

Normative Conventionalism about Contracts

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(rough draft)

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 and treat each other in accordance with the norms of justice as they have been laid down.

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. Instead, I argue, first, that normatively desirable conventions can be the source of the special obligations of contract. Second, I argue that either normatively desirable conventions are the sole source of obligations or that such conventions gradually replace naturally produced obligations in an increasingly complex society.

In this paper, I attempt to defend what I am calling normative conventionalism with a new argument and against some powerful critiques. In particular, I defend with what I am calling the general equilibrium argument and respond to the criticisms that conventionalism fails to account for the directedness of the obligations of contract.

The Underlying Moral Structure of Contracts in Normative Conventionalism

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. But it is a duty to do my share. The system will not fall apart if I fail to do my share 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.

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 distribution

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of income that results from this institution must be reasonably just. Four, the distribution of power in the operation of the institution must be reasonably just. And finally, the convention does broadly advance the interests of the members of society. These interests include not only interests in the outcomes of the arrangements, they also include interests in shaping the social world we live in in accordance with our judgments and values. These are the regulative values of the system of exchange and contract.

The specific purpose 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. And the conventions 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.²

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. There are procedural constraints on the distribution of power among participants that protect each person's abilities to shape the social world they live in.

What is it for me to do my share in the case of a system of exchange? Presumably, since the system is characterized by a division of labor, the first main job is for each person to do her part in the division of labor. Here that means each person must fulfill the contracts that they make with others, at least to the degree that the system requires and to provide a remedy when they do not. But if the system is characterized by some injustice or inefficiency, then each participant may have the secondary job of sharing in fixing it. The duties here are less clear in their shape. One duty is to help reshape the system by means of politics.

This establishes a practice based or convention-based obligation. One's moral obligation is to act in accordance with the rules of a morally desirable convention that satisfies the regulative values. The contents of the obligation are determined by the structures of the rules of the morally desirable convention. The rules of the convention acquire normative force from the fact that they implement the various values of autonomy, efficiency, and justice for the community. This gives each person non-individualistic reasons for action to participate in the convention.

The obligations of contract arise on this view because the rules of the convention provide a coordination point for those who have the non-individualistic reasons for action to engage in collective action. This solves a basic problem that arises for non-individualistic reasons for action. For example, consider reasons for action connected with climate change. These ultimately are non-individualistic reasons in that individual actions do not, on their own, make much or any difference to climate change. Only large collections of actions can make that kind of difference. We have non-individualistic reasons because we have reasons to contribute to the alleviation of climate change, even though individual actions don't by themselves make any

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). See also, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) for a discussion.

difference. The problem of 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 utterly superfluous.³ Only when they are coordinated with many other actions do they produce desirable outcomes. The function of the institutions of contracting as well as many other institutions is that they coordinate these non-individualistic reasons for bringing about and realizing desirable outcomes in a reasonably just way. The non-individualistic reasons for action are coordinated on the rules of the system of contracting.

To be sure, the rules of contracting are such that people participate in the system on a mostly voluntary basis.⁴ And much of the decision to participate in the system is properly motivated by self-interest or at least partial concerns. When persons make contracts with other persons or groups, they usually do so for very particular purposes connected with their interests or those of the associations to which they belong. But when they participate, they must participate in accordance with the rules of the convention and that necessity is based in non-individualistic reasons for action, which are connected with the fact that the system promotes the common good in a reasonably just way.

A system of exchange exhibits properties of composition and separability. The parts are to some degree separable in the system. The fact that there are sweatshops in Los Angeles does not undermine my duties to do my share in the parts of the system of exchange that I am engaged with in Tucson. And the particular rules of the convention I am acting in accordance with must themselves be reasonably just. If I am a plantation owner and I have a number of slaves on my plantation, the slaves do not have obligations to me that derive from this conventional system. Nor do others have obligations to me to make sure my slaves remain with me.

There is also a kind of systemic character to these activities. The sweatshops in Los Angeles lower the wages of workers in other places. The activities in one kind of market effect the activities in other parts of the market. The prices in one area are connected with the prices in other areas. There is an overall tendency towards a kind of general equilibrium in the markets. The tendency towards general equilibrium is what makes the system of contracts have a tendency to realize an overall good and distributive justice, or not.

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 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.⁵ And according to the normative powers approach A acquires an obligation to B by communicating an intention to put himself under an

³ 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.

⁴ Do we have duties to participate in the system? It seems that we must, though how we do so can be determined by our conception of our needs.

⁵ Thomas Scanlon, "Promises and Practices," *Philosophy and Public Affairs* Summer 1990.

obligation to B by that very act of communication.⁶ Conventions are normally necessary to both of these ways of generating obligations. But the conventions are usually merely means to communication between the parties. The importance of convention to contract making on these views is entirely derivative. By contrast the conventionalist asserts that 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 will try to show that conventions can generate 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 Conventionalism

The argument for the idea that there is a conventional set of obligations associated with property, exchange and markets more generally derives from a number of sources. The first consideration is 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, are constantly changing, 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. This is because new problems genuinely arise as the cumulative consequences of many actions tending towards suboptimal,

⁶ 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)

unjust or otherwise problematic equilibrium. It can also arise as we 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.⁷ 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 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.

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 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 inequalitarian 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.

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. It is not clear that there is anything intrinsically immoral about contracting for someone to vote for x in return for money. But the equilibrium effects of such contracting would be to undermine the minimally egalitarian character of one person one vote schemes.

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 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

⁷ 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).

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 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 ways 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 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 from 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 collective 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 increasing 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 promising, 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.⁸ 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. It thus seems to be morally lax with regard to the obligation to fulfill contracts.

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.

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

⁸ Seana Valentine Schffrin, "The Divergence of Contract and Promise," *Harvard Law Review* 2007

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.⁹ 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.

⁹ See Niko Kolodny and R. J. Wallace, "Promises and Practices Revisited," *Philosophy and Public Affairs* 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).

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 compliance with 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. I definitely have obligations, 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 agree to buy a certain product at a certain price from a firm at a later date and I fail to buy that product, 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. 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 are exceptions to directedness, there are clear cases in which there appears to be directedness in the system of contracting. 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. 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 directed by 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 grounded in the normative convention coupled with the fact that people have claims against the normative convention, which claims the convention has assigned to the individual to be served. 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 idea 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 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.

Could something like this be 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 has properly put herself into the position. 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 a contract with her. The idea here is not that there is a natural 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 person 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 it is also because we 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 kicks in here. Presumably 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. There may be a reason for that, 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 even, one makes as many contracts as one can with many people obviously incapable of performing, then collects 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 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?

Maybe the general claim is not against each contract but against the society overall. This might be in the sense that 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 connected to 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.

Have I offered a satisfactory answer to the directedness worry regarding conventionalism? One might think that the answer is not entirely satisfying because what I have done is simply added a claim against the whole system and then said that that claim is at least partly the responsibility of persons with whom they make contracts. I think the claim thesis is correct, but one might worry that what I have argued for is merely that there is an obligation and there is a claim. But whether the obligation is to the claim holder is a further question. The worry here is that the conventionalist picture, together with the claim each person has on the convention, does not generate a connection between the obligation and the claim holder that is sufficient to generate directedness. 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, it does not say that the contractor owes it to the party at least morally speaking. One could read the conclusion of the argument above as saying that the contractor acquires a duty to the whole system while the counterparty has a right against the whole system. If there are any directed obligations, it is the obligation of the collective behind the system that is directed to the promisee.

Dependence

Can one go from the description “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 teacher being assigned to the student.

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, 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.

Another thing to note here is that the legal practice of contracting recognizes the special nature of the relationship that each party bears to each other. And each party is aware of this legally structured relationship. In that sense, the formal directedness of the obligation is explicitly affirmed in the legal relation. Each party has a special cause of action when the other party fails to do as they contracted to do. And each party has the power, legally speaking, to forgive whatever the other party is initially obligated to do.

Finally, it is worth reminding ourselves that the moral directedness of obligations in the area of contracts is uneven. In some cases, there doesn’t seem to be any moral directedness. For example, in the contract between me and the credit card company, 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. 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.

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 different. 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 promises a reward to all those who participate in it wisely, conscientiously, and in good faith. 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 counterparty 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 what the party is dependent on at least with respect to the counterparty is 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.

What is striking is 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 instance, 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 debtor. One may have an obligation to pay one’s debts, but the sense is that this is not owed morally speaking except in a very thin sense to the credit card company.

In the case of the application of the mitigation rule, the sense of obligation vanishes when the very same value can be had from an alternative source. This does strongly suggest that there is a claim first and foremost against the system. Normally individuals are responsible for satisfying it but when that claim can be met by the system without the counterparty’s action, that is 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 claims dependent on the actions required of the duty holder.¹⁰ 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.

¹⁰ 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).

Conclusion

I have defended a conventionalist account of contractual obligation by appeal to what I have called the equilibrium argument. 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 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.