
2021

Gerhart and Private Law's Melody of Reasonableness

Mark P. Gergen

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Mark P. Gergen, *Gerhart and Private Law's Melody of Reasonableness*, 72 Case W. Res. L. Rsrv. 355 (2021)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol72/iss2/17>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

GERHART AND PRIVATE LAW'S MELODY OF REASONABLENESS

Mark P. Gergen[†]

CONTENTS

INTRODUCTION	355
I. GERHART'S ACCOUNT OF TORT LAW AND PROPERTY LAW.....	358
II. PARTS OF PRIVATE LAW OUTSIDE GERHART'S ACCOUNT	361
A. <i>Power-Confering Rules and Weak Equitable Safeguards</i>	362
B. <i>Rules that Privilege Harm-Doers over Harm-Bearers</i>	365
III. GERHART'S ACCOUNT OF CONTRACT LAW	368
IV. CONTRACT INTERPRETATION	376
V. READING GERHART ALONGSIDE BENSON	383
CONCLUSION.....	396

INTRODUCTION

Peter Gerhart was an intellectual hedgehog. In three books on tort law,¹ property law,² and contract law,³ he successfully accounted for much of private law through the lens of a simple but powerful set of ideas. According to Gerhart, private law rules often reflect how people, as social and moral beings, do and should reason about choices they make that involve other people's well-being. Social moral reasoning is "other regarding" and consists of "think[ing] appropriately about the well-being of others when deciding how to behave."⁴ In his terms, thinking appropriately involves applying the Golden Rule ("Do unto others as you would have them do unto you"⁵) behind a veil of ignorance.⁶ In more colloquial terms, when you are considering an action that could harm another person, you should put yourself in their shoes (while remaining in your own shoes), put aside personal biases and self-

[†] Professor, University of California Berkeley Law School.

1. PETER M. GERHART, TORT LAW AND SOCIAL MORALITY (2010) [hereinafter GERHART, TORT LAW].
2. PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY (2014) [hereinafter GERHART, PROPERTY LAW].
3. PETER M. GERHART, CONTRACT LAW AND SOCIAL MORALITY (2021) [hereinafter GERHART, CONTRACT LAW].
4. GERHART, TORT LAW, *supra* note 1, at 1.
5. *Id.* at 39.
6. *Id.* at 43. The "veil of ignorance" concept was developed by John Rawls. JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999).

interest, and imagine a conversation between the two of you to determine how best to balance your competing interests in deciding how to act. My impression is that Gerhart lived his life guided by this rule. If everyone emulated him, it would be a much better world.

This paper will argue Gerhart largely achieves the goals he set out for himself when he began this project over a decade ago, and that in doing so he captures a melody of reasonableness that runs through much of private law. Gerhart's goal was to provide a unified account of "how we think about" tort, property, and contract cases⁷ that is "conceptually coherent," "determinate in its application," and able to bridge the divide between corrective justice and economic theory.⁸ Importantly, the "we" to whom Gerhart refers is more than lawyers and judges. The "we" includes people going about their lives who the law instructs to think appropriately about a decision that involves other people to whom a duty to think appropriately is owed. Equally importantly, the method is "determinate in its application," but not because it is an algorithm that can be applied mechanically to yield a demonstrably correct result. The method is determinate in its application because it provides a structured way for people to think about how to act appropriately when an action affects the well-being of another person, and for judges to evaluate choices people make when a duty is owed to think appropriately. Sometimes no specific choice will be dictated because reasonable people could disagree about what is a reasonable choice.⁹

Part I begins with Gerhart's account of parts of tort law and property law that require people to act reasonably. He largely leaves to the side parts of tort law and property law that cannot be explained in these terms. Part II takes up where Gerhart leaves off by sketching these parts of the law. He does not address power-conferring rules in property law that make private-ordering possible. Particularly in property law, these rules tend to be highly formal to facilitate exercise of a power. They also generally allow people to exercise a power to pursue their own goals without regard for the well-being of others. Nor does Gerhart address equitable rules that sometimes excuse non-compliance with a power-conferring rule to prevent people from taking unfair advantage of someone's mistake or their vulnerability. While these equitable rules are highly moralistic, they provide limited justice and so tolerate a great deal of unreasonable conduct. Also largely outside of Gerhart's account are rules in tort law that privilege a harm-doer's interest in liberty of action over a victim's interest in freedom from harm when harm is nonphysical, and particularly when harm is

7. *Id.* at xii.

8. *See id.* at xi–xii.

9. Gerhart describes that these are choices made "across the community in accordance with a set of values" that is reflective of the choices made by individuals in "similar circumstances." *See id.* at 62–64 (describing "conflicting claims" by members of the community).

purely economic. These rules also tolerate a great deal of unreasonable conduct.

Part III turns to Gerhart's account of contract law. Gerhart's account of tort law and property law assumes the traditional premise that, insofar as private law is concerned, people are independent and owe limited duties to others.¹⁰ Private law generally takes the existing distribution of wealth and other sources of power and advantage as a given. His account of contract law derives the traditional conclusion from this premise, which is that when people make a contract, the agreed exchange defines the obligations that they owe each other.¹¹ He argues that much of contract law can be understood as implementing a requirement of reasonableness within the parameters of the agreed exchange. I observe that while rules regulating contract performance generally are amenable to this interpretation, the law of conditions and the rules on contract formation are not. Part IV gives separate attention to Gerhart's proposal on contract interpretation, for it is an important contribution to the literature on interpretation that stands alone.

Part V places Gerhart's account of contract law in the landscape of modern contract law theory alongside Peter Benson, *Justice in Transactions: A Theory of Contract Law*.¹² Gerhart and Benson have very different aspirations for their accounts of contract law, and their accounts differ greatly in scope and method. Still, their accounts converge on several key points. They share the traditional premise that, insofar as private law is concerned, people are independent and owe limited duties to other people. They both draw the traditional conclusion from this premise that when people make a contract, the agreed exchange defines the obligations they owe each other. They also both agree that parties to a contract have a duty to treat each other reasonably within the parameters of the agreed exchange. This leads both Gerhart and Benson to support progressive doctrines that most U.S. courts reject, including a robust form of the duty of good faith and fair dealing and use of the doctrine of reasonable expectations to police boilerplate terms in form contracts.

While I largely agree with these prescriptions as a matter of policy, I will argue that Gerhart's and Benson's accounts of contract law overlook several points that undercut their arguments in support of these progressive doctrines. Neither considers how supplementary requirements for contract formation, like the statute of frauds and the definiteness requirement, might extend the domain of independence and limited duty into contract formation. Neither addresses the important disagreement within contract law over whether the baseline contract is

10. See *infra* Part I.

11. See *infra* Part II.

12. PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* (2019).

the parties' agreement in fact or terms in a writing the parties adopt as an expression of their agreement. More generally, neither adequately addresses the tension created by defining contract law as a domain of reasonableness that lies within a larger domain in which people are independent and owe limited duties to others.

I. GERHART'S ACCOUNT OF TORT LAW AND PROPERTY LAW

This Part sketches Gerhart's account of tort law and property law. His account of both bodies of law flows from an optimistic account of human nature and society. People are social and moral beings who achieve social cohesion by "factoring the well-being of others into how they determine their own well-being."¹³ People are empathetic. They are able to "to understand the world as others experience it."¹⁴ People reciprocate. They make sacrifices for others so others will make sacrifices for them. Over time, "[a]s individuals interact, they develop ways of accommodating each other's projects and preferences."¹⁵ Patterns of accommodation become norms that define "social morality."¹⁶ This social morality "allows individual human enterprise to flourish in a community that flourishes."¹⁷

On Gerhart's account, private law institutionalizes norms of conduct that people have largely worked out for themselves.¹⁸ Negligence law institutionalizes social morality by instructing a person whose action creates a risk of harm to others to think appropriately about the well-being of a risk-bearer when deciding how to act. In the case of non-intentional harm, thinking appropriately basically involves a risk-creator putting herself in the risk-bearer's shoes (while staying in her own shoes), setting aside individual biases and self-interest, and imagining if she and the risk-bearer talked the matter through, how they would decide the risk-creator should act.¹⁹ Gerhart's account of negligence law centers on the Hand formula because it can be interpreted to require just this sort of decision-making by risk-creators.²⁰ According to Gerhart, negligence law also institutionalizes social morality by requiring a harm-doer to compensate the victim when the harm-doer's action

13. GERHART, TORT LAW, *supra* note 1, at 17.

14. *Id.* at 40–41.

15. *Id.* at 62.

16. *Id.*

17. *Id.*

18. *Id.* at 34, 36.

19. *See id.* at 29–30.

20. *Id.*

suggests she failed to think appropriately about the well-being of the victim.²¹

Gerhart's account of property law flows from the observation that people and societies gradually work out norms of recognition of resource ownership to handle conflicts over resources and to encourage cooperation. According to Gerhart, property rights exist "because, and to the extent that, the community, or a large proportion of the community, recognizes the justness of the claims of possession, labor, or other attributes of ownership."²² Property rights often are not absolute because they "are conditioned on constraints embedded in those norms that are designed to promote the interests of individuals vis-à-vis other individuals and vis-à-vis the community as a collective entity."²³ As with tort law, property law institutionalizes these norms of recognition and their embedded constraints.

Gerhart argues much of property law and tort law institutionalizes methods of interpersonal decision making, like the Hand negligence formula, that are good for the community. The law corrects people who fail to act as these institutionalized norms of interaction require.²⁴ He explains some instances of liability without fault by social norms that sometimes require people to repair a burden they impose on another person as a result of a reasonable decision.²⁵ For example, when a nuisance is permitted to continue but with compensation, Gerhart explains the law imposes a duty to pay compensation because, if the defendant had thought appropriately about the matter, then she would have paid compensation to the plaintiff without being ordered to do so.²⁶

A great deal of tort law and property law is amenable to Gerhart's interpretation. This is not surprising. Reading judicial opinions from the 19th and early 20th century gives one the strong impression that judges considered the law in areas like negligence, nuisance, and waste as not requiring much in the way of justification because the law was based on custom and common sense. Lord Atkin famously described negligence law in *Donoghue v. Stevenson* as defining the duty of care

21. *Id.* at 5.

22. GERHART, PROPERTY LAW, *supra* note 2, at 74.

23. *Id.* at 73.

24. *See* GERHART, TORT LAW, *supra* note 1, at 29–32, 237.

25. On his account, these are exceptional cases because, in most cases in which liability is said to be strict, the liability can be explained as fault-based because the "actor . . . makes unreasonable decisions about the location, timing, or frequency, or method of his activity" *Id.* at 151.

26. *See* GERHART, PROPERTY LAW, *supra* note 2, at 192–94.

we owe our neighbors.²⁷ Gerhart shows that much of tort law and property law can be interpreted in just this way as institutionalized norms of interaction and reasonableness. This is not to belittle Gerhart's contribution. He wrote *Tort Law and Social Morality* because he was dissatisfied with the current state of theory in torts scholarship and the “seemingly unbridgeable divide between corrective justice and economic theory.”²⁸ He bridges this divide by conceiving of tort law not in a top-down way as something imposed by the state on people, but rather in a bottom-up way as institutionalized social morality.²⁹

Gerhart is able to paint an appealing picture of tort law and property law because he focuses on areas of the law that are amenable to being interpreted as institutionalized social morality. The picture is less appealing if we remember the limited range of human interaction where private law demands that people show appropriate regard for others. As Lord Atkin also wrote in *Donoghue v. Stevenson*, “the lawyer's question, Who is my neighbour? receives a restricted reply.”³⁰

Gerhart recognizes that there are significant limits on how far one can take an interpretation of law as institutionalized social morality. He makes the absence of a duty to rescue a bedrock principle. An actor has a duty to take into account the well-being of others only if his action creates a risk to another, or if the actor engages in “an activity that implies the acceptance of dominion over another's well-being.”³¹ He carries this bedrock principle over to property law to justify the right to exclude:

[A]n individual who has made no choice to take responsibility for another's well-being is under no duty to benefit another. The right to exclude is the right to say “no” to the individual who wants the unearned benefit of using the owner's property. An individual cannot go onto an owner's property for the same reasons that an individual cannot go into an owner's wallet.³²

Gerhart's account of tort law and property law also makes the absence of liability for unintentional harm to others that could not

-
27. [1932] AC 562 (HL) at 580 (Scot.) (“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”).
28. GERHART, TORT LAW, *supra* note 1, at xi.
29. *Id.* at 239.
30. [1932] AC at 580.
31. GERHART, TORT LAW, *supra* note 1, at 106.
32. GERHART, PROPERTY LAW, *supra* note 2, at 163.

reasonably have been avoided a bedrock principle.³³ He argues at length in *Tort Law and Social Morality* that most cases labelled “strict liability” do not violate this principle.³⁴ He addresses a related issue in *Property Law and Social Morality*: what if an actor knowingly harms another?³⁵ Whether intentionally harming another is permissible is rarely an issue in personal injury cases because the law rarely permits people to knowingly inflict bodily harm on other people.³⁶ It is a significant issue in property law as conflicts in the use of property often involve knowingly inflicted harm.³⁷ To resolve conflicting uses of property by neighbors, Gerhart says neighbors should emulate what people would ideally do in this situation. They should adopt the veil of ignorance and decide how they would recommend a conflict be resolved if they did not know which position they were in.³⁸ As the next Part explains, while the rules that regulate conflicts between neighbors over the use of property are amenable to Gerhart’s interpretation, most legal rules that regulate conflicts over property and wealth are not.

II. PARTS OF PRIVATE LAW OUTSIDE GERHART’S ACCOUNT

This Part addresses parts of private law Gerhart does not address. These include rules that confer powers on people to pursue their own goals, generally with no requirement that they consider the well-being of other people. They also include rules in tort law that privilege the interests of a harm-doer over the interests of a harm-bearer when a harm is non-physical, and particularly when a harm is purely economic. The omission of these matters is not a flaw in the books or an oversight. Gerhart appropriately chooses not to address these parts of the law because these rules do not require people to act reasonably when an action affects another person’s well-being.

33. *Id.* at 144–46; GERHART, TORT LAW, *supra* note 1, at 114–15.

34. GERHART, TORT LAW, *supra* note 1, at 159–60 (“An actor who makes an unreasonable activity-level decision is failing to think about the well-being of others in an appropriate way and should be responsible for harm caused by that decision Strict liability is unnecessary, however, because the negligence regime is fully capable of identifying such decisions and making the actor responsible for the harm they cause.”).

35. GERHART, PROPERTY LAW, *supra* note 2, at 147–48.

36. *See* GERHART, TORT LAW, *supra* note 1, at 226–28 (addressing the difference between intentional and unintentional torts).

37. GERHART, PROPERTY LAW, *supra* note 2, at 148 (discussing nuisance law as an example).

38. *Id.* at 149–50, 208–10. Gerhart explains possible solutions, which include doing nothing, changing a use, and paying compensation either for the cost to change a use or for the burden imposed by a use. *Id.* at 210–11.

A. Power-Conferring Rules and Weak Equitable Safeguards

Much of property law consists of power-conferring rules.³⁹ These rules establish the basic legal characteristics of different types of property interests and approved ways to create, transfer, and eliminate an interest. For example, the rules on security interests establish the basic legal characteristics of a security interest and establish how one creates, transfers, and eliminates a security interest.⁴⁰ Gerhart says little about property law's power-conferring rules in *Property Law and Social Morality*. His interest is how property law regulates the management of resources and not the rules in property law that define the legal characteristics of different forms of property interests and how one creates, transfers, and eliminates such an interest.⁴¹ For example, Gerhart discusses how temporal division of property ownership creates the need for rules on waste to protect future owners,⁴² but he does not discuss the rules that make temporal divisions of property possible.

The terms of a power-conferring rule generally instruct people on how to exercise a power and the legal consequences of its exercise.⁴³ A power-conferring rule often does not define the permissible reasons for

39. H.L.A. Hart is credited with coining the term “power-conferring rule” to describe a type of legal rule that is not a command and does not impose a duty. H.L.A. HART, *THE CONCEPT OF LAW* 27–28 (1961). See also Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008), for a thoughtful discussion of the problems of distinguishing rules that confer powers and rules that impose duties.

[P]ower-creating laws have two characteristic features. First, the law must be designed in a way that underwrites an expectation of its purposive use—an expectation that persons will satisfy the law for the sake of the legal consequences. Second, that expectation must be the law's reason for attaching those legal consequences to acts of that type.

Id. at 1741–42. Klass continues that “[t]he clearest indication that a law is concerned with the purpose with which it is satisfied” is that a law's validity conditions “sort for legal purpose.” *Id.* at 1743. He identifies four broad “types of such validity conditions: legal formalities; required nonconventional legal speech acts; legal-intent tests; and nonlinguistic proxies for legal purpose.” *Id.*

40. See generally U.C.C. art. 9 (AM. L. INST. & UNIF. L. COMM'N 2020).
41. GERHART, *PROPERTY LAW*, *supra* note 2, at 5, 13. An exception is Gerhart's account of legal rules that prohibit certain forms of division of property, such as restrictions on alienability and future interests with unidentifiable owners. See *id.* at 238, 244–46 (explaining that exceptions are necessary to enable the market to function as a constraint on mismanagement of property).
42. GERHART, *PROPERTY LAW*, *supra* note 2, at 234–36.
43. H.L.A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799, 821–22 (1972).

exercising a power.⁴⁴ Nor does a power-conferring rule generally require a person to consider other people's well-being in deciding whether and how to exercise a power. The rules on wills illustrate. They instruct people on how to make a will and the legal consequences of making a will.⁴⁵ They do not instruct people on the permissible reasons for making a will or require people to consider other people's well-being in making a will.

When a dispute arises involving the application of a power-conferring rule, courts generally follow the rule's terms strictly and do not consider the relative equities of the parties to the dispute.⁴⁶ This would undercut the power conferred by the rule. This characteristic of power-conferring rules was clearer when law and equity were separate systems because equitable considerations came into play under a separate body of law, the law of equity, which would sometimes override the normal operation of a rule to prevent someone from taking unfair advantage of non-compliance with a power-conferring rule.⁴⁷ Deciding whether and how to make an exception to a rule requires a court to balance the value of doing justice in an individual case against the cost of destabilizing a rule.⁴⁸ If a court creates an exception to a rule, then the court's opinion is likely to condemn the defendant's conduct and justify the exception in highly moralistic terms. But the court will also make it clear that the exception is narrow, and that generally the rule being overridden is strictly enforced.

-
44. *See id.* (stating that power-conferring rules tell people how to use them but do not impose a duty on when to use them). The rules on servitudes are an exception that illustrates the general rule. Under the old "touch and concern" requirement, a servitude had to enhance the value of the dominant estate. Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1409 (1982).
45. *See* Klass, *supra* note 39, at 1735 (emphasizing legal duties rather than other-regarding considerations).
46. *Id.* at 1763–64.
47. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1076–1081 (2021) (arguing one function of equity is to redress opportunism); Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity* (arguing a current of "equity seeks to prevent the defendant from being a stickler in a bad way" for his legal rights), in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 32, 38–40 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020); *cf.* J.E. Penner, *Equity, Justice, and Conscience: Suitors Behaving Badly?* (developing account of equity as enforcement of "imperfect duties of virtue" to "prevent people from taking advantage of others" in ways that do not involve violating fundamental norms), in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra*, at 52, 70.
48. *See* Mark P. Gergen, *The System of Equitable Wrongs* (forthcoming) (manuscript at 7) (on file with author).

*Tkachik v. Mandeville*⁴⁹ is a 21st-century example of equity operating in just this way. Frank Mandeville “abandoned his wife [Janet] for the final 18 months of her life while she was battling [breast] cancer.”⁵⁰ Several weeks before her death, Janet revised her will to disinherit Frank.⁵¹ She also tried to dissolve a tenancy by the entirety in their home and another property they co-owned so Frank would not acquire her interest through a right of survivorship on her death.⁵² But she did this the wrong way, transferring her interest by a quitclaim deed rather than by filing for divorce or separate maintenance.⁵³ In other words, Janet failed to comply with the power-conferring rule that governs the dissolution of tenancy in the entirety. The equitable issue in the case was whether Janet’s estate could recover Frank’s half of the expenses she paid to maintain the property on a claim for contribution.⁵⁴ A divided court allowed the claim, proclaiming “equity, and the principles of natural justice embodied therein, call on defendant Frank Mandeville to contribute his share of the property maintenance costs incurred by this wife.”⁵⁵ The court also took pains to explain this was a narrow exception to the normal rules governing dissolution of a tenancy in the entirety.⁵⁶

Gerhart does not discuss equitable doctrines, like duress, undue influence, and constructive fraud, that allow courts to create exceptions to rules in property law and contract law to redress unfair-advantage-taking of a person’s failure to comply with a power-conferring rule. This is not an oversight or a flaw in the books. These doctrines relate to social morality in a different way than negligence law, nuisance law, and the other rules that Gerhart discusses. On Gerhart’s account, social morality bears a direct relationship to the rules in negligence law. Rules of negligence law basically instruct people to act reasonably and empower courts to redress unreasonable conduct.

The equitable doctrines bear a less direct relationship to social morality. They ask a court to balance the value of doing justice in an individual case (which may well be a matter of social morality) and the cost of destabilizing a rule when deciding whether to create an exception to a rule. This leaves a gap between what a rule of reasonableness would require and what equity will correct. For example, in *Tkachik v. Mandeville*, if Frank had thought appropriately about the well-being of

49. 790 N.W.2d 260 (Mich. 2010).

50. *Id.* at 262.

51. *Id.* at 263.

52. *Id.*

53. *Id.* at 263, 269.

54. *Id.* at 264.

55. *Id.* at 267.

56. *Id.* at 269.

Janet (or her heirs), then I believe he would have conveyed her half-interest in the properties to the estate. All equity required of him was to pay his half of the expenses to maintain the property.⁵⁷ The dissenting justices would not have required even this much.⁵⁸

B. Rules that Privilege Harm-Doers over Harm-Bearers

A policy of strictly enforcing power-conferring rules subject to limited equitable safeguards can be thought of as privileging the interest of the party who benefits from enforcement of a rule over the interest of the party who is harmed by enforcement of a rule. This Part addresses rules in tort law that similarly privilege a harm-doer's interest in freedom of action over a harm-bearer's interest in freedom of harm when the harm is non-physical. Examples include commercial torts like deceit and interference with contract and the tort of intentional infliction of emotional distress.

Gerhart says little about these rules in *Tort Law and Social Morality*. He touches on commercial torts briefly in *Property Law and Social Morality*. In discussing what interests are treated as property, Gerhart applauds “the 1410 *Schoolmaster Case*” for “establishing the principle, now foundational, that no producer has a property right in his prospective profits,” and that “harm inflicted through fair competition was not actionable.”⁵⁹ Later, in discussing the appropriate sphere of the common law, Gerhart applauds Justice Brandeis's dissenting opinion in *International News Service v. Associated Press*,⁶⁰ which argued courts did not have the capacity to decide whether selling news collected by a competitor is unfair competition.⁶¹ This is to make the general point that “[t]he common law is at its best when disputes involve clear harm to identified individuals from identified sources attributable to other individuals, and where the range of interests and information that must be taken into account is narrow and well-represented by the parties to the dispute.”⁶²

Gerhart correctly omits commercial torts like deceit and interference with contract from his account of tort law, for these rules permit a great deal of unreasonable conduct to go uncorrected. The same is true for the tort of intentional infliction of emotional distress. To put

57. *Id.* at 276.

58. *Id.* at 277 (Weaver, J., dissenting); *id.* at 295 (Young, J., dissenting).

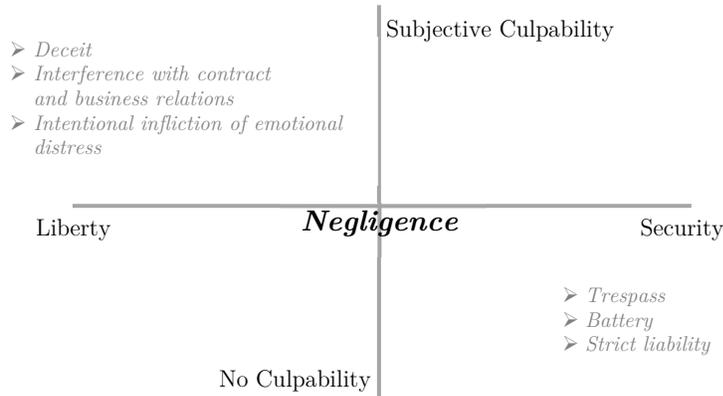
59. GERHART, PROPERTY LAW, *supra* note 2, at 106 (citing Hamlyn v. More (The Schoolmasters' Case), Y.B. 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.), translated in JOHN BAKER, BAKER AND MILSOM SOURCES OF ENGLISH LEGAL HISTORY 671–73 (2d ed. 2010)).

60. 248 U.S. 215 (1918).

61. GERHART, PROPERTY LAW, *supra* note 2, at 294–95, 295 n.5 (citing *Int'l News Serv.*, 248 U.S. at 267 (Brandeis, J., dissenting)).

62. *Id.* at 294.

these torts in perspective, the diagram below maps tort law on two dimensions. I also include the tort of intentional infliction of emotional distress, which Gerhart addresses.⁶³ I borrow the basic schema from Mark Geistfeld.⁶⁴



The horizontal dimension captures the balance a rule strikes between a harm-doer's interest in liberty of action and a harm-bearer's interest in security from harm. At one end of this dimension are rules of immunity or privilege that prioritize a harm-doer's interest in liberty of action, such as the privilege for competition and the privilege to say harmful things about a public figure. At the other end are strict liability rules that prioritize the harm-bearer's interest in security from harm. The negligence rule is at the center for it balances the parties' conflicting interests by making an actor liable for harm she causes when her action creates an unreasonable risk of harm while privileging an actor's conduct when her conduct does not create an unreasonable risk of harm. The negligence rule makes victims bear the cost of accidents that are not worth avoiding, which promotes liberty of action.

The vertical dimension captures how a tort rule defines a culpable state of mind. At one end of this dimension are intentional torts that require subjective culpability. At the other end are strict liability rules that require no culpability. "Negligence once again is at the conceptual

63. GERHART, TORT LAW, *supra* note 1, at 233. Gerhart argues "[w]hen the plaintiff alleges the intentional infliction of emotional harm, the court must compare the plaintiff's harm with the social value of the defendant's conduct, and this is fundamentally a reasonable determination." *Id.* This explanation of the tort cannot account for the requirement that the conduct be "extreme and outrageous" and the harm "severe." RESTATEMENT (SECOND) OF TORTS § 45 (AM. LAW INST. 1965). These requirements permit a great deal of unreasonable conduct to go unchecked.

64. MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 15–16 (2008).

center,” Geistfeld observes, because it is a rule of “objective culpability.”⁶⁵ Legal rules that require people to act reasonably when an action affects other people’s well-being again are at the center of the diagram.

The torts in the upper left-hand corner of the diagram privilege a harm-doer’s interest in liberty of action over a harm-bearer’s interest in security from harm and so let a great deal of unreasonable conduct go uncorrected. These rules immunize conduct that can be quite offensive morally. For example, liability for intentional infliction of emotional distress requires the defendant’s conduct to be “extreme and outrageous” and the plaintiff’s emotional distress to be “severe.”⁶⁶ Liability for deceit requires not just an intentional misrepresentation and foreseeable reliance;⁶⁷ liability also requires the plaintiff’s reliance to be justifiable, which many American courts treat as a requirement of reasonable reliance.⁶⁸ A requirement of reasonable reliance in the law of deceit creates a legal license to take advantage of another person’s gullibility.

The debate about the limits of the tort of interference with business relations is largely about what role tort law should play in redressing conduct in the commercial arena that is clearly inappropriate when the conduct in question does not violate other rules of tort law. The *Restatement (Second) of Torts* adopted an open-ended tort that could reach any conduct a court deemed improper.⁶⁹ This made possible the successful interference claim in *Nesler v. Fisher & Co.*,⁷⁰ where an owner of an office building pursued a long campaign of harassment against a potential competitor, which included filing or funding meritless lawsuits, while being careful not to cross the line and commit abuse of process and defamation.⁷¹ Most state courts refused to adopt the open-ended tort and so the third *Restatement* relented, allowing a claim for

65. *Id.* (emphasis omitted).

66. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

67. *Id.* at § 525; *see also* *Glassford v. Dufresne & Assocs., P.C.*, 124 A.3d 822, 828 (Vt. 2015) (“[L]iability for fraudulent misrepresentation under Restatement § 531, which attaches when a plaintiff’s reliance on the misrepresentation is reasonably foreseeable.”).

68. Mark P. Gergen, *A Wrong Turn in the Law of Deceit*, 106 GEO. L.J. 555, 564 & n.31 (2018) (citing several cases in support).

69. RESTATEMENT (SECOND) OF TORTS §§ 766B, 767 (AM. L. INST. 1965). Section 766B allows claims for intentional and improper interference with business relations. Section 767 has a multifactor test to determine whether interference is improper. *Id.* The factors balanced include the interests of the two parties and “the social interests in protecting the freedom of action of the actor.” *Id.* at § 767.

70. 452 N.W.2d 191 (Iowa 1990).

71. *Id.* at 193.

interference with business relations only when the defendant's conduct is independently wrongful.⁷²

This is not the place to try to explain what reasons justify these rules. It is clear that whatever these reasons may be, these rules do not instruct people on how to think appropriately about the well-being of other people. A person who thought appropriately about another person's well-being would not choose to gratuitously say something he knew to be painful so long as the pain was not "severe." And a person who thought appropriately about another person's well-being would not choose to deceive someone so long as the deception would not trick a reasonable person.

Gerhart's account of private law works best for rules at the center of the diagram where the interest of the plaintiff in liberty of action and the interest of the defendant in security from harm are treated by the law as being in equipoise. Gerhart is able to account for rules in the lower right-hand corner on trespass by reasoning that a defendant who trespassed innocently or out of necessity, and who harmed the plaintiff's property, would pay for the harm, if the defendant reasoned appropriately about her obligation to the plaintiff.⁷³ A similar explanation for the no-liability rules in the upper left-hand corner of the diagram is implausible.⁷⁴

III. GERHART'S ACCOUNT OF CONTRACT LAW

This Part takes up *Contract Law and Social Morality*. It begins with Gerhart's account of rules that apply once a contract has been formed, for this part of contract law is most amenable to Gerhart's interpretation. This Part then turns to two parts of contract law that are less amenable to Gerhart's interpretation. They are the rules on conditions and the rules on contract formation.

72. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 18(b) (AM. L. INST. 2020) (requiring the defendant to have "committed an independent and intentional legal wrong").

73. See *supra* notes 24–26 and accompanying text.

74. The argument would be that if the harm-bearer thought appropriately about the well-being of the harm-doer, then the harm-bearer would decide not to demand compensation for this harm. This argument may be plausible in cases involving inadvertent harm, such as negligent infliction of emotional distress. Because of the cost involved in demanding and obtaining compensation, people who thought appropriately about the matter might decide it is best for everyone that unintentional harm go uncompensated in the absence of physical harm even when the harm-doer's conduct is unreasonable. This argument is not plausible in cases involving intentional harm. A gullible victim of a fraud who is denied recovery because his reliance is unreasonable would not be expected to say "well-played" to the fraudster, if the victim thought appropriately about the matter.

According to Gerhart, once a contract has been formed, a party has a duty to think appropriately about the well-being of the other party when making decisions related to the contract.⁷⁵ This method of appropriate other-regarding reasoning is similar to the method of reasoning described in *Tort Law and Social Morality* and *Property Law and Social Morality*, but with an important difference. The similarity is that a party should be guided by the Golden Rule and assume the veil of ignorance in making decisions about whether and how to perform a contract.⁷⁶ In more colloquial terms, a party should put herself in the other party's shoes (while staying in her own shoes), set aside personal biases and self-interest, imagine the two parties talked the matter through, and ask what decision they would agree she should make in light of their competing interests. The important difference is that the parties' agreement defines the baseline for appropriate other-regarding reasoning.⁷⁷ Like negligence law, contract law requires people to act reasonably. The difference is that the parties' agreement defines the parameters of the requirement of reasonableness in contract law.

This account places a great deal of weight on the definition of the parties' agreement. Gerhart's treatment of boilerplate terms in consumer form contracts illustrates. According to Gerhart, these terms are not bargained for and so they are not part of the agreement.⁷⁸ The baseline agreed exchange is the terms on which the parties actually agreed, which Karl Llewellyn called the "dickered terms."⁷⁹ Gerhart applauds the doctrine of reasonable expectations because the doctrine requires a form contract maker to engage in appropriate other-regarding reasoning with respect to boilerplate terms.⁸⁰ Under this doctrine, a boilerplate term in a form contract is not enforceable when the form maker "has reason to believe that the party manifesting . . . assent" to the form "would not do so if he knew that the writing contained a particular term."⁸¹ For example, the doctrine instructs a court not to

75. GERHART, CONTRACT LAW, *supra* note 3, at 105–06.

76. *Id.* at 80–81.

77. *Id.* at 123 (“[T]he goal of determining performance obligations is to preserve the ex ante balance of burdens and benefits that each party bargained for in the exchange, the ex ante exchange equilibrium.”).

78. *Id.* at 163–65.

79. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

80. GERHART, CONTRACT LAW, *supra* note 3, at 163–66.

81. RESTATEMENT (SECOND) OF CONTS. § 211(3) (AM. L. INST. 1981). Gerhart credits the draft *Restatement of Consumer Contracts* with adopting this rule. GERHART, CONTRACT LAW, *supra* note 3, at 160–61. The reporters have consistently resisted embracing the reasonable-expectations doctrine, preferring to rely on the unconscionability doctrine, which sets a higher bar for not enforcing a term. *See* RESTATEMENT OF

enforce a boilerplate term that “eviscerates the non-standard terms explicitly agreed to, or . . . eliminates the dominant purpose of the transaction.”⁸²

Gerhart’s argument for the doctrine of reasonable expectations rises or falls with the premise that the baseline agreement to which the requirement of reasonableness attaches is the parties’ actual agreement. This premise is debatable as a legal matter because classical contract law defines the baseline agreement as the terms in a writing that the parties adopt as an expression of their agreement. I will return to this point.⁸³

The doctrine of material breach is a less problematic example of a rule in contract law that requires parties to act reasonably within the framework of the agreed exchange.⁸⁴ The doctrine defines when a party may suspend performance in response to the other party’s nonperformance.⁸⁵ Formally, this is determined by applying a multi-factor standard that requires a court to balance the risk that the aggrieved party will suffer an uncompensated loss if she does not suspend performance, the loss to the defaulter if performance is suspended, and whether the defaulter acted in bad faith.⁸⁶ Contracts often break down because the parties escalate what may start as a relatively minor dispute. The doctrine instructs a court to cast the loss on the first party who escalated a dispute in a way that indicates she did not engage in appropriate other-regarding reasoning.⁸⁷ The doctrine implicitly instructs parties to engage in appropriately other-regarding reasoning in

CONSUMER CONTS. § 5 cmt. 4 (AM. L. INST., Tentative Draft 2019) (stating the standard of substantive unconscionability is expressed in terms like “‘shock the conscience,’ ‘oppressive,’ ‘unreasonably harsh,’ or ‘fundamentally unfair’ . . . to capture a limiting criterion, that the doctrine is to be used only when the one-sidedness of a term in the contract is extreme.”). The tentative draft only embraces the part of the reasonable-expectation doctrines that prevents a boilerplate term from overriding an express representation. *See id.* at § 7. Gerhart knew he was giving the reporters credit that they did not deserve. When I asked him whether his motives were political, he smiled.

82. RESTATEMENT (SECOND) OF CONTS. § 211 cmt. f (AM. L. INST. 1981).

83. *See infra* Part IV.

84. *See infra* text and accompanying notes 190–221. I talked with Gerhart about using this doctrine and other constructive conditions to illustrate his method at the KCON meeting in Sacramento in early 2020. Had he lived, I expect he would have included the point made here in the book.

85. *See* RESTATEMENT (SECOND) OF CONTS. § 241 (AM. L. INST. 1981).

86. Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1411 (2009).

87. *K & G Construction Co. v. Harris* illustrates. 164 A.2d 451, 456 (Md. 1960). There was a dispute over whether a subcontractor was responsible for damage caused by its bulldozer, which turned on whether the operator

deciding whether to suspend performance by balancing their need to suspend performance to avoid losing the benefit of their bargain against the burden imposed on the other party if they suspend performance.

The doctrine of material breach illustrates what it means to make the agreed exchange the baseline for the requirement of reasonableness. An aggrieved party may suspend performance to avoid suffering an uncompensated loss, even though suspending performance inflicts a larger loss on the other party. Since the baseline is the agreed exchange, the aggrieved party is entitled to suspend performance to avoid suffering a material uncompensated loss, though this inflicts a larger loss on the defaulter, because she is entitled to the benefit of her bargain.⁸⁸ She is allowed to treat her interest in receiving the benefit of the bargain as paramount over the other party's interest in avoiding loss. However, a buyer may not seize on a curable defect in goods to get out a contract when the market price of the goods has dropped.⁸⁹ This would deny the seller the benefit of her bargain, which is the right to be paid an above-market price for the goods. The doctrine also allows the aggrieved party to consider whether the defaulter acted in an appropriately other-regarding way (i.e., in good faith) in defaulting.

Other contract doctrines that regulate responses to nonperformance have a broadly similar structure to the doctrine of material breach and serve a broadly similar function. These include the duty to mitigate,⁹⁰ the substantial performance doctrine,⁹¹ the rule governing the choice between remedial cost and loss in market value as a measure of damages

was negligent. *Id.* at 454, 456. The general contractor withheld a payment to cover the claim. *Id.* The subcontractor responded by stopping work. The court correctly cast the loss on the subcontractor because there was no evidence that the subcontractor needed the withheld payment to continue work. *Id.* The subcontractor responded inappropriately by stopping work. *Id.*

88. *Parker v. Twentieth Century-Fox Film Corp.* illustrates. 474 P.2d 689, 692–94 (Cal. 1970). The only way Parker could avoid suffering an uncompensated loss from losing the role in *Bloomer Girl* was to refuse the role in *Big Country*, *Big Man* and sue for the contract price. *Id.* Thus, her decision was reasonable though it imposed a significant loss on the studio and may have given Parker a windfall. *Id.*

89. *See, e.g., T.W. Oil, Inc. v. Consol. Edison Co.*, 443 N.E.2d 932, 938 & n.8 (N.Y. 1982).

90. RESTATEMENT (SECOND) OF CONTS. § 350 (AM. L. INST. 1981).

91. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 892 (N.Y. 1921), is a canonical case.

for incomplete or defective performance,⁹² the aggrieved party's restitution claim,⁹³ and the defaulter's restitution claim.⁹⁴ All of these doctrines require the party making a choice addressed by a rule (and require a court tasked with reviewing a choice made) to balance the extent to which the contemplated (or chosen) response to nonperformance is necessary for the aggrieved party to obtain the benefit of her bargain, the burden the response imposes on the defaulter, and whether the defaulter acted in bad faith. The agreed exchange defines the baseline under all of these doctrines. The primary goal is to ensure the aggrieved party obtains the benefit of her bargain. Once this goal is achieved, the rules minimize the burden on the defaulter so long as the defaulter acted in good faith.

It is not surprising that rules like the doctrine of material breach that regulate response to nonperformance are amenable to being interpreted as applications of a general requirement of reasonableness within the parameters of the agreed exchange. A breakdown of a contract is like an accident in tort law or a conflict between neighbors regarding use of property. These conflicts involve problems of coordination that often are not amenable to being solved in advance—either by parties writing terms or by courts establishing rules to cover the problem. Gerhart argues people can best solve these sorts of problems if they put themselves in each other's shoes, set aside their personal biases and self-interest, and identify a solution that works best for all involved. And he argues the law should encourage people to think in this way in these situations. What is different about the contractual setting is that the agreed exchange defines the parameters for an appropriate solution.

Gerhart advocates for a robust duty of good faith and fair dealing in the form of a general rule that would require parties to engage in appropriate other-regarding reasoning in making decisions in performing or enforcing a contract when the contract gives a party discretion in making a decision.⁹⁵ Again, the agreed exchange sets the baseline. Gerhart's incisive analysis of *Feld v. Henry S. Levy & Sons, Inc.*⁹⁶ illustrates how this works. The case involved an output contract for the sale of breadcrumbs.⁹⁷ The seller was a bakery that hoped to make a

92. RESTATEMENT (SECOND) OF CONTS. § 348 (AM. L. INST. 1981). *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1963), is a canonical case.

93. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 38 (AM. L. INST. 2011).

94. *Id.* at § 36.

95. GERHART, CONTRACT LAW, *supra* note 3, at 136–43.

96. 335 N.E.2d 320 (N.Y. 1975).

97. *Id.* at 321.

profit by installing a new oven to turn bread scraps into breadcrumbs.⁹⁸ This turned out to be a losing venture. After the buyer refused to pay a 1c per pound increase, the seller scrapped the oven and sold its scrap bread to a pig farmer.⁹⁹ Victor Goldberg has argued this was not a breach of the requirement of good faith in UCC § 2-306(1) because the seller was losing money and the buyer did not rely on the contract for it had other sources for breadcrumbs.¹⁰⁰ Gerhart responds this may give too little weight to the parties' bargain. The contract had a six-month termination clause.¹⁰¹ Gerhart argues the case should turn on whether this clause was meant to protect the seller (as well as the buyer), for if the clause did not protect the seller, then this would indicate the seller was not meant to be protected against loss by an implied right under the output term to stop production without notice.¹⁰² He predicts that who the termination clause was meant to protect could probably be easily determined by looking at the history of the negotiation of the contract.¹⁰³

Open performance terms, like the term in *Feld*, are a special case because people invite ex post regulation of performance decisions by a court when they use an open performance term like an outputs or requirements quantity term, a best-efforts term, or a condition of satisfaction. The robust duty of good faith Gerhart proposes would go further than most U.S. courts have been willing to go to prevent people from exploiting unexpected gaps or loopholes in a contract. Some courts reject the doctrine entirely¹⁰⁴ or almost entirely.¹⁰⁵ When a breach of the duty is found, there generally is a compelling specific ground, such as

98. *Id.*

99. *Id.*

100. VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 117–19 (2006); U.C.C. § 2-306(1) (AM. L. INST. & UNIF. L. COMM'N 2020).

101. GERHART, CONTRACT LAW, *supra* note 3, at 139; *Feld*, 335 N.E.2d at 321.

102. GERHART, CONTRACT LAW, *supra* note 3, at 139–41.

103. *Id.*

104. *See, e.g.*, *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983).

105. *See, e.g.*, *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, 817 (Utah 2011) (restricting doctrine to cases “where it is clear from the parties’ ‘course of dealings’ or a settled custom or usage of the trade that the parties undoubtedly would have agreed to the covenant . . .”).

dishonesty,¹⁰⁶ a clear abuse of a right,¹⁰⁷ a violation of a term implied by strong evidence of custom or usage,¹⁰⁸ or grossly unreasonable conduct when a party exploits a gap or loophole to capture a gain for himself by inflicting a much larger loss on the other party.¹⁰⁹ For example, Gerhart's robust version of the duty of good faith might well have allowed the claim in *Wagenseller v. Scottsdale Memorial Hospital*,¹¹⁰ where an at-will employee claimed that her termination for refusing to participate in a skit that required her to moon the audience was a breach of the duty of good faith.¹¹¹ The court denied the claim.¹¹²

The rules on conditions are not amenable to Gerhart's interpretation. These rules are power-conferring. They give people the power *not* to be under an obligation by making an obligation the subject of a condition. When a condition is strictly enforced, substantial performance is not enough.¹¹³ This allows an obligor to invoke a condition to avoid an obligation without regard to whether non-fulfillment of the condition actually impairs the interests the condition was meant to serve. This is not consistent with the requirement of reasonableness.

A large body of rules temper enforcement of conditions. These rules require special facts like waiver by the obligor;¹¹⁴ affirmative misconduct

106. For example, *Market Street Associates Ltd. Partnership v. Frey* is explained on this ground once it is recognized that taking advantage of the other party's mistake regarding the terms of a writing is a form of dishonesty. 941 F.2d 588, 597 (7th Cir. 1991).

107. *See, e.g., Fortune v. Nat'l Cash Reg. Co.*, 364 N.E.2d 1251, 1257–58 (Mass. 1977) (showing that an at-will employee was terminated to deprive him of a large bonus on sales).

108. *See, e.g., Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 805–06 (9th Cir. 1981) (implying term that asphalt supplier would protect paving company from a price increase based on strong evidence of course of performance and trade practice).

109. *See, e.g., Seggebruch v. Stosor*, 33 N.E.2d 159, 160–61 (Ill. App. Ct. 1941) (explaining that a lessee avoided obligation to pay based on gas sales on premises by moving pumps to adjoining property).

110. 710 P.2d 1025 (Ariz. 1985).

111. *Id.* at 1029.

112. *Id.* at 1038–41. The court allowed the claim to proceed on the ground that the termination violated public policy. *Id.* at 1044.

113. *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, is a leading case and an example of the point in the next sentence above. 660 N.E.2d 415, 419 (N.Y. 1995). The defendant was allowed to renege on a commercial sublease when the plaintiff failed to provide the landlord's written consent to work by a specified date though the plaintiff had obtained the landlord's verbal consent by that date and quickly obtained the landlord's written consent. *Id.* at 417, 421.

114. *See Clark v. West*, in which a publisher agreed to pay an author an additional \$4 per page for a treatise if the author abstained from

by the obligor that is a basis for estoppel or a finding of interference;¹¹⁵ or impracticability plus the absence of material harm from non-fulfillment of the condition.¹¹⁶ And U.S. courts have given limited effect to a rule that allows a court to excuse nonfulfillment of a condition to avoid disproportionate forfeiture.¹¹⁷ This pattern is similar to the pattern observed earlier with respect to power-conferring rules in property and equitable rules that sometimes allow a court to override a rule to avoid an unfair result. The rules that temper enforcement of conditions are weak safeguards that permit a great deal of unreasonable conduct to go unchecked.

Some parts of the law of contract formation also are not amenable to Gerhart's interpretation. Gerhart proposes that the consideration requirement and bargain test be replaced by a general rule that is similar to the doctrine of promissory estoppel.¹¹⁸ Under his proposed general rule, an apparent promise would be irrevocable if the promise materially "change[d] the promisee's decision space."¹¹⁹ Gerhart does not address a bevy of formal requirements for contract that basically resolve a disagreement about the existence or the terms of a contract in favor of the party denying a contractual obligation. They include the statute of frauds, the definiteness requirement,¹²⁰ the mutuality requirement,¹²¹ the presumption that an offer is revocable,¹²² the requirement that an acceptance be unequivocal,¹²³ and the mirror image rule.¹²⁴

"intoxicating liquor." 86 N.E. 1, 2 (N.Y. 1908). The author's claim for the additional \$4 was allowed to proceed, though the author violated the condition, but only on a theory of express waiver. *Id.* at 5.

115. *Johnson v. Coss*, 667 N.W.2d 701, 706–08 (S.D. 2003) (applying prevention doctrine).
116. RESTATEMENT (SECOND) OF CONTS. § 271 (AM. L. INST. 1981) (conditioning excuse on grounds of impracticability on occurrence of the condition not being "a material part of the agreed exchange").
117. *Id.* at § 227. *See, e.g., Aetna Cas. & Sur. Co. v. Murphy*, 538 A.2d 219, 224 (Conn. 1988) (adopting the rule while placing the burden on the obligee to establish that the obligor was not materially prejudiced by nonfulfillment of the condition); *Oppenheimer & Co. v. Oppenheim, Appel, & Dixon Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) (adopting the rule while restricting it to cases in which obligee would suffer a reliance loss).
118. GERHART, CONTRACT LAW, *supra* note 3, at 116–19.
119. *Id.* at 116.
120. *See, e.g., Acad. Chi. Publishers v. Cheever*, 578 N.E.2d 981, 983 (Ill. 1991).
121. *See, e.g., Off. Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So.2d 367, 370 (Fla. Dist. Ct. App. 2003).
122. RESTATEMENT (SECOND) OF CONTS. § 36(c) (AM. L. INST. 1981).
123. *See, e.g., id.* at § 57; *Ardente v. Horan*, 366 A.2d 162, 165 (R.I. 1976).
124. *See* RESTATEMENT (SECOND) OF CONTS. §§ 58–59 (AM. L. INST. 1981).

Modern contract law (e.g., the *Restatement (Second) of Contracts* and Article Two of the U.C.C.) weakens or eliminates many of these formal requirements for a contract, moving the rules on contract formation closer to Gerhart's account. For example, if courts adopted the broad claim in *Restatement (Second) Contracts* § 139 to overcome a statute of frauds defense, then this part of contract law would be amenable to Gerhart's interpretation. Under § 139, a court may give a remedy for breach of an oral promise based on an all-things-considered judgment that this is a reasonable way to resolve the parties' disagreement about the existence of a contract.¹²⁵ Only a light thumb is placed on the scale in favor of the defendant.¹²⁶ But most American courts have not adopted § 139 and instead require exceptional facts to override the statute of frauds.¹²⁷ As a consequence, contract law allows a party to renege on an apparent oral promise even when this decision would clearly be unreasonable, if the party engaged in appropriate other-regarding reasoning.

Formal requirements for a contract, like the statute of frauds and the definiteness requirement, are similar to the rules in tort law that privilege a harm-doer's interest in liberty of action over a harm-bearer's interest in security from harm. When there is a disagreement about the existence of a contract, formal requirements for a contract privilege the interests of the party denying a contractual obligation over the interests of the party claiming a contractual obligation. Part V will return to this point. It will argue Gerhart does not adequately address the tension created by defining contract as a domain of reasonableness that is within a larger domain in which people are independent and owe limited duties to others.

IV. CONTRACT INTERPRETATION

This Part considers Gerhart's proposal for how courts should handle problems of contract interpretation. It argues the proposal is an important contribution to the literature on contract interpretation. I will refer to the proposal as the Gerhart–Kostritsky (“G–K”) proposal

125. *Id.* at § 139(1).

126. Section 139 slightly favors the defendant by making enforcement discretionary (“as justice requires”) and by resolving evidentiary doubt about the existence or terms of the agreement in favor of the defendant. *See id.* at § 139 (stating as relevant “the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence”).

127. *See, e.g.,* *Classic Cheesecake Co. v. JP Morgan Chase Bank*, 546 F.3d 839, 841–43 (7th Cir. 2008).

because it is most fully developed in a co-authored paper.¹²⁸ After a brief explanation of the G–K proposal, this Part will situate the proposal within the debate on contract interpretation and then explain why the proposal may well be the best way to handle problems of contract interpretation.

G–K begin with the non-controversial point that, when there is a dispute over the meaning of a term in a contract, the court's task is to pick between the two meanings advanced by the parties.¹²⁹ G–K propose the court should choose the meaning that is more reasonable in light of the parties' bargain.¹³⁰ The court would do this by asking both parties to explain the factual assumptions under which their interpretation would maximize the expected joint surplus under the contract.¹³¹ The court would then choose the interpretation that has the more plausible factual assumptions.¹³² The court could consider evidence offered to establish the validity of an implausible factual assumption, but only if the court determined there was a sufficient probability that the evidence could make the factual assumption plausible.¹³³

The G–K method of resolving problems of interpretation suggests some simple rules of thumb. Generally, a court should select the interpretation that maximizes the joint expected return on a contract, or that allocates risk to the party in a superior position to bear the risk, when there is a significant allocative difference in the competing interpretations.¹³⁴ A court should reject an interpretation that depends on an unusual source of value to one party when this value was not communicated to the other party.¹³⁵ A court should choose an interpretation that is consistent with trade practice when it is implausible that the parties had some other meaning in mind.¹³⁶ And a court should

128. See Peter M. Gerhart & Juliet P. Kostritsky, *Efficient Contextualism*, 76 U. PITT. L. REV. 509, 509–10 (2015).

129. *Id.* at 514–15.

130. *Id.* at 536.

131. *Id.* at 546–47.

132. *Id.* at 547.

133. *See id.*

134. This rule of thumb is suggested by G–K's analysis of *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.*, 252 Cal. Rptr. 573 (Ct. App. 1988), and *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 971 N.E.2d 967 (Ohio Ct. App. 2012). Gerhart & Kostritsky, *supra* note 128, at 551–53, 556–59.

135. This rule of thumb is suggested by G–K's analysis of *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921). See Gerhart & Kostritsky, *supra* note 128, at 545–48.

136. This rule of thumb is suggested by G–K's analysis of *Hurst v. W.J. Lake & Co.*, 16 P.2d 627 (Or. 1932). See Gerhart & Kostritsky, *supra* note 128, at 548–51.

reject an interpretation that makes one party an insurer against a risk of loss the other party naturally faces in its business in the absence of evidence the party was compensated to bear this risk.¹³⁷

I draw these rules of thumb from G–K’s analysis of several cases. They do not draw any rules of thumb. I expect they chose not to do so because this might defeat their main objective, which is to encourage courts to abjure rule-bound reasoning in resolving issues of interpretation.¹³⁸ They encourage courts to think about “how the parties set up the exchange to get the most from the exchange” given “each party’s goals, motivations and likely decision making processes.”¹³⁹ This way of thinking about a transaction will be familiar to anyone who has engineered, litigated, or taught a complicated transaction. The goal of a transaction engineer is to help the parties (or at least her clients) get the most from a transaction in light of the parties’ goals and motivations and their decision-making processes. A litigator must reverse-engineer a complex transaction in just this way to understand how it was intended to work and why it broke down. A teacher must reverse-engineer a complex transaction to explain the choices the parties and their lawyers made in designing the transaction. The G–K proposal puts the onus on the parties to educate the court about a transaction by requiring the parties to explain the factual assumptions on which their interpretation of the writing is more reasonable. Often only one story will be plausible. The over-arching message is that problems of interpretation are best solved by asking which meaning makes sense in light of the transaction.

G–K join recent papers on contract interpretation by Gregory Klass¹⁴⁰ and Shafar Lifshitz & Elad Finkelstein¹⁴¹ in trying to shift the focus in the debate about interpretation from the question of what evidence a court ought to consider in interpreting a writing to the question of what type of meaning a court ought to ascribe to terms in a writing.¹⁴² G–K come down squarely in favor of what Klass refers to

137. This rule of thumb is suggested by G–K’s analysis of *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971). See Gerhart & Kostritsky, *supra* note 128, at 559–65.

138. See *id.* at 518–20 (“[W]e suggest that interpretation cannot be a rule-based enterprise . . .”).

139. *Id.* at 540.

140. Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL’Y 13 (2020).

141. Shafar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519 (2017).

142. GERHART, CONTRACT LAW, *supra* note 3, at 144; see *infra* notes 143–46 and accompanying text.

as the “pragmatic” or “purposive” meaning. Klass contrasts this meaning with the “semantic” meaning of terms in a writing.¹⁴³ Lifshitz & Finkelstein add a second dimension—whether a court ascribes the authorial meaning or the textual meaning to the relevant term—that clarifies how the G–K proposal differs from both modern contract law (i.e., the second *Restatement*) and classical contract law (i.e., the first *Restatement*).¹⁴⁴ Modern contract law ascribes the authorial meaning¹⁴⁵ while classical contract law ascribes the objective meaning.¹⁴⁶

One difference between the G–K approach and modern contract law is they reject authorial meaning as the touchstone for contract interpretation.¹⁴⁷ G–K reject authorial meaning for practical reasons. They believe an inquiry into the meaning the parties ascribed to terms in a writing at the time the contract was made will rarely resolve a problem of contract interpretation.¹⁴⁸ According to G–K, usually an inquiry into ex ante intent will be unhelpful because the parties will not have thought about the circumstances that gave rise to the dispute when the contract was made.¹⁴⁹ And, in the unusual case where the parties have thought about the matter, they will claim different ex ante

143. Klass, *supra* note 140, at 23, 32. Lifshitz & Finkelstein refer to these different types of meaning as “linguistic” and “purposive.” Lifshitz & Finkelstein, *supra* note 141, at 523.

144. Lifshitz & Finkelstein, *supra* note 141, at 523.

145. Section 201 of the *Restatement (Second) of Contracts* begins from the premise that the interpretation of an agreement turns on the meaning the parties attached to the relevant term(s) when the agreement was made. The objective rule is deployed to determine which meaning prevails when the parties attach different meanings to a relevant term when the contract was made. RESTATEMENT (SECOND) OF CONTS. § 201 (AM. L. INST. 1981). On the G–K view, resolving most interpretive disputes is akin to supplying an omitted term because the court must choose between two meanings that could be ascribed to the relevant term(s) when an inquiry into the parties’ ex ante intent cannot resolve the dispute. Reasonableness is the guiding principle when a court must supply an omitted term to give effect to a promise or agreement, *id.* § 204, just as reasonableness is the guiding principle of contract interpretation under the G–K proposal. *See supra* notes 129–33 and accompanying text.

146. RESTATEMENT (FIRST) OF CONTRACTS § 230 (AM. L. INST. 1932) (a court takes the perspective of “a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than the oral statements by the parties of what they intended it to mean.”). The plain-meaning rule precludes consideration of evidence of authorial meaning, such as evidence of prior dealings between the parties and course of performance, when the relevant terms are unambiguous. *See id.*

147. *See supra* text accompanying notes 143–46.

148. Gerhart & Kostritsky, *supra* note 128, at 518; GERHART, CONTRACT LAW, *supra* note 3, at 145.

149. *See* Gerhart & Kostritsky, *supra* note 128, at 518.

intentions (otherwise there would not be a dispute about the interpretation of the contract) and the court will have to select between the different meanings the parties claim they ascribed to terms in a writing.¹⁵⁰ For example, in *Jacob & Youngs v. Kent*, the parties are unlikely to have consciously thought about whether “Reading pipe” meant the brand of pipe or the quality of pipe when the contract was made.¹⁵¹ And, if the parties claim they did think about the matter, then they each will claim they had their preferred meaning in mind.

The G–K proposal directs courts to ascribe the pragmatic or purposive meaning to a term.¹⁵² Their proposal also directs courts to try to resolve interpretive disputes by looking at limited objective evidence.¹⁵³ G–K predict that most interpretive issues can be resolved this way because only one interpretation will be sensible. This commitment to trying to resolve interpretive disputes by looking at limited objective evidence is in the spirit of the commitment of classical contract law to objective meaning. Where G–K differ from the stereotypical depiction of classical contract law is their adoption of pragmatic or purposive meaning rather than semantic meaning.

The G–K proposal may well be the best way to handle problems of interpretation. G–K make several empirical claims that, if true, would make their proposal superior to an approach that ascribes the semantic meaning to a term without regard to the reasonableness of the semantic meaning in the context of a transaction. They claim textualism has a high error rate and high claim-processing costs because “[t]extualism invites ex post opportunism”¹⁵⁴ and requires courts to “spend considerable time reviewing textualist interpretations that have only the flimsiest justification when evaluated on the basis of surplus maximization.”¹⁵⁵ G–K agree with Learned Hand that “There is no surer way to misread any document than to read it literally.”¹⁵⁶ And G–K claim their approach has a lower error rate than textualism at comparable claim-processing costs. Claim-processing costs are relatively low because the relevant “kind of contextual information is not likely to be

150. *See id.* at 518 n. 23, 545.

151. *Jacob & Youngs v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

152. G–K refers to this as the meaning that is more reasonable in light of the parties’ apparent bargain. *See Gerhart & Kostritsky, supra* note 128, at 544.

153. *See id.* at 539–40 (“Understanding each party’s goals, motivations and likely decision making processes allows courts to understand . . . which interpretation relies on empirical claims that are likely to be true and which rely on empirical claims that seem too farfetched to be true without a strong evidentiary foundation.”).

154. *Gerhart & Kostritsky, supra* note 128, at 538–39.

155. *Id.* at 539.

156. *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944).

expensive to uncover or evaluate because most of it involves uncontested information that gives rise to no triable issues.¹⁵⁷ Error rates are lower than textualism because “courts will understand how the parties set up the exchange to get the most from the exchange,” once courts understand “each party’s goals, motivations and likely decision making processes.”¹⁵⁸

The evidence G–K advance for these empirical claims is anecdotal. To their credit, they try to back up their empirical claims with close analysis of specific cases, including a case that is often presented as a posterchild for textualism.¹⁵⁹ For what it’s worth, my own experience is consistent with their empirical claims. I have been involved in cases in which a commitment to semantic textualism is associated with perverse results.¹⁶⁰

The G–K proposal is similar to how the New York Court of Appeals handled problems of interpretation in commercial cases in the 1920s and 1930s, which is good legal authority for this approach. Consider a short opinion by Judge Cardozo in *Outlet Embroidery Co. v. Derwent Mills*.¹⁶¹ The issue was whether a seller committed to deliver yarn for \$3.10 per box when its acceptance said that the price “is subject to

157. Gerhart & Kostritsky, *supra* note 128, at 539.

158. *Id.* at 540.

159. *Id.* at 559–65 (discussing *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971)).

160. My first close engagement as a participant in the interpretation wars was writing an amicus brief with Robert W. Hamilton to the Texas Supreme Court in *National Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517 (Tex. 1995), urging the Court not to adopt a hard form of what Texas lawyers call the four-corners rule to deny a liability insurance claim by a literalistic interpretation of the “absolute pollution exclusion” clause in the face of overwhelming evidence that the clause was meant to address a different type of claim. Brief on behalf of Cooper Industries, Inc. on Motion for Rehearing as Amici Curiae Supporting Respondents, *Nat’l Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517 (Tex. 1995) (No. D–4353). The Court did not change its decision, though it did revise the opinion to allow courts to consider evidence of the “surrounding circumstances” in deciding whether a contract is ambiguous. Compare *National Union*, 907 S.W.2d at 521, with *Nat’l Union Fire Ins Co v. CBI Industries*, 38 Tex. Sup. Ct. J. 332, 334 (Tex. Mar. 2, 1995), *withdrawn and superseded on rehearing*. This qualification to the rule has developed into an impressive body of case law and rules that would probably lead to a different result in *National Union*. See *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 768 (Tex. 2018) (explaining surrounding circumstances include “the commercial or other setting in which the contract was negotiated and other *objectively determinable* factors that give a context to the transaction between the parties” as well as “trade custom” and “trade usage”) (quoting *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011)) (emphasis added).

161. 172 N.E. 462 (N.Y. 1930).

change pending tariff revision.”¹⁶² The seller argued there was no commitment because it clearly reserved the power to change the price.¹⁶³ Cardozo brushed this argument off, noting “the letters between plaintiff and defendant were from one merchant to another. They are to be read as business men would read them, and only as a last resort are to be thrown out altogether as meaningless futilities.”¹⁶⁴ He took judicial notice of a debate in Congress over a tariff increase and explained that, in this context, the qualification obviously meant the price was contingent on no tariff increase.¹⁶⁵

Outlet Embroidery illustrates that courts can take a textualist approach while ascribing a pragmatic meaning to contract terms with little factual investigation when the necessary information is readily available, and only one of the competing interpretations is reasonable in light of this information.¹⁶⁶ Classical contract law (as described by the *Restatement (First) of Contracts*) actually allows a court to consider a fair amount of information under the category of “surrounding circumstances.”¹⁶⁷ This includes information about the commercial setting of a contract and about trade custom and trade usage.¹⁶⁸ Classical contract law imposes a semantic limit on “how far the words will stretch, and how alien from the ordinary meaning of the words is the intent they are asked to include.”¹⁶⁹ Under classical contract law, “buy” cannot be interpreted to mean “sell,”¹⁷⁰ at least as a matter of contract law. Under modern contract law, this is ok.¹⁷¹ But this type of issue rarely arises because people rarely do business in code. In many cases where a meaning is odd semantically, the oddity disappears once the transactional context of a term is understood. G–K’s point is that courts can resolve most such cases with limited evidence and a high degree of confidence in the accuracy of an interpretation because usually

162. *Id.* at 462–63.

163. *Id.* at 463.

164. *Id.*

165. *Id.*

166. Lifshitz & Finkelstein, *supra* note 141, at 525, make this point.

167. RESTATEMENT (FIRST) OF CONTS. § 235, cmt. e (AM. L. INST. 1932).

168. *Id.* (“[E]ven to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.”); *see also id.* § 230 (explaining that what is excluded is evidence of prior dealings between the parties, course of performance, and statements in negotiations).

169. *Id.* § 235 cmt. f.

170. *Id.* § 231 illus. 2.

171. RESTATEMENT (SECOND) OF CONTS. § 212 illus. 4 (AM. L. INST. 1981).

only one argued-for meaning of a term will make sense once a transaction is understood.

V. READING GERHART ALONGSIDE BENSON

This Part places Gerhart's account of contract law in the modern landscape of contract law theory alongside Peter Benson, *Justice in Transactions*.¹⁷² This pairing may seem odd because Gerhart and Benson have very different theoretical aspirations. Gerhart aspires to give an account of "the method of reasoning that persons ought to use to determine their promissory behavior," which he posits is the same "method of reasoning that judges use to implement doctrine."¹⁷³ Benson aspires to give an account of contract law that "is both internally coherent and morally sound,"¹⁷⁴ and that can serve as public justification of contract law within a "broader framework of liberal justice"¹⁷⁵ that is committed to "the freedom and equality of the parties."¹⁷⁶ Consistent with his justificatory goal, Benson takes on

172. BENSON, *supra* note 12. Gerhart's accounts of private law in general and contract law in particular also share much in common with Lon Fuller's account of private law. Like Gerhart, Fuller explained much of private law as institutionalized norms of human interaction. Compare GERHART, CONTRACT LAW, *supra* note 3, at 72, with Lon L. Fuller, *Human Interaction and the Law*, 14 AMER. J. JURIS. 1, 20–21 (1969). Like Gerhart, Fuller believed the private-law system of adjudication was capable of solving only fairly simple problems of corrective justice, and that it was not capable of solving problems of distributive justice or complex polycentric problems. Compare GERHART, CONTRACT LAW, *supra* note 3, at 86 ("[P]rivate, common law understands obligations to be self-imposed, as a natural implication of the risks that arise from choices."), with Lon L. Fuller, *Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom through Law,"* 54 COLUM. L. REV. 70, 81–82 (1954) (book review) (discussing corrective-justice limitations and advocating that the government should act to address distributive-justice problems). Like Gerhart, Fuller defined the field of problems that could be addressed by contract law expansively to cover all "branch[es] . . . of the law having to do with the protection of expectancies created by words or meaningful conduct . . ." Compare Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 2 (1939) (book review), with GERHART, CONTRACT LAW, *supra* note 3, at 86 (drawing a parallel between "activity choices" in tort law and bargaining choices in contract law).

173. GERHART, CONTRACT LAW, *supra* note 3, at xi.

174. BENSON, *supra* note 12, at xi.

175. *Id.* at xii.

176. *Id.* at 2.

contract law in its entirety and on its own terms. Gerhart's methodological goal allows him to set aside much of contract law, including rules he finds to be indeterminate¹⁷⁷ or a proxy for other reasons.¹⁷⁸

Despite these differences, I will argue their two accounts of contract law complement each other. Both argue that at the heart of contract law is a requirement that parties act reasonably within the parameters of an agreed exchange. Benson situates the requirement of reasonableness within a larger theoretical account of contract law and private law. While Benson's account is theoretically rich, it largely treats people as abstractions. Gerhart's account of the requirement of reasonableness is more empathetic and richer in analyzing individual cases. Their accounts of contract law also share some oversights. Neither considers how supplementary requirements for contract formation, like the statute of frauds and the definiteness requirement, extend the domain of independence and limited duty into contract formation. Neither addresses the important disagreement within contract law over whether the baseline contract is the parties' agreement in fact or terms in a writing the parties adopt as an expression of their agreement. More generally, neither adequately addresses the tension created by treating contract as a domain of reasonableness within a larger domain in which people are independent and owe limited duties to each other.

Benson's theory of contract is the current state of the art in moral theories of contract law. In the United States, moral theories of contract law begin with Charles Fried, *Contract as Promise*.¹⁷⁹ In a 2012 retrospective, Fried explains he wrote the book in reaction to the "anti-individualist and anti-capitalist" accounts of contract law, and to "assert the coherence of standard contract doctrine . . . based on a morality of autonomy, respect for persons, and trust."¹⁸⁰ Much the same could be said of Benson's theory. A difference is that Benson targets economic theories of contract, which largely postdate Fried's book. Within the field of moral theories of contract, Fried's theory is described as a promise theory while Benson's theory is described as a transfer theory.¹⁸¹

Like Gerhart, Benson's theory starts from the premise that, as a matter of private law, people are independent and owe limited duties

177. GERHART, CONTRACT LAW, *supra* note 3, at 3.

178. *Id.* at 112–16 (discussing formation doctrines).

179. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (Oxford Univ. Press 2d ed. 2015) (1981).

180. Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 18–20 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

181. For a succinct explanation of promise theories and transfer theories, the relationship between the two types of theories, and a critical analysis of both, see HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 25–40 (2017).

to others. In Benson's terms, a person is legally responsible only for an act or omission that impairs someone's exclusive rights "with respect to her body or assets."¹⁸² This premise poses a question for contract law that Benson believes a transfer theory answers. This question is how can a person subject herself to an obligation to another person by making a promise she does not perform when non-performance does not impair any right the promisee had before the promise was made?¹⁸³ Benson finds an answer to this question in the existence of private property and the need for a property owner to be able to transfer property to another person to obtain something they desire from the other person.¹⁸⁴ On Benson's account, an executory contract is similar to a barter-exchange of property.¹⁸⁵ The difference is that in an executory contract each party acquires ownership of a right to the performance promised by the other party. In a barter-exchange of property each party acquires ownership of property previously owned by the other.

Benson and Gerhart's accounts of contract law agree on several important points. As noted, they share the premise that, as a matter of private law, people are independent and owe limited duties to others. They draw a similar conclusion from this shared premise, which is that, when people make a contract, the agreed exchange defines their obligations.¹⁸⁶ They also agree that contract law imposes a general duty on parties to act reasonably within the framework of the agreed exchange. Benson explains implied terms as applications of this requirement of reasonableness: "Implication has to do with what a party can reasonably be held to presume of the other in the frame-work of their particular transaction."¹⁸⁷ He continues: "In a sense, the parties may objectively be viewed as having placed themselves under the protection of the reasonable, trusting in the law's articulation and upholding of it."¹⁸⁸ Like Gerhart, Benson endorses the requirement of good faith as "an open and general framework norm of reasonableness available to develop legal responses to a wide range of issues, and requiring parties to act with due regard for the contractually intended performance interests of

182. BENSON, *supra* note 12, at 7.

183. *Id.* at 5–8.

184. *Id.* at 325–42.

185. *Id.* at 334–35.

186. *Id.* at 362–63; *see supra* note 11 and accompanying text.

187. BENSON, *supra* note 12, at 143.

188. *Id.* at 144.

each other.”¹⁸⁹ Both also conclude the doctrine of reasonable expectations follows from this requirement of reasonableness.¹⁹⁰ I will come back to this point.

The requirement of reasonableness makes a great deal depend on the rules on contract formation, for these rules determine when and to what the requirement of reasonableness attaches. Benson addresses the main rules of contract formation at length. In his view, the requirement of consideration works in tandem with the requirement of offer and acceptance to specify “a definite kind of relation that is purely promissory but that at the same time, being fully and intrinsically bilateral, is distinct from the structure and normativity of the gratuitous promise.”¹⁹¹

Benson does not address formal requirements for contract that supplement the requirement of consideration and the requirement of offer and acceptance. The requirement of definiteness is one such formal requirement for contract. *Academy Chicago Publishers v. Cheever*¹⁹² illustrates how the addition of a definiteness requirement complicates the questions of when, and to what, the requirement of reasonableness attaches. Under classical contract law, a court will not enforce a contract, though the parties manifested an intent to make a contract, when a material term is “unduly . . . indefinite.”¹⁹³ This requirement was applied in *Academy Chicago Publishers* to justify not enforcing a contract despite the parties’ manifested intent to make a contract.

Franklin Dennis was a neighbor of the author John Cheever.¹⁹⁴ When John Cheever died, Dennis approached a small Chicago publisher, Academy, and Cheever’s widow, Mary Cheever, and negotiated a contract under which Franklin Dennis and Mary Cheever would co-author a collection of John Cheever’s unpublished stories.¹⁹⁵ Franklin

189. *Id.* at 157.

190. *Id.* at 215–40.

191. *Id.* at 102. Gerhart disagrees with Benson on this point. He downgrades the fact that a promise is made as part of an exchange to one of several factors that are relevant to the question of when a promisor has a legal duty to consider the well-being of a promisee before rescinding a promise. Gerhart would dissolve the rules of contract formation into a general rule requiring a person to show appropriate regard for the well-being of another when deciding whether to retract an apparent promise that altered the other’s decision space. See *supra* notes 95, 119 and accompanying text. Benson endorses the U.S. doctrine of promissory estoppel but he would place the doctrine in tort law. BENSON, *supra* note 12, at 73–74.

192. 578 N.E.2d 981 (Ill. 1991).

193. *Id.* at 983.

194. John Blades, *Unfinished Business*, CHI. TRIB. (Dec. 31, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-12-31-9204280913-story.html> [<https://perma.cc/XR9F-JQG4>].

195. 578 N.E.2d at 982.

Dennis was responsible for finding the stories.¹⁹⁶ He found a treasure trove of stories, and Mary Cheever reneged because she preferred to have the entire trove published in a single book by a major publisher.¹⁹⁷ The trial court gave Academy limited relief, declaring that Mary Cheever could satisfy the duty of good faith and fair dealing if she delivered ten to fifteen stories of her choosing totaling 140 pages.¹⁹⁸ Academy appealed, wanting more.¹⁹⁹ The Illinois Supreme Court held the contract was unenforceable on the ground of indefiniteness.²⁰⁰

The trial court's disposition of the case may not violate the requirement of reasonableness within the agreed exchange that Gerhart and Benson find in contract law. The argument that it does not is that Mary Cheever only agreed to co-author a collection of John Cheever's unpublished short stories. Consistent with this agreement she could have held out for the shortest and least valuable collection possible, for this, she could argue, was the baseline to which she agreed.²⁰¹ The disposition of the case by the Illinois Supreme Court is impossible to square with Gerhart and Benson's requirement of reasonableness unless one takes the position that the requirement of reasonableness attaches only once an exchange reaches a fairly high level of completeness.

Benson's transfer theory could easily encompass supplemental formal requirements for contract, such as the definiteness requirement, the mirror-image rule, and the statute of frauds.²⁰² A barter-exchange of tangible property is unlike an exchange of promises because tangible property is a physical thing that someone can possess. A barter-exchange of tangible property involves a transfer of possession, which is complete, observable, and verifiable. An exchange of promises need not be complete, observable, or verifiable. These supplemental requirements for a contract could be justified as responses to these differences. The definiteness requirement makes a promise capable of ownership only when a promise is sufficiently definite and complete. The mirror image rule requires the parties to agree on what is being transferred, eliminating one source of incompleteness. The statute of frauds requires proof of visible evidence of a promise or a transfer. More generally, one could argue that under a transfer theory of contract the paradigmatic

196. *Id.* at 983.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 984.

201. Whether this is the baseline to which the parties agreed is debatable. Perhaps the baseline is a longer book with the best stories Dennis could find.

202. Benson does not address these issues so it is not clear that he would incorporate formal requirements for contract into his transfer theory. My point is that one easily could.

contract would be a debt instrument given in return for performance rendered. A debt instrument literally is a property-like interest in the hand of a holder.

There is an argument that these supplemental formal requirements for contract follow from a principle both Gerhart and Benson accept. This is the principle that, as a matter of private law, people are independent and owe limited duties to each other. As explained earlier, this principle is embodied in private law rules that privilege the interests of a harm-doer over the interests of a harm-bearer in freedom from harm when a harm is non-physical.²⁰³ This principle also is embodied in equitable rules that provide only limited protection from unfair advantage-taking of power-conferring rules in contract and property law.²⁰⁴ The supplemental rules on contract formation could be explained as extending the domain of independence and limited duty to contract formation. Rules like the statute of frauds and the definiteness requirement resolve a disagreement about the existence of a contract in favor of the party denying a contract, privileging her interest over the interest of the party claiming a contract.

Or Benson might reject these supplemental formal requirements for contract and insist that the only requirements for contract are consideration plus offer and acceptance. I believe this is close to Gerhart's position.²⁰⁵ In eliminating these supplemental formal requirements for contract, Gerhart and Benson could take the position that people's independence from unchosen contractual obligation is adequately protected by other rules that give people the unilateral power to avoid being under a contractual obligation. The rules on offer and acceptance give a person communicating about a prospective contract the unilateral power to reserve discretion whether to make a contract by clearly stating that a communication solicits an offer and is not an offer. It is as simple as saying "Would you like to make me an offer?" A person negotiating a contract has the unilateral power to reserve the power to back out for any reason by clearly stating that formation of a contract requires execution of a final agreement, and that they are under no obligation until this is done.²⁰⁶ Contract law may require that

203. *See supra* Part II(B).

204. *See supra* Part II(A).

205. A difference in their position is Gerhart would also weaken the presence or absence of consideration to only being a factor that is considered in deciding whether a contract has been made. As noted earlier, modern contract law points in this direction, for it weakens the requirement of definiteness and the statute of frauds. Modern contract law also weakens the consideration requirement.

206. *A/S Apothekernes Laboratorium v. I.M.C. Chem. Grp., Inc.* 873 F.2d 155 (1989) (describing letter that stated that it was subject to approval by the boards of directors of both parties "whose discretion shall in no way be limited.").

a person who wants to reserve this power clearly communicate this intent to another person. But it does not require they obtain the consent or agreement of someone with whom they negotiate for them to have this power.²⁰⁷ Once this power is reserved, there is no requirement of reasonableness in its exercise, and no duty to consider the well-being of the other person, so independence is preserved.

These supplemental formal requirements are one solution to a practical problem. Contract formation cannot be determined in a straightforward way by establishing a few simple rules of expression—like the rules on offer and acceptance—and then sitting back and relying on people to use these rules to express their intent. The problem is people often do not conform their conduct to simple rules of expression. Often it is unclear in applying simple rules of expression whether people intended to make a contract or the terms on which they agreed.

If the definiteness requirement and the statute of frauds were eliminated, then the presence of indefinite material terms and the absence of a signed writing would remain important factors in deciding whether there has been an offer and acceptance when communications are ambiguous. And they would remain important factors in deciding in an ambiguous case whether an agreement preliminary to execution of a written contract is a legal nullity, a promise to negotiate in good faith, or a contract that will be memorialized in the executed document. The effect of eliminating these requirements is that the absence of a signed writing or the presence of material indefinite terms would not be a basis for dismissing a claim under a more or less bright-line rule focused solely on this fact. Instead, these would be factors to be considered alongside other factors in applying simple rules of expression.

The supplementary formal requirements for contract are not the only formal rules of contract law that Gerhart and Benson slight. They say nothing about the parol-evidence rule. This is a telling oversight, for the classical form of the parol-evidence rule rests on a premise that is at odds with the premise of their argument for the reasonable-expectations doctrine. Gerhart and Benson assume the baseline agreed exchange to which the reasonableness requirement attaches is the parties' agreement in fact. If you accept this assumption, then boilerplate terms in a form contract should be subject to the requirement of reasonableness because a form-taker does not actually agree to these terms.

Under the classical form of the parol-evidence rule, the agreed exchange is the terms in a writing the parties adopt as an expression of

207. Compare what is required to negate a potential obligation to pay for benefits received in the law of restitution. This requires the agreement of the other party. *See* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION & UNJUST ENRICHMENT § 5 (AM. L. INST. 2011).

their agreement.²⁰⁸ A term on which the parties actually agree is discharged if the term does not appear in the writing, if the term would ordinarily be in such a writing.²⁰⁹ Importantly, under the classical form of the parol-evidence rule, a court does not consider the strength of the evidence showing that the parties intended the term to be part of the agreed exchange.²¹⁰ A court is instructed to discharge a term if it would ordinarily be in the writing.²¹¹ Thus, in *Mitchill v. Lath*²¹² the seller's promise to the buyer of an expensive country retreat to move an unsightly icehouse on neighboring property was held discharged even though the court conceded this promise was part of the parties' agreed exchange.²¹³ Judge Andrews observed that in applying the parol-evidence rule, the court was "not dealing . . . with [the seller's] moral delinquencies," it was achieving "the purpose behind the rule . . . [n]otwithstanding injustice here and there."²¹⁴ This purpose is to confer on a party to a contract the power to use a writing to determine the terms of an agreed exchange by obtaining the other's assent to the writing as an expression of an agreement.²¹⁵

The so-called duty-to-read rule also serves this purpose.²¹⁶ Under the duty-to-read rule, a person who adopts a writing as an expression of an agreement is treated as having assented to all of the terms of the writing, even if the person has not (and even if they could not) read

208. RESTATEMENT (SECOND) OF CONTS. § 213 (AM. L. INST. 1981).

209. *Id.* § 216(1) & cmt. d.

210. *See id.* § 216 cmt. d ("[E]vidence of the consistent additional terms is admissible unless the court finds that the writing was intended as a complete and exclusive statement of the terms of the agreement.").

211. *Id.* § 216(1) & cmt. d.

212. 160 N.E. 646 (N.Y. 1928).

213. *Id.* at 649–50.

214. *Id.* at 646–47.

215. The different positions of Corbin and Williston on whether a judge could consider extrinsic evidence in deciding whether a parol agreement was discharged because it was not included in a written instrument can be attributed to a disagreement over whether the parol evidence rule serves an evidentiary purpose or formal purpose. Williston took the position that a judge should not consider extrinsic evidence in applying the rule, which suggests the rule is intended to serve a formal purpose. Corbin took the position that a judge should consider extrinsic evidence in applying the rule, which suggests the rule is intended to serve an evidentiary purpose. John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 337–39 (1967).

216. This is a poor name for the rule because people generally do not, and are not expected to, read writings they adopt as an expression of an agreement.

the terms of the writing.²¹⁷ The duty-to-read rule makes a term in a writing part of a contract even though there is no actual agreement to the term. The parol-evidence rule excludes a term *not* in a writing from a contract, even though there is actual agreement to the term, when the term would normally be included in such a writing. Under both rules, the terms of an agreed exchange are determined by the writing the parties adopt as an expression of their agreement and not by the parties' actual agreement.

Like other power-conferring rules, the parol-evidence rule and the duty-to-read rule are subject to weak equitable safeguards. A person cannot take advantage of another person's mistake about the contents of a writing if they are responsible for the mistake (generally meaning they knew or had reason to know of the other party's mistake).²¹⁸ There is a large gap between this rule and the doctrine of reasonable expectations. The doctrine of reasonable expectations negates a term in a form if the form-maker would predict the form-taker would reject the contract, if the form-taker was aware of the term.²¹⁹ Equity negates a term in a form if the form-maker knows or has reason to know the form-taker has objected to the term.²²⁰

The shaky legal foundation of Gerhart and Benson's argument for the reasonable-expectations doctrine is a bigger challenge to Benson than it is to Gerhart because of Gerhart's more modest theoretical aspirations. Gerhart aspires to explain the method of other-regarding required in a contract when there is a duty to engage in other-regarding reasoning. He does not aspire to provide a theory that explains when a duty of other-regarding reasoning exists. This could be determined by convention, by policy-based reasoning, or by stipulation. Benson aspires to provide a theory that explains all of contract law using principles derived from contract law and without the need to refer to values external to contract law such as efficiency, fairness, and distributive justice.²²¹

It is hard to see how principles derived from contract law can resolve the disagreement between modern contract law and classical contract law over what the baseline agreed exchange to which the requirement of reasonableness attaches is.²²² One would have to show

217. *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 223 (3rd Cir. 2008).

218. *Sisneros v. Citadel Broad. Co.*, 142 P.3d 34, 40–41 (N.M. Ct. App. 2006).

219. RESTATEMENT (SECOND) OF CONTS. § 211(3) & cmt. f (AM. L. INST. 1981).

220. *Id.*

221. BENSON, *supra* note 12, at xi.

222. Robin Bradley Kar and Margaret Jane Radin argue that “[r]egardless of one’s normative theory of contract, the central focus of justification is on the enforcement of common terms that parties agree to when they form

that one definition of the baseline agreed exchange was so inconsistent with the rest of contract law that it could be rejected as a misfit. Classical contract law and modern contract law also disagree on whether there should be strong supplemental formal requirements for contract, like the statute of frauds and the definiteness requirement. Again, it is hard to see how principles derived from contract law can resolve this disagreement.

Critics of moral theories of contract have argued that moral theories are incapable of resolving these sorts of issues. Hanoch Dagan and Michael Heller refer to this as the “irrelevance thesis”²²³ This challenge was first made by Richard Craswell to Fried’s promise-theory of contract.²²⁴ The challenge is “that because promise-keeping relies on a plastic or malleable social convention—one that need not take any particular form or have any specific content—it is (almost) irrelevant to contract law.”²²⁵ Transfer theories run into the same problem, Dagan and Heller observe, for “[n]either the range of transferability, nor even its inclusion within the scope of an owner’s entitlement, is self-defining. . . . There is no inevitable content to the concept . . . and no arbitration among the different available conceptions is possible without pre-commitment to some normative apparatus.”²²⁶ This critique focuses on the definition of the “range” and “scope” of what is transferable by contract.²²⁷ A similar point could be made about the ability of a transfer theory to resolve the specific form of a transfer.

Benson does not claim that transfer theory resolves these issues, so we must dig a little deeper to see if his account of contract law is subject to the irrelevancy challenge. Benson looks to contract law to define the basic range and scope of what is transferable by contract. He also looks to contract law to define the basic form of a transfer. Benson extracts moral principles from contract law and then uses those moral principles to develop and evaluate more fine-grained details of contract law. His treatment of implied terms illustrates. Benson responds to Craswell’s argument that an autonomy-based theory of contract (such as Benson offers) is “wholly content-neutral and therefore . . . cannot offer *any* guidance *at all* as to which terms, if any, should be implied . . . [and]

contracts.” *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1138 (2019). Kar and Radin do not explain why an autonomy theory of contract could not make the baseline agreement terms in a writing parties assent to as an expression of their agreement. Nor do they address the shaky legal foundations of this premise.

223. DAGAN & HELLER, *supra* note 181, at 23–24.

224. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 529 (1989).

225. DAGAN & HELLER, *supra* note 181, at 23.

226. *Id.* at 36.

227. *Id.*

must therefore refer to other, mainly instrumentalist, nonpromissory grounds.”²²⁸ Benson claims the requirement of reasonableness within the framework of the agreed exchange has the capacity to “guide the when, what, and how of implication.”²²⁹ He also claims this method of deriving and explaining implied terms is superior to other methods because it “reflects the fundamental normative nature of contractual rights and obligations.”²³⁰

Benson may well be right that the requirement of reasonableness is a good basis for filling gaps in contracts once the parameters of the agreed exchange are set. But the requirement of reasonableness cannot determine the existence or parameters of an agreed exchange. Thus the question is whether the normative principles that Benson extracts from contract law can determine the parameters of the agreed exchange?

Benson’s normative principles may be able to do some of this work, but they cannot do all of the work that needs to be done. Consider two debates involving U.C.C. § 2-207 and the “battle of the forms.” One debate concerns how to apply § 2-207 when two companies make a contract by an offer with terms on an accompanying form and an apparent acceptance with additional or different terms on an accompanying form.²³¹ Under the mirror-image rule in classical contract law, the apparent acceptance is treated as a counter-offer.²³² When the original offeror performs or accepts performance, this is treated as assent both to a contract and to the terms on the form accompanying the apparent acceptance. This is called the last-shot rule.²³³ Section 2-207(2) was drafted to change this result.²³⁴ It treats an apparent acceptance as assent both to a contract and to the terms on the form

228. BENSON, *supra* note 12, at 129 (emphasis in original).

229. *Id.* at 130. Gerhart makes a similar claim about the efficacy of the requirement of reasonableness as a tool for filling gaps in a contract as compared to gap-filler rules. GERHART, *CONTRACT LAW*, *supra* note 3, at 126–31.

230. BENSON, *supra* note 12, at 132.

231. Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343 (1997), elegantly states the points made in this paragraph. Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2681–82 (2000), offers a different perspective and reviews other reform proposals.

232. Keating, *supra* note 231, at 2683.

233. *Id.* at 2684.

234. *Id.* at 2685.

accompanying the original offer.²³⁵ This is called the first-shot rule.²³⁶ There is a good argument that both approaches are wrong and that the appropriate solution in such cases is to make the baseline agreement terms to which the parties actually agree plus those on which the forms agree.²³⁷ A term that appears in only one form becomes part of the contract only if the term is reasonable within the parameters of the agreed exchange.²³⁸ This solution is possible once the parties' baseline agreement is defined as the terms on which the parties actually agree plus the terms on which their forms agree.

The other debate concerns whether to apply § 2-207 to what is called a "shrink-wrap agreement." Under the majority rule in the United States, a purchaser of a good manifests assent to terms on a form enclosed within the good's packaging so long as the purchaser is clearly told they have the power to reject the good by returning the item.²³⁹ Keeping the good is treated as legally equivalent to signing the form.²⁴⁰ Importantly, the rule in § 2-207(2)(b) does not apply to protect a purchaser from a term in a form that materially alters the contract.²⁴¹ The validity of the majority rule on shrink-wrap agreements in the United States cannot be determined by applying the requirement of reasonableness, for the rule is a formation rule that determines the terms of the agreed exchange. The majority rule on shrink-wrap agreements is similar to other rules in contract law that look to a writing parties adopt as an expression of their agreement, and not to the parties' agreement in fact, to determine the terms of an agreement.

The requirement of reasonableness cannot resolve these debates because the requirement can be applied only once the agreed exchange is determined. More generally, the requirement of reasonableness cannot determine when people are in a contractual relationship because this would expand the domain of contract (and the requirement of reasonableness), which would shrink the domain in which people are

235. Section 2-207(2) gives the offeror the upper hand by treating a purported acceptance as an acceptance of the offer with additional (and perhaps different) terms in the acceptance becoming part of the contract only if the terms do not "materially alter" the contract. An offeree can avoid this rule by making a counter-offer or an "expressly . . . conditional" acceptance so a contract is not formed under § 2-207(1). U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM'N 1977).

236. Keating, *supra* note 231, at 2688.

237. This is the rule in U.C.C. § 2-207(3) when a contract is not formed under § 2-207(1).

238. This result is achieved by applying the materially alter test in § 2-207(2)(b) to both forms.

239. DeFontes v. Dell, Inc., 984 A.2d 1061, 1068–70 (R.I. 2009).

240. *Id.*

241. *Id.* at 1070.

independent and owe limited duties to others. This is not just a theoretical possibility. If a claim for negligent misrepresentation was allowed for representations regarding prospective contracts, then people would be less independent, and they would owe greater duties to others, when they communicate regarding a prospective contract.

The principles of autonomy Benson extracts from contract law are capable of resolving some issues in this area. They can explain a rule about which there is no debate. This is the rule that for there to be a valid shrink-wrap agreement a buyer must be given an opportunity to return a good, if the buyer does not assent to terms and conditions enclosed in a good's packaging. This must be the rule for if it was not a seller would have the power to impose terms on a buyer. Benson's principles also are capable of resolving the debate about the relative merits of the last-shot rule, the first-shot rule, and the rule in U.C.C. § 2-207(3) in the basic battle of the forms case. In this case, both parties proceed with a transaction while transmitting a writing that demands that any contract is on their terms and conditions. I believe Benson's principles require the rule in U.C.C. § 2-207(3) in this case for only this rule treats the two parties as equals.

But I do not think Benson's principles are capable of resolving the debate over the application of the materially alter test in U.C.C. § 2-207(2)(b) to a shrink-wrap agreement. His principles cannot prevent a person from demanding that assent to a transaction is assent to terms on their form as the baseline of the agreed exchange. To deny people this power would violate their autonomy. Nor can Benson's principles preclude a person from having the power to accept a contract on terms in a form they choose not to read. Imposing this restriction would violate a form-taker's autonomy, which surely includes the power to make a contract on terms the form-taker chooses not to read. But a rule that gives effect to unread terms violates the autonomy of other form-takers who surely have the power to make a contract without having to read a form that people are expected not to read to ensure the form does not contain terms to which they object.

To be clear, this is not a defense of the majority rule in the United States on shrink-wrap agreements. The only point I am making here is that the validity of the rule cannot be determined by principles derived from contract law, by the requirement of reasonableness, or by Benson's principles of autonomy. The validity of the rule can only be determined by what my colleague and co-author, Melvin Eisenberg, describes as social propositions that relate to efficiency, fairness, and distributive justice.²⁴²

242. MELVIN A. EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW 5-6 (2018).

CONCLUSION

When Peter asked me if I would organize a panel on his new book on contract law for a conference in February 2020, I readily agreed. I had read his book on tort law and was interested in reading what he had to say about contract law. As one does, I used the occasion to say something about his book that I wanted to say anyway. This is that moral theories of contract present a misleadingly idealized view of how contract functions as an institution. Moral theories describe contract as “promise,”²⁴³ “consent,”²⁴⁴ “collaboration,”²⁴⁵ and “empowerment.”²⁴⁶ All good things. The title of Peter’s book, “Contract Law and Social Morality,” has a similar vibe. The cover photo of two people working together to climb a rock has the same vibe. Benson’s title, “Justice in Transactions: A Theory of Contract Law,” also has this vibe.

The point I made then is that we might provide a more accurate view of contract law as an institution if we emphasized the association of contract with debt. If we were more emphatic about the association of contract with debt, then we would treat legal rules on debt collection as part of the law of remedies. Rather than talking about the morality of promise-keeping we would talk about the morality of default and collection. And we might even talk about the difference between debts owed by entities that shield the wealth of their owners from claims and debts owed by individuals. Relatedly, I speculated whether we might provide a more accurate view of contract law and property law together—i.e., of the basic rules of private ordering—if we emphasized the concept of a “legal instrument” as the most basic building block of private ordering in our world. The traditional property course focuses on ownership and use rights in real resources (i.e., land and chattels). Most of the wealth people hold is represented by legal instruments. Much of this wealth is mediated through debt instruments that give the rentier class claims against the labor income of the debtor class.

I chose not to use this article to make these points for this would slight Gerhart’s contribution in identifying and fleshing out a requirement of reasonableness that runs through much of private law. Gerhart is right. Much of private law is just a command that people treat other people reasonably. Gerhart is also right that, insofar as private law is concerned, this requirement of reasonableness does not apply to people’s use of their wealth or to the exercise of power created by social hierarchies. Not surprisingly, treating contract as a domain of

243. FRIED, *supra* note 179, at 1.

244. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986).

245. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1419, 1420 (2004).

246. Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 761 (2016).

reasonableness within a larger domain of liberty and limited duties to others creates a tension within contract law. I cannot fault Gerhart for downplaying aspects of contract law that enable people with power to use the law to pursue their own ends with little regard for the well-being of people without power. It was Peter's optimism about people and society that enabled him to capture the melody of reasonableness that runs through much of private law.