

Normative Conventionalism about Contracts

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Normative conventionalism is the view that the nature of contracts and their normative force is primarily explained by reference to the normative force of conventions or institutions that create relations of contract. The normative force of the conventions derives from the system of such conventions satisfying a number of values such as freedom, justice, and efficiency. And the obligations of persons derive from the requirements that persons do their shares to uphold the justice and efficiency of the convention by, in the first instance, treating each other in accordance with the norms of the practice as they have been laid down.

In this paper, I attempt to defend what I am calling normative conventionalism with a new argument and against some powerful critiques. I do not argue that approaches such as the duty of fidelity or the normative powers approach are incapable of explaining the existence of obligations. Though I am sympathetic with Hume's thesis that the will cannot bind itself and I have reservations about the duty of fidelity, I do not need these arguments here.² Instead, I argue, first, that normatively desirable conventions can be the source of the special obligations of contract, so that neither the fidelity view nor the normative powers views express necessary conditions on contractual obligations. Second, I argue that considerations of equilibrium in the system of contracts overall provide good reason for thinking that normatively desirable conventions are the ground of a large swath of the contracts we see. Third, I argue that normatively desirable conventions either are the sole source of obligations or that such conventions gradually replace naturally produced obligations in an increasingly complex society. And finally, I argue that the fact that contracts create directed obligations, which is normally

¹ I thank Hanoch Dagan, Amy Sepinwall, Nico Cornell, Collis Tahzib, Steve Wall, Andrei Marmor, Seana Shiffrin, Sophia Moreau, David Enoch, David Owens, Massimo Renzo, Anna Stilz, Rebecca Stone and participants in conferences on the Normative Foundations of the Market in Tel Aviv, the Legitimacy of International Law Conference in Stockholm, the Memorial Conference for Joseph Raz at King's College London and the Law and Philosophy Conference at UCLA for comments on previous versions of this paper.

² The classic source of the arguments for conventionalism is David Hume, *Treatise of Human Nature* 2nd ed., ed. L.A. Selby-Bigge and P.H. Nidditch (Oxford: Oxford University Press, 1978). For an excellent critique of arguments for the fidelity view and the normative powers view, see Liam Murphy, "The Artificial Morality of Private Law: The Persistence of an Illusion," *The University of Toronto Law Journal* Fall 2020: 453-488.

taken to be a consideration in favor of non-conventionalist approaches, actually provides support for conventionalism because such directedness is actually quite uneven among contracts.

The Underlying Moral Structure of Contracts in Normative Conventionalism

By “convention” I mean an artificial system of rules that regulate the interactions of persons. The rules can be created by design; but they can also be brought about by some kind of social evolutionary process whose outcome no one foresees. Conventions in this sense include social norms, laws, artificial rules of games, social practices, and other institutions.

Normative conventionalism with regard to some subject such as contracting is the view that the rules of the convention have normative force but do not derive their normative force from any natural set of moral rules to which they might appear to correspond. In the case of contracts, normative conventionalism asserts that the obligation-generating character of contracts does not derive from natural moral rules of the sort that defenders of the fidelity principle or normative powers view suggest. The convention generates an obligation to comply with the rules because of desirable features of the convention that are systemic in character. In this sense, the conventions do display a kind of arbitrariness because the rules are not grounded in intrinsically desirable features of those rules. The convention, on a normative conventionalist account, can be justified by systemic features of the system of rules such as the overall consequences of having that set of rules or the overall distribution of power created by that set of rules. Though even here there are likely to be a number of arbitrary choices because presumably a number of different systems of rules could satisfy the same overall values.

The thesis I defend in this paper is that at least a very large part of the system of contracting and the attendant obligations of contract are grounded in normatively desirable conventions. The first stage in the argument will show how it is possible for contractual obligation to be grounded in convention. The second stage will present an argument to the effect that many contractual obligations should be understood to be grounded in normatively desirable convention. The third stage will involve showing that the system of contract becomes more grounded in convention as the society becomes more complex. The final stage will involve showing that a consideration that normally is thought to argue against the conventional nature of

contractual obligation, the directedness of these obligations, can actually be used to argue for the conventional nature of contractual obligation.

How Conventions Can Create Contractual Obligations

I start by giving an account of when a convention, in the sense defined above, can actually produce obligations on the part of participants. My account is limited to a set of sufficient conditions for such obligations. Other conditions may be sufficient under different circumstances.³ This account has similarities to some recent accounts such as the fairness accounts, indirect consequentialist accounts, and others.⁴ There are three conditions sufficient to generate obligation to a convention: the realization of fundamental moral values by the convention (either as valuable consequences of the convention or as valuable systemic features of the convention), the need for coordination on the convention of non-individualistic reasons to pursue the fundamental values, and the mitigation of demandingness of the convention.

The first condition of obligation is that the convention or the system of conventions is of fundamental value to the society. It advances the common good in a way and to an extent that no other accessible and available alternative convention can do. By accessible and available alternative, I mean an alternative that I can bring about through my action. Since conventions are coordination points for actions that do not on their own make a significant difference, as I point out below, alternatives are not easily accessible.⁵ It also advances the common good in a minimally efficient and in a minimally just way while respecting basic rights.⁶ This combination

³ I develop such alternative conditions with Sameer Bajaj in “An Egalitarian Theory of the Duty to Vote,” unpublished ms.

⁴ See George Klosko, *Why Should We Obey the Law?* (Cambridge: Polity Press, 2019); Conrad Johnson, *Moral Legislation: A Moral-Legal Model for Indirect Consequentialist Reasoning* (Cambridge: Cambridge University Press, 1991); Christopher McMahon, *Collective Rationality and Collective Reasoning* (Cambridge: Cambridge University Press, 2001); and Derek Parfit, *On What Matters Volume One* (Oxford: Oxford University Press, 2011) chap. 13 for excellent accounts.

⁵ To be sure, one could try to bring about a change in convention through political or other kinds of collective action, but the obligation remains as long as overall structural change has not occurred.

⁶ In this respect I am not thinking of conventions as intrinsically valuable as David Owens argues in his *Bound by Convention: Obligation and Social Roles* (Oxford: Oxford University Press, 2022). Thanks to Kimberly Brownlee for pointing this out to me.

of best among accessible conventions and minimally just is what I call “reasonably just.” It need not fully achieve the moral aspirations we have concerning such conventions for it to be worthy of our support. It need not be fully just, or even perfect in the respect for basic rights, to give us the kind of reason for support that produces obligations, as I will show below. To make sense of this condition, we need to divide the classes of conventions into types, and we need an account of the functions they serve. The main division is between centralized provision of goods and decentralized provision of such goods. One major way in which we can argue in favor of a convention would be to show that it displays one of these types of provision and that it is massively superior to provision by the contrasting type at least for a certain set of functions. For example, the conventions of contracting are normally associated with decentralized provision of economic goods. So, we show that they are desirable by showing that it is much better to have decentralized provision of many of these goods than to have centralized provision. We can argue this by showing that markets are an essential part of an efficient and minimally just system of provision of economic goods that respects basic rights and that they provide these goods in a way that is much better than centralized provision by a state.

What makes the convention desirable is that it advances human interests in an equitable and efficient manner. The convention in which I am playing a part must be reasonably just and it must advance the common good. We can say a lot more about what makes a system of exchange reasonably just, but there are a number of straightforward requirements. One, it does not systematically violate any natural rights. Torture, murder, enslavement, rape, arbitrary detention are not normal parts of the functioning of the institutions. Two, it is not systematically discriminatory towards groups of persons such as minorities or women. Three, the convention broadly advances the interests of the members of society. These interests include not only interests in the outcomes of the arrangements, but also interests in shaping the social world we live in in accordance with our judgments and values. Four, the distribution of power with which individuals pursue these interests in the operation of the institution must be reasonably just.⁷ Finally, the distribution of income that results from this institution must be reasonably just, or at least, the wider institutions in which the system of contracts has a place realizes a reasonably just distribution. These are the regulative values of the system of exchange and contract.

⁷ See my “Worker Participation and the Egalitarian Conception of Fair Market Exchange,” *Social Philosophy and Policy* Spring 2023.

It is worth noting here that a conventionalist approach to the moral obligation of contracts does not commit one to an exclusively consequentialist approach to the justification of the rules. There are the constraints of natural rights and non-discrimination mentioned above. And there are systemic and procedural constraints on the distribution of power among participants that protect each person's abilities to shape the social world they live in. Furthermore, one important class of values realized and promoted by a convention may consist in the realization of certain kinds of relationships among persons.

The second condition that produces obligation is that a person has a duty to uphold a reasonably well-functioning institution that advances the interests of many people in a reasonably fair and equitable way. Here the thought is that I have a duty to do my part in the maintenance and operation of this desirable institution. I have a duty of justice to maintain and operate this institution if it is reasonably just. To be clear, it is a duty to do my part. The system will not fall apart if I fail to do my part at least not normally. But it will fall apart if many people fail to do their shares. Hence the initial account of the duty falls within the class of duties that involve participation in a collective activity and that involve non-individualistic reasons for action.

The obligations of contract arise on this view because the rules of the convention provide a coordination point for those who have non-individualistic reasons for action to engage in collective action. Non-individualistic reasons are reasons for individual actions that do not, on their own, make much or any morally or prudentially significant difference. Only large collections of actions can make that kind of difference. We have non-individualistic reasons to participate in these collective actions. For example, we have non-individualistic reasons regarding climate because we have reasons to contribute to the alleviation of climate change, even though individual actions don't by themselves make any difference. We have non-individualistic reasons to contribute taxes to reasonably just governments, even though if we did not contribute our part, no one would notice.

The convention solves a basic problem that arises for non-individualistic reasons for action. The problem of many non-individualistic reasons is that the actions they favor have to be coordinated with the actions of many other persons. Otherwise, they not only make no

difference on their own, but they are also often utterly superfluous.⁸ Only when they are coordinated with many other actions do they contribute to desirable outcomes. Here it is essential that we coordinate on the rules for action. Hence, I do my part in a convention that realizes important goods, in the first instance, by complying with the rules of the convention.

Once we combine the idea that the convention is of fundamental importance to the common good with the idea that people have non-individualistic reasons to participate, we get an account of the reason to participate in the convention. It is not merely a sufficient reason; it is an exclusionary reason. That is, when it comes to determining the considerations for participating in the convention, it is essential that certain reasons are excluded from consideration by the agent.⁹ The convention works when everyone excludes considerations that normally would be relevant to the evaluation of action. For example, with regard to paying taxes, it is important that each person exclude from consideration alternative uses of the money that they must pay in taxes, even alternative uses that might seem to do a greater good on their own. For any collective action, each participant could think that it would be best if everyone else participated in the collective action while they did not participate instead trying to bring about good outcomes in addition to the outcome of the collective action. This is because each action involving participation in the collective action does not make a significant difference on its own. It would be better for any particular person to deviate from participation and act independently to realize good outcomes. But when people reason in this individualistic way, the collective action is undermined. Returning to the tax example, if everyone reasons in the individualistic way then the important public good provided by government is not supplied. Hence, many individualistic reasons must be excluded for collective action to work. Serious collective harm will occur if people do not exclude the individualistic reasons.

There is a further third condition for obligation. One problem with collective action is that there are many possible collective actions one can participate in, too many. There are many collective actions that can produce various important goods such as many charitable collective actions, collective actions connected with social movements that pursue social justice and many

⁸ See Julia Nefsky, "Fairness, Participation and the Real Problem of Collective Harm," *Oxford Studies in Normative Ethics* 2015 for the idea of non-individualistic reasons for action, though she does not use this term. For a criticism of this kind of approach see Shelly Kagan, "Do I make a difference?" *Philosophy and Public Affairs* Spring 2011.

⁹ See Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975), p. 39.

others. The list is such that the reasons for action would be excessively demanding if we were to think that one had obligations to participate in each one. It is a condition on the generation of moral obligation that it does not produce excessively demanding requirements on persons. Excessive demandingness is a defeater for obligation.

One condition that can mitigate this demandingness is that one can pick and choose how and where to participate in collective action. If one can reasonably avoid participating in a collective action, one might have an obligation to play one's role in the collective action once one has knowingly or at least negligently started participation in that action. For example, teachers participate in a collective action of educating people. Any person can avoid participation in this collective action, but once a person has elected to participate, they are bound by the rules of the collective action. Furthermore, the convention imposes only limited requirements that can be exhausted without too much effort. Further obligation requires further knowing participation. Avoidable participation protects each person against excessive demandingness.¹⁰

In modern societies, it is nearly impossible to avoid participating in the activities of contracting. But there is a kind of avoidability available here too. In the case of contracting there is a fair amount of avoidability of many particular contracts. One can pick and choose in many cases among the kinds of agreements one will enter into. One can contract with different people, or one can make different kinds of contracts. Hence one can pick and choose the burdens one is willing to undertake in the collective action. That avoidability within the convention may be sufficient to undercut the problem of demandingness and short circuit the defeater. For those agreements that are not avoidable, such as agreements to pay for life saving surgery, we must look to the structure of the conventions themselves to ensure that the burdens of payment are not excessive. In some of these cases, as we will see, there may be reasons for replacing a decentralized system with a centralized system of provision if the decentralized system is hopelessly unfair.

These arguments can be put to use in showing that the system of contracting can be a convention whose normative power derives from the benefits of that convention. The

¹⁰ This does not imply that participation involves consent or promising. It merely says that if one participates knowingly in a convention that has fundamental value, that depends on the coordination of non-individualistic reasons and that is reasonably avoidable, one is bound.

convention of contracting realizes a decentralized system of provision of certain goods for the purpose of production, transfer, and consumption of those goods. The specific purposes of the conventions of contract are that they enable a society to shift resources and labor to desirable uses and they do so in a way that permits individuals a significant amount of freedom in the process to shape the social world they live in. Modern societies have experienced a tremendous amount of economic growth as a result of allowing the provision of many goods to be done through markets. And markets function in large part through the process of contracting. The system of contracting has been an extraordinary stimulus to this growth. Societies have been lifted out of poverty and experienced extraordinary creativity partly as a result of this process. Economists from Adam Smith to John Maynard Keynes have noted the remarkable economic value of markets and the key mechanism of contracts. And the conventions can enable this activity while being regulated by justice and the common good, either on their own or in conjunction with other social and legal norms.¹¹ The importance of markets and the contracts that are made within them in no way commits one to free markets, though there may be some contexts in which such markets are valuable. Markets can be heavily constrained so as to produce more equitable outcomes and so as to equalize the distribution of power within. And the importance of markets and contracts for some goods does not entail that we must have markets and contracting for all goods, as we will see below. Moreover, the state can redistribute some of the gains from markets even after the markets have run in a constrained way. And the system of contracts has been shorn of the most offensive types of contracts such as slavery, child labor and it has developed in a way that forbids discrimination. Hence, the system of contracting can clearly satisfy the first condition of obligation, at least as long as it is within a larger institutional framework that redistributes resources.

The rules of contracting can serve as a coordination point for those who are participating in the process of contracting. The key here is that a particular failure to comply with the rules or even a few such instances may not always undermine the system. But the system does rely on large numbers of people following the rules in a way that accords with the idea that reasons for

¹¹ The classic source of the arguments for conventionalism is David Hume, *Treatise of Human Nature* 2nd ed., ed. L.A. Selby-Bigge and P.H. Nidditch (Oxford: Oxford University Press, 1978). See also, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) for a discussion. Most recently, see Liam Murphy, "The Artificial Morality of Private Law: The Persistence of an Illusion," *The University of Toronto Law Journal* Fall 2020: 453-488.

deviating are usually excluded. Each person sometimes faces circumstances in which it might seem better to breach the rules for the sake of the very values that undergird the rules. But it is essential that people are not motivated in those circumstances to violate the rules. Probably the most central rule of contracting is the rule that one must comply with the terms of one's contract. This rule is subject to innumerable variations but as a general matter it holds throughout the system.

Finally, markets and contracting usually involve a fair amount of freedom to pick and choose one's obligations. When they don't, there are restrictions on the amount of burden a person can assume. Slavery contracts are forbidden. Labor contracts limit the kinds of burdens people can assume by imposing health and safety requirements, requirements for overtime. Specific performance is usually not required as a remedy for breach of contract. Bankruptcy law imposes limits on the amounts of losses imposed on persons. These do not meet all the standards most people have for labor conditions, but they do attest to the fact that there are limits on the burdens one can impose.

The normative conventionalist approach to contracts is to be contrasted with more individualistic accounts of how contractual obligation arise. Two standard recent individualistic accounts are the fidelity view most rigorously advanced by Thomas Scanlon and the normative powers view proposed by Joseph Raz. According to the fidelity approach A acquires an obligation to B to do x by giving B assurances that A will do x that B wants and believes, where these assurances are common knowledge between A and B.¹² And according to the normative powers approach A acquires an obligation to B by communicating an intention to put himself under an obligation to B by that very act of communication.¹³ Neither of these views are committed to the thesis that contract is promise, as articulated by Charles Fried. But Scanlon explicitly claims that the moral obligation of contracts derives from the principle of fidelity. And

¹² Thomas Scanlon, "Promises and Practices," *Philosophy and Public Affairs* Summer 1990. Scanlon asserts that the principle of fidelity gives an account of the moral obligations of contractors, though it is not sufficient to explain the permissibility of the enforcement of legal contracts in his "Promises and Contracts," in *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003), pp. 234-69, esp. pp. 258, 261-2.

¹³ See Joseph Raz, "Promises and Obligations," in *Law, Morality and Society: Essays in Honor of H. L. A. Hart* ed. P.M.S. Hacker and Joseph Raz (Oxford: Oxford University Press, 1977) and "Is There a Reason to Keep a Promise?" in *Philosophical Foundations of Contract Law* eds. Gregory Klass, George Letsas and Prince Saprai (Oxford: Oxford University Press, 2014).

Joseph Raz seems to be saying that the normative powers approach gives us an account of the generation of moral obligations in all cases of voluntary obligations, though he does not come out and say it.¹⁴ Charles Fried's account of the obligation of promises and therefore of contracts (for him) is less worked out but has similarities to both Scanlon's and Raz's.¹⁵ It is reasonable to proceed on the assumption that these can be taken as accounts of the primary basis of the moral obligation of contracts, which is also the main concern in this paper.

Conventions are normally necessary to both of these ways of generating obligations. But, on these views, conventions are usually merely means for communication between the parties. The importance of convention to contract making on these views is entirely derivative. By contrast the conventionalist view I am defending asserts that many moral obligations are nonderivatively grounded in conventions that meet certain standards.

My purpose in this paper is not to refute the fidelity or normative powers approaches. I have my doubts about them, but here I have argued that conventions can generate contractual obligations and I argue below that conventions are what generate a large swath of contractual obligations. One possible view is an ecumenical one: the fidelity and normative powers approaches identify merely sufficient conditions for generating obligations along with normatively desirable conventions. What I argue in what follows is that even if we do accept the pluralistic approach to the generation of contractual obligation, we have reason to think that over time, conventions begin to take over the whole or nearly the whole of the space of contractual obligations.

Argument for the Pervasiveness of Conventionally Based Contractual Obligation

Here, I argue that there is reason to think that the system of contracting and the obligations that are imposed by it are actually grounded in significant part in normatively desirable conventions. The argument for the idea that the obligations associated with property, exchange and markets more generally are grounded in convention derives from a number of sources. The first

¹⁴ See Raz, "Promises and Obligations," p. 218 and Raz, "Is There a Reason to Keep a Promise?" p. 58. Raz does not say unambiguously that his account works for contracts though he hints at it. This paper does not require that he thinks this, only that it is a plausible way of construing the natural moral generation of the obligation of contract.

¹⁵ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981), p. 16.

consideration is that contracting is essential to markets and that markets have a systemic character. The activities in one part of the market are connected with the activities in many other parts of the market. The tendency of markets to try to achieve general equilibrium through the price system is the animating idea in economic theory. The tendency to general equilibrium of markets is a reason for thinking that we should not evaluate the rules merely in terms of intrinsic characteristics of particular rules or in terms of the intrinsic characteristics of the particular actions, except when these violate natural rights. This is a reason for thinking that there is and should be a significant divergence between contract and promise. The rules of promising are connected with particular intimate relationships that are to be taken one by one. The rules of contract, insofar as they are connected with markets, are to be evaluated in terms of how they work together as a system of rules and in the context of many people throughout the society acting on them. The rules of contract must be evaluated in terms of the overall equilibrium effects of having those rules.

Second, and relatedly, the rules of property and contract, as Hume observed, change constantly, exhibit a high degree of variation and a high degree of complexity. Presumably this is in significant part because they are connected to a complex system of interaction which requires constant adjustment to new conditions or in the light of new understandings of the operation and effects of these rules. Systematicity, variation and complexity are evidence of conventionality, as Hume argues, but they also are reasons for conventionality in another sense. We are not terribly concerned with changing the rules of contract if those rule changes help produce better processes of decision making and better outcomes. We want a system that is flexible and variable precisely because we need to be able to make changes in the system to overcome unforeseen problems. New problems arise as the cumulative consequences of many contracting actions tending towards suboptimal, unjust or otherwise problematic equilibrium. We also come to learn more about how a system of rules of contract operate. For example, the financial crisis of 2008 has shown to most people's satisfaction that an unregulated market in the financial industry is a bad idea.¹⁶ Hence, many new and complex regulations of contract have arisen to attempt to avoid similar financial disasters. For another example, the rise of unions as

¹⁶ See Guido Lorenzoni, "Inefficient Credit Booms," *Review of Economic Studies* July 2008; for a classic discussion see Joseph Stiglitz, *Wither Socialism?* (Cambridge, MA: MIT Press, 1994).

institutions for the protection of the interests of workers have involved very significant restructuring of contracting practices of employment for many workers. The point here is not to defend any particular set of changes but rather to demonstrate that when these changes have appeared to be desirable, they are made.

Another form of extreme variation in contracting practices is that in some areas of human activity contracting is abolished or marginalized in favor of centralized provision of goods. We needn't take a stand on the wisdom of these efforts here but the development of the state and the rise of the welfare state both testify to the desire to eliminate or marginalize contracting in certain areas of human society. Health care, workman's compensation, old age pensions, public education and public provision of police forces and many other activities involving centralized provision usually involve blocking exchanges to some significant extent and only allowing them at the margins of the activity.¹⁷

Other forms of blocked exchanges include the disallowing of exchanges of individual votes for money as well as officials' decisions in return for private rewards to the official. The blocking of the exchange in the case of votes can be made sense of in part by observing that if money were to be exchanged for votes quite generally, the artificially egalitarian system of votes would be undermined by its contact with the inegalitarian distribution of money. To avoid the bad equilibrium, we block certain contracts. It is not even possible to make a valid contract here with moral obligations.¹⁸

All of these cases involve the large-scale equilibrium effects of contracting. There isn't reason to think that certain contracts trading of financial assets is intrinsically problematic, but the large-scale equilibrium effects of these contracts can produce very bad outcomes.

The implication is that contracts are disallowed and produce no obligation in many cases. And the justification for these rules is that such activities would have very bad equilibrium effects. It is the impotence of the contract with regard to producing obligations that is

¹⁷ Arguments of this sort have been given ever since the beginning of modern economics, e.g. in John Stuart Mill's *The Principles of Political Economy with Some of Their Applications to Social Philosophy* 7th Edition 1871 ed. Jonathan Riley (Oxford: Oxford University Press, 1994) Book V, Chap. XI. See also references in fn 15.

¹⁸ I am referring here to suboptimal equilibrium reasons (which could be grounded in considerations of justice) for blocking exchanges and not the reasons for blocking the exchanges that are given in the commodification literature, such as in Debra Satz's *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford: Oxford University Press, 2010).

particularly noteworthy. This impotence would not obtain were individual acts of contracting to produce obligations just by themselves. It is the dependence on equilibrium effects for the production of contractual obligations that is a telling argument for normative conventionalism. Conventions and law attempt to steer people away from activities that have very bad equilibrium effects. They disallow certain contracts, but they also take away the power to produce obligations so as to avoid the bad collective effects of their activities. They create rules for contracting and for the generation of obligation that are designed to have desirable collective effects. And they inhibit the production of obligation when the collective effects would be very undesirable.

If contractual obligation were merely a matter of self-imposed obligation, as Charles Fried sometimes suggests, this dependence of obligation on collective effects should not obtain. Or if contractual obligation were produced by action in accordance with a duty of fidelity, the impotence of giving assurances with regard to the production of obligation in the context of bad equilibrium effects also would not be in evidence. And the idea that obligations can be produced by the exercise of individually held normative powers seems incompatible with the fact that very bad equilibrium effects defeat the generation of obligation. That is because these are inherently collective effects of many actions, in which no individual action by itself has the untoward effects. Hence, the defeat of the obligation cannot be based on the idea that the content is immoral.

To be sure, if I make a contract with someone to sell my vote for money and they give me money in advance, I will be on the hook for something. I will have been unjustly enriched and I may owe restitution to the person who paid me. But this is not the same as my having an obligation to give them my vote.

So, we have here so far two claims. One is that normatively reasonable conventions can generate duties. Two is that it appears that natural and individualistic ways of producing duties such as the exercise of normative powers and the giving of assurances seem to be completely undercut by bad equilibrium effects. This suggests that the natural ways of creating obligations are neither necessary nor sufficient for producing obligations of contract. This does seem to me to produce a serious criticism of the standard natural and individualistic conceptions of understanding how contractual obligation is created.

A Conciliatory Approach

But it is worth here considering a more conciliatory approach to natural ways of creating contractual obligation. We could say that the natural production of obligation is defeated by the fact that there is a non-individualistic reason against the content of the obligation. For example, suppose some kind of type financial contract could contribute to the instability of the financial system if enough people were to make such contracts. And suppose that enough are engaging in the problematic form of contracting. This might give a reason not to engage in the contracting and might be a kind of moral defeater of the generation of the obligation. One might argue that the non-individualistic reason against the contract has the same effect that the immorality of a contract to do something blatantly immoral has, namely it defeats the generation of an obligation. To be sure, when there is a rule against it in place and people are generally following the rule, the sole rule-defying contract does not have a chance of contributing to financial instability. But one might still think that one has a non-individualistic reason not to engage in the contract. So maybe there is some sense in which the generation of an obligation is defeated by the non-individualistic reason for action. And this might help salvage the idea that the contractual obligations are generated by the exercise of normative powers even though they can be defeated by their insignificant contribution to large cumulative bad effects.

In response to this salvaging effort on the part of the normative power or fidelity accounts of the obligation of contracts, I want to make the following points. First, it is very unclear whether either one of the accounts above can accept that contractual obligation is defeated by non-individualistic reasons, or reasons that concern actions that make insignificant differences on their own and that are not clearly immoral on their own. I don't know of any answer to this question.

Second, the reason that supposedly defeats the contractual obligation would derive in one of two ways from non-individualistic reasons. On the one hand, it might derive from the fact that the contract-making in question produces a public bad as an equilibrium when many people do it. The easiest case to see here is contracts of votes for money. Again, each action on its own is not particularly significant while a large collection of such actions produces very bad outcomes. Here we want to develop a convention that disallows certain actions. On the other hand, the non-individualistic reason derives from existence of a rule that co-ordinates non-individualistic reasons. Remember that non-individualistic reasons have little action guiding

force without a generally accepted coordination point that coordinates a large number of actions. And the rules of contract are that coordination point. But then it looks like the rule defining appropriate contracting is prior to the non-individualistic reason against the contract in this instance. Hence either the production of a public bad that calls for a convention or the existence of a convention, in other words, is what defeats the creation of an obligation. But this suggests that conventions, in these cases, replace the non-conventional methods of creating obligations when societal aims are at stake.

This response to the salvaging argument does allow that the fidelity or normative powers accounts do identify genuinely possible ways of producing obligations. But it asserts that the presence of non-individualistic reasons for action, along with conventions to coordinate them, can defeat the naturally produced obligations and replace them with conventionally produced obligations.

This sets the stage for the next step in the argument, which is that the need for collective action and conventions that coordinate that collective action increases with the growing complexity of societies. Processes of contracting need to be reconfigured in order to ensure collectively desirable outcomes that each person has non-individualistic reason to promote. But this suggests that even if obligations can be produced in ways suggested by the normative powers or fidelity approaches, these ways of producing obligations become slowly replaced over time by conventionally determined ways of producing obligations that are better suited to realizing societal aims. The space of contractual obligations becomes more and more occupied by conventionally produced obligations especially in the context of market interactions. Let us call this the Replacement Thesis.

The Replacement Thesis is necessarily vague and depends on the facts of particular societies. Strictly speaking we could end up in a social world where all contractual obligations are actually generated by normatively desirable conventions. Conventions would then have simply replaced all other forms of ways in which obligations occur. This could occur if the levels of interdependence and complexity increase to such an extent that many equilibrium enhancing rules become necessary. While it seems plausible to suggest that most or even nearly all contractual obligation becomes nonderivatively conventional based, the exact degree to which this will occur cannot be determined.

I have not tried to make the argument that cogent normative powers or fidelity accounts of promissory obligation are impossible as Hume did. Hume argued, and many others since have argued, that anything like the normative powers type approach is impossible because it is impossible for the will directly to produce obligations that bind it. I am sympathetic to those arguments, but my argument here does not rely on them. I also have a number of reservations about the fidelity account of obligation. But I do not here need to rest on the claim that these approaches cannot explain some obligations. Here my argument is that either the normative conventionalist account is the only account of the generation of contractual obligation or conventions end up taking over the space of contracting because of the need for collective action to shape processes of contracting.

Hence, we arrive at the thesis I have been trying to defend. The main thesis is that the nature of contracts and their normative force is primarily determined nonderivatively by the normative force of conventions. The arguments above suggest that though there may be some room for the normative powers and the fidelity accounts of contracting, those simpler accounts of contracting are gradually overtaken by conventions that serve certain overall aims for the community as the society becomes more complex.

Two Objections

One recent argument contends that to the extent that contract law diverges from promissory practices, it is a threat in some way to moral agency.¹⁹ This is because contract law seems to be far more permissive in its response to breach of contract and because it has very little room for punitive damages. In particular, the standard damages against breach of contract are based on the “expectation interest”, which is the “money equivalent no greater than the worth of the promised performance” instead of the agreed upon specific performance. It permits an enterprising person to avoid specific performance if she sees a more profitable use of her time and resources and wishes to pay the expectation damages in order to take advantage of the new opportunity.²⁰ It thus seems to be morally lax with regard to the obligation to fulfill contracts.

¹⁹ Seana Valentine Schffrin, “The Divergence of Contract and Promise,” *Harvard Law Review* 2007

²⁰ See Restatement (Second) of Contracts n 347 (1981). See Charles Fried, “The Ambitions of *Contract as Promise*,” in *Philosophical Foundations of Contract Law* ed. Gregory Klass, George Letsas and Prince Saprai (Oxford: Oxford University Press, 2014) p. 25.

This critique strikes me as misplaced. The rules of contract may indeed be less demanding than the rules of promising when it comes to the obligation of specific performance. But it is hard to see how this undermines moral agency. There are still rigorous rules and serious damages to be paid if one fails to fulfill one's part in an agreement. The reason why these rules are chosen is because they promote the morally desirable aims we wish to see realized in a system of exchange. Such rules promote a greater flexibility for agents in the process of exchange, which enables the system to achieve good and equitable results. And there are still clear and demanding requirements on agents in the system of contract. These requirements are moral requirements grounded in non-individualistic reasons for participating in highly valuable moral conventions.

It is asserted that the lax approach to breach in contract law might undermine the practice of promising in interpersonal relations. But this seems mistaken. The practice of promising in interpersonal relations is a very different kind of practice than the activity of contractual exchange. It is geared towards the particular needs of friendship, family and colleagues. Promises made to friends are usually grounded in independent reasons one has for acting towards one's friends and are designed to emphasize those independent reasons. Contracts are not usually based on the idea that there is independent reason for me to give money to some store, say. The reason for doing so is that the store does something for me in response to my action. This is very different from the kinds of promises I engage in with friends. In the case of friendship, I might promise my friend that I will be present at his daughter's baptism. The promise expresses my commitment to the friendship and expresses my attitude that I think I have strong reasons to be at the baptism. My promise builds on those reasons to create a commitment to be there that holds even if I temporarily forget the values involved. These values animate the promise and give it purpose. No such thing holds for contracts, which are arms-length and impersonal commitments that are animated by a kind of reciprocity. Hence, the different rules that shape the obligations of contracts are not likely to have spillover effects on the ability to act in accordance with rules that shape promises.

To be sure, there is insight in the agency argument, but it is not an argument against either conventionalism or the divergence of contract and promise. The insight is that some rules may actually undermine some of the virtues of character necessary to the proper maintenance of a system of exchange. This may be for any of a variety of reasons. But it is certainly correct to

say that if a set of rules damages in some significant way the virtues necessary to the maintenance of the system, then the rules must be altered so as not to have that effect. But there is no reason to think that the divergence of contract from promise in itself leads to such a dissolution. As I mentioned above, the divergence is compatible with stringent duties of remedy when contracts are breached. It is not that duties have been done away with, it is that one set of duties has been replaced, in some cases, by another set of duties. Moral agency is still a prominent factor in the maintenance of the system.

Conventionalism and the Directedness of Obligation

A second worry that some have had concerning the conventionalist approach to contracts is that it seems unable to explain the directedness of contractual obligation.²¹ When I enter a morally valid contract, I acquire an obligation to the other party to perform my part of the contract under certain conditions. There is a clear sense in which I wrong the other party when I fail to perform under these conditions and then when I fail to compensate the other party in the case of nonperformance. This strongly suggests that the obligation of the contract is owed to the other party. This can also be expressed by saying that the other party has a claim right against me.

The normative conventionalist seems *prima facie* unable to explain this directed feature of contractual obligation. The NC theory can explain that there is a duty to perform and a duty to compensate in the event of nonperformance. That duty is the duty to sustain the normatively desirable convention grounded in the justice and welfarist characteristics of the convention. It looks like this duty, as it is conceived, is not owed to the particular person with whom the contract is made. It may be owed to everyone, if that makes sense. Or it may be a duty that is not directed at all. This is potentially a serious objection to the normative conventionalist account of contractual obligation. But I am not convinced the objection works.

²¹ See Niko Kolodny and R. J. Wallace, "Promises and Practices Revisited," *Philosophy and Public Affairs* Winter 2004, and see Michael Thompson, "What is it to Wrong Someone? A Puzzle about Justice," in *Reasons and Values: Themes from the Moral Philosophy of Joseph Raz* ed. Michael Smith, Philip Pettit, and R. J. Wallace (Oxford: Oxford University Press, 2004). For a searching discussion of the directedness worry see Margaret Gilbert, *Rights and Demands: A Foundational Inquiry* (Oxford: Oxford University Press, 2020). See also Andrew Lichter, "Conventionalism and Contingency in Promissory Power" *Philosophical Studies* (2023) 180: 1769-1792.

There are preliminary difficulties with the directedness worry. First, directedness is built formally into the system of contracting. There is a kind of directedness in the rules that structure contracts. Counterparties have legal rights to performance, have the right to sue in case of nonperformance, which may bring about rights to expectation damages or other remedies and they have the liberty to abstain from suing the counterparty as well. There is a whole battery of legal rights and powers built into contracts. The law builds directedness into the system. And if the system is reasonably justified this legal status is also morally justified. One might ask whether this is enough to counter the directedness worry.

It is not clear that it is enough because there is a distinctive moral phenomenology associated with directedness that seems to go beyond mere adherence to rules that include legal directedness. If I fail to pay the contractor who helped me fix my roof, I will think that I wrong him in a way that goes beyond the fact that I violate the rules of the contracting process. There does seem to me to be a residual worry here that is not fully resolved by the existence of rules that involve a kind of directedness.

Nevertheless, if legal rules that structure the contractual relationship are morally justified then this provides for a kind of thin moral directedness in the relationship that is created by the contract. I don't think this directedness entirely accounts for the moral phenomenology we have in many cases, but it may be sufficient in many other cases, including those I discuss just below.

Second, the thick moral phenomenology of directedness is not associated with all contracts. I do not think that I have a clear thick phenomenology of directedness when I think of what I owe to my credit card company, my mortgage company, my bank, or many other corporations to which I owe money (actually most of the contracts I enter into). I definitely have obligations here, but I would be hard pressed to call this a directed obligation in any sense greater than the morally justified legal directedness found in the rules.

Third, there are other cases in which directedness, even in the legal sense, seems quite attenuated. For instance, the mitigation rule says that if I contractually agree to buy a certain product at a certain price from a firm at a later date and I fail to buy that product now that the firm has produced it, but the firm can sell it easily at the same price to someone else, I no longer have the contractually created obligation to buy. Indeed, if the firm can easily sell the product to someone else but does not sell it and tries to sue me for not buying it, courts will usually say that

the firm has no case since it could have sold the product easily to someone else.²² The law seems to be saying “no harm, no foul.” This seems to suggest the idea that if the system of markets can adequately recompense a producer for goods produced that I had agreed to buy, then my obligation is at an end. The claim must be fulfilled but I don’t need to do it in this case.

Directedness in Other Institutional Arrangements

Still, though there is a large class of exceptions to directedness, there are clear cases in which there appears to be directedness in many obligations of contract. It is worth seeing if there are any resources that the normative conventionalist has to answer the worry when it does arise. Let us see what can be done. A characteristic of the conventionalist account of obligation is that A has voluntarily assumed a position in the division of labor in the overall desirable institution that makes him responsible for B’s interests in some respect.

The first thing to note is that this is like the duty of the social worker to the persons whose cases have been assigned to him. It is like the duty that a teacher has to her students. They have been assigned to her and she has a duty to them. She has a duty to the whole system, of course, but in addition, she has a duty to each of the students assigned to her, at least to the extent that they remain assigned to her. The directedness is grounded in the fact that the students have some kind of claim to a good education. The person in need of consular services in a foreign country has a claim that the relevant consul has a duty to service. The doctor has a duty to treat the person who has come to her even in a nationalized system where medical services are not primarily a matter of contract. She has a duty to him. And the person in need of a social worker has a claim to aid, not fundamentally from this or that person but from the system as a whole. But the social worker or teacher initially acquires a duty because of his role in the system and then this gets its direction from the assignment the system gives to the person’s claim.

These duties of teachers, social workers, doctors, and others emerge from the roles these persons occupy in a normatively desirable system. The ground of the obligation is in the normatively desirable properties of the system. They acquire these duties to their respective persons simply because they have been assigned them by the institution. The directedness is

²² Restatement (Second) of Contracts n 350 (1981). See George Letsas and Prince Saprai, “Mitigation, Fairness and Contract Law,” in *Philosophical Foundations of Contract Law* ed. Gregory Klass, George Letsas and Prince Saprai (Oxford: Oxford University Press, 2014).

grounded in the normative convention coupled with the fact that people have claims against the institution created by the normative convention, which claims the institution has assigned to the relevant individual to serve. So, we do see directed duties emerge out of institutional role obligations, which themselves are not initially directed obligations.

Claims against the System

Why say that people have claims against the entire system? This proposition is inherent in the idea that institutions and social structures can be just or unjust. The justice of the overall system consists in the fact that each person's interests ought to be advanced by the system and that the just satisfaction of these interests are the purpose of the system and its endpoint. The system must be structured so that it advances these interests and is evaluated in terms of the meeting of the interests. Normally, if a person or group of persons is not able to advance their interests in the system, they are being treated unjustly (barring criminal penalties). The injustice consists in the fact that they are not being given what they are owed as persons. This idea requires more development, but I think it is intuitive and so I will not develop it here.

If the analysis of social workers or teachers is right, then they can acquire directed obligations to persons with all the phenomenology of directedness without engaging in any special relationship with the particular person to whom they have a directed obligation prior to the generation of the obligation. They are assigned to persons who have claims by a normatively desirable system of rules and that is sufficient to generate the sense that they owe the obligation to that person.

Something like this is in play with contractual obligation. The first part of the idea would be that each person has a kind of claim against the system of exchange that it meets his or her needs at least if she wishes to participate in the system. This would be a consequence of the idea that the system of exchange is to be evaluated partly in terms of its capacity to satisfy the needs of individuals in a fair and efficient way. Each person then has a claim that the system meets her needs in a way that is defensible from the standpoint of justice and the common good. In addition to claims to having needs and legitimate aims satisfied, the claims the person has also include claims to in process goods such as the power to choose for or against entering into particular contractual relationships. And persons have claims to proper distributions of the satisfaction of legitimate aims and the power to pursue aims.

The person who has the primary duty to service someone's claim is the one who made the contract with her. The idea here is not that there is a naturally generated duty to do this but that it makes sense to organize the society so that it imposes the duty on the other contracting party. This might be in part because such a system has good incentive effects. We want people to go out and find the right persons to contract with. So, we leave it to them to do this. And they must bear some costs if the person turns out to be unable to do this. Such a system takes advantage of a kind of local knowledge and the incentive to gain local knowledge. It tends to create relations of trust among persons. But we also want the system to give people the freedom and power to shape their relations with other people in accordance with their idiosyncratic aims and interests.

Sometimes, when one of the contracting parties cannot perform, there may be some reason to have a kind of insurance scheme that covers the losses. This happens with public hospitals in the United States that are required to treat anyone in the emergency room. If that person cannot pay, then the state steps in. So, there is a limited form of contracting here that is partly sustained by an insurance mechanism. This is done in order to make sure everyone can get the needed help and that hospitals are financially sustainable.

But sometimes the obligation of contract seems to fall only on the contracting parties. That is, if one of the parties fails to do her part, no other party is obliged to step in to take up the slack, as one might expect if there is a general claim against the system or community. This may seem to be a potential objection but there may be a reason for this feature, namely moral hazard. If the chance of getting back one's return are too high, then maybe one does not select one's partners as carefully as one should. Or one might make as many contracts as one can with many people obviously incapable of performing, in order to collect damages from the society. For the practice to work, that cannot be an available strategy.

But this raises the question, how can someone have a general claim to the contract being fulfilled if no one else has to step in to take up the slack when the other contracting party fails to perform? It looks like the claim has to be a special claim, that is, against a specific party. But then how can this be compatible with the analysis of desirable practice + general claim + division of labor?

One has a general claim against society that one's needs are met, and one has a proper share of resources and the conditions for thriving. When someone makes a contract with me to perform some service in return for something else, the fulfillment of that claim is threatened to

some degree when that person does not perform. Now this person is the person who is responsible for not setting back this general claim of mine. The way they fulfill this is by carrying out the contract. And if they cannot do that, they may owe expectation damages or perhaps restitution or reliance damages. The claim establishes a directedness, and the division of labor establishes that the contracting party is the person tasked with not undermining the claim. The schedule of remedies suggests this as well. First, there is specific performance, then expectation damages, then reliance damages, then restitution then If the other party is not able to perform any of the remedies, then the contract evaporates.

But this means that the general claim may not require any further action by anyone else, except when the person falls below some clear threshold (in which case, the state steps in). Sometimes the division of labor works like this. For example, a person has a claim to receive an impartial and careful judgment by a judge in a case they bring before a court. Sometimes the judge fails to do this and there is no further appeal. This doesn't mean that there is no general claim against the society, it just means that this is how the society services the general claim.

This is the whole point of having a decentralized system of provision. We think that when we divide up the labor in this way, the conditions of flourishing are better provided for. When we don't think that this decentralized division of labor will succeed at providing, we choose some more centralized system. For example, health care provision is increasingly centrally provided for in developed countries and almost completely centrally provided for in most developed countries. Contract is not the main way of allocating health care in many countries. The reason is that contracting with its division of labor does not adequately protect the health care of many people. Education at the primary and secondary levels is also not primarily given through contract.

The system of decentralized provision is based on the idea that the general claims of persons to have the goods necessary to flourishing are best realized when we divide up the labor within the society so that individuals become responsible for the conditions of other individuals.

Decentralized provision is justified when it is the case that delegation to particular parties to service a particular person's general claims is generally justifiable. The thought is that when there is a decentralized system of provision through contract, the society delegates to the contracting parties the duty to service the claims of the other contracting parties. Hence, each contracting party acquires not only a duty to comply with the desirable rules but a duty that is

directed to the other contracting party. This directed duty is grounded in the general claim of the other contracting party to have his needs served by the general system. But the general system now delegates to the contracting party the duty to serve the general claim. I am given some duty to make sure that the interests of the other party are being met. And here we can note the third qualification above: when the other party doesn't depend on me to have the claim satisfied but can have the claim satisfied without extra cost by someone else, I no longer have the duty. The conventionalist can account for this important exception in a way that the other views cannot.

In this way, a conventionalist can account for the idea that a contract with another person creates a directed moral duty to that other person. It is grounded in the moral claim that the other person has to the system working to his advantage. The system then delegates the satisfaction of that claim to the individual contractor. The claim to be satisfied is not merely a legal or conventional claim. It is a moral claim that the individual counterparty now has a duty to satisfy.

Does this mean that anytime a person has a duty to do something in an institution and others are relying on her that they have a directed duty to that other person? Not usually, because in most instances the duty holder is a replaceable, and small, part of how the claim is satisfied. They can be actually replaced by someone else if they cannot perform the duty. Institutional systems that are designed to guarantee the satisfaction of claims usually don't make the satisfaction dependent on individual persons, though there are exceptions such as the case of a high court judge.

Dependence

Have I offered a satisfactory answer to the directedness worry regarding conventionalism? Though the conventionalist picture does generate an obligation on the part of the contractor, and it involves a right on the part of the counterparty, one might worry that it does not say that the contractor owes it to the party at least morally speaking.

Here I will develop the last piece of the account that enables us to infer from "I am responsible for satisfying this person's claim to x" to "I owe it to this person to do x." The first thing to note is that somehow, we do this in the case of doctors in hospitals, teachers in the classroom, social workers with clients and in many other cases. Each teacher, to pick a case with which I am familiar, thinks of himself as having a duty to the students in his class to help them learn. This duty seems directed to those students, and it has its source in the combination of the

student having a claim against the school, the teacher having a duty to the school, and the student coming to depend on the teacher for a bit of their education. The way this happens is that the institution creates a kind of ongoing dependence of the student and the satisfaction of part of her claim on me for learning some particular thing. If the student leaves the class or I leave the class, I no longer have a duty to her with regard to her claim to education. But as long as she is in the class, I have a duty to her to enable her to enhance her education.

The notion of “dependence” is important to this account and so it is worth saying some things to explain what it is. The first thing to note is that it is not the same as “reliance” that is so central to the reliance conception of contractual obligation. A reliance interest is an interest connected with the costs of investment in the terms of a contract. The idea is that a party is owed something to the extent that it has made an investment in the terms of a contract and needs the counterparty to fulfill some part of the contract to recoup that investment. Clearly reliance interests are important to contracts. But what I am calling “dependence” is conceptually distinct, though reliance may sometimes create dependence. I am saying that the party is dependent on the counterparty to satisfy at least part of the claim that the party has on the system. This is meant to refer to what the party can get out of the system of exchange and so is not merely connected with recouping costs. The idea is that the system is required to reward all those who participate in it wisely, conscientiously, and in good faith, at least in the long run. That reward goes beyond the costs of the venture. Indeed, that reward is held out even if no costs have yet been incurred. And the realization of that reward has been delegated to the counterparties in the arrangement. We allow individuals to determine who they interact with as well as what the terms of their arrangements are, and so the reward of the system is normally determined by a properly functioning and just system of exchange. And the party is dependent on, at least with respect to the counterparty, the terms of the exchange. Such a reward is more naturally connected with specific performance and the appropriate remedy for breach is expectation damages in the usual case.

Dependence is also conceptually distinct from expectations. One may fail to have an expectation that one’s claim will be justly serviced because the other party is unjust or because there is pervasive injustice in the system. That does not eliminate the claim.

This notion of dependence can be applied analogously to an educational institution. A student has a claim against the institution that they receive a decent education and they thereby

come to depend on that institution for that decent education. They come to depend in turn on the particular teachers they have in that institution for the satisfaction of the claim against that institution. This need not depend on any reliance interests that person has in going to school or even on their expectations regarding the school. They may be quite skeptical about the ability of the school to provide an education to them, yet they still depend on the school for the satisfaction of the claim.

In support of the dependence analysis of directedness, it is worth reminding ourselves that the moral directedness of obligations in the area of contracts is uneven. It is striking that directedness seems to vary with dependence. When we look at the cases in which directedness becomes very thin, we see that dependence has diminished significantly. For example, in the contract between me and the credit card company (or bank or mortgage company or large scale internet delivery service), that absence of directedness seems associated with the fact that the credit card company doesn't depend on me for it to have its claims satisfied. The credit card company is not the sort of entity that can have this kind of claim. The individuals who are parts of the company do have such claims. But the relation of dependence between the satisfaction of their claims and my action of payment is very small. The sense that one does not have a directed obligation in the case of one's credit card company seems strongly associated with the fact that the credit card company is a highly sophisticated and diversified market player. The interest rates price in and insure against the chances that persons will be unable to pay back the loan. They make the creditor independent of the individual debtor. One may have an obligation to pay one's debts, but the sense is that this is not owed morally speaking to the credit card company except in a very thin sense. Interestingly, the credit card company may have a directed obligation to me since I may well be dependent in the relevant sense, an asymmetry that speaks in favor of the account I am offering.²³ In other cases, directedness is highly attenuated especially when the dependence of the counterparty is highly attenuated. The directedness seems in these cases to be contingent on the degree of dependence of the claim holder on the actions of the contractor. Dependence seems to be the key variable here.

In the case of the application of the mitigation rule, the sense of obligation vanishes when the very same value can be reasonably easily had from an alternative source. This does strongly suggest that there is a claim first and foremost against the system. Normally individuals are

²³ Thanks to Andrei Marmor for pointing this out to me.

responsible for satisfying it but when that claim can be met by the system without the counterparty's action, that is sometimes entirely sufficient to void the obligation of the counterparty.

On the other hand, when one has employed a private contractor to do work on one's house or a mechanic to work on one's car and they have performed their work, their dependence on one's payment in return is quite serious usually. The costs of the work and supplies and the opportunity costs of their work are very significant. They are usually not very well to do. They exhibit a high degree of dependence. They rely on one's payment for their livelihood. And the sense of directedness is very strong in this case.

Hence, it does not seem to be the contracting per se that explains the thick directedness many think essential to contracts since many contracts don't seem to generate directedness except in a thin sense. Again, we are talking here of a moral sense of directedness and not merely the legal sense. And we don't have a clear phenomenology of moral directedness in the case of many contracts. Yet directedness seems to increase as we observe the increase in the dependence of the counterparty's satisfaction of claims on one's action. But this directedness does not seem very different from the sense a teacher or a social worker or nurse might experience towards someone who has been assigned to them.

There is definitely some difference, we observe. The strength of the claims of the contractors can be greater than those of the clients or students, at least if other things are equal. The explanation for this might be given in two parts: First, we had a greater opportunity to avoid the relationship in the case of the contractor than in the case of the students or clients. That is, we have a greater ability to protect ourselves from excessive demands in the case of contracting. Secondly, in the case of the contractor, the fact that one is the last resort for the fulfilling of their claim in many cases also makes a difference. In the case of clients or students or patients, other persons can satisfy the claims of these persons when one is overwhelmed by demands. In the case of the contractors, the system is set up (with good reason) so that no one else can be assigned to pay the fee.

All of these factors and more can help explain how the thick sense of the directedness of the obligation can arise in contracting even though it is not a general feature of contracting. The conventionalist has a better explanation of how this is possible than the normative powers approach or the fidelity approach. The sense of directedness is messy and dependent on a lot of

features aside from the making of a contract, facts that are not compatible with these other accounts.

Hence, not only is it possible for the conventionalist to respond to the directedness worry. It seems to me that a proper understanding of the presence of directedness in contracting is more compatible with the conventionalist account than the others. Hence, the reality of directedness can be used as an argument in favor of the normative conventionalist account.

So let us look at the elements of the account here. First, there is a normatively desirable convention that each has a duty to uphold. Second, each has a claim against the normatively desirable institution. Third, the institution functions by making the claim holder's claims dependent on the actions required of the duty holder.²⁴ I think this captures how directedness is created and sustained when it is sustained, and how it evaporates under certain conditions.

To be sure, even in cases, as noted above, where we do not detect a thick sense of directed obligation, we may nevertheless have a directed obligation in the legal sense and that legal directedness may well be justified, morally speaking. Hence, even in the case of the credit card company, there is a morally justified legal directedness. This is quite thin, but it does seem to characterize many contracts I engage in.

Conclusion

I have defended a conventionalist account of contractual obligation first by showing how conventions can create obligation and second, by appeal to what I have called the equilibrium argument, which shows that it is important that a large swath of contract obligations at least are created by participation in conventions. I have suggested that either normatively desirable conventions are the only nonderivative source of obligation, or they slowly become the main source of obligations in very complex societies such as our own. I have responded to some main criticisms of the conventionalist account and mostly to the directedness. I observe that the moral

²⁴ The view outlined here has some similarity to the view defended by Niko Kolodny and R. J. Wallace. They advocate for a conventionalist position that creates a directed obligation by superimposing the principle of fidelity on the conventionalist approach. The convention creates the obligation, the commonly understood assurance creates a directed obligation from the assurer to the assured. The trouble is that assurance doesn't seem necessary to directed obligation and not all obligations of contract are directed (except in the sense of a thin morally justified legal rule).

directedness people observe in the case of contracts is not a general feature of contract making. And the sense of directedness is shared with other institutions that have very different structures from contract. Directedness is quite a bit messier than many philosophers have observed. It varies with dependence, opportunity to avoid. And this variation is an argument for the conventionalist account, not merely a defensive argument against a criticism.

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