . Against a backdrop according to which a person is presumptively not entitled to the state's assistance in acting civilly against a private party for a money

judgment or for an order that another private person act in some way, there was a sort of negative rule of recourse: A person is not entitled to a right of action in tort against another unless that other committed a legal wrong against her.

All of this was published [in 1998] in my article "Rights, Wrongs, and Recourse in the Law of Torts" in *Vanderbilt Law Review*. I felt I had the interpretive explanation for my fraud puzzle, as well as those in libel, and substantive standing in each tort, including negligence. I felt I had generated an adequate explanation of Palsgraf. And I had argued, and still believe, that the existence of substantive standing rules constituted substantial evidence against the interpretive adequacy of other leading frameworks, including the most common variants of law and economics and corrective justice theory.

Palsgraf, Punitive Damages, and Preemption

125 Harvard Law Review 1757 (2012)

The standard One-L curriculum remains heavy on Torts, Contracts, and Property, presumably on the theory that these subjects will help students learn "to think like lawyers." Ironically, however, these are the subjects in which leading scholars are most attracted to the opposite approach: they want to think like economists, philosophers, political scientists, and historians, not like lawyers. And so it is that a basic common law subject like Torts has turned into a battleground for "law-and-" scholars, with scholars of law and economics pushing efficiency theories on one side and legal philosophers pushing corrective justice theory on the other.

New Private Law theory is founded on the idea that legal scholars must do both: although we must avail ourselves of the sophistication of cognate fields of study, we must, in the end, think and theorize like lawyers. New Private Law theorists recognize the value of a pragmatism that is sensitive to which functions the law serves, critical as to how well it is serving those functions, and open-minded about how it might better serve them. We insist, however, that understanding private law goes far beyond an appreciation of its salutary functions and its limits. The task requires understanding the concepts and principles entrenched in the law and the structures, institutions, and languages that implement these concepts through the practices of courts, legislators, and lawyers. I have dubbed this view "pragmatic conceptualism" and, along with Professor John Goldberg, have applied it to a wide array of problems in tort law over the past fourteen years.

This Article utilizes a pragmatic conceptualist methodology to solve three problems in tort law: one on Palsgraf, one on punitive damages, and one on federal preemption. In each case, pragmatic conceptualism allows us to cut through distracting features of the problem, to avoid the embarrassment of judicial paralysis, and to move forward with a coherent approach that identifies which decisions will need to be made by judges and what practical concerns those decisions will turn on. Indeed, in each of the sections that follow, I begin by showing that courts and commentators have been so badly confused by the problem before them that they have been incoherent, silent, or deadlocked. The confusion has been generated by a failure to recognize that—despite the many aspects of tort law that render it importantly public—there is something distinctively private about the common law of torts. Utilizing civil recourse theory, this Article alleviates the confusion and articulates solutions to all three problems.

. . .

Chief Judge Cardozo's Palsgraf opinion ultimately relies upon a doctrinal requirement that a tort plaintiff may only sue for a wrong to herself; she may not sue for a wrong to another or for a wrong to no one at all. I have elsewhere documented a vast body of tort law that supports the doctrinal claim that this general requirement exists, arguing that Chief Judge Cardozo was in fact correct that tort doctrine does not permit claims based on wrongs that are not wrongs to the plaintiff herself. . . .

Preemption, like punitive damages, has become a hot torts issue in the Supreme Court over the past two decades. In this Part, I will focus upon one particular sort of preemption argument that was made to the Supreme Court by the company Warner-Lambert in the case Warner-Lambert Co. v. Kent.

Kent involved several Michigan residents who claimed that Warner-Lambert's diabetes drug Rezulin caused serious injury or death. The complaint—in a case earlier denominated Desiano v. Warner-Lambert & Co—alleged that Rezulin caused severe liver toxicity and that Warner-Lambert, by marketing the drug and failing to provide warnings of possible liver toxicity, had negligently injured the plaintiffs. The Kent plaintiffs sought to have Warner-Lambert held liable for injuring them or (in the case of deceased patients) causing their wrongful deaths. Citing both publicly available reports and material produced in the litigation, the plaintiffs also argued that Warner-Lambert was aware of evidence that its product caused liver toxicity and that it deliberately concealed or misrepresented these facts in its communications with the FDA.

In a pretrial motion in the United States District Court for the Southern District of New York, Warner-Lambert availed itself of a manufacturer-protective Michigan statute that is aimed at shielding manufacturers who comply with all federal regulations. Since Warner-Lambert had in fact received FDA approval for its product, and its warning labels complied with what was demanded of it by the FDA, it argued that it should not face any liability under a products liability or negligence claim. Warner-Lambert recognized, however, that Michigan's regulatory compliance statute contains an exception—M.C.L. section 600.2946(5)(a):

> [The statute's protection of the defendant] does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:
>
> (a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act, chapter 675, and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.

The plaintiffs in Kent asserted that they had evidence that Warner-Lambert had in fact engaged in intentional withholding and misrepresentation of important safety information about Rezulin. Anticipating this claim, Warner-Lambert put forward a deft counterargument derived from the Supreme Court's 2001 decision in Buckman Co. v. Plaintiffs' Legal Committee. In Buckman, plaintiffs brought a products liability claim against the manufacturer of orthopedic bone screws and further alleged that Buckman assisted the manufacturer in making false statements to the FDA in violation of federal regulations. The Supreme Court reversed the Third Circuit's denial of Buckman's preemption defense and held that any state tort claim against Buckman for fraud on the FDA was impliedly preempted. Chief Justice Rehnquist's opinion for a unanimous Court reasoned that any fraud on the FDA must be regulated exclusively by the federal government, and therefore any such claim fashioned as a state tort cause of action must be impliedly preempted.

Warner-Lambert drew on Buckman to complete its argument for dismissal in the Southern District of New York litigation. The Kent plaintiffs had to admit that Michigan law foreclosed their products liability claims unless the concealment/misrepresentation exception to the statute could save them. But any claim under that section of the statute, Warner-Lambert argued, was basically a fraud-on-the-FDA claim and was

therefore preempted under Buckman. So fraud or no fraud, the Kent plaintiffs had no claim. The Sixth Circuit embraced a nearly identical argument in Garcia v. Wyeth-Ayerst Laboratories, which declared that the fraud exception to Michigan's regulatory compliance statute was preempted under Buckman. District Judge Kaplan granted Warner-Lambert's motion, following Garcia.

When the Kent plaintiffs appealed Judge Kaplan's decision, however, the Second Circuit panel hearing the case included Judge Guido Calabresi, one of the pioneers of left-leaning tort theory and progressive products liability law. Writing for a unanimous panel, Judge Calabresi reversed.

Warner-Lambert petitioned the Supreme Court to hear its appeal from the Desiano decision in light of the split between the Sixth and Second Circuits. As indicated above, the Court did not resolve the split, and the results in lower courts today are all over the map. . . .

What does the Kent dispute look like from the perspective of Chief Judge Cardozo's Palsgraf opinion? The obvious starting point is that Chief Judge Cardozo would happily have voted along with Chief Justice Rehnquist in Buckman. The plaintiffs in Buckman were trying an argument quite similar to Mrs. Palsgraf's: they were identifying an act by the defendants that the legal system in some sense regards as a legal wrong, tacking together a causal path from that act to the plaintiffs' injuries, and then asserting that they had a cause of action in tort for which they should be able to recover. That is simply not how tort law works, in Chief Judge Cardozo's view. The plaintiff must seek recovery for a wrong to herself, not for a wrong to another or a wrong to no one at all. The plaintiffs suing Buckman alleged that Buckman's wrong to the FDA could support a tort claim running to them. Such claims are not viable tort claims, under the common law conception of torts.

. . . . The plaintiff [in Buckman] is essentially claiming she can perform the role of a private attorney general, enforcing the federal law that requires nonconcealment and truthfulness in communication with the FDA. When Chief Justice Rehnquist rejected the plaintiffs' claims in Buckman, he was rejecting both the alleged prerogative of private plaintiffs to play that role and the alleged suitability of state courts to host such enforcement actions in tort suits. . . .

From the Palsgraf perspective, the key question in Kent is whether the Rezulin plaintiffs suing Warner-Lambert alleged a right akin to that which was rejected in Buckman: were those tort claims built upon an alleged prerogative to play a private attorney general role with respect to noncompliance with FDA truthfulness regulations? There is an alternative, according to the Palsgraf perspective. It is possible that the Kent plaintiffs asserted causes of action predicated upon wrongs to themselves, not upon wrongs to the FDA. If so, then recognizing a right to try to prove that information was withheld or misrepresented would not be tantamount to recognizing a power to enforce federal laws prohibiting fraud on the FDA, and there would be little reason to think that recognition of a state right of action interferes with federal enforcement exclusivity.

How can one distinguish between these two models and tell whether the power sought by the plaintiff is a power to redress the common law wrong, conditioned on the proof of intentional concealment or misrepresentation, or a private attorney general power, derived from the state qua executive and geared to sanctioning violations of federal law? In order to interpret a regulatory compliance statute, a court must understand why it was put there and why it tends to glean substantial support. . . .

In an era of increasingly sophisticated products, defendant business enterprises are understandably critical of tort law's willingness to permit decisions by juries to trump expert regulatory decisions, and tort reformers have become increasingly fond of this critique. Reversing this traditional policy is one of the central aims of

regulatory compliance statutes, including the Michigan statute at issue in Kent. These statutes alter the common law so that the regulator's judgment about safety trumps the jury's; if a regulator has determined that a product was safe, the jury may not impose liability for a company's failure to do something else.

A regime that treats regulatory expertise as a decisive reason for putting aside any jury decision is based on an implicit premise that the regulators and the jurors are assessing roughly the same informational set in making their evaluations of the safety of the product. If the regulators were not actually provided with the relevant safety information about the product, and made their decision based on a seriously incomplete informational set, then the regulatory compliance-inspired critique of the tort system would not make sense. Under such circumstances, confidence in the regulatory decision would be misplaced.

The concealment/misrepresentation exception to regulatory compliance statutes makes perfect sense in this light. They tell courts that deference to the regulatory decision should be withheld if the regulators were given a seriously flawed informational package upon which to base their decision. Unsurprisingly, because the regulatory compliance statutes were designed by lawyers and lobbyists who represent repeat defendants, the statutes have typically nested what is hoped to be a narrow concealment/misrepresentation exception within a remarkably pro-defendant framework. Thus, the exception is drafted to put the burden on the plaintiff to prove what really happened—that the regulators approved products or warning labels for products based on a seriously incomplete or false set of information. The exception does not allow the plaintiff to succeed in undermining the regulatory compliance defense if the flaws in the informational package were irrelevant to the decision the regulators made. And it is not enough that the defendant in fact made misrepresentations or concealed information; the plaintiff must prove that the defendant did so intentionally, deliberately, or knowingly. If the plaintiff actually establishes that the regulatory decision was made based on deliberate misrepresentations and concealments, the reasons for enshrining the regulatory decision with insurmountable weight are defeated, and the safety question in the negligence or products liability claim can indeed go to the jury, as under the common law.

. . .

The relevance of Judge Calabresi's observations that the Kent plaintiffs were asserting common law causes of action for products liability now becomes clear. The plaintiffs' powers were not coming from FDA regulation or any conception of a private attorney general role. They were claiming the defendant wronged them by negligently selling them a dangerously defective product. The plaintiffs were, in this way, suing for wrongs to themselves, seeking recourse for having been the victims of a common law wrong committed by the defendant. The assertion that the defendant misrepresented or concealed information from the FDA was not an instrument for empowerment to exact a remedy from a person who committed a wrong to the FDA. . . .

The mystery surrounding Chief Judge Cardozo's Palsgraf opinion, the struggle to explain how due process applies to punitive damages, and the sharp controversy over preemption of claims alleging fraud against the FDA all stem from the same shortcoming in contemporary thinking about tort law. In all three, there is a problem when a private plaintiff seeks redress for a wrong to someone other than herself. Having abandoned a conception of tort law as private law and embraced a private attorney general conception of tort claims, contemporary legal thinkers are flummoxed by these three problems. Civil recourse theory permits clear thinking by allowing us to understand how and why tort law is rooted in wrongs to private persons.

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