

CONTRACTS AS PLANS

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This Article offers an original theory of contract law that draws from recent work in the philosophy of action and legal theory. Human beings are essentially planning creatures. Making plans and following through with them is crucial to everyday practical reasoning, both for individuals acting alone and individuals acting together. This somewhat intuitive point was not fully appreciated in the philosophy of action as recently as twenty years ago, when Michael Bratman began to point out the inadequacies of the then-dominant view of rationality. Recently, Scott Shapiro has been applying Bratman's insights on practical reasoning to debates in legal theory to great effect, developing what he calls the planning theory of law. According to the planning theory, laws are plans for citizens, developed and applied by legal institutions to solve coordination problems that result from individuals living together in otherwise unplanned communities.

In this Article, the author proposes a new theory of contract law informed by these insights. First, the author surveys the current leading theories of contract and explains why a new theory is needed. Then, he argues that viewing contracts as plans designed to solve a particular coordination problem better accounts for how we are able to make exchanges over time, even in situations where the parties involved might otherwise not be able to trust one another. A planning theory of contract law takes the view that whatever ends a society might want to achieve, those ends are more likely to be achieved if the parties have the ability to create contracts, that is, to adopt legally obligatory plans to make exchanges. The theory does not seek to justify a particular body of contract law. Rather, as the author argues, it explains the fundamental doctrines of our current law better than the presently available theories.

By viewing contracts as plans, it becomes clear that a better understanding of planning brings a better understanding of contract law. It follows that advances in the philosophy of practical reasoning as it treats plans also bring insight into contract law. In the final Part of

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the Article, the author shows how these insights go beyond an accurate description of the established central doctrines of contract law and can lead to a better resolution of more controversial issues. The author also gives a few indicative examples that offer suggestions for further study. At the very least, the author hopes to establish that contract scholars should pay attention to scholarship on practical reasoning just as they have long studied moral philosophy and economics.

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I. INTRODUCTION

Although no one seriously questions that the state should enforce contracts, there is much less agreement about why it should. There is even less agreement about why states in the Anglo-American legal systems enforce contracts in the way they do. Although several theories about why the state ought to enforce contracts have been offered, they all conflict in important ways with the body of contract law we actually have.¹ It is always possible that we need to revise radically our law of contract, especially if it seems incoherent or arbitrary. But it is my argument that, for the most part, we do have a coherent body of contract law and that a new theory, what I call contracts as plans, does explain why the state should enforce them. My aim here is to begin to develop that theory.

I will take an approach rarely taken in contract scholarship: to look at contract law first and foremost as a body of law. Before exploring

1. See *infra* Part II.

what is different about contract law, I want to examine what it has in common with law generally, what makes it law in the first place. I will not offer an original general theory of law, but will build on one from the positivist tradition: Scott Shapiro's planning theory of law.² Although it is not my intention to argue here for that general theory, my arguments in contract will, I hope, nonetheless provide some additional support for the planning theory.

The planning theory of law draws heavily from recent scholarship in the philosophy of practical reasoning, particularly from the work of Michael Bratman.³ Over the last few decades, Bratman has attacked a once-dominant view of practical reasoning according to which all reasoning is purely instrumental, or means-end.⁴ According to this view, rationality can be completely explained in terms of rational requirements to take actions that are likely to maximize the satisfaction of one's desires given one's beliefs about the world.⁵ Bratman has shown that this belief/desire picture of practical reasoning is much too simplistic.⁶ In particular, that view relies on a snapshot understanding of rationality that fails to reflect our actual experiences of reasoning over time.⁷ Instead of always acting in accordance with an immediate calculation of current desires and current beliefs, practical reasoning involves the development of forward-looking intentions, many of which are stable over time and govern our future conduct.⁸ As our needs become more complex, these forward-looking intentions also become more complex; these are what we typically call plans.⁹ Plans are crucial in allowing us to coordinate our behavior over time, both individually and with others.

Although planning is a crucial part of our everyday practical reasoning, it is not always necessary that we be the authors of all the plans that apply to us in order to achieve the benefits of planning. According to the planning theory of law, law is a set of plans promulgated by officials to solve coordination problems¹⁰ associated with individuals living in

2. See SCOTT J. SHAPIRO, *LEGALITY* (forthcoming) [hereinafter SHAPIRO, *LEGALITY*]; see also Scott J. Shapiro, *Laws, Plans, and Practical Reason*, 8 *LEGAL THEORY* 387 (2002) [hereinafter Shapiro, *Laws, Plans, and Practical Reason*]; Scott J. Shapiro, *Interpretation and the Economy of Trust* (Mar. 30, 2005) (unpublished manuscript, on file with the University of Illinois Law Review) [hereinafter Shapiro, *Interpretation and the Economy of Trust*].

3. See MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 15–34 (1999) [hereinafter BRATMAN, *FACES OF INTENTION*]; MICHAEL E. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 14–27 (1999) [hereinafter BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*].

4. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 15–34; BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 14–27.

5. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 6.

6. *Id.* at 6–9.

7. *Id.*

8. *Id.* at 9–11.

9. *Id.*

10. The term “coordination problem” has a technical meaning in game theory, but throughout this Article, I use the term in its everyday, nontechnical sense.

communities.¹¹ In small-group settings, individuals may well be able to solve coordination problems by planning for themselves. But as groups get larger, coordination becomes more and more difficult until it can be achieved only through hierarchical relationships.¹² Government solves these problems by creating laws—plans—for citizens. Of course, a government may plan well or poorly, and its plans may or may not create legitimate obligations for its citizens. But however desirable the goals of a particular system may be, laws are the plans that embody its ideologies and attempt to achieve its objectives by coordinating the actions of its citizens.

If all laws are plans, then contract law is a set of plans as well. My thesis is that contract law is distinct in that it solves a particular kind of coordination problem. It is often to our benefit to make exchanges with others. Even in a case where I have no claim on you, I may be able to induce you to do as I wish by doing something for you. In the case of simple, simultaneous exchanges, coordination is not difficult, and there may be little need for contract law. But often we find it useful to make exchanges over time, in particular where one party must perform all or part of its obligation before receiving any benefit. I might not be able to convince you to do something beneficial for me today unless I have a way of obligating myself to do something beneficial for you tomorrow. In order to convince others to do as we wish, we might create a shared plan with those others that will govern our future behavior. The problem is that shared immediate intentions alone do not create obligations to stick with plans, and we may later change our intentions. A moral obligation, by contrast, would provide a reason to stick with the plan, even if the interests of one or both parties change. But still, someone might decide to act immorally, or both sides might not have the same understandings of their moral obligations. We need a way to make shared plans nonoptional and clear so that those with whom we would like to make bargains have reason to trust us.

Contract law is the solution to this coordination problem: it is a plan for creating private yet legally obligatory plans to make exchanges. There is nothing unusual about this tiered system of planning. Our Constitution provides a broad plan for how legislatures may go about making sub-plans (laws) for citizens, and Congress does the same when it gives regulatory authority to administrative agencies. Similarly, contract law is a set of plans for how individuals might go about creating legal obligations for themselves, obligations that they specially tailor to suit their own particular needs. The benefits of being able to do so are obvious; contract law provides the means.

It is important to realize that the above is not a defense of any particular law of contract. So far we have seen only a description of what

11. See Shapiro, *Interpretation and the Economy of Trust*, *supra* note 2, at 4, 11–12.

12. See Shapiro, *Laws, Plans, and Practical Reason*, *supra* note 2, at 390.

contract law is, or at least what it is in our own system. The modesty of this is consistent with the positivist tradition with which I began. Positivism is a view of what law is, not of what it ought to be. While this Article will identify a reason for having a law of contract, it will not argue directly for any particular law of contract.

It might at first seem that the description of contracts as plans is unsatisfying both because the idea is obvious and because it is primarily descriptive rather than prescriptive. Before dismissing it so easily, we may wish to examine the alternatives. All of the prevailing theories of contract law currently available are in certain ways more normatively robust, but each of them clashes in certain important respects with the contract law we have.¹³ Those theories all struggle to explain, or even cohere with, certain basic features of our law of contract, features such as the consideration doctrine, expectation damages, the enforcement of executory contracts, and contract's strict-liability standard. The planning theory of contract law presented here explains all of those features nicely; it makes them understandable by explaining the reasons why we need enforceable shared plans.

In addition to providing a better description of contract law, my view of contracts as plans also has some normative advantages over its alternatives. For one thing, according to my view, contract law is narrowly tailored to solve a specific coordination problem. To the degree that we believe government should be neutral whenever possible with respect to broader theories of the good, my view shows that our current law of contract is normatively more attractive than many of the prevailing theories that try, but fail, to describe it. This neutrality with respect to a particular moral justification for contract law is a virtue of the theory of contracts as plans. It does not presuppose problematic moral foundations, such as a Kantian moral theory or utilitarianism. Avoiding such theories is clearly a good idea if they are wrong, and it is arguably a political virtue regardless if, with John Rawls, we prefer that law remain neutral with respect to controversial comprehensive moral or philosophical theories.¹⁴

Finally, although scholars tend to be drawn to arguments for legal reform over descriptive explanations, there is much to be said for explanatory work. Accurate explanations are essential because, in addition to the need for good law, it is also important to go about legal reform in an appropriate manner. Judges need to know what the law currently is in order to apply it, and when they reform it they should do so openly and knowingly. It could be the case, for example, that a law of contract designed to curtail the tendency of promisors to wrong others by failing to fulfill their moral obligations to keep promises would be morally preferable. As it now stands, however, our law of contract is not focused on

13. See *infra* Part II.

14. For the desirability of such a view, see Curtis Bridgeman, *Liberalism and Freedom from the Promise of Contract*, 67 MOD. L. REV. 684 (2004).

that problem (though it no doubt affects that problem indirectly). If we prefer such a law, it is important to understand that a change in the law is required, and that change should occur openly, after appropriate debate, and in the appropriate manner.

A good explanation for a body of law, even in broad terms, may also help with particularly difficult narrow issues. It may do so simply by reconceptualizing the practice. For example, I have argued elsewhere that thinking of contracts as plans can help us with the difficult question of how formally we should apply the law of contract.¹⁵ Another advantage an accurate description provides is that it can point us to advances in other disciplines that we may not have otherwise explored. Once we view contracts as plans, insights into planning in the philosophical literature dealing with practical reasoning may help us work through difficult contracts issues. I will later provide an example of such an avenue of research.

My arguments will proceed as follows. In Part II, I will give a brief survey of the prevailing theories of contract, as well as the most common objections to them. Unfortunately, it will be impossible to cover completely the literature about them in the short time I have here. Instead, the aim will be to give enough of an account to demonstrate the need for a new theory. Parts III and IV provide more background. Part III briefly describes Michael Bratman's work on the importance of planning in practical reasoning, and Part IV describes Shapiro's planning theory of law.

In Part V, I will apply the planning theory of law to contract law to show how contracts are plans for solving a certain kind of coordination problem. Part VI shows how this way of viewing contract law explains key doctrines—like consideration, contract's strict-liability standard, its enforcement of executory promises, and its measure of damages based on expectations rather than reliance—much better than the currently prevailing theories discussed in Part II. Of course, if the theory is to provide a true explanation, it must in principle be falsifiable, and I will show how my theory could be falsified. Although one might use any number of possible doctrines as examples, I will use promissory estoppel. If promissory estoppel were as widely used as some suppose, and as some would prefer, then we would indeed be departing from the theory of contract law I will propose. We would then need either to reconceptualize contract, or declare it dead, as Grant Gilmore mistakenly did in the 1970s.¹⁶

Finally, in Parts VII and VIII, I will suggest future avenues for research. Once we appreciate the fact that contracts are plans, it becomes apparent that we will profit by looking to the developing literature in

15. See Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443 (2008).

16. GRANT GILMORE, *THE DEATH OF CONTRACT* 1 (Ronald K.L. Collins ed., 1974).

practical reasoning on planning for insights into difficult problems in contract law. The aim is to show that by better understanding planning, we will better understand contracts. Although detailed exploration of these possibilities must wait for another day, I will suggest how different conceptions of what it means for people to do something together can give us insight into the different kinds of agreements into which parties can enter. I briefly explore one example: the possibility of what philosophers after Bratman call prepackaged cooperation,¹⁷ in which parties adopt a shared plan but carry out that plan separately. I will argue that although parties often act together when performing contracts, in many cases it will be quite useful for them to use prepackaged cooperation instead of adopting plans that require them to act together. In other cases, it will be better for parties to perform together, and in still others they may also commit to some degree of mutual support for one another. The understanding of the differences and the benefits of each form of acting together that comes from viewing contracts as plans will help us sort out some difficult issues in contract law, like the desirability of standardized forms or cases when duties of good faith are owed. Part IX concludes.

II. CONTRACT THEORIES TO DATE

During the early days of the American legal academy, contract law flourished as an academic discipline and was the focus of many leading scholars.¹⁸ Despite this attention, it remained undertheorized, at least by today's standards, until the last several decades. Two movements prompted a rise in theories of contract law. The legal realist movement of the mid-twentieth century raised doubts about fairness in the formalism of classical contract law.¹⁹ This, in turn, raised doubts about whether contract should even continue as a category distinct from torts.²⁰ The law and economics movement in the legal academy also brought about new perspectives on contract law,²¹ which gave rise to reactions against the reduction of contract to inquiries into efficiency or reliance, spawning a new interest in the practice of promising as a potential backbone of contract law.²²

17. Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 339 (1992).

18. Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary* 2 (Hofstra Univ. Legal Stud. Research Paper Series, Paper No. 06-8, 2006), available at <http://ssrn.com/abstract=894281>.

19. See GILMORE, *supra* note 16, at 98; WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 338-40 (1973).

20. See GILMORE, *supra* note 16.

21. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 101 (5th ed. 1998); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

22. See Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW 121 (Peter Benson ed., 2001).

While many of these theories have been expertly developed and are very informative, they have all proven to be flawed as explanations for contract law as we know it. A complete study of these theories is well beyond the scope of this project, but a brief look at them and their shortcomings will provide important background for understanding the theory I will propose.

A. *The Promise Theory of Contract Law*

The Restatement of Contracts defines a contract as a promise that the law will enforce.²³ Thus, it is natural to think of contract law as primarily concerned with the enforcement of promises. Indeed, it is perhaps so natural to think so that it was not until after scholars began to explain contract law as merely a special form of tort law that anyone developed a systematic theory of contract based on the morality of promising.²⁴ In 1981, Charles Fried argued that the “promise principle” is “the moral basis of contract law” by which people are able to “impose on themselves obligations where none existed before.”²⁵ According to Fried, we are obligated to keep our promises because of a Kantian duty not to treat others as means to an end, but rather as ends in themselves.²⁶ By freely invoking a convention of promising, we invite others to trust that we will do as we say we will. For the promisor to fail to follow through is to “abuse a confidence he was free to invite or not, and which he intentionally did invite.”²⁷ Breaking one’s promises is like lying²⁸ in that both actions use others; the breaker of a promise does so by invoking and then violating trust.²⁹ “[S]ince a contract is first of all a promise, the contract must be kept because the promise must be kept.”³⁰

One might believe that contract law is based on moral obligations to keep one’s promises, yet give a different account of why we are morally obligated to keep promises. John Rawls, for example, argued that promise breaking is wrong because the convention that recognizes duties to keep promises is quite useful to society so long as we are able to trust one another to keep them.³¹ By making promises, one makes use of the convention and the promisee’s trust in the convention. It would be unfair to make use of such a convention and then not keep one’s promise,

23. To be more precise: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

24. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 4, 10 (1981).

25. *Id.* at 1.

26. *Id.* at 8–17.

27. *Id.* at 16.

28. But as Fried notes, breaking a promise is only *like* lying and is not itself lying. *Id.* at 9–10.

29. *Id.* at 9.

30. *Id.* at 17.

31. JOHN RAWLS, *A THEORY OF JUSTICE* 303–08 (rev. ed. 1999).

as the promise breaker would be a free rider, benefiting from the fact that others keep their promises. Her breach erodes the trust in the convention upon which its effectiveness depends.³² Although Rawls gave an account of promising rather than an account of contract law, one can easily imagine a promise theory of contract based on his account of promising rather than the Kantian arguments employed by Fried.

As attractive as the promise theory seems, however, it is in fact fraught with difficulties as an explanation of the contract law we have. First, contract law does not enforce all promises. Of course, it may be the case that not all promises are morally binding, but contract does not even seek to distinguish between those that are morally binding and those that are not. In fact, courts have sometimes refused to enforce a contract while acknowledging the promisor's moral obligation to keep a promise.³³

The primary doctrinal distinction between promises that are enforceable and those that are not is the consideration doctrine: courts generally enforce only those promises supported by consideration, i.e., ones made to induce some action by the promisee.³⁴ While the justification for the consideration doctrine is a matter of some dispute, to say the least,³⁵ the promise theory seems to be in particular tension with it. If we enforce promises because we have a moral obligation to keep them, why should we only enforce promises that were made to induce some action by the promisee? What about cases where we have little doubt that the promise was solemnly made and that the promisor had every intention of freely undertaking an obligation to keep it? Charles Fried struggles to explain consideration in a way consistent with his version of the promise theory, and in the end dismisses the consideration doctrine as an incoherent historical oddity that we would be better without.³⁶

Consideration is not the only doctrinal problem for the promise theory. For example, one must keep in mind that contract has a strict-liability standard and is unconcerned with whether the breaching party's conduct was morally wrongful.³⁷ Under the standard of strict liability, to establish that a breaching promisor is liable, one need show only that a promise (supported by consideration and with all relevant formalities

32. *Id.* at 305 ("Thus promising is an act done with the public intention of deliberately incurring an obligation the existence of which in the circumstances will further one's ends. We want this obligation to exist and to be known to exist, and we want others to know that we recognize this tie and intend to abide by it. Having, then, availed ourselves of the practice for this reason, we are under an obligation to do as we promised by the principle of fairness.").

33. *See, e.g.*, *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 211–12 (1825).

34. *See, e.g., id.* at 211 (holding that consideration is necessary for an express or implied promise to exist).

35. I will suggest an explanation myself that is in accord with my theory of contracts as plans. *See infra* Part V.

36. FRIED, *supra* note 24, at 28–39.

37. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 2.8 (4th ed. 2004).

met) was broken.³⁸ There is also no need to inquire into whether the person could have performed but chose not to. Promisors will in general not be able to defend themselves against a breach-of-contract claim by establishing that they made reasonable efforts to perform, or even (except in rare cases³⁹) that they were unable to perform. Conversely, plaintiffs will also not be permitted to show that a given breach is particularly wicked and therefore worthy of punitive damages.⁴⁰ This indifference to morally relevant facts would be quite odd if contract really were primarily concerned with moral obligations.

There are also problems stemming from the nature of the moral obligation to keep one's promises. For example, if Fried is right that contract is based on the Kantian notion of an agent's will freely binding itself, then the most relevant fact would be whether such an exercise of free will occurred. Instead, contract law is objective, and so-called "will" theories of contract have long been in disrepute.⁴¹ The key event in contract law is an objective manifestation of an intention to bind oneself, not the subjective fact of the will binding itself.⁴² The misleading idea that there must be a "meeting of the minds" was discarded long ago.⁴³ A statement that would reasonably lead a listener to believe that she intends to bind herself will be sufficient even without an actual intention to bind.⁴⁴ Of course, it is not surprising that careless statements might lead to liability. The problem is that they might lead to *contract* liability, even without any intention to undertake an obligation.⁴⁵ According to Fried, it is the intention that is the essence of promissory, and hence contractual, liability.⁴⁶ He does not object to holding people liable for such utterances, so long as we do not confuse that liability with contractual liability.⁴⁷ Unfortunately for Fried, this qualification does not fit with contract law's claims to objectivity.

Rawlsian arguments may be subject to similar criticisms. The problem with promise breaking according to Rawls is that it undermines the general practice of promising.⁴⁸ But if true, anyone in society would have just as strong of a claim against the promise-breaker as the promisee.

38. See *id.* § 8.1.

39. Contract does allow a defense of impossibility or impracticability in some cases. For an explanation of how these defenses do not undermine the claim that contract law is not concerned with judging wrongdoing, see Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3034–39 (2007). And even if one is not convinced by that explanation of impossibility and impracticability, it remains true that these doctrines are rare exceptions, and as a general matter contract law is not concerned with judging the wrongfulness of breach.

40. FARNSWORTH, *supra* note 37, § 12.8.

41. *Id.* § 3.6; RESTATEMENT (SECOND) OF CONTRACTS § 21 (1979).

42. FARNSWORTH, *supra* note 37, § 3.6.

43. See *id.*

44. *Id.* § 3.7.

45. *Id.*

46. FRIED, *supra* note 24, at 16–17.

47. *Id.*

48. RAWLS, *supra* note 31, at 301–08.

Contract law, by contrast, recognizes that the promisee has a particular claim against the promisor, a claim the promisee is free to pursue as he sees fit. Indeed, this objection has been raised against the Rawlsian view of promissory obligation as such, independent of contractual obligation.⁴⁹

There are more problems with explaining contract law as primarily based on moral obligations to keep promises,⁵⁰ but even the few I have mentioned here, unless answered, are devastating to the promise theory as an explanation of contract law. The doctrines of consideration and strict liability, and the fact that contracts confer rights on the promisee in particular and not just society in general are so central to contract law that the promise theory's failure to account for them means that it cannot claim to explain contract law.

B. *Reliance Theories*

Another very prominent family of explanations for contract law centers on a desire to compensate promisees for their reliance on broken promises.⁵¹ According to this explanation, breaking promises is just a particular way of wrongfully harming people. There is nothing particularly special about promising or the will binding itself; a broken promise is "like a pit I have dug in the road"⁵² into which the promisee falls. Breaking a promise is on a par with negligent driving. Some theorists claim that the particular emphasis on the moral importance of keeping promises even without reliance is a relatively recent historical development in contract law, the product of Victorian morality.⁵³ Grant Gilmore triumphantly boasted of the "death of contract" as a legal category distinct from tort; in fact, his seminal book by that title opens with an apology for even bothering to write about the topic when contract's death was so manifestly obvious.⁵⁴ He even pines for a day when contract and tort would be combined in the first-year curriculum into a single course called "contorts."⁵⁵

Reliance theories do fare better in some respects as an explanation of contract law than promise theories. For example, reliance theories do not rely on metaphysically suspect notions such as the will binding itself.⁵⁶ Instead, the objective theory of contract is perfectly consistent with the reliance theory, since the focus of the reliance theory is on the promisee's (reasonable) perception of the promisor's actions, rather than on any subjective act of the promisor's will or on the unfairness of the promi-

49. See, e.g., T.M. SCANLON, WHAT WE OWE TO EACH OTHER 316 (1998).

50. See, e.g., Seana Valentine Shffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 710 (2007).

51. FRIED, *supra* note 24, at 4–5.

52. *Id.* at 10.

53. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 283 (1979).

54. See GILMORE, *supra* note 16, at 1–3.

55. *Id.* at 98.

56. FRIED, *supra* note 24, at 19.

sor's free-riding on a social convention.⁵⁷ Similarly, the reliance theory makes sense of the promisee having a particular claim against the promisor that no one else in society has.⁵⁸ It is less clear how well the reliance theory explains contract law's indifference to moral wrongdoing, but, as we will see later, such worries might be met with the aid of certain helpful distinctions from tort theory.⁵⁹

The reliance theories do still have problems of their own. For one thing, there is once again the nagging problem of the consideration doctrine, which reliance theorists can explain no better than promise theorists. Like Fried, they tend to ridicule rather than explain consideration as evidence that the doctrine itself is flawed, rather than as evidence of a shortcoming in their theory.⁶⁰ Many of the reliance theorists were in the legal realist movement of the twentieth century and considered all forms of law as best seen as vehicles to achieve social justice writ broadly.⁶¹ Indeed, for Gilmore, the consideration doctrine is the "balance wheel" of the "great machine,"⁶² the "monstrous" machine⁶³ of classical contract doctrine, which seemed to him dedicated to the proposition that "no one should be liable to anyone for anything."⁶⁴ According to Gilmore, the consideration doctrine is at best a product of history and at worst a tool by which the rich further entrench their own power.⁶⁵ Other reliance theorists worked harder to explain the consideration doctrine. Lon Fuller, for example, famously argued that the consideration doctrine was best understood as a legal formality similar to the seal.⁶⁶ While it is beyond the scope of this Article to explore Fuller's arguments in depth, suffice it to say that it is a credit to Fuller's powers of persuasion that this rather odd proposal has been so influential.

The reliance theories also face difficulties that the promise theory does not. Most notably, the reliance theory struggles to explain why the standard remedy for breach of contract is expectation damages, which seek to put the nonbreaching party into the position she would have been

57. See, e.g., P.S. ATIYAH, PROMISES, MORALS, AND LAW 66, 192 (1981).

58. See Bridgeman, *supra* note 39, at 3016.

59. See JULES L. COLEMAN, RISKS AND WRONGS 330-32 (1992), for a distinction between wrongful loss and wrongdoing. See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 116 (1995), for a possible distinction between factual loss and normative loss. And for a discussion of the possible usefulness of each distinction, see Bridgeman, *supra* note 39, at 3020-26, and Curtis Bridgeman, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 246-60 (2003), respectively.

60. See GILMORE, *supra* note 16, at 21-22.

61. See Bridgeman, *supra* note 15, at 1443-45.

62. GILMORE, *supra* note 16, at 19-20.

63. *Id.* at 19.

64. *Id.* at 15.

65. *Id.* at 104 ("It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers.").

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

in had the contract been performed.⁶⁷ While this is a natural remedy for a promise theorist like Fried,⁶⁸ it is a bit of an embarrassment for the reliance theorists. If contract law really were seeking to provide the same sort of justice for the same sort of wrong as tort law, one would expect the standard measure to be reliance damages, i.e., a measure of damages based on putting the promisor back into the position she was in before the promise was made. Expectation damages do more than make the promisee whole: they put her into a position she was never in before, but would have been in had the contract been performed. Once again, Fuller came to the aid of the reliance theorists with an argument that must be admired for its creativity, even if it is unpersuasive. Fuller argued that expectation damages are given because they are a proxy for reliance damages.⁶⁹ We need a proxy, Fuller argued, because reliance damages theoretically include lost opportunity costs, which are too difficult to calculate, while expectation damages, because they are based on the contract price, are typically easier to calculate.⁷⁰ The problem with this argument is that it ignores what courts say they are doing, which is the exact opposite: courts give expectation damages unless they are too speculative to calculate (e.g., if they involve lost profits), in which case the courts give reliance damages.⁷¹

Finally, and equally importantly, reliance theories cannot explain why we enforce executory contracts. An executory contract is a contract that requires substantial performance on both sides.⁷² In many cases, neither side may have begun performance at all, nor may there be reliance of any sort by either side. If the basis of contract law were compensation for reliance, not only would we expect reliance damages instead of expectation damages, we would expect there to be no liability at all if there were no reliance. When there is no harm, there would be no foul, just as in tort law. Instead, contract law does enforce even executory contracts so long as the other elements have been met.⁷³

C. *Efficiency Theories*

Advances in economic theory have been very influential in the legal academy generally. Contract is no exception. Much of law and economics scholarship is dedicated to the idea that a primary and proper concern

67. See FRIED, *supra* note 24, at 26.

68. See *id.* at 17–21. An even more natural remedy, of course, would be specific performance. See Shiffrin, *supra* note 50, at 723. But given the institutional limitations of courts, expectation damages seem to be a reasonable compromise. For a new suggestion as to why courts award expectation damages rather than specific performance in most cases, see *infra* note 69 and accompanying text.

69. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 57–68 (1936).

70. *Id.* at 54.

71. FARNSWORTH, *supra* note 37, § 12.16.

72. *Id.* §§ 1.1, 1.6.

73. This too is a result that fits well with the promise theory of contract.

of law is to promote efficiency, that is, to reduce transaction costs in private ordering.⁷⁴ While this is a difficult sell in many areas of law that have more normative content than the economic account suggests, it is a much more plausible idea for contract law, which deals only with voluntary transactions.

But efficiency theories have their own shortcomings, even in contract law. They, like other theories, often do not explain individual doctrines well.⁷⁵ Although they can usually show that any given doctrine does indeed promote efficiency,⁷⁶ there are often competing arguments that show the doctrine does not. For example, it has been argued that our contract law does not enforce liquidated-damage clauses that would constitute a penalty rather than a reasonable measure of compensation for breach because penalty clauses discourage efficient breach.⁷⁷ More recently, however, economists have argued that penalty clauses should be enforced if freely agreed upon by the parties.⁷⁸ Similar debates about how well efficiency theory explains other contract doctrines are still undecided.

However those debates come out, there is one unavoidable embarrassment for those efficiency theorists who hope to give descriptive accounts of the law. While it may or may not be possible to explain various contract doctrines in terms of efficiency, there is no question that the courts themselves very rarely do so.⁷⁹ To be sure, courts will occasionally refer to norms of efficiency, especially in the last few decades, given the influence of judges like Richard Posner and Frank Easterbrook.⁸⁰ But for the most part, courts explain their actions as being governed by the dictates of justice, not by a search for efficient outcomes.⁸¹

Contract law is not only relatively silent about the demands of efficiency; the entire structure of private law is at odds with efficiency theory. Contract law, at least our Anglo-American version of it, is private law. While much law involves government regulation of behavior—criminal law and administrative law in particular come to mind—contract law is a quintessential form of private law. Its aim is to achieve justice as it is owed among individuals, not to enforce duties owed to society in

74. See, e.g., POSNER, *supra* note 21, at 25–31.

75. See STEPHEN A. SMITH, CONTRACT THEORY 119–25 (2004).

76. This flexibility can itself be a cause for concern. See Brian H. Bix, *Contract Law Theory* 11 (Minn. Legal Studies Research Paper Series, Paper No. 06-12, 2006), available at <http://ssrn.com/abstract=892783>.

77. POSNER, *supra* note 21, at 142.

78. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 *passim* (1977); see also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 616–18 (2003).

79. Bix, *supra* note 76, at 11.

80. See, e.g., *Topps Co. v. Stani S.A.I.C.*, 380 F. Supp. 2d 250, 261 n.12 (S.D.N.Y. 2005); *Allapattah Serv., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1329 (S.D. Fla. 1999).

81. SMITH, *supra* note 75, at 133. For an analogous argument about tort law, see COLEMAN, *supra* note 59, at 383.

general.⁸² Efficiency theories do not distinguish between a duty owed to an individual and a duty owed to society. Rather, they claim that the aim of law is to encourage behavior that will maximize general welfare.⁸³ Thus, for them, the fact that private law is plaintiff-driven is entirely contingent upon and can be explained only by the (dubious) claim that private citizens are in the best position to enforce certain norms of conduct, like the prohibition against breaching a contract.⁸⁴ A promisee is entitled to enforce a contract made with a promisor not because she has a particular claim in justice against the promisor that no one else has, but only because she is in a better position to do so than the state. Even if this were true, it is at odds with what courts claim to be doing.⁸⁵

In recent years efficiency theorists have backed away from explanatory theories of private law,⁸⁶ no doubt in part because of the kinds of complaints I have catalogued here. Rather than squabbling over explanations of particular doctrines of our current law, many efficiency theorists have turned away from arguments that try to explain why we have the law we do and have turned toward prescriptive arguments that propose what sort of contract law we *ought* to have.⁸⁷ If that is the enterprise, the alleged explanatory failures have little bite. But in this new enterprise the efficiency theorist faces the important challenge of defending her normative arguments, which are at bottom utilitarian. The moral objections to utilitarianism are well known and powerful, but also beyond the scope of this project.

D. Communitarian Theories

Within the last decade certain scholars have begun to view contract law in an entirely new way. Although it is dangerous to lump such crea-

82. Bix, *supra* note 76, at 12.

83. COLEMAN, *supra* note 59, at 376–80.

84. See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 17–20 (2001).

85. For a very thoughtful argument that the disagreements between economic and autonomy-based explanations are grounded in differences in methodological commitments, see Jody S. Kraus, *Philosophy of Contract Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 687, 689 (Jules Coleman & Scott Shapiro eds., 2002); for an argument that the two approaches may be reconciled when understood as engaged in a division of labor, see Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *PHIL. ISSUES* 420, 421–22 (2001) [hereinafter Kraus, *Vertical Integration*].

86. See, e.g., Kraus, *Vertical Integration*, *supra* note 85, at 420.

87. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 1 (2002) (“This book is concerned with the principles that *should* guide society in its evaluation of legal policy.” (emphasis added)) (see Chapter IV for their arguments on contract law in particular); Schwartz & Scott, *supra* note 78, at 544 (“We attempt to make progress here with a more modest approach—to set out and defend a normative theory to guide decisionmakers in the regulation of business contracts.”); Richard Craswell, *Expectation Damages and Contract Theory Revisited* 52 (Stanford Pub. Law & Legal Theory Research Paper Series, Paper No. 925980, 2006), available at <http://ssrn.com/abstract=925980> (“In any event, whatever might be said for these various positions, my own position should be clear. In my own analysis of default rules, I am interested in the explicitly normative (or ‘law reform’) question of what the law *ought* to do with contract disputes.”).

tive thinkers together when their work is different in important ways, for our purposes, we can loosely call their approach to contract law communitarian. While the promise theorists focus on the moral obligations of promisors, the reliance theorists focus on the harm done to promisees, and the economists focus on the value of contracting to society at large, the communitarians focus on the moral worth of the personal relationship between the promisor and promisee.⁸⁸ Contract law is valued to the degree that it enhances the development of valuable, communal relationships or criticized to the degree that it inhibits such relationships.⁸⁹

Daniel Markovits has written the most comprehensive and unflinching communitarian account.⁹⁰ According to him, contract law can be explained and justified as a body of law that helps establish valuable relationships of recognition and respect among members of a given community.⁹¹ In his view, the value of these relations is grounded in Kantian moral philosophy.⁹² Markovits reads Kant's categorical imperative as requiring not only that we not use others as means to our own ends but rather as ends in themselves—the traditional reading of Kant, and the basis of Fried's promise theory⁹³—but also as identifying a positive duty to remain “open” to one another's ends⁹⁴ in order to live together in a respectful community.⁹⁵ Because without promises an individual's will would “remain isolated,” we have a duty not only to keep promises we have made, but also to make promises in the first place.⁹⁶ Contracts are worth enforcing because contractual relationships are necessary to the development of a certain kind of community that is not only valuable, but morally obligatory.⁹⁷

Although intriguing and strikingly original, Markovits's view is flawed in important respects. For one thing, the moral foundation for his theory is suspect. Kantian arguments are controversial enough as it is; Markovits's reading of Kant, according to which the categorical imperative places positive duties on us to establish interpersonal relationships rather than just negative duties not to use others as means to an end, is at the very least unorthodox. In fairness, Markovits freely admits that his view is not a mainstream interpretation of Kant, and in the end is primarily interested in the soundness of the arguments rather than whether they can be properly described as Kantian.⁹⁸ For my part, I am far from per-

88. See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–20 (2004).

89. *Id.* at 1446–47.

90. As we shall see, other communitarian accounts critique current doctrine as often as they explain it.

91. Markovits, *supra* note 88, at 1420.

92. *Id.* at 1424–46.

93. See FRIED, *supra* note 24.

94. Markovits, *supra* note 88, at 1425.

95. *Id.* at 1434–35.

96. *Id.* at 1444.

97. *Id.* at 1438.

98. *Id.* at 1424.

sued that we have such duties, though this is not the place to explore those arguments.

Not all communitarian views rely on Kantian moral theory, however. Seana Shiffrin, for example, also locates the value of promising (as distinct from contract—more on that in a moment) in its role in personal relationships.⁹⁹ Her view does not rely on Markovits's Kantian arguments—indeed, she rejects the notion that promising must involve a sharing of ends.¹⁰⁰ But she nonetheless argues that promising is valuable, indeed necessary, for the creation and maintenance of “morally decent” relationships.¹⁰¹ It does so by providing a way for individuals to reaffirm (in some cases publicly) their “equal moral status.”¹⁰² Similarly, Stephen A. Smith has also emphasized the role that contracts, as a form of promising, have in creating valuable bonds among individuals.¹⁰³

But even if one agrees with the communitarians that certain kinds of personal relationships are morally valuable, it is not entirely clear what follows for contract law. While Markovits understands his view both to justify and explain contract law¹⁰⁴ and applies it specifically to the consideration doctrine and the standard of expectation damages,¹⁰⁵ Shiffrin focuses on the “divergence” of contract and promise.¹⁰⁶ She argues that contract law does not reflect the interpersonal duties of promising and also undermines valuable interpersonal relationships by failing to live up to the moral standards of our practice of promising.¹⁰⁷ According to Shiffrin, such contract doctrines as the consideration doctrine, the strong presumption against specific performance, the duty to mitigate, and the refusal to grant punitive damages actually corrode human virtue, with the result that we fail to be as good to each other as we could and should be.¹⁰⁸ Her account of promising is not meant to explain or justify contract law.

Dori Kimel strikes something of a middle ground.¹⁰⁹ He argues that the practice of promising is crucial to the creation of valuable, trusting, personal relationships.¹¹⁰ Contract law, by contrast, operates where there

99. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481 (2008).

100. *Id.* at 494–95.

101. *Id.* at 497.

102. Shiffrin, *supra* note 50, at 750.

103. Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 367–69 (1997).

104. “Finally, because my ultimate purpose is to develop a theory of contract law, I show that the contract relation as I characterize it is no mere academic conceit but is instead immanent in our legal practice.” Markovits, *supra* note 88, at 1420.

105. *Id.* at 1477–1514.

106. See generally Shiffrin, *supra* note 50.

107. *Id.* at 709–10.

108. *Id.* at 719–29.

109. See DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003).

110. *Id.* at 14–31.

may be no such relationships on which to rely (in this respect, my view is more similar to his than to the other communitarians). One enters into contracts when there is a lack of trust, and indeed contracting often facilitates personal detachment.¹¹¹ Because the value of personal trust (which is valuable for its own sake and which forms the basis of the practice of promising) and the value of personal detachment (which is valuable only as a means to other ends and which forms the basis of contract) are at odds, we must be careful not to allow contract law to get in the way of the development of valuable, trusting relationships.¹¹² Thus, although Kimel is not so openly critical of contract law as Shiffrin is, part of his point is to argue that it should be carefully contained: that we must have freedom not only of contract, but *from* contract.¹¹³ We do so, he argues, by enforcing only agreements that the parties specifically mean to be legally enforceable.¹¹⁴

Although we have much to learn from these communitarian theories, they do not, in the end, provide an explanation for the contract law we have. They are all based on moral claims of one sort or another, moral claims that are both controversial and that do not fit with huge chunks of contract doctrine.¹¹⁵ They all also potentially violate the liberalist requirement that government stay neutral with respect to moral theories of the good, though these theorists try to defend against such charges.¹¹⁶

But even if one did not mind explaining contract with a robust moral theory, even if one found the communitarian moral theory, in at least one of its forms, persuasive, and even if one could overlook, or better explain, the divergence between contract doctrine and the requirements of interpersonal morality that seem to follow from the communitarian theory, a huge problem still remains. These moral theories seem to have little or nothing to say about contracts involving nonhuman legal entities such as corporations.¹¹⁷ Although corporations are treated as persons under the law for many purposes, they are obviously not the same as human beings. Corporations do not have wills, and relationships be-

111. *Id.* at 78–80, 134.

112. *See id.* at 79.

113. *See id.*

114. *Id.* at 135–42.

115. *See supra* notes 88–114 and accompanying text.

116. Markovits argues that his theory does not violate liberalism because it merely presents a formal relation rather than a substantive value. *See* Markovits, *supra* note 88, at 1511–14. Shiffrin claims her view does not violate liberalist constraints because she argues that government should only accommodate the formation of moral virtue, not enforce it. Shiffrin, *supra* note 50, at 716–17. Kimel simply rejects versions of liberalism that require neutrality with respect to theories of the good, *see* KIMEL, *supra* note 109, at 121–35, and instead argues that “personal autonomy is only valuable when exercised in pursuit of the good.” *Id.* at 131. For an assessment of Kimel’s view as a liberal theory of contract, *see* Bridgeman, *supra* note 14. I suspect that Markovits and Shiffrin also are subject to similar criticisms despite their arguments to the contrary, but this is not the place to pursue such claims.

117. Kimel’s theory of contract as distinct from promise could make more sense of the role of organizations than the others, though he does not dwell on the point.

tween such nonhuman “persons” do not seem to be intrinsically valuable.¹¹⁸ Indeed, Markovits makes his own focus on “individual, natural persons” clear at the outset: “I take these cases to represent the core of contract and content myself to address contracts that involve organizations in a derivative fashion only.”¹¹⁹

There may well have been a time when the central focus of contract law was face-to-face transactions among individuals with the role of organizations understood only derivatively, but in the twenty-first century that time has long since passed. In law schools, contract textbooks still include a great many simple, person-to-person transactions,¹²⁰ no doubt because the basic principles of contract law are easier to present at the introductory level using such simplified fact patterns. But in the real world it cannot be denied that very little of our contracting experience is with other individuals.¹²¹ Litigation is expensive and not undertaken lightly, and it is surely the case that the contract disputes worth litigating these days involve at least one organization in a high percentage of cases. The communitarians, then, owe us either an explanation of the value of relationships with or among organizations, or they will be left arguing that the (alleged) moral basis of law designed for old-fashioned, interpersonal, face-to-face contracts—what Karl Llewellyn called the law of “horse” and “hay stacks”¹²²—still explains a modern contract law dominated by organizations.

Of course, organizations must still act through human agents, so contracting with such entities always entails human contact.¹²³ But the basis of the communitarian view is not mere human contact, but rather

118. They may, of course, be valuable for other reasons—perhaps they create wealth, for example—but what is distinctive about the communitarian claim is that certain kinds of human relationships are in a sense intrinsically valuable, i.e., valuable for their own sake, not because they lead to some other valuable result.

119. Markovits, *supra* note 88, at 1421.

120. This seems to be true of many of the chestnuts. *See, e.g.*, *Webb v. McGowin*, 168 So. 199 (Ala. 1936); *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825); *Hawkins v. McGee*, 146 A. 641 (N.H. 1929); *Petterson v. Pattberg*, 161 N.E. 428 (N.Y. 1928); *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891); *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954). But a high percentage of even the chestnuts involve organizations. *See, e.g.*, *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929); *Groves v. John Wunder*, 286 N.W. 235 (Minn. 1939); *Allegheny Coll. v. Nat'l Chautaugue County Bank*, 159 N.E. 173 (N.Y. 1927); *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256 (Eng. C.A.); *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Exch. Div.).

121. Bix, *supra* note 76, at 5 (“It is a commonplace that a relatively small percentage of the contracts most of us enter match the model of face-to-face negotiation of terms that underlies most theories about contract law (both classical and contemporary). It is, therefore, misleading to argue that face-to-face-negotiated agreements are the “paradigm case” of contracts, and that the adhesion contracts that dominate commercial life are merely marginal or inferior instantiations.” (footnotes omitted)).

122. Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503 (1987).

123. Markovits considers this defense to the objection and is “open” to it, but is “inclined to reject” it. Markovits, *supra* note 88, at 1465–66.

the value of taking someone else's ends as one's own.¹²⁴ However valuable it may be to do so with other natural persons, the value of taking an organization's ends as one's own—or of two such organizations taking each other's ends as its own—is far from obvious, to say the least. Therefore, even in its best light, the communitarian view may just explain relatively rare transactions, nostalgia-inducing curiosities probably not worth the central place contract law currently holds in legal education.¹²⁵ Such a feat would have *historical* value, of course, if correct, but in this Article, I am interested in theories that explain contract law as currently practiced. If anything, such arguments should probably be directed to the study of business associations, which often stand between us and whatever valuable relationships might be developed by contracting with people rather than with abstract legal entities.¹²⁶

E. *Corrective Justice and Related Theories*

Recent decades have seen a growth in so-called corrective justice theories of private law, according to which private law is primarily concerned with correcting wrongdoing done to plaintiffs by defendants. Although some of these theories trace the idea of corrective justice all the way back to Aristotle,¹²⁷ recent versions have been developed in response to the rise of law and economics scholarship about private law.¹²⁸ In particular, law and economics scholars explain private law as an attempt to regulate behavior among private individuals with the goal of creating in-

124. "The collaborative account of contract therefore seems not to apply, either directly or indirectly, to contracts that involve organizations. Organizations cannot engage the values of respect and community that underwrite the collaborative ideal, and an organization's contracts draw neither its agents nor its stakeholders into collaboration." *Id.* at 1467.

125. Markovits anticipates this objection and argues that the set of relevant transactions is not so small. He cites the "purchase and sale of personal property . . . and services in many forms, including childcare and elder care, day labor, and services associated with any number of trades or professions." *Id.* at 1472. But it seems to me that fewer and fewer of even these transactions do not involve at least one organization. He also mentions Internet sales, especially on sites such as eBay, as evidence of the great number of person-to-person transactions. But notice first that even these sales involve an organization as a facilitator, and more importantly, it is hard to see the purchase of an item using eBay from a stranger across the country whom one will likely never meet or have anything other than rudimentary correspondence with as playing a great role in fostering the collaborative ideal.

126. I do not mean to suggest that it would be crazy to criticize corporate law on these grounds. In other contexts, many have long complained about the tendency of corporations to drive out local businesses and undermine small communities. Many would prefer a world in which one can deal with a mom-and-pop hardware store, coffee shop, and restaurant rather than a corporate chain (though apparently not enough people to keep the mom-and-pops in business in most places), and perhaps for reasons not so different from what the communitarians describe. My point is simply that a contract theory that is based on the value of contractual relationships among individuals seems anachronistic in today's world. And it probably was anachronistic even in the time of *Hadley v. Baxendale*.

127. See, e.g., WEINRIB, *supra* note 59, at 56–83; Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 529–49 (1992); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 452–56 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403–09 (1992).

128. Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 85, at 623, 627–31.

centives that will lead to greater welfare for all.¹²⁹ By contrast, according to corrective justice theorists, private law is a matter of individual justice among private litigants.¹³⁰ For example, while the economists see tort law as an attempt to set up incentives for individuals to take an appropriate amount of caution when acting, corrective justice theorists argue that tort law is concerned with righting wrongs done to the plaintiff by the defendant.¹³¹ Dispensing such justice will no doubt have an effect on the incentives of future actors and the general welfare, but such effects are incidental and not the principle goal. The principle goal of private law is to right certain kinds of relational wrongs.¹³²

So far, most work in corrective justice has focused on tort law.¹³³ While it is often claimed that corrective justice explains private law generally,¹³⁴ including contract, less has been written specifically on contract law itself. Whatever the success of the theory in explaining tort law, it faces three principle obstacles as an explanation of contract.

The first obstacle has received a considerable amount of scholarly attention. In fact, the objection was first raised by Lon Fuller long ago.¹³⁵ Fuller argued that because the normal damage remedy in contract law is expectation damages, contract law must be engaged in distributive rather than corrective justice.¹³⁶ Corrective justice, he reasoned, would seek merely to correct by compensating for losses—a goal that would seem to call for a reliance measure of damages.¹³⁷ Because expectation damages puts the nonbreaching party in the position she would have been in had the contract been performed (presumably a position she had never been in before) rather than the position she was in before she was wronged, damage remedy is arguably engaged in redistribution rather than correction.¹³⁸

Corrective justice theorists have since responded to Fuller's objection by arguing that expectation damages can be seen as compensatory after all.¹³⁹ One possibility is to distinguish between factual losses, which

129. *Id.* at 624–27.

130. *Id.* at 627–31.

131. *Id.* at 627–28.

132. *Id.* at 654–55.

133. See COLEMAN, *supra* note 59, at 373–74; WEINRIB, *supra* note 59, at 134–36; Perry, *supra* note 127, at 478–88; Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 634–40 (1992).

134. For example, while Weinrib's book focuses almost exclusively on tort law in its details, it is entitled *The Idea of Private Law*. WEINRIB, *supra* note 59; see also Wright, *supra* note 133, at 627 n.4.

135. See Fuller & Perdue, *supra* note 69, at 52–56.

136. *Id.*

137. *Id.*

138. As noted above, eventually Fuller argued that contract law awards only expectation damages as a proxy for reliance damages, which (according to Fuller) are harder to calculate because of the uncertainty of lost opportunity costs. *Id.* at 57–66. Again, this argument is flawed at least descriptively, in that contract law really does prefer expectation damages even when reliance damages are easy to calculate and only awards reliance damages when expectation damages are too speculative to calculate.

139. WEINRIB, *supra* note 59, at 115.

are based on actual harm to property or person, and normative losses, which are a measure of either the disrespect that certain kinds of wrongs represent or of related dignitary harms.¹⁴⁰ Ernest Weinrib, a leading corrective justice thinker, makes such a distinction in his attempt to explain compensatory damages in tort law.¹⁴¹ While he does not extend the idea to the doctrine of expectation damages in contract law,¹⁴² if the distinction holds up, it might well explain contract law's practice of awarding more than make-whole, reliance damages.¹⁴³ Unfortunately, it is not at all clear that the distinction is intelligible and defensible.¹⁴⁴ And besides, even if the distinction can be maintained, we are able to explain expectation damages only at a cost: we would have no reason to forbid punitive damages as well in at least some cases of egregious breach.¹⁴⁵ Once our measure of damages is focused on the amount of normative loss suffered, there is no nonarbitrary reason to assume that normative loss is always capped at expectation damages.

A more promising answer to Fuller's objection is that although expectation damages do not return the nonbreaching party to a precontractual position, they do compensate her for the loss of a right created by the contract. This is the strategy followed by most corrective justice and related thinkers today, including both Weinrib¹⁴⁶ and Peter Benson,¹⁴⁷ another leading figure. There is some disagreement about the nature of that right: Benson argues that the promisee gains a right to the thing contracted for itself,¹⁴⁸ while Weinrib and others argue that the promisee gains a right to the promisor's performance.¹⁴⁹ But the general point remains the same: contracts change the legal relations of the parties and, in particular, the entitlements of the promisee. Expectation damages are compensatory in that they compensate for the frustration of a legal entitlement created by the contract.

However successful that line of argument may be, corrective justice explanations of contract law face a second objection, though this one has been less appreciated: corrective justice theory seems to be inconsistent

140. *Id.*

141. *Id.* at 116.

142. For Fuller's explanation about why expectation damages are compensatory, see *supra* note 137 and accompanying text.

143. See Bridgeman, *supra* note 59, at 252–58.

144. See, e.g., Perry, *supra* note 127, at 478–88.

145. See Bridgeman, *supra* note 59, at 258–59.

146. Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 57–58 (2003).

147. Benson, *supra* note 22, at 128; Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, ISSUES IN LEGAL SCHOLARSHIP, 2001, <http://www.bepress.com/cgi/viewcontent.cgi?article=1004&context=ils>.

148. To be more specific, Benson argues that the promisee gains a right to the thing contracted for *as against the promisee* from the time of contracting, though she does not gain a right against the rest of the world until performance. See Benson, *supra* note 22, at 132–37; Peter Benson, *Contract as Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1693–1731 (2007).

149. Weinrib, *supra* note 146, at 64–70.

with contract law's standard of strict liability for breach.¹⁵⁰ Corrective justice theories are typically thought to view private law as engaged in the correcting of wrongdoing done by one individual to another.¹⁵¹ That makes sense as an explanation of tort law, but contract law is different from tort. Contract law operates under a standard of strict liability for breach. Thus, breaching parties are generally not allowed to make excuses for their breach or argue that their breach was unavoidable and thus not morally blameworthy. And contract is similarly uninterested in arguments from the plaintiff that the defendant's breach was particularly blameworthy, and thus worthy of punitive damages. Quite simply, contract law is indifferent to wrongdoing.

This objection may be answered with a better understanding of corrective justice. Not all accounts of corrective justice are alike, and an important distinction helps us understand how contract law can be both indifferent to moral wrongdoing and explained by corrective justice. The key is to understand the important conceptual difference between wrongful loss and wrongdoing.¹⁵² Jules Coleman, another leading figure in the corrective justice literature in tort law, argues that tort law is primarily concerned with compensation for wrongful losses suffered by victims of accidents.¹⁵³ Tort law answers the question of whether victims should shoulder the cost of accidents themselves, or whether instead there is someone else who is responsible for the loss and who should bear its cost.¹⁵⁴ Although wrongdoing, such as negligence, may make a tortfeasor responsible for someone else's loss (and here is the important distinction), that does not mean that the purpose of tort law is to address that wrongdoing *qua* wrongdoing. Criminal law addresses wrongdoing, but tort law, Coleman argues, is primarily concerned with cleaning up messes, not punishing bad behavior.¹⁵⁵ As evidence, notice that in some cases (a famous example from the casebooks is *Vincent v. Lake Erie Transportation Co.*¹⁵⁶) courts will find plaintiffs liable in tort even while denying that they are guilty of wrongdoing. While strict liability is a bit of an oddity in tort law, it is the norm in contract law.¹⁵⁷ Therefore, an account of corrective justice that can make sense of strict liability is much more likely to be successful at explaining contract than one that can-

150. See Bridgeman, *supra* note 39, *passim*.

151. *Id.* at 3041.

152. *Id.* at 3020–26.

153. COLEMAN, *supra* note 59, at 198.

154. *Id.*

155. See *id.* at 304–06.

156. 124 N.W. 221 (Minn. 1910).

157. Bridgeman, *supra* note 39, at 3016–17.

not.¹⁵⁸ The distinction between correcting wrongful losses and addressing bad behavior for its own sake makes such an explanation possible.¹⁵⁹

So far we have seen and responded to two objections to corrective justice accounts of contract law. It has been argued that corrective justice cannot explain expectation damages, and that contract law is indifferent to moral wrongdoing and therefore not obviously corrective. These two objections can be answered together. We can best understand contract law through the lens of corrective justice by understanding contract law as recognizing legal entitlements created at the time of contracting, and compensating for the frustration of those entitlements in the event of breach. At first blush, if one imagines a corrective justice account of contracting, one might imagine a regime based on correcting for morally wrongful breach. Instead, corrective justice better explains contract law when it limits itself to considering what happens at the time of contracting when legal entitlements are created rather than accounting for what happens at the time of breach.¹⁶⁰ How or why those entitlements are frustrated is seldom important. Contract law simply seeks to enforce them, and in doing so it compensates for their frustration.

But separating wrongful loss from wrongdoing comes at a cost, for now it might be objected that the argument is entirely structural. By divorcing itself from the idea that contract law seeks to compensate for the moral wrongdoing associated with breach, this version of corrective justice has no account of the source of the legal entitlements. It seems corrective justice tells us only that contract law seeks to enforce entitlements, whatever those entitlements may be. But if that is so, then corrective justice is consistent with any theory of contractual entitlements and can hardly claim to explain contract law.¹⁶¹

Indeed, conceived this way, corrective justice accounts of contract look very similar to a small but growing group of contract theories we might loosely call “entitlement” or “property-based” theories. These theories see property law as the foundation of private law. The real work

158. *See id.* at 3023–26.

159. Interestingly, although Coleman’s version of corrective justice is better able to explain contract law than Weinrib’s, Coleman himself does not apply it to contract law, instead giving up contract to his own version of rational choice theory. *See* COLEMAN, *supra* note 59, at 105–82.

160. *See* Bridgeman, *supra* note 39, at 3034–39; *see also* Benson, *supra* note 148, at 1674 (“From a legal point of view, no new rights or duties arise between the parties after formation, whether by performance or by breach. The contractual rights and duties between the parties are completely specified and determined at formation.”).

161. Craswell, *supra* note 87, at 19–24. For his part, Coleman admits with respect to tort law that corrective justice is an account of secondary duties of repair that presupposes, but does not provide, a theory of primary duties. *See* COLEMAN, *supra* note 84, at 32. But Coleman argues that corrective justice is not compatible with just any set of first-order duties, and is intelligible only in light of certain paradigm cases such as battery. *Id.*; *see also* Bridgeman, *supra* note 39, at 3039–40. A similar argument may well be made for contract law, in particular against theories based on economic efficiency. But it would still not provide a positive argument for the paradigm cases, or even which cases are paradigm (e.g., would the fact of reliance be required in a paradigm case of the wrong of promise-breaking?). So while a response similar to Coleman’s may eliminate certain accounts, a positive theory of the grounds of entitlement is still required.

in private-law theory, according to these thinkers, is done by the theory of property rights; tort law deals with violations of such property rights, and contract law deals with their transfer.¹⁶² The work of Peter Benson, who is often thought of as a corrective justice scholar even though he seldom uses the term himself,¹⁶³ can be described this way.¹⁶⁴ Randy Barnett's well known consent theory of contract qualifies,¹⁶⁵ as does Andrew Gold's intriguing recent "transfer" theory.¹⁶⁶ The success of these theories in private law will depend largely on the success of their theory of property rights.¹⁶⁷ Although this is not the place to address those theories of property, suffice it to say that it is extremely doubtful that they will adequately explain how property is transferred in contract law.¹⁶⁸ Thus we are left with a compelling structural story about contract law but with no acceptable substantive explanation for the rights, just as with entitlement versions of corrective justice theory.

A related theory that deserves special mention is the "civil recourse" theory developed by Ben Zipursky.¹⁶⁹ According to Zipursky, private law is a bargain struck between individuals and the government, according to which individuals give up their individual right to redress wrongs in exchange for the government's help in redressing those wrongs by means of a civil cause of action.¹⁷⁰ Zipursky's work is intriguing and especially illuminating for highlighting the role of courts in private law, which are often treated as invisible by private law theorists. But the civil recourse theory, like the entitlement-based version of corrective justice,

162. See, e.g., Peter Benson, *The Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 85, at 752.

163. In most of his work Benson does not describe his view as a corrective justice account in so many words. But see Benson, *supra* note 127.

164. See Benson, *supra* note 162.

165. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *A Consent Theory of Contract*]; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

166. Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. (forthcoming 2009) (on file with the University of Illinois Law Review).

167. Benson's work is a special case. His early work included a robust property theory based on a Hegelian conception of property rights. See, e.g., Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1177 (1988). More recently he has abandoned the normative project of justifying property rights with Hegelian arguments in favor of a descriptive project in the spirit of Rawls's political liberalism. See Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 309 (1995). The structure of the rights still looks very similar, but now he offers no external justification. *Id.* at 308–09.

168. For example, Barnett's theory is based on the idea that consent is required in order to transfer property. See Barnett, *A Consent Theory of Contract*, *supra* note 165, at 269. But he begins with controversial premises about individual rights, and even if one agrees with him, it never becomes clear how we move from the claim that consent is necessary to ground a contractual right to the claim that it is sufficient. Gold's property theory, by contrast, is more robust but correspondingly harder to accept, as it purports to build virtually all of private law on the idea that we own our bodies, and therefore, our labor. See Gold, *supra* note 166 (manuscript at 39–53).

169. See Zipursky, *supra* note 128, at 624. See generally Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

170. Zipursky, *supra* note 128, at 637–44.

is entirely structural and says nothing about the source or content of the individualized wrongs. The theory presupposes the existence of prelegal rights and duties. To his credit, Zipursky, along with his frequent coauthor John Goldberg, have elsewhere had a good deal to say about the wrongs that tort law addresses, providing normative substance to the structural arguments for tort law.¹⁷¹ At one point Zipursky suggests (almost in passing) that contract is also a response to a related set of wrongs.¹⁷² But the civil recourse theory itself provides no account of the prelegal source of contractual entitlements, and we have already seen how such *prima facie* candidates as the duty to keep one's promises or the duty not to harm others by making and then breaking promises do not explain contract doctrine.

F. Summary

I should emphasize that this survey of the leading theories of contract law has been cursory at best, indeed little more than a sketch. My intention is not to provide an exhaustive treatment, but rather merely to set the stage for my own theory of contract. Each of the current leading theories fails in important ways to explain the law of contract we have. It is time to think about contract law in a new way. The presentation of my own theory must wait two more sections since more background is needed. In these two Parts, I will examine theories outside of contract, both in practical reasoning and in legal philosophy, to continue setting the stage for my own theory, contracts as plans.

III. PLANS AND PRACTICAL REASONING

In the last twenty years or so, the philosopher Michael Bratman has revolutionized the field of practical reasoning. Bratman emphasized a point so simple that in hindsight it is quite striking how underappreciated it was before: human beings are essentially planning creatures.¹⁷³ Before Bratman, the dominant view of practical reasoning was that rationality is simply a matter of means-end reasoning, a view most commonly associated with David Hume.¹⁷⁴ The only mental states thought to be relevant to intentional action were beliefs and desires.¹⁷⁵ Desires are not ra-

171. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1738 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 662-63 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1564 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1126-27 (2007).

172. Zipursky, *supra* note 128, at 646-47.

173. See BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 1; BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 2.

174. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 413-18 (L.A. Selby-Bigge ed., 2d ed. 1978).

175. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 3-9.

tionally criticizable (according to Hume, it is not irrational to prefer the scratching of one's little finger to the destruction of the entire world¹⁷⁶), and rationality is nothing more than figuring out how to realize desires, or as many of them as possible, given what one believes to be true about the world.

This parsimonious view of mental states simplified matters a great deal, to the convenience of philosophers, until Bratman pointed out that it relied on a snapshot picture of human agency that does not fit the real world.¹⁷⁷ Real human beings are not governed by just beliefs and desires, but also by all sorts of other "pro-attitudes" like hopes, wishes, and, most importantly, intentions.¹⁷⁸ In particular, it is not only the case that we act intentionally, we also maintain stable, forward-looking intentions over time: in short, we plan.¹⁷⁹ Today I form the intention to pick up the dry cleaning on the way home tomorrow. This intention is stable over time and affects my practical reasoning. It might, for example, keep me from going to the cleaners today, and it might also keep me from staying so late at work tomorrow that the cleaners close before I arrive.

This ordinary, everyday phenomenon of a stable, forward-looking intention poses a problem for the belief/desire model of practical reasoning. According to that model, we should always act in a way that will maximize the satisfaction of our desires given our current beliefs.¹⁸⁰ Thus, tomorrow I should stop at the dry cleaners if and only if doing so will maximize the satisfaction of my (then-current) desires given my (then-current) beliefs. If that is true, forming an intention today to act tomorrow is problematic. The intention formed today "does not reach its ghostly hand over time and control my action tomorrow."¹⁸¹ Nor is the intention rationally irrevocable, so that no matter what happens tomorrow, the only thing that would be rational to do would be to go to the dry cleaners. It seems, then, that forming an intention today would be useless if, when tomorrow comes, whether I should go to the cleaners is completely determined by the beliefs and desires I have at that time.

We know, of course, that forming such intentions is not useless. On the contrary, plans are essential to everyday practical reasoning. They provide two main benefits.

First, they conserve time and resources.¹⁸² Even if I could refrain from forming intentions until the time for action came, I would no doubt miss out on more ideal opportunities for practical deliberation (e.g., it might make more sense for me to decide on a route for my trip when I

176. See HUME, *supra* note 174, at 416.

177. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, *supra* note 3, at 3–9.

178. *Id.* at 6.

179. *Id.* at 7–8.

180. *Id.* at 6.

181. *Id.* at 5.

182. BRATMAN, FACES OF INTENTION, *supra* note 3, at 59; BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, *supra* note 3, at 11–12.

have access to the Internet than when I am in the car). And if I decide on my route now, it would be wasteful to make myself consider anew the best way to go when the time comes, assuming that nothing important has changed.

Second, plans help to coordinate action over time.¹⁸³ Common, everyday activities require planning. If I decide right now what to eat for dinner tonight, I can reason better about the best route home—whether I need to stop at the grocery store, for example. Just as importantly, having stable intentions like plans helps me to coordinate my behavior with others. If my wife is getting the dry cleaning, then I do not need to, and if I am stopping at the grocery store, then she does not need to. By contrast, if my every action is governed solely by my immediate perception of my desires along with my then-current beliefs, my behavior is much harder for others to predict and interpersonal coordination is much more difficult.

To achieve the benefits that planning provides, our plans must have a certain amount of inertia, i.e., they must be somewhat resistant to change.¹⁸⁴ The fact that I form the intention today to pick up the dry cleaning tomorrow gives me at least some reason to pick up the dry cleaning tomorrow without reconsidering. Of course, the mere fact that I form the intention does not make the intention rationally irrevocable. For example, if an emergency arose it might well become *irrational* for me to pick up the dry cleaning rather than, say, take a friend to the hospital. But if everything goes as expected, I have reason to pick up the dry cleaning simply because I planned to do so. If this were not the case, planning would always be a waste of time.¹⁸⁵

Another feature of plans is that they are very often initially partial.¹⁸⁶ I might plan today to fly to New York in six months. It could be useful to do such far-reaching planning if it helps to coordinate with others, for example with friends I might meet there or with the airline. But I need not decide on all the details of the trip now in order to achieve the benefits of planning. I can wait until much later to decide whether to drive to the airport or take a cab, for example, and in fact it might be irrational for me to be too specific about the details now if they can be figured out more easily later. Much of practical reasoning consists of the filling in of partial plans over time.

183. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 59; BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 11–12.

184. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 2; BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 16–17.

185. Unless, of course, it were fun for its own sake—the way one might plan how to spend lottery winnings should this ticket be a winner.

186. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 3; BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON*, *supra* note 3, at 29.

Plans are also often nested.¹⁸⁷ That is to say, I often develop sub-plans that are part of larger plans. If I plan to cook dinner tonight, I might form the sub-plan to drive by the grocery store on the way home. I might also have a sub-sub-plan about how to shop once I am in the grocery store (start with the produce, say, as the rest of my list may depend on what fresh produce is available).

Plans also make demands on our rationality.¹⁸⁸ Once I have plans in place, I subject myself to rational criticism for doing things inconsistent with those plans without some good reason. My plan to pick up the dry cleaning today makes my surfing the Internet until after the dry-cleaning shop closes irrational, whereas otherwise it might not be.

Plans are not necessarily private or subjective. Instead, they can be made up of *shared* intentions.¹⁸⁹ You and I can plan to cook dinner tonight together. Our shared intention in some way depends on each of us having relevant intentions but is not reducible to our individual intentions.¹⁹⁰ Of course, our plans need not be completely shared. It could be the case that we simply share a partial plan—to cook dinner tonight—without filling in further details. Or we could be more specific: I will be responsible for the entrée, while you will make dessert. Even so, our plans will not overlap completely. We share the plan to make dinner, with me making the entrée and you making dessert, but we leave further sub-plans to be worked out individually. Perhaps I am to decide on my own what the entrée will be; or we could decide together that I am to bring duck breast, but you do not care from which store I purchase it, much less the route that I choose to drive home.

Finally, there is no reason why we must be the authors of the plans that apply to us. We can select a recipe out of a book, for example. Or we can follow a plan because we are ordered to do it, as when a general draws up a battle plan for troops. Indeed, as we will see in the next Part, law is just such a plan. According to the planning theory of law, the role of government is to promulgate plans in order to solve the coordination

187. See BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, *supra* note 3, at 29 (stating plans are hierarchical in nature and involve multiple steps).

188. BRATMAN, FACES OF INTENTION, *supra* note 3, at 3; BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, *supra* note 3, at 31.

189. BRATMAN, FACES OF INTENTION, *supra* note 3, at 110–12. The related notion of a shared intentional action has been hugely important in practical reasoning and moral philosophy in recent decades. Although we all agree that there is an important difference between our cooking dinner together and our both cooking dinner in the same kitchen at the same time, articulating the precise conditions for shared intentional activity has been quite tricky and controversial. And much is at stake. The basic question of when an individual is responsible for the actions of a group may well depend on what counts as a shared intentional action (e.g., under what circumstances am I responsible for the actions of the United States government abroad? To what degree can it be said that I am a party to a social contract? At what point is someone who is somewhat sympathetic to Islamic militants—who perhaps trains with them, or donates money, or simply asserts a membership in a group without more activity—responsible for a particular terrorist activity?). For a thorough discussion of these questions, see *Shared Intentions and Collective Responsibility*, 30 *MIDWEST STUD. PHIL.* 1 (2006).

190. BRATMAN, FACES OF INTENTION, *supra* note 3, at 122–23.

problems that come from people living together in unplanned communities. And as we will see in Part V, contract law is a special case of the planning theory of law. Contract law is law that allows people to make laws—plans enforceable by the government—for themselves, to govern their own situations.

IV. THE PLANNING THEORY OF LAW

Although Bratman himself is neither a lawyer nor a legal theorist, his path-breaking work in practical reasoning has begun to have influence in legal theory, most importantly in recent work by the legal philosopher, Scott Shapiro. Shapiro has used Bratman's ideas to fascinating effect in creating what he calls the "Planning Theory of Law."¹⁹¹ As I have with Bratman's, I will briefly introduce Shapiro's ideas without hope of doing them justice. My aim here is to give just enough background to allow me to use his basic ideas to develop a new theory of contract. I should point out that Shapiro's primary purpose is to address certain debates in jurisprudence that I will not treat here.

Shapiro employs the time-tested heuristic of the imagined state of nature, a society in which people live together (in Shapiro's case on an island) without government to regulate their behavior.¹⁹² The inhabitants soon realize that they need to work together to survive.¹⁹³ The problem for Shapiro's society is not the problem imagined by Hobbes: in the state of nature people will act entirely in their own self-interests, robbing and murdering each other to suit their own needs.¹⁹⁴ Rather, the inhabitants of Shapiro's community all have goodwill toward one another.¹⁹⁵ Nonetheless, they soon discover that to survive and prosper, they need to cooperate in the use of land, the division of labor, the storing of provisions for the winter, and so forth.¹⁹⁶ Some problems are solved naturally through the spontaneous development of conventions.¹⁹⁷ But other problems are not so easily solved, and eventually the islanders find it necessary to engage in planning, creating by agreement a system of property rights and rudimentary rules for trading.¹⁹⁸

191. See Shapiro, *Laws, Plans, and Practical Reason*, *supra* note 2, at 432–40; Shapiro, *Interpretation and the Economy of Trust*, *supra* note 2.

192. See SHAPIRO, *LEGALITY*, *supra* note 2 (manuscript at 140–50).

193. *Id.* (manuscript at 140).

194. THOMAS HOBBS, *LEVIATHAN* 86–90 (Richard Tuck ed., 1991).

195. See SHAPIRO, *LEGALITY*, *supra* note 2 (manuscript at 141). This fact for Shapiro is entirely contingent: he is not making a claim about human nature of the sort that interested Hobbes and Rousseau. His inhabitants just happen to be people who all share goodwill toward one another. The point of imagining such a society even though it seems unlikely in practice is to show that even such agreeable people still need law.

196. *Id.*

197. *Id.*

198. *Id.* (manuscript at 141–42).

So far there is nothing remarkable about this hypothetical picture. The inhabitants have simply engaged in very basic practical reasoning of the sort described by Bratman. Up to a point, this is all they need to survive and prosper. But eventually more complications arise. For example, changes in the population introduce new difficulties as the islanders have to decide whether to allow any outsiders to immigrate and what to do with property in the event of births and deaths.¹⁹⁹ The very success of the islanders also complicates matters as they accumulate more and more things over which they might disagree and as the potential for unequal distribution of resources arises.²⁰⁰ Eventually the size of the population and the sophistication of the trading make private planning more and more difficult.²⁰¹ Agreements become more complex and, despite their good intentions, disagreements develop about how those agreements are to be applied.²⁰²

Each of us is willing to do what we ought to do—the problem is that none of us knows or can agree about what that is. Customs cannot keep up with the evolving conflict because they develop too slowly to regulate rapidly changing social conditions and are too sketchy to resolve complex disputes and coordinate large-scale social projects. While private negotiation and bargaining are able to quell some conflicts, this process can be very costly, not only in terms of time and energy but emotionally and morally as well. With many more ways to interfere with one another's pursuits and many more goods to fight over, there is a danger that disputes will proliferate and fester, causing the parties to refuse to cooperate in the next communal venture or, worse, to become involved in ongoing and entrenched feuds. Some projects, such as income redistribution, are so complex, contentious and arbitrary that they are simply not feasible through private planning alone.²⁰³

When it becomes clear that private planning cannot handle all of these challenges, the inhabitants begin to engage in shared social planning to regulate their society as a whole.²⁰⁴ They meet as a group to make plans, but soon it becomes clear that shared social planning will not handle all of the challenges of an increasingly complex society.²⁰⁵ It is extremely time consuming, and in any event it quickly becomes nearly impossible to achieve consensus about important, complicated issues.²⁰⁶

The solution is to introduce hierarchy.²⁰⁷ The inhabitants agree on a master plan, according to which they appoint a few members of the

199. *Id.* (manuscript at 148–49).

200. *Id.* (manuscript at 144).

201. *Id.* (manuscript at 146).

202. *Id.*

203. *Id.* (manuscript at 145).

204. *See id.*

205. *Id.*

206. *See id.* (manuscript at 145–47).

207. *Id.* (manuscript at 147).

community to plan for the community as a whole.²⁰⁸ Some of these few are to debate and adopt plans, and others are to apply them.²⁰⁹ The master plan solves the biggest problems in that it allows a few people to concentrate on the complicated issues while the rest of the citizens can go on about their ordinary lives.²¹⁰ More importantly, according to the master plan, the consensus of all the inhabitants is no longer required.²¹¹ Instead, the plans adopted by the plan adopters are binding simply because they have been adopted by those authorized to do so, whether or not all of the inhabitants think they are a good idea.²¹²

While such a master plan solves many of the problems the community had faced before, it will need to do more than simply appoint individuals to plan for the community. It also needs to create offices that will describe when and how those individuals are to be replaced by other plan adopters and appliers.²¹³ The master plan describes under what circumstances plans adopted by one set of planners will be binding on future planners.²¹⁴ And it eventually creates institutional procedures for adopting and promulgating plans that do not depend on the actual intentions or other mental states of individual planners.²¹⁵

When private planning has been replaced by hierarchical, institutional planning of this sort, the inhabitants are no longer in the state of nature but instead have created a legal system. The master plan is a constitution of sorts, a plan for planning. The plan adopters are legislators, and the plan appliers are judges.

It is important to emphasize three features of the planning theory of law. First, it is thoroughly positivist, i.e., the content of the laws is entirely dependent on social facts, in particular whether the laws (the plans) have been adopted by the plan adopters in accordance with the master plan.²¹⁶ Thus, there is no requirement that the plans be morally acceptable, and in fact, they may be morally repugnant. Nor is there any requirement that the plans even be effective in doing what they are designed to do. The plan adopters may well be incompetent or immoral or both, but such facts would not defeat the validity of the plans and their claim to law.²¹⁷

Second, understanding law this way makes clear that although law typically includes sanctions for failures to obey, it need not do so by defi-

208. *See id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.* (manuscript at 148).

213. *See id.*

214. *Id.*

215. *See id.* (manuscript at 149).

216. *See id.* (manuscript at 156–58).

217. This is one of Shapiro's larger points, a claim well beyond the scope of this Article. The content of plans clearly depends on social facts. Since laws are themselves plans, he argues, the content of law depends on social facts—the central thesis of legal positivism.

dition.²¹⁸ The planners may well make plans that simply tell citizens what to do without stipulating what will happen if they do not. In a society such as the one imagined by Shapiro where everyone has the best intentions to cooperate and respect one another, plans may not need to include sanctions. They would still be quite useful in that they would inform well-intentioned citizens of their legal obligations and thereby help to coordinate behavior.²¹⁹ On the other hand, if it so happens (as is more likely) that many citizens will not follow plans without threat of sanction, a law that did not include sanctions might thereby deserve rational criticism, but the plans would still be law nonetheless. Therefore those who claim that law is nothing more than the threat of sanction are mistaken.²²⁰

Finally, by understanding law in this way, we can see that law is what Shapiro calls a “universal means.”²²¹ Law is a solution to the problems associated with societies so complex that coordinating behavior is difficult, if not impossible, without hierarchical planning. But the solution provided is not aimed at any one end. For example, James Madison famously said that “[i]f men were angels, no government would be necessary.”²²² According to this way of thinking, law is a solution to what Shapiro calls “the problem of bad behavior” or “bad character.”²²³ Hobbes argued that men are by nature greedy and selfish, and thus life in the state of nature without government would be “solitary, poore, nasty, brutish, and short.”²²⁴ But this view of law is too narrow in two respects. For one thing, it fails to recognize that law not only threatens, it also informs. As Larry Alexander has recently put it, “[T]he problem . . . is not that men are not angels, but that they are not gods.”²²⁵ Even well-intentioned citizens such as those imagined by Shapiro will often have good-faith disagreements about which principles to apply. And even when citizens do agree about the principles, they may disagree about how those principles are to be applied in given cases and thus need laws (plans) to inform them.

218. SHAPIRO, LEGALITY, *supra* note 2 (manuscript at 150–51).

219. I have elsewhere emphasized this important role of contract law in particular. See Bridgeman, *supra* note 15, *passim*.

220. For an example of this mistake in contract law, see Holmes’s famous proclamation that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” Justice O.W. Holmes, Supreme Judicial Court of Mass., Address at the Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 462 (1896); see also POSNER, *supra* note 21, at 131 (arguing for efficient breach and citing this Holmes quote).

221. SHAPIRO, LEGALITY, *supra* note 2 (manuscript at 154).

222. THE FEDERALIST NO. 51 (James Madison).

223. SHAPIRO, LEGALITY, *supra* note 2 (manuscript at 154).

224. HOBBS, *supra* note 194, at 89.

225. Larry Alexander, *Law and Formalism* 25 (Univ. San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 07-18, 2005), available at <http://ssrn.com/abstractID=829327>; see also Larry Alexander, “With Me, It’s All er Nuthin’”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 530 (1999). H.L.A. Hart made a similar point, indeed in similar language, about the difficulty of applying rules to specific facts given the open texture of language. H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994).

Second, as Shapiro's arguments make clear, correcting bad behavior is just one of an endless number of ends the law might aim to achieve.²²⁶ Master planners may not care at all about bad moral character, and may instead be concerned only with maximizing wealth for society (which might well require a certain amount of regulation of bad character). Or they might wish to maximize wealth for themselves at the expense of others, or to bring glory to gods, or to colonize Mars, or any other end whatsoever. A great number of aims can be better achieved through coordinating behavior with plans. Law is a tool for achieving goals—whatever the goals may be—in societies so complex that private planning is incapable of doing so.

We began with a quick outline of the shortcomings of currently prevailing theories of contract law. We then briefly surveyed literature in practical reasoning and legal theory that I will argue can help us start anew in contract theory. We have seen that the traditional belief-desire model of practical reasoning is not sufficient to explain ordinary, everyday practical reasoning. Rationality requires the ability to plan, to form and stick to forward-looking intentions. Without planning, our own reasoning would be grossly inefficient and wasteful, and we would find it nearly impossible to coordinate our behavior with others. When groups become large, coordinating behavior becomes so complex that it requires hierarchical, institutional planning. Law is a form of such planning. It includes a master plan for how such planning is to be done and creates specialized offices for creating and applying plans. Although law is always responsive to the same general problem—the difficulties we face coordinating behavior in complex societies—it is agnostic as to the ends to be achieved by planning. Rather, it is a universal tool for accomplishing whatever goals a society might pursue.

In the next Part, I will introduce the idea of contracts as plans. My claim will be that while law in general aims to coordinate complex communities, Anglo-American contract law is a solution to a specific coordination problem.

V. CONTRACTS AS PLANS

Contract law is a plan for how private parties may go about creating legally binding plans for themselves: it is a response to a special kind of coordination problem. It allows us to coordinate our actions with others by guaranteeing to them that we are committed to a shared plan, and that even if we do not remain committed, the government will enforce the shared plan as binding on us. It also informs us by clarifying the content of our duties under our plans.

226. SHAPIRO, *LEGALITY*, *supra* note 2 (manuscript at 154–56). Bratman's view of planning is also neutral with respect to what we might want to accomplish with plans. See BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 5–7.

The coordination problem that contract law aims to solve is a well-known one. Consider the following famous example from David Hume:

Your corn is ripe today; mine will be so to-morrow. 'Tis profitable for us both, that I shou'd labour with you to-day, and that you shou'd aid me to-morrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I shou'd be disappointed, and that I shou'd in vain depend upon your gratitude. Here then I leave you to labour alone: You treat me in the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.²²⁷

What we need in such cases is something to provide the needed mutual confidence and security. It is natural to think that I provide the confidence and security not by just telling you I will help you, but by *promising*, and thereby taking on a moral obligation.

It is worth noting the difficulty in establishing such a moral obligation. Hume thought it made no sense to say I could create a moral obligation just by an act of will, no matter how beneficial it might be for me to do so.²²⁸ Indeed, he thought the idea that one could create a moral obligation by an act of will and words is "one of the most mysterious and incomprehensible operations that can possibly be imagin'd, and may even be compar'd to *transubstantiation*."²²⁹ Perhaps much of Hume's confusion can be attributed to his own idiosyncratic moral theory, according to which "[a]ll morality depends upon our sentiments."²³⁰ For Hume, morality is just a matter of personal likes and dislikes. Thus, it is impossible for me to give myself a moral obligation just because it would be convenient for me to have one, just as it would be impossible for me to make myself like rice cakes just because preferring them to ice cream would help me lose weight.²³¹ That is not to say that there is no such thing as promissory obligation. Rather, Hume's point is that it does not

227. HUME, *supra* note 174, at 520–21.

228. *Id.* at 523.

229. *Id.* at 524.

230. *Id.* at 517.

231. It is perhaps useful to quote Hume at greater length on this point:

All morality depends upon our sentiments; and when any action, or quality of the mind, pleases us *after a certain manner*, we say it is virtuous; and when the neglect, or non-performance of it, displeases us *after a like manner*, we say that we lie under an obligation to perform it. A change of the obligation supposes a change of the sentiment; and a creation of new obligation supposes some new sentiment to arise. But 'tis certain we can naturally no more change our own sentiments, than the motion of the heavens; nor by a single act of our will, that is, by a promise, render any action agreeable or disagreeable, moral or immoral; which, without that act, wou'd have produc'd contrary impressions, or have been endow'd with different qualities. It wou'd be absurd, therefore, to will any new obligation, that is, any new sentiment of pain or pleasure; nor is it possible, that men cou'd naturally fall into so gross an absurdity. A promise, therefore, is *naturally* something altogether unintelligible, nor is there any act of the mind belonging to it.

Id.

arrive naturally, i.e., “antecedent to human conventions.”²³² Experience teaches us that it is useful to create symbols or signs by which we can indicate an intention to be held to our word.²³³ Once such conventions are in place, whoever invokes them is bound “by his interest to execute his engagements, and must never expect to be trusted any more, if he refuse[s] to perform what he promis’d.”²³⁴ For Hume, to say that we have a promissory obligation is just to say that having made a promise within the context of a social convention of a certain sort, it is now in our best interests to keep that promise.²³⁵

One does not need to subscribe to Hume’s sentimental moral theory for a similar problem with promissory obligation to crop up, however. Much has been written about the source and extent of promissory obligations, and the literature continues to grow.²³⁶ But even if we can conclusively establish moral obligations to keep one’s promises, a huge problem still remains: individuals may simply refuse to act in accordance with their moral obligations. Just because your promise gives you an additional reason to act in accordance with our shared plan to help each other harvest our crops does not mean that you will actually do so, and I know this to be true. Even if you manage to convince me that today you do regard your promise as giving you a reason, I still may not be convinced that you will regard it as a *sufficient* reason tomorrow. Of course, there may be social sanctions that follow from the breaking of promises as Hume noted,²³⁷ but in any given case they may not be sufficient to motivate you to perform. Thus, whether a moral obligation for you is created or not, I perform first at my own risk.²³⁸

Contract law provides a solution to this practical problem. It gives people a reason to trust those who make promises, or at least to feel confident that a remedy will be provided in the event of breach. By creating the possibility for rational trust in bargained-for promises, contract law

232. *Id.* at 516.

233. *Id.* at 522.

234. *Id.*

235. *Id.* at 516–23.

236. See, e.g., ATIYAH, *supra* note 57, at 120–21; RAWLS, *supra* note 31, at 303–08; SCANLON, *supra* note 49, at 295–327; Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119, 119–20 (2003); Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 26 LAW & PHIL. 531 (2007); Shiffrin, *supra* note 99; Holly M. Smith, *A Paradox of Promising*, 106 PHIL. REV. 153 (1997); Gary Watson, *Promises, Reasons, and Normative Powers*, in REASONS FOR ACTION (David Sobel & Steven Wall eds.) (forthcoming 2009) (on file with the University of Illinois Law Review); Joseph Raz, Book Note, 95 HARV. L. REV. 916, 927–33 (1982) (reviewing ATIYAH, *supra* note 57); Heidi M. Hurd, *Promises Schmomises* (June 14, 2008) (unpublished manuscript, on file with the University of Illinois Law Review).

237. HUME, *supra* note 174, at 541–45.

238. And even if you generally agree that you have a duty to keep your promise, you may disagree about particulars. You may disagree, first of all, about under what circumstances you are required to keep your promise—when, for example, new reasons will be allowed to trump your old reasons. And you and I may disagree about what your promise calls for. Even our broad agreement as to general principles will not guarantee agreement about specific actions. I will return to this point later.

makes available the benefits that can come from coordinated activity, particularly coordinated yet self-interested activity.

This is a point that Thomas Hobbes, for one, appreciated. Hobbes argued that there is no duty in the state of nature to fulfill one's side of what we today call an executory contract, i.e., a contract where performance is still owed by both sides.²³⁹ Very roughly speaking, according to Hobbes, one's duties in the state of nature are limited to what is in one's rational self-interest.²⁴⁰ Performing one's side of a bargain in the state of nature without having received performance by the other side is irrational in that it exposes one to the possibility of being exploited by the other party:

For most men are of evil character, bent on securing their own interest by fair means or foul; and so the man who performs his part first is laying himself open to the greed of the other party to the contract. For it is not reasonable for anyone to make performance first if it is not likely that the other will perform his part later.²⁴¹

But things are different in the "civil state where there is someone to coerce both parties."²⁴² In that case, even according to Hobbes, the one who is "called upon by the contract to perform first should do so; since the reason why he was afraid that the other party might not perform no longer exists, as the other can be compelled."²⁴³ Hobbes's views are quite different from my own in that he argues that the existence of the civil state makes possible a natural-law duty to fulfill one's executory agreements. By contrast, under my view, a natural-law duty is neither necessary nor sufficient to solve the practical problem of how to induce others to trust us to do as we promise.²⁴⁴ But Hobbes makes an important point: the existence of civil enforcement gives one a reason to trust even entirely self-interested parties to live up to their agreements.²⁴⁵

The problem is not just the potential for exploitation identified by Hobbes. Law also informs the well-intentioned about their legal obligations. A married couple may adopt joint plans not just to induce other-regarding behavior, but rather to coordinate behavior (you pick up the dry cleaning; I'll go to the grocery store). There is a difference between trusting *in* someone—i.e., finding someone trustworthy—and trusting

239. THOMAS HOBBS, ON THE CITIZEN 36–37 (Richard Tuck & Michael Silverthorne eds., 1998).

240. For a very useful discussion of Hobbes's theory of contract, see Claire Finkelstein, Hobbes on Contract *passim* (Sept. 2, 2000) (unpublished manuscript, on file with the University of Illinois Law Review).

241. HOBBS, *supra* note 239, at 37.

242. *Id.*

243. *Id.*

244. It is not necessary because all the other party needs to know is that one will perform or be forced; the alleged fact of a moral duty to perform is not needed once this is known. Nor is it sufficient, since even if a moral duty could be established, without government or other enforcement, there is no guarantee that a party will live up to her moral obligations.

245. HOBBS, *supra* note 239, at 37.

that someone will do something.²⁴⁶ The threat of legal enforcement of contracts can create trust in someone where it may not have existed, or been strong enough, before. But trusting in someone is not enough unless one has confidence that the person understands his legal responsibilities. Having an institutionalized practice of contract law can help to create trust that someone will do something specific by ensuring that both parties are informed of their contractual obligations.²⁴⁷

Although the contracts as plans view is an instrumental theory in that it sees contract law as a solution to a practical problem, it is neutral as to exactly what good is to be achieved by solving the coordination problem. For example, utilitarians think that morality requires the maximization of happiness (or, for other consequentialists, wealth, or preference satisfaction, etc.). According to law and economics approaches, for example, the situation in Hume's picture of the two farmers at harvest is a lost opportunity to create wealth, in that our lack of trust causes both to lose their crops.²⁴⁸ This way of thinking about contract law is consistent with the theory of contracts as plans, but is not identical to it because there are many goods other than economic ones that we might realize but for our lack of trust. Imagine, for example, a society whose members all share the primary goal of bringing glory to their gods. One way to do so would be for people to build huge idols, but no one is able to build such an idol alone. A dictator might simply order such idols built, which would be consistent with the planning theory of law. Or a legal system might decide to enforce contracts in the hope that individuals will build such idols privately. In such a case, a good would be realized (the idols would be built) only if people could rely on others to keep their promises in the case of bargained-for exchanges. Contract law would give them good reason to trust others and thereby create the good of increased glorification of their gods.

The contracts as plans theory is also distinct from the communitarian views described above, despite the fact that both emphasize the im-

246. See, e.g., Erin A. O'Hara, *Trustworthiness and Contract* 6-7 (Gruter Inst. Project on Values & Free Enter., 2007), available at <http://ssrn.com/abstract=929503>. O'Hara largely distinguishes between internal and external motivations for the party who would be trusted to do as he is supposed to do. My point is consistent with her discussion but different: sometimes we cannot trust *that* a person will do as he should even though we trust *in* him, i.e., find him to be of trustworthy character, simply because despite his good intentions, he may not have the same understanding of his obligations.

247. This idea is related to, but distinct from, the idea that the law can make people more trustworthy by reminding them of their legal or moral duties or both. For example, "the sermonizing tone typically adopted by courts in fiduciary cases [in corporate law] reinforces the social message that other-regarding behavior is demanded." Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1786 (2001). The law may be able to make people more moral (and perhaps thereby more productive) by preaching to them. My point here is that even people who already have the best intentions sometimes need guidance as to how to act. In other words, even people sufficiently motivated to fulfill their agreements need guidance as to the content of their contractual duties. This is a problem the law can help to solve, in particular through the use of formal rules. See Bridgeman, *supra* note 15, *passim*.

248. See HUME, *supra* note 174, at 520-21.

portance of trust. According to the communitarian theories, being involved in certain kinds of human relationships is important to living a worthwhile life. In particular, it is important to develop relationships of trust in order to treat others with mutual concern and respect. But those views place a value on trust itself: contract law is desirable insofar as it enhances interpersonal trust because trusting relationships are themselves valuable.²⁴⁹ By contrast, although it does not deny that trust is valuable in this way, the view of contracts as plans sees trust also as a means to other ends,²⁵⁰ whatever those ends may be. In addition, it emphasizes the role of contract law in informing parties of their legal obligations even when they already find their contracting party to be trustworthy.

I do not mean to suggest, however, that every system of contract law is necessarily designed to solve the problem of a lack of the trust needed to make exchanges over time. This is not an account of all the necessary and sufficient conditions for correct usage of the term “contract” or “contract law.” Other systems of contract law, for example, may be designed to respond to the wrong of promise breaking. European civil-law systems, for example, do not have a consideration doctrine; instead they often require “causa,” which is actually something of a fault standard.²⁵¹ Such laws, like all laws, can be understood as institutional plans, and they do help to coordinate behavior, but they do not seem to be aimed at the same coordination problem that preoccupies Anglo-American contract law. European contract law is less distinguishable from tort law: indeed, the two are commonly lumped together under the rubric of the “law of obligations.” Whether it makes sense to call both systems contract is not important. What is important is that we understand the different nature of the problems each are designed to solve.

While the idea of contracts as plans makes a certain amount of intuitive sense, in order for it to be better than the currently prevailing views, it must explain the central doctrines of contract law, or at least fit well with those doctrines. In the next Part, I will argue that it does. Then, in Parts VII and VIII, I will argue that in addition to explaining well-settled doctrines, the theory can have prescriptive implications for more controversial issues in contract law.

249. There is also a growing literature on the usefulness of trust in maximizing wealth, particularly in the corporate law setting. See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); Blair & Stout, *supra* note 247, at 1780–1807. For insights into the role of trust in contract law in particular, see O'Hara, *supra* note 246.

250. To be more precise, contract law is a set of plans for individuals to plan. That set of laws is a means to whatever ends are the ends of that society and its legal officials. Contracts themselves are also plans. They are means to the more specific ends of the individual parties.

251. E. Allan Farnsworth, *Comparative Contract Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 899, 910, 922 (Mathias Reimann & Reinhard Zimmerman eds., 2007).

VI. EXPLAINING CONTRACT DOCTRINE WITH THE THEORY OF CONTRACTS AS PLANS

We notice first that this view of contracts provides a solid explanation of the consideration doctrine. The consideration doctrine—which is the first cut in Anglo-American contract law for deciding between those promises that are enforceable at law and those that are not—holds that to be enforceable, agreements must be the product of a bargained-for exchange.²⁵² This phrase occasionally causes confusion, as, for example, when it is thought that there must actually be a negotiation or at least that parties be of somewhat equal bargaining power and thus, in theory, able to negotiate. Instead, according to the consideration doctrine, promises must be bargained for in the sense that they must be made in exchange for something, i.e., in order to induce the promisee to do something (often to make a promise herself).²⁵³ Promises to make a gift are generally not enforceable.²⁵⁴ Neither are promises that are purported to be in exchange for something that has already been done,²⁵⁵ or for something that the promisee already has a legal duty to do.²⁵⁶ And illusory promises, i.e., words of promise that do not actually bind (e.g., “I promise to do *X* next Wednesday unless I change my mind”) do not satisfy the consideration doctrine because nothing is exchanged.²⁵⁷

As we have seen, most of the prevailing theories of contract, especially the reliance theories and promise theories, struggle to explain this most basic doctrine. The promise theory, for example, can make no sense of this doctrine, as it would seem to call for the enforcement of all morally obligatory promises, whether made to induce action or not. Reliance theories fare no better. According to those thinkers, the key to the enforceability of promises is the fact that the promisee has relied on the promisor’s promise, not that there has been a bargained-for exchange as the consideration doctrine requires.²⁵⁸

By contrast, the consideration doctrine makes perfect sense once we view contracts as plans. It picks out those situations where threat of government enforcement is needed to solve an interpersonal coordination problem: cases where a promise is given to induce an exchange for something of value. There is no need for legal enforcement of promises if we

252. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979).

253. FARNSWORTH, *supra* note 37, § 2.2.

254. *Id.* § 2.5.

255. *Id.* § 2.7. There are, of course, a few exceptions. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 82, 92.

256. FARNSWORTH, *supra* note 37, § 4.21.

257. *Id.* § 2.13.

258. It has been suggested to me on more than one occasion that not much should be made of the consideration doctrine since, despite its central place in first-year courses on contracts, it is seldom litigated or otherwise even noticed by practicing lawyers. But even if consideration is seldom litigated these days, that does not downplay its conceptual significance. The doctrine is well established by this point, and there is therefore little dispute about its application.

are making gift promises. A gift promise is by definition made in exchange for nothing, so there is no benefit to the promisor in a government threat to enforce the promise. If the promisor wants to make a gift that is of no benefit to her, she can presumably do so any time she wants. The difficulty comes when she would like to plan an exchange over time with someone who needs reassurance.²⁵⁹

It is worth mentioning that the enforcement of non-bargained-for promises would, in some ways, help to coordinate behavior, in that the promisee would then be better able to predict the behavior of the promisor and act accordingly. But we must be careful not to go too far. In this same sense, *any* mandated action helps to increase predictability in behavior, whether the mandate is voluntarily assumed or not, and would thus in some sense increase coordination. For example, if the government were to insist that you pay me \$1,000 of your own money every year in exchange for nothing, I would be able to predict your behavior with some certainty and plan accordingly, but that is not a good reason for the government to do so. By enforcing the shared plans we wish to make nonoptional for ourselves, the government assists us in coordinating our behavior over time in a way that is voluntary for both of us, presumably beneficial for both of us, and that could probably not be accomplished, or accomplished as well, without the threat of government enforcement.

The advantage of viewing contracts as plans over the other theories does not end with the consideration doctrine. Consider, for example, contract law's doctrine of strict liability for breach. If contract were based on one's moral obligations to perform a contract (as the promise theory and at least one version of corrective justice argue), we would expect one's contractual obligations to exist only when they reflect moral obligations. Thus, we would expect courts to entertain arguments that there is no contractual obligation to perform when there is no moral obligation to perform, as, for example, when performance has become impossible for the promisor, when it would create an undue hardship, or when the promisor has come under conflicting and overriding duties since making the promise (e.g., perhaps a promisor now has an unanticipated moral duty to care for a family member²⁶⁰). We can easily imagine any number of circumstances when promisors are not morally blameworthy for breaking their promises. But courts in contract cases do not ac-

259. Of course, if one thought it morally wrong to break a promise and also thought that the government ought to be concerned to address the moral shortcomings of its citizens, then perhaps one would want gift promises enforced. But if instead one simply wanted to make available the possibility of exchange over time in conditions where there is good reason for a lack of trust, there would be no need to enforce gift promises.

260. For example, some evidence suggests that Mrs. Mary Yates Johnston's change of heart about her gift to Allegheny College was based on a felt duty to care for her nieces due to circumstances that had changed since the making of her now-famous pledge. See Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 656-59 (1987).

cept such arguments.²⁶¹ They are equally uninterested in arguments by plaintiffs that some breaches are particularly egregious and therefore worthy of punitive damages in addition to normal contract damages.²⁶² With rare exceptions, even if a promisee can show that a promisor intentionally and for the worst motives refused to perform her contract, punitive damages will not be awarded.²⁶³

Such indifference is odd if contract law is primarily based on the moral wrongfulness of breach, but not at all surprising under the theory of contracts as plans. To be sure, we can imagine a set of laws primarily designed to deal with such wrongdoings, and a law based on the moral wrongdoing of promise breaking could even be consistent with the planning theory of law.²⁶⁴ But such a set of laws would likely look very similar to criminal law, or perhaps tort law, but not very much like our law of contract. And while like all laws (according to the planning theory of law) they would be a solution to coordination problems present in complex societies, there is no reason to think they would be a solution to the particular coordination problem of a lack of interpersonal trust that inhibits private exchanges over time. And unlike a theory that sees contract law as designed to deal with bad behavior, contracts as plans does not presuppose any particular societal goal. Just about any shared end would be harder to achieve when citizens cannot trust each other to live up to private agreements. Contract law seeks to solve that coordination problem without taking a stand as to which ends are worth pursuing, and thus explains strict liability, which does not require or allow for considerations of moral duty.

Viewing contracts as plans also explains why contracts are enforceable both for organizations and natural persons alike. For example, a theory that views contract law as primarily concerned with the moral wrongfulness of a free agent willfully undertaking an obligation and then failing to live up to it must explain how that theory applies to corporations, which do not have "wills." Perhaps the promise theory can do so partially by considering the organization's agents, who presumably do have free will, but the communitarian theories cannot. Recall that according to those theories, the entire practice of contract law is best explained and justified by its role in enhancing valuable interpersonal hu-

261. There is a "defense" of impossibility or impracticability, but these cases are rare, and in any event can best be understood as interpretations of the duties created at the time of contract instead of a release from those duties. See Bridgeman, *supra* note 39.

262. See Bridgeman, *supra* note 59, at 264.

263. There is a *tort* for bad-faith breach of contract, but even it is limited to insurers. Montana and California courts briefly toyed with broadening the cause of action beyond the context of insurance agreements, in *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 1116–19 (Ct. App. 1984), and *Nicholson v. United Pacific Insurance Co.*, 710 P.2d 1342, 1346–48 (Mont. 1985), but the experiments did not last. See also Bridgeman, *supra* note 59, at 268–71.

264. That is, consistent with Shapiro's general theory of law called the planning theory of law. Contracts as plans is a special case of that theory that sees contract as addressing a different practical problem: a lack of interpersonal trust.

man relationships.²⁶⁵ In Markovits's version, which he calls contract as collaboration, this enhancement is accomplished by allowing people to undertake the ends of others as their own, thereby showing them due respect as fellow free agents of equal moral worth.²⁶⁶ But that means that contracting with organizations is only understood derivatively.²⁶⁷ Even if we can do so (and it's not clear we can), a theory of contract law that explains the fundamental purpose of contract law in a way that at best ignores the role of organizations is seriously flawed, at least in the twenty-first century, and probably in the nineteenth and twentieth centuries as well.

Because the theory of contracts as plans does not argue that the point of the practice is to enhance such allegedly valuable interpersonal relationships, it need not be embarrassed by the predominance of organizations in the real-world practice of contract law. In fact, in the real world, the problem of a lack of interpersonal trust is potentially exacerbated for nonhuman persons like corporations. Because organizations are not natural persons, individuals may be more likely to breach or otherwise take advantage of them. Real people may also be less likely to trust an organization, like a corporation, than another person. Trust in contracting is as important and as hard to establish for organizations as it is for people (perhaps more so), and thus they have an equal if not greater need for contract law. And contract law's role of informing parties as to their legal obligations is also at least as important for organizations, who often act through multiple agents who may each have different understandings of the parties' obligations.

Another problem, particularly for the reliance theorists, is contract law's willingness to enforce executory contracts. An executory contract is a contract where substantial performance is still due on both sides.²⁶⁸ In many such cases, by the time of repudiation, the only thing that has happened is that a promise has been exchanged for a promise. If we enforce promises only to redress the loss unjustly incurred by reliance on a promise, as if contract were a special kind of tort (as the reliance theory holds), there would be no reason to enforce executory contracts. Contract plaintiffs would need to show harm suffered just as tort plaintiffs must. But in fact, courts are willing to enforce contracts even if the non-breaching party is no worse off for the breach. Reliance theories, and promise theories that ground the moral obligation to keep a promise in the face of reliance, have a hard time explaining this fact.

The decision to enforce executory contracts is perfectly natural once we view contracts as plans. Recall first that it is fundamental to the no-

265. Or for some communitarians, it is openly criticized when it tends to inhibit such relationships. See *supra* Part II.D.

266. Markovits, *supra* note 88, at 1462–63.

267. *Id.* at 1421.

268. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973) (defining an executory contract).

tion of a plan—and of any forward-looking intention—that it has inertia. That is, by adopting a plan we give ourselves a reason—a practical reason, i.e., one grounded in rationality—to follow through with the plan. Inertia does not amount to irrevocability, but planning is so crucial to our practical reasoning that adopting plans does give us *some* reason to carry out the plan no matter its content. Having adopted a contract as a plan, we therefore have some reason to carry out the plan regardless of whether it has been relied upon.

The inertia of plans goes only so far. Generally speaking, plans are revisable in light of changed circumstances, and the adoption of a plan does not (necessarily) give us a moral or legal duty to continue with it. As we have seen, in many cases it would be useful for us if we could not only adopt a plan, but also make it irrevocable. Contract law allows us to do so. Since the point of the practice is to allow us to make otherwise optional behavior nonoptional just by agreeing to do so, it would be surprising if contracts were enforceable only in the event of reliance. The point of contract law is not to redress harms suffered due to wrongful breach, but rather to give promisees a reason to trust promisors when promises are given as part of an exchange.²⁶⁹

Reliance theorists also struggle to explain expectation damages. If contract law were primarily concerned with redressing wrongful losses suffered as a result of broken promises—again, as if breaching a contract were a special kind of tort—we would expect damages to seek merely to put the nonbreaching party back into the position she held before the promise was made, not the position she would have been in had the contract been fulfilled, i.e., to award her expectation damages. Once again, the award of expectation damages is a perfectly natural result given the conception of contracts as plans. Expectation damages are an approximation of carrying out the plan.²⁷⁰

It is true that specific performance—that is, requiring that the breaching party perform the contract—would be an even more natural way to carry out the plan than the payment of expectation damages, but there are all sorts of practical problems that make specific performance less than ideal and an award of damages preferable. Given the institutional limitations of courts, the award of expectation damages is the best way to enforce plans; that is, it is the best way to make the breaching party live up to the plan he made with the promisee.

269. A law of contract that did require actual reliance would also increase trust at least somewhat, for in that case parties could at least be assured that they will not be made worse off by performing first. Thus, if we did have a reliance requirement, that would not necessarily count much against the contracts as plans view. But we do not have a reliance requirement, and that fact is a natural result of the contracts as plans view, but an embarrassment for reliance theories.

270. That is not to say, however, that expectation damages are the only possible measure. It could be the case that parties plan for a different measure of the value of their plan. That is to say, it could be the case that parties plan not only for a certain performance, but also for what the response to a failure to perform would be.

Seeing contracts as plans offers yet another reason for the choice of damages over specific performance. As I will explain later (after some additional background on literature from the philosophy of action on what it means to act together), it is often useful for parties to have a shared plan that can be executed without acting together. One circumstance in which it might be especially useful is when a contractual relationship has soured. Replacing performance with the payment of damages provides one way to do so: it provides a shared plan that the parties can carry out separately—but more about this in Part VIII.

We must beware of the theories that explain too much, however. A theory that purports to explain every possible scenario violates the fundamental philosophical and scientific principle that there must be some possible circumstances that would show the theory to be false: that is, it must be “falsifiable.” To keep from violating this principle, we must be able to describe circumstances that, if true, could not be explained by the theory of contracts as plans. Despite its success explaining the fundamental doctrines of contract law, my view of contracts as plans is falsifiable. The example on which I will focus now is promissory estoppel. If that doctrine were as broadly applied as is sometimes thought, the theory of contracts as plans would be false.

The doctrine of promissory estoppel developed as a safety valve to the consideration doctrine.²⁷¹ Early on, it was primarily applied in charitable subscription cases.²⁷² When a party made a promise to a charity knowing that the charity was likely to rely on that promise (e.g., by beginning a new building project), and the charity did in fact act in reliance on that promise, the promisors were sometimes prevented (estopped) from raising the lack of consideration as a defense for their failure to keep their promise.²⁷³ The doctrine was eventually included in section 90 of the first Restatement of Contracts.

Although originally intended as a narrow exception to the consideration doctrine, the wording of section 90 is very broad.²⁷⁴ By its terms, any promise that could be expected to induce reliance and that does induce reliance is enforceable if justice demands enforcement, and it says nothing about the requirement of a bargained-for exchange (consideration). Such broad wording supports the reliance theory of contract because it includes none of the formal bars to enforcement found in classical contract theory such as consideration, the statute of frauds,

271. See Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 247–53 (2005).

272. See Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 652 (1952).

273. See *id.* at 650.

274. “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT OF CONTRACTS § 90 (1932). The Second Restatement adds that “[t]he remedy granted for breach may be limited as justice requires.” RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

definiteness, or even offer and acceptance. It was thus seen as a triumph by reliance theorists like Grant Gilmore, who saw contract law as just a special form of tort, and claimed that promissory estoppel led to an “explosion of liability” in the twentieth century.²⁷⁵ For Gilmore, this was both a theoretical and moral triumph, as he saw the formalities of classical contract theory as barriers to achieving justice.²⁷⁶

If section 90 were enforced as broadly as it is written, it would indeed have been a triumph for the reliance theorists, and it would undermine my view of contracts as plans enforced in order to solve the problem of a lack of trust. But, in fact, section 90 has never been consistently applied so broadly as a freestanding cause of action. Rather, it has largely remained a mere safety valve. It has indeed spawned similar reliance-based exceptions (e.g., to the statute of frauds,²⁷⁷ for mistakes in bidding cases,²⁷⁸ indefiniteness,²⁷⁹ and consideration for modifications²⁸⁰), but these are all cases where the doctrine is used as a “shield” to certain defenses. When it is used as a “sword,” i.e., as its own freestanding cause of action, it is seldom successful in the courts. For example, one common sword-like use of section 90 is in cases of precontractual assurances, when during the process of prolonged negotiations, but before agreements are reached, one party makes certain kinds of assurances that agreement is likely. Although most contracts textbooks include examples of this sort, a recent empirical study showed that the vast majority of such suits lose, so much so that today’s chestnuts like *Hoffman v. Red Owl Stores, Inc.*,²⁸¹ *Goodman v. Dicker*,²⁸² and *Pop’s Cones, Inc. v. Resorts International Hotel, Inc.*²⁸³ are actually outliers that do not deserve their now-prominent place in the contracts casebooks and curriculum.²⁸⁴ In short, if promissory estoppel were as widely used as people like Gilmore supposed (and wished), it would undermine my view. Contracts might still be seen as plans, but we would have to justify their enforcement as a solution to some problem other than a lack of trust. But, in fact, promissory estoppel remains a rare exception rather than a central doctrine.

In this Part, I have argued that viewing contracts as plans better explains fundamental doctrines of contract law than do the currently prevailing theories. Most of these doctrines are not in dispute these days;

275. See GILMORE, *supra* note 16, at 72.

276. See Bridgeman, *supra* note 15, at 1451–52.

277. RESTATEMENT OF CONTRACTS § 178; RESTATEMENT (SECOND) OF CONTRACTS § 139.

278. RESTATEMENT (SECOND) OF CONTRACTS § 87.

279. *Wheeler v. White*, 398 S.W.2d 93, 93–95 (Tex. 1965).

280. RESTATEMENT (SECOND) OF CONTRACTS § 89(c).

281. 133 N.W.2d 267 (Wis. 1965).

282. 169 F.2d 684 (D.C. Cir. 1948).

283. 704 A.2d 1321 (N.J. 1998).

284. See Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 670 (2007); see also Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71, 98–101 (2007).

few people any longer engage in the hand-wringing about the consideration doctrine as Gilmore did, for example, in his day. While some scholars are interested in explanatory theories for their own sake, others are interested only in theories explaining our law if they can tell us something about what sort of law we ought to have tomorrow. In the remainder of this Article, I shall try to show how viewing contracts as plans is not only a correct explanation of the contract law we currently have but will also be useful in interpreting and applying our law of contract in the future.

VII. PUTTING THE THEORY TO WORK: WAYS OF ACTING TOGETHER

We began with the observation that contract theories have on the whole been unsuccessful at making sense of central contract doctrines. It then seemed a good idea to take a step back from contract law and consider what law in general is. We examined a very recent idea based on work in the philosophy of action on the importance of planning to practical reasoning. The planning theory of law argues that laws are plans that respond to coordination problems associated with people living in unplanned communities. I have argued that contract is distinct from other law in that it responds to a particular kind of coordination problem based on the lack of the trust needed in order to make exchanges over time. This theory provides a better explanation of the central doctrines of contract law with which other theories struggle.

But some may still be unsatisfied with this account so far. Even if persuasive, the theory is largely descriptive: it argues that contract law is a solution to a certain kind of coordination problem, but it remains agnostic as to what ends society should be pursuing that the coordination problem inhibits, and it does not directly argue for any given law of contract or set of its doctrines. Nonetheless, since the theory explains central doctrines like consideration, expectation damages, strict liability, and the enforcement of executory contracts, it does by doing so provide some support. If I am right about the kind of coordination problem contract law is meant to solve—i.e., the inability to trust that others will keep their word—these doctrines seem to be very natural responses to that problem. While a doctrine like consideration, for example, seemed an arbitrary (or perhaps pernicious) bar to enforcement to a reliance theorist like Gilmore, it is exactly what one would expect when we view contracts as plans.

Even if I am right so far, those looking for a prescriptive application are not likely yet to be much interested in the theory of contracts as plans because the doctrines it has thus far explained are so well established as a matter of law that they are largely uncontroversial. So far, the planning theory neither offers a sweeping reform nor staves one off. In the final two Parts, I would like to suggest a few ways in which seeing contracts as plans might be of help in developing some prescriptive arguments. I will

do this by very briefly examining some doctrinal issues that remain controversial. We must tread carefully here, as descriptive arguments do not directly translate into prescriptive ones. But sometimes merely examining a doctrine or a practice with a new set of concepts can be helpful, especially when those concepts are drawn from sophisticated scholarship in other disciplines. Although I will not here develop these ideas fully, my aim is to say enough about them to convince those interested in prescription that thinking of contracts as plans is not only correct, but useful. Since contracts are plans, understanding planning better might help us to understand difficult issues in contract law better.

Let us begin with some additional background about the literature on planning, using one issue from that literature as an example. In what follows I will examine Bratman's work, though of course in the long run we should look more broadly and critically at his and related literature. Bratman has worked carefully to articulate what it is for people to do something together. Using simple examples such as painting a house or singing a duet, he specifies under what circumstances parties can be said to be involved in a joint undertaking, as opposed to doing similar actions at the same time and place.²⁸⁵ For Bratman, planning plays a central role in acting together just as it does in individual action over time.²⁸⁶ Recall that one of the benefits of forming and sticking to forward-looking intentions is that it makes our behavior more predictable to others and thereby helps to coordinate our activity with them. Thus, one key to individuals acting together is for them to adopt and to act in accordance with shared plans. That, of course, is exactly what parties do when they enter into and then perform contracts.

Bratman distinguishes different degrees of acting together, that is, of adopting and acting in accordance with shared plans.²⁸⁷ It may be useful to categorize these to see which of them best describes the act of making exchanges with contracts. It is my conjecture that if we better understand how a contract calls for the parties to act together, then we will better understand what their legal rights and duties should be toward one another when we enforce a contract. Again, I will tread carefully here because Bratman is only interested in describing what it is to act together and leaves for others the normative implications—e.g., whether one has a duty to stick to a shared plan once one has adopted it.²⁸⁸ But I am optimistic that a better account of what it means to act together will help us determine what those legal obligations should be.

285. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 93–95.

286. *Id.* at 35–36.

287. *Id.* at 93–108.

288. There are those who are not so shy about moving from the descriptive to the normative. See BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 131 (citing MARGARET GILBERT, *ON SOCIAL FACTS* (1989)). But I want to start with a more minimalist, less controversial account of practical reasoning to take things one at a time.

Bratman's aim is to describe what he calls a "shared cooperative activity."²⁸⁹ To arrive at that end, he first moves through two lesser degrees of acting together. The first he calls "prepackaged cooperation" and the second "joint intentional activity."²⁹⁰ For two people to be involved in a shared cooperative activity, such as painting a house, they each must obviously at least engage in the appropriate behavior (painting the house, in this case).²⁹¹ They must also perform the actions intentionally.²⁹² But it is not enough for both parties merely to engage in the same intentional activity, as the two parties may not know or care about the other. To act together, their intentions must interlock in the appropriate ways.²⁹³ What counts as having interlocking intentions, however, is complicated.

To accomplish any intentional activity (even individually), one must form sub-plans. To paint the house tonight, I might form a sub-plan to buy a new paintbrush and put on old clothes. If we are to paint the house together, it is not necessary that our intentions overlap completely. There may be overlap at a very general level (we both plan to paint the house), while our sub-plans differ a great deal (I plan to buy a new brush and put on old clothes; you plan to find an old brush in the garage and stop at the store to buy paint). For us to be engaged in a joint intentional activity, however, our sub-plans must "mesh," i.e., they must be consistent with one another. If I plan to paint the house red all over and you plan to paint it green all over, then our plans do not mesh.²⁹⁴

Although we could accidentally have meshing sub-plans, in order for us to be engaged in a shared cooperative activity, our plans must not only mesh but we must intend to perform the actions with each other, i.e., we must intend to perform them according to our meshing sub-plans. Note that in order to have such an intention, I need not even know what your sub-plans are yet.²⁹⁵ In addition, our plans must be "mutually responsive" to those of the other. We must not only adopt sub-plans that mesh with each other and intend to act in accordance with them, but the sub-plans must be constructed²⁹⁶ *with reference to* the sub-plans of those with whom we are acting. In an important sense, when we act together we take the (relevant) ends of the other party as our own. There is a sense in which we go to New York together if I kidnap you and put you in the trunk for the trip, but it is obviously not a shared cooperative activity.²⁹⁷ In order to be engaged in shared cooperative activity, I must not

289. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 93–108.

290. *Id.* at 104, 106.

291. *See id.* at 94.

292. *See id.*

293. *See id.* at 102.

294. *See id.* at 98.

295. *See id.* at 101.

296. The plans or sub-plans need not be constructed by us, though, as mentioned above.

297. *See* BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 100.

“bypass your intentional agency.”²⁹⁸ Rather, my intention must “include the efficacy of your intentions.”²⁹⁹

So far what I have described is sufficient for what Bratman calls “prepackaged cooperation,”³⁰⁰ at least assuming that all of this is common knowledge between us.³⁰¹ But prepackaged coordination is not the same as acting together. The act of planning the prepackaged cooperation may have been done together, but so far we could accomplish everything described even if we fulfill the plan separately. For example, we might together plan for you to go to San Francisco, while I go to New York. We may well insure that our sub-plans mesh and are mutually responsive to one another (you will take the car, while I will fly), but there is no need for interaction in performance.³⁰² We would then have mutual responsiveness of intention, but we do not act together in carrying out the plan unless there is mutual responsiveness in action as well.³⁰³ When there is mutual responsiveness in action, we have joint intentional activity.

Finally, in addition to the requirements of prepackaged cooperation and joint intentional activity, shared cooperative activity requires at least some minimal level of commitment to mutual support.³⁰⁴ While it is possible for us to engage in joint intentional activity without commitment to mutual support, shared cooperative activity requires it. To show this, Bratman imagines two singers who are singing a duet together.³⁰⁵ The parts for each are laid out in advance, and the singers may have faith in each other to get the notes right and may coordinate their actions together in accordance with those expectations.³⁰⁶ But each singer may actually prefer the failure of the other and thus not be committed to helping the other should she run into trouble.³⁰⁷ Two such singers could still be said to be acting together in a sense. They are engaged in jointly intentional activity, but they cannot be said to be engaged in a shared cooperative activity unless there are at least some circumstances in which they are committed to helping each other should the need arise.³⁰⁸

To sum up briefly, I have described three different degrees of acting together identified by Bratman. In what he calls prepackaged cooperation, individuals have a shared plan to act in accordance with meshing and mutually responsive sub-plans, though their actions in carrying out the plan need not be mutually responsive. In joint intentional activity,

298. *Id.*

299. *Id.*

300. *Id.* at 106.

301. *See id.* at 102.

302. *See id.* at 106–07.

303. *See id.*

304. *See id.* at 103–05.

305. *Id.* at 103–04.

306. *Id.*

307. *Id.*

308. *See id.* at 104.

not only are their sub-plans mutually responsive, their actions in carrying out the plan are as well: they act together in carrying it out. And finally, in shared cooperative activity their actions are mutually responsive and they are committed to helping each other in at least some circumstances should the need for help arise.

How might all this be useful in contract law? It is fitting to begin by noting that Daniel Markovits has already used these distinctions in his thoughtful work *Contract and Collaboration*, mentioned above.³⁰⁹ What Markovits finds particularly helpful is the explanation for how one party can come to adopt the ends of another as his own. As mentioned briefly above, when we develop a shared intention, we no longer act only on behalf of ourselves, but also adopt the ends of others as our own. As we saw in Part II.D, Markovits thinks that not only are we able to take the ends of others as our own, we in fact have a moral obligation to do so. He is not referring to duties owed to specific parties (e.g., the duty of parents to act in the best interests of their children), but rather a general duty³¹⁰ to adopt the ends of *some* other people. Adopting the ends of others is necessary, according to Markovits, in order for us to develop the kinds of valuable personal relationships necessary to moral agency.³¹¹ Bratman's work is helpful to Markovits because it describes in some detail one important circumstance in which we commonly adopt the ends of another as our own. If Bratman is correct that when we act together in accordance with shared plans we necessarily adopt another's ends as our own and if it is also true that contracts are plans,³¹² then when we contract with another we necessarily adopt the ends of that other as our own. Contract law can then provide us a means by which we can satisfy our moral obligation to take the ends of others as our own.

Bratman's work is only a starting point for Markovits, however, because Bratman's account stops short of the sort of obligation that Markovits thinks forms the necessary personal relationships. Bratman also stops short of the type of obligation present in contract law. Neither prepackaged cooperation, joint intentional activity, nor shared cooperative activity necessarily involves an obligation to *keep* another's ends as one's own. Bratman describes only what it takes to be engaged in such

309. See Markovits, *supra* note 88, at 1451–63. This section by Markovits is one of only two instances I know of someone applying Bratman's work on planning to contract law. The other is by my now-colleague Manuel Utset, who toyed with the idea briefly in a paper on corporate law. See Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 83. Professor Utset even titled his section, "Contracts as Plans." *Id.* Although I did not know of his work when this project began, I owe a great debt to Professor Utset for valuable conversations and insight since then.

310. In the language of meta-ethics, this is an "imperfect" duty, i.e., a duty that one owes not to any particular person. For example, one may have a duty to give to the poor, but no duty to give to any particular poor person.

311. See Markovits, *supra* note 88.

312. Although it is not the main point of his paper, Markovits argues that "contracts plainly present cases of joint intentional activity." *Id.* at 1456.

activities; nothing he says requires that once engaged in these activities, we must remain committed to them. I could very well embark with you on a shared plan to paint the house together, but if I have an obligation to complete that plan, it is not contained in the mere fact of my having adopted it. In other words, just because someone abandons a plan mid-course does not mean that she was not acting together with the other party before then. Bratman's work shows merely what it is to be engaged in such a shared activity for however short a time.³¹³ The arguments therefore stop well short of what Markovits thinks is required in order to explain contract law. Contract, Markovits argues, is based on our moral need to develop a certain kind of interpersonal relationships. According to him, such relationships involve *commitment* to the ends of another, not mere adoption of those ends. Contract law also requires such a commitment. It requires an intention³¹⁴ to perform unless released by the other, as Markovits put it, and that goes well beyond any of the forms of acting together described by Bratman. Thus, although contracts can be seen as joint intentional activities, according to Markovits, Bratman's work falls well short of explaining contract law.³¹⁵ And Bratman agrees.³¹⁶

I argued briefly above against Markovits's theory as an explanation for contract law.³¹⁷ It is based on a theory of moral duties that is controversial and does not explain important parts of settled contract doctrine. And as we remember, his theory fails to explain the fact that contract law is equally geared to guiding relationships involving organizations as it is to ones between human beings. Indeed, this failure looms more important given the increasingly prominent role corporations play in actual contract disputes. Markovits is correct when he asserts that contract law requires a commitment to shared plans that is not required in simply having a shared plan. But he is misguided when he claims that commitment is based on a moral obligation. In my view, that commitment is simply legal fiat in response to the need for legal fiat. We need the ability to undertake the ends of others as our own and to make those ends nonoptional for ourselves not for any moral reasons, but because it is necessary in order to accomplish our own ends and the ends of our community. Markovits is correct that a duty to follow through with a plan does not follow from our merely having adopted it. But I contend that what is added in contract law is not a moral obligation, but a legal one posited for instrumental reasons.

313. Again, one might argue that some duties follow from being engaged in shared activities such as living together, as Margaret Gilbert has argued. See MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION* 288–300 (1996). But Bratman does not think that such duties follow, nor does Markovits.

314. Or at least an objective manifestation of such an intention.

315. Markovits, *supra* note 88, at 1452–63.

316. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 130–41.

317. See *supra* note 88 and accompanying text.

But Markovits has provided a valuable stepping-stone for my theory even though I disagree with his application of Bratman to contract law. He offers the insight that exchanges may be usefully thought of as joint intentional activities.³¹⁸ He considers and rejects the idea that exchanges could be prepackaged cooperation, and although he suggests they could be shared cooperative activities, he thinks that would be unusual.³¹⁹

In the next Part, I want to suggest that all of these categories may be more useful in contract law than Markovits supposes. The three categories describe different ways or degrees of acting together, and it may be that parties can and do make contracts in all three ways. If we can determine whether a particular contract is designed to be prepackaged cooperation, joint intentional activity, or shared cooperative activity, then we will have a better idea of how contract law ought to hold the parties to their plans.

VIII. THE THEORY AT WORK IN CONTRACT LAW: WHAT KIND OF SHARED PLANS ARE CONTRACTS?

To review, the three types of shared activity described by Bratman are prepackaged cooperation, joint intentional activity, and shared cooperative activity.³²⁰ Prepackaged cooperation involves a shared plan with meshing sub-plans that are mutually responsive to one another. It does not, however, require that the meshing sub-plans be carried out with mutually responsive actions; while the planning may be done jointly, the parties can carry out the plans completely separately. Joint intentional activity does require that the actions be mutually responsive, and shared cooperative activity adds the additional requirement that the actors be committed to helping one another should the need arise.

Markovits's impressive work has been too modest. While he accepts joint intentional activity as a category of behavior reflected in contract law, he rejects the possibility of prepackaged cooperation.³²¹ He claims that in order to be successful, prepackaged cooperation would require the plans to be complete in every necessary detail, fully specifying in advance what the parties are to do and "anticipating every contingency."³²² The strictness of this requirement "renders the prepackaged coordination that Bratman imagines a narrow, indeed perhaps a vanishingly narrow, phenomenon."³²³ He seems to think it is particularly rare for contract law: "For, as any contract lawyer knows, the administration of even the very simplest joint plan requires constant addition, revision,

318. Markovits, *supra* note 88, at 1456.

319. *Id.* at 1455–56.

320. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 93–108.

321. Markovits, *supra* note 88, at 1454–57.

322. *Id.* at 1454.

323. *Id.*

and adjustment over the course of its performance.”³²⁴ Similarly, “even the simplest contract cannot be administered as prepackaged cooperation.”³²⁵ This is true, argues Markovits, even for contracts as simple as the sale of goods:

Moreover, even discrete, purely transactional contracts—including most prominently contracts for the sale of goods—involve joint intentional activity, even if . . . they do not invoke any rich culturally familiar relations among the parties, who become nothing more than buyers and sellers. . . . [A]nd even the most discrete, transactional contract cannot fully specify in advance every component of the performance that it contemplates or every contingency that might affect the parties’ intentions in this performance, and it therefore cannot be administered as prepackaged coordination, but instead depends on some degree of mutual responsiveness in action.³²⁶

According to Markovits, then, contracts can never be instances of prepackaged coordination. In what follows, I will argue against his rejection of prepackaged coordination as an important category for contract law.

We can readily imagine any number of common transactions that would constitute prepackaged coordination. Consider, for example, simple unilateral offers for the sale of goods—a vending machine, for example. The prepackaged plan is for the buyer to insert money into the machine, which issues the purchased product. Or think of the office coffee pot with a jar into which drinkers are to put fifty cents per cup, or the various ways parking lots now manage to charge for parking without an attendant on duty. Internet transactions are a more common example, in particular when delivery can be done in automated fashion, e.g., via a download of music or software. The list of products that can be bought in automated fashion goes on and on: gasoline pumps are now left on long after the clerks have gone home, and retail outlets like grocery stores and Home Depot often have automated check-out systems. To be sure, even in these cases unanticipated problems may occur, but that does not mean that the 99 percent of similar transactions that were completed problem-free fail to qualify as successful prepackaged cooperation.

More complicated contracts can also be described as prepackaged coordination. Consider first one noncontract example of prepackaged cooperation given by Markovits himself:

Prepackaged coordination may even reflect the dissolution of a previously joint endeavor, as when [a] pair of musicians, tired of their partnership, divide their mutual possessions and plan for each

324. *Id.* at 1455.

325. *Id.* at 1457.

326. *Id.*

to collect her share from the old practice room, as they go their separate ways.³²⁷

I agree with Markovits that this is a good example of prepackaged cooperation, and here there was no contract. But this break-up could have been accomplished via contract, and that contract would indeed reflect the prepackaged cooperation Markovits rightly saw in the activity itself. Contracts for the dissolutions of marriage when there are no continuing obligations to care for children and no need for spousal support can be similarly described, and these sorts of divorce contracts are quite common. Even peace treaties between nations about disputed territory might qualify.

Of course, it may be the case that contracts such as the ones I have just described are in some sense incomplete in that they do not anticipate every possible contingency, and this, we remember, is the crux of Markovits's argument that contracts cannot be cases of prepackaged cooperation. But just because a plan does not anticipate all possible contingencies does not mean that it is not prepackaged cooperation, nor does it mean that the contract could not be successfully executed as prepackaged cooperation. The fact that our actions are to be mutually responsive in joint intentional activity should not be confused with a potential need to modify or further specify a plan. Prepackaged cooperation is not distinguished from joint intentional activity by a lack of flexibility;³²⁸ what distinguishes it is its lack of mutual responsiveness in performance. It is simply a shared plan that is carried out independently rather than in concert. Whether a plan is fully specified (in the language of contract theory, whether an agreement is "complete") is a different matter.³²⁹ To see that this is so, note that prepackaged cooperation can be accomplished via incomplete plans. For example, our prepackaged, shared plan may require me to go to New York while you drive to San Francisco, but the plan might not say exactly how I am to get to New York. Or it might say that I am to go by plane, but not say what I am to do if a snowstorm comes and all flights are cancelled. Yet our shared plan would still be prepackaged coordination, because my acting out my part of the plan is in no way responsive to your acting out your part. If our agreement is for me to provide a service to you, for you to tender payment to me for that service, and for me to accept payment, then we are engaged in a joint intentional activity with mutually responsive actions (in particular, an exchange of services for money), whether or not our

327. *Id.* at 1454.

328. Perhaps the "prepackaged" label is partly to blame for this confusion.

329. I do think that an additional benefit of viewing contracts as plans is that it can be particularly helpful when deciding how—or whether—to fill gaps in incomplete contracts, and indeed have much to say on that score. See generally Bridgeman, *supra* note 15. But that is a separate issue from whether contracts can be prepackaged cooperation.

agreement is complete. But we might accomplish some exchanges without acting together.³³⁰

The potential benefits of prepackaged cooperation are easy to see. Most obviously, in many cases they will greatly reduce transaction costs. Unlike store clerks, machines do not require a salary or benefits package, and the effect of the Internet on the retail economy has been discussed ad nauseam. These reduced costs lead to better profits for sellers, but also likewise lead to savings for consumers, usually in both time and money.

But there are many other potential benefits to prepackaged cooperation, most of which do not spring to mind as quickly if one views contract law as a means to enhance interpersonal relationships. For a variety of reasons, parties may actually wish to avoid a commitment to mutually responsive actions. Consider, for example, the dissolution of partnerships or marriages mentioned above. The parties may wish to *avoid* interaction with one another while dissolving a relationship. A divorcing couple might plan for one spouse to collect his things while the other is at work in order to avoid uncomfortable interactions.

A similar recognition is no doubt behind the reluctance of common-law courts to issue specific performance for breach of contract. When a contractual relationship has soured, it is better if it can be dissolved in a way that requires little or no mutually responsive action. When a court orders the payment of damages for breach and refuses to order specific performance, it can be seen as replacing a plan that may have called for joint intentional activity with a plan that calls for simple, prepackaged coordination. Note that the most common kind of transaction where specific performance is the norm rather than the exception is for the sale of real property.³³¹ Real property can generally be transferred with even less mutually responsive action than the payment of damages. All that is usually required is a change on the deed, so such transactions can typically be completed by one party with the appropriate court order at the appropriate state office.

In addition, some people may prefer prepackaged cooperation for the privacy it could yield. When buying certain medical or personal products at a drugstore, say, one may prefer automated check-out to avoid the embarrassment that might follow from having a clerk ring up purchases that open a window into one's private life. Similarly (though

330. One might also object that because the sale of goods typically includes at least warranties of merchantability, even simple exchanges involve future performance in an important sense. *See, e.g.*, U.C.C. § 2-314 (2005). But we must be careful not to confuse a promise that a good is of a certain quality with a promise to fix it or to replace it if it is not, which might call for future interaction between the parties. If a good turns out not to be of merchantable quality, that fact would give rise to a secondary duty to pay damages, but this duty is not to be confused with a promise that a good is of such-and-such quality. A promise *that* x is not a promise *to do* y.

331. 25 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 67:61 (Richard A. Lord ed., 4th ed. 2002).

the net benefits here are somewhat controversial), untold amounts have been made through the purchase of intellectual property with adult content over the Internet.

Prepackaged cooperation can also be authored by a third party, even if the relevant coordination is an exchange of private property. Consider, for example, the use of copyright-protected music by a radio station. Rather than require each station to track down, negotiate with, and pay individual copyright owners, “societies” have been created to simplify this process.³³² These societies, such as the American Society of Composers, Authors, and Publishers, are comprised of copyright owners, mainly songwriters and music publishers, who grant the society the non-exclusive “public performance right,” i.e., the right to play a copyrighted song on the radio.³³³ The society then will grant licenses to entities such as public radio stations to use these rights to public performances,³³⁴ and thus radio stations can purchase a prepackaged plan for the use of copyrighted music without ever interacting with the copyright owners.

A more important example of beneficial prepackaged cooperation in the commercial world is the letter-of-credit method of shipping and paying for goods. Letters of credit were first used, and are still widely used, in international trade.³³⁵ A buyer in the United States and a seller of goods in Chile may have insufficient reason to trust one another. The seller does not want to ship goods without reasonable assurance of payment, and the buyer does not want to prepay for goods still sitting (allegedly) on a shipping dock on another continent. To reassure one another they may enlist the help of a reputable bank.³³⁶ The bank issues a letter of credit with the seller as beneficiary, payable to it upon presentation of certain documents that evidence delivery, insurance, and so forth.³³⁷ The letter is payable if, and only if, the correct documents are presented.³³⁸ Importantly, the bank itself undertakes a contractual obligation to pay the seller upon presentation of the correct documents even if the buyer becomes insolvent or wishes to breach the contract.³³⁹ In effect, the buyer and seller prepackage the entire transaction, and each carries out its own part of the transaction separately with the help of the bank, which undertakes independent obligations to each.

The letter-of-credit example shows that prepackaged cooperation can be just as important in contracts between equally sophisticated par-

332. R. Anthony Reese explains this process at length in his article, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 245 (2000).

333. *Id.*

334. *Id.*

335. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 20-1 (5th ed. 2000).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

ties as it can be in consumer transactions. It also ties prepackaged cooperation to what I have argued Anglo-American contract law is about in the first place: solving the problem of the lack of interpersonal trust in coordinating activity. Parties may wish to avoid mutually responsive action not just because doing so saves money and not only when they want to avoid interacting with the other party, but simply because they do not trust the other party. Committing to a joint undertaking, even one as simple as an exchange, requires a certain amount of trust because one is committing to being responsive to another, and to the other's being mutually responsive as well. One of the benefits of providing a way for parties to make their shared plans nonoptional is that it opens the possibility that transactions can be structured in such a way that there is no need for mutual responsiveness in action. Each party can perform independently on its own, and because of the threat of legal enforcement, neither side need worry whether the other side will do so as well. When one sits down for dinner in a restaurant, the exchange requires mutual responsiveness in action that involves a certain amount of trust by at least one party. Because the amounts are so low, the risks are insignificant in restaurants, but it is useful not to have to perform all exchanges in this way, especially when a lot of money is at stake and the parties are physically distant and have little reason to trust each other.

Another crucial benefit of prepackaged cooperation not readily apparent to one who emphasizes interpersonal relationships in contract law is that it helps organizations manage the actions of their agents. Organizations must act through agents. That is not to say that there is never a case when an organization acts; organizations can act, just as they can have intentions, adopt plans, and so forth. But not every act of an agent is an act of the organization the agent represents. One can usefully see the role of contract lawyers for big organizations as in large part dedicated to writing contracts that prepackage cooperation as much as possible in order to limit the role of its agents, who may not have the knowledge or authority to act on behalf of the company in anything more than a limited sense. The use of standardized forms, the "terms and conditions" links on Web sites, and the like, can be seen as contracts with which organizations attempt to prepackage planning in a way that minimizes the role of whatever clerks are needed in order to complete the transaction. Thus, although at first glance the purchase of a book from an on-line Web site might appear to be joint intentional activity in that it seems to involve mutual responsiveness in action (the workers in the warehouse package and ship the book to the buyer at the address provided), from the point of view of the company, the transaction is practically automated. The company pays lawyers to develop effectively prepackaged cooperation through the drafting of standardized forms and "terms and conditions" language on the Web site, and the decisions contained in these types of contracts are made at a high enough level in the company that it is easy to describe the company itself as intentionally adopting a

plan when it issues an offer³⁴⁰ to engage in prepackaged cooperation. But each individual performance of a contract is much further removed from the company's decision makers such that it is harder to see a customer of a major retailer as engaged in a joint intentional activity with that retailer in the act of exchange itself (in fact, a customer is much more likely to interact with a UPS worker than an Amazon.com worker, not to mention Amazon.com itself). Moreover, the important role of prepackaged cooperation via standardized forms for organizations is not limited to its consumer transactions, as the prevalence of so-called "battle of the forms" cases suggests.³⁴¹

We see, then, that prepackaged cooperation is not only possible in the real world, it is actually quite common, including in many contractual relationships. More importantly, it is common for good reason: people often find it quite useful to adopt shared plans that are designed *not* to be carried out together in any important sense. Why does this matter for contract law? Once we see the benefits of designing contracts that will be performed separately, then we should start to think about how that is typically accomplished. For example, one common way to accomplish prepackaged cooperation is through the use of standardized agreements. Courts tend to have knee-jerk reactions against such "take it or leave it" contracts. But while it is possible to negotiate prepackaged cooperation on a case-by-case basis, in practice the best way to achieve the normal benefits that come from making exchanges without acting together is often through the use of standardized agreements. Standardized agreements not only save money, they also inform the other party as to the terms on which the nonpresent party (often an organization) is willing to deal. So long as the drafters do not abuse the process (by including concealed or confusing terms or by having its agents orally misrepresent its intentions), we should not be as reflexively hostile to these agreements as courts and scholars often are.

On the other end of the spectrum, thinking about Bratman's third category of acting together, shared cooperative activity, may help explain certain kinds of contracts where additional duties are implied. In shared cooperative activities, the parties not only perform together, they are each committed to some degree of mutual support for the other should the need arise.³⁴² Although such cases are not the norm in contract law, they do arise. Recall, for example, the famous *Wood v. Lucy, Lady*

340. Or solicits offers; depending on the circumstances, the placing of the order might technically count as the offer.

341. We must be careful not to confuse the typical debates about the battle of the forms with the issue of prepackaged cooperation, however. The battle-of-the-forms problem has to do with how to interpret contracts when standard forms, including nondickered terms, have been used. For a detailed explanation of battle of the forms, see WHITE & SUMMERS, *supra* note 335, § 1-3. Viewing contracts as plans may be helpful here as well, though more likely it would be by informing debates over authorship of plans than the distinctions among different kinds of interactions I am discussing here.

342. BRATMAN, *FACES OF INTENTION*, *supra* note 3, at 95.

*Duff-Gordon*³⁴³ case, where Cardozo attributed an implied “best efforts” promise to an agent, Wood, for the clothing designer Lady Duff-Gordon. The key for Cardozo was that although Wood made no express promise to use his best efforts, Gordon’s promise to give Wood *exclusive* rights to secure endorsements for her changed the nature of the agreement.³⁴⁴ One might argue that the best interpretation of such a transaction is that Wood and Gordon were not only to perform a shared plan with mutually responsive actions, but that he also had an additional duty to support her, as it were, with his best efforts. He must act with her interests in mind and not just his own. Otherwise she would be entirely at the mercy of his whims, a result they were so unlikely to have intended that it would need to be stated expressly.

By contrast, the U.C.C.’s inclusion of a duty of good faith and fair dealing in all contracts for the sale of goods³⁴⁵ may go too far, depending on what is meant by the duty. A duty amounting to the sort of mutual support present in shared cooperative activity is probably beyond the norm for ordinary sales of goods. The trick, of course, is to figure out which contracts are meant to embody commitments to which kinds of shared activity. Under what circumstances does it make the most sense for parties not only to commit to mutual responsiveness in their performance, but also to some form of mutual support for one another? Or on the other end of the spectrum, when is it advantageous to the parties to create plans that may be performed without even acting together? But further speculation about such arguments must wait for another day.

IX. CONCLUSION

Most prevailing theories of contract law are grounded in moral philosophy. They generally claim roots in the moral duty to keep one’s promises, to avoid causing harm to others, to maintain morally valuable interpersonal relationships, or to respect property rights. Even economic theories, which are typically viewed in contrast to moral ones, often presuppose a moral duty to maximize welfare. Thus, when thinking about contract law, these theories advise us to learn from moral theory, or perhaps from advances in the social sciences such as economics.

I have suggested that those theories are all flawed in certain ways as explanations of contract law. I have proposed a new way of looking at contract law, through insights gained from the philosophy of practical reasoning and legal theory. Once we understand that law (both law in general and contract law in particular) is a solution to a practical problem, it makes sense to look to advances in theories of practical reasoning when analyzing and evaluating a body of law like contract.

343. 118 N.E. 214 (N.Y. 1917).

344. *Id.* at 214.

345. U.C.C. § 1-304 (2005).

The legal theory most helpful is the planning theory, which draws from the literature on planning in the philosophy of action. As Michael Bratman has shown, we are essentially planning creatures;³⁴⁶ as Scott Shapiro has shown, our governments are essentially planning institutions.³⁴⁷ I have argued here that contract law allows us to create or adopt specially tailored plans for ourselves that are legally binding. Viewing contracts as plans not only explains many important established doctrines of contract law that other theories cannot, it also will aid us in applying the law to certain doctrinal issues that are a matter of some dispute.

At the very least, I hope that my arguments have shown that contracts scholars have much to learn from the philosophy of action. Whatever the moral implications of entering into a contract, it is often no more than a rational response to certain instrumental needs and desires. That fact alone suggests that we may have much to learn about contract from theories of rationality, just as we have always learned from moral theory and have more recently learned from economics. Some of the brightest minds in philosophy today are working on the philosophy of action, and it is a wonderful time for legal scholars to pay attention.

346. See BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON, *supra* note 3, at 2.

347. SHAPIRO, LEGALITY, *supra* note 2.

