

2011

Consent to Retaliation: A Civil Recourse Theory of Contractual Liability

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Repository Citation

Oman, Nathan B., "Consent to Retaliation: A Civil Recourse Theory of Contractual Liability" (2011). *Faculty Publications*. 1127.
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Consent to Retaliation: A Civil Recourse Theory of Contractual Liability

Nathan B. Oman*

ABSTRACT: In the ancient Near East, contracts were often solemnized by hacking up a goat. The ritual was an enacted penalty clause: “If I breach this contract, let it be done to me as we are doing to the goat.” This Article argues that we are not so far removed from our goat-hacking forbearers. Legal scholars have argued that contractual liability is best explained by the morality of promise making, or by the need to create optimal incentives in contractual performance. In contrast, this Article argues for the simpler, rawer claim that contractual liability consists of consent to retaliation in the event of breach. In the ancient ritual with the goat, the consented-to retaliation consisted of self-help violence against life and limb. The private law in effect domesticates and civilizes retaliation by replacing private warfare with civil recourse through the courts. It thus facilitates the social cooperation made possible by the ancient threats of retaliation, while avoiding the danger of escalation and violence that such private violence presented. This civil recourse theory of contractual liability provides an explanation for a number of remedial doctrines that have proven difficult for rival interpretations of contract law to explain—including the penalty-clause doctrine, limitations on expectation damages, and the basic private-law structure of contractual liability. Finally, this Article responds to some of the most powerful objections that might be made against a civil recourse theory of contractual liability.

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* Associate Professor, William & Mary Law School. I want to thank Pete Alces, Randy Barnett, Curtis Bridgeman, Josh Chafetz, Dave Douglas, Greg Klass, Andrew Gold, Michael Green, Robert Hillman, Ben Huff, Eric Kades, Charles Koch, Jeff Lipshaw, and Stephen Smith, as well as participants at the Contract and Promise Seminar at Georgetown Law Center and workshops at DePaul Law School, J. Reuben Clark Law School, and William & Mary Law School for their helpful comments and criticisms. All of the standard disclaimers apply. Megan Brazo and Matt Sutton provided excellent research assistance. As always, I thank Heather.

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I. INTRODUCTION

Many of the earliest contracts were bloody affairs. Both Homer and the *Bible* recount covenant rituals in which promisors slaughtered animals and poured their blood on the ground to seal a bargain. In essence, these sanguinary rituals consisted of consent to retaliation in the event of breach. When promisors hacked up a goat, they consented to be hacked up in like manner should they breach. While the modern legal world seems very different from the violent one depicted in these ancient sources, this Article theorizes that contemporary contract law is much closer to these ancient covenant rituals than we suppose. Modern scholars have struggled to account for contractual liability in terms of the moral obligation to keep a promise, the need for incentives to promote optimal investment in contract performance, and other social goals.¹ This Article argues in favor of a simpler, rawer claim: contractual liability consists of consent to retaliation in the event of breach. Of course, the retaliation consented to in a modern contract consists of recourse through the courts, rather than violence against life and limb. We moderns, however, are closer to our goat-hacking forbearers than we assume.

This is an interpretive claim about contractual liability. The goal of such a theory is not to explain what contract law would look like in the best of all possible worlds. Rather, the goal is to reveal the normative structure of contractual liability as it currently exists. Such a theory can be valuable for a number of reasons. First, it increases our philosophical understanding of an important social practice. To the extent that we can show that our current law—or some portion of it—represents a set of coherent goals and choices rather than the outcome of essentially random historical accidents, we understand the law better. Second, to the extent that we believe that judges should decide cases according to preexisting legal rules, or should shift legal doctrine in ways that nevertheless retain continuity with previous law, we need an interpretive account of our law as it now stands. Finally, an understanding of the normative structure of our current law is important when we propose reforms to change it. Such proposals never exist in a vacuum, but must be measured against the value of our current law. To justify replacing current rules with something new, we must understand the values—if any—instantiated in our current law. Only then can we judge whether a proposed change will be an improvement. Understanding the

1. See, e.g., Peter Benson, *Contract*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 24 (Dennis Patterson ed., 1996) (summarizing contemporary debates over the theory of contract law); James Gordley, *Contract*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 3 (Peter Cane & Mark Tushnet eds., 2003) (same); Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687 (Jules Coleman & Scott Shapiro eds., 2002) (same).

normative foundations of our current law is thus an integral part of the way it, to use Lord Mansfield's phrase, "works itself pure."²

I label the core interpretive claim of this Article—that contractual liability consists of consent to retaliation in the event of breach—the civil recourse theory. Civil recourse has been a much-discussed topic in the philosophy of tort law.³ In that context, civil recourse theorists have focused on the fact that at its core, private law empowers plaintiffs to act against defendants, rather than having the State step in as a third-party enforcer of some set of moral duties or as a provider of optimal economic incentives. This Article is the first attempt to articulate in detail a civil recourse theory of contractual liability. I label the theory offered here a civil recourse theory with the knowledge that there is some risk of confusion in terming it as such. The civil recourse theory of contractual liability shares with civil recourse accounts of tort law an emphasis on private law's role as an empowerer of plaintiffs rather than an independent enforcer of norms. It also shares with these theories a sense that private law represents the civilization of earlier forms of violent self-help. Ultimately, however, this Article offers a different normative justification for civil recourse than those offered by tort theorists, and one that is less embarrassed about defending the virtues of private retaliation.

We begin by setting forth the civil recourse theory with a stylized recreation of the progress from anarchic systems of contract enforcement to the contemporary common law of contracts. In ancient covenant rituals, parties consented to violent retaliation in the event of breach. Over time, this consent to violent retaliation was transformed into consent to the extraction of wealth through the courts. This can be seen most clearly in the penal bond, which was the dominant contractual mechanism for much of the common law's history. Finally, as scholars of relational contracts have long pointed out, legal rights under contracts do not capture the full complexities of the relationship between the parties. In modern litigation, legal contracts function as weapons that can be used in the event of a

2. *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (Ch.) 23; 1 Atk. 22, 34 (Lord Mansfield) (emphasis omitted).

3. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) [hereinafter Goldberg, *Constitutional Status*]; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 1, at 623; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998); see also Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky*, 1 N.Y.U. J.L. & LIBERTY 1023 (2005) (criticizing the theory); John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 1, at 1 (same); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 (2006) (same). For a summary of the debates from which their civil recourse theory of tort law emerged, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003).

breakdown in relations between the parties. Modern parties understand that when they contract they do not simply define their reciprocal obligations. Rather, they make themselves vulnerable to attack via litigation in the event of breach. This historical foray suggests that consent to retaliation in the event of breach represents the deep structure of contractual liability. What began as a bloody system of violence and self-help has been civilized into a system of civil recourse through the courts. The basic structure, however, of consent to retaliation continues.

From this interpretive claim, we turn to the normative case in favor of the civil recourse theory. Although not offered as a policy proposal, a successful interpretive argument should still present current law as at least normatively plausible. This Article frankly embraces the virtues of allowing retaliation. Providing recourse against contract breakers allows promisees to threaten retaliation in the event of breach. This threat, in turn, facilitates cooperation by reducing the problem of *ex post* opportunism. The insight here is tied to the basic understanding of executory contracts as presenting a prisoner's dilemma. Contrary to the conventional story in the literature, this Article argues that contract law does not solve this problem through third-party enforcement of contract obligations. Instead, by facilitating retaliation against breaching promisors by disappointed promisees, contract law allows contracting parties to credibly threaten defectors with personal retaliation. The civil recourse theory, though, is necessarily limited. It is only a theory of liability and remedies. It does not purport to be a complete justification of contract law. Indeed, the civil recourse theory suggests that a broader account of contract law will be necessarily pluralistic, resting on a number of normative concerns.

The civil recourse theory does, however, shed light on some persistent puzzles in the remedial law of contracts. First, it views expectation damages as an upper limit on retaliation by plaintiffs against defendants, rather than as an optimal incentive for performance or as compensation for the value of a broken promise. Accordingly, the ubiquitous deviations from the strict expectation measure that we see in current doctrine are not troubling. One can accommodate pragmatic or efficiency concerns by limiting recovery without compromising the basic justification for contractual liability. In contrast, such limitations become problematic if damages are viewed through the lenses of rival theories—such as promissory morality or economic efficiency. Second, the rule against penalty clauses is awkward for both autonomy and efficiency theories, which see it as a suspicious limitation on contractual freedom. In contrast, the rule flows naturally from a recourse theory of contract, which seeks to limit plaintiffs' rights of retaliation against defendants to a proportional or "civil" response. Third, civil recourse theory accounts for the basic private-law structure of contractual liability—specifically, the bilateralism of contract damages and private standing. Bilateralism refers to the fact that damages are always paid from defendants

to plaintiffs, rather than as fines to the State. Private standing refers to the fact that rather than enforcing contractual obligations, the State waits for plaintiffs to initiate and control litigation. Both of these features are awkward for rival theories of contract, but flow naturally from the idea of civil recourse.

The civil recourse theory is open to a number of objections. First, it seems to valorize revenge, which we usually regard as morally abhorrent. This objection, however, fails to differentiate between facilitating retaliation as a means of social ordering versus mere predation or retribution. Second, a civil recourse theory seems inconsistent with some of the language used by judges. An interpretive theory ought to take such language more seriously than the one presented here apparently does. This objection can be met by understanding the limited demands that judicial language places even on interpretive theories, as well as by explaining how judicial language is not as inconsistent with a civil recourse theory as one might assume. Finally, the rules regarding contract formation, particularly under American law, do not appear to turn on consent to recourse. The doctrines of consideration and promissory estoppel seem to pick out a class of agreements that, for whatever reason, are worthy of enforcement, regardless of whether the parties consent to recourse.⁴ Contract formation rules, however, can be seen as doing a rough and ready job of identifying agreements where parties would expect a promisee to claim a right of recourse upon default.

This Article proceeds as follows: Part II sets out the interpretive claim that contractual liability consists of consent to recourse in the event of breach; Part III provides a normative argument in support of this interpretive claim, showing how facilitating retaliation can serve laudable social goals; Part IV extends the theory by showing its implications for some puzzles in contract doctrine; Part V responds to objections; and Part VI concludes.

II. CONSENT AND CIVIL RECOURSE

Contractual liability consists of consent by promisors to retaliation by promisees in the event of default. Put in starker terms, when you and I make

4. Indeed, consent to be legally bound is not an element of contract formation in the United States, and plays only a vestigial role in English and Commonwealth law. *See* 1 CHITTY ON CONTRACTS ¶ 2-153, at 198 (H.G. Beale et al. eds., 29th ed. 2004) (noting that English law requires an intention to be legally bound to form a contract). In actual fact, even under English law, the intent to be legally bound is the subject of a strong presumption, particularly in commercial contracts. *See id.* ¶ 2-154, at 199 (“In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations.”). Thus, P.S. Atiyah insists that “[i]t is . . . more realistic to say that no positive intention to enter into legal relations needs to be shown.” P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 153 (5th ed. 1995). Indeed, so strong is the presumption that English courts have found a binding contract even where the promisor believed that his promise had no legal effect. *Id.*

a contract, I consent to your right to attack me if I breach. In support of this claim, we examine a highly stylized account of the rise of contract law, one that begins with ancient covenant rituals and shows the recourse theory of contract in its rawest form. This Article argues that while the methods and limits of legitimate recourse under current law are very different than those envisioned by these ancient rituals, the underlying logic of the relationship between promisor, promisee, and contract is the same. These historical examples are meant to offer an insight into the current structure of the law, rather than provide a complete account of its origins. A true history of contract would necessarily be more complex than what follows.⁵ The historical examples here are meant to bring to the surface the latent structure of our current law.

A. CUTTING A COVENANT

The fifteenth chapter of Genesis in the *Bible* records one of the most famous contracts in history. Abram (later renamed Abraham) has left his homeland in Ur and come to the land of Canaan. After defeating a coalition of local kings, Abram has a vision in which God promises the childless patriarch that his decedents will outnumber the stars of heaven and that he will inherit the land of Canaan. The skeptical Abram asks, “O Lord God, how am I to know that I shall possess it?”⁶ The text goes on: “[God] said to him, ‘Bring me a heifer three years old, a she-goat three years old, a ram three years old, a turtledove, and a young pigeon.’ And he brought him all these, cut them in two, and laid each half over against the other . . .”⁷ It is, to modern ears, a strange story. Abram doubts God’s promise, but his doubts are allayed when God instructs him to dismember three animals. Why does the ritual with the mutilated livestock convince Abram that God’s promise is meant seriously? While the answer is obscure to us, it would have been apparent to an ancient reader. God’s response to Abram transforms his promise into a legal covenant by invoking the formality by which such covenants were created in the ancient Near East.⁸

5. See generally DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* (1999) (providing a history of the common law of contracts); A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* (1975) (same).

6. *Genesis* 15:8 (RSV) (internal quotation marks omitted).

7. *Id.* 15:9–10.

8. See ROBERT DAVIDSON, *GENESIS* 12–50, at 45 (1979) (“From the one other Old Testament reference (Jer. 34: 18–20) and extra-biblical parallels, it seems that the rite was a form of dramatized curse. The parties as they walked between the severed halves were in effect saying, ‘May God do so to me if I violate this solemn agreement.’”); ZE’EV W. FALK, *HEBREW LAW IN BIBLICAL TIMES* 89 (2d ed. 2001) (“[I]n the patriarchal age the parties used to kill an animal as a sign of the punishment to befall the person who broke the covenant.”).

The slaughter of the heifer and the she-goat was an enacted penalty clause.⁹ In effect, the parties to a covenant agreed that, in the event that they failed to fulfill their part of the bargain, they should be treated in the same manner as the dismembered animals. Indeed, in Biblical Hebrew one does not “make a covenant.” The phrase is translated more literally as to “cut a covenant.”¹⁰ The formality of killing an animal to seal a deal was widespread in the ancient world—appearing, for example, in Babylonian treaties, and the agreement dividing Alexander the Great’s empire upon his death where his generals hacked up a dog.¹¹ Thomas Hobbes notes the form in *Leviathan*, writing that, “before the time of Civill Society . . . there is nothing can strengthen a Covenant of Peace . . . but . . . [the] Feare as a Revenger of their perfidy. . . . Such was the Heathen Forme, *Let Jupiter kill me else, as I kill this Beast.*”¹²

In part, as Hobbes noted, the ritual invoked the punishment of the gods (an ironic position for the militantly monotheistic Yahweh to take in Genesis 15), but it also may have been embedded in a system of self-help. The relationship is nicely captured in Book III of *The Iliad* when Priam, the King of Troy, and Agamemnon, leader of the besieging Achaeans, agree to end their war through single combat between champions from either side. They formalize the agreement by slitting the throats of a brace of sheep and pouring their blood, along with wine, on the ground as a libation to the gods. The Trojans and Achaeans then join in a prayer: “Zeus—god of greatness, god of glory, all you immortals! Whichever contenders trample on this treaty first, spill their brains on the ground as this wine spills—theirs, their children’s too—their enemies rape their wives!”¹³ Notice the prayer invokes not only the wrath of the gods, but also suggests the legitimacy of violence against oath breakers and their families.¹⁴ In an anarchic world of

9. Genesis 15:8 (RSV).

10. See 7 THEOLOGICAL DICTIONARY OF THE OLD TESTAMENT 351 (G. Johannes Botterweck et al. eds., David E. Green trans., 1995) (discussing the meaning of the Hebrew term “karat” in the context of covenant making).

11. See L. ELLIOTT BINNS, THE BOOK OF THE PROPHET JEREMIAH 262 n.19 (1919) (discussing the dismembering of the dog among Alexander the Great’s generals); BRUCE WAWTER, ON GENESIS: A NEW READING 211–12 (1977) (providing the Babylonian examples).

12. THOMAS HOBBS, LEVIATHAN 99 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

13. HOMER, THE ILIAD 138 (Robert Fagles trans., Penguin Books 1990) (c. 800 B.C.E.).

14. Charles Fensham describes the legitimacy of violence following breach:

On a breach of covenant punishment must follow. The curses of the gods in the extrabiblical material is a deterrent, but not an actual punishment. . . . [D]irect punishment on the breach of covenant [as opposed to a lawsuit] is probably the only one which could have been used by Near Eastern kings

F. Charles Fensham, *Malediction and Benediction in Ancient Near Eastern Vassal-Treaties and the Old Testament*, 33 ZEITSCHRIFT FÜR DIE ALTTESTAMENTLICHE WISSENSCHAFT (n.s.) 1, 7–8 (1962) (Ger.).

feuding tribes, this *ex ante* authorization would have been particularly important because it would allow a disappointed promisee to exact vengeance on a promisor without fear of retaliation by members of the promisor's tribe.¹⁵

If the ancient sources valorize the right of private retaliation without ambivalence, they also show an interest in limiting retaliation. The most famous example of this concern is found in the *Bible*. According to the Book of Exodus, the divine law delivered to Moses at Sinai declared: "When men strive together . . . [i]f any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."¹⁶ Hence, retaliation was limited by some principle of proportionality. To take more than an eye for an eye was to engage in predation. According to the Talmud, the bloody, but limited, retaliation sanctioned by the *lex talionis* was then converted into the payment of money.¹⁷ Likewise, the earliest Germanic and Anglo-Saxon laws contained a schedule of *wergild* that might be proffered in lieu of blood feud.¹⁸ Indeed, according to nineteenth-century historians, private law itself emerged from attempts to limit the violence of feuding tribes. "Step by step, as the power of the State waxes," wrote Frederick Pollock and Frederic William Maitland, "the self-centred and self-helping autonomy of the kindred wanes. Private feud is controlled, regulated, put, one may say, into legal harness . . ."¹⁹

B. PENAL BONDS

Although in early English law the "law of contract [was] rudimentary, so rudimentary as to be barely distinguishable from the law of property," it is possible to discern the successive limitations on earlier forms of self-help

15. Indeed, the *Bible* records at least one case in which a promisor explicitly agreed to violence by the promisee in the event of breach. During the invasion of Canaan recounted in the Book of Joshua, the Israelites send two spies into the city of Jericho, where they are hidden and assisted by a prostitute named Rahab. Rahab and the spies exchange oaths, but the spies insist that "if you tell this business of ours, then we shall be guiltless with respect to your oath which you have made us swear," meaning that when the Israelites sacked the city they would be within their rights to kill Rahab and her family. *Joshua* 2:20 (RSV) (internal quotation marks omitted).

16. *Exodus* 21:22-25 (RSV).

17. See WILLIAM IAN MILLER, *EYE FOR AN EYE* 63-68 (2006) (discussing rabbinic interpretation of the *lex talionis*).

18. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 47-48 (2d ed. rev. 1968) (1895) (discussing *wergild* and composition in early Anglo-Saxon law).

19. *Id.* at 31. Modern historians have questioned the seemingly neat narrative of organic progression put forward by Pollock and Maitland, noting that litigation coexisted in many early societies less as a substitute for the blood feud than as alternative mode of attack in the conflict between persons and clans. See, e.g., MILLER, *supra* note 17, at 119-21. But see POLLOCK & MAITLAND, *supra* note 18, at 47 (noting that feud and "the semi-judicial arbitration of wise men" coexisted in medieval Iceland).

that we see so clearly with the rise of *wergild* and the decline of feuds.²⁰ Given the circumstances of early English law, the surviving codes are concerned mainly with claims arising out of violent confrontations²¹—what we would classify today as torts.²² Later, the embryonic common law devoted most of its attention to questions revolving around property in land.²³ Nevertheless, in the arena of contract, we see a similar move to civilize recourse by transforming claims to exact violent retribution into claims for cash and by replacing self-help with adjudication.

In telling this story, we turn from the bloody world of “cutting covenants” to the less exotic penal bond, which was the dominant form of contracting for much of the common law’s history.²⁴ The English borrowed the mechanism from the Romans. The earliest source of Roman law, the *Twelve Tables*, operated in a world where adjudication coexisted with self-help violence.²⁵ A debtor who failed to pay on a debt, for example, could be bound in the marketplace.²⁶ “After the third market day,” the *Tables* cold-bloodedly continued, “let the debtor’s body . . . be cut up in pieces. If the parts are greater or less than they should be, no liability will be entailed.”²⁷ The mature Roman law replaced the forum’s bloody ritual with contracts under which a promisor simply agreed to the payment of a sum as punishment in the event of breach.²⁸ The medieval common law adopted this device as the penal bond.²⁹ It took the form of a deed in which a promisor confessed a debt to the promisee—in effect creating a status-based relationship of creditor and promisor.³⁰ The deed was put in writing and

20. POLLOCK & MAITLAND, *supra* note 18, at 43.

21. *Id.*

22. *See id.* at 44–45.

23. *See generally id.* at 1–28 (describing the evolution of rights in land).

24. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 368–71 (4th ed. 2002).

25. *See generally* ALAN WATSON, ROME OF THE XII TABLES: PERSONS AND PROPERTY (1975).

26. *See Twelve Tables*, in THE INSTITUTES OF GAIVS AND JUSTINIAN 579, 579 (T. Lambert Mears trans., Wm. W. Gaunt & Sons 1994) (1882) (setting forth rules for commencing a lawsuit).

27. *Id.* at 581.

28. *See* DIG. 44.7.44 (Paul, Ad Edictum Praetoris 74) (“If I have stipulated as follows: ‘Do you promise to give a hundred if you have not transferred the land?’ Only the hundred is part of the stipulation, but the land serves for its discharge.”).

29. *See* Joseph Biancalana, *The Development of the Penal Bond with Conditional Defeasance*, 26 J. LEGAL HIST. 103, 103–06 (2005) (discussing the influence of Roman law on early common-law penal bonds).

30. Judge (then Professor) Morris Sheppard Arnold nicely summarizes the status of debt in the early common law of contracts:

[I]nstead of saying a defendant promised to pay money, a plaintiff could claim that he owed it. This is what the writ of debt said simply—*debet*, he, the defendant, owes. The writ always was general, although the facts of the transaction giving rise to the duty to pay would be given in the plaintiff’s declaration. A duty to pay money might arise (a writ of debt might work) in a great miscellany of situations, most of them

sealed by the debtor.³¹ The bond, however, would contain a condition relieving the promisor of the obligation to pay.³² For example, *A* would execute a bond confessing a debt of £100 in a year's time to *B*. Noted on the reverse of the bond, would be a condition relieving *A* of the obligation to pay if he conveyed Blackacre to *B* first. The intention of the parties, of course, was to transfer Blackacre rather than the £100. The bond's purpose was to give *B* the ability to exact a penalty from *A* in the event that *A* failed to keep this promise to convey Blackacre. Strictly speaking, the bond contained no legally recognized promise by *A* to transfer Blackacre. Any such promise existed only as an extra-legal undertaking by *A*.

In structure, the penal bond was similar to the covenant ritual of hacking up a goat. Under both devices, the parties, *ex ante*, created a system of recourse against a promisor who breached *ex post*. The goal was to provide an *in terrorem* incentive to perform by giving the promisee a means of retaliating in the event of breach, while limiting the possibility of escalation. In the case of Priam and Agamemnon, the Trojans and Achaeans sought to authorize attacks against breachers that would not lead to a resumption of the all-out war they were attempting to limit.³³ As the subsequent story of *The Iliad* shows, they were ultimately unsuccessful, in part because the violence of the remedy rapidly escalated.³⁴ The penal bond avoided this problem by eliminating private violence altogether. Initially, however, the financial scope of the penalty that the promisee could extract in the event of breach remained largely unregulated.

This shifted in the seventeenth century. Defendants began resorting to the equity courts, claiming that the penalty due under the bond was excessive in light of the value of the failed condition. For example, in the 1671 case of *Wilson v. Barton*, the litigants in an ecclesiastical court agreed to submit their dispute to a secular court and executed a £200 penalty bond to secure the contract.³⁵ When the plaintiff refused to submit the case as

consensual. So if a person admitted a debt in a sealed writing—by executing a *scriptum obligatorium*, a bond—then a writ claiming that the person *debet* the obligee named (or his attorney) would work. The liability arose not because the obligor impliedly promised to pay, as we ourselves would say, but because he admitted he owed. The instrument was an I.O.U., not a promissory note, and the writ was said to be “on the obligation” (*sur obligation*).

Morris S. Arnold, *Transcending Covenant and Debt*, 85 YALE L.J. 990, 992 (1974) (reviewing SIMPSON, *supra* note 5).

31. See BAKER, *supra* note 24, at 368; SIMPSON, *supra* note 5, at 91; Biancalana, *supra* note 29, at 107.

32. See BAKER, *supra* note 24, at 368; SIMPSON, *supra* note 5, at 91; Biancalana, *supra* note 29, at 103.

33. HOMER, *supra* note 13, at 138.

34. See *id.* at 145–63.

35. (1671–1672) 21 Eng. Rep. 812 (Ch.) 812; Nelson 148.

agreed, the defendant sued on the bond at common law.³⁶ The plaintiff then petitioned the equity court for relief, “[w]hereupon the Master of the Rolls granted an Injunction against the Penalty, and directed a Tryal to try what the Defendants were damnified by the Countermand.”³⁷ In another case involving a complex marriage contract secured by a £3000 penalty bond, the equity court declared they “saw no Colour of Cause to give the said Plaintiff any Relief against the said £3000 Bond and Judgment thereon had, other than against the Penalty.”³⁸

Ultimately, Parliament sided with the equity courts in a series of laws passed at the turn of the eighteenth century. The initial procedure adopted by Parliament suggests an attempt to limit retaliation through the legal system, rather than an attempt to substitute compensation for penalty. Hence, under a 1696 statute, a plaintiff suing upon a bond was allowed to execute on property only up to the value of the damages suffered as a result of breach.

[B]ut notwithstanding, in each case such judgement shall remaine continue and be as a further security to answer to the plaintiffe or plaintiffs and his or their executors or administrators such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture deed or writing³⁹

Only a decade later, Parliament acted to make payment of damages a full substitute for the stipulated penalty under the bond.⁴⁰ The penal bond continued as a popular transactional form for another century and a half, mainly because of procedural advantages—such as a longer statute of limitations—for actions on specialty contracts like bonds, vis-à-vis simple contracts.⁴¹ Following the limitations of the early eighteenth century, regardless of the penalty specified in the bond, the value of the underlying

36. *Id.*

37. *Id.*

38. *Hodkin v. Blackman*, (1674–1675) 21 Eng. Rep. 628 (Ch.) 629; 2 Chan. Rep. 103, 104.

39. Administration of Justice Act, 1696, 8 & 9 Will. 3, c. 11, § VIII (Eng.).

40. The amended law stated:

[I]f at any time pending an action upon any such bond with a penalty the defendant shall bring into [the] court where the action shall be depending all the principal money and interest due on such bond and also all such costs as have been expended in any suit or suits in law or equity upon such bond the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.

Administration of Justice Act, 1705, 4 & 5 Ann., c. 3, § XIII (Eng.).

41. See BAKER, *supra* note 24, at 325–26; SIMPSON, *supra* note 5, at 125; Biancalana, *supra* note 29, at 113.

promise represented a ceiling on the plaintiff's recourse against the defendant.⁴²

C. RECOURSE AND MODERN LITIGATION

Despite the apparent distance between the worlds of ancient covenants or penal bonds and modern contract litigation, the notion of contractual liability as consent to retaliation fits comfortably within modern commercial practices. Relational contract theorists have long noted the apparent disjunction between contract doctrine and the actual practices of contracting parties.⁴³ Contract lawyers often speak as though contracts specify the obligations of parties over the course of a deal, guiding their behavior.⁴⁴ But in practice, formal legal contracts often have little to do with the complex process of cooperation and mutual accommodation that characterizes actual business practice.⁴⁵ Rather, contracts are important not because they govern the terms of the deal, but because they function as the basis for litigation in the event of a breakdown in the relationship between the parties. Lisa Bernstein, for example, has shown how businesspeople operate under two distinct sets of norms.⁴⁶ Relationship-maintaining norms govern ongoing business relationships and are characterized by the informal

42. See BAKER, *supra* note 24, at 325; SIMPSON, *supra* note 5, at 122; Biancalana, *supra* note 29, at 111.

43. Ian Macneil notes:

[A]ll the standard texts on English law reflect a notion that the law of contract litigation is a relatively neat and logical structure of rules. [I] believe[] this idea to be inaccurate . . . Contract law is hardly a neat and logical structure of rules, but like all law a social instrument designed to accomplish the goals of man.

IAN MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 6 (David Campbell ed., 2001) (quoting IAN R. MACNEIL, CONTRACTS: INSTRUMENTS FOR SOCIAL COOPERATION: EAST AFRICA (1968)) (internal quotation marks omitted); see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) ("Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade.").

44. *Renaud v. Simmons*, 254 S.W.2d 418, 419 (Tex. Civ. App. 1952) ("The contract specifies the obligations of the parties in detail."); MACNEIL, *supra* note 43, at 130–31 ("Thus, the first two elements of promise in its contractual context are the wills of *two* or more individuals with beliefs in the power of one to affect the future—subject to the linkage of the social matrix essential to exchange.").

45. Stewart Macaulay describes this reality:

[The lawyers] complained that businessmen desire to "keep it simple and avoid red tape" even where large amounts of money and significant risks are involved. One stated that he was "sick of being told, 'We can trust old Max,' when the problem is not one of honesty but one of reaching an agreement that both sides understand."

Macaulay, *supra* note 43, at 58–59.

46. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796 (1996) (describing the difference between relationship-preserving norms and end-game norms).

accommodation and cooperation observed by relational contract theorists.⁴⁷ End-game norms come into play when ongoing relationships have broken down.⁴⁸ It is at this point, according to Bernstein, that parties invoke their formal contract rights.⁴⁹ Put in starker terms, formal contracts often function less as guides for cooperation than as weapons to be used when cooperation breaks down.

This vision of modern practice is consistent with the core structure at work in the ancient covenant rituals and the penal bond. In both cases, the formal contract exists to specify the conditions under which a promisee may retaliate against a wayward promisor. Likewise, modern practice suggests that it is quite reasonable to suppose that in many—or indeed most—cases, legal contracts exist mainly to facilitate retaliation in the event that relations between the parties break down. The contract does more than this, however. It also radically constrains the ability to retaliate in the end game, by specifying the conditions under which *A* may proceed against *B*, and by limiting the mode of retaliation to litigation. Furthermore, while speaking of litigation as a form of attack on a defendant's wealth, or as retaliation by a disappointed promisee, may seem odd, it captures an important reality of modern law. People experience litigation as an aggressive action. Indeed, military metaphors abound in discussions of litigation.⁵⁰ Much of this, of course, can be dismissed as lawyerly machismo. Nevertheless, the rhetoric persists because it comports with the inevitably antagonistic and aggressive nature of litigation. When *A* sues *B* for breach of contract, he or she makes a

47. *Id.* (defining relationship-preserving norms as “the norms that transactors choose to follow when they cooperatively resolve disputes among themselves and want to preserve their relationship”).

48. *Id.* (noting that end-game norms are “the norms that transactors would want a third-party neutral to apply in a situation where they were unable to cooperatively resolve a dispute and viewed their relationship as being at an end-game stage”).

49. As Professor Bernstein notes:

[M]erchants behave in ways that reflect an implicit understanding of the distinction between end-game and relationship-preserving norms and . . . they do not necessarily want the RPNs they follow during the cooperative phase of their relationship to be used to resolve disputes when their relationship is at an end-game stage.

Id. at 1798.

50. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542 (1991) (plurality opinion) (“fight their own battles by litigating before victory was certain”); *Torres-Rosario v. United States*, Civil No. 07-1282, 2010 WL 174884, at *4 (D.P.R. Jan. 13, 2010) (“Petitioner was faced with a seemingly uphill battle at trial.”); *OneBeacon Ins. Co. v. Parker, Kern, Nard & Wenzel*, No. 1:09-cv-00257 AWI GSA, 2009 WL 2914203, at *2 (E.D. Cal. Sept. 9, 2009) (“Defendant moved to stay the instant action, asserting that it will be required to ‘fight a two-front litigation war’ because Plaintiff here seeks to adjudicate facts that are the subject of the underlying action”); *Lock v. Encompass Ins. Co.*, No. 07-CV-14257, 2009 WL 804151, at *1 (E.D. Mich. Mar. 25, 2009) (“During the trial, a battle of the experts ensued.”); *Peavey Elecs. Corp. v. Baan U.S.A., Inc.*, 07-CA-00341-COA (¶ 8), 10 So. 3d 945, 950 (Miss. Ct. App. 2009) (en banc) (“[f]ollowing what the trial court described as an ‘all out war’ of litigation”).

decision to attack *B* through the courts, and one will be hard-pressed to find a defendant who does not experience litigation as a form of attack. In this sense, modern litigants are much like the Trojans and Achaeans who battled before Illium in the wake of Agamemnon's broken covenant.

At this point, we can formulate the central interpretive claim of this Article: Contractual liability consists of *ex ante* consent to retaliation in the event of breach—a retaliation limited and civilized through litigation. The evolution of contract from the bloody enacted penalty clause of the ancient covenant ritual to the written penalty clause of the penal bond, and then to a limited claim for money damages, casts remedy for breach of contract in a new light. What we see is a gradual limiting of the scope of retaliation in the event of breach. Among the Trojans and Achaeans, a breach of covenant gave rise to the right to brutally attack the breaching party and his family. With the rise of more powerful legal systems, the right of personal recourse was replaced with a right to proceed against a breaching party in the courts. The claim of violent retaliation was replaced with a claim for money, although initially a promisor faced few *ex ante* limitations on what sort of financial recourse he could consent to in the event of breach. The rise of adjudication merely ruled out *ex ante* consent to violence and replaced it with consent to a claim for money.

We then see a second process by which the intensity of the recourse was further limited. In effect, equity and Parliament ruled that any response prosecuted in the courts could not exceed the value of the bargain lost as a result of breach. Put another way, rather than seeking to enforce contracts, contract law in effect continues the ancient ritual of the dismembered goats, albeit in a civilized and limited form. It replaces the anarchic world of violence and feuds with a controlled world of civil recourse through the courts.

III. JUSTIFYING CIVIL RECOURSE

This account of contractual liability is an interpretive theory. It seeks to uncover something important about the underlying structure of the law that we currently have and is not offered as a model of what contract law would be if all was for the best in the “best of all possible worlds.”⁵¹ Rather, it has the more modest goal of revealing an aspect of the underlying normative logic of the law. An interpretive theory necessarily must pay attention to the normative logic of the law. Accordingly, it must also examine the extent to which the law is justified. Some theorists—most dramatically Ronald Dworkin—claim that a proper understanding of the law must present it as

51. VOLTAIRE, *CANDIDE OR OPTIMISM* 130 (Burton Raffel trans., Yale Univ. Press 2005) (1759) (internal quotation marks omitted).

justified by the best possible moral argument.⁵² Even if one adopts a less exalted view of the moral possibilities of legal interpretation, a successful interpretive theory will reveal the law as at least morally plausible.⁵³ Accordingly, this Part puts forward an argument that is meant to justify a consent to retaliation in the event of breach.

The civil recourse theory sees contract law as facilitating a form of limited retaliation against breaching parties. While “attack” and “retaliation” may initially raise moral hackles, ultimately allowing retaliation against contract breachers is a valuable way to facilitate social cooperation. This justification for civil recourse, however, is necessarily limited. Indeed, to the extent that the normative and interpretive case for the civil recourse theory is successful, it suggests that any comprehensive account of contract law will necessarily be pluralistic, calling on normative concepts beyond those embodied in the idea of civil recourse. The civil recourse theory provides an account of contractual liability and contract remedies; it cannot account for a host of doctrines such as mistake or the statute of frauds, which necessarily embody other normative concerns.

A. THE CASE FOR RETALIATION

In the philosophy of tort law, civil recourse theory has been justified by appeal to a Lockean social contract in which a citizen retains a limited version of his natural right of “appropriating to himself, the Goods or Service of the Offender.”⁵⁴ Because the view of contractual liability offered here shares with these tort theories an emphasis on a plaintiff’s ability to act against a defendant through the courts, it seems fair to label it a civil recourse theory. Such a label, though, carries with it a risk of confusion because the argument offered for the theory’s application to contractual liability rests on a very different normative basis than does the theory as applied to tort law. To understand those differences, it is useful to begin not with John Locke’s vision of the state of nature, but with the view offered up by Thomas Hobbes.⁵⁵

52. See RONALD DWORKIN, *LAW’S EMPIRE* (1997) [hereinafter DWORKIN, *LAW’S EMPIRE*] (laying out Dworkin’s theory of law as integrity at greater length); RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81 (1978) (“I propose . . . the thesis that judicial decisions in civil cases . . . characteristically are and should be generated by principle and not policy.”).

53. See STEPHEN A. SMITH, *CONTRACT THEORY* 13–24 (2004) (discussing strong, moderate, and weak versions of the justification requirement for theories of contract law).

54. JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 285, 292 (Peter Laslett ed., Cambridge Univ. Press 1970) (1689); see *supra* note 3 and accompanying text.

55. To be clear, I am not trying to offer a Hobbesian theory of civil recourse in contrast to the Lockean theory put forward by Professors Zipursky and Goldberg. I begin with Hobbes because of the hold that his vision of anarchy has exercised on our thinking, not because my theory rests on the particular account of natural law and natural rights set forth in Hobbes’s *The Leviathan*.

Hobbes famously claimed that life in the state of nature was “solitary, poore, nasty, brutish, and short.”⁵⁶ By the “state of nature,” Hobbes meant a world without formal government. His solution to the miserable brutishness of anarchy was Leviathan, an all-powerful State that could compel obedience to law.⁵⁷ The alternative to Leviathan, he insisted, was chaos.⁵⁸ Few thinkers today endorse Hobbes’s frank embrace of absolutism, although a strong assumption continues that Hobbes was correct about anarchy: In the absence of the State, chaos results.⁵⁹ History and anthropology, however, reveal that Hobbes was mistaken on this crucial point. As an empirical matter, anarchic systems are not chaotic. Rather, they are filled with social practices that constrain conflict, violence, and predation. The State simply is not the only solution to the Hobbesian problem of man’s constant “endeavour to destroy, or subdue one an other.”⁶⁰

For example, one of the most common mechanisms for creating order in an anarchic system is the feud.⁶¹ If a member of tribe *A* harms a member of tribe *B*, then members of tribe *B* will retaliate against a member of tribe *A*. This creates incentives for members of both tribes to avoid predation and to police misconduct by members of their own tribe. Admittedly, the order provided by such a system is brittle and can result in a cycle of violence that is difficult to escape. Most of the time, though, it does not break down. Indeed, as opposed to the rude and vicious anarchy predicted by Hobbes, in many societies where feuds govern, elaborate courtesy and hospitality are the norm.⁶²

Human flourishing, however, requires more than simply the absence of predation. It also requires that individuals cooperate with one another. In Hobbes’s vision of the state of nature, anyone foolish enough to enter a contract makes himself vulnerable to opportunism:

56. HOBBS, *supra* note 12, at 89.

57. *See id.*

58. *See id.*

59. An example of this presumption’s hold is expressed by the Tenth Circuit:

To empower each individual to decide whether the particular law is worthy or runs against the individual’s private beliefs would necessarily produce a lawless society and chaos. Quite apart from the fact of invalidity of such a system, it has no practical social value. Such a government would fail in a very short time, for carried to its logical conclusion it is anarchy and revolution.

United States v. Ogle, 613 F.2d 233, 241 (10th Cir. 1979).

60. HOBBS, *supra* note 12, at 87.

61. *See generally* M.J.L. HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST (1963) (discussing Arab society’s longstanding customs following instances of violent death or injury).

62. *See* FRANK HENDERSON STEWART, HONOR 88–90 (1994) (discussing the obligations that honor culture of the Bedouins imposed on hosts to defend their guests against hostility and contrasting it with early European norms).

For he that performeth first, has no assurance the other will performe after; because the bonds of words are too weak to bridel mens ambition, avarice, anger, and other Passions, without the feare of some coërcive Power; which in the condition of meer Nature, where all men are equall, and judges of the justnesse of their own fears, cannot possibly be supposed.⁶³

In a world of simultaneous exchange, of course, contracts are not really necessary.⁶⁴ Quid is exchanged for quo, but there is never an executory obligation to deliver quid or perform quo.⁶⁵ As soon as the element of time is introduced, however, the problem becomes more complicated.

Consider an example from Roman history. In 73 B.C.E., Spartacus, a gladiatorial slave in Capua, led a revolt in which he killed his owner.⁶⁶ Other slaves rallied to his cause, and in a short time, he commanded an army of several thousand soldiers.⁶⁷ Over a three-year period, Spartacus's forces marched from one end of the Italian peninsula to the other, defeating the Roman legions sent to suppress the revolt.⁶⁸ Finally, Spartacus was cornered at Rhegium in the toe of the Italian boot.⁶⁹ Without a navy, he contracted with Cilician pirates, who promised to ferry the escaped slaves out of Italy in exchange for a share of the vast booty of Spartacus's army.⁷⁰ Plutarch records that "after the pirates had struck a bargain with him, and received his earnest, they deceived him and sailed away."⁷¹ Trapped, the Romans captured the Spartacan army, and the consul Marcus Licinius Crassus lined the whole of the Via Appia between Capua and Rome with their crucified bodies.⁷²

63. HOBBS, *supra* note 12, at 96.

64. In subsistence economies without common exchanges, however, the social practice of agreement and trade can be underdeveloped to a surprising degree. In early medieval Iceland, William Miller writes of "how difficult it might be, in the absence of a market economy and its accompanying mercantile assumptions, to transact without ill-feeling." WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 84 (1990).

65. Of course, this is an oversimplification. Even in a world of purely simultaneous exchange, disputes can arise out of agreements. For example, if Able exchanges a widget with Baker for cash, and the widget subsequently proves defective, Baker may complain to Able. Some mechanism would be necessary to resolve their dispute. Even in a world of caveat emptor, we would need some rule to tell us that caveat emptor is the standard.

66. See generally BARRY STRAUSS, *THE SPARTACUS WAR* (2009) (chronicling the story of the gladiator Spartacus who led a slave rebellion in ancient Rome).

67. *Id.* at 42-43.

68. *Id.* at 110.

69. *Id.* at 132.

70. *Id.* at 133-34.

71. 3 PLUTARCH, *The Life of Crassus*, in PLUTARCH'S LIVES 204, 214 (A.H. Clough ed., John Dryden trans., Cosimo, Inc. 2008) (c. 75 C.E.).

72. SANDRA R. JOSHEL, *SLAVERY IN THE ROMAN WORLD* 63 (2010).

Contrary to Hobbes's claim, there are many ways to solve this problem without an omnipotent Leviathan.⁷³ In the absence of the State, cooperation can occur. Norms of reciprocity offer one solution.⁷⁴ For example, the Algonquin tribes of northeastern America developed an elaborate system of customs by which those with personal abundance had an obligation to share their abundance with family, fellow tribe members, and allies.⁷⁵ The recipients of this largess were in turn expected to share out of their abundance in the future.⁷⁶ Those who failed to comply with these reciprocity norms undermined the cohesion and unity of clan and tribe relationships to the detriment of all of the parties involved.⁷⁷

Another solution developed in medieval Iceland, where the opposite of a reciprocity norm occurred.⁷⁸ Warriors would engage in raids—*rán*—in which they would take property from one another.⁷⁹ The expectation was that a *rán* would give rise to either a proportional counter-raid or litigation, in which the victim of the original *rán* would demand payment.⁸⁰ Over time, a system of exchange, albeit without initial consent, formed.⁸¹ Another naturally occurring strategy encouraging cooperation is the social ostracism of promise breakers. For example, in the eleventh century, the Maghribi

73. See generally Joseph M. Perillo, *Exchange, Contract and Law in the Stone Age*, 31 ARIZ. L. REV. 17 (1989) (discussing mechanisms used by stateless societies to enforce agreements and facilitate exchange and cooperation).

74. See generally JACQUES T. GOUBOUT IN COLLABORATION WITH ALAIN CAILLE, *THE WORLD OF THE GIFT* (Donald Winkler trans., 1998) (discussing the gift's role in creating social connections that encourages the recipient to respond in kind); MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., W.W. Norton & Co. 1990) (1950) (same); MARSHALL SAHLINS, *STONE AGE ECONOMICS* (Routledge 2004) (1972) (discussing the economical implications of gifts during the Stone Age).

75. Richard White describes this system:

Each recipient [of a gift] incurred a reciprocal obligation to the giver thus ensuring that goods were constantly in motion. Defining what were surplus goods in this situation—goods beyond the basic needs for subsistence and production—is difficult, since groups, not individuals, accumulated goods, and possession was so fluid.

RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815*, at 101–02 (1995).

76. See *id.*

77. See *id.* at 101 (“The distribution of goods created obligation and established status, but here, in extending alliances and social relationships, Potawatomi leaders neglected existing internal obligations and eventually fragmented their villages and clans.”).

78. See MILLER, *supra* note 64, at 84–93 (discussing a case of exchange of resources through a process of *rán*, counter *rán*, and litigation).

79. See *id.* at 77, 83, 85–86.

80. See *id.* at 89–91.

81. See *id.* at 93–102 (discussing the norms governing raiding in medieval Iceland); see also JAMES F. BROOKS, *CAPTIVES & COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS 3–40* (2002) (arguing that a similar system of limited and quasi-legitimate raiding existed among American Indian tribes in what became the southwestern United States).

(Jewish merchants in the Islamic lands of the Mediterranean) developed an elaborate system of collective shunning to deal with commercial misbehavior.⁸² Hostage taking, a standard method of increasing compliance with ancient treaties, offers yet another solution.⁸³ None of these systems rely on a Hobbesian Leviathan to provide order and trust.

Notwithstanding such mechanisms, the fate of the Spartan army illustrates how any agreement involving executory obligations makes one or both of the contracting parties vulnerable.⁸⁴ It leaves both in a classic prisoner's dilemma.⁸⁵ In its simplest form, the prisoner's dilemma explains how rationally self-interested parties will always choose to defect, leaving everyone worse off than they would be in a world where cooperation is possible.⁸⁶ Traditionally, scholars have looked to law as a solution to the dilemma.⁸⁷ If we have contract law, so goes the argument, Able needn't worry about Baker's defection because once Baker enters into a legally binding contract, the law will prohibit his defection. This explanation assumes, however, that contract law enforces contracts—which is not quite true. The State leaves the question of legal action entirely in the hands of

82. See Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 528–31 (1993) (discussing the mechanisms by which long-distance merchants managed the problem of embezzlement by distant agents).

83. See JOEL ALLEN, *HOSTAGES AND HOSTAGE-TAKING IN THE ROMAN EMPIRE* (2006) (discussing hostage taking in the ancient world); A.D. Lee, *The Role of Hostages in Roman Diplomacy with Sasanian Persia*, 40 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 366 (1991) (Ger.) (discussing hostage taking in international diplomacy in the ancient world); M. James Moscovich, *Obsidibus Traditis: Hostages in Caesar's De Bello Gallico*, 75 CLASSICAL J. 122 (1979) (discussing hostage taking as a means of treaty enforcement during Caesar's Gallic campaigns).

84. See PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* 491–93 (2005) (discussing the problem of ex post opportunism in contracting).

85. See AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 14–15 (2004) (discussing the famous hold-up problem faced in executory contracts). As Dixit notes, "This is like a prisoner's dilemma except that only the second player has the opportunity to make an extra private gain, therefore it is often called a one-sided prisoner's dilemma." *Id.* at 16.

86. See *id.* at 15 ("[I]n the normal form, (Don't Invest, Hold Up) is the only Nash equilibrium; for any other strategy combination, one of the players wants to deviate to a different strategy.").

87. See, e.g., Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 312 (1992) ("The prisoners' dilemma is simply a situation in which the costs of bargaining or of enforcing the resulting contract are very high."); D.K. Osborne, *Cartel Problems*, 66 AM. ECON. REV. 835, 836 (1976) ("A prisoners' dilemma can be resolved satisfactorily by an enforceable contract."); Alan Schwartz, *Contracting About Bankruptcy*, 13 J.L. ECON. & ORG. 127, 128 (1997) ("The prisoners' dilemma thus vanishes if the prisoners can write an enforceable contract not to confess."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 835 (1995) ("[B]inding, rule-oriented trade adjudication is an enforcement mechanism by which states solve a multiparty 'prisoner's dilemma' arising out of trade contracts." (footnote omitted)).

the promisee.⁸⁸ In the absence of plaintiff-initiated litigation, Leviathan is indifferent to breach of contract. Contract law merely provides a promisee with a nonviolent and limited ability to retaliate against a promisor through litigation in the event of breach. Accordingly, the story of contract law as a simple prohibition on defection must be modified.

Another solution to the prisoner's dilemma is for disappointed promisees to retaliate against promise breakers. While the classical prisoner's dilemma yields the depressing result of mutual defection when played as a one-shot game between rational actors, substantial literature demonstrates that when the game is played repeatedly, cooperation develops through a strategy of tit-for-tat.⁸⁹ Each player cooperates until the other player defects, at which point the nondefecting player retaliates by defecting in the next round.⁹⁰ The logic behind the strategy is that Able limits the probability of Baker's defection by threatening to punish him should he defect.⁹¹ Ironically, the ability to retaliate provided by a multi-round game increases the probability of cooperation and thus reduces the likelihood that retaliation will become necessary.

The problem with the simple tit-for-tat strategy is that it is costly and requires that parties engage in a series of mutual commitments.⁹² It cannot provide for cooperation in one-shot scenarios or where one of the parties can simply refuse to deal further with the other party.⁹³ One must be able to retaliate without a second transaction. Consider again the case of Spartacus. The pirate-admiral was able to break his promise to Spartacus with impunity because his navy immunized him from retaliation by the Spartan army. Ironically, perhaps, it was Spartacus's inability to retaliate that led to the breakdown of cooperation, and some mechanism facilitating attacks would have resulted in greater cooperation (and, one might add, fewer crucified slaves). On the other hand, as the treaty between Agamemnon and Priam from *The Iliad* illustrates, even parties that are violently opposed to one another can reach agreement when it is possible to credibly threaten the other party with retaliation in the event of breach.⁹⁴ There is, thus, a sense

88. See *infra* notes 164–66 and accompanying text (discussing the private-law structure of contract law and the absence of independent state enforcement of contracts).

89. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984) (explaining success of “tit-for-tat” strategy—e.g., matching the cooperate/defect decision made by one's opponent in the previous round—in multi-round prisoner dilemma “tournaments”).

90. *Id.* at 31.

91. *Id.* at 36–37.

92. *Id.* at 37–38.

93. The threat of refusing to deal can itself discipline defection, provided that the returns on future cooperation are greater than the returns that can be generated from investing the proceeds of a one-time defection. See DIXIT, *supra* note 85, at 16–17 (discussing the “grim-trigger strategy”).

94. See HOMER, *supra* note 13, at 128–44 (discussing a treaty between the Trojans and the Achaeans).

in which cooperation depends on the ability to retaliate rather than, as Hobbes suggests, its complete suppression.

Of course, retaliation may lead to escalating conflict.⁹⁵ If retaliation takes the form of self-help violence, as in the case of feuding Icelandic chieftains or Bronze Age Greeks, the target may fight back. Furthermore, if the legitimacy of the initial attack is not clearly established, then the natural reaction of the attacked party's tribe is to retaliate. The reason is simple: In an anarchic system, the credible threat of retaliation is the best way to avoid unprovoked predation. A retaliatory threat is only credible, however, if one consistently retaliates against apparent wrongs, which is why the strong culture of honor and vengeance emerged in anarchic societies. Not surprisingly, these societies developed memorable rituals—such as the dismembering of goats and dogs—by which retaliation for breach of contract could be distinguished from simple predation. These rituals were attempts to reduce, *ex ante*, the potential level of *ex post* violence in the event of retaliation for breach. As we have seen, over time, societies developed stronger safeguards against the risk of escalating conflict inherent in encouraging permissible retaliation for breach: the extraction of wealth replaced bloodier responses; adjudication came to replace self-help, acting as a gatekeeper to retaliation; and finally, the scope of even monetary retaliation was limited.⁹⁶

The shift from self-help and violence to adjudication and money damages is fairly easy to understand in terms of limiting the potential costs of retaliation. But while the logic of limitation finds a home within the idea of civil recourse theory, explaining why expectation damages, rather than some other amount, should be the upper limit on consented-to retaliation is less obvious. Limiting consented-to attacks at attacks for expectation damages ensures that a promisee does not receive more through retaliatory litigation than he or she would receive through successful cooperation. This

95. Robert Bates provides the following trenchant summary of the problem:

When the threat of retaliation works, the private provision of coercion can produce peace, as Evans-Pritchard argued; but the behaviors and beliefs that supply peace also encourage behavior that increases the likelihood of violence. In such societies, private warriors populate public places; people bearing arms and intimating their willingness to employ them strut in the boulevards and cluster in the marketplace. Public places are populated with *provocateurs*; where families are honor-bound to protect their own, hot-tempered youths find protection against the consequences of brazen behavior. Interactions thus take place in a volatile ambience of honor and impudence; young hotheads move to the fore; and a culture of machismo permeates the society. . . . Provocative acts become commonplace—but also uncommonly dangerous because they can unleash violent reprisals.

ROBERT H. BATES, PROSPERITY AND VIOLENCE 46 (2001).

96. It is also worth noting that as the scope of retaliation was limited and the possibility of escalation was reduced, the rituals surrounding contract formation have become considerably less colorful.

differentiates legitimate retaliation for breach from mere predation. Hence, Lord Nottingham, writing in the 1690s, articulated equity's oversight of penal bonds not in terms of providing just compensation, but in terms of limiting predation through the courts: "*Yet equity will not suffer any advantage to be taken of this bond beyond the true damnification, and therefore usually awards an injunction till a trial at law be had either upon an action of Covenant or upon a special issue quantum damnificatus.*"⁹⁷ Similarly, there is a difference between a legitimate raid carried out because the target broke a covenant and a merely predatory raid aimed at carrying off the target's wealth.⁹⁸

In short, rather than completely displacing the world of anarchy, as Hobbes suggested, contract law tames and limits the anarchic mechanism of retaliation without repudiating its basic structure. It solves the problem of opportunism and facilitates the human flourishing made possible by social cooperation.⁹⁹ It does this by facilitating retaliation against contract breachers in ways that prevent retaliation from becoming merely predatory.

B. RECOURSE AND PLURALISM

There is an important sense in which the civil recourse theory is radically incomplete. Allowing limited retaliation against contract breachers is desirable because it facilitates cooperation. A system of cooperation based on retaliation, however, is necessarily brittle, and therefore the scope of permissible retaliation must be limited. The idea of civil recourse, having elucidated the nature of contractual liability, tells us comparatively little about the rest of contract doctrine.

To date, no theory has emerged as a widely accepted interpretation of all of contract law.¹⁰⁰ Rather, differing theories successfully explain particular doctrines, while failing to explain others.¹⁰¹ Rival theories are able

97. LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 275 (D.E.C. Yale ed., Cambridge Univ. Press 1965) (1673-1675) (emphasis added).

98. Signaling the difference between these two types of attacks is why the bloody covenant rituals acknowledging the legitimacy of attack were so important. The point was to keep a healthy anarchy from degenerating into the mindlessly predatory anarchy envisioned by Hobbes.

99. This argument, of course, does not rest on the notion that all forms of social cooperation are good. Indeed, doctrines such as the law's refusal to recognize illegal or immoral contracts can be understood as a refusal to facilitate pathological forms of cooperation.

100. See Nathan B. Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1483-84 (2005) (summarizing the polyphony of contemporary contract theory).

101. See, e.g., Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VA. L. REV. 157 (2007) (discussing how law and economics and moral theories of contract seek to explain different features of our legal practices); Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L.

to provide explanation for these neglected doctrines, but often at the price of discounting those doctrines that the first theory explained.¹⁰² For example, economic theories explain the rule in *Hadley v. Baxendale*¹⁰³ as a penalty default rule;¹⁰⁴ but these theories encounter difficulty in explaining expectation damages.¹⁰⁵ Promissory theories are able to account for why the law should recognize the obligation to keep a contract; but they fail to explain the doctrine of consideration, which eliminates liability for a whole class of promises.¹⁰⁶ On a broader level, Jody Kraus argues that efficiency theories provide detailed accounts of the outcomes in contract cases, while failing to account for the common law's *ex post* language of rights and duties.¹⁰⁷ Autonomy theories, he goes on to assert, provide an account of contract law's internal language, but fail to yield concrete explanations for the outcomes in particular cases.¹⁰⁸

There are three potential responses to this normative pluralism. On one hand, we could claim that contract law lacks any internal coherence.¹⁰⁹ A second approach is to continue to search for a unified normative theory that could account for the bulk of contract doctrine.¹¹⁰ The final approach is to construct a theory that integrates various normative goals in a coherent manner.¹¹¹ A recourse theory is pluralistic in this final sense. As I argue below, this theory casts light on several contract doctrines that seemed

REV. 829, 843–59 (2007) (discussing the comparative failures and successes of autonomy and efficiency theories' explanation of doctrines surrounding contract damages).

102. See, e.g., Kraus, *supra* note 1, at 691–94 (arguing that autonomy theories capture the language of judicial opinions in contract cases while efficiency theories capture the outcomes in contract cases).

103. (1854) 156 Eng. Rep. 145 (Exch.); 9 Ex. 341.

104. See Ian Ayers & Robert Gerner, *Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101–04 (1989) (discussing the holding in *Hadley* as a penalty default rule).

105. See Oman, *supra* note 101, at 851–59.

106. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 29 (1981).

107. See, e.g., Kraus, *supra* note 1, at 690.

108. See *id.*

109. See, e.g., Peter Alces, *Unintelligent Design in Contract Law*, 2008 U. ILL. L. REV. 505, 508–09 (arguing that ultimately contract law reflects a series of historical accidents and ad hoc decisions that lack any underlying conceptual unity).

110. This, for example, is what Randy Barnett claims to have done with his consent theory of contract, which is similar to Charles Fried's promise-based theory in its acceptance of liberal individualism as a basic premise, but which differs from it by jettisoning the concept of promising. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *Consent Theory*]; Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992).

111. See Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, 1 SOC. POL. & LEGAL PHIL. 385 (2002); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001).

contradictory or anomalous. It would be foolish, however, to claim that the notion of consent to retaliation lies behind all of contract doctrine. It provides an account of some of the law's core structures, but there are many doctrines that it fails to explain. The strength of the theory lies not in its ability to account for all strands of contract law, but rather in its ability to allow other normative principles to account for these doctrines without contradicting them. The way a civil recourse theory accommodates other normative concerns can be seen best in the doctrines surrounding remedies, to which we now turn.

IV. CIVIL RECOURSE AND SOME PUZZLES OF CONTRACT DOCTRINE

The civil recourse theory provides theoretical traction on three puzzles in the law of contract remedies: the penalty-clause doctrine; limitations on expectation damages; and the private-law structure of contractual liability.

A. THE PENALTY DOCTRINE

It is black-letter law that a so-called penalty clause is unenforceable.¹¹² Parties are free to specify the amount of money that they must pay in the event of breach, but the amount chosen must be a reasonable estimate of one's actual damages.¹¹³ A liquidated-damages clause that exceeds a reasonable estimate of the parties' actual expectation damages will be deemed a penalty clause.¹¹⁴ For many theories, this rule is puzzling.

For autonomy theorists, the penalty doctrine is a stark limitation on freedom of contract.¹¹⁵ If contracts are to be respected because they represent the autonomous choices of the parties, then, unless there are third-party effects, the law ought to be indifferent as to the substantive content of agreements.¹¹⁶ This content is a matter for the parties to decide, and for the State to restrict or second guess if the choices of private parties fail to show them the respect that they are due. Granted, some promissory theorists, such as Seana Shiffrin, question whether one can make a promise that contemplates its own breach, but this argument suggests that contract law should reject not only the penalty doctrine, but the entire notion of liquidated damages.¹¹⁷ But for those who ground contracts in promissory

112. See RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981) (setting forth the penalty-clause doctrine).

113. See *id.*

114. See *id.*

115. See Ugo Mattei, *The Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427, 433 (1995) ("The coherence of penalty clauses ban with the underlying philosophy of freedom of contract is questionable, and the issue is frequently raised both in judicial opinion and in the academic literature.").

116. See Barnett, *Consent Theory*, *supra* note 110, at 286; FRIED, *supra* note 106, at 105; SMITH, *supra* note 53, at 246-47.

117. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 734-36 (2007).

morality or the autonomy of citizens in a liberal polity, the penalty doctrine constitutes an interpretive embarrassment.

Economic theorists, who place a premium on the value of private ordering, likewise have difficulty accounting for the penalty doctrine. Initially, the theory of efficient breach seems to suggest that penalty clauses are undesirable because they overincentivize performance.¹¹⁸ From an economic point of view, there is nothing per se efficient about the performance of contracts—rather, the parties should perform only when the benefits of performance outweigh its costs.¹¹⁹ Penalty clauses appear to incentivize performance even when the costs of breach outweigh the benefits of performance. This apparently neat explanation, however, holds true only if the costs of renegotiation are high. It falls apart once the possibility of ex post renegotiation emerges.¹²⁰ If a promisor can realize greater returns from breach than performance will realize for a promisee, he can always bargain for a release from his obligations by offering the promisee part of the upside profit from breach. In effect, a promisor can threaten, “Agree to release me, or else I will perform and you won’t be able to capture any of the benefits from my breach.” Indeed, because penalty clauses commit the promisor to sharing a larger portion of the surplus created by breach opportunities ex post, they may provide an efficient ex ante bargaining tool for promisors who wish to credibly commit to dividing such a surplus with promisees.¹²¹

One might try to justify the rule on the ground that it protects contracting parties from inconsiderately imposing crushing liability on themselves in the event of breach.¹²² For example, some scholars have pointed to the experimental results of behavioral decision theorists, which suggest that humans are prone to systematic errors in how they assess the risk of unlikely events such as breach of contract.¹²³ Accordingly, courts’ willingness to vigilantly police liquidated-damages clauses can be justified by

118. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 31–34 (2d ed. 1989) (detailing why the expectation remedy leads to an efficient outcome in breach-of-contract cases).

119. See *id.*

120. See generally Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988) (arguing that, given the possibility of renegotiation ex post, there is no reason to suppose that expectation damages represent a uniquely efficient way of internalizing the costs of breach).

121. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 260–61 (5th ed. 2007).

122. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (Posner, J.) (“On this view the refusal to enforce penalty clauses is (at best) paternalistic—and it seems odd that courts should display parental solicitude for large corporations.”).

123. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

the need to protect people from their faulty assessments of the risk of paying a penalty.¹²⁴

The problem with this interpretation of the doctrine is that it cannot explain why penalty clauses are singled out for special monitoring.¹²⁵ After all, the behavioralist research suggests that people are likely to inaccurately assess the risks associated with events other than contract breach; yet the law normally does not inquire into the substance of contractual terms. For example, if *A* loans *B* \$10 to be repaid with ten percent interest in one year, the penalty doctrine would disallow a clause requiring the payment of a fairly trivial additional sum—say \$50—if *B* failed to tender the \$11 as promised.¹²⁶ It is difficult to see why the law should protect parties from the decision to enter into such relatively harmless agreements. Alternatively, suppose that *A* loaned an enormous sum of money to *B*, so enormous that *B* had little hope of repaying it. Absent fraud or unconscionability, such a contract is legally unobjectionable.¹²⁷ The penalty-clause doctrine thus seems, at best, a ham-fisted attempt at paternalism.¹²⁸

In contrast, a civil recourse theory of contractual liability has a simple explanation for the penalty doctrine: Law exists in part to limit the ability of parties to engage in predation against one another. This does not mean that the law eliminates any ability to retaliate against wrongs. Rather, the law civilizes recourse by replacing private violence with private litigation and limiting satisfaction to the extraction of wealth from the party in the wrong.¹²⁹ Consider again the covenant between Agamemnon and Priam

124. Robert Hillman has written:

These cognitive phenomena and the predictions they generate about contract parties' decision making both help to explain the judicial response to liquidated damages provisions and tend to confirm the appropriateness of the current aggressive judicial approach to the issue. The parties view contract breakdown as a remote possibility, fail to focus on it, and, to the extent that they do think about breach, seek a fair remedial package. Because of the lack of paradigmatic bargaining with respect to liquidated damages provisions and because of their potential, due to unanticipated circumstances, to generate penalties and windfalls contrary to the parties' intentions, courts do and should enthusiastically police liquidated damages provisions.

Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 732 (2000).

125. *See id.* at 735 (“[W]hy should judges single out liquidated damages for this treatment? What contract term would be safe from this attack? Aggressive use of this reasoning to question contract enforceability could therefore undermine contract law’s goals of certainty and predictability, which may be better served by the traditional objective theory of assent.”).

126. *See* RESTATEMENT (SECOND) OF CONTRACTS § 365 cmt. a (1981).

127. *See id.* §§ 162, 208.

128. *See* *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (Posner, J.) (“[S]ince little effort is made to prevent businessmen from assuming risks, these reasons are no better than makeweights.”).

129. *See* Zipursky, *Civil Recourse*, *supra* note 3.

before the walls of Ilium. The parties consented that in the event of breach their throats could be slit, their children enslaved, and their wives raped.¹³⁰ The agreement is barbarous and unjust, but the injustice does not reside in the fact that the promisor consented to attack in the event of breach. The barbarity of the agreement lies in the excessive nature of the attack. The advent of contract law wrought the improvement of limiting recourse to retaliation that is proportionate to the wrong inflicted. The law does not allow a party to consent to a disproportionate response because the establishment of a system of private law was fueled by a desire to limit the scope and violence of recourse in the face of wrongs.¹³¹

This account is consistent with two other aspects of the penalty doctrine. First, the civil recourse doctrine does not work in reverse. The law will not honor a liquidated-damages clause that exceeds the value of what was promised; but there is no objection to clauses that limit recourse to less than expectation damages in the event of breach.¹³² In effect, parties may declare that they will be satisfied with recourse at less than the full value of what was promised to them.¹³³ Such subcompensatory recourse is not excessive, and therefore is unobjectionable. Indeed, parties are free to disclaim all rights to recourse *ex ante* by agreeing to otherwise valid contracts that contain clauses disclaiming that they are legally enforceable.¹³⁴

Second, the doctrine does not sweep into its ambit true option contracts, in which parties agree *ex ante* on a price for the purchase of a release from certain obligations. For instance, so-called pay-or-play contracts are quite common in the film industry, and are routinely honored by the courts.¹³⁵ Under these contracts, an actor is promised a fixed sum of money—say \$1 million—in return for the actor's promise to perform in or refrain from performing in a contemplated film at the movie studio's

130. See HOMER, *supra* note 13, at 128–44.

131. See LOCKE, *supra* note 54, at 324; Goldberg, *Constitutional Status*, *supra* note 3, at 602 (arguing that allowing civil recourse for tort actions limits the cycle of escalating violence and vengeance that would result from extra-legal recourse); Zipursky, *Civil Recourse*, *supra* note 3, at 736 (“Indeed, an earmark of our civil legal system is that it does not involve violent remedies, but civil remedies; it does not involve punishment.”).

132. See RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. d (“A term that fixes as damages an amount that is unreasonably small does not come within the rule stated in this Section, but a court may refuse to enforce it as unconscionable under the rule stated in § 208.”).

133. See *Rose & Frank Co. v. J.R. Crompton & Bros.*, [1925] A.C. 445 (H.L.) (appeal taken from Eng.) (holding that courts should honor an agreement expressly disclaiming a right to recourse to damages in the event of breach).

134. See *id.*

135. See, e.g., *Welch v. Metro-Goldwyn-Mayer Film Co.*, 254 Cal. Rptr. 645 (Ct. App. 1988) (“The contract included a standard ‘pay or play’ clause, under which the studio could terminate Welch from the film at any time, but was obligated to pay her the full contract price, unless she failed to fulfill her contractual obligations.”), *vacated*, 782 P.2d 594 (Cal. 1989).

discretion.¹³⁶ If the studio and the actor instead entered into a bilateral contract where the actor promised to act and the studio promised to hire the actor for a film at the rate of \$1 million, a \$1 million liquidated-damages clause could well be deemed a penalty clause.¹³⁷ The actor would have a duty to mitigate his damages by finding another role, and in any case his claim for the lost \$1 million under the contract would be offset by the amount saved—in this case, the cost of performing in the movie—as a result of the breach.¹³⁸

From a purely economic point of view, there is no distinction between the pay-or-play agreement and the liquidated-damages clause. Both are options. In contrast, the legal distinction makes sense if the aim of the penalty doctrine is to limit retaliation. The \$1 million pay-or-play clause is not meant as recourse in the event of breach; indeed, in refusing to make the movie and tendering \$1 million, the studio fully performs its contractual obligations, and there is no breach. On the other hand, when the clause is meant to specify the recourse to be allowed in the event of breach, then the law limits recourse to proportionate damages.

B. LIMITATIONS ON EXPECTATION DAMAGES

In a sense, the modern philosophy of contract law begins with the question of expectation damages, famously posed in Lon Fuller and William R. Perdue's article, *The Reliance Interest in Contract Damages*.¹³⁹ For Fuller and Perdue, the mystery was why the law should award expectation damages rather than reliance damages.¹⁴⁰ Their answer was a rather convoluted story about how expectation damages were the most effective way to protect reliance.¹⁴¹ Modern promissory theorists, however, have offered a more straightforward account: Expectation damages "enforce" contracts by giving to the promisee the value of what was promised.¹⁴² Indeed, Melvin Eisenberg has made a powerful empirical argument that, in most cases,

136. See Victor P. Goldberg, *Bloomer Girl Revisited or How To Frame an Unmade Picture*, 1998 WIS. L. REV. 1051, 1070–82 (discussing pay-or-play clauses in Hollywood contracts).

137. See *Lynch v. CIBY 2000*, No. CV 97-9022, 1998 U.S. Dist. LEXIS 23496, at *3 (C.D. Cal. Aug. 13, 1998) (refusing to rule a pay-or-play clause a penalty clause because the plaintiff chose one of two options for performance rather than breaching).

138. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

139. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 52–53 (1936).

140. See *id.* at 53.

141. See *id.* at 73–75.

142. See, e.g., FRIED, *supra* note 106, at 21–27 (arguing that the enforcement of promises requires either specific performance or the rendering of an amount equivalent to the promised performance). But see Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1 (2007), <http://www.harvardlawreview.org/media/pdf/cfried.pdf> (arguing that the promissory theory of contract need not imply a preference for specific performance).

expectation damages constitute a kind of virtual specific performance.¹⁴³ Alternatively, one might argue for expectation damages on the grounds of corrective justice, as Peter Benson, Curtis Bridgeman, and Andrew Gold have done.¹⁴⁴ Finally, of course, the theory of efficient breach seems to explain expectation damages as forcing promisors to fully internalize the costs of breach.¹⁴⁵

Regardless of what one makes of the merits of any of these arguments,¹⁴⁶ they all suffer from a basic problem: The law seldom awards full expectation damages.¹⁴⁷ A host of doctrines ensure that the actual damages awarded to any plaintiff will be less than the value of her expectancy. First, at least under American law, parties must bear their own legal expenses, which means that in the absence of an attorney's fee clause, a plaintiff will always be undercompensated for the full value of her contractual expectation.¹⁴⁸ Second, damages may only be recovered where they can be calculated with certainty.¹⁴⁹ Real, but uncertain, losses receive no compensation beyond nominal damages.¹⁵⁰ Third, under the rule in *Hadley v. Baxendale*, consequential damages are sharply limited.¹⁵¹ Those damages that are not foreseeable at the time of breach are not recoverable unless they are specially communicated at the time of contract formation.¹⁵² In at least some jurisdictions, additional consequential damages must also be

143. See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 978 (2005) (arguing that damage awards in most cases operate as a form of virtual specific performance by allowing promises to recover through the market).

144. See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1149 (1989); Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1675-76 (2007); Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOOD HALL L.J. 273, 291 (1995); Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3028-31 (2007); Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 24 (2009). Indeed, elsewhere I have myself suggested that corrective justice offered a justification for expectation damages. See Oman, *supra* note 101, at 844.

145. See, e.g., POLINSKY, *supra* note 118, at 31-34 (detailing why the expectation remedy leads to an efficient outcome in breach-of-contract cases).

146. And there is reason to be skeptical of all of them. See SMITH, *supra* note 53, at 409-13 (discussing the shortcomings of autonomy and transfer accounts of expectation damages); Oman, *supra* note 101, at 851-53 (discussing the shortcomings of efficiency theories of expectation damages).

147. See Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 507 (2002) ("[C]ontracts people continue to report that the goal of expectancy damages is to make injured parties whole. The reality is dramatically different. A large set of remedial rules often limits the recovery of injured parties to well below expectancy." (footnote omitted)).

148. See *Richmond Am. Homes of Colo., Inc. v. United States*, 80 Fed. Cl. 656, 673 (2008); RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

149. See RESTATEMENT (SECOND) OF CONTRACTS § 352.

150. See *id.*

151. See *id.* § 351.

152. See *id.*

specially agreed to ex ante.¹⁵³ Fourth, in the event of a promisor's breach, a promisee has a duty to mitigate her damages.¹⁵⁴ She must make reasonable efforts to limit the amount that the promisor must pay.¹⁵⁵ Failure to do so results in a reduction of any claim for damages.¹⁵⁶ These limitations present problems for any theory that takes full expectation damages as the correct remedy for breach because they ensure that full expectation damages are virtually never paid.¹⁵⁷

As a doctrinal matter, it thus makes more sense to think of expectation damages as a limitation on awards rather than an entitlement in the event of breach. The point is most powerfully illustrated by contemporary doctrine's treatment of claims for reliance damages. According to the Restatement (Second) of Contracts, reliance damages are available as an alternative measure for recovery.¹⁵⁸ As a practical matter, plaintiffs are likely to seek reliance damages in those cases where the reliance measure would yield a larger recovery than expectation damages—for example, where a promisee makes a losing contract that the promisor then serendipitously breaches.¹⁵⁹ Courts (and the Restatement), however, have been unsympathetic to plaintiffs who attempt to recover the full value of their reliance on a losing contract.¹⁶⁰ Rather, defendants are allowed to provide evidence of what the plaintiff would have lost had the contract been performed, and any award will then be reduced by these avoided costs.¹⁶¹ The result is that the expectation measure—when it can be determined—operates as an effective limit on the amount of reliance damages that can be recovered.¹⁶²

The structure of expectation damages must be viewed in light of the previously discussed limiting doctrines. Requirements of certainty, limitations on consequential damages, and the like all serve to cabin the recourse available to promisees against breaching promisors.¹⁶³ The

153. See, e.g., *Morrow v. First Nat'l Bank of Hot Springs*, 550 S.W.2d 429 (Ark. 1977) (adopting the tacit-agreement version of the *Hadley* rule).

154. See RESTATEMENT (SECOND) OF CONTRACTS § 350.

155. See *id.*

156. See *id.*

157. See Oman, *supra* note 101, at 872 (noting that due to the limitations on damages, full expectation damages are virtually never awarded).

158. See RESTATEMENT (SECOND) OF CONTRACTS § 349.

159. See E. ALLAN FARNSWORTH, CONTRACTS § 12.16, at 805–08 (4th ed. 2004) (discussing the situations in which plaintiffs generally ask for reliance damages rather than expectation damages).

160. See RESTATEMENT (SECOND) OF CONTRACTS § 349.

161. See *id.*

162. See Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1772 (arguing that the availability of reliance damages simply shifts the burden of proof and that expectation damages operate as an upper limit on recovery).

163. See *supra* notes 147–57 and accompanying text (summarizing the various doctrinal limitations on full expectation damages).

expectation measure, rather than providing the value of an entitlement, represents an upper limit on recovery. The actual amount that a plaintiff can recover may in practice be considerably less than the full value of his expectation interest. Indeed, plaintiffs are free to sue and ask courts for less than the value of their full expectation damages, and they frequently do so. There is no impediment to such suits. Rather, claims for damages are disallowed when they exceed the expectation measure or fall within one of the other limiting doctrines discussed above. The virtue of the civil recourse theory is that it sees damages in terms of limited retaliation, rather than in terms of compensation for a lost right. Accordingly, the logic of expectation as limit runs with the grain of the theory rather than against it.

C. THE PRIVATE-LAW STRUCTURE OF CONTRACTUAL LIABILITY

The civil recourse theory also provides an explanation for the basic, private-law structure of contractual liability.¹⁶⁴ This structure consists of two features: bilateralism and private standing. Bilateralism means that damages in private litigation always pass from the defendant to the plaintiff.¹⁶⁵ Private standing means that rather than having a state official independently enforce contracts, the law waits for disappointed promisees to bring suits.¹⁶⁶ In the absence of a decision by the promisee to proceed against the promisor, nothing happens. Both of these features present challenges for the dominant theories of contract law, and both are explained by the civil recourse theory.

Economic theories claim that damages exist to internalize the costs of breach.¹⁶⁷ Ideally, this aligns the promisor's private incentives with society's

164. While over the course of the twentieth century the distinction between private law and public law fell into disfavor, of late there have been dissenters from this dominant consensus. Most radically, Ernest Weinrib has argued for the complete autonomy of private law. "The purpose of private law," he writes enigmatically, "is to be private law." ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5 (1995). Even theorists such as Jules Coleman and Benjamin Zipursky, who reject Weinrib's full-throated formalism in favor of what they label pragmatism, have insisted that private law has a distinctive formal structure for which any adequate theory must account. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 3-12 (2003); Benjamin Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457, 458-59 (2000). All of these theorists have focused their attention on tort law, but the basic structures that they identify are equally present in contract cases, even if this fact has attracted little attention among contract theorists. *But see, e.g.*, Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118, 170-84 (Peter Benson ed., 2001) (discussing the bilateral structure of contract law); Oman, *supra* note 101, at 851-59 (noting that economic theories of contract damages fail to account for the bilateral structure of contract law). Their account of private law's structure has focused on two key features discussed in the text.

165. See Oman, *supra* note 101, at 846-51 (discussing bilateralism).

166. See, e.g., Zipursky, *supra* note 164, at 458 (discussing the plaintiff-centric nature of private-law actions).

167. See COOTER & ULEN, *supra* note 121, at 208-12 (arguing that contract damages serve to internalize the costs of breach).

collective interests.¹⁶⁸ If damages incentivize promisors, however, there is no reason to pay them to promisees. The incentive for the promisor would be identical whether the damages were thrown down a rat hole or given to the government. Bilateralism is economically perverse.¹⁶⁹ Damages provide promisees with insurance against breach.¹⁷⁰ This creates a moral hazard by encouraging overreliance on promisors' commitments.¹⁷¹ Ideally, a system would perfectly incentivize efficient performance, and the promisee would make reliance decisions purely on the basis of the likelihood of performance and not the availability of compensation through damages in the event of breach.¹⁷² Moral theories do not fare better. Consider Charles Fried's argument that the law of contracts tracks the morality of promising.¹⁷³ This claim fails to explain why the law should enforce promises by forcing promisors to pay promisees instead of simply punishing breach with a fine or some other sanction. The idea of promise making does not seem to have anything to say about the choice between a regime of criminal sanctions and one of private lawsuits.¹⁷⁴

168. See, e.g., POLINSKY, *supra* note 118, at 31–34 (detailing the argument why the expectation remedy leads to an efficient outcome in breach-of-contract cases).

169. See Aaron S. Edlin, *Cadillac Contracts and Up-Front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. & ORG. 98, 98 (1996) (discussing the phenomenon of expectation damages causing overinvestment); Aaron S. Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478, 487–91 (1996) (offering economic proof that expectation damages do not promote efficiency); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 J.L. & ECON. 691, 693 (1983) (arguing that without reliance, the rule of law produces damages that are not Pareto optimal); William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 RAND J. ECON. 39, 47–48 (1984) (noting that expectation and reliance damages produce inefficient results); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 472 (1980) (discussing the problems of breach in reaching Pareto efficiency); Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q.J. ECON. 121, 124–27 (1984) (describing the relationship between efficient breach and the Pareto efficient production contract).

170. See Oman, *supra* note 101, at 852–53. Put another way, because the promisee can count on compensation through damages in the event of breach, she will engage in investment based on the expectation of performance in cases when the probability of performance does not justify such investment. See COOTER & ULEN, *supra* note 121, at 269–73.

171. COOTER & ULEN, *supra* note 121, at 269–73.

172. See POLINSKY, *supra* note 118, at 36–41. So long as damages pass from defendants to plaintiffs, avoiding overreliance by reducing recovery will overincentivize breach, while avoiding the over-incentivizing breach by allowing recovery will over-incentivize reliance. See Oman, *supra* note 101, at 853.

173. See FRIED, *supra* note 106, at 14–17.

174. Cf. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–91 (1989) (arguing that promissory theories of contract have nothing to say about the content of contract law's default rules). One cannot object that promissory commitments are less important and, therefore, do not merit criminal enforcement. It is possible to calibrate the sanction for breach by simply providing a smaller sanction. Not all crimes are major evils. Rather, the criminal law simply punishes minor evils with minor sanctions.

It seems initially plausible to justify private standing on practical grounds. There are many breaches of contract, and it would be difficult and expensive for government prosecutors to acquire information about such breaches.¹⁷⁵ The law thus empowers plaintiffs to act as private attorneys general and incentivizes them with damage payments.¹⁷⁶ On this view, the promisee is like the whistleblower in a *qui tam* action who receives a bounty in return for bringing an action that vindicates social policy.¹⁷⁷ Under efficiency theories, plaintiffs are enlisted to incentivize optimal performance, while under moral theories, plaintiffs serve as enforcers of the obligation to perform one's promises.¹⁷⁸ This pragmatic argument, however, cannot explain the odd fact that only the promisee (or a third-party beneficiary) may bring an action for breach of contract.¹⁷⁹ If private standing were simply a diffuse method of enforcement, anyone who happens to have information regarding a breach ought to be able to bring suit. Indeed, in whistleblower actions the only connection that the plaintiff must have to the defendant is knowledge of wrongdoing.¹⁸⁰ There is no requirement that the plaintiff be in privity.¹⁸¹ But this is not the case in contract actions.

The civil recourse theory accounts for both private standing and bilateralism because it does not view contractual liability as the enforcement of some underlying moral duty or as the creation of optimal incentives by the State. It sees contractual liability as the civilization of what is at its core an anarchic system of self-help. If contracts consist of consent to retaliation in the event of breach, the plaintiff-centered system of private standing makes sense. The legal system waits on the plaintiff's decision to sue because it is not ultimately organized to enforce contracts in some abstract or absolute sense. Rather, it serves to facilitate the private retaliation of the disappointed promisee against the promisor. Others who might have the information necessary to press a successful suit are not allowed to sue on the

175. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 141 tbl.C-2 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (reporting over one thousand contract-dispute actions pending in only the federal courts).

176. See Oman, *supra* note 101, at 848–49.

177. See 31 U.S.C. § 3730(d) (2006) (providing the procedure by which *qui tam* recoveries are divided between the government and the *qui tam* plaintiff).

178. In the case of corrective-justice theories, discussed *supra* note 144 and accompanying text, plaintiffs substitute for prosecutors, punishing breaching promisors who fail to carry out their duties of repair.

179. See *Mahalsky v. Salem Tool Co.*, 461 F.2d 581, 584 (6th Cir. 1972) (“Ohio has no remedy for and does not recognize an action in contract absent privity . . .”)

180. 31 U.S.C. § 3730(b).

181. See *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998) (concluding that a *qui tam* plaintiff only has standing as a representative of the government and that “only the government has a dog in the fight”).

contract because the promisor never consented to retaliation by a third party in the event of breach. This can be seen most clearly in the law's treatment of third-party beneficiaries. Under limited circumstances, third parties may sue on the contract, but the touchstone of a third party's potential standing is the promisor's and promisee's intent.¹⁸² If both parties agree that the third party shall not have standing, that party cannot sue, even if he or she is the contract's intended beneficiary.¹⁸³

Bilateralism can also be explained by the logic of limiting retaliation. In its rawest form in the ancient world, recourse following a breach took the form of bloody attacks on life and limb. What makes the civil recourse theory *civil* is that recourse has been limited and civilized. Promisors cannot consent to bloody retaliation that poses the danger of escalation and violence; they are limited to consenting to attacks upon their wealth. When a disappointed promisee brings suit against a breaching promisor, the money passes from promisor to promisee because while the promisor consented to monetary retaliation in the event of breach, he only consented to retaliation by the promisee. The money is paid only to the promisee because no one else has a claim upon it, and indeed, for a third party to make such a claim would effectively amount to predation through the courts. Again, the case of third-party beneficiaries is the exception that shows the structure of the rule. In cases where someone other than the promisee may extract wealth in the event of breach, it is because the law deems the parties have implicitly consented to the third party's standing.

V. RESPONDING TO OBJECTIONS

There are at least three objections against the recourse theory of contract. The first is normative. Although an interpretive theory need not ultimately persuade us that current law is "all for the best in the best of all possible worlds," it should at least be morally plausible; and this Article's argument seems to rest on the valorization of revenge and retaliation, which are morally objectionable. Second, the recourse theory is apparently inconsistent with the language that judges use when justifying legal

182. See RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."); see also *Reaugh v. Inner Harbour Hosp., Ltd.*, 447 S.E.2d 617, 620 (Ga. Ct. App. 1994) ("The remedies available to the beneficiary are exactly the same as would be available to him if he were a contractual promisee of the performance in question.").

183. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 17.3, at 580 (6th ed. 2009) ("However, if the parties explicitly agree that a third party shall have an enforceable right (or defense), their express agreement will be given effect. Similarly, if their agreement states that no third party will have an enforceable right, that express intent will be honored." (footnote omitted)); see, e.g., *City of Olean v. N.Y. State Envtl. Facilities Corp.*, 625 N.Y.S.2d 775 (App. Div. 1995) (holding that contracts can expressly prohibit enforcement by third-party beneficiaries).

outcomes. Accordingly, it seems to make the implausible assumption that these very sophisticated actors are systematically mistaken about what they do. Finally, despite this Article's earlier concession that the recourse theory is not meant to explain all of contract law, it does seem flatly inconsistent with the doctrines surrounding contract formation. This matters because while the theory does not offer a comprehensive explanation, it does offer an account of contract formation—namely, consent to retaliation in the event of breach—that current doctrine seems to reject. This Part addresses and meets these objections.

A. THE NORMATIVE OBJECTION

The link between recourse and retaliation makes some theorists queasy. John Finnis has rejected civil recourse theories, writing:

At its root the theory of recourse treats as worthy the emotional impulse of a victim of wrongdoing to 'get even', by 'act[ing] against'—having recourse against—the rights-violator. This impulse is in most if not all respects contrary to the true principle, do not answer injury with injury.¹⁸⁴

Most civil recourse theorists, for their part, have been eager to distance the idea of recourse from revenge and mere retaliation. John C.P. Goldberg and Benjamin Zipursky, for example, sheepishly concede that their theory might appear "archaic or barbaric because it links torts to vengeance or retaliation," but deny that they defend revenge.¹⁸⁵ In a philosophical tour de force, Jason Solomon has tried to meet Finnis's objection head on, setting forth an elaborate justification for why one might legitimately feel aggrieved in the face of harm caused by another's wrongdoing and act accordingly.¹⁸⁶

Finnis's objection, however, misidentifies what is at stake in retaliation. Under this Article's version of civil recourse, the purpose of moving against a breaching promisor is not to vindicate one's aggrieved feelings. Nor is it a matter of retribution—extracting one's pound of flesh in a gleeful bit of revenge against an enemy. Rather, retaliation—the bloody-minded rhetoric of Homer notwithstanding—is a solution to a problem of social coordination. The goal is not vindication, but cooperation. Admittedly, the cooperation facilitated by recourse against contract breachers represents a

184. Finnis, *supra* note 3, at 57 (alteration in original) (footnotes omitted). Finnis has not been alone in accusing recourse theorists of exalting revenge. See, e.g., Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1747, 1794 (2007) ("Drawing primarily on Locke and Blackstone, the recourse theorists point to the transition from the 'state of nature' to the liberal state and embrace tort law's roots as a substitute for private vengeance.").

185. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1644 (2002).

186. See Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1766 (2009) (arguing for the legitimacy of recourse based on the notion of the second-person standpoint in moral philosophy).

thin and potentially impersonal relationship. Yet such relationships are vitally important in creating prosperous societies.¹⁸⁷ Such thin relationships can also provide the basis for a deeper human flourishing beyond mere material prosperity. As Finnis himself has written, “Many relationships initiated merely for business and private need or advantage, or for play and individual pleasure, ripen into relationships of more or less intense friendship.”¹⁸⁸ A defense of recourse need not ultimately resolve the question of why social cooperation is desirable;¹⁸⁹ so long as one is willing to concede its desirability, the credible threat of retaliation can be a key element in generating the trust necessary for such cooperation.¹⁹⁰ Ironically, creating a system that allows retaliation against breaching parties is a way of

187. See, e.g., DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 113 (2009) (“[A]ll open access orders [i.e., prosperous and stable modern democracies] are, largely, impersonal. . . . Economies in these states are also characterized by impersonal exchange.”). Another author explains:

The lack of legal property thus explains why citizens in developing and former communist nations cannot make profitable contracts with strangers, cannot get credit, insurance, or utilities services: They have no property to lose. Because they have no property to lose, they are taken seriously as contracting parties only by their immediate family and neighbors. People with nothing to lose are trapped in the grubby basement of the precapitalist world.

HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 56 (2000).

188. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 142 (1980).

189. Of course, believing that social cooperation is valuable does not imply that all cooperation is valuable. Criminal conspiracies, for example, may show high levels of cooperation—cooperation that makes them more, rather than less, pernicious. Contract doctrine, however, is sensitive to such concerns, refusing to enforce illegal contracts or agreements in furtherance of an immoral purpose. See *RESTATEMENT (SECOND) OF CONTRACTS* §§ 159–179 (1981) (voiding contracts on the grounds of misrepresentation, duress, and illegality).

190. There is an irony in the way that retaliation fosters cooperation—an irony that seems embedded in the structure of markets more generally. Hence, Jules Coleman has written:

Markets require contracting or exchange. Exchange is threatened by uncertainty. Uncertainty can be reduced by factors that are endogenous to the relationship between the parties. For example, if potential contractors are involved in repeat play or are members of closely knit communities, then their incentives to defect from transactions will be reduced by reputation effects. But in these sorts of circumstances, pure markets are not as important to social stability as they otherwise would be. For example, we would not think that a family needs to organize itself as a “market” in order to make allocation decisions. And here is the problem: Under precisely those circumstances where markets are most desirable from the point of view of social stability, they are most difficult to create and sustain, whereas in those circumstances most conducive to low-cost market interaction, because of their impersonality, markets may well be less desirable forms of social organization.

JULES L. COLEMAN, *RISKS AND WRONGS* 68–69 (1992).

increasing cooperation so that such attacks become less and less necessary.¹⁹¹

Contract law in its current form emerged out of the tension between the need to allow retaliation to facilitate cooperation and the need to limit the scope of that retaliation so that it does not threaten the general peace of society.¹⁹² It accomplished this by channeling retaliatory attacks into the legal system. In place of self-help violence, with its explosive potential for escalation, we have the bloodless tourney of lawyers. This reduces the potentially disruptive force of retaliation in three ways. First, it eliminates violence as a means of retaliation. Bloodshed is replaced by debts, debts that can be violently satisfied only by a sheriff or marshal through the tightly controlled procedure of a writ of *fiery facias*. Second, it makes a third party (the court) the gatekeeper for retaliation. This both increases the perceived legitimacy of the plaintiff's attack and limits the possibility of excessive, emotional, or predatory retaliation.¹⁹³ Finally, it caps the level of permissible retaliation at the value of the promised performance. The result is a system of retaliation, but one that has been civilized and controlled.¹⁹⁴

B. THE TRANSPARENCY OBJECTION

The recourse theory seems inconsistent with the language that common-law judges use in deciding contract cases. Because the theory is offered as an interpretive account of the law, it seems a major objection that it does not take seriously the reasons judges offer when justifying why a plaintiff or defendant wins a lawsuit. Surely, one might argue, a theory that purports to explain the underlying structure of the law must account for this language. Alternatively, if the theory explicitly or implicitly asserts that judges are systematically mistaken about the reasons behind their decisions, this surely counts as an objection to the interpretation. After all, it seems unlikely that judges could be so ill-informed about their own practices. This objection can be met in at least three ways. The first is to deny that judicial

191. See, e.g., BATES, *supra* note 95, at 45 ("The very readiness of the Nuer [a tribe in the southern Sudan without any formal system of law enforcement] to employ violence provides a reason, then, that violence so rarely takes place."). Bates clearly notes that "[t]he security [the norms of feuding and retaliation] supply to the producers and accumulators of wealth is fragile." *Id.* at 48.

192. Cf. Goldberg, *Constitutional Status*, *supra* note 3, at 602–03 (arguing that allowing civil recourse for tort actions limits the cycle of escalating violence and vengeance that would result from extra-legal recourse).

193. Such excessive, emotional, and predatory retaliation is, of course, a staple of the epic literature depicting the more anarchic worlds. Homer's *The Iliad* famously opens with the rage of Achilles, and the danger of feuds spinning out of control is a repeated theme in the Icelandic sagas. HOMER, *supra* note 13, at 77.

194. Cf. Zipursky, *Civil Recourse*, *supra* note 3, at 736 ("Indeed, an earmark of our civil legal system is that it does not involve violent remedies, but civil remedies; it does not involve punishment.").

language places strong constraints on interpretive theories. The second is to argue that judges actually do use language that is consistent with the recourse theory. The third is to note that the language of rights and obligations in judicial opinions refers to legal rights and obligations, not to the structure of the moral arguments that justify those rights and obligations.

According to an important strand of thinking, the common law presents itself as a transparent practice. The reasons offered by judges are meant to be the real reasons for the decisions that they reach. As Stephen Smith puts the point: “The theorist’s explanation of the law must show why the legal concepts employed by a judge are an appropriate way of expressing in practice the broader concepts that the theorist argues underlie the law. A good theory, on this view, works through, rather than around, judicial reasoning.”¹⁹⁵ If we take transparency as a criterion for a successful interpretive theory, the civil recourse argument seems open to at least two objections. The first is that judges frequently explain expectation damages in terms of compensating plaintiffs for the value of their lost bargains.¹⁹⁶ The purpose, they aver, is to put the plaintiff in as good a position as he or she would have been in had the contract been performed.¹⁹⁷ The civil recourse theory, in contrast, suggests that damages are not primarily compensatory. Rather, expectation damages serve only as an upper limit on recovery. To the extent that they are compensatory, they are accidentally so; compensation is not the ultimate purpose of expectation damages. Yet judges do not seem to use the language of limits and boundaries in justifying their decisions.

The second transparency objection is that judges speak as though contracts create affirmative obligations to perform, rather than simply marking the defendant’s consent to retaliation in the event of breach.¹⁹⁸ The recourse theory, however, seems to reduce the notion of contract to its remedy. The objection here is analogous to that often raised against Oliver Wendell Holmes, Jr.’s famous option theory of contract. According to Holmes, “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”¹⁹⁹ The

195. SMITH, *supra* note 53, at 27.

196. *See, e.g.*, *Marefield Meadows, Inc. v. Lorenz*, 427 S.E.2d 363, 366 (Va. 1993) (“The remedy for breach of contract is intended to put the injured party in the same position in which it would have been had the contract been performed.”).

197. *See id.*

198. *See, e.g.*, *Pollock v. D.R. Horton, Inc.-Portland*, 77 P.3d 1120, 1127 (Or. Ct. App. 2003) (noting “each party’s obligation to perform the contract . . . in a way that will effectuate the objectively reasonable contractual expectations of the parties”).

199. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Holmes made the same point in *The Common Law*, writing:

language used by judges, however, is much richer, implying that contracts—like promises—ought to be performed.²⁰⁰ On this view, the civil recourse theory, like the Holmesian theory, offers too impoverished a view of contractual obligation.

The transparency objection can be met in a number of ways. The first, and perhaps least satisfactory answer, is simply to concede that the recourse theory does not account for the language used by judges. No theory of a practice can account for its every facet—indeed, one of the purposes of a theory is to reveal latent or hidden structures, and so by definition an illuminating theory will necessarily diverge from our common-sense understanding of the law. Even if one acknowledges the inability to account for judicial language as a failure, one might believe the advantages gained in terms of structural insight justify the sacrifice. One could insist that we must account for contractual liability in terms of its actual social function, regardless of judicial language. One is necessarily left with the problem of judges who seem systematically mistaken about the function of the practice that they engage in day in and day out, but this is not so damning a conclusion as it first appears.

Consider the analogy of religion. On some level, everyone believes that a large proportion of all religious practitioners are mistaken about the import of their own religious practices. But an atheist does not regard the implausibility of a large number of people being systematically mistaken about their own practices as a sufficient reason to adopt believers' self-understanding of prayer. The same, perhaps ironically, is true of believers. Those who subscribe to the truth claims of a specific creed will necessarily understand other religionists as systemically mistaken about their own beliefs. A pious Christian is necessarily an atheist when it comes to the ancient Egyptian pantheon, for example. Even those who purport to be generally religious without subscribing to any particular creed cannot avoid the problem, as they will necessarily regard believers who hold to religious truth claims in their particularity as mistaken. This problem cannot be avoided by insisting that—unlike judges—religious believers (or unbelievers) are, on the whole, misguided or unsophisticated. Only in the realm of polemic are all believers (or unbelievers) rubes and Philistines. In

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 236 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881); *see also* *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903) (Holmes, J.) (“When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass.”).

200. *See Pollock*, 77 P.3d at 1122.

the real world, it is difficult to dismiss Augustine or Aquinas as ignoramuses, and Nietzsche and Russell stand as ready refutations of the claim that only idiots are atheists.

The point of this analogy is not to take any particular position with regard to religious debates. It is simply to point out that very intelligent people may be systematically mistaken about the practices in which they are involved. This does not mean that the practices themselves are without meaning or function—just that the meaning and function are different than those ascribed to them by the practitioners. Judges may simply be priests who mistakenly believe that their prayers are efficacious or atheists who wrongly assume that their blasphemies are intellectually virtuous. Prayer and blasphemy have meaning and functions; they just may not be the ones ascribed to them by the penitent or the blasphemous.

The transparency objection can also be met by offering some explanation of how the civil recourse theory can be squared with the language of judicial opinions. First, the extent of the disjunction between legal language and the recourse theory is not as great as the transparency objection suggests. Certainly, when judges invoke the penalty doctrine, they use the language of limits in discussing expectation damages. Under a liquidated-damages clause, a plaintiff is not necessarily entitled to a payment that would put him or her in as good a position as if the contract had been performed. Parties are free to contract for the payment of some lesser sum, as for example when a warranty is coupled with “a money-back guarantee,” limiting recovery to the purchase price. In such cases courts explicitly invoke the plaintiff’s expectation interest merely as a limit. Likewise, in cases where plaintiffs claim damages in excess of their expectation, as for example when a plaintiff demands reliance damages beyond those necessary to put him in the position he would have been in had the contract been performed, courts will explicitly invoke expectation damages as a limit on recovery. Reliance damages will be awarded “up to” the amount of the plaintiff’s expectation.

Finally, any remaining insistence on the compensatory nature of expectation damages is belied by the actual behavior of courts. Such language is insufficient to keep judges from regularly and knowingly awarding plaintiffs less than the value of their full expectation through the application of limiting doctrines such as the requirements of certainty, the rule in *Hadley v. Baxendale*, and the like. A theory’s disregard of such language can hardly be taken as an affront to judicial self-understanding when judges themselves routinely ignore the same language in practice.

Even accepting the account of judicial language offered above, the objection that courts speak of contracts as creating obligations to perform remains. Unlike Holmes’s theory, however, the civil recourse theory of contract does not reject the notion of such obligations. Holmes noted with satisfaction that his “mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they

can.”²⁰¹ In contrast, the civil recourse theory need not be less committed to the notion of such obligations than the more overtly moralizing approaches. Even a promissory theorist who insists that contract law merely reflects the morality of promising must acknowledge that the law is incapable of enforcing all contractual obligations. In some cases this will be literally impossible, and in other cases, the costs of doing so will be prohibitive. Those who insist that every contract creates an obligation to perform must acknowledge that in some cases those obligations will exist without any legal enforcement. The law may still create moral obligations, but the language of obligation will not necessarily be an adequate guide to law as a social practice.

A recourse theorist can make similar concessions. There is nothing about the civil recourse theory that denies that contracts may create moral obligations to perform. The civil recourse theory offered here is agnostic on such questions. On the other hand, the civil recourse theory does not seem to take the notion of legal obligation to keep a contract any less seriously than does a promissory theory that purports to account for our current remedial machinery. Such a theory is also necessarily reconciled to a disjunction between the language of legal obligation and the reality of legal remedy. The civil recourse theory is entirely comfortable with saying that one has an obligation to keep a contract, so long as the obligation is understood as one where breach gives rise to the right to legitimately retaliate against the breaching party.

A final response to the transparency objection is to insist on the distinction between legal language and ordinary moral language. When judges explain their decision in a particular contract case, they do not purport to provide a justification for contract law in general. Rather, taking the law as given, they seek to show how it forms the major premise of an argument whose conclusion is that this plaintiff wins or loses. Put another way, judges provide reasons for their decisions, but these reasons are legal, rather than moral.²⁰² When judges speak of obligations, they refer to legal, not moral, obligations.²⁰³ Likewise, when they speak of compensating a party for a loss, they mean a legal, not a moral, loss.²⁰⁴ Legal arguments thus invoke legally normative concepts rather than morally normative concepts. To be sure, the fact of legal obligation may be a premise in an argument about moral obligation, but when deciding particular cases, judges do not make such an argument. Their goal is not to explain why the defendant is or is not morally reprehensible; rather, it is to explain why the defendant is or is not legally liable.

201. Holmes, *supra* note 199, at 462.

202. See Oman, *supra* note 100, at 1493–94.

203. See *id.*

204. See *id.*

This does not mean, of course, that legal concepts lack a moral justification. It does mean, however, that those moral justifications need not rely on a set of moral claims and obligations whose structure mirrors that of legal claims and obligations. For example, a body of law might be devoted to creating efficient incentives by allocating legal obligations. Once the efficiency theory had allocated the obligations, however, judges could speak without embarrassment of how a party had a legal duty to perform a particular act. The judicial language would sound *ex post*, even deontological, notwithstanding that the ultimate justification for the body of law was entirely *ex ante* and consequentialist.

Of course, we would still be left with the question of why the courts should use the *ex post* language of duties in deciding their cases, rather than the more transparent language of *ex ante* incentives. The answer is that a judge decides a particular case applying preexisting rules *ex post*, even if the rules themselves are justified on *ex ante* grounds. Given the fact that in deciding cases, judges do not justify legal rules, but apply them, the preference for *ex post* language is unsurprising and need not imply anything about the underlying moral structure of the law's justification. The fact that judges speak in terms of rights and obligations does not provide an adequate response to the civil recourse theory's account of the purposes of contractual liability. Indeed, given the distinction of justification of particular outcomes within a body of law and the justification of the body of law as a whole, the judicial language of rights and obligations may be reconciled with virtually any normative justification of the practice as a whole.

C. THE DOCTRINAL OBJECTION

The aim of the recourse theory is to present contractual liability as embodying in part a commitment to providing disappointed promisees an avenue of legitimate recourse against breaching promisors through the courts. A successful interpretive approach will both fit and justify current contract doctrine.²⁰⁵ Of course, the fit need not be perfect. The common law of contracts arose over a half millennia of fits, starts, dead ends, and historical accidents, and it is too much to hope that any theory could make sense of the entire mass of legal doctrine. One of the tasks of interpretive theory is to separate a practice's central themes from the historical detritus. On the other hand, so long as core features of the doctrine remain unexplained, it is unlikely that we truly understand the law, unless we are to assume that it is *nothing* more than a set of historical accidents bereft of

205. See SMITH, *supra* note 53; cf. DWORKIN, LAW'S EMPIRE, *supra* note 52 (nesting the interpretation of legal concepts within a set of controversial theories about what constitutes law, how judges ought to decide cases, and the priority of a particular version of liberal moral philosophy). Dworkin is thus an example of interpretive theory, rather than its *sine qua non*.

normative coherence. Accordingly, the failure of a theory to account for a major set of doctrines must surely count as a point against it. On first inspection, the doctrines surrounding contract formation, especially the doctrines of consideration and promissory estoppel, seem to pose major problems for the civil recourse theory of contract. But upon closer examination, these doctrines pick out obligations where one would expect a disappointed promisee to demand satisfaction in the event of breach. Admittedly, they do so in an ad hoc manner dictated by the historical accidents of the common law; but when viewed from the perspective of the civil recourse theory they have a unity of purpose.

The strongest objection to the claim that contracts consist of consent to retaliation in the event of breach is that intent to be legally bound is not an element of contract formation under American law.²⁰⁶ A promise becomes legally enforceable under American law when it is supported by bargained-for consideration, or when it induces reasonable reliance.²⁰⁷ There is no additional requirement that the parties intend for their commitments to be legally enforced.²⁰⁸ This position can be usefully contrasted with English law, where intent to be legally bound is at least formally required to form a valid contract.²⁰⁹ Likewise, Randy Barnett has argued on normative grounds that consent to be legally bound should be the touchstone for contract formation.²¹⁰ Whatever the merits of this proposal, it does not represent current law.²¹¹ American law attaches liability to a certain class of promises—those with consideration or those inducing reasonable reliance—regardless of the legal intentions of the promisors.²¹² Put another way, the rules regarding contract formation do not seem to pick out the class of promises—those where the promisor consents to recourse by the promisee—suggested by the civil recourse theory. Accordingly, whatever its merits as a normative theory, a recourse theory of contract would seem to fail as an interpretive account of the law.

206. See RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c (1981).

207. See *id.* §§ 18–19.

208. See *id.* § 17 cmt. c.

209. See *supra* note 4 and accompanying text (discussing the strong presumption under English law that the parties to a contract intend to be legally bound by forming the same).

210. See Barnett, *Consent Theory*, *supra* note 110, at 304 (“Therefore, the phrase ‘a manifestation of an intention to be legally bound’ neatly captures what a court should seek to find before holding that a contractual obligation has been created.” (footnote omitted)).

211. Barnett does seem to suggest, however, that the American law is on the cusp of formally recognizing such a requirement, which he regards as the best account of current doctrine. See RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 811–12 (4th ed. 2008) (setting forth “A Hypothetical Alternative to Restatement § 90” hinging on “manifest[ing] an intention to be legally bound”).

212. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 21.

It is difficult to find modern contract theorists who are enthusiastic supporters of the doctrine of consideration.²¹³ Stephen Smith, for example, provided the following tepid endorsement: “[An] examination of the consideration rule suggests that no explanation can account for all of its various features. But the examination also suggests that it would be wrong to conclude (as some have concluded) that the rule is entirely without rationale.”²¹⁴ Charles Fried has been more scathing. “The bargain theory of consideration,” he wrote, “not only fails to explain why [the] pattern of decisions is just; it does not offer *any* consistent set of principles from which all these decisions would flow.”²¹⁵

Nevertheless, the doctrine of consideration answers an important practical question. No legal system has ever tried to enforce every promise or future commitment.²¹⁶ So which promises does the law enforce? The modern doctrine of consideration provides a simple answer to this question: The law will enforce bargained-for promises. One may quarrel about whether this choice is justified, but it does provide an apparently simple answer to the threshold question.

Or at least it did to the classical theorists who formulated modern contract doctrine at the end of the nineteenth century.²¹⁷ As has been chronicled many times since then, the ambition to have the law of contracts pivot on the fulcrum of bargained-for consideration proved a chimera.²¹⁸ The limits of the bargain principle can be seen in two contexts. The first is contract modification—one cannot bargain with what one has already given away. Thus, under the preexisting-duty rule, a performance to which one was already obligated under a contract cannot serve as consideration on a new promise.²¹⁹ The result of this rule has been to require both parties to a contract to alter their obligations when they want to modify their existing contractual obligations.²²⁰ Courts were frequently forced to resort to creative readings of the facts of cases—finding recessions and altered

213. Of course, even unloved consideration is not without its partisans. *See, e.g.*, Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821 (1997); Gold, *supra* note 144; Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99 (2000).

214. SMITH, *supra* note 53, at 232.

215. FRIED, *supra* note 106, at 33.

216. FARNSWORTH, *supra* note 159, § 1.5, at 11 (“No legal system has ever been reckless enough to make all promises enforceable.”).

217. *See id.* § 2.2, at 47–48 (summarizing the rise of the bargain theory of consideration).

218. *See, e.g.*, P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 448–54 (1979) (discussing the rise and fall of the doctrine of consideration).

219. *See* U.C.C. § 2-209 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

220. *See* *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902); *Stilk v. Myrick*, (1809) 170 Eng. Rep. 1168 (C.P.); 2 Camp. 317.

obligations out of thin air—to reach seemingly reasonable results.²²¹ Eventually, consideration was abandoned—at least by the Uniform Commercial Code and the Restatement (Second) of Contracts—as the exclusive touchstone for contract modification.²²² The second context where consideration broke down involved the enforcement of gratuitous promises under the doctrine of promissory estoppel. In these cases, the courts simply abandoned the doctrine of bargained-for consideration all together, enforcing promises that induced reasonable and substantial reliance.²²³

In addition, a number of apparently vestigial transactions from before the rise of the bargain theory of consideration continue to be enforced as exceptions to the rule. Examples include the enforcement of promises under seal, written option contracts for the sale of land that recite (ultimately nonexistent) consideration, and the like.²²⁴ This patchwork of approaches has long frustrated those looking for a clean theory of contract formation. For instance, promissory estoppel finds a ready justification in the desire to protect promisees from unfair losses caused by detrimental reliance.²²⁵ But such a rationale cannot be squared with the consideration doctrine's willingness to enforce wholly executory bilateral contracts on which there is no reliance of any kind.²²⁶ Likewise, arguments can be marshaled for the usefulness of a formal device such as a seal—yet since at least the early seventeenth century, the common law has enforced informal contracts.²²⁷ Whatever the apparent contradictions of these doctrines, however, it seems clear that none of them hinge on consent to recourse. Accordingly, the heart of the law of contract formation seems to stand in stark defiance of the civil recourse theory.

The response to this apparently powerful criticism is that each of the various routes by which a promise might become a contract—consideration, reliance, and formality—picks out the sort of promises that a person would expect to give rise to a legitimate demand for recourse in the event of breach. Rather than trying to find individual arguments for consideration, formal contracts, and reliance, we can see all of these devices as picking out the sort of promises where a promisor might expect a promisee to demand a

221. See, e.g., *Brian Constr. & Dev. Co. v. Brighenti*, 405 A.2d 72 (Conn. 1978) (finding a new contract supported by valid consideration despite no actual written contract after a change in circumstances).

222. See U.C.C. § 2-209; RESTATEMENT (SECOND) OF CONTRACTS § 89.

223. See *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959); *Ricketts v. Scotchorn*, 77 N.W. 365 (Neb. 1898); *Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927).

224. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 95.

225. See Fuller & Perdue, *supra* note 139, at 70.

226. See *id.* at 77–78.

227. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799 (1941).

right of recourse in the event of breach. Hence, bargains give rise to contractual liability not because bargains enjoy some special normative status, but because as an empirical matter, promisors can be held to expect promisees to demand recourse when bargains are breached. On the other hand, as an empirical matter, promisors do not expect promisees to demand recourse in the event that they breach gratuitous and unrelieved-on gift promises. Likewise, when someone reasonably relies on the promise of another, the promisor may be held to expect that the promisee will demand some method of recourse in the event of breach.²²⁸

To put the point more graphically, in the ancient Near East when a promisor entered into a covenant, he could expect a demand for recourse if he hacked a goat to pieces—not because there is any special moral significance to hacking up a goat, but because there was a shared social understanding that goat-hacking covenants are the sorts of promises where promisees will expect recourse in the event of breach.²²⁹ This does not mean that hacking up a goat is the only way in which such expectations might arise—a heifer, a ram, or a dog seemed to work as well.²³⁰ Indeed, there was no reason why such an expectation could not arise when no animal, of any species, was hacked to pieces.²³¹ The rituals involving the

228. An analogy may help to illuminate the nature of this claim. Consider the way in which the criminal law protects personal property. See PAUL H. ROBINSON, *CRIMINAL LAW* 771–81 (1997) (discussing crimes against personal property). The crime of larceny punishes those who take property that is not their own. See MODEL PENAL CODE § 223.2 (1985). The crime of fraud punishes those who obtain the property of others through deception. See *id.* § 223.3. The crime of robbery punishes those who obtain property by threatening physical violence. See *id.* § 222.1. The crime of blackmail punishes those who obtain property by threatening others with wrongful conduct. See *id.* § 223.4. We can understand all these crimes in at least two ways. First, we might see them as a bundle of essentially unrelated wrongs. Larceny punishes the taking of what is not one's own, fraud punishes lying, robbery punishes the use of threats of violence, and blackmail punishes other threats. The apparent unity of these crimes is largely accidental. Alternatively, one might say that in each of these cases we are picking out a particular kind of wrongful conversion of the property of another. Notice the second approach sees the distinction between these various crimes as a matter of convenience and historical accident. This rather ad hoc explanation, however, confers the benefit of revealing the latent unity between the various crimes. It also avoids some of the problems that a more particularized account of the crimes runs into. For example, if fraud is about punishing lies, we are left with the problem of accounting for the fact that the law does not punish all lies, but only those used to obtain property from another.

229. See *supra* text accompanying notes 1, 9.

230. See *supra* text accompanying note 7.

231. For example, in the so-called Shechem Covenant, recounted in the final chapter of *Joshua*, the Children of Israel enter into a covenant to serve God and Joshua sets up a stone under a tree to memorialize the covenant, explaining that should they breach their obligations, the jealous God of Israel will demand vengeance. What was important was not the particular formality—dismembered animals or stones under a tree—or even the presence of formality at all. What mattered was that parties expected recourse in the event of breach. See *Joshua* 24:1–28 (King James) (setting forth the story of the Shechem Covenant); THE NEW JEROME BIBLICAL

dismembered livestock just happen to be one of the myriad of situations in which such expectations arose.²³²

There are at least two objections to the claim that formation doctrines pick out consent to recourse as an empirical matter. The first objection is that it smuggles an intent to be legally bound back into the theory by locating that intent in a social understanding that happens to coincide with the doctrinal categories. The second objection is that the claim views the doctrine as a set of essentially accidental and ad hoc attempts to get at a concept that does not quite seem to be present in the rules. There is some truth to both of these objections, but neither ultimately provides a reason for rejecting the claim that consideration, promissory estoppel, and other formation doctrines pick out promises where promisors expect promisees to demand recourse.

There is a sense in which this first objection is correct, but we must be careful about what we mean when we say “an intent to be legally bound.” The absence of any requirement to be legally bound can be justified precisely because the law seeks to capture a preexisting set of social understandings of when commitments give rise to a legitimate expectation of recourse in the event of breach. Because the duty arises out of these social understandings, however, it is not absolute. If the parties actually have a different understanding, that understanding controls.²³³ For example, even though under American law there is no requirement that contracting parties intend to be legally bound, if they both agree *not* to be legally bound, then no contract is formed.²³⁴ The doctrine seeks to track what it assumes would be the parties’ understanding and willingly steps back when their mutually expressed understandings diverge from the default position. There is an implicit assumption that parties do intend to be legally bound—an assumption that the law will abandon in the face of contrary evidence.

The second objection is that this interpretation of formation doctrines views the doctrine as a set of essentially accidental and ad hoc attempts to get at a concept that is not quite present in the rules. This is true, and a

COMMENTARY 130–31 (Raymond Brown et al. eds., 1990) (discussing the formalities of the Shechem Covenant).

232. This interpretation reveals the nature of the error committed by the classical theorists. Classical-contract doctrine failed to meet its goal of turning consideration into a necessary condition for contractual liability. This failure does not, however, preclude it from serving as a sufficient condition. Furthermore, the sufficiency of consideration does not imply that other elements cannot be sufficient as well. What matters is not the special moral status of bargains; rather, consideration matters because of the socially shared meaning of bargains, a meaning that includes an expectation of satisfaction in the event of breach. The same is true of reliance and vestigial formalisms like contracts under seal. Nothing about the fact that parties to a bargain expect some form of recourse in the event of breach is logically inconsistent with similar expectations in other factual situations.

233. See RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

234. See *id.*

more abstract rule—say, that contracts arise out of consent to retaliation in the event of breach, and in the absence of contrary evidence such consent will be presumed where the parties could reasonably expect a legitimate right of recourse in the event of breach—would better track the justification offered by the recourse theory. There are two reasons why the absence of such a general rule need not be fatal to the interpretation offered here. First, such a general principle would provide courts with little guidance in resolving particular cases.²³⁵ Rule-of-law values such as predictability and the limitation of judicial discretion counsel in favor of rules at a finer level of granularity.²³⁶ Second, any account of contractual liability must be willing to tolerate a certain amount of ad hoc historical accident. To demand a perfect fit between theory and institution would set a bar for interpretative theory so high as to deprive the project of any meaning. Such a demand would effectively amount to an all-or-nothing approach to the normative coherence of the law. It would also rob interpretative theory of its usefulness, which in part is to identify those portions of the law that fail to fit within any plausible justifying theory and are therefore good candidates for reform.

In comparing the interpretive success of theories, we are thus left with the need to weigh their comparative coherence. Because the interdependence of what is being explained and explanation is inherent in interpretive arguments,²³⁷ the best that we can hope for is an oscillation between good-faith adjustments to our theory and reexamination of the explained practice until some reflective equilibrium is reached.²³⁸ While the account of formation doctrines offered here suggests that they are ad hoc and historically contingent attempts to get at a broader class of agreements, this account does have the advantage of seeing these doctrines as having a certain unity. In contrast, other theories view them in opposition to one another, with reliance, for example, representing a tort-like intrusion into the bargain-centered world of contract.²³⁹ Finally, in contrast to some other theories, the account offered here does not require the wholesale rejection

235. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 138–40 (William Eskridge & Philip P. Frickey eds., 1997) (discussing the comparative advantages of using rules versus standards); FREDERICK SCHAUER, *PLAYING BY THE RULES* 98 (Tony Honoré & Joseph Raz eds., 1991) (“If . . . we see rules not so much as implements for achieving predictability but as devices for the allocation of power, then it is far from clear that granting the power to a rule-applier to determine whether following the rule is on the balance of reasons desirable on this occasion is necessarily desirable.”).

236. See LON L. FULLER, *THE MORALITY OF LAW* 110–13 (rev. ed. 1969).

237. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 267 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (discussing the hermeneutic circle).

238. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 42–45 (rev. ed. 1999) (discussing the idea of reflective equilibrium).

239. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 95–98 (Ronald K.L. Collins ed., 2d ed. 1995).

of formation doctrines. For example, a promissory theory has a difficult time explaining why some promises should fail to give rise to contracts at all.²⁴⁰ After all, if one has a moral obligation to keep one's promises, the State's obligation to enforce seems odd—even perverse—because it allows some promise breakers to escape legal sanction entirely.²⁴¹ In contrast, the account offered here renders formation doctrines meaningful if historically contingent and idiosyncratic.

VI. CONCLUSION

This Article began with the bloody covenant rituals of the *Bible* and Homer. The agreement between Priam and Agamemnon recounted in *The Iliad* ultimately failed. The attempt to limit war through cooperation broke down, fighting resumed, and after the sack of Troy, Agamemnon returned to Argos. In his *Oresteia* trilogy,²⁴² Aeschylus continues the story, recounting how Agamemnon's wife Clytaemnestra murdered him in revenge for his earlier sacrifice of their daughter. Clytaemnestra, in turn, was killed by her son Orestes in revenge for the murder of his father. In the final play of the trilogy, Orestes, pursued by the Furies, a vengeful band of outraged demigods, flees to Athens, throwing himself on the mercy of the goddess Athena. The Furies, embodying vengeance, feud, and outraged honor, demand the murderer. Orestes's patron, the god Apollo, calls for the summary expulsion of the Furies from the city, dismissing them as nothing more than agents of senseless violence:

Go where heads are severed, eyes gouged out,
where Justice and bloody slaughter are the same . . .
castrations, wasted seed, young men's glories butchered,
extremities maimed, and huge stones at the chest,
and victims wail for pity—
spikes inching up the spine, torsos stuck on spikes.²⁴³

One might say that Apollo wishes to relegate the Furies to a world where life is "solitary, poore, nasty, brutish, and short."²⁴⁴

Athena's response, however, is more measured. She submits Orestes to the judgment of the Athenian court, allowing the Furies to make the case for his punishment. The jury is hung, and Athena reluctantly casts the final vote for acquittal on the grounds that Clytaemnestra's crimes justified Orestes's

240. See, e.g., FRIED, *supra* note 106, at 39 (arguing that the doctrine of consideration cannot be justified on any grounds).

241. See Shiffrin, *supra* note 117, at 710–11.

242. I am grateful to Josh Chafetz for bringing the connection between Aeschylus's *Oresteia* and civil recourse to my attention. Any errors in interpretation, of course, remain mine.

243. AESCHYLUS, *The Eumenides*, in THE ORESTEIA 227, 239 (Robert Fagles trans., Penguin Books 1984) (c. 458 B.C.E.) (lines 183–88).

244. HOBBS, *supra* note 12, at 89.

matricide, enraging the Furies. Their leader insists to Athena that by supplanting vengeance with adjudication, “you have ridden down the ancient laws, wrenched them from my grasp.”²⁴⁵ Athena, however, refuses to cast the Furies from the city. Instead, she invites them to take a hallowed place buried beneath its foundations, an offer the Furies ultimately accept. Athena tells the citizens of her city:

Neither anarchy nor tyranny, my people.
Worship the Mean, I urge you,
shore it up with reverence and never
banish terror from the gates, not outright.²⁴⁶

The title of the final play is *The Eumenides*, which refers to the transformation of the Furies—literally, the “kindly ones.” In the final speech of the play, the women of the city, acting as chorus, sing their praises:

You great good Furies, bless the land with kindly hearts,
you Awesome Spirits, come—exult in the blazing torch,
exult in our fires, journey on.²⁴⁷

The civil recourse theory of contractual liability rests on a sensibility similar to that put forward by Aeschylus. The earliest covenant rituals consisted of consent to violent retaliation in the event of breach. In effect, the parties invited the Furies into their relationship in the hope of creating trust sufficient for cooperation. It was a dangerous expedient, one that resulted in a fragile cooperation prone to violent breakdown. Hobbes, following Aeschylus’s Apollo, insisted that the Furies must be driven from the community by an omnipotent Leviathan. To the extent that modern theories of contract focus their attention exclusively on the way that the law, as a third party, enforces agreements, they rest on a similar sensibility. The common law took a different course. Rather than eliminating private retaliation, the common law tamed and limited it. The Furies, however, remain buried deep within the structure of contractual liability. Damage measures act less as fines or entitlements to compensation than as limits on private retaliation. Indeed, inherent in the notion of money damages is itself the notion of a limit on retaliation that eliminates the possibility of personal violence. Perhaps most strikingly, contract law does not enforce contracts *per se*; rather, it empowers disappointed promisees to act against breaching promisors through the courts.

245. AESCHYLUS, *supra* note 243, at 267 (lines 820–21).

246. *Id.* at 262 (lines 709–12).

247. *Id.* at 276 (lines 1050–52).