

TOWARD A REFORMULATION OF THE LAW OF CONTRACTS

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Many of the problem areas in the law of contracts stem from the historical fact that the law of contracts has been fashioned out of material that does not fit together logically. Some jurists view contracts as conventions serving to secure people's expectations.^[1] These jurists, who support their approach by invoking the allied philosophical traditions of utilitarianism and pragmatism, have tried to make the law of contracts a device to protect parties who rely on promised advantages. Therefore, these jurists want law-enforcement processes to make people live up to the expectations they arouse in others.

On the other hand, other jurists, particularly those who base their legal theory upon the natural rights philosophical tradition, view contracts as instruments by which rights to things (both present and future alienable goods) are assigned, delineated, transferred or exchanged.

Because there have been influences from these two conflicting approaches, the law of contracts as now constituted has many internal inconsistencies. It is true of positive law in general, as it is of such particular fields as the law of contracts, that in order to facilitate human social life such law must be sensible, coherent, and consistent. This is a necessary but not a sufficient attribute of a sound legal system. The law must also properly order real-world social life in a way that is in accord with human nature. In both these endeavors, reason and logic must function as guidelines for the discovery of sound law.

At present, the law of contracts is predominantly influenced by the expectations-oriented approach.^[2] This expectations model has its historical origins in the medieval action of *assumpsit*, within the evolution of the common law, but it has received a full-blown philosophical

defense and intellectual sustenance from the utilitarian-pragmatist tradition.

HISTORY

The present Anglo-American law of contracts developed as part of the English common law. It should be noted, however, that apart from the common law there existed channels in which laws of contract also developed. In the canon law of the Church and in the customary law of merchants, mere promises (with no consideration) were recognized as binding. Each of these legal systems had a profound influence on equity decisions and an indirect influence on the common law.^[3]

In pre-Norman medieval England, ownership was thought of largely in terms of physical possession.^[4] Debts were thought of as bailments in which a specific set of chattels (conceived of as belonging to the lender throughout the period of the loan) were turned over to another person to be returned at a later date. Debt in this period of English legal theory was viewed by the law in the way that today one might view lending a neighbor a lawnmower. The lender kept his property-right relationship to the items loaned. If the debtor did not return the items lent to him, then he was sued for unjustly detaining the lender's property. Such detention was considered an aggressive tort analogous to trespass upon land. In the early legal theory of medieval England, then, the creditors' remedies at law regarded default as delictual and not as contractual in the modern promissory sense.^[5]

In medieval England there were various writs that were common law remedies in commercial transactions. There were *detinue* (for bailments on specific chattels or against a seller for the chattels in a bargain and sale), *account* (to secure

trusts for the payment of money), *covenant* (where the transaction was recorded in a sealed instrument), and *debt* (for a specific amount of money or of undifferentiated chattels).

Most of the various writs that could be used in commerce — *detinue*, *account*, and *debt* — were actions intended to reclaim and recover property. They were *real* actions, actions *in rem* aimed at securing property. They were not *personal* actions aimed at enforcing personal obligations or duties. This network of remedies for obtaining justice in commercial transactions was upset, according to Edward Jenks, by the Norman Conquest. The deeply feudal Normans did not recognize the legitimacy of a real action to recover a chattel; they recognized only such real actions that concerned land owned under freehold tenure.^[6]

There were in medieval England also actions of *trespass* (for cases of direct violent injury) and of *trespass on the case* (for cases of indirect injury due to negligence). This action of trespass on the case was extended after the Norman Conquest from instances of misfeasance and malfeasance to instances of nonfeasance where an undertaking was promised (and where there was consideration: a detriment to the promise stemming from reliance). This new action was *assumpsit*. Early *assumpsit* writs were for negligence, for impelling those in certain statuses (innkeepers, common carriers, etc.) to fulfill their callings, and for compelling the performance of activities undertaken.^[7] *Assumpsit* eventually supplanted the older action of *debt* and the other old writs pertaining to commerce.

The origins of *assumpsit* lay in the law of torts, but it became the basis of the law of contracts. *Assumpsit* brought to the fore an emphasis on duties and obligations deemed to arise from a promisee's reliance on a promised expectation. *Assumpsit* underplayed the conveyance of title that takes place in commercial transactions. On the one hand, *assumpsit* boldly enjoined the enforcement of promises. On the other hand, *assumpsit* refused to recognize as legally binding contracts, promises that were not given for good consideration. Jenks suggests that the legal doctrine of consideration has a mixed parentage. The

positive element requiring recompense or benefit to the promisor is descended from the older action of *debt*: In order to bring the action of *debt*, there had to be a physical object that was unjustly detained. The negative element requiring detriment to the promisee is derived from the requirement of damage in order to support an action to trespass on the case.^[8]

The doctrine of consideration introduces considerable logical discord into the law of contracts. The idea of consideration has its roots in the older idea that a breach of contract was a form of theft or injury to a property right. This clashes directly with the predominant view, after the creation of *assumpsit*, according to which a breach of contract is the breaking of a promise.

THE EXPECTATIONS-ORIENTED APPROACH

At present, the law of contracts is predominantly influenced by the expectations-oriented approach and the pragmatic-utilitarian tradition which sustains that approach. Nonetheless, pragmatist Roscoe Pound once noted that the law of contracts did not as yet fully conform to the expectations model, though he hoped someday it would:

In a developed economic order the claim to promised advantage is one of the most important individual interests that press for recognition. If it is a task of the legal order to secure reasonable individual expectations so far as they may be harmonized with the least friction and waste, in an economic order those arising from promises have a chief place. Credit is a principal form of wealth. It is a presupposition of the whole economic order that promises will be kept. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item. But the law has been slow in coming toward this demand of the economic order, and Anglo-American law has not fully secured individual interests in promised advantages to the extent of the jural postulate of the economic order.^[9]

Pound's lament that the lawmakers have not consistently cleaved to the idea of security of expectations is eloquent. But careful scrutiny of the expectations model will show that it is unsatisfactory in important respects.

The first question to be raised is: Why should the law enforce promises? Keeping one's promises may well be part of leading a good, morally correct life. But being considerate

toward one's spouse is also morally excellent — yet it is not a concern of the police. Keeping promises may enhance one's reputation. But that should be incentive enough to keep promises normally, without judicial involvement. If law enforcement is to take on the task of enhancing people's reputations, irrespective of their wishes, let this task be argued for directly. Many aspects of social life may well be facilitated, as Pound argues, by stability and predictability. But the marketplace can meet consumer demand in these areas. In some cases, insurance schemes may be used to pool risks. In other cases, performance bonds may be used to make erratic conduct costly. Both these marketplace remedies require only a legal approach treating contracts as transfers of title. Thus, despite Pound's eloquence, it is not immediately clear that courts and law enforcement agencies should hold people to their promises *per se*.

Legal theorist Lysander Spooner viewed contracts as conveyances of property titles. From his stance within the natural-rights philosophical tradition, Spooner criticized the apotheosis of promise:

The words, "I promise", are no essential part of the contract. Nor is a formal promise in any case essential to the validity of a debt — that is, to the obligation to deliver money that has been sold and paid for. A man may make as many naked promises to pay money, as he pleases, and they are of no obligation in law. On the other hand, if a man have received value from another, with the understanding that it is not a gift, or that an equivalent is to be paid for it, the debt is obligatory — that is, the obligation to deliver the equivalent is binding — whether there be any formal promise to pay or not. This we see in the case of goods sold, and charged on account. And the obligation to deliver the equivalent consists in this — that it, (the equivalent or money) has been bought and paid for, and now actually belongs to the creditor or purchaser, as a matter of property. The promise, then, is a matter of mere form in any case, and of no importance to the validity of an obligation to deliver an equivalent, that has, by contract, (consent), been exchanged for value that has been received. It may be important as evidence of the contract; but it is no part of the contract itself; that is, it of itself, conveys no rights of property to the promisee, and no rights of any, to the equivalent promised, which he would not have without any formal promise.

But it may be said, (and this is the language of the lawyers) that where a man has paid a *consideration* for promise, there the promise is binding. but the truth is, (as has before been stated), that a man never pays a consideration for a *promise*. He simply pays an equivalent, a price, or consideration, for the *thing promised*. And his right of property to the thing promised, of course, attaches at the time of the

contract — at the time he pays the equivalent of it — or it can never attach at all. And *then* the promise to deliver, or pay it, (the thing promised), is made solely as evidence that it (the thing promised) has been sold, and now belongs to the promisee as a matter of property.¹¹⁰

Despite Spooner's misleading emphasis on exchange of equivalents (an emphasis that stems from his economic theory of value), the concept of transfer or exchange of property titles figures prominently in Spooner's analysis of contract. It is not promising which is essential, Spooner noted, but rather the transfer of title to an alienable good. Such a title-transfer model for the law of contracts is an alternative to the expectations-oriented approach.

Both the title-transfer model and the promised expectations model are more logically defensible and consistent than the present mixed content of the law of contracts. But building contract rights and remedies on a foundation of promised expectations presents difficulties. If one has the right to the fulfillment of promised expectations, should the law enforce specific performance (including the performance of personal services), or should the law demand payment of the pecuniary equivalent of performance, or should the law demand compensation for all costs incurred because of reliance on the promise? Some examples will help illustrate these difficulties.

Suppose my uncle promises to pay my way through Harvard. He comes through with the money the first three years. But the fourth year he says, "Business was not good this year. I'm sorry, but I can't pay for you this year". Meanwhile, in reliance of my uncle's original promise, I have planned out my life, have neglected to get a summer job, and so forth. Should I have any legal remedy against my uncle?¹¹¹

If one wishes to afford security to expectations, as Pound does, my uncle should have a binding legal obligation to come up with the scholarship money once promised, even if the promise has not been relied on.

If one wishes to protect reliance on expectations, my uncle should be estopped to deny liability for the cost I have incurred because of reliance. Under promissory estoppel theory then, my uncle would be held liable for damages to the

extent of my reliance on his promise.

On the other hand, under the title-transfer model, I would have no valid claim upon my uncle's property. This is because he still retains the absolute title to it.¹²² My uncle has made a mere promise, what was called a *nudum pactum* in Roman law¹²³. No formal transfer of title has taken place.

Let us change the example somewhat. Suppose my uncle says he will pay my way through Harvard if I will come to dinner every week to tell him about what I have learned. In this case, under the title-transfer model, my uncle has made a conditional transfer of title. It does not matter whether title-transfer or promissory language is used in the transaction. As Spooner pointed out, one is not entitled to the *promise* but to the alienable *thing* that is conditionally transferred. If I accept and I perform the services which are the condition for receiving the scholarship, then I am legally entitled to it¹⁴¹.

Needless to say, under the title-transfer model, if my uncle explicitly transfers title to the money to me at the time of the original discussion about college, then this gift is mine absolutely. It would, of course, also be mine under the promised expectations approach.

To take a different example, suppose I contract with a construction firm to have a building erected. The firm, however, does not put up the building at all, or does not put it up on time, or does not put up the sort of building described in the contract. Should I be able to compel the construction firm to go through with the positive act of putting up the building¹⁵¹? Should I be able to sue for damages¹⁶¹?

According to the logic of the expectations model, I should rightfully be able to force the firm to put up the building. But in order to compel specific performance, I would have to make the construction firm's personnel forced laborers for me¹⁷¹.

The involuntary servitude involved here is more starkly apparent in another example. Suppose an opera singer or a comedian promises to show up for a performance, but doesn't. Should it be lawful to capture him and force him to perform?

Some courts have attempted to get around

being in the position of enforcing obvious slavery by instead issuing an injunction that while it doesn't compel specific performance of personal labor, does prohibit the enjoined party from engaging in any alternative remunerative work¹⁸¹. While this is more discreet than kidnapping or forced labor, it is still the enforcement of a slave contract.

Both the rationale for compelling specific performance of a contract requiring human labor (a rationale which the courts today do not follow) and the rationale for breach-of-contract damages imply that one can properly have an enforceable legal claim to one's expectations. Yet this is not so. Suppose that a woman who is eligible for marriage leads a suitor to believe that his suit is favored. (He may even incur expenses in reliance of this expectation.) Yet in the end his suit is rejected, and his proposal is turned down. What sort of right should and does this suitor have to the fulfillment of his reasonable expectations. None. People cannot really have a property right to their expectations, which are mere subjective mental states. Neither should the law attempt to give them any such rights.

If we reconsider, under the title-transfer model, the construction firm example given above, we find quite different results from what the expectations model gave us.

If the non-performing construction firm received pre-payment for the work, the law under the title-transfer model will force the firm to restore the money. Transfer of title was conditional on performance of the work.

The original contract might have included a performance bond (according to which title to certain amounts of the firm's money would be transferred to the landowner if such conditions obtained as misfeasance, nonfeasance, or completion behind schedule). Such a performance bond is perfectly compatible with the title-transfer model.

If the construction firm damaged the landowner's physical property, the firm would be liable for damages.

But, under the title-transfer model, it would be illegitimate to compel the construction firm to build. Any expenses incurred because of reliance are simply the costs of poor entrepre-

neurship on the part of the landowner⁽¹⁹⁾. This is the proper assignment of risk-bearing.

THE TITLE-TRANSFER MODEL

Spooner and other legal philosophers like Immanuel Kant have constructed theories of the law of contracts based on property titles rather than on promises⁽²⁰⁾. Fully developed and in pure form, such a legal theory would consider contracts solely as instruments by which titles to alienable goods are assigned or transferred.

An adequate title-transfer model must distinguish between alienable and inalienable goods. One cannot sell one's "true gratitude", because it is the product of an inalienable attribute — the will. Living human beings always are possessed of a will, and any attempt to deprive them of control over it is an attempt at dehumanization. Compelling personal service or compelling specific performance of labor is an illegitimate attempt to alienate another's will⁽²¹⁾. Likewise a human cannot rightfully alienate his liberty of will and sell himself into slavery. The argument against the validity of slave contracts was cogently set forth by Rousseau in *The Social Contract*:

To renounce liberty is to renounce being a man to surrender the rights of humanity and even its duties... Such a renunciation is incompatible with man's nature; to remove all liberty from his will is to remove all morality from his acts. Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other unlimited obedience. Is it not clear that we can be under no obligation to a person from whom we have the right to exact everything? Does not this condition alone, in the absence of equivalence or exchange, in itself involve the nullity of the act? For what right can my slave have against me, when all that he has belongs to me, and, his right being mine, this right of mine against myself is a phrase devoid of meaning⁽²²⁾?

John Stuart Mill adds further arguments against the supposed right to sell oneself into slavery:

In [Great Britain] and most other civilized countries... an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law or opinion... The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him,

and his own good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself... It is not freedom to be allowed to alienate his freedom⁽²³⁾.

To extend Mill's argument and put it in Lockean terms, all philosophical defenses of human rights to life, liberty, and estates (other than the contention that such rights are privileges granted at the convenience and pleasure of the sovereign) are founded upon the natural fact that each human is the proprietor of his own will. To take rights like those of property and contractual freedom that are based on a foundation of the absolute self-ownership of the will and then to use those derived rights to destroy their own foundation is philosophically invalid. Using a piece of equipment mounted on the upper stories of a building to knock out the foundations of the same building will do nothing but bring down the entire edifice.

One can readily see that a suit for breach of promise of marriage or arresting people for desertion from the military are entirely consistent with the promised expectations model. But under the title-transfer model, promises of marriage would be naked promises (an interesting thought), employees of the military would be free to quit their jobs as other persons are, and divorce would be no-fault.

Restrictive covenants

Under the title-transfer model, the rights pertaining to different aspects of some piece of property could be divided up among several actual owners. For example, one person might own a copy of a book and another person might own the right to make copies of the book (the copyright). Such a right would have to belong to some existing owner (whether person or corporation) to have effect under the title-transfer model⁽²⁴⁾. Covenants and deed restrictions could not simply "run with the land".

An example will serve to illustrate how restrictive covenants might work. *A* might sell *B* item *X* reserving in *A*'s possession the right to sell or loan the item to non-Catholics. *A* could then exercise this restrictive covenant by never selling or loaning to non-Catholics. In a different

case, *A* might sell *B* the deed to Blackacre reserving in *A*'s possession the right to construct all buildings over five stories high. The restrictive covenant in both cases is a right belonging to *A* which *B* or some other party subsequently could acquire in a manner analogous to a homesteading if *A* or his assignees abandon it, could purchase, or could receive as a gift.

Product warranties

Product warranties would have legal recognition under the title-transfer model, not because they are promissory representations⁽²⁵⁾, but because they describe one of the entities, the title to which is changing hands in the contract. Product warranties are part of the terms of the contract. If the entity is not as described, fraud (and therefore implicitly theft) has taken place⁽²⁶⁾.

Creditor's forgiveness of a debt

A creditor's forgiveness of a debt in whole or upon partial payment has been questioned as to whether it could be considered a binding contract⁽²⁷⁾. The creditor receives nothing (no consideration) to which he was not already entitled. Merton Ferson points out that the creditor's act is a gift not a contract (in the present legal sense of a promise given for a consideration). Since it is a gift, the question of consideration is irrelevant under the present law of contracts. Since a gift is a transfer of title, such forgiveness is quite legitimate under the title-transfer model as well. Ferson writes:

The creditor's act by way of releasing a claim is of the same kind as the ordinary act of transfer. In either case the act is simply the manifested consent of the owner of the right. In either case the effect of the act on the owner is intended to be the same, i.e. to divest him of his right or rights⁽²⁸⁾.

Purchase breaks hire

It would seem that those who adhere to the promised expectations model are caught in an internal contradiction on the question of whether purchase breaks hire. If they make promise primary, the original promiser is no longer the owner and his personal obligation no longer pertains to the item. Therefore purchase breaks hire if promise is primary. But if expectations are primary, then the leaser (old or new) is

breaking the lease illegally before it is up. Purchase cannot break hire if expectations are to be secured.

The title-transfer model would contend that purchase cannot break hire (unless any express lease provision said it did). The leaseholder owns use of the property for the contractual period of the lease.

Alienability of choses in action

It is now a settled legal principle that choses in action are alienable. This was not so in the past. With the appearance of the action of *assumpsit*, the personal nature of the obligation involved in contract was stressed⁽²⁹⁾. A promise was made by one person to another. If one bases one's theory of the law of contracts on promises, it is not at all clear why the personal obligation bound up in a promise should be alienable⁽³⁰⁾. On the other hand, it is not difficult to see that claims to titles can quite properly be transferred from one person to another.

Death of an offeror

Three hypothetical examples will illustrate how the title-transfer model handles the death of an offeror. First, consider the following example given by Ferson: *A* has said to *B*, "I request that you furnish goods to *C*, and for doing so I will pay you *X* dollars". *A* dies; and *B* thereafter furnishes goods to *C*. Should *B* have a claim against *A*'s estate⁽³¹⁾? The title-transfer model would indicate that *A* had made a transfer of title to *B* conditional on the delivery of the goods to *C* and with the delivery of *X* dollars to follow delivery of the goods. Therefore *B* has a proper claim on *A*'s estate. The key is when the title was transferred.

Secondly, consider another case: *A* advertises that he will sell Wheaties for *X* dollars. *B* sees the ad and sends off the *X* dollars by messenger. In the interval, *A* dies. In his will he has left the inventory of Wheaties to *C*, who is a natural foods fanatic. *C* decides to sell no more Wheaties and to destroy the inventory. *B*'s *X* dollars arrive. In fact, in reliance upon *A*'s ad, *B* has made future business plans making use of the Wheaties. *C* returns the *X* dollars to *B*, explaining the new policy. *B* sues *C* to obtain the Wheaties.

Under the title-transfer model, *A*'s offer is no

more binding than a naked promise. It was only an offer containing the terms for a contract. But there was no transfer of title at any point. An offer should be revocable at any time⁽³²⁾.

Thirdly, consider a situation in which the Wheaties were in a vending machine and C was suing B to get the Wheaties back. They had been placed in a vending machine by A. But B bought them out of the vending machine after A's death. Again the key to the problem is determining whether good title is transferred at some point.

A placed the Wheaties in an automatic selling device preprogrammed to accept a certain contractual situation. C inherited the Wheaties as they were placed. If C can get to them in time, he can recover them. If B buys them first from the vending machine, whose automatic operation is an objective act symbolizing consent, then B purchases good title.

If, however, we subsequently learned that A had stolen the Wheaties from D, under the pure title-transfer model, neither C or B (even though he is an innocent purchaser without notice) would have good title. The Wheaties would have to be returned to D.

It should be noted that the adherent of the promised expectations model faces the same difficulty with the death of an offeror that he did on the question of whether purchase breaks hire. A dead man's promised personal obligations die with him; therefore his offers are void. But if expectations are to be protected, all his offers should still be considered good.

Unilateral contracts

When one offers a reward either to any member of the public or to such specific person, one is setting forth the terms for a conditional property transfer. A person might say, "Do X, and I will give you Y as a reward". Law enforcement agencies do not force a person to whom a reward offer is made to do the project, even if he says he plans to undertake it. If a person who tries to earn a reward fails at the task or quits, he is not forced to pay damages. The person who offers the reward, under the title-transfer model, can withdraw it anytime. The reward may be for reaching the top of the greased pole; the reward may be withdrawn when someone is almost in reach. This is the

proper assignment of risk-bearing. At present the courts do not recognize the validity of this conception of unilateral contracts. They award partial payment for partial fulfillment of conditions⁽³³⁾.

Maurice Wormser presents a convincing defense of the right of the offeror to withdraw his offer in unilateral contracts:

Suppose A says to B, "I will give you \$100 if you walk across the Brooklyn Bridge", and B walks... When B has walked across the bridge there is a contract, and A is then bound to pay B \$100. At that moment there arises a unilateral contract... Let us suppose that B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, "I withdraw my offer". Has B any rights against A?... The objection is made...that it is very "hard" upon B that he should have walked half-way across the Brooklyn Bridge and should get no compensation... By way of reply the pertinent inquiry at once suggests itself, "Was B bound to walk across the Brooklyn Bridge?" The answer is obvious. By hypothesis, B was not bound to walk across the Brooklyn Bridge. B had never surrendered his volition with regard to walking across the bridge... A was bound to pay the \$100 in the event that B should walk across the bridge, but B had not bound himself to walk...B...could have refused...at any...time to continue to cross the bridge without making himself in any way legally liable to A. If B is not bound to continue to cross the bridge, if B is will-free, why should not A also be will-free? Suppose that after B has crossed half the bridge he gets tired and tells A that he refuses to continue crossing. B, concededly, would be perfectly within his rights in so speaking and acting. A would have no cause of action against B for damages. If B has a *locus poenitentiae*, so has A. They each have, and should have, the opportunity to reconsider and withdraw. Not until B has crossed the bridge, thereby doing the act called for, and accepting the offer, is a contract born. At that moment, and not one instant before, A is bound, and there is a unilateral contract. Critics of the doctrine of unilateral contract, on the ground that the rule is "hard" on B, forget the primary need for mutuality of withdrawal, and in lamenting the alleged hardships of B, they completely lose sight of the fact that B has the same right of withdrawal that A has⁽³⁴⁾.

It should be borne in mind that if the easy withdrawal that Wormser points out is characteristic of unilateral contracts is not desired by the parties, they can do away with it by making the contract bilateral. The person offering the reward and assigning the task can demand performance bonds of those to whom he offers the reward. The person undertaking the task in order to earn the reward can demand that the contract specify that he is to be rewarded in proportion to the extent he accomplishes the task.

In conclusion, although only a sketch of the title-transfer approach has been possible within this brief compass, it seems plausible that this approach is more consistent and rationally defensible than either the present law of contracts or a pure promised expectations approach (as suggested by Pound). The title-transfer model seems to be able to handle adequately the historic problem-areas of the law of contracts. In addition, it meshes well with the rights set forth in the Bill of Rights and proclaimed in the Declaration of Independence. It would seem that the title-transfer model might well be the appropriate law of contracts for a free society.

NOTES

1. For a utilitarian defense of security as "the most vital of all interests", see John Stuart Mill, *Utilitarianism* (1863), in *Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), Vol. 43, p. 471. The utilitarian defenses of *ancien regime* privileges (especially in Bentham) and later of the welfare state follow directly from the primacy given to security.
2. Adam Smith: "The foundation of contract is the reasonable expectation, which the person who promises raises in the person to whom he binds himself; of which the satisfaction may be extorted by force". *Lectures on Justice, Police, Revenue and Arms* (Cannan ed., 1896), p. 7.
John L. Austin: "The main essentials of a convention are these: first, a signification by the promising party of his *intention* to do the acts or observe the forebearances which he promises to do or observe. Secondly, a signification by the promisee that he *expects* the promising party will fulfill the proffered promise... To prevent disappointments of...expectations is...the main object of the legal and moral rules whose direct and appropriate purpose is the enforcement of pacts or agreements". *Lectures on Jurisprudence*, 4th ed. (London: John Murray, 1873), Vol. 1, pp. 326-327. Also see William Paley, *Principles of Moral and Political Philosophy*, 8th American ed. (1815), Chap. 5; Jeremy Bentham, *A General View of a Complete Code of Laws*, in his *Works*, ed. by John Bowring (Edinburgh: William Tait, 1839), Vol. 3, pt. 9, p. 191.
Thomas Erskine Holland: "When the law enforces contracts it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise". *Jurisprudence*, 12th ed. (1916), p. 262. Though Holland was a follower of Austin, his difference on the matter of intention should be noted.
Edwin W. Patterson: "The law enforces promises, when it does, because of the expectation aroused in the promisee or because of his justifiable reliance... because the social interest in the security of transactions demands that some, at least, of the reasonable expectations of men be given a sanction through the machinery of administering law. The classes of promises which are to be enforced should be determined by a balancing of the social interests involved on either side, for and against". "Illusory Promises and Promisors' Options", in *Selected Readings on the Law of Contracts* (New York: Macmillan, 1931), pp. 405-406.
Arthur L. Corbin: "That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules, and a determination of their effectiveness requires a lively consciousness of their underlying purpose". *Law of Contracts* (1950), Vol. 1, p. 2. It should be noted that the warranty deed, the deed poll, and the bill of exchange are considered contracts by the American Law Institute, yet they contain no promises. See Morris R. Cohen and Felix S. Cohen, eds., *Readings in Jurisprudence and Legal Philosophy* (New York: Prentice-Hall, 1951), p. 102.
3. Lord Mansfield (1705-1793), who incorporated the law merchant into the common law, was influenced by the principles underlying the law merchant and wished to make moral obligation to fulfill promises rather than consideration the basis of the law of contracts. See William Searle Holdsworth, "The Modern History of the Doctrine of Consideration", *Selected Readings*, pp. 82 ff; E. Allan Farnsworth, "The Past of Promise: An Historical Introduction to Contract", *Columbia Law Review*, Vol. 69, no. 4 (April 1969), p. 592n.69, Roscoe Pound, *Jurisprudence* (St. Paul, Minn. West, 1959), Vol. 3, p. 201.
4. This emphasis on possession, combined with the construction of early English thought in terms of remedies rather than rights, meant that the idea of *title* to an article was very imperfectly conceived of. The case of *William of Tempsford v. Austin Chaplain*, in 1291, in the fair-court of St. Ives shows how the law changed on the holding of good title. The theory of the law had previously been that a transfer of possession was necessary to transfer ownership. But this case held that as against a creditor of the vendor the purchased article (a horse) belonged to the customer who had agreed to pay for the item. This changed the theory as to transfer of ownership. It passed at once upon the bargain being made. Changing the theory of ownership gave the vendor the right to sue for the price (since the title to the property had passed). Previously the customer could sue for the goods once the bargain had formally been struck, but the vendor could not sue for the price (although he could re-sell the goods if the purchase price was not delivered). See Robert L. Henry, *Contracts in the Local Courts of Medieval England* (London: Longmans, Green, 1926), pp. 239-241, 245. Such confusions in the concept of ownership did much to inhibit development of a title-transfer approach to contracts.
5. Frederick Pollock, "Contract", *Encyclopaedia Britannica*, 14th ed. (1929), Vol. 6, pp. 339-340; Farnsworth, p. 586; James Barr Ames, "The History of Assumpsit",

Harvard Law Review, Vol. 2, no. 2 (15 May 1888), pp. 55-57; Edward Jenks, *The History of the Doctrine of Consideration in English Law* (London: C. J. Clay and Sons, 1892), pp. 115-118; and Merton Ferson, *The Rational Basis of Contracts* (Brooklyn: Foundation Press, 1949), p. 121.

On similar views of debt in other cultures, see Max Gluckman, *The Ideas in Barotse Jurisprudence* (New Haven, Conn.: Yale University Press, 1965), pp. 177, 182-183, 198; N. Chandrasekhara Aiyar, ed., John D. Mayne, *Treatise on Hindu Law and Usage*, 11th ed. (Madras: Higginbothams, 1953), Chap. 9, pp. 395-447; Pherozechah N. Daruvala, *The Doctrine of Consideration* (Calcutta: Butterworth, 1914), p. 270: "Where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein"; Farnsworth, p. 587.

Nineteenth-century libertarian legal theorist Lysander Spooner tried to defend a return to treating debts as bailments in his 1846 work *Poverty: Its Illegal Causes* (in Vol. 5 of Charles Shively, ed., *The Collected Works of Lysander Spooner*, Weston, Mass: M & S Press, 1971).

While Spooner correctly sought to derive the law of contracts from the natural law pertaining to property titles, he was mistaken in his belief that this entailed a return to debt as bailment. The modern libertarian view is that first title to the creditor's money is transferred to the debtor, then at later contractually-agreed-upon due dates, title to the debtor's money is transferred to the creditor. Before the money falls due, the debtor has full title to it. Once the money falls due, the debtor who does not pay up is defrauding the creditor and is unjustly detaining his property. This is true, under the modern libertarian view, even if the debtor does not have the funds on hand to pay the creditor. (It would not be true under Spooner's bailment approach if the debtor had showed due diligence.) So the creditor properly has a lien on the defaulting or bankrupt debtor's future earnings.

Spoooner's theory has numerous flaws. By ruling out the assignment of title to future goods, for example, it effectively prohibits partnerships and corporations as well as simpler arrangements. In return for medical care, a patient who has no property should be able to give a physician a legally binding claim on the patient's future earnings. But this is prohibited by Spooner's approach. (See *Poverty*, p. 85.)

6. Jenks, pp. 115-116.

7. Jenks, pp. 124-125; Ames, "History of Assumpsit", in *Selected Readings*, pp. 37-40; and Daruvala, p. 112.

8. Jenks, Chap. 3.

9. Pound, pp. 162, 163. For Pound's explicit statement of his hopes for the triumph of the expectations model, see pp. 220-221. Also see Pound, *Introduction to the Philosophy of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1954), pp. 157ff. Compare Morris R. Cohen, "The Basis of Contract", *Harvard Law Review*, Vol. 46, no. 4 (February 1933), p. 573 for an explicit rejection of Pound's position.

Pound's pragmatist view of property is worth quoting at length: "We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests with the sacrifice of less thereby than by any-

thing we are likely to devise. Moreover we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better". *Jurisprudence*, Vol. 3, p. 140.

On Pound's pragmatism in legal matters, see Francis E. Lucey, "Natural Law and American Legal Realism". *Georgetown Law Journal*, Vol. 30, No. 6 (April 1942), pp. 496-497. Although I have grouped the utilitarian tradition with the pragmatic tradition as backers of the expectations model, strictly speaking this applies only to rule-utilitarianism and not to act-utilitarianism.

10. Spooner, pp. 100-101. See note 5 above for discussion of Spooner's contention that the right of property must attach at the time of the contract.

11. A case in which the grantor of a tuition gift attempted to recover it (*Keith & Hastings v. Miles*, 39 Miss. 442, 1860) is discussed by Ferson, pp. 26-27. Illustration 2 to Sec. 75 of the first *Restatement of Contracts* hypothesizes that "A promises B \$500 when B goes to college" and concludes that "if the promise...is reasonably to be understood as a gratuity, payable on the stated contingency, B's going to college is not consideration for A's promise".

In the second *Restatement*, the "when B goes to college" illustration has been omitted. The following new illustration is substituted: "A promises to make a gift of \$10 to B. In reliance on the promise B buys a book from C and promises to pay C \$10 for it". The second *Restatement* then says that A's promise and others like it are subject to promissory estoppel. For a discussion of this change, see Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974), pp. 59ff.

12. On the importance of titles in contract, see John W. Salmond, *Jurisprudence*, 2nd ed. (London: Stevens and Haynes, 1907), pp. 303-305. In the pure title-transfer model, all contracts executory are uncompleted, conditional conveyances of title.

13. Salmond, p. 318; Pollock, *Principles of Contract*, pp. 119, 120. *Ex nudo pacto non oritur actio* was a Roman legal maxim. In his dialogue of *Doctor and Student*, St. Germain writes: "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do him such certain service and nothing is assigned for the money, for the building, nor for the service; these are called naked promises because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. Also if I promise to another to keep him such certain goods safely to such a time and after I refuse to take them, there lieth no action against me for it". Quoted in Daruvala, p. 98.

14. Under the older view of consideration, this would also be a binding contract since there is a direct benefit to the promisor (or detriment to the promisee) that is sought.

15. Early in the reign of Henry VI, an action *ex delicto* was brought for failure to build a mill within the time promised. One judge dissented from the compelling of specific performance, insisting correctly that mere nonfeasance could not be construed as an act of trespass. He said: "If this action is to be maintained on this matter, one shall have an action of trespass on every

agreement that is broken in the world". Sir Frederick Pollock writes that this "was the very thing sought, and so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established". Pollock, *Principles of Contract*, p. 125. The dissenting judge's view was, it should be remembered, the dominant view in that era. See also Ames, "The History of Assumpsit", *Harvard Law Review*, Vol. 2, no. 1 (15 April 1888), pp. 10-11; Daruvala, p. 66.

For a defense of compelling specific performance, see William T. Barbour, "The 'Right' to Break a Contract", *Selected Readings*, pp. 500-503. On the current revival of specific performance, see Gilmore, p. 83.

16. Damages have to be awarded on some basis and the choice of a basis means facing the question again of which is primary expectation or reliance. Should the law demand payment of the pecuniary equivalent of performance, or should the law demand compensation for all costs incurred because of reliance on a promise? Holmes' theory that the promisor takes upon himself the risk of some event as between himself and the promisee emphasizes the appropriateness of damages. Oliver Wendell Holmes, Jr., *The Common Law*, Howe ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), pp. 235-236. Also see Holmes, "The Path of the Law", *Harvard Law Review*, Vol. 10, no. 8 (25 March 1897), p. 462. However, it seems that Holmes is confusing contracts and insurance policies in his discussion. For a treatment of the theoretical underpinnings of Holmes' view, see Gilmore, pp. 14-15.

For a utilitarian welfare-economics treatment of damages, see John H. Barton, "The Economic Basis of Damages for Breach of Contract", *Journal of Legal Studies*, Vol. 1, no. 2 (June 1972), pp. 277-304. For a utilitarian welfare-economics analysis of the law of contracts in general, see Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972), pp. 41-64. Posner's attempt to reformulate the law of contracts in order to facilitate exchange-at-the-least-cost must fail because costs are subjective not objective.

17. Holmes speaks of the "theory that contract is a qualified subjection of one will to another, a kind of limited slavery. It might be so regarded if the law compelled men to perform their contracts, or if it allowed promisees to exercise such compulsion. If, when a man promised to labor for another, the law made him do it, his relation to his promisee might be called a servitude *ad hoc* with some truth". *The Common Law*, p. 235.
18. John Norton Pomeroy, Jr. and John C. Mann, *A Treatise on the Specific Performance of Contracts*, 3rd ed. (Albany, N.Y.: Banks, 1926), sec. 24, pp. 78-79; sec. 310, pp. 683-686; sec. 311, p. 687.
19. Murray N. Rothbard, a proponent of the title-transfer model, writes: "Take the case of a promise to contribute personal services without an advance exchange of property. Thus, suppose that a movie actor agrees to act in three pictures for a certain studio for a year. Before receiving any goods in exchange (salary), he breaks the contract and decides not to perform the work. Since his personal will is inalienable, he cannot, on the free market, be forced to perform the work there. Further, since he has received none of the movie company property in exchange, he has commit-

ed no theft, and thus the contract cannot be enforced on the free market. Any suit for "damages" could not be entertained on an unhampered market. The fact that the movie company may have made considerable plans and investments on the expectation that the actor would keep the agreement may be unfortunate for the company, but it could not expect the actor to pay for its lack of foresight and poor entrepreneurship". Murray N. Rothbard, *Man, Economy, and State*, Vol. 1, p. 153. The belief in a right to security in one's expectations is supportive of welfare-state legislation, as pointed out in note 1 above.

20. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (Edinburgh: T. & T. Clark, 1887), p. 101. Kant derives the obligation of contracts not from promises but from a consensus of free wills to transfer rights under conditions set up by a civil society governed by a Rousseauian general will. Kant's position has two difficulties. One is the conflict between free choice and civil obedience in a Rousseauian society. The other is his view that contracts are essentially instances of the mental unanimity of two parties (*consensus ad idem*). Courts and law enforcement agencies cannot, however, read people's minds. Hence any legal principles based on overriding concern with Kant's subjective will theory are sure to be fraught with troubles.

The proper resolution of the problems raised by the subjective will theory is to make objectively observable conduct symbolizing consent the standard for determining whether consent has been given. See *Hallock v. Commercial Ins. Co.*, 26 N.J.L. 268 (1857). If the two parties act to transfer titles (and neither is under threat of physical duress), then the contract is consensual and legitimate. See William Anson, *Principles of the English Law of Contract*, 2nd ed. (1882), p. 13; Cheshire and Fifoot, *Law of Contract*, 4th ed., pp. 21-22; Samuel Williston, "Mutual Assent in the Formation of Contracts", *Selected Readings*, pp. 119-127.

Similarly, in matters of fraud, whether or not the seller believes his description of the entity he is selling is not relevant. The question is whether it is objectively true. See Holmes, *The Common Law*, p. 254.

21. On the importance of freedom of the will and self-ownership in supporting the judicial doctrine prohibiting compulsion of the specific performance of personal service contracts, see Pomeroy and Mann, sec. 310, p. 683.
22. Jean-Jacques Rousseau, *The Social Contract*, bk. 1, Chap. 4, in *Great Books*, Vol. 38, p. 389; see also Locke, *Second Treatise of Civil Government*, Chap. 4, in *Great Books*, Vol. 35, p. 30; Kant, p. 99. In Robert Paul Wolff's book *In Defense of Anarchism*, he criticizes civil obedience as being in conflict with autonomy.
23. John Stuart Mill, *On Liberty*, Chap. 5, in *Great Books*, Vol. 43, p. 316; see also Herbert Spencer, *Justice*, sec. 70.

It should be noted that the idea of a social contract in political philosophy depends on the notion of contract as promise. See Richard Taylor, *Freedom, Anarchy, and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), chap. 16, pp. 109-114; Christopher D. Stone,

"Comment", in Eugene V. Rostow, ed., *Is Law Dead?* (New York: Simon & Schuster, 1971), pp. 95-96. The title-transfer model would rule out the acceptability of a social contract as a justification of governmental rule.

24. I am indebted to Murray N. Rothbard for this suggestion.
 25. Pound, *Jurisprudence*, Vol. 3, p. 200.
 26. Ames notes that the action of deceit against the vendor of a chattel upon false warranty was originally a pure action of tort. "The History of Assumpsit", *Harvard Law Review*, Vol. 2, no. 1, p. 8. Compare Holmes, *The Common Law*, p. 216.
 27. On the rule in *Foakes v. Beer* as an absurd consequence of the Holmes-Williston bargain theory of contracts, see Gilmore, p. 33.
 28. Ferson, p. 159.
 29. Holdsworth, "The History of the Treatment of Choses in Action by the Common Law", *Selected Readings*, p. 708.
 30. See Ames, *Lectures in Legal History* (Cambridge, Mass.: Harvard University Press, 1913), pp. 211-212.
 31. Ferson, p. 103.
 32. Compare Williston and George J. Thompson, *Selections from Williston's Treatise on the Law of Contracts*, rev. ed. (New York: Baker, Voorhis, 1938), sec. 55, pp. 62-63, sec. 60, pp. 67-68, sec. 60B, pp. 70-71; also see Clarence D. Ashley, *The Law of Contracts* (1911), p. 26. The title-transfer model would view a paid-for option contract, however, as similar to any conditional title transfer.
- The question of the formation of a contract between

parties who are not in each other's presence has been governed by the rule that acceptance should be considered effective once sent off. Langdell criticizes this position. He argues that an acceptance is a counter-promise and as such must first be an offer, and therefore must be communicated. C. C. Langdell, *Summary of the Law of Contracts*, 2nd ed. (Boston: Little, Brown, 1880), secs. 12-15, pp. 13-21. The title-transfer model includes an analogous position. Holmes cannot believe that if an acceptance were snatched from an offeror's hands before he read it, there would be no contract. *The Common Law*, p. 240. But in a legal system based on the title-transfer model snatching it from the messenger's hands would stop the contract from coming into effect. Snatching it from the offeror's hands complicates matters by introducing what may be a theft.

The absurdity of the rule that acceptance should be considered effective when dispatched is shown in the hypothetical case of an offeree undertaking to communicate the acceptance himself after traveling in his automobile or airplane. See Florence Hodel, "Communication of Acceptance Between Parties at a Distance", *Selected Readings*, p. 292.

33. See Cardozo's opinion in *Jacob & Younger, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921). This sets forth the rule of substantial performance.
34. I. Maurice Wormser, "The True Conception of Unilateral Contracts", *Selected Readings*, pp. 307, 308-309. Compare Frederick Pollock, review of Clarence D. Ashley, *The Law of Contracts*, 28 *L. Q. Rev.* 100.