PUBLIC RESPONSIBILITIES BEYOND CONSENT: RETHINKING CONTRACT THEORY

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I. INTRODUCTION

This Article argues for a vital new pathway to the regulation of contracts in American law. It proposes a theory of public responsibility to safeguard public values that are unprotected by the reciprocal consent of private parties to contract. Challenging the conception of contracts-as-property-rights, it posits that such responsibilities are necessary to redress public harm that is ordinarily not protected by the exchange of contractual promises. If contract law is to support social justice, it ought to surpass restrictive conceptions of equity that focus wholly on corrective injustice between contracting parties at the expense of public deterrence. If contract regulation is to promote the public good, it ought to transcend limiting theories of consent that reduce public responsibilities to imperfect obligations that are binding in morality, but not in law.

II. CORRELATIVE RIGHTS AND DUTIES

The continuing problem with correlative rights talk[1] lies in the tendency to preserve rights as the overriding manifestation of individual liberty in private law, not least of all in relation to the liberty to contract.[2] At issue is the deontological liberal proposition[3] that

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1. *See* W. L. Summers, *Legal Rights Against Drainage of Oil and Gas*, 18 TEX. L. REV. 27, 32 (1939) (explaining in the context of gas and oil that correlative rights limit the privileges of adjoining landowners through right-duty relations that preclude such landowners from both causing injury to, and taking an undue proportion of, the common source of supply).

2. P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 586-89 (1979); Roscoe

correlative rights and duties inhering in the individual transcend communal, including moral, values, which otherwise might justify the regulation of contracts in the public interest.[4] In contention is the argument that public responsibilities beyond individual rights are defensible and indeed warranted, due to this limitation in private contract rights.[5]

This Article considers the judicial dilemma in determining whether, when, and to what extent to transcend the correlative nature of private and individuated rights and duties, such as in extending public responsibilities for contracts beyond the ambit of the individual's consent to contract.[6] It explores the judicial reluctance to invoke normative values to impose responsibilities on parties.[7] Using contract law illustrations, it challenges these three propositions: first, that contract law excludes public responsibilities as being morally and not legally determined; second, that private rights give rise only to private duties; and third, that violations of public responsibilities, whether or not redressed by public law, are external to contract remedies.[8] It argues instead that public responsibilities should necessarily be embodied in contract law to protect important moral and social interests that are otherwise unprotected by contract rights, and in respect of which other private and public law remedies may be absent or limited in their scope

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Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455-57, 461-62, 478-79 (1909).

3. On deontological liberalism, see LEON TRAKMAN & SEAN GATIEN, RIGHTS AND RESPONSIBILITIES 48, 53, 61-63, 74-75 (1999).

4. Wesley Newcomb Hohfeld identified four kinds of correlative (and opposing) jural relations. This Article focuses on only two of his jural correlatives—rights and duties. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 741-45 (1917) [hereinafter Hohfeld, *Legal Conceptions 1917*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-33 (1913) [hereinafter Hohfeld, *Legal Conceptions 1913*]; *see also* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 62 (Aleksander Peczenik & Frederick Schauer eds., 1997); Robert A. Hillman, Essay, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 106-07 (1988).

5. On the legal as distinct from the moral boundaries of rights, see Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesi*s, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 99, 112-14 (Jules Coleman ed., 2001); Scott J. Shapiro, *On Hart's Way Out*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra*, at 149, 149-53; Matthew Kramer, *How Moral Principles Can Enter into the Law*, 6 LEGAL THEORY 83, 99-107 (2000); and Matthew H. Kramer, *Throwing Light on the Role of Moral Principles in the Law: Further Reflections*, 8 LEGAL THEORY 115, 131-35 (2002).

6. On the conception of public reason in how we ought to stand in relation to one another as citizens within a liberal democracy, see JOHN RAWLS, THE LAW OF PEOPLES: WITH *THE IDEA OF PUBLIC REASON REVISITED* 54-58, 78-85 (1999).

7. *See infra* Part III.

8. *See infra* Parts VI–VIII.

and application.[9] It proposes moving beyond conceptual fictions by which consent is imputed to the parties; and, it focuses instead on achieving social-moral ends, including public order, beyond the artificial construction of party consent.[10] It maintains further that a law of contract that remains imbedded in correlative rights and duties associated with the reciprocal promises of contracting parties will impoverish the very conception of contractual duties that it purports to protect.[11] That impoverishment is most evident when contractual duties are excluded on grounds that they are not formally proportionate to contractual rights, or because they improperly address public interests beyond the immediate rights of contracting parties. The purpose of a public responsibility is to protect public interests that are not commensurate with the correlative rights and duties of contracting parties but warrant legal protection because of their overriding communal value.

In addressing these issues, this Article focuses on the inherent tension between libertarian idealism, reflected in the autonomy of the individual from government constraint, and the social welfare state that purports to promote equality in contracting.[12] Typifying this tension is the long-standing assertion that contracts embody rights to property in the liberal state in which individuals freely exchange goods and services including by contract, even when the contract is intended wholly to protect the interests of a dominant party, as was upheld in the recent, divided U.S. Supreme Court decision of *DIRECTV, Inc. v. Imburgia*.[13] On the other side are attempts to ameliorate the perceived economic and social impact of individual autonomy upon communal interests, notably with the rise of the post-welfare state.[14]

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9. On public responsibilities beyond correlative or jural rights, see TRAKMAN & GATIEN, *supra* note 3 and *infra* Part VIII.

10. *See infra* text accompanying notes 41-42.

11. *See infra* Part V.

12. *See* LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 26, 43, 73-76 (1983); Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1664-66 (2009); Leon E. Trakman, *A Plural Account of the Transnational Law Merchant*, 2 TRANSNAT'L LEGAL THEORY 309, 309-27 (2011); Leon E. Trakman, *The Twenty-First-Century Law Merchant*, 48 AM. BUS. L.J. 775, 800-03 (2011).

13. 136 S. Ct. 463, 466-68, 471 (2015) (preempting California law that barred a contractual waiver of class-wide consumer arbitration actions). On a rights-based theory of contracting, identified with contracts-as-private-property, see Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 31-46 (2009) and see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1100-01, 1105-09 (1972).

14. This sentiment is reflected in Justice Ginsburg's dissent in *DIRECTV, Inc.*, 136 S. Ct. at 473 (Ginsburg, J., dissenting) ("[A]rbitration is a matter of 'consent, not coercion.'" (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010))). On the amelioration of the sanctity of contract in the welfare state, see generally Eric A. Posner, *Contract Law in the Welfare*

In recognizing community interests beyond contractual rights, public responsibilities can protect normative values that are unprotected by reciprocal promises in contract, that produce unfair and publicly deleterious consequences, and that are not shielded by private law remedies arising in contract, tort, or unjust enrichment.

The conceptual rigidity of correlative rights and duties is nowhere more evident than in the readiness of common law courts to decline to enforce promises to negotiate in good faith, as it insists on an artificial separation between obligations grounded in morality and legal duties grounded in consent.[15] Let us assume a hypothetical conflict between Mal and Bonum. Bonum alleges that Mal has breached his promise to negotiate a contract in good faith. Under a correlative conception of rights and duties, Mal's promise does not give rise to a duty to negotiate in good faith because it does not promise to produce a certain result, namely, a binding main contract between Mal and Bonum. In effect, Bonum has no right to impose a duty on Mal to negotiate in good faith.[16] The functional result is that Mal can flaunt the narrow ambit of Bonum's rights, knowing that common law courts are unlikely to treat Mal's promise to negotiate as per se binding.[17]

This Article argues instead for imposing a responsibility on Mal to negotiate in good faith even though Bonum lacks a legal right to impose a legal duty on Mal.[18] The purpose is to hold Mal responsible for his unfair treatment of Bonum in negotiating because Mal would otherwise not be subject to a duty in contract to negotiate in good faith on grounds that he has not promised to produce a certain result, namely, a negotiated contract.[19] Imposing a responsibility on Bonum also ensures that he has

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State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract, 24 J. LEGAL STUD. 283 (1995).

15. For a criticism of the reluctance of common law courts, particularly in England, to enforce agreements to negotiate in good faith, see Leon E. Trakman & Kunal Sharma, *The Binding Force of Agreements to Negotiate in Good Faith*, 73 CAMBRIDGE L.J. 598, 600-06 (2014).

16. *See id.* at 603-04 (distinguishing between "morally irksome and legally condemnable negotiating conduct"). On the proposition that the moral basis of a contract is determined by the consent of the parties to exercise rights and assume duties, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272 (1986).

17. On the duty of good faith primarily in relation to performance, as distinct from good faith in contracting, see Tymshare, Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.); Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 255-57 (2005); E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 8, 15-17 (1984); and Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1034-36 (2003).

18. *See infra* Part III.

19. *See* ALLAN E. FARNSWORTH, THE CONCEPT OF GOOD FAITH IN AMERICAN LAW 2-3 (1993); Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99

a legal remedy against Mal beyond the narrow conceptual boundaries of certainty in contract law.[20]

However, in advancing a theory of public responsibilities, this Article also focuses on the value of imposing public requirements on parties like Mal on moral grounds that, arguably, are justifiably embodied in the law.[21] It challenges the public-private law divide by which the protection of a public interest in Bonum's fair treatment is excluded as not being commensurate with his private rights.[22] The purpose is to demonstrate that Mal ought to be legally responsible *both* for failing to negotiate in good faith in relation to Bonum, *and* in light of the social reprobation of his action. At issue, therefore, is not only the inequitable treatment suffered by Bonum as a result of Mal's bad faith, but redressing the public interest in discouraging Mal's negotiating conduct, explicated through the injustice to Bonum. The rationale for courts injecting plural standards of fairness into contracts[23] is reinforced by structural bargaining inequalities between parties like Mal and Bonum. The purpose of a public responsibility is to remedy those disparities in the absence of, or in addition to, statutory or common law remedies.[24]

The further purpose is to transcend a restrictive theory of contractual consent based on the correlative promises of Mal and Bonum that fails to recognize the moral foundations of legally binding promises.[25] Imposing a public responsibility beyond a consensual duty aims to avoid the fiction that Justice Oliver Wendell Holmes sought to normalize in stating, "nothing is more certain than that parties may be

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MINN. L. REV. 2051, 2057-58, 2064-65 (2015); Trakman & Sharma, *supra* note 15, at 613-14, 627.

20. *See* Trakman & Sharma, *supra* note 15, at 624-26.

21. *See infra* Part VI. The conception of liability for failing to fulfill a responsibility is significantly better developed in moral theory than in law. *See, e.g.*, Randy E. Barnett, *Rights and Remedies in a Consent Theory of Contract*, *in* R.G. FREY & CHRISTOPHER W. MORRIS, LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 135, 165 (1991).

22. For arguments on the artificiality of the public-private divide, see Morton J. Horwitz, Comment, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423-25 (1982) and Duncan Kennedy, Comment, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351-52 (1982). On a challenge to the public-private divide in contract law in particular, see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010-11, 1014-15, 1024 (1985).

23. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 85-92 (N.J. 1960).

24. *See* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270-71, 1303-06, 1310-12 (1993); Andrew Phang, *Doctrine and Fairness in the Law of Contract*, 29 LEGAL STUD. 534, 549, 560-61 (2009).

25. On the morality of promising, see Charles Fried, Response, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 3 (2007). *But cf.* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 654-57, 662-64 (2012) (arguing for a consent rather than a promise theory of contracting); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 571-78 (1933) (criticizing both will and promissory theories of contract).

bound by a contract to things which neither of them intended, and when one does not know of the other's assent."[26] Contrary to Holmes's proposition, this Article advocates for a less fabricated and more contextual conception of a responsibility than reliance on the fictional intention of the parties.[27] It argues instead for imposing standards of good faith in negotiating that are publicly sustainable, without having to hypothecate Mal's and Bonum's intentions, which neither likely expressed and Mal would emphatically deny having made.[28]

Imposing a responsibility on Mal does not displace the correlative relationship between the legal rights and duties of Mal and Bonum in entering into, performing, and terminating a contract.[29] What this Article advocates is that a party like Mal be held legally responsible to collaborate with Bonum in accordance with public standards of accountability that are grounded in social morality and, which not only take account of, but transcend Bonum's legal rights and Mal's correlative duties.[30] Even Justice Oliver Wendell Holmes, who drew a distinction between law and morality 130 years ago, elaborated: "I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance."[31] Arguably, imposing a legal responsibility on Mal to negotiate in good faith, operating beyond his legal duties correlative to Bonum's rights, embodies that "wider point of view."[32]

Part III of this Article evaluates the limitations associated with correlative legal rights.[33] Part IV proposes that legal responsibilities transcend the required commensurability between rights and duties of contracting parties that give rise to correlative, and reciprocal, promises.[34] Part V illustrates the limits of correlative promises in contract law.[35] Part VI advocates for moral determinism to inform the nature and operation of legal responsibilities that would otherwise be

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26. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897).

27. *See* Leon E. Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1039, 1041, 1043 (2010).

28. Leon E. Trakman, *Frustrated Contracts and Legal Fictions*, 46 MOD. L. REV. 39, 42 (1983); Trakman, *supra* note 27, at 1043, 1082-85.

29. On such correlative rights and duties, see Hohfeld, *Legal Conceptions 1913*, *supra* note 4, at 31-33.

30. On theories of regulation beyond contractual consent, see HILLMAN, *supra* note 4, at 152-55 and Hillman, *supra* note 4, at 119-20.

31. Holmes, *supra* note 26, at 459.

32. *Id.* On the tension between liberty and equality in seeking this "wider point of view," see ISAIAH BERLIN, *Historical Inevitability*, *in* FOUR ESSAYS ON LIBERTY 41, 91-97 (1969).

33. *See infra* Part III.

34. *See infra* Part IV.

35. *See infra* Part V.

excluded from the analytical construction of correlative rights and duties in contracting.[36] Part VII challenges the division between private property rights and public responsibilities arising from the nature and use of contracts.[37] Part VIII illustrates how legal responsibilities can redress the tension between contract liberalization and contract regulation.[38] Part IX discusses the distinction between efficiency and moral determinism in delineating the nature and operation of responsibilities.[39] Part X evaluates the law governing commercial impracticability, first, in terms of correlative rights and duties, and second, in accordance with a conception of responsibility.[40]

III. THE LIMITATIONS OF CORRELATIVE RIGHTS AND DUTIES

Public responsibilities redress the limitation in consent theories of contracting that insist on an artificial separation between obligations grounded in morality and legal duties grounded in consent.[41] If Bonum has no correlative right to enforce Mal's promise to negotiate in good faith, Bonum has no legal remedy. The normative basis for Mal's responsibility arises because Bonum's correlative rights are deficient in failing to protect important social, economic, and moral interests that are not fully or adequately protected by Bonum's legal rights, in respect of which Mal has no correlative legal duties. The basis for imposing public responsibilities lies in the insufficiency of reciprocal rights and duties in contract to redress socioeconomic and moral interests, that include but extend beyond the interests of the immediate parties to that contract, and that are not adequately protected either statutorily or judicially, including in equity.[42]

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36. *See infra* Part VI.

37. *See infra* Part VII.

38. *See infra* Part VIII.

39. *See infra* Part IX.

40. *See infra* Part X.

41. On the morality underlying the consent of the parties to exercise rights and assume duties by contract, see Barnett, *supra* note 16, at 297-300. On the Fuller-Hart debate on the separation between law and morality, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638-43 (1958); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-95, 597-601, 605-06, 608, 616-17 (1958); RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14, 19-22, 29-30, 41-44 (1977); David Lefkowitz, *The Sources of International Law: Some Philosophical Reflections*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 187, 196-99 (Samantha Besson & John Tasioulas eds., 2010); and Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 31-35, 49-50 (Arthur Ripstein ed., 2007).

42. On deficiencies in consumer contract legislation, see Chris Willett, *Direct Producer Liability*, *in* MODERNISING AND HARMONISING CONSUMER CONTRACT LAW 189, 199-202 (Geraint Howells & Reiner Schulze eds., 2009).

Such responsibilities are not restricted to particular kinds of relationships involving structural bargaining inequalities between the parties, such as responsibilities to negotiate in good faith with mass consumers or employees.[43] Nor, too, are these responsibilities necessarily limited to remedial action. They are proactive in seeking to prevent harm as much as they are reactive in responding to such harm. As such, responsibilities include affirmative obligations, such as for the producer of perishable goods to cooperate, consult, guide, or even caution purchasers in averting risks of accelerated product deterioration of which they are unaware and which are not dealt with expressly by contract, or are inadequately regulated by statute or the common law due to the novelty of the goods and limited regulation of the sector, or both. Mal's failure to act affirmatively includes failing to explain the risks associated with use of the product, or doing so in a substantially insufficient manner.[44]

The justification for responsibilities being proactive in seeking to prevent future harm is not without justification in moral theory, if not in law. In particular, a foundational principle in socially responsible investing is to give "heightened attention" to risks of human rights abuse in industries in which correlative legal duties are absent or deficient.[45] Noteworthy, too, is the fact that corporate responsibility to respect human rights exists independently of the ability and willingness of states to fulfill their own human rights obligations.[46]

However, public responsibilities are not directed only at redressing substantive inqualities borne by a defined class of persons, such as consumers, but derive from the heightened consciousness of the need to prevent and redress social harm arising from the risk of rights abuses, such as environmental health risks that are not adequately protected as legal rights.[47] The primary purpose of such a responsibility is to both redress and discourage public harm, subject to the remedy being commensurate with, and not disproportionate to, that harm.[48] Such a

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43. *See* MARTÍN HEVIA, REASONABLENESS AND RESPONSIBILITY: A THEORY OF CONTRACT LAW 53-55 (2013) (discussing the relational duties of individuals and the importance of "enforceable cooperation" in the idea of "equal freedom").

44. *See* James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340, 367, 369, 399 (2007) (discussing consumer protection and safety legislation).

45. John Ruggie (Special Representative), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 12, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011).

46. On this foundational principle, see *id.* ¶ 11.

47. On the harm theory of contracting, focusing on the prevention of harm, compare STEPHEN A. SMITH, CONTRACT THEORY 69 (2004).

48. The following is an example of such proportionality. It would be arbitrary to permanently shut down a factory for emitting potentially harmful environmental waste in respect of which the

responsibility extends beyond substantive inequalities between defined classes of persons. As a matter of principle, the determination is whether a corporate producer was aware of the actual or prospective harm that eventuated, whether it failed reasonably to inform its purchasers, and whether that failure was inadequately redressed by equitable rights and duties arising from statutory and common law.

The purpose of public responsibilities is also not to prevent producers from limiting their liability, expressly or by reasonable implication, notably where purchasers are properly informed about impending risks and demonstrate informed consent to assume the risk of ensuing harm. Such responsibilities do not jettison exemption or limitiation of liability clauses.[49] Rather, they subject them to public standards of accountability, not unlike the responsibility that both governments and citizens bear for the conduct of full, free, and fair elections.[50]

The nature of public responsibilities is therefore influenced not only by disparities in structural bargaining power between the parties, as well as not only by the capacity of one party to exploit the limited knowledge of the other in a wanton and dissolute manner. The purpose of a responsibility is to respond to an actual or impending public harm, such as a drug manufacturer's failure to advise unknowing purchasers of novel risks associated with the product at issue. That purpose is not to seek formal or quantitatively proportionate remedies between the manufacturer's act and its public effect. The purpose is rather to apply a remedy that is qualitatively commensurate to the act giving rise to the public harm without exceeding the normative need for it.

The imposition of such a responsibility does not deny that a drug manufacturer like Mal might well offer purchasers like Bonum extended warranties to redress such risks of harm. What it *does* deny is that Mal is absolved from legal responsibility as of right in the absence of warranty protection on grounds that Mal has no duty in the absence of Bonum having a correlative legal right.

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factory was compliant with pre-existing environmental regulations: the factory was not reasonably aware of the nature of that potential harm, the impact on factory employees would be disproportionate to the benefit of the factory being closed, the harm to employees could be redressed, and future harm could be minimized. On deterrence damages, see, for example, Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 153-61 (1988) and Craig Rotherham, *Deterrence as a Justification for Awarding Accounts of Profits*, 32 OXFORD J. LEGAL STUD. 537, 541-42 (2012).

49. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.28, at 316-19 (1982).

50. On a theory of public responsibility extending beyond private law rights, see Leon E. Trakman, *Public Responsibilities for Electoral Fraud Beyond Correlative Rights and Duties*, UTRECHT J. INT'L & EUR. L., 14 Aug. 2015, at 17, 23-25.

Comparable reasoning applies to responsibilities arising from workplace agreements. Illustrating the responsibilities of employers over workplace safety are two related employer responsibilities: that employers do not obfuscate workplace safety measures, such as by "negotiating" to omit them from workplace agreements; and that courts apply remedies qualitatively commensurate with standards of public safety, and quantitatively commensurate with the losses sustained by individual employees due to employer non-compliance with those standards. The guiding premise is that the employer's failure to exercise such responsibilities undermines the effectiveness of, and confidence in, employment safety, not only as a private but also as a public concern.[51] The application of that responsibility depends on the nature of the employer's conduct giving rise to public harm, such as failing to redress systemic workplace bullying and promoting a culture of compliance in which dissonance is suppressed.[52] The extent of that responsibility, in turn, depends on the viability of alternative legal remedies, such as the reluctance of regulators to impose legal duties on employers on grounds that regulatory costs outweigh the social and economic benefits.[53]

Accordingly, the basis for imputing public responsibilities to contractual dealings is conceptual, functional, and contextual. The conceptual purpose of public responsibilities is to avoid attenuating a conception of mutual consent that shields employers from public accountability, including from accounting to employees.[54] The functional purpose of public responsibilities is to supplement restrictive conceptions of correlative promises, without displacing them, by taking into account workplace hazards, such as exposing employees to physical and environmental harm that employment contracts fail to protect

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51. *See, e.g.*, F. M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 244-48 (2007) (criticizing Joseph Raz's conception of rights and duties). On the scope for developing social rights, see JEFF KING, JUDGING SOCIAL RIGHTS 41-57 (2012) and David Beetham, *What Future for Economic and Social Rights?*, 43 POL. STUD. 41, 44-50 (1995).

52. On responsibilities for workplace bullying, see Kara A. Arnold et al., *Interpersonal Targets and Types of Workplace Aggression as a Function of Perpetrator Sex*, 23 EMP. RESP. & RTS. J. 163, 167-69 (2011) and Margaret H. Vickers, *Towards Reducing the Harm: Workplace Bullying as Workplace Corruption—A Critical Review*, 26 EMP. RESP. & RTS. J. 95, 97-99 (2014).

53. On these propositions, see ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 39, 50, 52-54 (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf and PER SKEDINGER, EMPLOYMENT PROTECTION LEGISLATION: EVOLUTION, EFFECTS, WINNERS AND LOSERS 57-65, 118 (Laura A. Wideburg trans., 2010).

54. On the need for freedom of contract to protect property rights as distinguished from human rights, see SYLVESTER PETRO, LABOR POLICY OF THE FREE SOCIETY 40-42, 48, 52 (1957) and see also RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 65-67 (1998), which maintains that the freedom to exchange property depends on the knowledge of those involved in the exchange.

against and that are insufficiently protected by employment legislation.[55] The purpose of responsibilities for workplace safety is also contextual in taking account of the employment context, such as the preponderance of vulnerable women, minorities,[56] and elderly employees in the sector, and evidence of contractual clauses that exclude employer liability for workplace safety[57] or that deny fiduciary duties arising from the failure of corporate officers to advise employees about workplace hazards.[58]

The protection of responsibilities is directed not only at protecting the private interests of employees, but also at promoting the public interest in employee welfare.[59] The presupposition is that public remedies are not invariably available, as when legislation fails to provide adequate workplace protections for reasons varying from political inertia to the previously unknown or unreported nature of the private and public harm. By imposing responsibilities beyond promises as rights giving rise to legal duties, courts can identify, investigate, and redress actual or prospective abuses of agreements that are otherwise unprotected by contract rights, or for that matter tort law, restitution, or the criminal justice system.[60] They can protect public standards of workplace safety, beyond the equitable limits placed on promissory estoppel and detrimental reliance.[61] They can award punitive damages beyond

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55. On responsibilities, beyond correlative legal duties, for environmental damage, see TRAKMAN & GATIEN, *supra* note 3, at 59, 65-69, 254-70.

56. On gender stereotyping in employment and family contracts and conflicts, see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 54-68 (2010). On gender and racial discrimination, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-46, 1248-52 (1991). On the absence of consent or contract as the embodiment of slavery, see generally ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY (1991).

57. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 44, 51-52 (2004); James W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, 18 YALE J. INT'L L. 281, 285-87 (1993); Kathleen Segerson, *An Assessment of Legal Liability as a Market-Based Instrument*, *in* MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: LESSONS FROM TWENTY YEARS OF EXPERIENCE 250, 262-66 (Jody Freeman & Charles D. Kolstad eds., 2007).

58. *See supra* note 52 and accompanying text. On the reluctance of securities commissions in multiple jurisdictions to reformulate rules governing the duties of auditors in the wake of corporate collapses, such as Enron, see Leon E. Trakman & Jason Trainor, *The Rights and Responsibilities of Auditors to Third Parties: A Call for a Principled Approach*, 31 QUEEN'S L.J. 148, 180-92 (2005).

59. *See* Korobkin, *supra* note 12, at 1665-66, 1671-73 (discussing the intersection of private behavior and social welfare); Posner, *supra* note 14, at 285, 298-301, 316-17 (discussing the mechanism of welfare through both a private and public lens).

60. On the interface between freedom of contract and the law of torts and restitution, see generally FRANCIS ROSE, BLACKSTONE'S STATUTES ON CONTRACT, TORT AND RESTITUTION (27th ed. 2016).

61. On the moral basis of promissory estoppel, see Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 292-96 (1996). *But see* JONATHAN MORGAN,

compensation on public policy grounds directed at deterring unfair contracting through tort remedies that supplement contract liability.[62] Importantly, they can also impose responsibilities, varying from injunctions to judicial supervision of the workplace, to protect against workplace harassment that is inadequately protected by legal rights.[63]

Importantly, too, courts can recognize that a private law theory of contracts that focuses predominantly on the rights of individuals, such as those that arise from an employment contract, is deficient in failing to recognize a social good beyond contracts-as-property-rights.[64] Typifying the social good beyond private contract rights are intergenerational interests, such as preserving the environment for future generations that are insufficiently protected by correlative rights and duties.[65]

Responsibilities that result in remedies extending beyond those prescribed by contract law do not speak for themselves but must be substantiated in fact. For example, the responsibility of employers to redress workplace stress arising from supervisors using racial epithets is contingent on whether employee interests in not being victimized by racist taunts are inadequately protected by employer duties and whether employees sustain material harm arising from that conduct.[66]

Requiring an employer to redress such employee interests in the absence of effective contractual remedies extends beyond the costs and benefits of compensating employees to include deterrent and retributive

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CONTRACT LAW MINIMALISM: A FORMALIST RESTATEMENT OF COMMERCIAL CONTRACT LAW 4-16 (2014).

62. The assumption is that an "efficient breach" is entirely compensatory, although it is arguable that including a punitive element in damages may be efficient in fact. *Cf.* U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 696-97 (2d Cir. 1991). For a comparative analysis of efficient breach, see generally Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721 (2007).

63. *See* discussion *supra* Part I; *see also* TRAKMAN & GATIEN, *supra* note 3, at 26-28, 39-41 (arguing between the priority of the "right over the good" and a "plurality of values" in a social context in which the state and the community "help to determine the nature of justice").

64. On deontological liberalism, see *supra* note 3 and accompanying text.

65. On generational responsibilities for the environment beyond correlative rights and duties, see Brian Barry, *Sustainability and Intergenerational Justice*, *in* FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE 93, 106-13 (Andrew Dobson ed., 1999); INT'L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., SCI. & ENVTL. HEALTH NETWORK, AN ENVIRONMENTAL RIGHT FOR FUTURE GENERATIONS: MODEL STATE CONSTITUTIONAL PROVISIONS AND MODEL STATUTE 4 (2008), which provides that "[t]he current regulatory system falls short of completely protecting the interests or rights of future generations"; and Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 66-68 (1988), which discusses the way in which cultural relativism is compatible with cross-cultural universals, due to its focus on enculturation rather than tolerance.

66. *See* TRAKMAN & GATIEN, *supra* note 3, at 109-10.

liability.[67] For example, responsibilities arise when regulators consider ex ante that the cost of regulation exceeds its social benefit, such as by treating the cost of a constitutional challenge for violating freedom of expression under the Fourteenth Amendment as outweighing the benefit of regulating racist speech in the workplace—but ex post evidence demonstrates a deficiency in that ex ante cost-benefit analysis.[68]

However, responsibilities are neither wholly fixated on offsetting market dominance by aberrant employees or producers nor focused solely on providing remedies to employees and consumers in mass employment and consumer markets. Certainly, public responsibilities take into account structural bargaining disparities, such as Mal's capacity to subordinate Bonum by virtue of class, race, gender, and age, in negotiating an employment contract. However, Mal's responsibility extends further to the manner in which Mal failed to advise Bonum about product risks, the public harm that ensued, and the insufficiency of legal rights—not limited to Bonum's rights—to redress that harm.

So, too, what is sauce for the goose is also sauce for the gander. Just as employers have duties and, arguably, also responsibilities to regulate workplace safety in renegotiating employment contracts, employees have responsibilities, such as in responsibly redressing the alleged failure of employers to adopt workplace safety measures through responsible workplace demands and reasonable use of grievance procedures.[69] No person or authority ought to have absolute rights or powers that can be exercised irresponsibly without both moral and legal consequence.[70] Insofar as rights bestow powers on entities or persons over other persons, as a parent has powers over a child, an employer has over employees, and a government has over citizens, it is arguable that all are subject to responsibilities, however minimal, on account of that bestowal.[71]

Imposing a responsibility on a negotiating party does not idealize the distribution of justice, such as between parties to employment

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67. *See, e.g.*, Kostritsky, *supra* note 48, at 123-35; Rotherham, *supra* note 48, at 541-44.

68. *See* Leon E. Trakman, *Transforming Free Speech: Rights* and *Responsibilities*, 56 OHIO ST. L.J. 899, 909-11, 908 n.55 (1995).

69. On employee responsibilities, see, for example, Michael T. Zugelder et al., *Balancing Civil Rights with Safety at Work: Workplace Violence and the ADA*, 12 EMP. RESPONSIBILITIES & RTS. J. 93, 102 (2000). On the history of this tension between employee rights and contract duties, see, for example, ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 39-47 (Christopher Tomlins ed., 2001).

70. On responsibilities as rational bases for moral-legal obligations, see JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS: VOLUME IV, at 141 (2011).

71. For an analysis on the limits of legal power as authority for social order, see IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY 371-75 (2014) (ebook).

contracts, nor does it seek a perfectly just, efficient, or Pareto optimal outcome.[72] However, it does decry the subordination by rank or status of the Kantian "person" as a moral being.[73] As such, responsibilities are conceived primarily substantively, as safeguards against the misuse of contract promises as rights.[74] They are also conceived procedurally, as embodying a Rawlsian notion of procedural fairness by which persons with limited bargaining capacity to negotiate are accorded procedural fairness, such as to file a grievance against an employer without fear of reprisal.[75] Those procedural rights are directed at ensuring that the consent of employees to contract is not unfairly imposed and that the terms of agreements concluded are procedurally—not only substantively—fair. As such, public responsibilities are directed at promoting a fair process of contract bargaining and redressing social harm arising from the failure of that process.[76] By requiring the exercise of responsibilities beyond legal duties arising from promises as rights, courts can avoid hypothecating the intention of the parties.[77] They can identify, investigate, and prosecute abuses of the bargaining process that are otherwise unprotected by contract rights, or for that matter by the law of torts, restitution, and the criminal justice system.[78] Conversely,

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72. According to Coleman, "Economists as well as proponents of the economic analysis of law employ at least four efficiency-related notions, including: (1) Productive efficiency, (2) Pareto optimality, (3) Pareto superiority, and (4) Kaldor-Hicks efficiency." Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980).

73. On the Kantian "person," see CHARLES W. MILLS, THE RACIAL CONTRACT 55 (1997).

74. On such substantive inequality in contract law, see CAROLE PATEMAN & CHARLES W. MILLS, CONTRACT AND DOMINATION 20 (2007) (discussing the impact of property rights to perpetuate domination in contracting).

75. JOHN RAWLS, A THEORY OF JUSTICE 83-88 (1971). On Rawlsian principles of contract law, see HEVIA, *supra* note 43, at 122-26.

76. *See, e.g.*, Kent Greenfeld, *Corporate Law and the Rhetoric of Choice*, *in* LAW AND ECONOMICS: TOWARD SOCIAL JUSTICE 61, 78-82 (Dana L. Gold ed., 2009) (indicating that choice and consent are two tools that can be used to balance bargaining power); *cf.* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 774-75 (1983) (demonstrating the rationale for restricting contractual powers); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 267-71 (1998) (illustrating the paternalistic view of forfeiture clauses in credit sales).

77. *See* RICHARD AUSTEN-BAKER, IMPLIED TERMS IN ENGLISH CONTRACT LAW 144 (2011) (discussing the imposition of duties based on the relationship between the parties); Hugh Collins, *Implied Terms: The Foundation in Good Faith and Fair Dealing*, 67 CURRENT LEGAL PROBS. 297, 299-304 (2014) (reconciling the settled practice of judges imposing default rules on contracts with obligations that "had to be discovered in the . . . will of the parties"). *But cf.* George M. Cohen, *Implied Terms and Interpretation in Contract Law*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE REGULATION OF CONTRACTS 78, 82-90 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (analyzing the presumed intent of parties whose contract is incomplete); Trakman, *supra* note 28, at 39-53 (challenging implied terms giving rise to excuses from performance, as hypothecations of intention and ultimately, as legal fictions).

78. On the interface between freedom of contract and the law of torts and restitution, see generally FRANCIS ROSE, *supra* note 60 and Linda Curtis, Note, *Damage Measurements for Bad*

while responsibilities transcend the strict sanctity of correlative rights and duties, they do not exclude legal duties arising in tort, restitution, and criminal law.[79]

Finally and importantly, one can argue that the existing structure of legal rights and duties provides adequate legal protection, whether through a constitution, such as in the Equal Protection Clause of the Fourteenth Amendment; legislation and administrative regulations; or the common law.[80] However, such laws may give rise, at most, to imperfect obligations, binding in morality and not in law.[81] A particular case for public responsibilities arises, inter alia, in relation to contracts in emerging areas of law, such as agreements relating to environmental protection, surrogacy interests in the fetus, and the unrequited interests of indigenous peoples not limited to land claims.[82] Public responsibilities seek, inter alia, to protect material interests that are otherwise underprotected or unprotected by law for not being correlative to any countervailing right, and which would produce material loss or harm in the absence of such responsibilities.

IV. REQUIRING PROMISES TO BE COMMENSURABLE

Correlative rights and duties are based on the assumption that legal duties are owed only if they are commensurate in both kind and degree with legal rights.[83] For example, the judicial language of contracting is

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Faith Breach of Contract: An Economic Analysis, 39 STAN. L. REV. 161, 163-85 (1986).

79. *Id.*; *see* Cohen, *supra* note 25, at 578-80 (arguing that reliance-based theories of consent are overstated); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1613-16, 1631-32 (2009).

80. On the nature of the application of the Equal Protection Clause to corporations, see Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 409-10 (1886) and see also PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 241-42 (4th ed. 2000), which outlines the origins of the Fourteenth Amendment; BREEN CREIGHTON & ANDREW STEWART, LABOUR LAW §§ 2.53–.54, at 40-41 (5th ed. 2010), which notes how an Australian statute "called upon the corporations power" in its constitution to "permit the negotiation of 'enterprise flexibility agreements' between incorporated employers and groups of employees"; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 251-54 (Henry Steele Commager & Richard B. Morris eds., 1st ed. 1988), which discusses the historical circumstances of the drafting and passing of the Fourteenth Amendment; and SKEDINGER, *supra* note 53, at 69-73, which examines employment protection litigation in both common and civil law systems.

81. The conception of "imperfect obligations" as moral obligations giving rise, at most, to weak legal rights, is ascribed to John S. Mill and Jeremy Bentham. *See* P.J. KELLY, UTILITARIANISM AND DISTRIBUTIVE JUSTICE: JEREMY BENTHAM AND THE CIVIL LAW 67-68 (1990); John Rawls, *Justice as Reciprocity*, *in* JOHN STUART MILL, UTILITARIANISM WITH CRITICAL ESSAYS 242, 255 (Samuel Gorovitz ed., 1971).

82. On a comprehensive treatment of each of these issues, see TRAKMAN & GATIEN, *supra* note 3, at 138, 182-87, 217-25.

83. On the concept of commensurability, and its distinction from incommensurability, see, for example, MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES 149-55 (1990); David

framed in light of correlative promises which, in being commensurable, give rise to mutual consent.[84] This commensurability occurs in discrete transactions at the moment of mutual consent when the parties are ad idem—of the same mind.[85] So, too, in relational contracts in which there are multiple moments of consent over the course of a contractual relationship, the presupposition is still that the promises of the parties are commensurate in kind and degree at each stage of their relationship, expressed through their mutual exchange of correlative promises.[86]

As an illustration, Mal has a duty to compensate Bonum for breach of a contract promise that leads to damages that are commensurate with Bonum's rights. These damages may conceivably extend beyond reliance damages when Mal is estopped from denying a pre-contractual representation giving rise to expectation damages.[87] However, such damages remain compensatory in nature and therefore also remain commensurate with Bonum's rights.[88] As a result, Mal has no responsibility beyond his duty to compensate.

Nor have courts, in general, ventured substantially beyond the conceptual boundaries of rights and duties in imposing responsibilities on contracting parties. Significantly, the objective theory of contracting relies on a fictionalized account of the conceptual framework of contractual rights and duties to redress a defect or deficiency in a person's consent, rather than impute external standards of fairness into contractual relationships.[89] For example, the judicial assumption is that employer-Mal has an imperfect and therefore unenforceable legal duty

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Wiggins, *Incommensurability: Four Proposals*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 52, 52-56 (Ruth Chang ed., 1997); and BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, at 76-80 (1981).

84. AUSTEN-BAKER, *supra* note 77, at 22.

85. *See* Janet O'Sullivan, 56 CAMBRIDGE L.J. 231, 231-33 (1997) (reviewing F.D. ROSE, CONSENSUS AD IDEM: ESSAYS ON THE LAW OF CONTRACT IN HONOUR OF GUENTER TREITEL (1996)). For a challenge to "consensus ad idem" in so-called "nonbargained contracts," see Joshua A.T. Fairfield, *The Search Interest in Contract*, 92 IOWA L. REV. 1237, 1260-64 (2007) and Lawrence Solan et al., Essay, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1271-73 (2008).

86. On relational contracts, see *infra* note 197.

87. *See, e.g.*, Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 483 n.192 (1987).

88. *Id.* at 478-79; *see also* Koch Hydrocarbon Co. v. MDU Res. Grp., Inc., 988 F.2d 1529, 1541-43, 1548 (8th Cir. 1993); Lickley v. Max Herbold, Inc., 984 P.2d 697, 700-01 (Idaho 1999).

89. In subscribing to an objective measure of consent, Randy Barnett emphasizes the difficulty in ascertaining the subjective state of mind of the parties. But, he does not see anything contradictory between his conception of objective consent and consent as a subjective measure of agreement. *See* Barnett, *supra* note 16, at 305-10. On the subjective and objective conceptions of contract, see Boudewijn Sirks, *Change of Paradigm in* Contractus, *in* NOVA RATIONE: CHANGE OF PARADIGMS IN ROMAN LAW 133, 136-45 (Boudewijn Sirks ed., 2014).

to negotiate in good faith due, inter alia, to an inferred vice or defect in consent, namely in failing to promise to conclude the main contract.[90]

Alternatively, courts impute a legal duty to Mal to respect a promise to negotiate in good faith with Bonum, in effect imputing consent to Mal to be bound contractually based on party practice or trade usage.[91] The operative fiction is that the court carries out the will of Mal and Bonum by objective imputation, such as by analogy to other employer-employee relationships.[92]

At their most adventurous, judges fill gaps in incomplete contracts;[93] redress perceived inequities between parties like Mal and Bonum, including on grounds of economic efficiency;[94] and arrive at remedies beyond the literal or plain word meaning of the text.[95] Judges using creative methods of interpretation along contextual lines can conceivably redress material interests not ordinarily protected by rights, such as Bonum's interest in binding Mal to pre-contractual statements that do not promise to lead to a binding contract. However, such contractual remedies are resisted conceptually, such as on grounds that Mal's promise is uncertain in nature, making the case for legal

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90. *See* Trakman & Sharma, *supra* note 15, at 615-17.

91. On a strict construction, the court could conclude that parties who freely conclude contracts are legally "bound by their pacts," namely *pacta sunt servanda.* On the ancient origins of this concept, see Paradine v. Jane (1647) 82 Eng. Rep. 897, 897 and see also Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 775-79 (1959).

92. At issue, again, is the will theory of contracting. *See* F.H. BUCKLEY, JUST EXCHANGE: A THEORY OF CONTRACT 15 (2005); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404, 420-21 (1981) (reviewing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981)).

93. On the merits of a new criterion for default rules in incomplete contracts, namely "filling gaps" in contracts with terms that are favorable to the party with the greater bargaining power, see Omri Ben-Shahar, Essay, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 420-23, 426 (2009). For new formalists who challenge judicial gap-filling by realist courts, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1783, 1784 & n.66, 1785-86 (1996) and Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

94. For the argument that judicial gap-filling may be efficient including in contracting, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 41-49 (1973). *But see* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 98, 119 (1989); Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 400, 407-09 (2004). For evidence that sophisticated parties often may prefer a default rule that strictly enforces their contracts rather than "delegate" authority to courts to fill gaps on equitable or other grounds, see Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1046, 1048, 1051-52 (2009).

95. On the literal interpretation of contracts, see, for example, Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289, 298-300 (2006).

responsibilities to protect otherwise under-protected public interests all the more justifiable, particularly in the absence of enabling legislation.[96]

A key problem in excluding moral duties on grounds that they are quantitatively incommensurate with legal rights is the exclusion of legal responsibility for moral outrage at breach.[97] In effect, "efficient breach" prevails over "fault in breach."[98] The guiding tenet of faultless breach is, "let us not blame the contract breaker."[99] However morally or socially deleterious Mal's breach may be, Mal has a duty only to compensate Bonum contractually through restitution, reliance, or expectation damages,[100] and not to assume further compensatory or punitive liability for public harm for ensuing losses.[101] Bonum, in turn, is entitled only to damages that are commensurate with Mal's breach, beyond nominal damages.[102]

Certainly, courts can modify the language of correlative promises to accommodate conceptions of willfulness or negligence directed at public care and safety.[103] For example, they can adopt tort-like conceptions of negligence, such as to deter Mal from using negligent misstatements to induce employees like Bonum to contract.[104] However, in borrowing from the language of correlative rights and duties in tort

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96. *See* Trakman & Sharma, *supra* note 15, at 624-27.

97. On the debate over whether moral values are inseparable from efficiency values, see Richard A. Posner, Reply, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1653-54, 1660, 1662, 1668-70 (1998), which argues that moral values are encompassed in efficiency values, and comapre Ellis Washington, Reply, *The Inseparability of Law and Morality*, 3 RUTGERS J.L. & RELIGION 1, ¶¶ 19-20, 47, 52, 133 (2002).

98. On efficient breach in common law contracts, see Scalise, *supra* note 62, at 724-27.

99. *See* Omri Ben-Shahar & Ariel Porat, Foreword, *Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1344-45 (2009); Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1350, 1356-58 (2009). *But cf.* TONY HONORÉ, RESPONSIBILITY AND FAULT 70-76 (1999) (justifying tort liability as corrective justice).

100. On reliance damages, see L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54-55, 71-75, 89-92 (1936). *But cf.* Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 126, 144-51 (2000) (arguing that reliance damages are subsumed by expectation measures); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1783-85 (1992) (characterizing reliance damages as an academic exercise). On expectation interest, see David W. Barnes, *The* Net *Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1146-50 (1999).

101. *See, e.g.*, U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 696 (2d Cir. 1991) (arguing against the award of punitive damages in contract law, and arguing for compensatory damages based on the theory of "efficient breach").

102. On nominal damages for breach of contract, see Acheson v. W. Union Tel. Co., 31 P. 583, 583 (Cal. 1892) (per curiam).

103. *See* Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1529-30 (2009).

104. On the interface between liability for negligent misstatement in contract, as distinct from tort, see Mark P. Gergen, *Negligent Misrepresentation as Contract*, 101 CALIF. L. REV. 953, 999-1001 (2013).

law, this judicial approach is conceptually strained, even though it is functionally justified.[105]

Equally apposite, courts can construe Mal's and Bonum's correlative rights and duties in light of canons of construction to redress structural inequalities in their bargaining capacities. For example, they can interpret the contract *contra proferentem*, namely against the drafter—in this case, Mal.[106] They can also hold that Bonum's consent is subject to a vise under the law of undue influence,[107] physical or economic duress,[108] or unconscionability.[109] Again, the judicial reasoning is conceptual, in relying on the contract doctrine to prevail over strict compliance with consent in contracting.

Finally, a court can address the incommensurability in the remedies derived from Bonum's rights and Mal's duties in contract, by reconstituting Bonum's damages for pain and suffering in contract into damages in tort.[110] In so doing, it can accommodate a higher threshold of liability that reflects a public standard of moral outrage at Mal's default.[111] Similarly, the court can award Bonum damages exceeding Mal's unjustified enrichment under the law of restitution, or it can order the disgorgement of Mal's profits.[112]

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105. Nevertheless, the conception of fault in contracting arguably has a place in common law contracts. *See* Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1418-19 (2009); Robert A. Hillman, *The Future of Fault in Contract Law*, 52 DUQ. L. REV. 275, 284-89 (2014); Barry Nicholas, *Fault and Breach of Contract*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 337, 345 (Jack Beatson & Daniel Friedmann eds., 1995); Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 373-76 (1997).

106. RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (AM. LAW INST. 1981).

107. *Id.* § 177(1).

108. *See* Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 153-54, 156 (1935).

109. *See infra* text accompanying notes 132-36. On procedural unconscionability, see Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489-508 (1967).

110. *See, e.g.*, Hawkins v. McGee, 146 A. 641, 642-44 (N.H. 1929) (denying damages for pain and suffering in a contractual claim against a doctor who promised that surgery would fully repair the plaintiff's hand, which was injured during an electrical wiring accident).

111. On binding promises underpinning the philosophy associated with contract law, see W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 20-21 (1996) and Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 491-503 (1989).

112. On the commensurability between unjust enrichment and compensation, see, for example, Georgia Malone & Co. v. Rieder, 973 N.E.2d 743, 746-47 (N.Y. 2012). *But see* Peter Birks, *Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment*, 23 MELB. U. L. REV. 1, 4-7, 15-20 (1999) (discussing the discontinuity between the law of unjust enrichment and the law of restitution, as between the law of equity and the common law). On the disgorgement of profits, see DAVID WINTERTON, MONEY AWARDS IN CONTRACT LAW 133-216 (2015).

The problem, yet again, is that the decision remains imbedded in a right-duty correlation that excludes public morality, unless that morality is legally recognized *a priori*, such as through laws rendering contracts unenforceable for offending good morals—namely, for being *contra bonos mores*.[113] Part V illustrates the limitations of relying on fictional imputations of party intention under a correlative rights and duties contractual regime.[114]

V. AN ILLUSTRATION: LIMITATIONS IN CORRELATIVE RIGHTS AND DUTIES

The limitations associated with a rights-based contractual regime that fails to take adequate account of public interests is best represented through an illustration of correlative rights and duties in contracting. Let us commence with an agreement in which material public interest issues, arguably, do not arise. Assume that Mal offers to sell Bonum a 1910 Ford designed by Henry Ford himself for $10,000,000, which Bonum accepts. According to a strict application of correlative rights and duties, Mal has the right to receive $10,000,000 in return for passing title in the car to Bonum. The result is mutual assent by which Bonum has the right to the car in return for the duty to pay Mal $10,000,000, while Mal has the converse rights and duties.[115] Those rights and duties are binding in law so long as they satisfy other requirements associated with the formation of a contract: the parties seriously intended to conclude a contract, the parties engaged in a bargained-for exchange, and the material terms of their contract were certain.[116]

Now, let us add an issue relating to fair dealings between Mal and Bonum. Assume that Mal had stated, before the sale, that the car was "in mint condition." After buying the car, Bonum discovers that the engine

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113. *See* Nelson Enonchong, *Effects of Illegality: A Comparative Study in French and English Law*, 44 INT'L & COMP. L.Q. 196, 201-02 (1995); Leon E. Trakman, Commentary, *The Effect of Illegality in the Law of Contract: Suggestions for Reform*, 55 REVUE DU BARREAU CANADIEN [CAN. B. REV.] 625, 627-28, 632-33 (1977); John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV 261, 262-65 (1947).

114. *See infra* Part V.

115. For a subjective conception of the meeting of the mind signifying mutual assent, see Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 369 (1921). *Contra* Spring Lake NC, LLC v. Holloway, 110 So. 3d 916, 917 (Fla. Dist. Ct. App. 2013) (arguing that there is no attention given to a party's "mind" in determining whether there was a "meeting of the minds," even when that party, in seeking to avoid a contract, "could not possibly have understood").

116. *See* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 42, 49-51 (Gregory Klass et al. eds., 2014); Mindy Chen-Wishart, *A Bird in the Hand: Consideration and Contract Modifications*, *in* CONTRACT FORMATION AND PARTIES 89, 91 (Andrew Burrows & Edwin Peel eds., 2010); MICHAEL FURMSTON & G.J. TOLHURST, CONTRACT FORMATION: LAW AND PRACTICE 6, 283-84, 316 (2010).

was significantly rebuilt in the 1940s using the original parts from other 1910 models insofar as they were available and substitute parts insofar as the former were not available. He wants the contract to be rescinded on grounds that Mal, in not indicating that the car was rebuilt in the 1940s, had misrepresented in a material respect that the car was in mint condition and misled Bonum into buying it. Assume that Mal responds that he did not know that the car had been rebuilt in the 1940s but that the material condition of the car was no different to that which he had promised, namely it is still a 1910 Ford designed by Henry Ford and that it was in mint condition when he so represented its condition.

Did Mal engage in a pre-contractual misrepresentation about the condition of the car? If Mal's statement that the car is in mint condition is a mere opinion upon which Bonum is not expected reasonably to rely, Mal may not be bound. However, if the court concludes that Mal is an expert in classic cars upon whose opinion Bonum is likely to rely, and that the car was not in mint condition associated with its original condition, it may order rescission of the contract.[117] The potential arguments a court might invoke in deciding are multi-fold. If it decides to construe the contract strictly in accordance with a classical will theory of consent, it would conclude that there is a contract.[118] Mal promised to sell Bonum a specific car at a particular price—and Bonum agreed. There were no express conditions attached to their respective promises. Therefore, there was *consensus ad idem*. Mal has a right to receive $10,000,000 in return for the car; and Bonum has a duty to pay that sum in order to acquire ownership of it. In effect, the court finds no objective reason to vary from the will theory in which the contractual rights and duties of Mal and Bonum are determined subjectively.[119]

Alternatively, the court might conclude, using a subjective theory of contracting, that Bonum had the right to rescind the contract on grounds that Mal intended to induce and, conceivably, deceive Bonum into buying the car; that Mal had concealed his awareness that the car had been reconditioned; that such reconditioning was material; and that Bonum was induced and, conceivably, deceived into buying it.[120]

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117. *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 908-09 (Fla. Dist. Ct. App. 1968); RESTATEMENT (SECOND) OF CONTRACTS § 168 cmt. d, illus. 6 (AM. LAW INST. 1981).

118. *See* Trakman, *supra* note 27, at 1038 & n.24.

119. On the classical wills theory of contracting, see BUCKLEY, *supra* note 92, at 27-34 and Cohen, *supra* note 25, at 575, which provides, "[a]ccording to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect."

120. On misrepresentation by concealment, see, for example, Reed v. King, 193 Cal. Rptr. 130, 131-32 (Dist. Ct. App. 1983), which involved failure to disclose that the house was the scene of multiple murders, and Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674, 676 (App. Div. 1991), which

If the court rejects this subjective construction of Mal's and Bonum's intentions to contract, there are various objective arguments upon which it can base its decision. Among them, it can imply a term into the contract that the car should satisfy particular conditions of sale, including both originality and authenticity.[121] It may imply these conditions of sale on grounds that reasonable parties in the position of Mal and Bonum would have agreed to them had they been aware of them at the time of contracting. This determination is conjectural. Unless Mal or Bonum knew about the condition of the car at that time, it is unlikely that either contemplated that eventuality in fact.

The court might attempt to make its conjectures less fictional by, for example, admitting evidence of a trade usage that regulates the physical condition of a classic car offered for sale.[122] However, the court may again engage in conjecture about the nature and effect of that usage (if it exists at all). It may also conjecture about such usage's applicability, given that neither party had expressly agreed to adopt that usage, and Bonum, as a one-time buyer, may have lacked knowledge about it.

The court could conjecture further that, had a reasonable person in Bonum's position been aware of the car's condition at the time of purchase, that person would not have wanted to buy the car, or would have wanted to buy it at a lower price. This ex post facto construction of intention is contrived because the reasonable person in Bonum's position is the court itself, imputing an intention to Bonum based on its reconstruction of the bargain.[123]

Similar reasoning arguably would apply to other objective constructions of consent, which the court could adopt in determining whether to enforce the contract.[124] For example, the court could hold that a reasonable person would have concluded that Mal had

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involved failure to disclose that the house was "haunted."

121. *See* AUSTEN-BAKER, *supra* note 77, at 106-15. On the use of implied terms to hypothecate the intention of contracting parties ex post facto, see Trakman, *supra* note 28, at 41.

122. *See, e.g.*, AUSTEN-BAKER, *supra* note 77, at 80.

123. On the shift from the subjective to an objective theory of contracting, see Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 444-46 (2000) and see also RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (AM. LAW INST. 1981); AUSTEN-BAKER, *supra* note 77, at 22; FARNSWORTH, *supra* note 49, § 3.6, at 114; Ian R. Macneil, Commentary, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. ANN. INDEX 589, 592-93 (1974); and Williston, *supra* note 115, at 369.

124. On the objective test, see, for example, Lucy v. Zehmer, 84 S.E.2d 516, 521 (Va. 1954) ("We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts." (quoting First Nat'l Exch. Bank of Roanoke v. Roanoke Oil Co., 192 S.E. 764, 770 (Va. 1937))).

misrepresented, expressly or impliedly, the condition of the car with the intention of inducing Bonum to contract, and that a reasonable person in Bonum's position would have relied on that misrepresentation to his detriment.[125] Conversely, that court could conclude that a reasonable person in Bonum's position would not reasonably have relied on Mal's representation, but should have resorted instead to a pre-purchase inspection.[126]

In each scenario immediately above, the court uses the conceptual language of rights and duties to determine whether or not to enforce the contract. For example, it could conclude that Mal had a correlative duty to disclose the condition of the car based on a reasonable imputation of a misrepresentation to him about which he was silent but upon which Bonum could reasonably have relied.[127] It could hold the opposite: that Mal has no such duty to disclose based on the opposite inference drawn from his silence. The result is that the analytical foundation of correlative rights and duties arising from mutual promises remains intact; what changes are the reasonable inferences, which the court draws ex post facto from Mal's silence and imputes to each party.

These ex post facto judicial constructions of the correlative promises of the parties also determine their remedies. If the court holds that an objective person would conclude that Mal had expressed an opinion about the condition of the car, the court might decide that there was no misrepresentation in fact. The court might conclude differently, that Mal had innocently misrepresented the condition and require Mal to return any money received from Bonum, such as a down payment on the car, as restitution.[128] The court might determine that Mal's misrepresentation was grossly negligent or fraudulent, Bonum reasonably relied on the misrepresentation, and thereby order rescission of the contract and require Mal to pay further damages to Bonum.[129]

The essential method of imputing an objective intention to Mal and Bonum is by the court framing reasonableness in moral terms, which it

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125. A material misrepresentation is one which "would be likely to induce a reasonable person to manifest his assent" or that "the maker knows . . . would be likely to induce the recipient to do so." RESTATEMENT (SECOND) OF CONTRACTS § 162(2).

126. *See, e.g.*, *id.* § 163 ("If a misrepresetation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.").

127. *See, e.g.*, Estate of Timko v. Oral Roberts Evangelistic Ass'n, 215 N.W.2d 750, 752 (Mich. Ct. App. 1974).

128. On innocent misrepresentation, see, for example, Lesher v. Strid, 996 P.2d 988, 993 (Or. Ct. App. 2000).

129. On fraudulent misrepresentation, see, for example, Kirkham v. Smith, 23 P.3d 10, 13 (Wash. Ct. App. 2001).

then reconceptualizes in terms of correlative rights and duties. For example, it infers from Mal's silence that a person in Mal's position ought reasonably to have known about the condition of the car and was under a reasonable duty to investigate and disclose that condition;[130] and, that a person in Bonum's position ought reasonably to have the right to rely on Mal to disclose the condition of the car. Each judicial inference depends on two distinct presuppositions grounded in the prioritized language of rights and duties: that Mal had the primary duty to disclose the condition of the car or that Bonum had the primary duty to inquire about that condition.[131] Despite the moral nature of the language used, the reasoning is ultimately conceptual, in that it resides in the primacy accorded to Mal's and Bonum's correlative rights and duties.

This primacy of correlative rights and duties is also evident, albeit less apparently, in the judicial application of contract doctrines, such as unconscionability, which seek to redress substantive inequalities in contracting. For example, assume that Mal deals in classic cars and Bonum is a neophyte who had never before purchased a classic car. Mal is aware of Bonum's lack of such knowledge. Under a subjective will theory of contracting, Bonum's right not to be treated unconscionably is correlatively related to Mal's duty not to act unconscionably.[132] In shifting to an objective theory of contracting, the court is likely to draw reasonable inferences about Mal and Bonum, including Mal's knowledge and expertise about classic Ford cars and Bonum's lack of expertise, Mal's awareness about Bonum's limited knowledge and expertise, Mal's unconscionable conduct in describing the car as being in mint condition when he knew that the engine had been reconditioned, as well as the likelihood that Bonum was not so aware and likely persuaded by Mal's words in buying the car.[133]

However, the same objective inferences arise when the court hypothecates that Mal had or had not misrepresented the condition of the

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130. On silence as acceptance, see, for example, Hobbs v. Massasoit Whip Co., 33 N.E. 495, 495 (Mass. 1893) ("[I]f skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.").

131. On the nature of this duty, see, for example, Ikeda v. Curtis, 261 P.2d 684, 691 (Wash. 1953) (finding misrepresentation in the sale of a hotel in not disclosing income derived from the rent of rooms as a brothel).

132. *See* Leff, *supra* note 109, at 538-39; *cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 301-05 (1975).

133. On the rationale for such judicial scrutiny on grounds of unconscionability, see, for example, Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 350-54 (Ct. App. 2007). *But see* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 37-41 (1981).

car to Bonum. The fact that Mal is a car dealer does not necessarily imply that Mal was aware that the engine had been reconditioned, and even so, stating that it was in mint condition in pre-contractual negotiations does not infer that such statements were unconscionable in fact.[134] Bonum, in turn, may be a neophyte in buying a classic car, but if Bonum has $10,000,000 to indulge his fancy, he might presumably have the car inspected prior to purchase, which presumably would identify its reconditioned engine.

Conversely, the court could conclude, using an objective test, that Mal's statement about the condition of the car fell short of unconscionability in not being substantively unfair and also was not procedurally unconscionable in not being expressed in a complex fine print clause excluding Mal's liability.[135] The court could also conclude that the incommensurable knowledge of the parties about classic cars was insufficient to ground an unconscionability claim, that Bonum could have had the car independently inspected prior to purchase, and that Bonum could have sought legal advice prior to making so costly a purchase.[136]

The problem is that the court's objective determination in each case is based on the selective imputation of an intention to Mal and Bonum, as distinct from their per se intentions. The criteria to determine their correlative rights and duties, again, depends upon the judicial imputation of their reasonable conduct. These are based on such factors as the incommensurability of Mal's and Bonum's relative knowledge and bargaining ability, and objective evidence that Mal was reasonably able to use superior knowledge and experience to take unfair advantage of Bonum. It could conclude, based on a reasonable person standard, that Mal intended to take unfair advantage of Bonum and that Bonum was unreasonably disadvantaged in fact. Alternatively, the court could decide to the contrary. However, the underlying basis for its decision resides in an objective theory of contracting, namely, in protecting the right of a reasonable person in Bonum's position to receive the car in mint

134. *See* Hillman, *supra* note 133, at 11-15.

135. On procedural unconscionability, see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965), in which the court recognizes unconscionability to include "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party," and see also Harris v. Blockbuster Inc., 622 F. Supp. 2d 396, 398-99 (N.D. Tex. 2009), in which the court finds an arbitration provision to be illusory.

136. *See, e.g.*, *Gatton*, 61 Cal. Rptr. 3d at 352 (explaining that for the purposes of rendering a contract provision procedurally unconscionable, "[o]ppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (quoting Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 381 (Ct. App. 2001))).

condition, correlated to the duty of a reasonable person in Mal's position not to violate Bonum's right.[137]

The court, again, resorts to an objective test based on agreement between Mal and Bonum, construed in light of statutory and common law. For example, a court can conclude, based on a reasonable person standard, that an exclusion or limitation of liability clause in a contract between Mal and Bonum is substantively unfair and procedurally unconscionable.[138] It can invoke the common law doctrines of duress or undue influence to nullify that contract,[139] or the statutory and common law governing unconscionability, to determine that Mal's treatment of Bonum is objectively unfair.[140]

The problem is that the law of unconscionability, which has contractual fairness as its central objective, has a limited scope of application. Take the case of Mal and Bonum in which some attributes of unconscionable contracts are lacking. Substantive unconscionability may be difficult to establish if Mal did not exert undue influence on Bonum or subject him to economic duress.[141] A key attribute of procedural unconscionability, such as a fine print limitation of liability clause in favor of Mal, is also likely lacking in the absence of a detailed written contract.[142] So, too, legislation governing unconscionability, which applies most readily in mass consumer and employment markets, is less likely to be available, given that Mal and Bonum are not engaged in highly regulated economic sectors.[143] In summary, if legislated and common law principles of fairness, such as under the law of unconscionability, fail to regulate dealings between Mal and Bonum

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137. On the objective theory of contracting, see Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 295-97 (1997); Perillo, *supra* note 123, at 430-35, 444-45; and Trakman, *supra* note 27, at 1043-44.

138. For divergent views on unconscionability in contract, see, for example, Epstein, *supra* note 132, at 301-15; David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 394-400 (2012); and Leff, *supra* note 109, at 543-46.

139. Undue influence is determined by a variety of factors, including "the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded." RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b (AM. LAW INST. 1981); *see also* Hale, *supra* note 108, at 149-50.

140. *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 5 (2014).

141. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1255-56, 1273 (2003).

142. *Id.* at 1256, 1271-72.

143. *See* MINDY CHEN-WISHART, CONTRACT LAW 432-34 (5th ed. 2015) (outlining the regulation of standard form contracts); Korobkin, *supra* note 141, at 1247-49, 1254-55, 1284, 1287-89 (arguing that the efficient use of standard form contracts, including greater use of mandatory contract terms and judicial modification of the unconscionability doctrine, will better respond to the primary cause of contractual inefficiency).

adequately, the case for subjecting Mal to responsibilities on public interest grounds grows. If the ability to negotiate fair contracts is to serve as a determinant of conscionable social and economic ordering, it is entirely fitting to transcend analytical constructions of correlative rights and duties that fail to serve those ends adequately.[144] If consent-based theories of contracting are deficient in their nature or application, public responsibilities are justified, not only in moral determinism but also in law. If moral determinism underlying responsibilities is reflected in social policy, it must surely find a place in legal policy as well.[145]

VI. MORAL DETERMINISM AND LEGAL RESPONSIBILITIES

Common law scholars are not lacking in moral theories that recognize contract responsibilities beyond correlative rights and duties. These vary from returning contract law to its natural law roots,[146] to efforts by legal realists to transcend formalism in regulating contracts, including on moral grounds.[147] Implicit in these legal developments are both explicit and implicit movements away from the conception of correlative promises constituted as mutual consent, to the enforcement of essentially unilateral promises on moral grounds, framed, inter alia, on grounds of promissory estoppel[148] or as rectification[149] of a mistake.[150]

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144. For classical commentary on adhesion contracts, see Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 202-10, 215, 220-22 (1919).

145. *See* BUCKLEY, *supra* note 92, at 51-59; Andrew Robertson, *On the Distinction Between Contract and Tort*, *in* The LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES 87, 91, 95 (Andrew Robertson ed., 2004).

146. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 100-01 (2d ed. 2015). For an examination of freedom of contract in natural law and in ethics more generally, see DAVID G. RITCHIE, NATURAL RIGHTS: A CRITICISM OF SOME POLITICAL AND ETHICAL CONCEPTIONS 227-31 (Unwin Brothers Limited 1952) (1894).

147. On a blend between legal formalism and legal realism, referred to as "realistic formalism," see Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 265, 308-09 (2009) and Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007).

148. *See, e.g.*, Barnett & Becker, *supra* note 87, at 455-57; Holmes, *supra* note 26, at 463-64.

149. On formal and substantive grounds underlying rectification, see Paul S. Davies & Janet O'Sullivan, *Rectification*, *in* SNELL'S EQUITY 449, 452-56 (John McGhee ed., 32d ed. 2010); GERARD MCMEEL, THE CONSTRUCTION OF CONTRACTS: INTERPRETATION, IMPLICATION, AND RECTIFICATION 488-92 (2d ed. 2011); and EDWIN PEEL, THE LAW OF CONTRACT 348-55 (13th ed. 2011).

150. The court could conclude that only Bonum was mistaken. On the other hand, it could conclude that Mal and Bonum were at cross purposes about the qualities of the car. *See, e.g.*, Raffles v. Wichelhaus (1864) 159 Eng. Rep. 375, 375-76; *see also* Konic Int'l Corp. v. Spokane Comput. Servs., Inc., 708 P.2d 932, 935 (Idaho Ct. App. 1985) (finding a mutual mistake); Sikora v. Vanderploeg, 212 S.W.3d 277, 286-88 (Tenn. Ct. App. 2006) (same). Alternatively, it could conclude the parties were subject to a common mistake, for example, in both believing that the car was in a particular condition. *See* Sherwood v. Walker, 33 N.W. 919, 923-24 (Mich. 1887).

Even the traditional will theory of contracting is sometimes recast into a moral theory.[151] Moral consideration in the absence of a bargained-for exchange, in turn, includes promises to keep an offer open, to release a debt, to modify a duty, and to pay for past benefits or favors.[152]

Common law courts have also implicitly recognized responsibilities beyond correlative promises in construing allegedly unreasonable terms in contracts expansively, in response to limitations in party consent.[153] They have recast, by hypothecation, correlative promises into the moral rectitude of the court, not least of all in arriving at equitable remedies in contract.[154] They have imposed responsibilities directed at substantive fairness in contracting, such as under section 2-302 of the Uniform Commercial Code ("UCC"), which regulates substantive and procedural unconscionability.[155] They have applied responsibilities, too, in constructing contract terms, notably to regulate boilerplate adhesion contracts.[156]

Statutes have also grounded contract responsibilities in moral values, notably through unfair contracts legislation, which grants wide judicial discretion to deem certain terms and conditions unfair in consumer contracts.[157] For example, section 2-305 of the UCC expressly provides that courts can imply terms into contracts of sale, including by establishing a reasonable market price, which may take account of principles of fairness, beyond narrow conceptions of party consent.[158]

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151. *See, e.g.*, Kronman, *supra* note 92, at 412-13. *But cf.* JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 47-49 (1999).

152. On categories in which judges allegedly uphold contracts in the absence of a bargained-for exchange, see FRIED, *supra* note 146, at 30-33. Fried identifies these four categories as not requiring a bargained-for exchange. *Id.* at 28.

153. Conversely, courts have reconstituted the objective theory of contracting into the "subjectivity of judgment." *See* DiMatteo, *supra* note 137, at 343-53.

154. On judicial gap-filling in contracts, see Avery Wiener Katz, Essay, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 502, 518, 521, 526 (2004). *But see* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1819, 1832, 1867-68 (1991); George M. Cohen, *The Fault That Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1457-60 (2009) (arguing for the qualification of the strict liability view of contract law).

155. On the tensions in the UCC between freedom of contract and fairness between parties, see Caroline Edwards, *Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment*, 78 ST. JOHN'S L. REV. 663, 675-79, 689-99 (2004).

156. *See* DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 123-27 (2013); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 936-39, 947-50 (2006); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637-42 (1943).

157. *See* Mindy Chen-Wishart, *Regulating Unfair Terms*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 105, 107, 111-13 (Louise Gullifer & Stefan Vogenauer eds., 2014).

158. *See* U.C.C. § 2-305(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

Legal scholars, too, recognize the value of moral reasoning in determining the fidelity to promises.[159] As Melvin Eisenberg proclaimed, "[t]he first great question of contract law, therefore, is what kinds of promises *should be* enforced."[160] At issue is the nature and kinds of promises that ought to be protected, whether or not the moral basis for a responsibility to respect a promise is formally commensurate with a legal duty protected by a legal right.[161]

The problem is, therefore, not that public responsibilities lack recognition in contract law, but rather that they are ordinarily excluded reactively in the absence of a duty and not imposed proactively. If Bonum's rights do not give rise to a correlative duty owed by Mal, Mal ordinarily will owe Bonum no responsibility, however deficient Mal's duty may be when it is considered proactively.[162] If courts embrace a "contract-as-product" model of contracting, grounded in a mechanized conception of consent, an all-encompassing conception of consent will exclude morally informed notions of public harm.[163]

Accordingly, if responsibilities are to overcome restrictive conceptions of consent, they ought to transcend analytical constructions of correlative rights and duties. If such responsibilities are to be legally sustained, they ought to be evaluated systematically, comprehensively, and proactively—not piecemeal, artificially, and reactively.[164] If they are accorded public standing, they should redress both Bonum's equitable interests and the public policy considerations arising from Mal's bad faith in negotiations. If the effect of that bad faith is particularly egregious, they should raise the specter of deterrent and

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159. *See* P.S. ATIYAH, PROMISES, MORALS, AND LAW 177-79 (1981). *But see* Barbara H. Fried, *The Holmesian Bad Man Flubs His Entrance*, 45 SUFFOLK U. L. REV. 627, 632-34 (2012).

160. Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 640 (1982) (emphasis added).

161. On such commensurability, see *supra* Part IV and see also T.M. Scanlon, *Promises and Contracts*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 86, 99-111 (Peter Benson ed., 2001), which emphasizes that not every moral responsibility translates into a legally cognizable right.

162. On this close-ended nature of Hohfelt's correlative rights and duties, see, for example, Layman E. Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of "Legal Right": A Powerful Lens for the Electronic Age*, 48 S. CAL. L. REV. 428, 432-36 (1974); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 164-66 (1919); A.K.W. Halpin, *Hohfeld's Conceptions: From Eight to Two*, 44 CAMBRIDGE L.J. 435, 441-45 (1985); and H.J. Randall, *Hohfeld on Jurisprudence*, 41 L.Q. REV. 86, 89-90 (1925).

163. *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 99-103 (2013); Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 144-55 (1970); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1125-26 (2000).

164. *See* R.A. BUCKLEY, ILLEGALITY AND PUBLIC POLICY 87-93, 100-04 (3d ed. 2013); M.P. FURMSTON, LAW OF CONTRACT 449-55 (14th ed. 2001); RICHARD STONE, THE MODERN LAW OF CONTRACT 16-28 (8th ed. 2009); Trakman, *supra* note 113, at 651-55.

retributive damages, beyond compensation in contract, as some legal scholars recognize.[165]

Part VII explores the rationale that public responsibilities are necessary to redress the exploitation of important public interests, which lack protection as contracts, through a historical U.S. Supreme Court case.[166]

VII. PRIVATE PROPERTY RIGHTS VERSUS PUBLIC RESPONSIBILITIES

The debate over the boundaries between private property rights arising in contract and public responsibilities beyond those private rights is epitomized in the historical case of *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge* decided by the U.S. Supreme Court in 1837.[167] A key issue in that case was whether the government of Massachusetts, under the Constitution's Contract Clause, had breached a charter granting the Charles River Bridge Company the right to build and operate a private toll bridge when the government authorized the construction of a new bridge nearby, which was not subject to a toll until all construction costs had been paid.[168]

Chief Justice Roger B. Taney, writing for the majority, decided against the Charles River Bridge Company.[169] He noted that, although the Constitution prohibited states from violating contracts, nothing in the grant of the charter to build the Charles River Bridge rendered that charter exclusive.[170] Stating that the language of contracts must be interpreted strictly, or precisely, he concluded that states could regulate property in the public interest unless the language of a charter explicitly prohibited it.[171] Otherwise, he explained, no one would invest in new transportation or new technologies until the old charter had run its course.[172] He added that economic progress at times required that

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165. *See* KATY BARNETT, ACCOUNTING FOR PROFIT FOR BREACH OF CONTRACT: THEORY AND PRACTICE 25, 53-55 (2012) (arguing that contract damages should take into account deterrence and retribution); Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 370-72 (1997) (evaluating punishment as part of a harm theory of contract obligations). On punitive damages associated with tort-like breaches of contract, see Leon E. Trakman, *Breach, Compensation and the Magic Carpet*, *in* REMEDIES: ISSUES AND PERSPECTIVES 373, 374-76, 393 (Jeffrey Berryman ed., 1991) and Gergen, *supra* note 104, at 959-66. *But see* Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 578-81 (2006).

166. *See infra* Part VII.

167. 36 U.S. (11 Pet.) 420 (1837).

168. *Id.* at 536-37.

169. *Id.* at 536-38, 553.

170. *Id.* at 546-49.

171. *Id.* at 548-49.

172. *Id.* at 547-48, 552-53.

existing property rights had to be destroyed to make room for innovation and improvement.[173] Such was the price of progress.[174] Justice Taney further noted: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[175] He concluded that the social harm of denying such community rights is that "[w]e shall be . . . obliged to stand still, until the claims of the old turnpike corporations shall be satisfied . . . ."[176]

Writing for the dissent, Justice Joseph Story argued that the grant to the Charles River Bridge Company was a public contract protected by the Constitution's Contract Clause in which Article 1, Section 10 stated: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[177] He disagreed with the majority that property rights were subordinate to the public interest.[178] Insisting that the Charles River Bridge Company had undertaken great economic, political, and technological risks in building the bridge in the 1780s, he asked this rhetorical question: "Would any sensible business man . . . venture capital in a risky enterprise . . . in which the sole profit was the right to collect tolls, if the legislature reserved the right to destroy those tolls at any time by chartering an adjacent free bridge?"[179] He answered: "For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security, and as to productiveness."[180]

As the case exemplifies, subjecting contract rights to public responsibilities ascribed to social, economic, and political interests raises conflicting choices. On the one side is the judicial activist, but nevertheless minimalist, view of Justice Story that private contract rights, by reason of individual autonomy and social utility, should be subject to minimal public responsibilities imposed on contract rights.[181] Supporting such minimalism is the resistance to expanding contract rights beyond their consensual roots, and to not subjugate commercially

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173. *Id.* at 553.

174. *Id.*

175. *Id.* at 548.

176. *Id.* at 553.

177. U.S. CONST. art. I, § 10, cl. 1; *Proprietors of the Charles River Bridge*, 36 U.S. (11 Pet.) at 646-47, 650.

178. *See Proprietors of the Charles River Bridge*, 36 U.S. (11 Pet.) at 615.

179. *See id.*; Kent Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEGAL HIST. 232, 237 (1973).

180. *Proprietors of the Charles River Bridge*, 36 U.S. (11 Pet.) at 608.

181. On contractual minimalism, see MORGAN, *supra* note 61, at 89-113.

driven rights in contracting to a transcendent social contract between citizens and the state. Justice Story coupled this minimalist view with an expansive conception of Article 1, Section 10 of the Constitution, prohibiting states from interfering with contract rights.[182] In conceptual terms, no contractual duty ought to be owed to citizens at large, such as access to affordable travel on public highways, in the absence of them having an allegedly constitutionally protected correlative legal right or power giving rise to that duty. Moral entitlement, such as arises from the public impact of the exercise of contract rights, ought to operate externally to the law of contract.[183]

An ancillary result of this minimalist view is to eschew social determinants of liability in contracting, as extra-legal, whether they are expressed as "promissory morality, corrective justice, taxonomic rationality, or otherwise."[184] In particular, a party should not be morally judged for declining to perform a contract, so long as that party is willing to compensate the other party commensurably for the failure to perform.[185]

On the other extreme is the literal interpretation, which Chief Justice Taney adopted in construing the constitutional protection of contracts restrictively, coupled with an expansive view of the responsibility of courts to protect against publicly harmful contracting. Included in this public interest is, for instance, to render travel on highways more affordable to the public, or conversely to impede the strict application of private contracts from undermining those public ends.[186] The perceived social malady stems from the conception that contracts, however free parties are to enter into them, can have negative consequences for third parties—here, members of the public at large, who have no correlative rights giving rise to contractual duties owed to them. The social policy concern is over the need for public

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182. *See supra* text accompanying note 177. On this tension between private rights—not limited to contract—and social rights, see DAVID J. BODENHAMER, OUR RIGHTS 213-22 (2007) and DAVID HUME, OF THE ORIGINAL CONTRACT 147-55 (Oxford Univ. Press 1948) (1748).

183. On the moral-legal basis of the consent theory in contracting, see Barnett, *supra* note 16, at 291-300.

184. *See* MORGAN, *supra* note 61, at i.

185. On this minimalist approach, see Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope for?*, 12 J. POL. PHIL. 190, 193-202 (2004) and see also CLAUDIO CORRADETTI, RELATIVISM AND HUMAN RIGHTS: A THEORY OF PLURALISTIC UNIVERSALISM 49-53 (2009), which discusses the theory of absolute metaethical moral relativism, and Maurice Cranston, *Human Rights, Real and Supposed*, *in* POLITICAL THEORY AND THE RIGHTS OF MAN 43, 49-53 (D.D. Raphael ed., 1967), which considers human rights as a universal moral right.

186. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 199(b) (AM. LAW INST. 1981) (allowing a party to withdraw from a contract prior to an illegal purpose being carried out to "put an end to a continuing situation that is contrary to the public interest").

accountability for the propertied rights of individuals, including the Charles River Bridge Company, in a context which, according to Chief Justice Taney, was unrestricted by state regulation.[187] In economic terms, the case raised the disjuncture between the transaction costs arising from the loss of toll revenue of a contracting party, the Charles River Bridge Company, and the benefit to the public in not having to pay those tolls.[188]

This tension in judicial reasoning in *Proprietors of the Charles River Bridge* is replicated in our post-welfare twenty-first century. On the one side is the inferred constitutional affirmation of the liberty of the individual to contract freely and voluntarily[189] and to discourage courts from interfering in the marketplace of contracting.[190] This liberal idealism of freedom *of* contract, in turn, is transformed—functionally more than ideologically—into freedom *from* contract, directed at limiting the application of contract law in informal non-contractual relations.[191]

On the other side is the perceived malady of, inter alia, dominant parties using one-sided contracts, including contracts sanctioned by states, to perpetuate de facto servitude, such as toll companies regulating public transportation, employers dictating employment contracts, and producers excluding liability in consumer contracts.[192] While the Charles River Bridge Company did not enjoy a contractual relationship of

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187. This concern is most evident in the perceived lack of legal responsibility of corporations for actions, including contractual, which undermine social, economic, and environmental interests. *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 472-75 (2001). *See generally* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005).

188. For commentary on the divided court in *Proprietors of the Charles River Bridge*, see DONALD P. KOMMERS ET AL., AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 524-28 (2d ed. 2004).

189. On the sanctity of contract enunciated in the early twentieth century, see, for example, Pound, *supra* note 2, at 460 n.35 and Roscoe Pound, *Liberty of Contract and Social Legislation*, 17 COLUM. L. REV. 538, 540-41 (1917); and see also Daniel Markovits, *Good Faith as Contract's Core Value*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 116, at 280-84, which identifies freedom of contract with good faith.

190. On the freedom of the market from governmental intrusion, see 3 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 89-93 (1979) and see also RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 33-34, 50-53 (2003). On the perceived structure of liberty and its application to contract law, see BARNETT, *supra* note 54, at 64-67, 65 n.10.

191. On the functional transformation from "freedom *of*" to "freedom *from* contract," see Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 777-88 (2004).

192. On the use of adhesion contracts to disempower consumers, see Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1: A Comparative Study*, 74 YALE L.J. 262, 280-83 (1964).

dominance over mass commuters, because it had not contracted directly with commuters at large, it enjoyed a position of de facto market dominance in being the only bridge crossing prior to the erection of the Warren Bridge.[193]

Part VIII, below, illustrates how legal responsibilities can redress this tension between contract liberalization, such as articulated by Justice Story, and contract regulation as enunciated by Chief Justice Taney.[194]

VIII. RESPONSIBILITIES BEYOND CORRELATIVE PROMISES

A theory of responsibility is prefaced on an adaptable conception of the common good. As such, it responds to competing moral, social, and economic norms. This unavoidably entertains the contextual assessment of conceptions of fairness that may affirm, qualify, or supplant the normative value of contractual efficiency.[195]

A theory of responsibility is, therefore, functional in considering normative moral and communal values beyond analytical conceptions of correlative rights and duties.[196] For example, it takes account of the nature, kind, and duration of the relationship between the parties. It recognizes the difficulty in determining ex post facto whether one party could have averted risks of intervening extraneous events disrupting performance or whether the other could have mitigated those risks. It also considers such relational factors as the economic impact of such disruptions upon the continuity of their relationship, the transaction costs borne by each in maintaining their mutual dealings, the moral rationale and economic justification for modifying their performance, and the extent to which these moral and economic justifications are mutually reinforcing or contradictory in nature. In essence, moral values inform responsibilities that support, vary from, or augment correlative rights and duties that are ascribed to mutual consent.

Finally, a theory of responsibility is capable of sustaining both discrete transactions and relational contracts, without having to distinguish between them conceptually through correlative rights

193. *See* Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 536-37 (1837).

194. *See infra* Part VIII.

195. On the variable nature of the common good in Aristotelian philosophy, see MARY M. KEYS, AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD 29-56 (2006).

196. On functionalism in contract law, see W. Friedmann, *Changing Functions of Contract in the Common Law*, 9 U. TORONTO L.J. 15, 22-40 (1951) and see also ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 72-73 (2d ed. 1992); W. FRIEDMANN, LEGAL THEORY 76-77 (5th ed. 1967). *But see* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811-14 (1935); Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 565, 576-78 (1950).

and duties, or through overreliance on a "single moment" as distinct from multiple moments of consent.[197] The nature of responsibilities may vary according to the kind of discrete transaction or relational contract in issue.[198] Their application will depend, inter alia, on the kind of transactions or relationships in issue; the contractual or other instruments used; the applicable trade custom, usage, and practice in issue; and external obstacles to contracting allegedly arising beyond the control of one or both parties.[199] It will also depend on moral-legal responsibilities imputed to contracting which include but extend beyond efficient dealings.[200]

Part IX argues that a conception of economic efficiency may influence the nature and extent of a public responsibility, but it is an inquiry that is both distinct from, and subject to, moral determinism.[201]

IX. EFFICIENCY VERSUS MORAL DETERMINISM

Economic efficiency and social utility may impact the nature of a responsibility. The seller's exclusion of a warranty may be efficient in reducing the seller's costs and even in reducing the buyer's purchase price.[202] But that exclusion may be morally doubtful if the seller relies on a fine print exclusion clause that leads to a marginal reduction in purchase price well below the cost of repairing a defective computer.[203]

In effect, the moral basis for such a responsibility extends beyond the cost of the service to the party declining to provide it, and depends instead on the social effect—not limited to the economic cost to the

197. On the genesis of relational contracts, see IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 10-20 (1980); Ian R. Macneil, *Reflections on Relational Contract Theory After a Neo-Classical Seminar*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 207, 208-09 (David Campbell et al. eds., 2003); and Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881-83 (2000). For a critique of the relational theory of contracts, see Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 813-19 (2000).

198. *See* Trakman, *supra* note 27, at 1063-65.

199. On these external impediments to relational and network contracts, see, for example, David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 25, 46-49 (David Campbell et al. eds., 2003).

200. On the reconciliation between moral rights and economic efficiency in contracting under a unifying theory of liberty, see Nathan Oman, *Unity and Pluralism in Contract Law*, *2005 Survey of Books Relating to the Law*, 103 MICH. L. REV. 1483, 1488-98 (2005).

201. *See infra* Part IX.

202. *See* Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1935 (2005).

203. *See* Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 429-30 (2005). *But cf.* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2, 15-19 (1960).

buyer, and other buyers in comparable situations—of its denial.[204] Accordingly, the producer of a defective product may justifiably be subject to a lesser duty towards consumers who are charged lower prices on account of exclusion clauses in boilerplate contracts. But, that determination is normative, in taking account of the moral-legal effect of that clause. For example, a producer of an over-the-counter medicine may well have a legal responsibility to explain the potentially harmful attributes of a health product to a consumer prior to sale, even if the "transaction cost" makes doing so economically inefficient, and even in the absence of formal privity of contract with that consumer. The normative consideration is whether the consumer is likely to lack such an understanding, whether the producer is reasonably aware of that lack of understanding and reasonably able to redress it, and whether the producer's failure to explain its harmful attributes to the consumer constitutes a material threat to public health, however incremental that threat may be.[205]

The determinative issue for the failure to exercise a responsibility, therefore, is not whether the exclusion clause is economically efficient, whether it reduces the producer's transaction costs, or even whether it reduces the price of the product within mass consumer markets.[206] The determinative issue is whether the exclusion clause violates the responsibilities of a producer for such actions as knowingly excluding liability for serious product defects, hiding exclusion clauses amidst a myriad of otherwise innocuous clauses, or including such clauses in fine print.[207] Such determinations of responsibility do not take place in a legal vacuum, but include consideration of whether consumer protection legislation and the law of unconscionability regulates such exclusion clauses and holds producers responsible for the manner in, and extent to which, they use such exclusion clauses to the economic disadvantage of specific buyers. If these statutory or common law duties of the producer are deficient, the case for imposing a responsibility grows stronger.

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204. *See* JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY 14-15, 19, 24-25 (1969); G.F. Thirlby, *The Subjective Theory of Value and Accounting "Cost"*, *in* L.S.E. ESSAYS ON COST 135, 138-41 (J.M. Buchanan & G.F. Thirlby eds., 1973).

205. *See, e.g.*, Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 858 (2000) ("If there are to be tradeoffs, why not trade off the chimera of ex ante certainty in favor of ex post efficiency (or fairness).").

206. *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 602-03, 607-08, 618 (1990).

207. On the relationship between fine print clauses and transaction costs, see Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1062-66 (2006) and David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 1021-22 (2006).

Nevertheless, economic analysis can assist in determining whether a consumer agreement ought to be legally binding because the consumer has market choice, even if the terms are one-sided and in favor of the producer.[208] It can do so, for example, by assessing consumer ignorance and confusion in contracting,[209] and by determining the manner in and extent to which boilerplate contracting can reduce economic waste in individuated bargaining.[210] More generally, economic analysis can also help to assess when regulating consumer contracts is likely to operate paternalistically;[211] reinforce a "herd mentality" among consumers;[212] exacerbate unconscionable dealings;[213] and/or perpetuate a dominant class system among contractors.[214] Part X evaluates prospective remedies arising in relation to commercial impracticability under section 2-615 of the UCC, first, in terms of rights and duties; second, in accordance with a conception of responsibilities; and, third, by taking account of conceptions of good faith in terminating or in modifying a contract on grounds of reasonably unforeseen circumstances.[215]

X. RESPONSIBILITIES FOR COMMERCIAL IMPRACTICABILITY IN CONTRACT

The final basis for a responsibility lies in its public character. For example, if Mal fails to supply materials to Bonum under a long-term

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208. *See* Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 251, 259 (Franklin G. Miller & Alan Wertheimer eds. 2010); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828-30 (2006); Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 5 EUR. REV. CONT. L. 1, 15-18 (2009).

209. On the "irrelevance" of consumer "confusion," see Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 428-29 (2010).

210. *But see* Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610, 1661-63 (2008).

211. *See, e.g.*, PÉTER CSERNE, FREEDOM OF CONTRACT AND PATERNALISM: PROSPECTS AND LIMITS OF AN ECONOMIC APPROACH 89-93 (2012); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 631-33 (1982).

212. On the intuitive formalism of consumers, see Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2123-26 (2015) and compare Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 353-59 (1996) and David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 466 (1990).

213. On the economic analysis of unconscionable contracting, see Korobkin, *supra* note 141, at 1259-68.

214. *See* Kennedy, *supra* note 211, at 616-18. *But cf.* Thomas Brennan et al., *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191, 1197-1201 (2009).

215. Section 2-615 of the UCC provides for an excuse from performance on grounds of commercial impracticability. U.C.C. § 2-615(a) (AM. LAW INST. 2003); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

supply contract in respect of which Mal is the only supplier, and Mal claims commercial impracticability, the potential loss is borne not only by Bonum but by Tertius and Oblitus who depend on Bonum for their downstream supplies. A key issue in determining whether Mal is responsible to negotiate with Bonum to provide modified supplies is whether to take account of the material interests of Tertius and Oblitus, who do not enjoy rights to privacy of contract with both Mal and Bonum, and therefore have no contractual remedy against Mal.

The common law of contracts has long recognized that a legal duty to perform a contract ought to be excused due to changed circumstances that are unforeseen and beyond the promisor's reasonable control to avert.[216] A conceptual basis of commercial impracticability is that Mal, who has a duty to perform a contract of supply, is excused from performance, which extinguishes the right of the other party, Bonum, to require performance from Mal.[217]

The first problem with this conception of commercial impracticability is that it leads to all-or-nothing results, in which one party, Mal, is excused from performance, imposing the entire loss on Bonum, or vice versa.[218] The second problem is that it is conceivable that intermediate remedies ought to apply, such as granting Mal partial relief from performance based on his degree of foresight and control, and his economic hardship in having to perform in full as a result of the intervening event.[219] The third problem relates to whether Mal, faced with an intervening event that disrupts his long-term relationship with Bonum, ought to have a duty to negotiate with Bonum in good faith to maintain modified performance in order to preserve the long-term relationship.[220] These problems are addressed below.

As a preliminary matter, under a correlative analysis, the basis for excusing supplier Mal from a duty to perform in relation to Bonum is that had the parties foreseen the intervening disruption of Mal's

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216. *See* Sunflower Elec. Coop., Inc. v. Tomlinson Oil Co., 638 P.2d 963, 969-70 (Kan. Ct. App. 1981).

217. *See* David Campbell, *Ian Macneil and the Relational Theory of Contract*, *in* IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 3, 18-19 (David Campbell ed., 2001); Hugh Beale, *Bridging the Gap: A Relational Approach to Contract Theory*, 41 J.L. & SOC'Y 641, 644 (2014); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 875 (1978); Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 826 (2000).

218. *See* Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 249-50 (2004); *infra* Part X.A.

219. *See* Richard A. Posner & Andrew M. Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 88-97 (1977); *infra* Part X.B.

220. *See infra* Part X.C.

performance arising from circumstances beyond his control, Mal or Bonum would not have agreed to contract in the first place.[221] This hypothecation of Mal's and Bonum's intentions often constitutes no more than an ex post judicial conjecture. Had Bonum contemplated the intervening circumstance at the time of contracting, Bonum might still have entered into the contract, assuming that the risk of its occurrence was worth taking in light of the greater prospective benefit of performance. Mal, in turn, may or may not have done the same. Realistically, as Judge Skelly Wright noted in *Transatlantic Financing Corp. v. United States*, "[p]arties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy."[222] The result is that planning for future risks in long-term relational contracts is unavoidably speculative.[223] It is also difficult and often disruptive of a relationship for parties to provide explicitly for future intervening circumstances they do not anticipate, save only as a general possibility.[224]

A. Winner Take All

Let us now consider the first problem, the all-or-nothing remedy arising from commercial impracticability, through a traditional analysis of rights and duties in which Mal promises to supply Bonum with goods under a long-term supply contract. Applying a traditional approach to economic impracticability, should Mal not reasonably have foreseen the ensuing intervening event that arose beyond Mal's reasonable control, Mal would be wholly excused from performance.[225] Alternatively, if the court deems that Mal had reasonably foreseen, or was reasonably able to control or avert the intervening event, such as by supplying goods from an alternative source, the court may deny Mal an excuse.[226] The result is an all-or-nothing remedy: Mal either receives a total excuse from performance or, alternatively, no excuse at all. The judicial reasoning

221. Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 476-77 (1985).

222. 363 F.2d 312, 318 (D.C. Cir. 1966). The issue related to commercial impracticability arising from the closure of the Suez Canal. *Id.* at 315.

223. *See* Susan Helper & Rebecca Henderson, *Management Practices, Relational Contracts, and the Decline of General Motors*, J. ECON. PERSP., Winter 2014, at 49, 55, 61-66.

224. Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 5-6 (1987).

225. Trakman, *supra* note 221, at 474-76.

226. *See id.* at 476-77.

relies on an ex post facto assessment of what Mal actually knew or might have or ought to have known at the time of contracting.[227]

The essential problem, in the analysis, is that the court imposes a duty on Mal on the grounds that Bonum has a right, which the court itself constructs and then imputes by fiction to the parties. In effect, its determination is based on an after-the-fact conjecture about Mal's and Bonum's intentions, particularly in the absence of words or conduct verifying Mal's and Bonum's actual intentions when contracting. [228] The court hypothecates and ascribes an intention to them, distinct from their per se intention. The result is a protracted objective test grounded in the conduct of a reasonable person in the position of Mal or Bonum, or both. That person, inevitably, is the court itself, as the final arbiter in determining the just and fair result.[229]

B. Winner Take Some

Let us now consider how a conception of public responsibility can address the second problem—namely, splitting the loss between Mal and Bonum based on their long-term relationship, the nature and gravity of the intervening risk, the prospective economic hardship borne by each party, and the potential to arrive at an intermediate solution in good faith, such as modified performance.[230]

Under a theory of responsibility, the basis of Mal's relief from performance for commercial impracticability depends on an assessment of the normative context surrounding the intervening risks of Mal's non-performance and extends beyond an all-or-nothing excuse or no excuse from performance granted to Mal.[231] The result is that the court can take account of the economic costs and fairness to Mal in reaching a reasonable remedy that does not place the full burden of the loss arising from Mal's non-performance only on him, or if Mal is excused from

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227. On the judicial hypothecation of the consent of the parties, see *id.* at 477-78.

228. Trakman, *supra* note 28, at 42.

229. This difficulty to anticipate ex post what the parties actually foresaw and whether they could have reasonably prevented the intervening event at the time of contracting is well documented. *See* Fla. Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440, 454-55 (E.D. Va. 1981) (involving the failure of a long-term uranium supply contract on grounds of commercial impracticability under section 2-615 of the UCC); RICHARD E. SPEIDEL, CONTRACTS IN CRISES: EXCUSE DOCTRINE AND RETROSPECTIVE GOVERNMENT ACTS 7 & n.15 (2007); Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the* Westinghouse *Case*, 6 J. LEGAL STUD. 119, 157-58 (1977). *But cf.* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1433, 1490-91 (2004).

230. On the importance of context in interpreting relational contracts, see Hugh Beale, *Relational Values in English Contract Law*, *in* CHANGING CONCEPTS OF CONTRACT: ESSAYS IN HONOUR OF IAN MACNEIL 116, 131-33 (David Campbell et al. eds., 2013).

231. *See* Trakman, *supra* note 221, at 488-89.

performance, only on Bonum.[232] This analysis provides for a loss-splitting remedy on several grounds. For example, Mal and Bonum should share losses for reasons beyond whether one or both could foresee the loss in general but not foresee when the loss would occur, foresee its gravity, or could have averted it only in part. The responsibility of Mal and Bonum, arguably, should be shared on grounds that neither Mal nor Bonum should fairly bear the full burden of intervening losses, including on grounds that reasonable foresight of the risk of loss, considered ex post facto, is ordinarily speculative.

The proposition in supporting such a responsibility is, first, that it is often conjectural whether Mal reasonably foresaw or was reasonably able to avert the effect of the intervening disruption of supply on Mal's performance. Second, Mal's partial relief from performance does not depend on artificially implied terms by which Mal's consent to perform is vitiated on the dubious ground that Mal, or Bonum, would not have contracted had either anticipated the changed circumstances.[233] Third, granting Mal partial relief from performance hinges on rational limitations of a court inferring that which Mal or Bonum might, could, or would have done had they anticipated the intervening event whose nature and gravity was not foreseen. Fourth, the rationale for loss-sharing is that if Mal was not wholly responsible for the effect of the intervening event, placing the full burden of the ensuing loss on either Mal or Bonum might not be economically efficient, not least of all in threatening a long-term supply relationship in the face of often economically burdensome risks of future losses.[234] Fifth, rather than speculate about which party should bear the full loss arising from non-performance based on judicial hypotheses about the knowledge and ability of each party to foresee and avoid it, the court can adopt a loss-sharing remedy by which the parties share responsibility for loss as the court deems just, based on a contextual analysis beyond their spurious

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232. For arguments in favor of imputing efficiency values to the non-performance of contracts, see Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1133 & n.42 (1987) and Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1584-89 (2005). *But see* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1557-62 (2003) (arguing that courts "can be thought of as providing the supply side of the market" in producing legal rulings).

233. For arguments in favor of implying "fairness" values into contracts in cases of commercial impracticability, see Trakman, *supra* note 28, at 42-45.

234. On relational contracts including performance adjustment clauses to address uncertain future risks and maintain economic efficiency in mutual dealings, see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1109-11 (1981); Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAV. SCIENTIST 337, 338-43 (1980).

intentions. Such a loss-sharing analysis may lead to ex post speculation about the knowledge and control each party had over the intervening event. However, that speculation is more palpable in arriving at a loss-sharing formula than insisting on a winner-take-all approach in all cases. It is noteworthy that a loss-sharing formula is statutorily endorsed in some British Commonwealth jurisdictions in which courts have the discretion to split losses between parties arising from frustration of the contract.[235]

Finally, a court may rely on Mal and Bonum to participate in determining their responsibilities in arriving at a loss-sharing remedy, such as by the court appointing a special master to aid the parties to arrive at a negotiated settlement.[236] In effect, a theory of responsibility can promote a conception of party-managed responsibility, such as by requiring the contracting parties to participate in determining their respective shares of a frustrated loss in complex contracts, as was adopted by the U.S. District Court of the Eastern District of Virginia in *Florida Power and Light Co. v. Westinghouse Electric Corp*.[237]

C. Duty to Negotiate in Good Faith to Modify Performance

The third problem relates to imposing a responsibility on Mal and Bonum in a long-term relationship, to negotiate in good faith to modify their performance in light of the disruption in Mal's performance. The objective of such a negotiation is to limit its harsh economic effects on their long-term supply relationship.[238]

Consider, initially, Mal's responsibility to act in good faith to preserve a long-term relationship, recognizing the greater cost, difficulty, or both in Mal performing one or more discrete transactions within that relationship.[239] Imposing such a responsibility on Mal is

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235. *But see* Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. [1942] AC 32 (HL) 80 (appeal taken from Eng.).

236. Trakman, *supra* note 221, at 490-91.

237. 517 F. Supp. 450 (E.D. Va. 1981). There, the court appointed a special master to assist the parties in arriving at a negotiated settlement arising from a contract for the supply of uranium, when the contract became economically impracticable due to supply disruption in the Middle East. *Id.* at 461-62.

238. *See* David Campbell & Donald Harris, *Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation*, 20 J.L. & SOC'Y 166, 168-72 (1993); David Campbell, *Good Faith and the Ubiquity of the "Relational" Contract*, 77 MOD. L. REV. 475, 479-80, 482-83, 485 (2014). On modifying or varying a term in a contract, see JOHN CARTWRIGHT, FORMATION AND VARIATION OF CONTRACTS: THE AGREEMENT, FORMALITIES, CONSIDERATION AND PROMISSORY ESTOPPEL 336, 345 (2014).

239. On the virtue of sustaining a long-term relationship, including on organizational economic grounds, see James M. Malcomson, *Relational Incentive Contracts*, *in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 1014, 1058-59 (Robert Gibbons & John Roberts eds., 2013).

conceivably subject to certain guidelines. First, Mal's responsibility to act in good faith is recognized in international instruments, not least of all in article 7 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),[240] to which most countries are parties, and also in the UNIDROIT Principles of International Commercial Contracts.[241] Second, Mal's responsibility to perform takes account of the cost to Mal and its benefit to Bonum. Third, Mal's responsibility to negotiate to modify performance of a long-term supply contract conceivably includes a responsibility for Mal and Bonum to cooperate to sustain a continuing relationship for their mutual benefit, such as through a network contract.[242] Such a responsibility is distinct from the availability of a remedy when parties transact discretely in a competitive market in which each party assumes risks of non-performance in competition with other buyers and sellers.[243]

Finally, a public responsibility takes account of the economic and social effects of a shortfall in Mal's performance, not only on Bonum

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240. United Nations Convention on Contracts for the International Sale of Goods art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3. Each party must act in accordance with good faith and fair dealing in international trade. *See id.* art. 7(2). The parties may not exclude or limit this duty. *See* Larry A. DiMatteo & André Janssen, *Interpretive Methodologies in the Interpretation of the CISG*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 79, 95 (Larry A. DiMatteo ed., 2014); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 34 (2d ed. 2004); Michael Bridge, *The CISG and the UNIDROIT Principles of International Commercial Contracts*, 19 UNIFORM L. REV. 623, 626-27 (2014); Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 J.L. & COM. 75, 82-85 (2005); Steven D. Walt, *The Modest Role of Good Faith in Uniform Sales Law*, 33 B.U. INT'L L.J. 37, 41-49 (2015).

241. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.8, cmt. 1 (2010); *see also* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 94, 127-51 (3d ed. 2005); STEFAN VOGENAUER, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 211-20 (Stefan Vogenauer ed., 2d ed. 2015); Giuditta Cordero Moss, *International Contracts Between Common Law and Civil Law: Is Non-State Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 GLOBAL JURIST 1, 30-34 (2007).

242. Hugh Collins, *Introduction* to GUNTHER TEUBNER, NETWORKS AS CONNECTED CONTRACTS 11 (Michelle Everson trans., Hugh Collins ed., 2011); Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, *in* MARKETS, HIERARCHIES AND NETWORKS: THE COORDINATION OF SOCIAL LIFE 265, 270-72 (Grahame Thompson et al. eds., 1991); Richard M. Buxbaum, *Is "Network" a Legal Concept?*, 149 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT [J. INSTITUTIONAL & THEORETICAL ECON.] 698, 700 (1993) (Ger.); Anna Grandori & Giuseppe Soda, *Inter-Firm Networks: Antecedents, Mechanisms and Forms*, 16 ORG. STUD. 183, 194 (1995).

243. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 59 (1985); R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA N.S. 386, 390-92 (1937); Hugh Collins, *Competing Norms of Contractual Behaviour*, *in* CONTRACT AND ECONOMIC ORGANISATION: SOCIO-LEGAL INITIATIVES 67, 69, 73, 78-79 (David Campbell & Peter Vincent-Jones eds., 1996).

but also on Tertius and Oblitus who depend on Bonum for their supplies as downstream buyers and who have no control over the risk of Mal not supplying Bonum. It is in taking account of their material interests, as parties who do not enjoy the right to privity of contract with Mal, that Mal's responsibilities to negotiate to continue to supply are most publicly tested. The issue is not that Mal ought to be infinitely responsible for the economic consequences of his non-performance on Tertius and Oblitus. The issue is whether there is a basis for holding Mal responsible, in law as in morality, for being the direct and proximate cause of Tertius's and Oblitus's losses arising from Mal knowingly failing to negotiate. This does not impose a responsibility on Mal when Tertius and Oblitus foresee the risk of loss and fail to make contingency plans, such as by identifying alternative sources of supply. Nor ought Mal's responsibility be to his ruin, such as by requiring him to substantially perform—notwithstanding a radical increase in supply costs arising beyond his control. Nor, too, ought Mal be responsible in the face of a floodgate of crippling downstream claims. Nevertheless, Mal should conceivably be held responsible for the material interests of parties like Tertius and Oblitus that are otherwise denied legal protection on grounds that they are not in privity of contract with Mal.[244]

XI. CONCLUSION

This Article argues for recognizing public responsibilities beyond correlative rights and duties in contract in recognition of public—both social and economic—interests that are not legally protected, on grounds that they are inchoate, imperfect, or morally rather than legally informed.[245] It illustrates the limitations of correlative rights and duties that inhere in conventional theories of consent to contract in different areas of contract law.[246] It challenges the wholly artificial hypothecation of the intention of parties under an objective theory of consent.[247] It disputes the prevalence of freedom of contract as a propertied right, and market efficiency as the determinative purpose in contracting.[248] It accepts that well-functioning markets may be morally desirable[249] but questions whether they ought necessarily to be protected through

244. *See generally* MICHAEL FURMSTON & GREGORY TOLHURST, PRIVITY OF CONTRACT (2015).

245. *See supra* Part II.

246. *See supra* Part III.

247. *See supra* Part V.

248. *See supra* Part IX.

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

contract law. It evaluates the proposed nature and scope of such public responsibilities, the criteria governing them, and their actual and potential application to contracts in particular.[250]

Public responsibilities are necessary to fill lacunae in the so-called private law not filled by the "new equity" that commenced in the mid-twentieth century.[251] As such, responsibilities focus primarily, but not exclusively, on the communal context in which contractual rights are exercised. Using moral theory to identify the just society, the rationale for public responsibilities is that social and economic rights, not limited to property, are not absolute in nature, but are contingent on both private and public interests which are unprotected by correlative rights giving rise to correlative duties in contract.

The theory behind a public responsibility holds that a private right is subject to a public good, as when an individual contractor is subject to a public responsibility not to engage in contracts that discriminate on the basis of race or sex, or that damage the environment to the harm of future generations. Conversely, a government, including its courts, is subject to a responsibility to regulate such discriminatory conduct in respect of an individual employee or consumer. However, public responsibilities transcend deficiencies in structural bargaining, focusing also on material public interests that are unprotected by correlative duties associated with reciprocal promises.

A public responsibility does not deny the conceptual principles underlying deontological liberalism, as reflected in notions of the individual's freedom to contract and the sanctity of contractual promises.[252] Nor does it refute the value of correlative rights and duties. However, it does not conceive of these concepts as exhausting the boundaries of contract law either conceptually or functionally.

In addition, applying a theory of public responsibility to contract law does not purport to replace subjective consent with anthropomorphic conceptions of the reasonable person when those objective measures are artifacts that do not represent consent at all.[253] Nor, too, do public responsibilities that supersede principles governing the formation, performance, and termination of contracts signify the "death" of contract, as the late Professor Grant Gilmore portended, either

250. *See supra* Part VIII.

251. Sir Alfred Denning, *The Need for a New Equity*, 5 CURRENT LEGAL PROBS. 1, 5-6 (1952).

252. G.C. Cheshire, *A New Equitable Interest in Land*, 16 MOD. L. REV. 1, 7-8 (1953).

253. *Cf.* Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 627 (2016) ("[W]ith the increasing availability of information about actors' characteristics, negligence law should give up much of its objectivity by allowing courts to 'subjectify' the standard of care—that is, to tailor it to the specific injurer's tendency to create risks and his or her ability to reduce them.").

conceptually or functionally.[254] The purpose of public responsibilities is also not to require the per se redistribution of rights as property or wealth based on the per se need for social welfare.

However, public responsibilities *do* envisage placing limits on the exercise of rights to redress social injustice, varying from the abuse of contractual rights or powers, to the perpetuation of poverty and resulting destitution and degradation, through the exercise of rights or powers in contracting that are not addressed through correlative rights and duties expressed through mutual promises.[255] As such, so long as contract rights are construed as property rights, and duties owed on account of those rights are fettered, responsibilities are needed to redress the imbalance between those interests—as imperfect or non-rights—and the rights of producers, employers, and governments whose rights are not so fettered.[256] Such responsibilities are not limited to protection accorded to consumers and employees in mass markets but also apply in legal areas in which rights are underdeveloped such as in the protection of the environment, or when legislatures fail to protect public interests due to the political and economic costs of doing so.[257]

In some respects, public responsibilities are defined by that which they are not. They are not contingent on narrow conceptions of consent to which correlative legal duties do not ordinarily attach. They are not restricted to individuals but include corporate persons and governments engaged in contracting. They are not determined formally, but functionally; and they are not accounted for in the abstract, but contextually. Nor do they rely on the simulated intention of parties who have not expressed an intention or have done so doubtfully at best.

Viewed affirmatively, public responsibilities transcend restrictive conceptions of reciprocal promises, fictionalized accounts of consent to contract, and formalized depictions of privity of contract. They are woven into the fabric of law, whether under the rubric of moral theory, equitable dealings, or socially responsible contracting. What they have lacked is a rationale that transcends the artificial boundaries between private contracting and public responsibility for contracting. This Article has sought to provide that rationale.

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254. GRANT GILMORE, THE DEATH OF CONTRACT 3 (1974).

255. *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 744 nn.7-8 (1982) (discussing how, inter alia, morality, beyond legal sanction, can justify enforcing promises).

256. On the relationship between the bargain and the normative structure of a contract, see STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 57-62 (2009) and Charny, *supra* note 154, at 1825-30. *But cf.* Eisenberg, *supra* note 253, at 785-87.

257. *See supra* Parts III, IX.