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# The Puzzle of the Beneficiary's Bargain

Nicolas Cornell\*

*This Article describes a jurisprudential puzzle—what I call the puzzle of the beneficiary's bargain—and contends that adequately resolving this puzzle will require significant revisions to some of the ways that we think about contract law. The puzzle arises when one party enters into two contracts requiring the same performance and the promisee of the second contract is the third-party beneficiary of the first. For example, a taxi driver contracts with a woman to transport her parents from the airport and then separately enters into a contract with the parents to transport them. Is the second contract valid and enforceable, or does it fail for lack of consideration? This specific question—on which courts have split—implicates several important contract law doctrines. Moreover, it highlights a deep tension in our modern understanding of contractual obligation. This Article argues that adequately resolving the puzzle necessitates a general reconsideration of the relationship between rights and liability in contract law. Surprisingly, the best solution requires abandoning the foundational understanding that contract liability arises out of breach of a promisee's right to performance. This relatively specific puzzle thus offers a lens through which to examine general concepts of modern contract law.*

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## I. INTRODUCTION

Here is a puzzle for modern contract law: What happens when a party makes successive contracts for the same performance if the second contract is with the intended beneficiary of the first?<sup>1</sup> Consider the following examples:

- A taxi driver contracts with a woman who hires him for a fee to transport her parents from the airport. The driver then separately enters into another contract with the parents, who also agree to pay him a fee in exchange for a promise to transport them.
- A cargo owner hires a shipping company to transport goods, and the contract includes a Himalaya clause, extending liability limits to agents or subcontractors used in fulfilling the contract. The cargo owner then separately enters into a contract with the railroad company used by the shipping company, requiring that it waive certain rights in exchange for the liability limits.<sup>2</sup>
- A bank agrees, in exchange for an interest in certain real property, to pay the debt that a struggling company owes to a creditor. The bank then separately enters into a contract with the creditor, whereby the bank agrees to pay off the company's debt in exchange for the creditor's accepting a lower amount in satisfaction.<sup>3</sup>

In each of these cases, one party makes two contracts requiring the same performance, and the second contract involves the intended third-party beneficiary of the first contract. Given how typical it is for real commercial actors to engage in iterated agreements with the same players, it is unsurprising that such pairs of overlapping contracts do, in fact, arise in the course of business.

Is the second contract enforceable in these cases? The third party is already, in legal terms, an intended beneficiary of the original contract. What are we to make of a second promise given to the

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1. More precisely, the puzzle arises in the following situation: *Y* enters into a contract with *Z* requiring action  $\phi$ , and *X* is an intended third-party beneficiary; then *Y* enters into a contract directly with *X* to do action  $\phi$ .

2. This example is loosely inspired by *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 30-32 (2004) (holding that Himalaya clauses do not require privity and may be read expansively where that is the intent of the parties).

3. For an example of a party who has promised to pay off a debt by negotiating for a different payoff amount with a creditor-beneficiary, see *Wartell v. Novograd*, 137 A. 776, 777 (R.I. 1927).

beneficiary directly? I will call this *the puzzle of the beneficiary's bargain* (or often just *the puzzle*).<sup>4</sup> Largely unnoticed, courts have come to divergent, problematic answers. There is, right now, no settled or satisfying conceptual response.

This may sound like a technical, doctrinal question of limited import. But that appearance is deceptive. The puzzle created by this unique set of facts implicates our understanding of consideration doctrine, third-party beneficiary rules, and even the nature of contractual obligation itself. Resolving this puzzle, I believe, requires a new perspective on the most basic concepts of contract law.

This is not the first time that successive contracts for the same performance have been seen as a lens for thinking about contract law. At the turn of the twentieth century, many of the great minds of modern contract law—including Langdell, Anson, Williston, Ames, Ashley, and Corbin—hotly debated what should happen when a promisor in one contract makes another, subsequent promise for the same performance.<sup>5</sup> That debate, unlike the puzzle presented here, did not involve third-party beneficiaries. Still, the mere existence of successive promises for the same performance raised an important question about how the law should understand contractual obligation.

Today, that old puzzle of successive promises has been largely forgotten. Conceptual progress generated some consensus that a duty owed to someone new is a new duty. This conceptual progress, however, has opened the door to a new puzzle that is, one might say, a descendent of the old one. It too involves a second, subsequent promise.<sup>6</sup> What the new puzzle adds is that the second contract is made with the intended beneficiary of the first.

Is the second contract redundant or meaningful? As will be seen, courts have split on this issue.<sup>7</sup> Different core principles of contract

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4. The name refers to the fact that the real question is whether the intended third-party beneficiary—the parents, the railroad company, and the creditor, respectively, in the examples above—has successfully bargained for anything at all or whether consideration is lacking in the second contract.

5. See discussion *infra* Part II.A.1.

6. The puzzle of the beneficiary's bargain is a descendent of the old puzzle in three respects. First, as it too involves a subsequent contract, the set of circumstances that gives rise to the puzzle of the beneficiary's bargain are a subset of those giving rise to the old puzzle. Second, the connection between contractual duties and the doctrine of consideration is at issue in both puzzles. Finally, it is due to the advances in our understanding of contractual obligation—because we now know how to resolve the old puzzle—that the new subset of cases presents a difficulty. Our understanding that duties with someone new are new duties creates the tension with consideration doctrine that I will highlight. In short, modern ideas have yielded answers and progress, but also a new pressure point.

7. See discussion *infra* Part I.B-C.

law press in opposite directions, such that either response appears deeply problematic. On the one hand, it looks like the second promise creates a new relational duty. On the other hand, it looks like the recipient, who could already demand performance, gains nothing from the agreement. This is the puzzle of the beneficiary's bargain. Laying it out, exploring both sides of the dilemma, and mapping out the available responses is the first aim of this Article.

The second, broader goal of this Article is to examine what the puzzle means for contract law. The fact pattern at issue is especially worth attending to because it implicates our understanding of what it means to owe a duty in contract law. That is, it strikes at the very core of how we think about contracts.

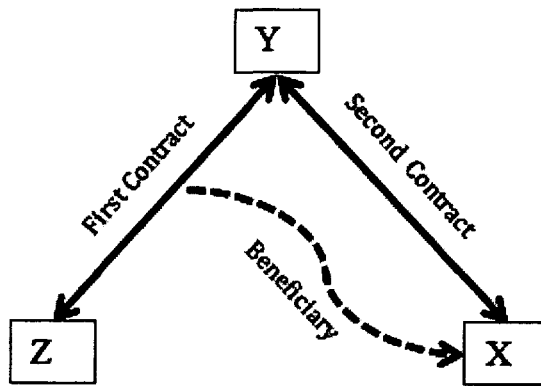
Every first-year law student learns that contracts create legal duties to perform, which correspond with the liability arising from a lack of performance. Scholars, practitioners, and judges all conceive of contract liability in this way—as arising from a breach of the legal duty to perform. Serious analysis of the puzzle of the beneficiary's bargain, however, makes this assumption appear problematic, at least with regard to third parties. And, if contractual obligation is not what we thought in that specific case, there is reason to doubt whether it is what we thought in other cases too. In this way, the puzzle challenges the very idea that contractual liability necessarily reflects legal duties. This Article concludes that the best solution to the puzzle requires abandoning the belief that contract liability arises out of a breach of a promisee's right to performance—radical though that suggestion may sound at the outset.

The Article proceeds in four parts. The remainder of Part I describes the puzzle of the beneficiary's bargain and considers two cases that resolve the issue in opposing ways. Part II describes the conceptual difficulty in resolving the puzzle by refusing to enforce the second contract. Part III describes the problems with resolving the cases in favor of enforcement. Part IV offers a way forward by reconceiving what contract law provides third-party beneficiaries. As I will suggest, though, accepting this way forward threatens some basic assumptions about the connection between legal wrongs and legal duties in contracts. Perhaps surprisingly, given the initially discrete appearance of the puzzle, I conclude that we should broadly endorse this revised conception of contract law.

A. *Two Overlapping Contracts*

The puzzle that I wish to discuss involves two contracts. First, one party makes a contract in which a third party is an intended beneficiary. Second, the same party attempts to make another contract with the third-party beneficiary directly, demanding the same performance that the first contract demanded. I will put the idea more formally:  $Y$  promises  $Z$  to do action  $\phi$ , and  $X$  is an intended third-party beneficiary; then  $Y$  promises  $X$  to do action  $\phi$ . See Figure 1.

Figure 1



Consider a simplified example. A taxi driver makes a contract with a woman, promising to transport her parents from the airport in exchange for the woman's paying a fee. The taxi driver then makes a contract directly with the parents, promising exactly the same service in exchange for their paying a fee. Thus there are two contracts, but the same action will satisfy the driver's obligations under each of them and, moreover, the second promisee was the intended beneficiary of the first promise.

In the real world, the same structure can arise in more complex commercial relationships. Consider another example. A securities broker hires a clearinghouse to purchase stock in the name of a client and deliver that stock to the client. The clearinghouse purchases the stock but requires that, prior to delivery, the client pay a delivery fee not mentioned in the original contract between the clearinghouse and the broker, and the client accepts.<sup>8</sup> Thus there are two contracts; the

8. This example is loosely inspired by *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595 (2d Cir. 1991).

delivery will count as performance under each of them, and, moreover, the client was already the intended beneficiary of the first contract.

Put another way, the puzzle arises where the intended beneficiary of one contract bargains for what he or she expected to receive from the original contract that he or she was not party to.<sup>9</sup> The parents in the taxi example bargained for precisely what they were supposed to receive already under the original contract with the daughter; the client in the clearinghouse example paid for what he should have received all along. This way of putting things draws out the role that consideration plays in the puzzle. This set of facts raises the legal question of whether the second promise, made to the third-party beneficiary of the first promise, constitutes consideration.<sup>10</sup> That is, does a promise to someone who is already an intended beneficiary of an identical promise count as consideration? Has the beneficiary actually bargained for anything at all? Either answer to this question creates significant doctrinal problems. I argue that the tension revealed by this unique fact pattern reveals a much deeper tension in how we think about contractual obligation.

But, before proceeding to the doctrinal implications, it is first necessary to appreciate the scenario and the two opposing answers that courts have given. Thus far, I have described the relevant situation in generalized terms and simplified examples. *American Jurisprudence* provides another simplified example: "Where Brown is under contract with Smith to perform an act for Jones, Brown's subsequent contract with Jones to perform the very same act has been upheld as based upon sufficient consideration, notwithstanding that Brown is already

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9. For an interesting literary example, consider the story of Hannah, as told by Philo. PHILO, *THE BIBLICAL ANTIQUITIES OF PHILO* 214-16 (M.R. James trans., 1917). God promises the people that Hannah, who is barren, will have a son that will lead them. *Id.* at 214. Unaware of this promise, Hannah goes to the shrine and promises that, if God grants her a child, she will return the child to God. *Id.* at 215-16. Is this promise, offered in exchange for something already promised, binding? As one commentator notes, "[W]ithout Hannah's knowledge, Samuel was already promised to the people; hence Hannah's request is really superfluous." JOAN E. COOK, *HANNAH'S DESIRE, GOD'S DESIGN: EARLY INTERPRETATIONS OF THE STORY OF HANNAH* 72 (1999).

10. The chronological order of the contracts is important. In *Constable v. National Steamship Co.*, 154 U.S. 51, 72-74 (1894), the United States Supreme Court might be read as holding that a party cannot be excused from a prior contract by virtue of becoming the intended beneficiary of a subsequent contract. I read that case as more plausibly holding that the party in question was not actually the intended beneficiary of the second agreement. But, in either event, this Article will only consider cases in which the contract with the third-party beneficiary comes second.



contractually obligated to perform the same act.”<sup>11</sup> This commentary maintains that courts uphold the second contract. In fact, however, courts go both ways on this issue, as the following two cases illustrate.

*B. Enforcing the Second Contract: Johnson v. SEACOR Marine Corp.*

Some courts do, as the commentary suggests, uphold the second contract as based on sufficient consideration. *Johnson v. SEACOR Marine Corp.*<sup>12</sup> offers an excellent example. Two oil companies, Chevron and Matrix, used Production Management Industries, L.L.C. (PMI), as a contractor to provide labor in the Gulf of Mexico. The oil companies then contracted with SEACOR to provide transportation for the PMI laborers to the offshore rigs where they would work.<sup>13</sup> SEACOR, however, informed PMI that it would not transport any PMI employees until PMI signed a “Vessel Boarding and Utilization [sic] Agreement Hold Harmless,” naming SEACOR as an additional insured, with special terms, under its comprehensive general liability policy.<sup>14</sup> PMI eventually agreed to this.<sup>15</sup>

Some PMI employees were injured while being transported.<sup>16</sup> SEACOR claimed that PMI had waived liability, and a dispute arose as to whether the agreement between PMI and SEACOR rested on valid consideration. To summarize, the structure of the case is as follows: the oil companies contracted with SEACOR to transport PMI employees, SEACOR refused to transport the PMI employees until they agreed to additional terms, and the PMI employees agreed to these terms. The question is whether there was consideration for this second agreement. See Figure 2.

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11. 17A AM. JUR. 2D *Contracts* § 141 (2004). Although it says that the initial contract was “for Jones,” this example does not explicitly state that Jones was an intended beneficiary, but I think that can be implied.

12. 404 F.3d 871 (5th Cir. 2005).

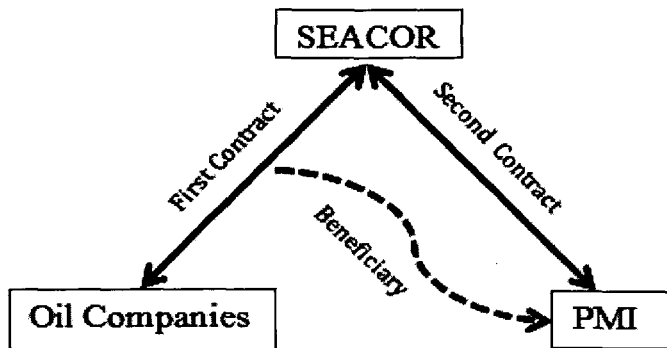
13. *Id.* at 873.

14. *Id.* at 873-74.

15. *Id.* at 874.

16. *Id.*

Figure 2



The United States Court of Appeals for the Fifth Circuit, applying federal maritime law,<sup>17</sup> concluded that SEACOR's second promise could serve as consideration "even if SEACOR owed a duty to Chevron and Matrix to transport PMI employees under SEACOR's agreements with those oil companies."<sup>18</sup> In support of this conclusion, the court cited various sources for the idea that third parties gain additional rights when a new contract is formed. Quoting various authorities, the court explained, "The performance is bargained for, it is beneficial to the promisor, [and] the promisee has forborne to seek a rescission or discharge from the third person to whom the duty was owed . . . ."<sup>19</sup> Although not explicitly addressed by the court,<sup>20</sup> there is good reason to believe that the PMI employees were intended beneficiaries of the original contracts with the oil companies.<sup>21</sup> In sum, despite the fact that SEACOR was contractually obligated to the oil companies to transport PMI's employees, its promise to do the same could count as consideration for PMI's agreement to waive liability.

17. *Id.* at 877 (holding that the vessel boarding agreement was a maritime contract not governed by Louisiana law). For a slightly more thorough explanation of the choice of law issue, see *Hoffpauir v. Seacor Marine Corp.*, No. 01-0536, 2003 U.S. Dist. LEXIS 27733, at \*13-14 (W.D. La. June 3, 2003), *vacated sub nom. SEACOR Marine*, 404 F.3d 871.

18. *SEACOR Marine*, 404 F.3d at 877.

19. *Id.* at 876 (quoting *Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856, 861 (10th Cir. 1968)).

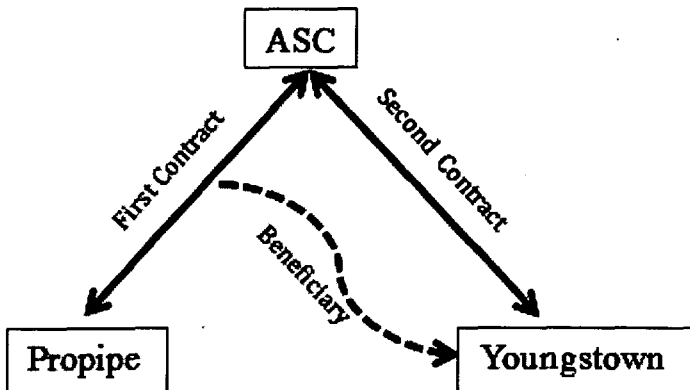
20. The court did state, in passing, "If SEACOR chose to prevent PMI employees from boarding its vessels, only the oil companies had a remedy against SEACOR." *Id.* at 877. It is not clear that this is correct.

21. *See, e.g., Conver v. EKH Co.*, No. 02AP-1307, 2003 WL 22176815, at \*9 (Ohio Ct. App. Sept. 23, 2003) (holding that a contract to transport people in a limousine made the people transported intended beneficiaries).

C. *Rejecting the Second Contract: Youngstown Welding*

Contrast that result with *United States ex rel. Youngstown Welding & Engineering Co. v. Travelers Indemnity Co.*<sup>22</sup> In that case, A.S.C. Constructors, Incorporated (ASC), asked Propipe Corporation (Propipe) to furnish aluminum bronze pipe, and Propipe asked Youngstown Welding and Engineering Company (Youngstown) to manufacture the pipe.<sup>23</sup> Youngstown requested that Propipe obtain progress payments from ASC by joint check.<sup>24</sup> With these and other details worked out, the contracts between ASC and Propipe and between Propipe and Youngstown were executed in June 1980.<sup>25</sup> ASC made at least five payments jointly to Propipe and Youngstown. Four of the checks contained endorsement language on the reverse side stating that endorsement by Youngstown acknowledged receipt of payment and released any lien, stop notice, or bond that Youngstown might possess.<sup>26</sup> To summarize, ASC made a contract with Propipe, one term of which required payment by joint check to Youngstown. In order to accept such payment, ASC made Youngstown agree to additional terms, which it did.

Figure 3



Propipe eventually went bankrupt, and Youngstown brought suit against ASC and its surety, seeking payment for materials provided for

22. 802 F.2d 1164 (9th Cir. 1986), *superseded by statute on other grounds*, Act of July 13, 1992, 1992 Ariz. Legis. Serv. ch. 353 (West) (codified at ARIZ. REV. STAT. § 33-1008 (2014)).

23. *Id.* at 1165.

24. *Id.*

25. *Id.*

26. *Id.* at 1165-66.

the project.<sup>27</sup> The court needed to decide whether Youngstown's acceptance of the endorsement language barred recovery. Youngstown argued that its agreement was without consideration because ASC was already obligated, pursuant to its contract with Propipe, to pay Youngstown via joint check. That is, Youngstown contended that ASC was merely performing its preexisting duty because ASC gave nothing up in exchange for Youngstown's acceptance of the waiver.

The United States Court of Appeals for the Ninth Circuit, applying Arizona law, concluded that there was a lack of consideration.<sup>28</sup> The court recognized that a promise to a third party for the same performance may constitute consideration insofar as the preexisting duty is not already owed to that party.<sup>29</sup> But the court determined that this was not the circumstance in this case. As the court put it, "The ASC-Propipe purchase order, . . . by making Youngstown an intended beneficiary of the joint check agreement, created just such a direct duty in the case before us."<sup>30</sup> Because Youngstown was considered an intended beneficiary of the original agreement between ASC and Propipe, ASC already owed Youngstown the duty to pay, and thus Youngstown's acceptance of the endorsement language was without consideration.<sup>31</sup> Youngstown's waivers were

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27. *Id.* at 1166.

28. *Id.* at 1167.

29. *Id.* (discussing *Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856 (10th Cir. 1968)). The *Morrison* opinion illustrates the complexity that can arise in cases like this. Cisco Aircraft had a federal contract for aerial spraying of timberland in Montana, but the company was in bad financial straits. As a result, it entered into an agreement with the defendant, Deming National Bank (Bank), to assign the proceeds of the contract to the Bank, with the Bank agreeing to finance the project. The plaintiff, Morrison Flying Service (Morrison), entered into an oral agreement with Cisco to provide fuel and aircraft for the spraying. Then, Morrison subsequently entered into an agreement with the Bank, whereby the Bank agreed to pay Morrison for its performance under the contract. The court addressed the question of whether this contract was without consideration because Morrison was already obligated to perform based on its contract with Cisco. Following the modern rule discussed in Part II.A.2, the court concluded that there was consideration. But one might equally wonder whether there was consideration for Morrison's promise to the Bank. The agreement between Cisco and the Bank involved the Bank's ensuring payment to subcontractors under the spraying contract. It involved the Bank's agreeing to "act as paying agent[]" for Cisco, 404 F.2d at 859 n.3, and an agreement that funds distributed to Cisco would be held in trust to pay expenses under the spraying contract, *Morrison Flying Serv. v. Deming Nat'l Bank*, 340 F.2d 430, 431 n.2 (10th Cir. 1965). Arguably, Morrison was already an intended third-party beneficiary of the Bank's contract with Cisco. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. b, illus. 3 (AM. LAW INST. 1981) (discussing intended and incidental beneficiaries).

30. *Youngstown Welding*, 802 F.2d at 1167-68.

31. For another decision reaching a similar conclusion, see *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 853 (Del. Super. Ct. 1980) ("Chrysler was under a pre-existing duty to perform the services for the third-party beneficiary and Airtemp had a right to enforce that

unenforceable because they were offered in exchange for something ASC already owed to Youngstown. Under the preexisting duty rule, there was no consideration for the waivers.

#### D. *The Dilemma*

Both *SEACOR Marine* and *Youngstown Welding* exemplify the puzzle of the beneficiary's bargain. In each case, one party made a legally binding promise to do something for a third party who was to benefit under that promise. In each case, the party who made the promise then attempts to offer the same promise as consideration for an agreement with the third party of the original agreement.

The parallels in how this fact pattern plays itself out in the two cases are striking. In both cases, the original contract involved a promise to provide some service to a third party—transport in *SEACOR Marine*, joint check payment in *Youngstown Welding*. And, in both cases, the party providing that service then required the third party to waive certain liabilities as a condition of receiving the service that they were already contracted to provide. In each case, the beneficiary is asked to give up certain rights in order to receive their benefit.

Despite these parallels, the courts reached exactly opposite conclusions. In *SEACOR Marine*, the court concluded that the subsequent promise to the third party created a new obligation, different in character from the original. In *Youngstown Welding*, the court concluded that the subsequent promise offered no new obligation.

This split invites the question: Which view is correct? Does a subsequent promise to an intended third-party beneficiary create a new contractual obligation, or is it merely redundant and thus inadequate consideration?

Answering this question, I believe, poses a dilemma. On the one hand, we can follow *Youngstown Welding* and reject the second contract. On the other hand, we can follow *SEACOR Marine* and enforce the second contract. As I will describe below, neither horn of this dilemma is without trouble. Choosing between them, however,

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duty. . . . [T]he new promise must be from one who previously had no right to performance by the other party. Conversely, the concept does not apply if the new promisor had a right to performance without the intervention of the new promise. Here, the alleged new promise was made by Airtemp to Chrysler when Airtemp had a right as third-party beneficiary and assignee to receive performance from Chrysler.”).

will implicate how we think about consideration, third-party beneficiaries, and the very nature of contractual duties.

## II. THE TROUBLE WITH NOT ENFORCING

I begin by considering the option of not enforcing the second contract. The court in *Youngstown Welding* opted for this, and the reasoning behind that decision can seem doctrinally compelling. It appears to be the inevitable combination of third-party beneficiary rules, which grant enforcement rights to third-party beneficiaries,<sup>32</sup> and the preexisting duty rule, which prevents promises to do what one already must do.<sup>33</sup> Insofar as an intended third-party beneficiary obtains a right to performance, then, when the second contract is offered, the beneficiary already had a right to performance; promising that performance can hardly constitute newly bargained-for consideration. The second promise seems redundant.<sup>34</sup>

But this answer is not, unfortunately, as simple and as appealing as it seems. In fact, I will argue that it is subject to a major problem. To understand the problem, it is necessary to delve into some old questions about the nature of consideration. For many years, a dispute existed about whether a subsequent promise made to a third party (who is not an intended beneficiary of the original promise) constitutes consideration.<sup>35</sup> In the past century, this dispute has been resolved squarely in favor of the view that it does<sup>36</sup>—and, I will argue, for good reason. The subsequent promise does create new obligations and is not simply redundant.

But, I will also argue that the same reasons that favor this resolution count squarely in favor of finding consideration in the promise to an intended beneficiary. In short, we have good reason to treat promises to third parties as consideration, and intended beneficiaries are third parties like the rest. Put another way, we can break down the puzzle into two questions. First, is there consideration in a subsequent promise to a third party? Second, are intended beneficiaries relevantly different from other third parties? When

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32. For more extensive discussion of this doctrine, see discussion *infra* Part III.A.3.

33. For more extensive discussion of this doctrine, see discussion *infra* Part III.A.4.

34. For some recent philosophical discussions of redundant promises, see James Penner, *Promises, Agreements, and Contracts*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 116, 125-20 (Gregory Klass et al. eds., 2014), and Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in *REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON* 155 (R. Jay Wallace et al. eds., 2011).

35. See discussion *infra* Part II.A.1.

36. See discussion *infra* Part II.A.2.

considered in this way, the problem with applying the preexisting duty rule comes into focus.

### A. *Is There Consideration in a Subsequent Promise?*

Consider, first, the reasons to believe that subsequent promises made to a generic third party are not necessarily lacking in consideration. In a moment, I turn to the question of whether these reasons apply similarly when the promise is made not to any third party, but specifically to a third-party beneficiary.

#### 1. The Old Puzzle of Successive Contracts

It has not always been accepted that a second contract for the same performance made to a different party is supported by consideration. In fact, during the nineteenth century, the courts facing this question tended to conclude that there was no consideration.<sup>37</sup> The party was already under a contractual duty to perform the act in question, and thus performance of this act could not be considered a legal detriment for the purposes of consideration.<sup>38</sup>

At the turn of the twentieth century, this rule became the subject of a heated debate between the great Anglo-American contract scholars.<sup>39</sup> This debate, over a seemingly obscure doctrinal question, received the attention that it did because it drew out deep questions about the nature of contractual obligation.

The debate arose—first in England and then in the United States—out of a difficulty in the explanation of the doctrine of consideration. In England, Sir Frederick Pollock had explained that giving up some legal right constituted one form of consideration.<sup>40</sup>

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37. See, e.g., *Johnson's Adm'r v. Sellers' Adm'r*, 33 Ala. 265, 271 (1858) ("Here, while there is a subsisting contract with the trustees, and a subsisting obligation to perform it, the proposition of the appellant is, that a promise by a third party to induce its performance, or rather to prevent its breach, was supported by a valid consideration. We do not think the law so regards such a promise."); see also 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, *CORBIN ON CONTRACTS* § 7.7 n.5 (rev. ed. 1995) (collecting cases).

38. See, e.g., *Ford v. Crenshaw*, 11 Ky. (1 Litt.) 68, 68 (1822) ("Where a man has, by his own contract, become morally and legally bound to do an act, he can not maintain an action on the promise of a third person, afterwards made, to pay him for doing it." (quoting the case syllabus)).

39. For an excellent history of this debate, see Richard Bronaugh, *A Secret Paradox of the Common Law*, 2 L. & PHIL. 193 (1983). My discussion in this Part is deeply indebted to Bronaugh's paper.

40. See, e.g., FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* 166 (Robert Clarke & Co. 1881) (1876) ("The loss or abandonment of any right, or the

Discussing the case in which a party promises to do what he already promised another he would, Pollock argued that the second promise would be consideration because “[i]t creates a new and distinct right, which must always be of some value in law.”<sup>41</sup> Sir William Anson noted a circularity in Pollock’s explanation, pointing out that “this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad.”<sup>42</sup> In other words, the new promise only creates a legal detriment if it is legally binding, which is precisely what is in question. Pollock eventually acknowledged the circularity, referring to it as “one of the secret paradoxes of the Common Law.”<sup>43</sup>

The same dynamic played itself out in the United States. In his 1880 treatise, C.C. Langdell, then the first Dean of Harvard Law School, explained, “The consideration of a promise is the thing given or done by the promisee in exchange for the promise.”<sup>44</sup> For Langdell, the “thing given or done” had to be a legal detriment. That is, the promisor must be giving up some legal right or power. Langdell illustrated this idea by contrasting unilateral and bilateral contracts made subsequently with a third party:

It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding, though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i.e.* one to each of two persons), though each be to do the same thing.<sup>45</sup>

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forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually doing something.”).

41. *Id.* at 163.

42. WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 81 (O.W. Aldrich ed., Callaghan & Co. 1880) (1879).

43. Bronaugh, *supra* note 39, at 195 n.7 (quoting Book Review, 30 L.Q. REV. 128, 129 (1914) (reviewing J.G. PEASE & A.M. LATTER, THE STUDENT’S SUMMARY OF THE LAW OF CONTRACT (2d ed. 1913))).

44. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 45, at 58 (2d ed., Little, Brown & Co. 1880).

45. *Id.* § 84, at 104-05.



The idea, here, is that merely doing what one is already obligated to do (unilaterally) is not taking on any detriment. But promising to do what one was already obligated to do is a legal detriment because this promise created new legal liabilities.<sup>46</sup>

Langdell's definition suffers from the same circularity as Pollock's. The great contracts scholar Samuel Williston addressed this circularity in an 1894 paper entitled *Successive Promises of the Same Performance*.<sup>47</sup> Williston explained:

To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding.<sup>48</sup>

The promise is only a legal detriment if it is binding, but the whole point of determining whether there is a detriment is to say whether the promise is binding. Williston concluded that the subsequent promise to a third party to do what one already owed another could not count as consideration.<sup>49</sup>

Thus, at the turn of the century, four of the great contract scholars were divided concerning the validity of a subsequent bilateral contract with a third party for the same performance—Pollock and Langdell thought that consideration was present; Anson and Williston contended that it was not. Other great scholars of the era were attracted to the question. James Barr Ames, who succeeded Langdell as Dean of Harvard, argued that the circularity could be avoided by understanding “detriment” or “forbearance” more broadly to include nonlegal effects.<sup>50</sup> Understanding oneself to be changing one's normative

46. This contrast between unilateral and bilateral contracts with third parties was drawn by some courts at the time. *See, e.g., Merrick v. Giddings*, 12 D.C. (1 Mackey) 394, 410-11 (1882) (“[A] promise made in consideration of the doing of an act which the promisee is already under obligation to a third party to do . . . is not binding because it is not supported by a valuable consideration. . . . On the other hand, if the promise be made in consideration of a *promise* to do that act . . . then the promise is binding, because not made in consideration of the performance of a subsisting obligation to another person, but upon a new consideration moving between the promisor and promisee.”).

47. Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894); *see also* Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 123 (1914) (“To Professor Williston belongs the credit of having pointed out the question-begging fallacy in Langdell's theory.”).

48. Williston, *supra* note 47, at 35.

49. *Id.* at 37-38.

50. *See* James Barr Ames, *Two Theories of Consideration II: Bilateral Contracts*, 13 HARV. L. REV. 29, 31-32 (1899) [hereinafter Ames, *Two Theories of Consideration II*] (“Everyone will concede that the consideration for every promise must be some act or

position, Ames argued, was all that consideration required.<sup>51</sup> Taking on the promise itself, not the legal obligation, was the consideration.<sup>52</sup> He concluded that the second contract with the third party should be valid and enforceable.<sup>53</sup>

Clarence Ashley, then Dean of NYU, offered a different solution. His view was that, in law, “promise and contract do not differ as terms, for a promise is a contract.”<sup>54</sup> Thus, consideration exists insofar as the parties consciously take on a legal obligation—consciously make a legal promise. As one scholar explains, “This solution attacks the problem of circularity in bilateral contexts by declaring it to be a technical feature of the law and so to be virtuous, not vicious.”<sup>55</sup> Regarding the subsequent promise to a third party, Ashley concluded that there could not be consideration. In his opinion, “The proposed promisor has nothing to promise, as he has entirely disposed of his right to refrain from doing the supposed act.”<sup>56</sup> Thus, scholarly opinion remained divided.

In 1914, in the face of increasingly unfavorable case law, Williston surprisingly reversed course, accepting that consideration existed for subsequent contracts with third parties.<sup>57</sup> He retained his view that no detriment exists in such cases, but, contrary to his earlier position, he allowed that a benefit to the promisee could count as consideration.<sup>58</sup> This reversal, while noteworthy, did little to illuminate the earlier debate.

The real breakthrough came following Wesley Hohfeld’s introduction of a clearer typology of legal relations, which emerged

forbearance given in exchange for the promise. The act of each promisee in the case of mutual promises is obviously the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise . . . .”); see also James Barr Ames, *Two Theories of Consideration I: Unilateral Contracts*, 12 HARV. L. REV. 515, 515-16 (1899) (discussing his expansive definition of “detriment”).

51. Ames’s view, unfortunately, was not well understood by his contemporaries. See Bronaugh, *supra* note 39, at 200 (noting that Holmes described the view as “absurd” and Ballantine called it “fanciful”).

52. See Ames, *Two Theories of Consideration II*, *supra* note 50, at 33-35.

53. *Id.* at 35.

54. Clarence D. Ashley, *What Is a Promise in Law?*, 16 HARV. L. REV. 319, 320 (1903).

55. Bronaugh, *supra* note 39, at 201.

56. Ashley, *supra* note 54, at 328.

57. Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 520-24 (1914).

58. *Id.* at 524 (“I conceive the discussion to be well worth while whether benefit to the promisor is not sufficient consideration. That, however, is another story, and I will only say here that I have changed my mind . . .”).

around this time.<sup>59</sup> The Hohfeldian approach offered two important things: first, it focused attention on normative relations as between the parties, and second, it carefully delineated different rights and obligations at a fine-grained level.<sup>60</sup>

Arthur Corbin, influenced by Hohfeld, can be seen as the final and decisive entrant into the debate.<sup>61</sup> Corbin defended the emerging consensus in the courts that the subsequent promise with the same content could still count as consideration. He offered two main arguments, corresponding with Hohfeldian themes. First, Corbin departed from the detriment-based theories of consideration. Instead, Corbin focused on the social meaning of the promises, somewhat echoing Ames's earlier suggestion.<sup>62</sup> "Mutual promises create a legal obligation because . . . the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases promise-breakers shall make compensation."<sup>63</sup> By making promises, parties enter into a normative relationship with the other party, and this relationship, rather than any idea of detriment, is the important point for consideration.<sup>64</sup>

Corbin's second argument was that "there is nothing impossible in the idea of two separate and independent duties in A to perform one act."<sup>65</sup> As he explains, "The fact that A might have satisfied his duty to B and his separate duty to C by performing one and the same act is quite immaterial and shows no identity in the *legal relations*."<sup>66</sup> This is a Hohfeldian point. The duty to one party and the duty to another are two separate legal relations. And thus the former is no barrier to a contract that creates the latter.

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59. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*].

60. See, e.g., Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 59, at 28-58.

61. See Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 YALE L.J. 362 (1918).

62. Indeed, Richard Bronaugh called Corbin's solution "a vindication of Ames." Bronaugh, *supra* note 39, at 223.

63. Corbin, *supra* note 61, at 375-76.

64. *Id.* at 376 ("If we are asked why this return promise is deemed to be a sufficient consideration, the answer is the same as the answer to the question why various detrimental acts are deemed to be sufficient. The answer lies in the prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse.").

65. *Id.* at 377.

66. *Id.* at 377-78.

What are we to take away from the lengthy debate over this old puzzle about subsequent contracts with third parties? First, consideration must be a normative idea, not an idea about actual detriment or value. As P.S. Atiyah puts it:

If there is a paradox in all this, it is that not until the end of the nineteenth century did lawyers begin to realize that the conventional accounts of the doctrine of consideration [in terms of value] could no longer be squared with the fundamental basis of classical contract law, the bilateral executory contract.<sup>67</sup>

Richard Bronaugh similarly concludes, “Oblique bilateral contracts will be found good—surely a desirable state of affairs—so long as a nonlegal but nonvaluative detriment conception prevails.”<sup>68</sup> In other words, what the party loses in giving consideration is neither a legal right, which would be circular, nor a factual sacrifice, which would be too contingent. The second and perhaps even more important lesson is that we must be careful in delineating legal duties as between different parties. As Hohfeld usefully emphasized, notions like rights and duties are relational concepts, and a party does not simply have a duty to  $\phi$ , but rather a duty owed to some party (or parties) to  $\phi$ .<sup>69</sup>

## 2. The Modern Consensus

Since the early twentieth century, a fairly robust consensus emerged that subsequent contracts with unconnected third parties are valid. That is, the preexisting duty rule will not apply when the preexisting duty is owed to some other party. The first shift occurred in England in the late nineteenth century.<sup>70</sup> U.S. courts followed suit not long afterwards.<sup>71</sup> The first *Restatement of Contracts* adopted the following position: “Consideration is not insufficient because of the fact . . . that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration . . . .”<sup>72</sup> Going

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67. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 688 (1979).

68. Bronaugh, *supra* note 39, at 230-31.

69. See Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 59, at 28-58.

70. See *Scotson v. Pegg* (1861) 158 Eng. Rep. 121; 6 H. & N. 295 (finding consideration in a promise to a coal supplier to deliver coal when the delivering party had already contracted with the purchaser to deliver the coal); *Shadwell v. Shadwell* (1860) 142 Eng. Rep. 62; 9 C.B. (N.S.) 159 (finding consideration in a promise to marry when the party was already engaged).

71. Judge Cardozo’s opinion in *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917), is usually discussed as the turning point in the United States.

72. RESTATEMENT OF CONTRACTS § 84(d) (AM. LAW INST. 1932).

forward, courts<sup>73</sup> and commentators<sup>74</sup> approved of the *Restatement's* position.

By now, this new rule—doing what one is already under a contractual duty to do with a different party can still be consideration—is almost universally accepted.<sup>75</sup> As one court put it, “[T]he trend of the law is to hold that the performance of a preexisting contractual duty is consideration provided the duty is not owed to the promisor.”<sup>76</sup> A thorough examination of modern cases confirms that courts overwhelmingly follow the new rule and find consideration in such circumstances.<sup>77</sup>

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73. See, e.g., *Willard v. Hobby*, 134 F. Supp. 66, 68 (E.D. Pa. 1955) (approving of the *Restatement's* position).

74. See, e.g., 2 PERILLO & BENDER, *supra* note 37, § 7.7; Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 938 (1958) (“It might be argued that no gentleman would be so greedy as to attempt to buy with the same performance or promise of performance by him, two different promises at different times, whether from the same or different promisors. Such a moral aphorism may be good for some situations, but it is too weak to justify a general legal rule.”).

75. RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. d (AM. LAW INST. 1981) (“[T]he tendency of the law has been simply to hold that performance of contractual duty can be consideration if the duty is not owed to the promisor.”); 2 PERILLO & BENDER, *supra* note 37, § 7.7, at 375 (“The tide has definitely turned, with most recent decisions on the side of enforcement.”); 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 7:40, at 752 (Richard A. Lord ed., 4th ed. 2008) (“Today courts are virtually unanimous in upholding such bargains as long as there is either a bargained-for legal detriment incurred by the promisee or a bargained-for legal benefit accruing to the promisor.”).

76. *USLife Title Co. of Ariz. v. Gutkin*, 732 P.2d 579, 586 (Ariz. Ct. App. 1986).

77. See, e.g., *Morrison Flying Serv. v. Deming Nat'l Bank*, 404 F.2d 856, 860-61 (10th Cir. 1968) (holding that there was consideration in an agreement between a subcontractor and a financing bank to provide and to pay for supplies, respectively, despite prior agreements between both parties and the main contractor to do the same); *Scherer v. Laborers' Int'l Union*, 746 F. Supp. 73, 83 (N.D. Fla. 1988) (holding that a promise by an employee of one union to another union of her cooperation constituted consideration even if she was already obligated to cooperate because “[t]he performance of a pre-existing duty may be consideration if the duty is not owed to the promisor”); *Willard*, 134 F. Supp. at 68 (holding that a contract to take care of one's husband was not supported by consideration because the promise was made to a third-party, not the husband); *Briskin v. Packard Motor Car Co. of N.Y.*, 169 N.E. 148, 149-50 (Mass. 1929) (“The promise of the plaintiff to perform his contractual duty to pay his note to the holder of the note and otherwise to perform the obligation imposed on him by the conditional contract was a sufficient consideration for the promise of the defendant, if the defendant thereby received any legal benefit.”); *Patterson v. Katt*, 791 S.W.2d 466, 469-70 (Mo. Ct. App. 1990) (holding that the plaintiff's promise to the defendant individually was consideration, even though the plaintiff had already contracted for the same performance with the defendant's corporation); *Joseph Lande & Son, Inc. v. Wellsco Realty, Inc.*, 34 A.2d 418, 423 (N.J. 1943) (accepting a promise by a subcontractor to a property owner to complete work in accordance with a contract with the general contractor); *De Cicco v. Schweizer*, 117 N.E. 807, 808-09 (N.Y. 1917) (holding that there was consideration for a parent's promise to provide financial support to his daughter in exchange for her marrying a man, where the daughter was already engaged to the man); *Perry M. Alexander Constr. Co. v. Burbank*, 350 S.E.2d 877, 880 (N.C. Ct. App. 1986) (“[W]e hold

The central reason for this shift is a new understanding of rights and duties in a relational way. Whereas the earlier rule was based on the idea that the party in question was under a duty to perform the promised act, the new rule is based on the idea that the party in question is not under a duty *to the other party* to perform the promised act. In other words, once one shifts from focusing on merely whether the party in question is under a duty and focuses instead on whether the party is under a duty *to the other party*, the modern rule seems much more natural. The new promise, even if it is redundant with regard to what is required of the promisor, makes the requirement personal to the promisee in a way that it was not before.<sup>78</sup>

Consider a typical example. In *Enco, Inc. v. F.C. Russell Co.*,<sup>79</sup> the Oregon Supreme Court found consideration where a window supplier promised a third party to provide windows according to a given schedule when the window supplier had already agreed to that schedule with the eventual purchaser. The court explained, "It is true that the defendant was under obligation to make delivery of its [windows to the consumer], but no similar obligation existed between the plaintiff and the defendant until the agreement sued upon by

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that plaintiff's promise to perform the demolition suffices as consideration for Burbank's promise to pay even though the promise to perform the demolition was also the consideration in the contract between plaintiff and Sure-Fire."); *Burton v. Kenyon*, 264 S.E.2d 808, 809 (N.C. Ct. App. 1980) ("[T]he same factors [of the preexisting duty rule] do not come into play where a third person is involved."); *Chvatal v. U.S. Nat'l Bank of Or.*, 589 P.2d 726, 728 (Or. 1979) ("[E]ven if we were to accept defendant's assumption that plaintiff's statement to his supervisor obligated him toward the Abel company, this alone does not prevent his subsequent performance of his work from being consideration for the promise of a third party, which had an independent interest in his performance of that work, to see that the compensation earlier promised by his financially incapacitated employer would in fact be paid."); *Enco, Inc. v. F.C. Russell Co.*, 311 P.2d 737, 744 (Or. 1957) (holding that a promise by a window producer to the manufacturer of wood surrounds that the producer would ship windows according to a schedule was valid consideration, even though the producer had already contracted with the consumer to ship the windows according to that same schedule). *But see Romero v. Buhimschi*, No. 09-1195, 2010 U.S. App. LEXIS 19219 (6th Cir. 2010) (holding that a promise to list the plaintiff as a coauthor in exchange for collaboration lacked consideration because the federal employment contract already required collaboration). The *Romero* decision, however, was based on two atypical factors. First, it was a federal court applying Michigan law, and because Michigan had not yet decided the issue of preexisting duties owed to third parties, the court refused to apply the modern rule. *See id.* at \*33-34. Second, the court viewed the federal employment contract as creating a public duty and not just a contractual duty. *See id.* at \*24. Although not raised by the court, one might also wonder whether the recipient of the second promise in *Romero* was already an intended third-party beneficiary of the prior contract. If so, then the case may be considered an example of the puzzle with which this Article is concerned.

78. *See Shiffrin, supra* note 34, at 167-70 (discussing the way that a redundant promise can shift the obligation from impersonal to personal).

79. 311 P.2d 737 (Or. 1957).

plaintiff came into existence.”<sup>80</sup> In other words, the essential question was not whether the defendant was under an obligation in general (or what may be called a monadic obligation), but whether the defendant was *in general* under an obligation *to the plaintiff* (or what may be called a relational obligation).

This shift in perspectives may be considered Hohfeldian. As already noted, it is no coincidence that the change in rules corresponds with the emergence of Hohfeld’s work.<sup>81</sup> One of Hohfeld’s major contributions was recognizing that our concepts of rights and duties pair one party with another party in jural relations.<sup>82</sup> At the center of his typology of jural relations is the claim-right.<sup>83</sup> A person *X* has a *claim-right* against *Y* if and only if *Y* has a *duty* to *X*. For example, I have a right that you repay your debt to me, and that right correlates with your duty to pay me. What is important here is that rights and duties relate one party with another party, and thus I can have a right or a duty with regard to you and not have the same right or duty with regard to another person. This relational understanding of rights and duties supports the idea that, in general, consideration exists when one promises the same thing to someone new.

This is true in two ways. First, the third party, not being the promisee of the prior contract, is not the party to whom the preexisting duty is owed. H.L.A. Hart—who was deeply influenced by Hohfeld<sup>84</sup>—offers the following example to demonstrate the way in which rights and duties are owed to the promisee, not a third party:

X promises Y in return for some favor that he will look after Y’s aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y’s mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something *due to* or *owed to* Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done

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80. *Id.* at 744.

81. *See supra* text accompanying notes 59-60.

82. *See* Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 59, at 28-58.

83. *See, e.g.*, Alan Gewirth, *Rights*, in 1 *ENCYCLOPEDIA OF ETHICS* 1506, 1507 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001) (“Despite the possible interconnections between Hohfeld’s types, it is generally agreed that claim-rights are the most important kind of rights . . .”).

84. *See* Geoffrey C. Shaw, *H.L.A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 *HARV. L. REV.* 666, 685 n.104 (2013) (“Hart found in Hohfeld a forerunner to his own linguistically focused analytical jurisprudence.”).

wrong if he fails to keep his promise, though the mother may be physically injured.<sup>85</sup>

Hart argues—I think convincingly—that the son (*Y*) and not the mother is the rightholder in this case. That is, the contractual duty is owed to *Y*. It was to *Y* that the promise was made. That *X* did not owe the duty to the mother is evidenced by the fact that she would not control *X*'s performance. She could not demand or excuse performance. As Hart puts it, “[I]t is *Y* who has a moral *claim* upon *X*, is *entitled* to have his mother looked after, and who can *wave* the claim and *release* [*X*] from the obligation.”<sup>86</sup> In short, the son—the promisee—is the rightholder because the duty is owed to him insofar as he is the one with control over the duty.

This point—that a third party is not the one to whom the duty is owed—implies that a new promise to that party would count as consideration. Corbin, for example, explains: “The promisor [who receives in exchange a promise to do something already owed to someone else] gets the exact consideration bargained for, one to which the promisor previously had no right and one that the promisor might never have received. This is a benefit to which the promisor had had no entitlement.”<sup>87</sup> The party receives the valuable status of being the obligee of the duty in question. To hold otherwise “results . . . in the law ignoring the very real (as opposed to the ‘theoretical’ or ‘legal’) benefit that exists when the second promisor thereby gains the direct, and directly enforceable, obligation of the promisee.”<sup>88</sup> Thus, there is consideration in the subsequent promise insofar as the third party acquires a duty owed directly to him or her.

This first point focused on the position of the third party and what he or she gains through the new promise. A second point focuses on the party to the original contract and what he or she gives up. Through the second contract, this party gave up the possibility of excusal from performing the action—or, at least, the possibility of excusal by the party in the original agreement alone. The party who makes both contracts undergoes the detriment of no longer being

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85. H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 180 (1955).

86. *Id.* Hart clearly intended an *X*, not a *Y*.

87. 2 PERILLO & BENDER, *supra* note 37, § 7.7, at 373. Discussion of consideration in bilateral contracts, like this one, makes the language of “promisor” and “promisee” quite confusing. I have tried to avoid the terms altogether for this reason. To be clear, the “promisor” in this passage is the party who would receive the promise to do something already promised to someone else.

88. 3 WILLISTON, *supra* note 75, § 7:40, at 752-53.



bound only to one party, who might release or excuse the obligation, and instead is bound separately to two parties.

Like the *SEACOR Marine* opinion, some courts and commentators support this second point by observing that “the promisee [i.e., the one making the second promise] has forborne to seek a rescission or discharge from the third person to whom the duty was owed.”<sup>89</sup> As I will discuss below, this formulation can be misleading if it is taken to describe the content of the obligation.<sup>90</sup> But what it captures is the fact that the new agreement imposes an additional obligation owed to the third party and that, in this sense, the central party is now bound in a way that he or she was not previously. This additional obligation is reflected in the fact that now, unlike before, the party would still be under a duty even if the duty owed to the party in the original contract were extinguished. The important point is that the central party is now bound to two people rather than to only one.

Again, the existence of consideration becomes evident as long as one thinks of duty in relational, Hohfeldian terms. Once one understands duties in this way, it becomes clear that the party receiving the subsequent promise acquires something new, even if the party making the promise was already under an obligation to another party and, similarly, that the party making the promise gives something up. For these reasons, a consensus has now developed that, in general, a promise to a third party to do what one is already obligated to another party to do counts as consideration.

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89. 2 PERILLO & BENDER, *supra* note 37, § 7.7, at 373; Morrison Flying Serv. v. Deming Nat'l Bank, 404 F.2d 856, 861 (10th Cir. 1968) (quoting ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 176 (1 vol. ed. 1952)); *see also* De Cicco v. Schweizer, 117 N.E. 807, 808-09 (N.Y. 1917) (Cardozo, J.) (“The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void. If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.” (citations omitted)); RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. d (AM. LAW INST. 1981) (“In some cases consideration can be found in the fact that the promisee gives up his right to propose to the third person the rescission or modification of the contractual duty.”); *cf.* Burton v. Kenyon, 264 S.E.2d 808, 810 (N.C. Ct. App. 1980) (“Where one party to a contract has the right to terminate it because of the default of the other, his completion of the contract is a sufficient consideration for the promise of a third person.” (quoting 17 C.J.S. *Contracts* § 113, at 835 (1963))).

90. *See* discussion *infra* Part III.B.5.

*B. Is a Subsequent Promise to a Third-Party Beneficiary Different?*

The history and arguments discussed above explain why consideration exists when one makes a subsequent promise to a third party. This reflects the lesson of the old puzzle on contracting with third parties.

The puzzle of the beneficiary's bargain—the one that arises in *SEACOR Marine* and *Youngstown Welding*—involves the additional fact that the third party in question was an intended beneficiary of the original agreement.<sup>91</sup> In my view, however, this additional fact does not change the force or applicability of the reasons that apply in the straightforward third-party case. The same reasons for thinking that a promise to a third party counts as consideration apply equally to the third-party beneficiary.

First, while it is true that the intended beneficiary obtains the legal right to bring suit if breach occurs, the beneficiary is still not the one to whom the original promise is owed. Recall Hart's example of the promise to care for the mother. The mother, in that example, would arguably count as an intended beneficiary.<sup>92</sup> But she is not the promisee, and she is not ultimately the rightholder in Hart's sense. The son, not the mother, is still the party to whom the promise was rendered and who now has the power to waive, alter, or release the resulting duty. While special additional facts could change this situation and make it so that the son could no longer waive or alter the duty, the mere fact that the mother is an intended beneficiary does not mean that the duty is not owed to the son.<sup>93</sup> The promisee, not the intended beneficiary, is still the party to whom the promisor's duty is owed.

As a result, the second, subsequent promise to the intended third-party beneficiary does give that party some new benefit. As in the

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91. See discussion *supra* Part I.B-D.

92. See *supra* text accompanying notes 85-86; cf. *Smallwood v. Cent. Peninsula Gen. Hosp.*, 151 P.3d 319, 326 (Alaska 2006) (treating a Medicaid patient as an intended beneficiary with a right to sue for breach of a contractual agreement to provide care between the state and the hospital).

93. See RESTATEMENT (SECOND) OF CONTRACTS § 311. My sense is that we can usefully distinguish two very different kinds of contracts with intended third-party beneficiaries. In the ordinary case, the intended beneficiary gets the power to bring suit, even though the promisee is still the primary rightholder (i.e., the one who controls the duty). In other cases, however, the promise is essentially a promise to transfer certain rights to the third party, which essentially amounts to a promise to make another promise to the third party. Once such a transfer or second promise occurs, then the third party becomes the rightholder in a perfectly intelligible way. It is the first set of cases that are most interesting and problematic from a structural perspective.

older, simpler scenario, this benefit should be sufficient to count as consideration. What the beneficiary receives is a duty owed directly to him or her.

Second, even though the central party may have already been liable to the third-party beneficiary had he or she breached, the second agreement still creates an additional liability. Speaking metaphysically, whereas the party was previously under a single duty with two potential complainants should breach occur, that party is now under two duties owed separately to two different promisees. This metaphysical difference becomes practically significant if the first duty is altered or eliminated or defective. But, even if none of these things turn out to be true, the third party receives a right of his or her own that guards against such circumstances. And, by being subject to this additional claim, the party who makes the subsequent promise suffers a legal detriment.

Once one adopts the relational, Hohfeldian understanding of rights and duties, owing a duty to one person naturally appears distinct from owing it to another. By making it the case that one owes the duty directly to the third party, the central party bears a new burden and the third party acquires a new set of rights. The fact that the third party would have had standing to sue as an intended beneficiary had the original duty been breached does not change this conceptual point.

Consider a practical example. Imagine that your friend Marcus owes me \$1,000. Marcus, a masseuse, offers you a month of free massages if you will pay off his debt to me. Because this amounts to a discounted rate on Marcus's massages, you accept. Note that, although this is a contract between you and Marcus, I am a third-party beneficiary of the agreement.<sup>94</sup> Marcus performs his side of the contract and gives you the month of massages. Now, you have a duty to Marcus to pay his debt, and I have the right to bring suit on the basis of the agreement with Marcus. Suppose, however, that you do not immediately have the cash to pay me. So you offer to promise me directly that you will pay me \$1,000 if I will discharge Marcus's debt, and, preferring your debt to Marcus's, I accept.<sup>95</sup>

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94. See RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(a); see also, e.g., *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999) ("If . . . performance will come to [a third party] in satisfaction of a legal duty owed to him by the promisee, he is a creditor beneficiary.").

95. For a similar example and discussion, see 3 WILLISTON, *supra* note 75, § 7:40.

There is little doubt that our agreement would be enforceable; it is a standard novation.<sup>96</sup> If this is an enforceable bilateral agreement, it must be supported by consideration on both sides. And it is not hard to see that it is. You gain the bargained-for benefit of no longer being liable to Marcus under your agreement, and you undergo the bargained-for detriment of being directly liable to me (thus losing any defenses or protections that your agreement with Marcus might have afforded you). I gain the bargained-for benefit of a direct obligation from you, and I suffer the bargained-for detriment of losing Marcus as a debtor. These things are all true irrespective of the fact that I was already in a position to bring suit against you if you did not pay me as the creditor beneficiary of your agreement with Marcus.

An example like this illustrates that the same reasons that applied in the straightforward case—a contract with a third party (who is not an intended beneficiary) to do what one is already contractually obligated to another person to do—also apply in the more complicated case.<sup>97</sup> The reasons for the modern rule in the former case derive from an understanding that rights and duties are relational, so a duty to one person is not the same as a duty to another. We are not merely interested in whether we are obligated to do an act, but to whom we are so obligated. It is different to owe it to me to pay me \$1,000 than it is to owe it to your friend to pay me \$1,000. As long as we recognize this difference, then there is a strong reason not to apply the preexisting duty rule where the preexisting duty was owed to someone else. There are good reasons to see a duty to  $\phi$  owed to one person as not the same as a duty to  $\phi$  owed to someone else.

These same reasons will apply with equal force when the new party was an intended beneficiary of the preexisting duty. A different relational duty is still being created. A duty to  $\phi$  owed to one person is still not the same as a duty to  $\phi$  owed to someone else even if that someone else were a beneficiary of the first duty.

For this reason, the first response to the puzzle of the beneficiary's bargain—namely, refusing to enforce the subsequent promise to the third-party beneficiary on the grounds that doing so would violate the preexisting duty rule—is deeply problematic. At a

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96. See RESTATEMENT (SECOND) OF CONTRACTS § 280; 58 AM. JUR. 2D *Novation* § 5 (2012).

97. In fact, the point about novations raised in the preceding paragraphs was an argument advanced by Ames in favor of finding consideration in the original puzzle. See Ames, *Two Theories of Consideration II*, *supra* note 50, at 35 (“[A]ny theory of consideration which would nullify this rational business arrangement stands *ipso facto* condemned, unless inexorable logic compels its recognition.”).

theoretical level, it cuts against the modern, Hohfeldian, relational understanding of contractual obligation. At a practical level, it invalidates run-of-the-mill novations that occur regularly and without dispute.

### III. THE TROUBLE WITH ENFORCING

As the *SEACOR Marine* and *Youngstown Welding* cases exemplify, there is a puzzle about what to do when a subsequent promise is made to a third-party beneficiary—the modern cousin of the older, more familiar puzzle regarding third parties. Above, I described the difficulties with refusing to enforce such a promise. If not enforcing such a contract seems so problematic, why not enforce the second contract, i.e., the contract with the third-party beneficiary? I now turn to addressing this question. The second horn of the dilemma posed by the puzzle arises because of the difficulty with enforcing the contract.

#### A. *Four Mutually Inconsistent Propositions*

Given the argument provided in Part II, the approach of the court in *SEACOR Marine*, treating the subsequent contract as valid, may appear increasingly tempting. That is, one might be tempted to think that there is consideration for the second contract. The difficulty with this response is that, when combined with three relatively basic propositions about contract law and legal obligation, this position seems to create an inconsistent set of commitments. In short, the claim that the subsequent promise (of identical performance) to an intended beneficiary constitutes consideration appears to be in tension with some canonical legal principles.

In particular, if one commits to the view that subsequent promises are valid, one seems to commit to the following four mutually inconsistent propositions:

- (1)  $Y$ 's promise to  $X$  to  $\phi$  will constitute consideration even if  $X$  is a third-party beneficiary of a promise in a legally valid contract that  $Y$  has made to  $Z$  to  $\phi$ ;
- (2)  $X$  has a right (claim-right) that  $Y$  does  $\phi$ , which means that  $Y$  owes  $X$  a duty to  $\phi$ ;
- (3) An intended third-party beneficiary of a promise by  $Y$  to  $\phi$  in a legally valid contract has a right (claim-right) that  $Y$  does  $\phi$ ; and

- (4) If  $Y$  owes  $X$  a duty to  $\phi$ , then a promise from  $Y$  to  $X$  to  $\phi$  will not constitute consideration.

As a straightforward matter of logic, these four propositions are inconsistent, and they cannot all be true. I will now say something more about each of these propositions.

1.  $Y$ 's Promise to  $X$  To  $\phi$  Will Constitute Consideration Even If  $X$  Is a Third-Party Beneficiary of a Promise in a Legally Valid Contract that  $Y$  Has Made to  $Z$  To  $\phi$

This proposition describes the proposed response to the puzzle of the beneficiary's bargain, i.e., it is the second horn of the dilemma. It says that a second promise made to the third-party beneficiary of a previous promise still counts as consideration. This proposition reflects the holding in *SEACOR Marine*.

We can further break this proposition down into two separate claims: first, a second promise to perform the same act *made to a different person* will generally count as consideration; second, it does not matter whether the different person was an intended beneficiary of the first promise. The first claim expresses, as discussed above, the modern consensus deriving from an earlier era of scholarly debates about successive contracts. As discussed in Part II.B, if one is not going to enforce the subsequent contract with a third-party beneficiary, one must either reject this established idea about subsequent promises more generally, or one must somehow distinguish the third-party beneficiary. Neither option is appealing. In order to avoid either of these unappealing options, one must accept this first proposition.

2.  $X$  Has A Claim-Right that  $Y$  Does  $\phi$  If and Only If  $Y$  Owes  $X$  a Duty To  $\phi$

This proposition is a central tenet of Hohfeld's typology of jural relations. Essentially, it is definitional.<sup>98</sup> Hohfeld recognized that philosophers and lawyers often conflate different uses of the word "right."<sup>99</sup> In order to clarify the concept, Hohfeld distinguished different ideas—jural relations, as he called them—that rights invoke.

98. See JOEL FEINBERG, *SOCIAL PHILOSOPHY* 62 (1973) ("[C]orrelativity . . . is, for a certain class of rights and duties, logically unassailable, for as we have seen, legal claim-rights are *defined* in terms of other people's duties."); see also Linda C. McClain, *Rights and Irresponsibility*, 43 *DUKE L.J.* 989, 1040 (1994) (discussing Hohfeld's conception of legal rights as pairs of jural relations).

99. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 59, at 30-31.

The first and most basic idea is that *X* has a *claim-right* against *Y* if and only if *Y* has a *duty* to *X*.<sup>100</sup> For example, if I have a right that you repay your debt to me, that correlates with your having a duty to pay me. Thus, claim-rights correlate with duties. They are, in many respects, the most basic instances of right.<sup>101</sup>

Hohfeld distinguished the claim-right from other relations that we also refer to as rights.<sup>102</sup> In particular, in contrast to a claim-right, *X* has a *liberty* (or privilege) against *Y* if and only if *Y* has *no right* with regard to *X*. For example, we might say that, in regard to you, I have a (liberty) right to decorate my living room how I want, and this correlates with the fact that you have no right to tell me how to decorate my living room.

It should be clear that these four first-order relations stand in two different relations to each other—as opposites and correlates. As already noted, a claim-right correlates with a duty, and, as should be apparent, the opposite of a claim-right is a no right. Similarly, the correlate of a liberty is a no-right; the opposite is a duty. Thus one can represent the first order relations in the following matrix (with correlates across from each other and opposites diagonal from each other):

claim-right	duty
liberty	no right

In addition to the first-order relations, Hohfeld distinguished four second-order jurial relations. These relations are second-order in the sense that they involve the ability to alter first-order relations.<sup>103</sup> But the focus, for the present purposes, will be on the first-order relations.

The essential point is simply that, by definition, when one party has a claim-right, another party has a duty owed to the rightholder.

100. See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 59, at 717.

101. See, e.g., John Harrison, *Power, Duty, and Facial Invalidity*, 16 U. PA. J. CONST. L. 501, 509 (2013) (“The owner has the position that is said to correlate with the others’ duty, called a right or, in more technical usage, a claim-right.”).

102. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 59, at 28-44.

103. A *power* involves the ability to place others under a duty or to relieve them from a duty. The correlate of a power is a *liability*—in other words, *X* has a liability with regard to *Y* if and only if *Y* has a power with regard to *X*. Finally, there are *immunity* and *disability*, which are the opposites of liabilities and powers, respectively (and correlated with each other). *Id.* at 44-58. It is worth noting that these terms are being used in something of a technical sense. We might say that I have the power to relieve you of your duty not to trespass on my land, by, for example, granting you an easement. Insofar as I have this power, you have a liability with regard to me. But of course, this is not a bad thing—your liability is just a potential to be given additional rights.

This definition may seem like a trivial, formal point. As the history of the old puzzle about contracting with third parties illustrated, however, this formal distinction has assisted in clarifying jurisprudential understanding of various topics. In particular, the idea that each right correlates with a duty held by someone else helped make sense of the idea that duties owed to two different people confer two different rights.

### 3. An Intended Third-Party Beneficiary of *Y*'s Promise To $\phi$ in a Legally Valid Contract Has a Claim-Right that *Y* Does $\phi$

This proposition is a statement of the rule that intended third-party beneficiaries may, in proper circumstances, sue on a contract. In other words, the proposition represents the modern rule about third-party rights in contract law. It rejects the idea that only the persons between whom a contract is formed can enforce the resulting contract.

The ability of third parties to bring suit has evolved over time; it has not always been accepted. Roman law held that "*res inter alios acta tertiis nec nocere nec prodesse potest*" ["a thing done between some does not harm or benefit third-party others"].<sup>104</sup> The need for more flexible legal actions, however, gradually pushed European legal systems away from a strictly personal understanding of contractual obligations.<sup>105</sup> In northern Europe, Grotius argued that acceptance by the third party made the contractual obligation binding,<sup>106</sup> and both Dutch and German law eventually permitted beneficiary suits.<sup>107</sup> In

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104. M.H. Bresch, Note, *Contracts for the Benefit of Third Parties*, 12 INT'L COMP. L.Q. 318, 318 (1963) (translated by author) (discussing the early Roman rule); see also VERNON VALENTINE PALMER, *THE PATHS TO PRIVACY: A HISTORY OF THIRD PARTY BENEFICIARY CONTRACTS AT ENGLISH LAW* 181 (1992) (discussing the Roman rule, but also noting that Roman law on this issue was not "altogether rigid").

105. For a discussion of the particular agricultural arrangements that pressed against third-party contractual rights, see Bresch, *supra* note 104, at 318-19. For a more general history of the transition away from strictly personal claims in England, see W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920).

106. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 143 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625).

107. BURGERLIJK WETBOEK [BW] art. 6:253 para. 1 (Neth.), translated in *THE CIVIL CODE OF THE NETHERLANDS* 713 (Hans Warendorf et al. trans., 2009) ("A contract creates the right for a third person to claim performance from one of the parties or to otherwise invoke the contract against any of them, if the contract contains a stipulation to that effect and if the third person so accepts."); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 328, para. 1 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p1201](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1201) ("Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.").



France, the Code Napoleon, influenced conservatively on this issue by Robert Pothier, accepted contractual stipulations on behalf of third parties, even while formally retaining the Roman rule.<sup>108</sup> And in England, a back-and-forth history saw the right of third parties to sue apparently endorsed in the seventeenth century,<sup>109</sup> firmly repudiated in the nineteenth century,<sup>110</sup> and then, after years of academic opinions in its favor,<sup>111</sup> only recently reestablished conclusively.<sup>112</sup>

In the United States, the contractual rights of third-party beneficiaries first emerged in *Lawrence v. Fox*.<sup>113</sup> A man named Holly, not a party to the suit, loaned \$300 to the defendant, Fox. In return, Fox promised that he would pay \$300 to Lawrence, to whom Holly was indebted, the very next day.<sup>114</sup> The New York Court of Appeals held that Lawrence, not a party to the contract between Holly and Fox, could nevertheless maintain an action on the contract.<sup>115</sup> The court explained, “[W]here one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it.”<sup>116</sup> *Lawrence v. Fox* became the foundation for suits by “creditor beneficiaries.”<sup>117</sup>

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108. See CODE NAPOLEON art. 1121, at 307 (Barrister of the Inner Temple trans., 1824) (translating the 1803 French Civil Code). For the historical development in France, see Jan Hallebeek, *Contracts for a Third-Party Beneficiary: A Brief Sketch from the Corpus Iuris to Present-Day Civil Law*, 13 *FUNDAMINA* 11, 27-28 (2007), and PALMER, *supra* note 104, at 183-84.

109. See *Dutton v. Poole* (1677) 83 Eng. Rep. 523; 2 Lev. 210 (holding that a sister could sue on a contract between her brother and her father in which the brother was to pay money to the sister in exchange for the father refraining from selling certain property).

110. See *Tweddle v. Atkinson* (1861) 121 Eng. Rep. 762; 1 B. & S. 393 (holding that a groom could not sue on a contract between the groom's father and the bride's father in which the bride's father was to pay the groom).

111. See, e.g., A.M. FINLAY, *CONTRACTS FOR THE BENEFIT OF THIRD PERSONS* (1939); Jack Beatson, *Reforming the Law of Contracts for the Benefit of Third Parties: A Second Bite at the Cherry*, in 45 *CURRENT LEGAL PROBLEMS* 1992 pt. 2, at 1 (R.W. Rideout & B.A. Hepple eds., 1992); M.P. Furmston, *Return to Dunlop v. Selfridge?*, 23 *MOD. L. REV.* 373 (1960). But see Stephen A. Smith, *Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule*, 17 *OXFORD J. LEGAL STUD.* 643, 645-49 (1997).

112. See *Contracts (Rights of Third Parties) Act 1999*, c. 31 (Eng.).

113. 20 N.Y. 268 (1859). For an excellent history of the *Lawrence* decision, see Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 *HARV. L. REV.* 1109 (1985).

114. 20 N.Y. at 269.

115. *Id.* at 274-75.

116. *Id.* at 271 (quoting *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 140 (N.Y. Sup. Ct. 1806)).

117. The picture of third-party beneficiary rules as a fringe area of contract law might be due, in part, to its exclusion from early casebooks, and *Lawrence v. Fox*'s image as an iconic shift may be in part due to its eventual inclusion as a casebook classic. See E. Allan

Another New York case, *Seaver v. Ransom*,<sup>118</sup> added to the rule announced in *Lawrence v. Fox*. This case involved an agreement between a husband and his dying wife. The wife's will had been written to leave the house to her husband for life, but the wife asserted that she wanted instead to leave it to her niece.<sup>119</sup> Rather than drafting a new will, however, it was agreed that her will would be left as it was, and, in exchange, her husband promised to leave money to the wife's niece in his own will to make up the difference.<sup>120</sup> But the husband did not leave money to the niece, and the niece brought suit against his estate.<sup>121</sup> Citing the "great case of *Lawrence v. Fox*" and noting the inequity that would result from a contrary holding, the court accepted the niece's right, as a third-party beneficiary, to sue.<sup>122</sup> *Seaver v. Ransom* became the model for what came to be known as "donee beneficiary" cases.<sup>123</sup>

By now, U.S. courts have largely unified these cases under the more general rule that intended beneficiaries have a right to sue on the contract.<sup>124</sup> As the *Second Restatement of Contracts* puts it, "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."<sup>125</sup> In other words, the modern rule is that, despite the lack of privity, a promisor owes a contractual duty to any intended third-party beneficiary; correlative to this duty, the third-party beneficiary acquires a right to performance.

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Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1430, 1444 (1987) (discussing *Lawrence v. Fox* in particular).

118. 120 N.E. 639 (N.Y. 1918).

119. *Id.* at 639.

120. *Id.* at 639-40.

121. *Id.* at 640.

122. *Id.* at 640, 642 (emphasis added).

123. See Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1371-73 (1992).

124. See, e.g., *Costanza v. Costanza*, 346 So. 2d 1133, 1135 (Ala. 1977) ("It is essential that one claiming benefits under a contract to which he was not a party must show that he falls within that class of persons for whose benefit the contract was intended."); *Murphy v. Allstate Ins.*, 553 P.2d 584, 588 (Cal. 1976) ("A third party beneficiary may enforce a contract expressly made for his benefit. And although the contract may not have been made to benefit him alone, he may enforce those promises directly made for him." (citation omitted)); see also RESTATEMENT (SECOND) OF CONTRACTS ch. 14, intro. note (AM. LAW INST. 1981) ("Since the terms 'donee' beneficiary and 'creditor' beneficiary carry overtones of obsolete doctrinal difficulties, they are avoided in the statement of rules . . .").

125. RESTATEMENT (SECOND) OF CONTRACTS § 304.

4. If  $Y$  Owes  $X$  a Duty To  $\phi$ , then  $Y$ 's Promise to  $X$  To  $\phi$  Will Not Constitute Consideration

This proposition is a formal description of the preexisting duty rule.<sup>126</sup> The preexisting duty rule means that, if one party is already obligated to perform an action, a promise to perform that action will not count as consideration. As one court put it, "It is elementary law that giving a party something to which he has an absolute right is not consideration to support that party's contractual promise."<sup>127</sup>

The idea here is very intuitive. If contracts must involve a bargain in which two sides exchange rights, then it cannot be the case that one party promises something that the other party can already claim. Otherwise, one party would be attempting to convey something that was already, by right, the other party's. It would be like selling someone her own property. Or, from the opposite perspective, one party would be receiving nothing more than what she was already owed.

That is the conceptual point. Practically speaking, the preexisting duty rule protects against a hold-up game in which one party extorts a promise in exchange for doing what is already required.<sup>128</sup> For example, if I promise you that I will not assault you, that promise will not count as consideration, because I am already under a legal duty to refrain from assaulting you. Analogously, the rule prevents an already bound promisor from extracting one-sided contract modifications from the promisee.<sup>129</sup> In other words, it prevents against metaphorical hold-ups during the performance of a contract as well as literal hold-ups like those that may involve the threat or implicit threat of violence.<sup>130</sup>

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126. *See id.* § 73 ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.")

127. *Salmeron v. United States*, 724 F.2d 1357, 1362 (9th Cir. 1983); *see also Ramanathan v. Saxon Mortg. Servs., Inc.*, No. 2:10-CV-02061-KJD-VCF, 2011 U.S. Dist. LEXIS 147681, at \*8 (D. Nev. Dec. 21, 2011) ("It is axiomatic that giving a party something to which he has an indisputable right is not consideration.")

128. *CORBIN*, *supra* note 89, § 171, at 246 (characterizing the preexisting duty rule as addressing a "hold up game").

129. *See, e.g., Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902) (refusing to enforce the promise of an employer to pay more to an employee for work); *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844 (Mo. 1891) (refusing to enforce the promise of a brewer to pay an architect more for work that the architect was already contractually obligated to complete).

130. *See Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (Posner, J.) ("Allowing contract modifications to be voided in [preexisting duty circumstances] assures prospective contract parties that signing a contract is not stepping into

The way that I have articulated the rule here requires that the preexisting duty be owed *to the other party*. A preexisting duty to  $\phi$  owed to anyone other than the opposing party is not included in the present statement of the rule. In stating the rule this way, I am following the consensus that arose out of the old puzzles about third-party contracts and, furthermore, I am at the same time offering a less expansive version of the rule.<sup>131</sup>

### *B. Cataloging the (Unappealing) Ways Out*

The four propositions just described are mutually inconsistent. As a matter of basic logic, they cannot all be true. This logical inconsistency is a formalization of what is a relatively intuitive problem: It looks like third-party beneficiaries have a right to performance, which would seem to imply that a promisor owes a duty to a third-party beneficiary, but, if a promisor already owes a duty to a third-party beneficiary, then it seems inconsistent with the preexisting duty rule that the same performance could be the basis for a subsequent contract. My formal restatement confirms the logical inconsistency that one may have intuitively detected.

In the remainder of this Part, I want to catalog briefly the various possible ways out of this inconsistency. For the sake of clarity and completeness, I will catalog the conceivable options in order. I see six possible ways out of the inconsistency. Each escape is, I believe, troubling. That is, none of them strike me as without significant costs. I will delay discussing the most promising options at length, in order to get the other possibilities on the table. My aim in this Subpart is only to catalog, flagging certain options for further consideration and noting others that I will discard as implausible.

#### 1. Reject Subsequent Promises to Third-Party Beneficiaries (i.e., Deny Proposition 1)

The first possible escape from the logical inconsistency involves abandoning the idea that the puzzle's second contract is enforceable. That is, perhaps this puzzle should be resolved in the opposite way—

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a trap, and by thus encouraging people to make contracts promotes the efficient allocation of resources.”).

131. Because it is more conservative, the party-relative version reading of the preexisting duty rule should be less likely to generate a puzzle. One might say that the narrower version of the preexisting duty rule is the solution to the old puzzle about contracting with third parties. Without this restriction, one would not even need my focus on third-party beneficiaries in order to create a puzzle.

as the court chose to do in *Youngstown Welding*.<sup>132</sup> This option represents the first horn of the dilemma posed by the puzzle of the beneficiary's bargain; it was the subject of Part II above.

This escape has two possible routes. One might deny that any subsequent promise to a third party to do what one has already promised another party can count as consideration. In other words, one might believe that a successive promise for the same performance necessarily violates the preexisting duty rule. In thinking about the old puzzle of contracts with third parties, this was—at least for a time—the view that Anson and Williston adopted.<sup>133</sup> On the other hand, one might accept the modern consensus that a second promise for the same performance made to a third party counts as consideration but maintain that it is different when the third party in question is already the beneficiary of the original promise. This would require a rationale for treating third-party beneficiaries differently than generic third parties.<sup>134</sup>

## 2. Deny Hohfeld's Framework (i.e., Deny Proposition 2)

Hohfeld's framework has been widely adopted as a useful schematization for thinking about rights and legal relationships. Of course, some scholars have criticized certain aspects of the framework.<sup>135</sup> For the present purposes, however, the important idea is simply that a claim-right correlates with a duty. This is definitional, and disputing it would be unproductive. Even if one is skeptical of the role that Hohfeldian concepts are playing, what is required is to show how or why Hohfeld's concepts do not apply here. One might dispute that Hohfeld's concepts of claim-rights and correlative duties are appropriate for thinking about the rights of third-party beneficiaries or the preexisting duty rule. But these would be substantive rejections of the way that I have characterized the other elements of the logical inconsistency of the proposition. The Hohfeldian point is more-or-less tautological.

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132. *United States ex rel. Youngstown Welding & Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164 (9th Cir. 1986).

133. See discussion *supra* Part II.A.1.

134. See discussion *supra* Part II.B.

135. See, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 179 (1970) (criticizing Hohfeld because "[h]e thought that every right is a relation between no more than two persons"); A.M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 TUL. L. REV. 453, 456 (1960) (criticizing the strict delineation of types and the assumption of correlativity); Albert Kocourek, *Non-Legal-Content Relations*, 4 ILL. L.Q. 233 (1922) (criticizing Hohfeld's inclusion of permissive relations).

### 3. Abandon Suits by Third-Party Beneficiaries (i.e., Deny Proposition 3)

A third possible way to resolve the inconsistency would be to reject the suits by third-party beneficiaries. Doctrinally, the ability of third-party beneficiaries to bring suit can be hard to explain. Judge Comstock's dissent in *Lawrence v. Fox* famously illustrates the problem:

The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking.<sup>136</sup>

Because they are necessarily not the promisee, the general principles that undergird the ability of promisees to bring suit do not seem to apply to third-party beneficiaries.

As noted above, suits by third-party beneficiaries have not always been favored.<sup>137</sup> For many scholars, such as Melvin Eisenberg, the widespread acceptance of suits by third parties is a tale of doctrinal formalism giving way to the demands of social reality.<sup>138</sup> This explanation strikes me as somewhat hasty because we should strive to have our law unified by some coherent set of principles. Third-party beneficiary suits do serve essential social purposes, but that should not eliminate our dissatisfaction if they do not fit into a coherent set of principles for thinking about contract liability.<sup>139</sup> We should seek concepts and principles that can explain and justify the practices that we adopt.

136. *Lawrence v. Fox*, 20 N.Y. 268, 275 (1859) (Comstock, J., dissenting).

137. See discussion *supra* Part III.A.3.

138. See Eisenberg, *supra* note 123, at 1370 ("A central vice of the classical contract school was that as between the values of doctrinal stability and social congruence, the classical school placed almost all of its chips on the former and few or none on the latter. This vice was particularly apparent in the third-party-beneficiary area, in which courts under the influence of classical contract law applied the doctrines of consideration and privity as objections to enforcement by third parties without even attempting to provide a social underpinning for that result."); see also FRIEDRICH KESSLER & GRANT GILMORE, *CONTRACTS: CASES AND MATERIALS* 1118 (2d ed. 1970) ("The eventual triumph of the third party beneficiary idea may be looked on as still another instance of the progressive liberalization or erosion of the rigid rules of the late nineteenth century theory of contractual obligation.").

139. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 21 (1971) ("I do not claim for the principles of justice proposed that they are necessary truths or derivable from such truths. A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.").

In addition, though excising third-party beneficiary suits might win some conceptual gains, it would come at a serious cost. Courts have, for hundreds of years, allowed at least some third parties to enforce contracts. And they have done so because of a felt social need or principled basis for these decisions. We should not abandon this practice. But we should want to identify or develop a coherent justification for the practice within our contract concepts. Leaving a legal conclusion as a socially necessary but otherwise inexplicable exception is unsatisfactory. But, if historical evolution is anything to go on or to respect, abandoning it altogether would be even less attractive.

#### 4. Reinterpret the Third-Party Beneficiary Rule (i.e., Revise Proposition 3)

There is another way to reject the third proposition—one that does not involve the radical elimination of third-party beneficiary suits. Instead of rejecting the current law, one might reject only the *interpretation* of the current law. Specifically, one might reject the idea that allowing third-party suits means that third-party beneficiaries have claim-rights to performance.

I will return to this possible way out of the inconsistency in Part IV. For now, I will merely note that the standard contemporary understanding of a third-party beneficiary is that one has a claim-right to performance. For example, the *Second Restatement* articulates the rule as follows: “[A] beneficiary of a promise is an intended beneficiary if recognition of a *right to performance in the beneficiary* is appropriate to effectuate the intention of the parties . . . .”<sup>140</sup> The *Second Restatement* clearly states that this right is correlative with a duty: “A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”<sup>141</sup> Both courts<sup>142</sup> and commenta-

140. RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW INST. 1981) (emphasis added).

141. *Id.* § 304.

142. *See, e.g.*, *Pub. Serv. Co. of N.H. v. Hudson Light & Power Dep't*, 938 F.2d 338, 341 n.8 (1st Cir. 1991) (“A promisor owes a duty of performance to any *intended* beneficiary of the promise . . . .”); *Brewer v. Dyer*, 61 Mass. (7 Cush.) 337, 340 (1851) (“[T]he law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded.”); *Banker's Tr. Co. of W.N.Y. v. Steenburn*, 409 N.Y.S.2d 51, 64 (Sup. Ct. 1978) (“[A] promise to discharge the promisee's duty creates a *duty of the promisor to the creditor beneficiary* to perform the promise [and] *also a duty to the promisee . . .*” (quoting RESTATEMENT OF CONTRACTS § 136(1) (AM. LAW INST. 1932))); *Potato City, Inc. v. Bartlett*, No. 525, 1968 Pa. Dist. & Cnty. Dec. LEXIS 285,

tors<sup>143</sup> have routinely accepted this characterization of intended beneficiaries as having a right to performance correlative with a duty on the part of the promisor.

#### 5. Abandon the Preexisting Duty Rule Altogether (i.e., Deny Proposition 4)

A fifth response to the apparent inconsistency would be to dispense with the preexisting duty rule. The preexisting duty rule has been somewhat curtailed in recent years. Courts have limited its application, for example, where it might unduly constrain the parties' ability to enter into reasonable modifications.<sup>144</sup> More significantly, the Uniform Commercial Code (U.C.C.) does not require consideration for a modification to be valid.<sup>145</sup> Some scholars have even called for the complete elimination of the preexisting duty rule.<sup>146</sup> If these calls were heeded, then the inconsistency would dissolve.

I am agnostic about whether the preexisting duty rule should be altered in these ways. Note, however, that most of the objections to the application of the preexisting duty rule address contract modifications. Critics of the rule generally argue that parties should be able to enter into contract modifications as long as they are arrived at in good faith.<sup>147</sup> This scenario is precisely what the U.C.C. permits.<sup>148</sup> Consideration doctrine, it is argued, is about contract formation, not modification.<sup>149</sup>

The situation with which we are concerned—second contracts with third-party beneficiaries—is not a contract modification. The

at \*6 (Pa. Com. Pl. Ct. Jan. 8, 1968) (“A third-party donee beneficiary has an unqualified right of action to enforce the promisor’s duty to perform his promise.” (citations omitted)).

143. See, e.g., 17A AM. JUR. 2D *Contracts* § 426 (2004) (accepting the characterization of intended beneficiaries as having a right to performance).

144. See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.21, at 270 (4th ed. 2004) (“Courts have become increasingly hostile to the pre-existing duty rule.”).

145. U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 2013) (“An agreement modifying a contract within this Article needs no consideration to be binding.”); see also RESTATEMENT (SECOND) OF *CONTRACTS* § 89 (allowing binding modifications of executor contracts).

146. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* 280 (1982); Patterson, *supra* note 74, at 936-39; Corneill A. Stephens, *Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary*, 8 HOUS. BUS. & TAX L.J. 355 (2008).

147. See, e.g., Stephens, *supra* note 146, at 357, 364-66.

148. See U.C.C. § 2-209(1).

149. See Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 476 (1996) (“The application of the dictum in *Pinnel’s Case* to assumpsit actions was doctrinally flawed from its inception in requiring consideration—a doctrine developed to determine whether a contract was formed—to be the test for determining whether a contract modification or discharge was binding.”).



subsequent agreement with the third party does not constitute a modification of the first contract. Even if the preexisting duty rule should be abandoned as to contract modifications, it would not follow that it should be abandoned in contexts where no modification is being countenanced. Where the preexisting duty does not arise out of a prior contract with the party to whom the duty is owed, the rationale for allowing the parties to dispense with that duty would be significantly less persuasive.<sup>150</sup> In such a case, a party extracts a promise from another in exchange for promising what the party was already required to do independent of the other party's will. They are, in that sense, receiving a promise in return for absolutely nothing—unlike the modification case in which there is an exchange of promises. Insofar as we are to keep the doctrine of consideration at all, it would seem to recommend keeping some form of the preexisting duty rule. This remains true even if there is a good argument for eliminating its application to modifications. The inconsistency will persist in the face of the most natural or benign revisions to the preexisting duty rule.

Let me add that, in a deeper sense, preexisting duty rules—and consideration doctrine more generally—are something of a side issue to my real purposes. In this Article, I use consideration doctrine as a mechanism for thinking about how to delineate separate obligations and when obligations become redundant. The deep question at issue, to my mind, is whether the promise to the beneficiary is, in fact, redundant.<sup>151</sup> Has the promise created any new rights or duties? Consideration doctrine offers a tool for thinking about that question. But, even if consideration doctrine were radically altered, that question would remain.

#### 6. Reinterpret the Second Promise as a Promise Not To Rescind the First Promise Rather Than a Promise To $\phi$

One might attempt to resolve the inconsistency by interpreting the content of the second promise as different from the content of the

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150. For example, one common way that the preexisting duty rule is avoided is through mutual rescission. *See, e.g.,* *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887, 889 (N.Y. 1921) (allowing the cancelation of an employment contract followed by creation of a new contract with different terms). If the parties to the contract are not in a position to rescind the prior duty, then this rationale for not applying the preexisting duty rule would make no sense.

151. *Cf.* Shiffrin, *supra* note 34, at 165 (“Redundant promises offer perhaps the most challenging case for the rights-transfer theory.”).

first.<sup>152</sup> The second contract, it might be posited, does not actually involve a redundant promise to perform—even if that is what it looks like—but rather a promise not to rescind the original contract.

This is a tempting idea. It eliminates the inconsistency because there would be two different, rather than two redundant, promises. The act promised would not be the same thing throughout. In the first of the four inconsistent propositions, it will not actually be a promise to  $\phi$ , but rather a promise to do something else,  $\psi$ , which is not inconsistent with there having already been a promise to  $\phi$ . Courts do sometimes describe the second promise in this way.<sup>153</sup> In considering third-party contracts, Anson suggested this idea as a solution to the old puzzle about successive contracts.<sup>154</sup>

Although tempting, this idea is illusory. Upon reflection, it is evident that the second promise is not in fact a promise not to rescind, but actually a promise to perform the act in question. In responding to Anson's suggestion, Williston made this point very clearly:

[T]he great difficulty with the theory is that it does not fit the facts. It may well be that one of the parties to the second contract is not aware of the existence of the earlier contract, and, in any event, a rescission of the earlier contract might obviously be made without liability on the second contract if the performance promised was actually carried out. If that be done, the second promisor cares nothing whether the original contract remains in force or is abrogated.<sup>155</sup>

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152. Actually, in the second contract, both promises might be interpreted in different ways. The solution that I am considering here involves reinterpreting the promise of the party who was a party to the prior contract; that promise may be reinterpreted as a promise not to rescind. In a different vein, the promise of the beneficiary might be reinterpreted not as a promise to perform, but as a promise to ensure that that the other party receives performance. For example, in the taxi example, the parents' promise might not be understood as a promise to pay, but as a promise that the taxi driver be paid. This would be discharged if the daughter pays, and this avoids the appearance of double-dipping. (I am grateful to Charles Fried for this point.) While this reinterpretation may make enforcing the second contract seem less unpalatable, it does not solve the puzzle about whether there is consideration for that contract because that question relates to the other party's promise.

153. See sources cited *supra* note 89.

154. See ANSON, *supra* note 42, at 81 ("The case may however be put in this way: that an executory contract may always be discharged by agreement between the parties; that A and M, parties to such an agreement, may thus put an end to it at any time by mutual consent; that if X says to A, 'do not exercise this power; insist on the performance by M of his agreement with you, and I will give you so and so,' the carrying out by A of his agreement, or his promise to do so, would be a consideration for a promise by X. A in fact agrees to abandon a right which he might have exercised in concurrence with M, and this, as we have seen, has always been held to be consideration for a promise.").

155. Williston, *supra* note 47, at 37.

Williston offers two incisive points to show that we cannot reinterpret the second promise as a promise not to rescind the first promise. First, the recipient of the second promise might be unaware of the first contract. It would be very strained to interpret a promise that superficially looks to be a promise to  $\phi$  as a promise not to rescind an earlier agreement if the promisee is unaware of the earlier agreement. For example, if the PMI employees in *SEACOR Marine* had been unaware of the contract to transport them, it would be incoherent to interpret the promise given to them as, in fact, a promise not to rescind a previous contract of which they were unaware.<sup>156</sup>

Second and even more decisively, the party could perform the act in question, i.e.,  $\phi$ , but rescind the first contract. If the second promise were actually a promise not to rescind, then this would constitute breach. But it is not. For example, had ASC rescinded its agreement with Propipe and yet fully paid Youngstown, would ASC still be liable to Youngstown?<sup>157</sup> The answer, I think, must be negative. If so, then the content of the obligation was to pay, not to refrain from rescinding the first contract.<sup>158</sup> Reinterpreting the second agreement as a promise not to rescind requires denying this fact. Thus, for the reasons Williston identified, it is quite implausible to reinterpret the second contract with a third party as a contract not to rescind the first contract. In the puzzle of the beneficiary's bargain, the two contracts are contracts to do precisely the same thing, i.e., to  $\phi$ .<sup>159</sup>

#### IV. A RESOLUTION: ABANDONING THE RIGHT TO PERFORMANCE

The shape of the conceptual dilemma presented by the puzzle of the beneficiary's bargain should now be clear. Refusing to enforce the second contract in the puzzle is at odds with a relational understanding of contractual obligation. As just described, however, enforcing the contract seems to be in tension with the preexisting duty rule and the idea that third-party beneficiaries are rightholders.

In this final Part of the Article, I propose a resolution to the puzzle. In particular, I argue that the best response to the puzzle of the

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156. See *Johnson v. SEACOR Marine Corp.*, 404 F.3d 871 (5th Cir. 2005).

157. See *United States ex rel. Youngstown Welding & Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164 (9th Cir. 1986).

158. In contrast, for an example of a dispute truly over an obligation not to rescind, see *State Farm Fire & Cas. Co. v. Sevier*, 537 P.2d 88, 93-94 (Or. 1975).

159. Cf. Shiffrin, *supra* note 34, at 167 ("[T]here are cases in which the discharge conditions of the perfect duty and the discharge conditions of a promise may be the same, in which case the counterfactual oomph of the redundant promise would be ethereal.").

beneficiary's bargain is to reconceive third-party beneficiaries such that, although they are entitled to sue on the contract, they do not have a claim-right to performance correlative to a duty to perform. According to this solution, *SEACOR Marine* and Corbin turn out to be correct, though not exactly for the reasons that they articulate.<sup>160</sup>

If my proposed solution is correct, however, it threatens to call into question a basic assumption about the nature of contractual obligation. If third-party beneficiaries can bring suit like any other plaintiff, despite not being owed the duty of performance, it challenges the core idea that duty and liability are necessarily paired with one another.

The larger significance of the puzzle of the beneficiary's bargain, then, may extend well into the center of understanding the nature of contractual obligation.

#### A. *Reconceptualizing the Right of Third-Party Beneficiaries*

Earlier, I mentioned the possibility that one might resolve the puzzle of the beneficiary's bargain by reconceiving the right of third-party beneficiaries.<sup>161</sup> That is, a solution might be available if one could explain the legal status of third-party beneficiaries without attributing to them a contractual right to performance correlative to a duty to perform on the part of the promisor.

This suggestion may sound obscure at first. After all, if third-party beneficiaries can bring suit in contract much like any ordinary promisee, it may seem like they must have a right to performance.<sup>162</sup> How could they be able to sue and yet not have a right to the thing sued for? And how could the promisor be liable to third parties in court without owing them a duty?

We can make sense of this suggestion, however, if we distinguish between being the holder of a right—i.e., the one to whom the duty is owed in Hart's sense—and being a party entitled to complain if the duty is breached.<sup>163</sup> In Hart's example of the contract to care for the mother, one can accept Hart's core point that the son, and not the mother, is the bearer of the right. Yet one might still maintain that the

160. See *SEACOR Marine*, 404 F.3d 871; *supra* text accompanying notes 61–66.

161. This was option four *supra* Part III.B.4.

162. See, e.g., *Shay v. Aldrich*, 790 N.W.2d 629, 645 (Mich. 2010) (“[T]hird-party beneficiaries have . . . the ‘same right’ to enforce as they would if the promise had been made directly to them.”); *Tex. Farmers Ins. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994) (“A third-party beneficiary ‘steps into the shoes’ of the named insured and is bound by the terms of the policy.”).

163. See *supra* text accompanying notes 85–86.

mother has a privileged position to complain. Speaking morally, the mother is no mere bystander. If the promise were broken, it would be appropriate for her to resent the breach, complain that she has been aggrieved, demand compensation, or forgive the perpetrator. The natural applicability of this package of moral practices and emotions shows that the mother is morally connected to the action in a special way, albeit not as a rightholder. She has what we might call the “standing” to complain.<sup>164</sup> Unlike a mere bystander, she may appropriately view the wrongdoing as a wrong done to her.

As this example suggests, we can and do understand the privileged position toward a moral breach—the standing to complain about the breach—in the absence of any thought that the person in this position is the rightholder.<sup>165</sup> It is conceptually open that a person might have the standing to complain despite not being the party to whom the relevant duty is owed. This might happen when, as in the mother example, someone has a significant stake in whether a duty to another is fulfilled.

If we can understand having the standing to complain apart from being a rightholder, then such a position may be the appropriate characterization of third-party beneficiaries. They are parties who, though they are not the ones to whom the contractual duties are owed, nevertheless stand to be wronged in a special way and who have a special position to complain should breach of the contract occur. Intended beneficiaries do bear a special connection to the duty in question—not because the duty is owed to them, but because they have a privileged complaint if the duty is violated.

When a third-party beneficiary brings suit, then, it is not to exact performance that was owed by the promisor to him or her. Instead, it is to seek judicial recognition of the fact that she has been wronged by the breach of contract, albeit breach of a duty owed to someone else.

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164. The term “standing” here is not meant in the narrow, Article III sense. Rather, the idea is much closer to what civil recourse theorists mean when they refer to there being “a substantive standing requirement” in tort law. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 957-60 (2010); Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 FLA. ST. U. L. REV. 299, 304-07 (2011). More generally, we might simply think of the moral standing to complain, where that idea attaches to those who may aptly resent an act of wrongdoing. See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006); Margaret Gilbert, *Scanlon on Promissory Obligation: The Problem of Promisees’ Rights*, 101 J. PHIL. 83 (2004).

165. See Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHIL. & PUB. AFF. 109 (2015).

Third-party beneficiaries exercise a standing to complain that is detached from being the rightholder.

In criticizing the *Second Restatement's* formulations of the third-party beneficiary rules, Melvin Eisenberg reached a similar conclusion, albeit via a different route:

[In my account,] the law of third-party beneficiaries is largely conceived as *remedial*, rather than substantive. The question . . . is not whether the contract creates a "right" in the third party, but whether empowering the third party to enforce the contract is a necessary or important means of effectuating the contracting parties' performance objectives.<sup>166</sup>

Eisenberg understood that formulating the third-party rules in terms of a right to performance could lead to various confusions.<sup>167</sup> He believed that this was a vice of "scholastic" reasoning that lacked "social propositions."<sup>168</sup>

But, if I am correct, a similar thought can be seen, not as an expedient, but as the solution to a very conceptual puzzle. We need to recognize that, at the conceptual level, we have been lulled into conflating into one concept having a right and having the standing to complain of a wrong done to oneself. It is not that we are forced to abandon the conceptual approach, but rather that we had confused concepts.

Once we distinguish holding a right from having the standing to complain and recover for a wrong, then we have the conceptual tools to address the puzzle. We can say that third-party beneficiaries have the standing to bring suit because they are among the parties who stand to be wronged when breach has occurred. They are not mere bystanders.<sup>169</sup> But we can also say that third-party beneficiaries are not

166. See Eisenberg, *supra* note 123, at 1386.

167. See, e.g., *id.* at 1417 ("Because the contract gives something to the third party, then axiomatically the third party must hold not merely a power, but a 'right.' Since a right must belong to the right-holder, then axiomatically the right of the third party must be 'vested' the moment the contract is made. And because the right is vested, then axiomatically it cannot be divested.").

168. *Id.*

169. The third-party beneficiaries are not being afforded standing as a pragmatic mechanism to vindicate the wrongs of others. They are complaining on their own behalf. Or, one might say, they are complaining in their own right, even if not on the basis of their own right. In this sense, the situation is somewhat different from cases in which parties have been granted the standing to assert the rights of others, which really amounts to the standing to assert the complaints of others. See *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a criminal defendant had standing to assert the rights of prospective jurors not to be peremptorily challenged on the basis of race); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (holding that an attorney resisting disciplinary proceedings for receiving

owed the duty of performance; that is owed to the promisee. And, insofar as the promisor does not owe the third-party beneficiary a duty to perform, there is no problem with the preexisting duty rule if a second promise is made to the third-party beneficiary. The beneficiary stands to be wronged but does not have a right; the promisor, though potentially liable to the third-party beneficiary, does not owe the third-party beneficiary a duty.

Another way to explain the proposed solution is to understand why a decision like *Youngstown Welding* is erroneous. Recall that, in that case, the court held that there was no consideration for Youngstown's waiver when it accepted payment from ASC because Youngstown was already an intended beneficiary of the payment agreement between ASC and Propipe. The court understood this to mean that ASC owed Youngstown the duty to pay by check.<sup>170</sup> This was the key mistake in the court's reasoning.<sup>171</sup> The fact that Youngstown, as intended beneficiary, would have been in a position to sue does not mean that the duty was owed to Youngstown. And, for this reason, the application of the preexisting duty rule was not appropriate.<sup>172</sup>

### B. *Is There a Right to Performance in Contract Law?*

I believe that the solution sketched above offers the most satisfying resolution to the puzzle of the beneficiary's bargain. I also

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contingent fees could assert the constitutional rights of his clients); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a vendor had standing to challenge on equal protection grounds an Oklahoma law that prohibited the sale of alcohol to males under twenty-one, but females under eighteen); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a doctor had standing to raise the constitutional rights of married persons seeking birth control); *Barrows v. Jackson*, 346 U.S. 249 (1953) (holding that a white woman who sold her land had standing to challenge a racially restrictive land use covenant). These cases, though similar in certain respects, are less challenging to the received understanding of the relationship between rights and legal complaints.

170. One can pinpoint the problematic inference: "The ASC-Propipe purchase order, . . . by making Youngstown an intended beneficiary of the joint check agreement, created just such a direct duty in the case before us." *United States ex rel. Youngstown Welding & Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1167-68 (9th Cir. 1986). It is not necessarily correct that, by making Youngstown an intended beneficiary, the agreement created a direct duty.

171. This is not to assert that there might not have been other rationales available to the court in that case. For example, one might wonder whether the second contract was negotiated in good faith.

172. The same problem can be vividly seen in *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845 (Del. Super. Ct. 1980). The court mistakenly assumed that the existence of an intended third-party beneficiary implied that "Chrysler was under a pre-existing duty to perform the services for the third-party beneficiary." *Id.* at 853.

believe, however, that it threatens to destabilize claims about legal obligation and liability that are currently taken as axiomatic. Once we accept that third-party beneficiaries have standing to complain but do not have a right to performance, this idea may have significant implications for our assumptions about contract law and private law more generally.

It is normally thought that contract law operates by enforcing the promisee's right to performance from the promisor. It would be hard to overstate how widespread and entrenched this way of thinking about contract law is. Consider just a few examples of how we talk about contract law. We think of contract law as enforcing a duty to perform. As the United States Supreme Court once put it, "The obligation of a contract is a duty of performing it recognized and enforced by the laws."<sup>173</sup> This duty to perform correlates with a right in the promisee (i.e., a Hohfeldian claim-right).<sup>174</sup> In fact, we even say things like, "the right to performance of an executory contract . . . is a property right."<sup>175</sup> Contract liability is taken to be a response to a violation of this right. As one writer put it, "Because the promisor owes a duty to the promisee, and not anyone else, or to society as a whole, only the victim of the breach can require compensation for the promisor's breach."<sup>176</sup> In short, the assumption is that contract law enforces a legal right of the promisee that correlates with a legal duty of the promisor to perform.

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173. *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10, 20 (1864); see also Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 236 (2011) ("The law may not punish contract breakers, but it is clear that there is a legal duty to perform a contract and that this duty is not fulfilled by paying damages.").

174. See, e.g., David Pearce & Roger Halson, *Damages for Breach of Contract: Compensation, Restitution and Vindication*, 28 OXFORD J. LEGAL STUD. 73, 75 (2008) ("[E]ach party to a bilateral, or synallagmatic, contract acquires 'a legal right to the performance of the contract' and, at the same time, 'assumes a legally recognised and enforceable obligation to perform' it." (footnotes omitted) (first quoting *Alley v. Deschamps*, (1806) 33 Eng. Rep. 278, 279; 13 Ves. Jun. 225, 228; then quoting *In re T&N Ltd.* [2005] EWHC (Ch) 2870 [26], [2006] WLR 1728 [26] (Eng.)); Charlie Webb, *Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation*, 26 OXFORD J. LEGAL STUD. 41, 45 (2006) ("[A] contracting party has an interest in having the contract performed. . . . The law protects this interest by recognizing a right in the claimant that the defendant perform his part of the bargain, which entails a correlative duty on the part of the defendant so to perform.").

175. *Napier v. People's Stores Co.*, 120 A. 295, 299 (Conn. 1923).

176. Martín Hevia, *Separate Persons Acting Together—Sketching a Theory of Contract Law*, 22 CAN. J.L. & JURIS. 291, 299-300 (2009); see also Brian Coote, *Contract Damages, Ruxley, and the Performance Interest*, 56 CAMBRIDGE L.J. 537, 569 (1997) ("There can be little doubt that a primary purpose of contractual remedies is to protect the parties' rights to performance of their contracts, whether directly or indirectly.").



As widespread and entrenched as this understanding may be, I think that there may be reason to question it. The argument runs as follows: If the proposed solution to the puzzle of the beneficiary's bargain is correct, then third-party beneficiaries have the standing to assert a wrong and seek a remedy, but not a right to performance in the Hohfeldian sense that would correlate with the duty of the promisor. But contract law gives third-party beneficiaries essentially the same claims and powers that it gives to any party to a contract. Thus, if third-party beneficiaries do not have a legal right to performance in contract law, why say that even a promisee has a legal right to performance?<sup>177</sup> Once one detaches the standing to assert a wrong from being the bearer of a right, in what way does contract law afford anyone more than the former?

It may sound heretical to suggest that contract law does not create any rights to performance. But it is plausible that what contract law affords is essentially remedial.<sup>178</sup> The business of contract law in all cases, one might say, is to recognize where a breach of contract has left a party with an injury that ought to be acknowledged and repaired.<sup>179</sup> Contract law does the same for third-party beneficiaries, and it also does that for ordinary promisees.

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177. It is important, here, that the point is about *legal* rights. Part of my point has been to show that promisees and third-party beneficiaries do stand in different normative relationships with the promisor. The promisee has a right correlative with a duty; the beneficiary does not. But, this right is not a legal right—otherwise it could not serve as consideration without becoming circular. Thus, while I have been at pains to distinguish the normative position of the promisee and the beneficiary, what I am not pointing out is that their legal position is essentially the same.

178. Cf. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (AM. LAW INST. 1981) (“The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from [the] breach.”).

179. There are some parallels between this suggestion and civil recourse theory's thesis that private law operates to afford an ex post response to wrongs. See, e.g., Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 543 (2011) (“Contractual liability consists of ex ante consent to retaliation in the event of breach . . .”). I do not, however, mean to align myself entirely with that view. I still see contract law as affording a remedy, not just a recourse or retaliation. There are also some parallels here with the distinction that Andrew Gold draws between having a right to performance and having the right to coercively enforce performance. See Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1926 (2011) (“The key insight is to see that, even in cases in which there is a remedial duty to perform, this does not automatically mean the promisee has a moral right to require performance.”). Gold's distinction, however, would not really solve the puzzle of the beneficiary's bargain, unless he is willing to say that third-party beneficiaries receive the right to coercively enforce performance without having a right to performance.

To say this is not to deny that promisees have a right to performance and promisors have a duty to perform. But this right and duty are not the result of contract law. They are normative relationships that exist outside of contract law. Recall that, in discussing the old debates about successive contracts, one of the lessons was that consideration must be a normative but nonlegal detriment.<sup>180</sup> When one promises, what one gives up is a moral right. What contract law adds, on this picture, is the standing to assert one's wrong and seek a remedy. Contract law adds a remedial scheme on top of our moral obligations.

In this way, I think that, once one arrives at the idea that third-party beneficiaries might be understood as proper contract law plaintiffs while entirely lacking any right to performance, it may erode our faith in the story told in most first-year contracts classes. Contract law begins to look like something else, no longer about rights and duty but rather about wrongs and the standing to complain.

### C. *Some Practical and Theoretical Implications*

Why might it matter whether there is, legally, a right to performance in contract law? The above argument suggests that there is not, but it does not deny that promisees can sue for breach of contract. How is the conceptual claim that there is no legal right to performance—heretical though it may sound—much more than a linguistic point? In this final Subpart, I want to sketch briefly some ways in which this insight matters. I will mention four possible implications—two practical and two theoretical. But I do not mean for this list to be exhaustive, nor do I take the arguments here to be fully developed. My aim is simply to gesture at the broad implications that reconceptualizing the right to performance might have.

#### 1. Consequential Damages

Traditionally, contract law limits consequential damages to those that were foreseeable at the time of the contract.<sup>181</sup> This is the famous rule of *Hadley v. Baxendale*.<sup>182</sup> Economically oriented scholars have

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180. See discussion *supra* Part II.A.1.

181. See RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”).

182. (1854) 156 Eng. Rep. 145, 151; 9 Exch. 341, 354.

viewed this rule as a matter of selecting an efficient default rule.<sup>183</sup> And some have suggested that courts should be even more willing to limit consequential damages.<sup>184</sup> In all of this, the basic idea is that parties negotiate for certain rights and duties and contract law's job is to enforce those rights and duties. Consequential damages are appropriate, we might think, only when they are explicitly something that was part of the bargain.

If, however, contract law is better viewed not as assigning legal rights and duties but as a remedial scheme for the injuries that result from breach, then a strict limitation on consequential damages may be less compelling.<sup>185</sup> What a party complains about after a breach may be quite different than what right they anticipated bargaining for. Viewing contract law as adjudicating wrongs, rather than creating rights, may thus influence our approach to thinking about consequential damages. In particular, it may make us less hostile to them. Courts have relied on a variety of mechanisms to circumvent the limitations imposed by the *Hadley* rule.<sup>186</sup> Reframing contract law might make these judicial maneuverings less strained.

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183. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101-04 (1989) (discussing the *Hadley* rule as a choice of an efficient default rule); Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547, 1550-54 (1999) (challenging the simplicity of choosing the *Hadley* rule as a default).

184. See, e.g., Robert B. Bennett, Jr., *Trade Usage and Disclaiming Consequential Damages: The Implications for Just-in-Time Purchasing*, 46 AM. BUS. L.J. 179, 184 (2009) (“[C]ourts should recognize and effectuate a disclaimer of consequential damages arising out of trade usage in the appropriate circumstances.”); Clayton P. Gillette, *Tacit Agreement and Relationship-Specific Investment*, 88 N.Y.U. L. REV. 128, 168-69 (2013) (arguing that courts should be even more willing to defer to the parties’ intent with regard to consequential damages).

185. Cf. Thomas A. Diamond & Howard Foss, *Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale*, 63 FORDHAM L. REV. 665, 666 (1994) (arguing that the *Hadley* rule should be replaced in favor of a more flexible standard); Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CALIF. L. REV. 563, 602-04 (1992) (condemning the *Hadley* rule because it is at odds with the policy goals of deterring breach and of compensating the victim of breach).

186. Some courts have appealed to a breach in the covenant of good faith. See, e.g., *A & E Supply Co. v. Nationwide Mut. Fire Ins.*, 798 F.2d 669, 677 (4th Cir. 1986) (relying on a finding of a breach of the covenant of good faith in order to award consequential damages in an insurance contract); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127, 132 (N.Y. 2008) (same). Some courts have appealed to other extracontractual duties as a way to allow consequential damages. See, e.g., *Congregation of the Passion v. Touche Ross & Co.*, 636 N.E.2d 503, 514-15 (Ill. 1994) (allowing consequential damages for breach of a duty of professional competence). Still, other courts have held that a limitation on consequential damages would be unconscionable. See, e.g., *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622-25 (Ill. 2006) (affirming the award of consequential damages to the buyer of a used vehicle). And yet other courts have simply interpreted the foreseeability

## 2. Mitigation

Contract law requires mitigation. A promisee does not receive expectation damages if she might have avoided those damages by her own actions.<sup>187</sup> If one views a promisee as having an enforceable right to performance, then this “mitigation requirement” can appear unduly harsh. Why should the party whose rights have been breached be forced to clean up the mess?<sup>188</sup> Commentators have offered a variety of defenses for this requirement, ranging from duties of altruism<sup>189</sup> to duties of cost minimization,<sup>190</sup> but they are not entirely satisfying.

If, however, contract law is not viewed as enforcing rights of the promisee, the so-called “mitigation requirement” may seem less problematic. If contract law recognizes a certain standing to complain against wrongs suffered by promisees, then the rules surrounding mitigation can integrate naturally. Instead of imposing a duty to mitigate,<sup>191</sup> contract law simply places a standing requirement on those

standard quite broadly. See, e.g., *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 639-43 (8th Cir. 1975) (allowing damages for lost profits from a failed fundraising campaign).

187. See RESTATEMENT (SECOND) OF CONTRACTS § 350(1)-(2) (AM. LAW INST. 1981) (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. . . . The injured party is not precluded from recovery . . . to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”); see also U.C.C. § 2-715(2)(a) (AM. LAW INST. & UNIF. LAW COMM’N 2013) (“Consequential damages resulting from the seller’s breach include . . . any loss . . . which could not reasonably be prevented by cover or otherwise . . .”).

188. See Seana Valentine Shffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 725 (2007) (“It is morally distasteful to expect the promisee to do work that could be done by the promisor when the occasion for the work is the promisor’s own wrongdoing.”).

189. See CHARLES FRIED, *CONTRACT AS PROMISE* 131 (1981) (“If the victim of a breach can protect himself from its consequences he must do so. He has a duty to mitigate damages. . . . This is a duty, a kind of altruistic duty, toward one’s contractual partner, the more altruistic that it is directed to a partner in the wrong. But it is a duty without cost, since the victim of the breach is never worse off for having mitigated.”). Fried’s defense has been reasonably criticized. See, e.g., P.S. ATIYAH, *The Liberal Theory of Contract*, in *ESSAYS ON CONTRACT* 121, 124-25 (1986) (“Considering the otherwise limited role of altruism in the liberal theory of contract, it does seem remarkable that one of its chief functions is to shield the promise-breaker from the full consequences of his wrong.”). Fried has more recently seemed to back away from this approach, instead describing mitigation as simply a default rule disconnected from the promise principle that parties can contract around if they choose. See Charles Fried, *The Ambitions of Contract as Promise*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW*, *supra* note 34, at 17.

190. See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983).

191. See 11 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 57.11, at 303 (rev. ed. 2005) (“This absence of a right of recovery for enhanced damages is often improperly called a ‘duty to mitigate.’ It is not infrequently said that it is the ‘duty’ of the injured party to mitigate damages so far as can be done by reasonable effort. Since there is no judicial penalty,

who can complain and what they can complain about. It may be that a promisor has a duty to perform, but the promisee may have nothing to complain about if they can avoid injury upon breach.<sup>192</sup> The conceptual shift that I have described potentially offers a justification for the practical rules surrounding mitigation.

### 3. The Parallels of Contract and Promise

The doctrinal implication for mitigation suggests a broader potential implication for academic debates about the relationship between contract law and the morality of promises. Philosophical accounts of contract law have long connected contract law with morality.<sup>193</sup> But the connection has not always been perfect. Seana Shiffrin, for example, has influentially argued that contract law and promissory morality diverge in important ways.<sup>194</sup> Her basic argument is that the obligations of contract law do not map onto the strength of our moral obligations. As she puts it, “[C]ontract law expects less of the promisor and more of the promisee than morality does.”<sup>195</sup>

This argument, however, assumes that the relevant comparison between contract law and morality is in the duties that they impose. If contract law is not meant to enforce rights and duties, but rather to offer a mechanism for recognizing certain wrongs and the complaints derived therefrom, then it will come as no surprise that contract law does not map onto the obligations of morality. The relevant question, instead, is whether contract law mirrors our moral understanding of wrongs and complaints.<sup>196</sup> When the debate is recast in this light, I believe that the parallels between contract and morality may be very strong.<sup>197</sup> So, in this way, the conceptual shift may illuminate some broad theoretical debates about the nature of contract law.

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however, for the failure to make this effort, it is not desirable to say that the injured party is under a ‘duty.’”).

192. For an account of mitigation rules in roughly this vein, see George Letsas & Prince Saprai, *Mitigation, Fairness, and Contract Law*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW*, *supra* note 34, at 319.

193. See, e.g., FRIED, *supra* note 189 (arguing that a victim of a breach has a moral duty to mitigate damages).

194. See Shiffrin, *supra* note 188, at 708-53.

195. *Id.* at 719.

196. Cf. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1610 (2009) (“By insisting that the justification of contractual remedies turns on their correspondence to promissory morality, correspondence theories force the question of how morality determines the content of remedial moral rights and duties generally.”).

197. See Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. (forthcoming 2016).

#### 4. The Connection Between Rights and Wrongs

Even more broadly, the solution to the puzzle of the beneficiary's bargain that this Article suggested has implications beyond contract law for how we conceive the relationship between rights and the standing to seek a remedy.

It is often assumed that being wronged—being the party to whom the special standing to complain attaches—is necessarily and conceptually bound up with being the party whose right was violated. Philosophical discussions have largely assumed this connection between rights and the special position of those who are wronged. To select just one example, Jeremy Bentham writes, “The distinction between rights and offences is therefore strictly verbal—there is no difference in the ideas. It is not possible to form the idea of a *right*, without forming the idea of an *offence*.”<sup>198</sup> The thought, here, is that rights and the recognition of a legally cognized injury go hand in hand. This idea becomes the crux of Cardozo's famous opinion in *Palsgraf v. Long Island Railroad Co.*: “What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right . . . . [T]he commission of a wrong imports the violation of a right . . . . Affront to personality is still the keynote of the wrong.”<sup>199</sup> The thought, here, is that what separates mere harm (*damnum absque injuria*) from the legally cognized injury is that the injured party was the rightholder.<sup>200</sup>

The understanding of third-party beneficiaries as parties who stand to be wronged and yet who are not rightholders is at odds with these ideas. If third-party beneficiaries have the standing to sue without being the bearer of the right sued upon, then it challenges the assumption that legally cognizable injury is—as a conceptual matter—a function of having one's right violated. In other words, the seemingly benign reconceptualization of third-party beneficiaries threatens to destabilize even our understanding of the relationship between legal rights and the standing to sue.

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198. 3 THE WORKS OF JEREMY BENTHAM 159 (John Bowring ed., 1843). For a more modern example, see DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE 46 (2012) (“[W]hat is it to do wrong in a way that wrongs someone? If X would wrong you by deceiving you then you have a right against X that he not deceive you; X *owes* it to you not to deceive you, he has an obligation *to you* [to] be truthful to you. . . . And owing *you* the truth is different from merely being obliged to be truthful.” (citation omitted)).

199. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100-01 (N.Y. 1928).

200. See ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 59 (1995) (“[B]eing deprived of one's due is . . . the suffering of a wrong.”).

## V. CONCLUSION

This Article began with a technical but seemingly innocuous puzzle. What should courts do about a second contract made with a third-party beneficiary of a prior contract? Courts have, as I noted, come to conflicting decisions on this question, and there are pressures pushing in both directions. Still, it may appear that this rather technical puzzle requires only a similarly technical conceptual analysis using standard jurisprudential tools.

I have proposed a solution to the puzzle of the beneficiary's bargain that relies on reinterpreting what, precisely, the intended third-party beneficiary gets when the beneficiary gets the ability to bring suit on a contract. Third-party beneficiaries, it turns out, do not have a right to performance. What the law recognizes in them is not a right, but the standing to complain about breach. Once this distinction is drawn, the puzzle dissolves. The second contract, in each of the examples considered, is not lacking consideration, because the beneficiary is now acquiring a right of her own, where she previously had only the standing to complain. This solution simply demands some precision about how we think about rights and duties. Thus, this may look like the technical solution that was needed.

If my solution is accepted, however, it destabilizes our traditional concepts of rights and duties in contract law. Insofar as contract liability does not depend on having a right to performance, this insight has the potential to bleed into all of contract law and is not limited to the specific context of third-party beneficiaries. Contract law is no longer conceived as imposing rights and duties, but rather as responding to the interpersonal complaints that arise from breach of our promissory obligations. Thus, in this indirect way, the puzzle of the beneficiary's bargain may shift the concepts with which we understand contracts.