

# Contract as Commodified Promise

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*Many scholars assume that lawmakers should design contract law with the goal of facilitating commercial promises. But the question of which promises count as commercial remains neglected. This Article argues that this question matters more than one might initially expect. Once we understand commerciality in terms of commodification—roughly, treating something as subject to market norms—surprising recommendations for reform follow. First, if contract law should enforce commodified promises, we should demote the consideration doctrine to a presumption of enforceability rather than a formal requirement. Second, we should adopt a rule, contrary to current doctrine in most jurisdictions in the United States, that intending to make a promise legally binding renders it presumptively enforceable. Beyond these reforms, understanding contracts as commodified promises also provides a new lens through which to view recurring debates about boilerplate, enforcing donative promises, remedies, and efficient breaches. We can even understand the 2008 financial crisis as caused in part by over-commodifying promises. In short, this Article shows how debates about the moral limits of markets, which might have seemed peripheral to contract theory, belong at its very core.*

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## INTRODUCTION

Many commentators accept that legally enforceable contracts involve promises.<sup>1</sup> But why should courts enforce promises? And which

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1. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives remedy, or the performance of which the law in some way recognizes as a duty.”); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 58 (2013) (“Promise-based theory is still the basis of much contract philosophy, and is also enshrined in US legal doctrine.”); STEPHEN A. SMITH, *CONTRACT THEORY* 44 (2004) (describing promissory theories as an “orthodox” explanation of the analytical question of what contracts consist of); Seana Valentine Shiffrin, *Is a Contract a Promise?*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 241, 242 (Andrei Marmor ed., 2012) (“Many, perhaps most, lawyers, theorists and lay people in the United States consider contracts to be ‘legally enforceable promises.’”); Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417, 1448 (2004) (claiming that “[c]ontract presents a special case of promise” and asserting that contractual commitments are a “class of promises”); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 *IOWA L. REV.* 183, 205 (2012) (“[M]ost judges, practitioners, and scholars accept that a contract consists of a legally enforceable promise.”).

ones?<sup>2</sup> Market-based justifications of contract law answer these questions plausibly.<sup>3</sup> Courts enforce promises, according to these justifications, because doing so facilitates robust markets that not only tend to enhance the welfare of participants in specific transactions or promote economic efficiency, but also because markets tend to promote and embody liberal values like autonomy, civility, tolerance, and cooperation.<sup>4</sup> As for the question of *which* promises courts should enforce, the market justification suggests that promises that facilitate or constitute market exchanges should be the primary focus of contract law.<sup>5</sup> In short, contract law should primarily enforce commercial promises.<sup>6</sup>

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Writers in the law-and-economics tradition of contract theory also typically accept the view that contracts involve promises. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 277 (6th ed. 2012) (calling the question of which promises should be enforced one of the fundamental questions of contract law); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261, 1261 (1980) (taking for granted that contract law involves enforcing promises).

2. After all, no legal system enforces all promises—nor should they. BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 133 (2012) (observing that “our legal system fails to enforce many promises”); E. ALLAN FARNSWORTH, *CONTRACTS* 14 (2d ed. 1990) (“No legal system has ever been reckless enough to make all promises enforceable.”); Goetz & Scott, *supra* note 1, at 1263 (criticizing theories of contract that ground enforceability in the “moral force” of promises for failing to account for the fact that “no legal system attempts to enforce all promises”).

3. Avery W. Katz, *Economic Foundations of Contract Law*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 171, 171 (Gregory Klass et al. eds., 2014) (“Since at least the time of Lord Mansfield, it has been commonplace to view the law of contracts as an important tool for facilitating and regulating economic activity.”); *id.* at 175 (“Putting specialized categories such as consumer and employment contracts to the side, much of contract law has been developed with the goal of facilitating exchange between business firms or commercial professionals.”); Roy Kreitner, Comment, *Multiple Markets and the Justification for Contract*, 98 *IOWA L. REV. BULLETIN* 20, 23 (2013) (explaining that an “eye toward a justification of contract through its role in markets and an understanding of the political value of markets runs like a guiding thread through some of the most important contract[ ] writing of the 1930s”); Oman, *supra* note 1, at 185 (“Contract law is the quintessential institution of a market economy.”).

4. *See infra* Part I. In the legal literature, the most thorough recent discussion that describes the role that contract law plays in facilitating market virtues other than efficiency can be found in Oman, *supra* note 1, at 193–204. What makes Oman’s discussion particularly noteworthy is its emphasis on values apart from welfare maximization that are promoted and instantiated by markets. *See id.* Oman has since considerably revised and expanded his argument in NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016).

5. The instrumental justification sketched here echoes the work of Nathan Oman. *See* Oman, *supra* note 1, at 213 (“Hence, when asking, ‘What promises should the law enforce?’, the answer is: ‘The law should enforce promises when doing so facilitates markets.’”).

6. *See* James D. Gordon, III, *Consideration and the Commercial-Gift Dichotomy*, 44 *VAND. L. REV.* 283, 285 (1991) (introducing the view that “commercial promises should be enforceable” as opposed to “gift promises”); Oman, *supra* note 1, at 209; *see also* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 544 (2003) (arguing that “contract law should facilitate the efforts of contracting parties to maximize the joint gains (the ‘contractual surplus’) from transactions” and do “nothing else,” which the authors claim follows from the principle that “the state should choose the rules that regulate commercial transactions according to the criterion of welfare maximization”).

But what precisely makes a promise *commercial* in nature? This Article's key insight is that commercial promises are *commodified* promises—i.e., contracts involve, and should involve, treating promissory rights and obligations as subject to market norms, including norms permitting the purchase and sale of those rights and obligations.<sup>7</sup> The simple observation that contracts commodify promises has multiple important implications for reforming contract law and interpreting its central doctrines. This Article advocates, in particular, two doctrinal reforms: First, if we take for granted that contract law concerns itself primarily with enforcing commercial promises, then we should demote the doctrine of consideration from a requirement to a presumption, given that *quid pro quo* exchanges do not exhaust the ways that parties may commodify their promises. Second, and more surprisingly, courts should presumptively enforce promises when parties *intend* them to be enforceable under contract law. This surprising result follows from a rigorous philosophical conception of commerciality stated in terms of commodification, which in turn is defined in terms of treating something as subject to market norms—including norms of contract law itself. In short, this Article shows how parties can and should bootstrap their promises into enforceability, at least presumptively, simply by willingly treating their promises like goods subject to market norms.

But commodification has a dark side. Some things should not be for sale. This widely shared belief is reflected in the criminal law, which bans certain market exchanges—such as the sale of kidneys, certain drugs, sexual labor, and so on.<sup>8</sup> Less widely noticed, this Article argues, is that anti-commodification norms help to justify certain contract law doctrines, like voidness for illegality.<sup>9</sup> More surprising still, over-

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7. For a similar usage, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* 15 (1996), which argues that “[o]ne of the earmarks of commodification, perhaps its central one, is that of *sale*; so commodification is undercut when things are thought of as, or declared to be, not capable of sale.” See also Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 73 (1990) (explaining commodification generally).

8. For the federal statute banning the sale of human organs, including kidneys, see 42 U.S.C. § 274e(a) (2012), which makes it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” See also 42 U.S.C. § 274e(c)(1):

The term “human organ” means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

For some statutes banning the sale of sexual services, see, for example, FLA. STAT. § 796.07 (2017), which bans prostitution, and TENN. CODE ANN. § 39-13-514 (2014), which does the same.

9. For a thorough treatment of how anti-commodification norms help justify and explain the doctrine of consideration, see David Gamage & Allon Kedem, *Commodification and Contract*

commodifying some promises may undermine norms or values associated with promising itself. And, arguably, contract law's design does and should strive to avoid this where practicable. Indeed, the rule against enforcing breaches of so-called donative promises plausibly accommodates noncommercial values associated with gift promises, including friendship.<sup>10</sup> This Article discusses other ways that the law already accommodates concerns about over-commodifying promises, as well as other ways that over-commodifying promises may have led to the breakdown of promissory norms (including ways this breakdown may have contributed to the 2008 financial crisis). Thinking about moral constraints on commodification thus provides a new way to interpret the limits on contract enforcement.

Construing contracts as commodified promises has other implications for contract theory, allowing us to reframe existing debates about the appropriate remedies for breaches of contract. Debates about whether contract law's remedies adequately reflect promissory morality can be bolstered—and replied to—on the grounds that current contract law doctrines facilitate over-commodification and hence undermine promissory norms and values. Reframing these debates may make them more tractable by providing a common vocabulary for those who try to justify contract law by reference to promissory practices and those who emphasize markets.

Arriving at these conclusions requires some groundwork. Part I introduces the market-based instrumental justification for contract law. This justification supports the view that contract law should primarily focus on commercial promises and in turn motivates the inquiry into the question of what makes a promise commercial in nature. Part II defines commodification and explains why it matters, focusing especially on the reasons why some writers oppose commodification. Part III defends the very possibility of commodifying promises, while Part IV introduces three principles that should govern the enforceability of promises in contract law. Finally, Part V applies those principles to doctrines of contract formation, while arguing for their reform. Part V also shows how understanding contracts as commodified promises helps solve certain doctrinal puzzles (particularly involving illegality doctrine), while simultaneously

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*Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299 (2006).

10. See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 847 (1997) (discussing the moral importance of keeping promises). Others have observed that expectations governing promissory obligations in the context of close personal relationships differ from those in commercial and contractual relationships. See also DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* (2003); Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709 (2011).

casting new light on recurring debates about contract law's remedies and the justification of boilerplate agreements.

## I. AN INSTRUMENTAL JUSTIFICATION FOR CONTRACT LAW

A widely held view holds that contract law aims to enforce, and should be designed to facilitate, primarily commercial promises.<sup>11</sup> Little work discusses what commerciality involves. But it behooves us to pay closer attention to the concept of commerciality. After all, according to the commercial promise view, the limits of commerciality presumably limit the scope of a promise's enforceability in contract law. But before turning to the question of what commerciality involves, let us consider what motivates commercial-promise views of contract law to begin with.

Commercial-promise views that this Article takes for granted presuppose an instrumental justification for contract law,<sup>12</sup> one version of which holds that contract law is justified to the extent that it supports robust market economies—or that the point of contract law is “helping to sustain markets.”<sup>13</sup> Markets have many virtues that have been discussed at length elsewhere, so I will not try to exhaustively catalogue them here.<sup>14</sup>

I will emphasize, however, that the instrumental justification that this Article presupposes does not reduce to the standard welfarist, efficiency-seeking approach favored by economists.<sup>15</sup> To be sure, market economies based on the price system are more efficient than command-and-control economies, which notoriously fail to ensure that production

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11. See, e.g., NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 19 (2013); OMAN, *supra* note 4; Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 555 (1933) (asserting that the “development of contract is largely an incident of commercial and industrial enterprises that involve a greater anticipation of the future than is necessary in a simpler or more primitive economy”); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 818 (1941) (describing the “archetype” contractual relationship as a “business trade of economic values in the form of goods, services, or money”); Oman, *supra* note 1, at 185–87.

12. Distinguish between instrumental justifications for a social practice and consequentialist ones. See VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 31–32 (2011). Instrumental justifications hold that certain social practices are valuable primarily or exclusively for some desirable goods they bring about rather than for any intrinsic value of that practice in and of itself. See *id.* at 23–24. Consequentialist justifications go further, holding that certain desirable outcomes, and only those outcomes, matter in justifying the practice; nonconsequentialists hold simply that desirable outcomes do not alone matter in justifying a social practice. See *id.* at 32. The account I give here thus leaves room for an instrumentalist but nonconsequentialist account of contract law, according to which contract law exists primarily to facilitate markets though operates within moral constraints.

13. JULES L. COLEMAN, RISKS AND WRONGS 197 (1992).

14. See especially Oman, *supra* note 1, at 187.

15. COOTER & ULEN, *supra* note 1, at 28–29; Oman, *supra* note 1, at 187 (observing that “[e]conomic theorists of contract certainly laud markets,” but criticizing their “single concern: the efficient allocation of resources”).

quotas and demand align.<sup>16</sup> No doubt efficiency gains often translate into welfare gains. But the virtues of markets go beyond efficiency. Other values promoted by or embodied in markets include freedom or autonomy (terms that I will use interchangeably here).<sup>17</sup> Markets liberate, and not just by giving consumers many ways to satisfy their wants by exercising free choice. Free labor markets, for example, allow employees to leave domineering employers.<sup>18</sup> They may also undermine pernicious discrimination. Others have discussed how markets foster virtues like tolerance.<sup>19</sup> As Jules Coleman aptly remarks before offering his own list of market virtues, “[t]here is no shortage of defenses of the market within the liberal tradition.”<sup>20</sup>

To secure market virtues certain preconditions must be in place.<sup>21</sup> Large markets need a stable legal system to flourish, including a law of contract.<sup>22</sup> Contract law provides some assurance that parties to an agreement will actually follow through with their commitments—that a promise made now will be kept in the future—or face legal

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16. See, e.g., ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 12 (1996) (“Markets do a lot better than command economies at generating roughly accurate prices in many realms much of the time.”).

17. There are broad distinctions between freedom and autonomy in the philosophical literature, as well as various conceptions of freedom and autonomy. See generally John Christman, *Autonomy in Moral and Political Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), <http://plato.stanford.edu/entries/autonomy-moral/> [<https://perma.cc/9ZAS-DHJC>] (distinguishing between freedom and autonomy and identifying several conceptions of the latter). These distinctions will not make a difference in what follows.

18. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970) (suggesting that “one of the principal virtues” of a market system is an individual’s ability to exit firms with which one is dissatisfied); see also DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 24–25 (2010) (relying on Hirschman’s framework to explain how, in competitive labor markets, some employees have the power to avoid “humiliating servitude”). Others have described the liberating effects of market systems. See ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 1–36 (2017) (acknowledging that markets played a liberating and egalitarian role in the West before the industrial revolution, while also arguing that we should temper our enthusiasm given the oppressive character of the employer-employee relationship); MILTON FRIEDMAN, CAPITALISM AND FREEDOM: FORTIETH ANNIVERSARY EDITION 7–21 (2002) (arguing that economic freedom is a prerequisite to political freedom). Even Marx appreciated the liberating effects and “cosmopolitan” impulses brought about by commerce. See Karl Marx, *The Communist Manifesto*, in SELECTED WRITINGS 161–62 (Laurence H. Simon ed., 1994); see also SATZ, *supra*, at 23 (quoting Marx).

19. See especially Oman, *supra* note 1, at 187 (“Markets . . . are complex social institutions that can serve multiple functions.”).

20. COLEMAN, *supra* note 13, at 62.

21. SATZ, *supra* note 18, at 26–31; see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 297–99 (1986).

22. SATZ, *supra* note 18, at 26–27; see Barnett, *supra* note 21, at 297 (arguing that contract law should be seen as part of a system including an initial allocation of entitlements and the means for their legally binding transfer). This is not to say that commercial exchanges are impossible, even among relative strangers, without contract law. But without it the stable, robust, large-scale exchanges of the kind constitutive of robust market economies seem far-fetched.

liability.<sup>23</sup> Contract law also serves a well-known gap-filling function.<sup>24</sup> Because contracts cannot account for every possible contingency, contract law supplies a wide variety of “default rules” governing contract interpretation or default contractual terms that apply absent express agreement to the contrary.<sup>25</sup> These off-the-rack default provisions allocate liabilities when contract disputes arise and where the contract itself is silent or unclear. By mitigating potential sources of conflict and confusion arising from this silence, contract law’s gap-filling function facilitates market transactions wholly apart from any enforcement function.

The preceding remarks support an instrumental justification for contract law. If we assume that a well-regulated market economy is justified (given the aforementioned virtues), that a legal framework is practically indispensable for this kind of economy, and that contract law (or something very much like it) is a practically indispensable component of this framework, then having a contract law is thereby justified.

Instrumental, market-based theories of contract law motivate the view that contract law should be designed with the aim of facilitating commerce, especially by enforcing commercial promises. The remainder of this Article focuses on the neglected question of what a commercial promise is, which in turn requires investigating what commerciality involves. Doing so will affect our understanding of contract law both descriptively and normatively, sometimes in surprising ways.

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23. See, e.g., COLEMAN, *supra* note 13, at 20, 68, 119–20 (explaining that “[m]arkets require contracting or exchange” and emphasizing how enforcing contracts mitigates risks of noncompliance with promises); COOTER & ULEN, *supra* note 1, at 284–85 (offering a simple game-theoretic model illustrating how enforceability of promises makes costlier a promisor’s noncooperation in promissory exchanges); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 16 (1993); Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 *LEGAL THEORY* 313, 326 (2002); Erin O’Hara, *Trustworthiness and Contract*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 173, 175 (Paul J. Zak & Michael C. Jensen eds., 2010) (“The availability of a remedy for breach of contract provides a type of safety net that helps to minimize the sense of vulnerability that makes trust assessments necessary in the first place.”); Oman, *supra* note 1, at 209 (“[T]he availability of formal recourse in the event of breach gives market participants the confidence to engage in transactions that they would otherwise forgo out of fear of exploitation.”).

24. COOTER & ULEN, *supra* note 1, at 307 (“Explicit terms in a contract may require interpretation, gaps may require filling, and inefficient or unfair terms may require regulation.”); TREBILCOCK, *supra* note 23, at 17.

25. For example, under the Uniform Commercial Code, contractual rights of either the seller or buyer of goods may be assigned to others “[u]nless otherwise agreed.” U.C.C. § 2-210(2) (AM. LAW INST. & UNIF. LAW COMM’N 2012).



## II. COMMODIFICATION AND WHY IT MATTERS

Given a market-based, instrumental justification, contract law should primarily stand ready to enforce *commercial* promises. Although this view is widely held, surprisingly few attempt to explicate the notion of a commercial promise. One of this Article's contributions is to fill this gap. The remainder of this Part explains commerciality in terms of *commodification*, explains what commodification involves, and presents the ways in which commodification might be morally problematic, and hence why commodification matters.

A. *What Commodification Involves*

To “commodify” something, as I will use the term, is to treat it as subject to market norms, especially including norms permitting its purchase or sale for a price set in common currency.<sup>26</sup> This definition's most important element is the idea of *treating something as subject to market norms*.<sup>27</sup> Whatever else may count as such treatment, treating something as available for purchase or sale for a price surely does.<sup>28</sup>

Later on, we will see other market norms—such as contract law itself and norms permitting quid pro quo exchange<sup>29</sup>—and will consider

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26. Cf. Anderson, *supra* note 7, at 73 (defining “commodities” similarly as “those things which are properly treated in accordance with the norms of the modern market”). It is important to note that my use of the term “commodity” is more capacious than the narrow use of the term as used to describe tangible assets exclusively. See *Commodity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The term [commodity] embraces only tangible goods, such as products or merchandise, as distinguished from services.”). Some writers conflate commodifying goods with pricing them. See, e.g., GUIDO CALABRESI, *THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* 26 (2016) (discussing goods “people do not wish to have ‘priced’” as items whose “commodification is *in itself* costly”). But see EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 111 (2010) (denying any “necessary link between monetization and commodification,” adding by way of illustration that “courts routinely award monetary damages for loss of limb or life in tort actions, without thereby transforming them into tradable goods”).

27. There is potential overlap between the notion of treating something like a commodity and the ways in which one might treat something as property, since sales, purchases, or other transfers involve transfer of validly possessed property rights. See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* 4 (2012) (observing that property rights have been thought to “include the right to possess (which includes the right to exclude) . . . the right to transmissibility and the absence of term (potentially infinite duration)” (citing A.M. Honoré, *Ownership*, in *READINGS IN THE PHILOSOPHY OF LAW* 557, 563–74 (Jules L. Coleman ed., 1999))).

28. See CALABRESI, *supra* note 26, at 26 (defining merit goods as those that bear a positive market price).

29. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 145 (1993). The fact that exchange signals commodification is simply assumed, for example, in Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1461 (1985), where the authors note a sense in which “the exchange of legal rights is no different than the exchange of ordinary commodities.” But see Viviana A. Zelizer, *Payments and Social Ties*, 11 SOC. F. 481, 490 (1996) (considering borderline noncommercial quid pro quo exchanges, such as instances where “women received financial help, gifts—including clothing or even a vacation trip—and access to

ways in which these norms raise moral concerns relating to commodification of things generally and promises in particular.<sup>30</sup> But unless otherwise noted, this Article discusses transactions involving the purchase or sale of something, and hence transactions to which the notion of commodification plainly applies.

Two further clarifications. First, like the term “discrimination,” “commodification” is often used pejoratively.<sup>31</sup> But for clarity I want to separate analytical from normative issues. Just as we can distinguish a normatively neutral notion of discrimination from wrongful discrimination, I want to distinguish commodification from improper commodification.<sup>32</sup>

The second clarification is more important: commodification can be a matter of degree. In explaining this idea, Margaret Jane Radin coined the term “incomplete commodification” to refer to two different but interrelated perspectives.<sup>33</sup> The first refers to how an *individual* may simultaneously hold commodified and non-commodified understandings of certain goods and services.<sup>34</sup> Consider a lawyer whose firm sells her labor at an hourly rate. This lawyer might understand that she sells her intellectual labor hourly, while also viewing her work as a profession that is subject to nonmarket constraints, including market-inalienable ethical responsibilities.<sup>35</sup>

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entertainment from men in exchange for a variety of sexual favors, from flirting to sexual intercourse”).

30. See *infra* Part V.

31. See DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 13 (2008) (observing that “discrimination” can be used descriptively or in a “moralized” sense); Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 5 (2003) (“Currently, one rarely reads a defense of commodification per se in legal literature because the term itself carries such negative connotations that only commodification skeptics tend to use it.”).

32. One might define “commodification” more narrowly, say, as treating something as subject to market norms even though it is *not usually* treated this way. But I think this is too narrow: one’s labor *is*, in a sense, usually treated as subject to market norms in some ways, and I want to preserve our ability to correctly observe that our labor is being commodified. In other words, I think it is perfectly appropriate to say that our labor is commodified despite the regularity with which it occurs. So at the risk of overinclusion, I will use the analytically stripped down account of commodification.

33. RADIN, *supra* note 7, at 102–14; see Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1918 (1987) (distinguishing between commodification from the “participant” perspective and “social” one); see also ANDERSON, *supra* note 29, at 147 (using “partially commodified” in the same spirit).

34. See Radin, *supra* note 33, at 1918 (“The social aspect of incomplete commodification draws attention instead to the way society as a whole recognizes that things have nonmonetizable participant significance by regulating (curtailing) the free market.”).

35. In many jurisdictions and legal cultures, lawyers are expected to perform pro bono work, providing free legal services to those who otherwise could not afford it. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2016) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay.”). One cannot satisfy one’s professional pro bono

Participating in the labor market more generally requires reconciling commodified and non-commodified self-conceptions.<sup>36</sup>

An individual's ambivalence about commodification both reflects and contributes to ambivalence at the level of social policy.<sup>37</sup> For example, insurance, antidiscrimination, and safety regulations all limit to some extent the ways in which they may be produced and sold.<sup>38</sup> Some of these regulations—food safety laws, for example—can be explained and justified by reference to the goal of mitigating run-of-the-mill market failures, by (for example) seeking to mitigate information asymmetries and negative externalities.<sup>39</sup> But other laws—like those banning sales of internal organs, for example—are better understood as manifesting social ambivalence about commodification in the first place, even if they introduce inefficiencies.

### *B. Why Commodification Matters: The Moral Limits of Markets*

Although the preceding discussion provided an analytically neutral definition of “commodification,” controversies over commodification—whether, for example, kidneys should be available for purchase or sale—are normative in nature. The important questions are whether, to what extent, and how certain things or acts or practices should be commodified.

So when are things properly or improperly commodified? To make things more precise, let us focus on the more specific question of

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obligations by simply paying another attorney to do the work instead—even if there is a sense in which this might be more efficient or overall welfare-enhancing. The point about norms “internal” to the legal profession extends to other professions. *See* ANDERSON, *supra* note 29, at 147 (considering “the status of professionals such as doctors, lawyers, academics, athletes, and artists who sell their services”).

36. *See* Radin, *supra* note 33, at 1918 (“What we hope to derive from our work, and the personal importance we attach to it, are not understandable entirely in money terms, even though we demand and accept money.”); *see also* ANDERSON, *supra* note 29, at 147 (“And though individuals may engage in market transactions in their non-market institutional- or role-given capacities, their activities are not and should not be comprehensively governed by market norms.”).

37. *See* RADIN, *supra* note 7, at 102–03 (describing how some individuals cannot understand an interaction as completely commodified or non-commodified, and noting that it is inapposite to think of social policy choice as fitting absolutely into either category); Radin, *supra* note 33, at 1918 (“The social aspect of incomplete commodification draws attention instead to the way society as a whole recognizes that things have nonmonetizable participant significance by regulating (curtailing) the free market.”).

38. Margaret Jane Radin focuses on other heavily regulated markets, including the regulation of labor and residential tenancies, but the essential point is the same. *See* Radin, *supra* note 33, at 1919–20 (using regulations on the labor industry and residential tenancies to demonstrate how these markets are incompletely commodified with regard to safety, insurance, and antidiscrimination requirements, among others).

39. *See* COOTER & ULEN, *supra* note 1, at 39–42 (discussing market failures, including externalities, public goods, and information asymmetries, and proposing that restricting output, subsidies, and mandatory disclosures may help ameliorate these failures).

the circumstances under which it is morally appropriate to treat things as available for purchase or sale, with the caveat that treating things this way is just one paradigmatic way to commodify something.

To begin, distinguish two kinds of reasons that have been offered against commodifying certain things: *intrinsic* and *extrinsic* reasons. To illustrate the former, consider some of Elizabeth Anderson's reasons for opposing the practice of commercial surrogacy. She writes, "Whereas parental love is not supposed to be conditioned upon the child having particular characteristics, consumer demand is properly responsive to the characteristics of commodities."<sup>40</sup> That is, products are properly negatively evaluable for their perceived defects or shortcomings, no matter how minor. Children are not. This kind of evaluation expresses the wrong kinds of attitudes towards them.<sup>41</sup> So commodifying children expresses the wrong kinds of attitudes towards them or threatens to preempt the right kinds of attitudes. Or so one might argue.

Intrinsic reasons need not only be about the norms governing attitudes or their expression. Intrinsic reasons also call attention to what makes a good itself valuable, the right ways to value it, and point towards the ways in which commodification of that good, understood as either an act or practice, degrades or imperils the good's value or the norms governing its proper treatment.<sup>42</sup> Would widespread baby markets tend to erode valuable relationships between parents and their children generally? Perhaps. As Anderson observes, parents have obligations to nurture their children, and to help them become self-sufficient, considerate, and morally decent adults.<sup>43</sup> But one may allow one's *purchases* to rot on the vine if one so chooses. Less dramatically, the strong moral imperatives to help a child grow and develop do not apply with the same force to, say, purchased pets, even though many pet owners truly love them. Even so, a world in which commodification of children was commonplace might very well erode the strong norms governing the raising of children by blurring the lines between children and pets. Intrinsic reasons against commodifying other goods have been offered in the literature.<sup>44</sup>

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40. Anderson, *supra* note 7, at 76.

41. *See id.* at 77 (asserting that commodifying children would "undermine the norms of parental love").

42. *See, e.g.*, MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 112–13 (2012) (describing "corruption" arguments against commodification).

43. *See* Anderson, *supra* note 7, at 75 ("Parental love can be understood as a passionate, unconditional commitment to nurture one's child, providing it with the care, affection, and guidance it needs to develop its capacities to maturity.").

44. For example, widely cited empirical work on the "commercialization effect" suggests intrinsic reasons against commodifying blood transfers on the assumption that permitting the practice aims to encourage those transfers. *See* RICHARD M. TITMUS, THE GIFT RELATIONSHIP:

Writers often couple intrinsic reasons with *extrinsic* ones. Extrinsic reasons refer to norms or values that are less closely associated with the underlying good being commodified, but which are nonetheless threatened by that commodification. To illustrate, suppose for the sake of argument that neither the act nor practice of buying or selling sex is demeaning to either the buyer or seller. Suppose further that the values associated with sex—love, intimacy, personal identity, and so on—are not jeopardized by allowing prostitution to flourish. Still, allowing a widespread *practice* of prostitution to flourish—by allowing a robust and lawful market for sexual labor to develop—might perpetuate or promote the exploitation of juveniles and other vulnerable members of a population, the illicit trafficking of humans, sexually transmitted disease, the exacerbation of gender-based oppression and discrimination, and so on.<sup>45</sup> If a flourishing market in sexual labor promotes or reinforces these other highly undesirable and unjust practices, then they provide extrinsic reasons against permitting the commodification of sexual labor—or at least not without putting into place safeguards to offset these unintended consequences of commodification.<sup>46</sup>

I will draw on the preceding remarks in the discussion that follows. But I should emphasize that many deny that commodification is wrong.<sup>47</sup> Some writers argue that the idea of market inalienability is untenable; that anything that may be given away for free—kidneys, sex, and so on—should be available for sale.<sup>48</sup> They reject the notion that there are any intrinsic reasons (and perhaps even extrinsic ones) sufficient to justify imposing restraints on alienation in this way.

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FROM HUMAN BLOOD TO SOCIAL POLICY (1971); see also KUTTNER, *supra* note 16, at 65–67 (relying on Titmuss’s work); SANDEL, *supra* note 42, at 122–25 (same). Another kind of intrinsic reason against commodification is conceptual rather than empirical. Certain things literally cannot be purchased: it is not a conceptual possibility. Michael Walzer gives a list of “blocked exchanges”—things that include certain goods that he thinks cannot be purchased or sold, including love, friendship, certain awards, and more. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100–03 (1983). At best, one can purchase things that make bringing about these goods more likely, but a direct quid pro quo exchange of cash for these things is, according to Walzer, impossible. See *id.*

45. An argument based on similar considerations is developed in SATZ, *supra* note 18, at 135–44.

46. *Id.* at 139, 150–53 (identifying the external costs of prostitution to include disease, guilt, marital instability, dissipation of familial resources, and moral offense, and proposing that prostitution should not be legalized without certain restrictions and regulations in place). For further empirical work on how markets may undermine moral norms, see also Armin Falk & Nora Szech, *Morals and Markets*, 340 SCIENCE 707 (2013).

47. See generally JASON BRENNAN & PETER M. JAWORSKI, *MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS* (2016) (proposing that the act of commodification is not inherently wrong, but rather how items are bought and sold invites limitation and regulation).

48. Jason Brennan & Peter Jaworski, *In Defense of Commodification*, 2 MORAL PHIL. & POL. 357, 360–61 (2015); see also BRENNAN & JAWORSKI, *supra* note 47, at 12–13.

Others emphasize that the question of commodification is almost entirely beside the point, rejecting anti-commodification theory that presupposes a problematic assumption that market and nonmarket relationships represent “hostile worlds.”<sup>49</sup>

For all that I have written so far, these writers may be correct. And even writers who raise worries about commodification recognize that we should not always legally prohibit morally problematic markets.<sup>50</sup> But my aim in this Section has been to *describe* two kinds of reasons offered by others against at least some forms of commodification, not to endorse any particular argument against extending markets to where they purportedly do not belong. These two kinds of reasons, I will argue, help illuminate some of contract law’s doctrinal features and, more interestingly, provide normative resources to those who call for contract law’s reform, regardless of whether commodification is something we should celebrate or worry about. But before returning to law, I will focus more narrowly on the analytically prior issue that has escaped attention in the scholarly literature: what it means to commodify a promise and whether that might be morally problematic.<sup>51</sup>

### III. COMMODIFYING PROMISES

This Part explains the idea of commodified promises and how commodifying promises may in some cases be open to criticism for intrinsic and extrinsic reasons. The basic framework will be instructive when we return to contract law in the Parts that follow.

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49. See Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 362, 365–66 (Martha M. Ertman & Joan C. Williams eds., 2005) (criticizing the “hostile worlds” theory as creating an artificial division between culture and commerce and failing to recognize the economic aspect of nonmarket relationships). For what it is worth, I worry that the Williams and Zelizer critique targets a caricature. Even writers who emphasize the “cons” of commodification acknowledge that turning aspects of our social lives into market goods or services may have “pros” and that our lives admit of complicated intermingling of market and nonmarket norms. See RADIN, *supra* note 7, at 123–24 (describing the core “double bind” dilemma facing virtually any question about commodification).

50. See, e.g., SATZ, *supra* note 18, at 150 (“It is important to distinguish between prostitution’s wrongness and the legal response that we are entitled to make to that wrongness. Even if prostitution is wrong, we may not be justified in prohibiting it if that prohibition makes the facts in virtue of which it is wrong worse, or if it has too great a cost for other important values.”).

51. Some writers have criticized anti-commodification theorists on metaphysical grounds for being “essentialist.” See Ertman, *supra* note 31, at 48 n.231 (citing antiessentialist critiques of Margaret Radin’s work). I suspect that this critique misses the mark, in part because anti-commodification concerns can be couched in nonessentialist terms, and in part because essentialism is neither here nor there; the concern is whether anti-commodification is generally or characteristically problematic in a given market given some characteristic, even if not essential, features of those markets or objects of commodification.

*A. The Possibility of Commodifying Promises*

So what does it mean to say that a *promise* is commodified? Although one may commodify a promise in several ways, my discussion focuses on cases in which *a promissory right or obligation has been sold or otherwise exchanged for value by the promisor to the promisee*. The purchase or sale of promissory rights and obligations is the paradigmatic case of commodifying a promise.

But the thought that promises can be bought or sold initially seems odd. Consider an objection. If I promise to sell you widgets for \$10,000, what you have purchased are *widgets*, not the promise for them. Similarly, if I promise to mow your lawn for \$100, you have purchased my lawn-mowing labor. We can explain the purchase or sale without reference to promissory rights or obligations.

But this objection fails. Insofar as valid commitments (implied or express) require one of the parties to do something in the future, the purchase and sale of at least one promise is involved. Return to the cases. Assume that you *have* purchased widgets, and that the terms of the validly formed agreement immediately transfers ownership to you.<sup>52</sup> You still lack physical *possession* of those widgets, which must still be delivered. So there is an outstanding action that someone must perform, which is part of the overall package purchased by the promisee. Even if I simply promise to *maintain possession for the time being*, this too involves a promised performance that you have purchased from me as part of the overall deal. You obtain a right to my commitment to do something in the future. The future-oriented performance is characteristic of a promissory right. (Similar remarks apply to the lawn example, given that I have to mow your lawn in the future.)<sup>53</sup>

Note also that promises, like anything else that might be subject to market norms, can be more or less commodified, depending in part on the content of the promise.<sup>54</sup> To illustrate, consider two transactions:

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52. Whether someone succeeds in transferring ownership immediately upon forming the contract depends on the jurisdiction in question and the relevant rules of property transfer. To illustrate, I assume that it is possible to transfer ownership immediately upon forming a valid contract.

53. One might respond that at least some contracts effectuate nothing more than transfers of ownership rights—that once certain writings are complete, transfers of ownership over things are complete. Such a document, however, is no longer governed by the law of contract but rather the law of property, including especially the rules governing transfer of ownership. But to the extent that an exchange truly lacks *any* outstanding promise yet to be performed, the law should not recognize the existence of a contract because there are no more outstanding obligations. See SMITH, *supra* note 1, at 62–63, 176–79 (arguing simultaneous exchanges should be classified as conditional rather than contractual transfers as they lack *ex ante* offer and acceptance).

54. See *supra* Part III.

*Nontransferable.* John promises to wash Bill's car for twenty dollars. John stipulates that the promise is not transferable to anyone. Bill cannot, for example, sell the right to a car wash from John to anyone else or give that right away as a gift.

*Fully Transferable.* John promises to wash Bill's car for twenty dollars. John stipulates that the right to a car wash is fully transferable: it can be sold to others or given away as a gift.

In *Nontransferable*, the initial transaction involves John's selling a promissory right to a car wash to Bill for twenty dollars. Because the purchase or sale of something treats that thing as subject to market norms—the norms governing purchase or sale—this counts as a commodification.<sup>55</sup> But the stipulation limiting resale does not allow you, in turn, to make the promised car wash available for purchase or sale. So even though the promised car wash has been commodified, the scope of commodification is limited. It has been partially commodified. Contrast this with *Fully Transferable*, which has no such constraint. Bill can sell the promised car wash to someone else. The promise, since it is available for resale, is more commodified because it is potentially available for purchase or sale beyond the initial transaction.

So if we can make some sense of the idea of commodifying promissory rights and obligations, and if all commodification is in principle open to criticism (for extrinsic or intrinsic reasons), then it follows that we can in principle criticize the commodification of *promises* for extrinsic and intrinsic reasons, as discussed below.

### *B. Extrinsic Reasons Against Commodifying Some Promises*

Recall the distinction: Intrinsic reasons call attention to what makes a good itself valuable and the right ways to value it, and they point towards the ways in which commodification of that good, understood as either an act or practice, imperils that value and/or norms associated with that good.<sup>56</sup> Extrinsic reasons, by contrast, do not focus on the nature or value of the good being commodified. Instead, extrinsic reasons refer to ways in which commodification imperils other valuable goods or norms, which may have a more tenuous connection to the commodified good itself.

So what might be an extrinsic reason against commodifying promises—e.g., buying or selling promissory rights or attempting to do

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55. See *supra* Part III. I want to emphasize that purchasing or selling something does not necessarily presuppose that contract law exists or that the transaction is enforceable. Black markets and informal markets thrive despite understandings among participants that their transactions will not be enforced in law.

56. See *supra* Part III.



so? Consider an example: Suppose that selling kidneys is wrong for intrinsic and/or extrinsic reasons, bracketing the question of whether it is unlawful.<sup>57</sup> Now suppose that someone promises to sell his kidney to someone else for some money. If treating kidneys like a commodity by attempting to sell them or purchase them is itself wrong, then any *promise* that aims to facilitate this purchase or sale is wrong derivatively. So attempting to buy or sell a *promise* to sell a kidney will likewise be improper. Similarly, if selling babies, votes, other persons, sex, and so on are improperly commodified (for extrinsic or intrinsic reasons, or both), then a *promise* to deliver a baby, a vote, and so on in a quid pro quo exchange for money or another commodity is derivatively problematic.

To generalize, promises can inherit their status as improperly commodified from the fact that they facilitate transactions that themselves represent improperly commodified exchanges. When commodifying promises is problematic for reasons having little or nothing to do with undermining the norms or values associated with *promising itself*, these derivative cases of “inherited” wrongness represent extrinsic reasons against commodifying promises.

### *C. Intrinsic Reasons Against Commodifying Promises: Special Relationships*

If intrinsic reasons against commodifying certain promises exist, this means that commodifying those promises would be at odds with the values or norms constitutive of, or presupposed by, promising itself. Intrinsic reasons might involve, for example: expressing the wrong kind of attitude towards promissory rights or obligations (by promisors or promisees); valuing promissory rights or obligations for the wrong kind of reasons; or corrupting, devaluing, or degrading social norms presupposed by or constitutive of promising, such as the norm that promises must be kept.

To make this kind of critique intelligible we have to say more about the values associated with promising. Consider one such view, which holds that one of the primary values of promising lies in its ability to constitute and manage special relationships.<sup>58</sup> Seana Shiffrin in

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57. Again, for the sake of this discussion, set aside the question of whether selling kidneys is or should be unlawful. We are discussing the moral question only.

58. Various writers explore this theme. *See generally* KIMEL, *supra* note 10, at 27–29, 65–78 (exploring the manner in which promises foster relationships with trust and respect); Bagchi, *supra* note 10, at 715–27 (explaining how the moral obligation of a promise builds an intimate relationship between the parties); Markovits, *supra* note 1, at 1422–42 (discussing the promise relation and its values and how this relation is characterized through contract law, and explaining how this relation is doctrinally expressed); Joseph Raz, *Promises and Obligations*, in *LAW*,

particular has argued that, to properly understand the value of promising, one needs to first understand that the paradigmatic promise is an extralegal one that takes place in the context of a close or intimate relationship.<sup>59</sup> For Shiffrin, our ability to commit to one another through promising involves effectively transferring limited authority to someone else over our conduct.<sup>60</sup> She claims that the value in doing so lies principally in enabling us to manage intimate relationships, and to mitigate power disparities that may emerge or subsist between participants in those relationships, thereby maintaining equality between those participants.<sup>61</sup>

If promising's primary value is that the practice helps us build and regulate special relationships, then commodifying some promises might stand in tension with those relationships. This in turn would provide intrinsic reasons against commodifying certain promises to begin with. Consider some examples:

*Alice.* Alice promises to help her friend (Beatrice) move to a new apartment. Beatrice, who now has the promissory right to Alice's performance, attempts to sell this right to Beatrice's roommate (Cathy), such that Alice will help Cathy in lieu of Beatrice herself.

*Bill.* Bill promises to help a friend move to a new apartment. Bill then pays a third party to perform the move instead.

*Cece.* Cece pays professional movers \$1,000 to help her move to a new apartment. The movers thereafter subcontract to some third party to perform the move.

Consider *Alice*. Attempting to sell the promissory right involves commodifying that right. The *content* of the right does not make the commodification problematic. There is nothing particularly problematic about a robust market for professional movers. So what makes Alice's behavior morally problematic? A natural thought is that there is deception in the air. It is such an unusual thing to do, to sell a friend's right to a performance, that Alice had no reason to expect it. And if selling the right *were* a live possibility, then Alice might not have agreed to help move in the first place. This is a plausible explanation but hides

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MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 210, 227–28 (P.M.S. Hacker & J. Raz eds., 1977) (proposing that principles of promissory obligation are justified only insofar as special relationships are valuable in general); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 502–10 (2008) (asserting that promises both enhance and are necessary to relationships). For an opposing view, see Daniel Markovits, *Promise as an Arm's-Length Relation*, in PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295, 295 (Hanoeh Sheinman ed., 2011), which asserts that the promise relationship is “opposed to intimacy.”

59. See Shiffrin, *supra* note 58, at 502–10.

60. See *id.* at 497 (“An account of promising should treat promises within friendly and intimate relationships as central, though not exclusive, cases.”).

61. See *id.* at 498 (arguing that “being able to promise plays a role in forestalling some morally undesirable dynamics within special relationships and in reinforcing an important aspect of equality within them”).

a deeper account. Why would there be deception in the air to begin with given that subcontracting and other forms of resale of promissory rights and obligations are commonplace commercial practices? And why would Alice *agree* to help Beatrice by moving her, but reasonably *decline* to help her by either moving her or being liable to help the roommate (with whom Alice is not a friend)? The sale, after all, does not appear to be within the scope of Beatrice's presumed authority. But why is that?

The nature of promises made in the context of friendships has something to do with it. When I make a promise to *a friend*, not only is the content of the promise important, but so are the identities of the promisee and promisor.<sup>62</sup> Promises between friends aim not just to achieve some instrumental end—moving from point A to point B—but also to reinforce and test the bonds of friendship. In this context, the prospect of buying or selling promissory rights defeats this purpose, even if it would advance the goal of moving from point A to point B.

This is why we should also take *Bill's* case to be unusual. Arguably, Bill has strictly fulfilled the content of the promise: to help his friend move. But a conventional understanding of what it means for one friend to help another to move involves more than simply paying *someone else* to help him move. Notice that it would seem reasonable for Bill's friend to ask why he chose to pay movers rather than come and aid in the physical labor; it would seem reasonable to expect Bill to answer for his not coming in person to physically help move furniture and such. Now, Bill might provide a good answer. Perhaps Bill has the flu or had an unanticipated job interview that day, and so on. But if Bill says that he simply preferred to play video games, this is a bad reason to not show up, reflecting poorly on how Bill understands friendships. It misses the point, in some way, of asking a *friend* to help move, a point that goes beyond saving money in not hiring movers. Friendship involves, to some extent, a disposition to want to spend time with one's

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62. Shiffrin goes further, arguing that ordinary promises are not transferable because of the nature of promises. See Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON 155, 164 (R. Jay Wallace et al. eds., 2011) (“[A] promise is not simply transferable.”). Roughly, when A promises B to do something, according to Shiffrin, A transfers to B the right to decide, *as between A and B*, whether to do it. *Id.* This means that B's attempt to transfer that right to C without A's consent is *ultra vires* and presumptively illegitimate. See *id.* at 164–65 (“[A]ll A transfers to B is something specific about the relation between A and B, not a general power to make decisions on A's behalf.”). Although I do not necessarily endorse Shiffrin's characterization, she is surely correct that presumptive nontransferability is the norm when the identities of the promisors and promisees matter with respect to the underlying promissory transaction, even if that transaction involves an arm's length personal service contract. See *id.* at 177 n.34 (“[A]bility of a promisee to assign contractual rights to another without the promisor's consent is quite limited in personal-service contracts and other circumstances in which the identity of the party to whom performance is owed might reasonably matter to the promisor.”).

friend and to share in burdens together.<sup>63</sup> Commodifying a promise, in this case, is improper because it attempts to circumvent the burdens of friendship.

I have assumed that Bill has satisfied the terms of the promise. But this assumption is doubtful. To see why, consider that, when a promise involves people in a close relationship, the friendship or close relationship might create certain expectations about the *content* of the promise. Perhaps part of the promise presupposed by Bill as promisor and his friend as promisee is that the right to performance includes not only a right *that* the move takes place, but that *Bill* is the mover. This is one important way that certain promises between members of close relationships may alter the content of the promise by default. So any wrongness in Bill's conduct can be simply explained in terms of his breaking the promise, without recourse to commodification.

But even assuming that Bill broke his promise, Bill's conduct (arguably) reflects an inappropriate attitude towards promissory commitments as such. Bill's preemptive decision to pay someone else to move, without consulting his friend beforehand (let's say), suggests that Bill takes the following attitude towards his promises: one may break a promise if one is willing to pay a price.<sup>64</sup> But this is not the proper attitude to take with respect towards one's promissory obligations.<sup>65</sup> If

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63. See, e.g., ALEXANDER NEHAMAS, ON FRIENDSHIP 11 (2016) (noting one of the "indirect benefits" of friendship as including "the willingness of friends to help one another personally, professionally, and financially in their hour of need, often sacrificing their own welfare, sometimes even their own life, for their friends' sake").

64. Returning briefly to the world of contract from the world of personal promises, Bill's attitude anticipates theories according to which the primary duties of contract are not simply to perform, full stop, but rather consist of disjunctive obligations to perform or pay damages. See, e.g., Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977) (asserting that "a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages" (citing Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 273 (1970))); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1977 (2011) (discussing the "dual performance hypothesis" in which the promisor has a choice to perform the promise or to transfer monies to the promisee equaling the expectation value). Writers often trace the origins of efficient breach to Oliver Wendell Holmes, Jr., who stated: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897), reprinted in 110 HARV. L. REV. 991, 995 (1997); see Gregory Klass, *Efficient Breach*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 3, at 362 ("The simple theory of efficient breach advances a prescriptive version of the Holmesian Heresy."). But see Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1090 (2000) ("[I]t has become commonplace to tie the economists' notion of efficient breach to the towering legal authority of Holmes, who is incorrectly cast as articulating the idea of a *right* to breach a contract.").

65. Robin Kar presents a similar example, according to which a father breaks a promise to attend his daughter's graduation ceremony, and thereafter tries to pay the fair market value of

there is any thought that unifies promise theorists of contract law, it is that the core constitutive norm of promising is this: that when one makes a promise, one must keep it.<sup>66</sup> This implies that one shall not unilaterally convert the content of a promise to do x into a promise to do x or to pay some amount of money.<sup>67</sup> This notion—that it is okay to unilaterally decide to pay one’s way out of a promissory commitment—takes the *wrong kind of attitude* towards one’s promise, and hence is yet another way Bill’s treatment of the promise might be criticized on intrinsic grounds. Attempting to view one’s promissory obligations as subject to purchase and sale rather than outright performance reflects a degraded attitude towards one’s status as a promisemaker and towards promising more generally. It is not something that one who is true to her word does.

Contrast *Alice* and *Bill* with *Cece*. The mover did nothing wrong. To be sure, if the subcontractor is one that *Cece* studiously sought to avoid, and if *Cece* sought assurances from the contractor that the subcontractor would not be used, then this raises red flags. But subcontracting is prevalent in commercial contexts. So long as the underlying content of the promise does not change, the identity of the service provider is normally assumed to matter little.<sup>68</sup>

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his attendance to compensate her. Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 797 (2016). Plausibly, Kar asserts that this “would only add insult to injury,” since “this payment would signal that the father considers his presence in his daughter’s life at this important moment to be fungible for cash.” *Id.*

66. See Klass, *supra* note 64, at 367 (“A contractual promise creates a moral obligation to perform, not an obligation to perform if performance is efficient, or an obligation to perform or pay damages.”); Seana Valentine Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 VA. L. REV. 159, 164 (2012):

Among my objections both to encouraging efficient breach and also to presumptively interpreting the contractual term to read “perform or pay” (or “trade or transfer”) when the parties do not explicitly specify that disjunctive is that either arrangement allows the seller to elect that the buyer either be disappointed or find cover even when the buyer prefers performance (“trade”) full stop and reasonably believes she contracted for performance (“trade”) full stop.

67. To be sure, some promises might appropriately take disjunctive form at the outset, as might be the prevailing assumption among perfectly rational, profit-maximizing firms. See Markovits & Schwartz, *supra* note 64, at 1979–86 (identifying critiques of the efficient breach concept but noting that many parties might prefer bargaining for performance or payment at the outset); see also Daniel Markovits & Alan Schwartz, *The Expectation Remedy Revisited*, 98 VA. L. REV. 1093, 1093 (2012) (outlining their assumptions that contracting parties are “sophisticated and rational,” that they may make choices to maximize profits, that the legal system allows contracting for any remedy, and that the parties can verify economic values to a court). But it is hard to understand why ordinary people—who are likewise empowered to make contracts and whose contractual obligations, if any, are also governed by contract law—should understand their promises in the disjunctive in the absence of any express agreement indicating this to be the case. For discussion of a similar point, see Shiffrin, *supra* note 66, at 162–64.

68. But even this much—the alienability of certain commitments—seems open to question. Mortgage lenders make very risky loans when there are thriving secondary markets—markets made possible by the ability to sell those promissory rights to performance on secondary markets.

Other writers, most notably Aditi Bagchi, have accepted the idea hovering in the background of cases like *Alice*, *Bill*, and *Cece*—i.e., that some promises take on a different normative character depending on their role in close interpersonal relationships.<sup>69</sup> Call promises made within the context of these relationships *personal promises*. But assuming that a core value associated with promising is its role in helping to forge and maintain close personal relationships, we should worry to the extent that commodification (or any other practice for that matter) puts the health and safety of these relationships at risk.

#### *D. Intrinsic Reasons Against Over-Commodifying Promises*

Commodifying promises may not itself be problematic, but *too much* commodification potentially undermines two norms at the heart of promising, even outside the context of close personal relationships: norms governing keeping one's promises and norms governing caring about others' success. I take up each in turn.

*Undermining Norms of Promise Keeping.* To see how commodifying promises might undermine promise keeping, recall that in some contexts promisees may sell or otherwise assign their promissory rights to third parties, and that these promissory rights are thereby more commodified than those promissory rights that may not be assigned.<sup>70</sup> Although presumably assignability should make no moral difference as to whether a promise ought to be kept, some empirical work suggests that promisors, at least in the mortgage context, view breaking a promise as less immoral when the promisee was not a party to the original transaction.<sup>71</sup> This in turn suggests that promisors are less likely to keep their promises once they have been transferred; transferring promissory rights may over-commodify them insofar as doing so undermines a norm at the heart of promising: the norm that one ought to keep one's promises. Indeed, available evidence suggests that borrowers are more likely to default when their mortgage obligations are securitized.<sup>72</sup> If so, this provides an intrinsic reason—

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These secondary markets fueled recent financial crises. See SATZ, *supra* note 18, at 207–08 (asserting that the market for credit derivatives played a role in the United States' financial crises by allowing lenders to sell to third parties with little information about the transactions, which led banks to collapse).

69. See generally Bagchi, *supra* note 10, at 709.

70. See *supra* Section III.A.

71. See Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1570–74 (2011) (explaining the psychological consequences of assigning contracts, particularly mortgages, to third parties).

72. See *id.* at 1580 (“The research I have presented here suggests that the assignment of a contract, including securitization, may undermine the promisor’s commitment to performance.”).

though perhaps not a decisive one—against commodifying promises by allowing them to be alienated or securitized.<sup>73</sup>

*Undermining Incentives to Care About Others.* Another way that commodifying promises may undermine norms associated with promising is by reducing incentives to, for lack of a better word, *care* about others and their success, even if the original motivations for the promise were purely profit seeking. The relationship between promising and caring is sometimes overlooked, so I will dwell on it for a moment. Generally, though not necessarily,<sup>74</sup> a valid promise represents a commitment towards a jointly desired end.<sup>75</sup> This is so even if the promise is undertaken strictly for self-serving reasons. John promises to loan Kim \$1,000 at a certain interest rate, to be repaid at a later date. Kim agrees to those terms. John's promise, we can stipulate, is motivated solely by profit. Kim's promise to repay is likewise self-serving. Despite these motivations, under ordinary circumstances Kim and John now have jointly desired ends.

But the nature of the commitment—and each party's *interest* in following through on his or her end of the bargain—involves more than merely the satisfaction of their independent desires. Two points are worth emphasizing. First, notice the *content* of the desires: they are desires that others *achieve* the committed-to goal. The promisor wants the promisee to succeed and vice versa. Again, this might be for primarily self-serving reasons. John wants Kim to succeed in repaying her loan so that John reaps the interest. Kim wants John to succeed in paying the promised money so that she can use it to pursue her own ends. But even though the genesis of the desire may be self-serving, wanting another person to succeed is ultimately a pro-social attitude we want to encourage rather than discourage.

The second point is that the desires for success may cause, or become, genuine *caring* for another's success. Caring about another person's success differs from merely desiring that success. Desires have,

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73. I am not arguing that we should never permit alienating promissory rights or delegating promissory obligations. Saying that there is a reason against doing something does not commit one to claiming that we should never do that thing.

74. See Raz, *supra* note 58, at 213 ("Imagine a man who solicits a promise, hoping and believing that it will be broken, in order to prove to a certain lady how unreliable the promisor is.").

75. Several writers emphasize the role that promisors and promisees play in bringing about the promised objective as a joint or collaborative rather than individual endeavor. See, e.g., MARGARET GILBERT, *Three Dogmas About Promising*, in JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 296, 318 (2014) (sketching a "joint decision" account of promising, which makes sense of the fact that "even the promisee appears to take on some obligations, though not performance obligations"). See generally Markovits, *supra* note 1, at 1448 (detailing "the collaborative ideal" within contracts).

as Harry Frankfurt points out, “no inherent persistence.”<sup>76</sup> But to care about something is to take up a complex set of attitudes towards it that suggest, at a minimum, a “certain consistency or steadiness” or a “degree of persistence,” as well as a belief that that thing is in some way valuable or important.<sup>77</sup> Roughly, to care about something is to “invest” oneself in it and in some sense “identify” oneself with it.<sup>78</sup>

Of course promisors may care about fulfilling their obligations, insofar as taking commitments seriously disposes them to care about fulfilling them. But, as is less often noticed, promisees who ostensibly benefit from the promise’s fulfillment also care about the commitment and desire that the promisor actually fulfill it. While the promisor will, if properly motivated, follow through on her commitment by declining to give in to countervailing temptations, the promisee should be disposed, at a minimum, not to interfere with the promisor’s fulfilling that commitment so long as it remains in place. Promisees may also take it upon themselves to help the promisor satisfy her obligation. Onerous mortgages, for example, may be renegotiated to ensure that they remain mutually beneficial. On this view of promising, a standard or paradigmatic promise takes on something like the character of a joint enterprise, joint commitment, or shared plan.<sup>79</sup>

Promising in this light involves *both* the promisor and promisee sharing a bundle of practical attitudes and dispositions that tend, on the part of both parties, to exhibit or express the parties’ respective *caring* and *desiring* that the promise be fulfilled. And this complex does seem to bear an important connection, though perhaps not a conceptually necessary one, to promissory practices. The wholesale absence of this complex, after all, would involve mutual indifference towards promissory commitments and their maintenance. And it is difficult to imagine what, if anything, morally important would be left of those commitments if promisor and promisee were both largely indifferent to them.

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76. Harry Frankfurt, *The Importance of What We Care About*, 53 *SYNTHESE* 257, 261 (1982). Although I speak in terms of valuable caring attitudes or dispositions, there is certainly a family resemblance to a broader ethic of care. See, e.g., Virginia Held, *Care and the Extension of Markets*, 17 *HYPATIA* 19, 30–32 (2002).

77. Frankfurt, *supra* note 76, at 261.

78. *Id.* at 260. I hasten to add that Frankfurt seems to have something stronger in mind, such that the term “devotion” seems an apt gloss. See *id.* But the weaker characterizations offered up here are all I want to use for the purposes of gesturing towards the practical attitudes I have in mind by using the term “caring.”

79. See GILBERT, *supra* note 75, at 318 (“One point in favor of the joint decision account of promises is that, in the paradigm case, one person makes a promise to another, and *both are active in the process of constructing the promise.*”).



Commodifying promises is not per se inconsistent with these attitudes, dispositions, or practices.<sup>80</sup> Our loan example described earlier involved a commodified promise that nevertheless motivated caring about others. But some ways of commodifying promises may go too far, undermining the incentives we might otherwise have to care about others' success. Consider secondary markets and securitization.<sup>81</sup> When contractual rights are assignable, secondary markets develop, allowing mortgagees to sell their contractual entitlements to third parties. The mortgage obligations attached to those rights, and the promises that constitute them, thereby become further commodified. After all, as we saw above, the greater the scope of an item's alienability, the more commodified it is.<sup>82</sup>

Bank-to-customer mortgage practices more readily involved these relationships of care. Lending was local.<sup>83</sup> Banks were not indifferent, or were less indifferent, to whether mortgagors paid on time, given that “[t]hey made conventional loans within 50 miles of their home offices and kept them in portfolio until they were paid off.”<sup>84</sup> They wanted mortgagors to pay on time and hence to succeed. However thin these caring relationships were, they created an incentive for lenders to scrutinize carefully those with whom they forged these relationships. And it was not unheard of for lenders to remain flexible with respect to mortgage terms, allowing their renegotiation, to facilitate this success. But if the demand for mortgages in secondary

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80. Far from it. When long-term contractual relationships are at issue, far richer relationships seem possible, as writers on relational contracts have long emphasized. Some commentators draw on the ways in which contracts establish special relationships that bear a family resemblance to marriage and friendship. For the marriage analogy, see, for example, Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569, stating that “[i]n bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism . . .” For the friendship analogy, see, for example, Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 676 (2010), stating that “both relational contracts and friendships display high degrees of trust, interdependence, flexibility, reciprocity, and solidarity.” I worry that these comparisons mislead more than they illuminate, causing commentators to romanticize relational contracts even if we grant that long-term commercial relationships incentivize or presuppose reciprocity, solidarity, and the like. So I emphasize far weaker notions of minimal care that are jeopardized by easy transferability—though of course these other values are also placed at risk.

81. See generally JOSEPH E. STIGLITZ, FREEFALL 77–108 (2010) (describing the developments in the mortgage market leading up to the 2008 financial crisis).

82. See *supra* Section III.A.

83. Jie Gan, *Banking Market Structure and Financial Stability: Evidence from the Texas Real Estate Crisis in the 1980s*, 73 J. FIN. ECON. 567, 575 (2004); see Ann M. Burkhardt, *Lenders and Land*, 64 MO. L. REV. 249, 271 (1999) (“American lenders traditionally made loans based on the security of land located within fifty miles of their office.”).

84. Burkhardt, *supra* note 83, at 272 n.131 (quoting James A. Hollensteiner, *The Secondary Market Maintains a Primary Role*, SAVINGS INSTS., Jan. 1988, at S-11).

markets becomes sufficiently high, such that a mortgagee can easily sell on secondary markets the mortgage entitlements it has obtained or “originated,” little incentive exists (absent adequate regulation) to carefully scrutinize the mortgager or care whether the mortgagor is in a position to repay.<sup>85</sup> Nor is there the same incentive to be flexible. As Tess Wilkinson-Ryan observes:

One of the practical consequences of increased securitization is the constrained ability of lenders to modify mortgage loans. Securitizing mortgages means that lenders often have obligations to holders of the securities that make them less flexible when faced with a homeowner in distress.<sup>86</sup>

Wilkinson-Ryan goes on to note that this makes it less likely that borrowers will stick to their commitments to repay, reinforcing the prior claim that transferability may undermine the norm of promise keeping. But as we have seen, it also undermines caring norms that ordinary mortgage lending may facilitate absent assignability or securitization. Even if original lenders wanted to renegotiate the terms of a lease in ways that would allow distressed homeowners to stay in their homes, while still allowing the lenders to profit, the same lenders’ hands are tied if they have sold off their promissory rights on secondary markets or if those same rights are bundled with other mortgages, making renegotiation practically impossible.<sup>87</sup> As Ann Burkhart notes, “the personal relationship [between borrower and lender] has been shattered by the explosive growth of the secondary mortgage market . . . .”<sup>88</sup>

The systemic risks associated with reckless lending are by now well known. When defaults on mortgages hit a critical mass in 2007, market valuations of mortgage backed securities—whose values were a function of those underlying mortgages—likewise plummeted, triggering massive obligations under credit default swaps and other asset-backed securities, culminating in the financial crisis of 2008.<sup>89</sup> The causes of the financial crisis were multiple, and the easy targets are ratings agencies that overrated complex mortgage-based

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85. See generally STIGLITZ, *supra* note 81, at 77–108.

86. Wilkinson-Ryan, *supra* note 71, at 1581.

87. A parallel occurs in the context of real property ownership. On a model of ownership that assumes that owners and occupiers of land *L* are the same, we can expect public interests in environmental protection of *L* to converge with the interests of *L*’s owner because the owner’s health and welfare will be directly impacted by environmental degradation. Absentee ownership, however, severs the connection between *L* and its owner, undermining the owner’s incentive to protect *L* against degradation by removing her personal health and welfare from the equation. See Elizabeth Blackmar, *Of REITS and Rights: Absentee Ownership in the Periphery*, in CITY, COUNTRY, EMPIRE: LANDSCAPES IN ENVIRONMENTAL HISTORY 81 (Jeffrey M. Diefendorf & Kurk Dorsey eds., 2005) (illustrating the causes and consequences of absentee property ownership).

88. Burkhart, *supra* note 83, at 272.

89. See generally STIGLITZ, *supra* note 81, at 77–108.

derivatives.<sup>90</sup> But the seemingly endless supply of bad mortgage loans poured lighter fluid on the flame, making a bad problem worse.<sup>91</sup>

Here the relevance of over-commodification is important but easy to overlook. It was not commodification per se that contributed to the financial crisis. Secondary markets might be a net positive, making mortgages overall more affordable and mitigating risk to lenders. That said, making contractual rights assignable and securitizing mortgages plausibly contributed to the breakdown of promissory norms and values—i.e., promising’s role in fostering minimally caring, mutually beneficial relationships. When a promisee no longer has incentive to care about whether the promisor succeeds in being able to fulfill the underlying promissory commitment, this undermines the collaborative ideal that promissory relationships might otherwise foster.<sup>92</sup> Losing these incentives is troubling not only for intrinsic reasons relating to the corrosion of characteristically promissory norms (about promise keeping) and values (about care), but also for the disastrous, systemic consequences for the economy as a whole.

#### IV. CONTRACT AS COMMODIFIED PROMISE: NORMATIVE PRINCIPLES

Given the preceding framework, return to our main question: Which promises should be enforced in contract law? My answer, *Contract as Commodified Promise* (“CCP”), holds as a first approximation:

1. If a promisor and promisee treat the promissory rights in question as subject to market norms (i.e., the promissory rights are commodified), then this fact counts as a strong reason *favoring* the promise’s enforceability in contract law.
2. If the promisor and promisee do *not* commodify the promissory rights in question, then this fact counts as a strong reason *against* the promise’s enforceability in contract law.
3. If the promisor and promisee commodify the promissory rights in question, but those rights should *not*, for

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90. See generally *id.*

91. See generally *id.*

92. See GILBERT, *supra* note 75, at 318; see also Markovits, *supra* note 1, at 1515 (admitting that parties to a contract or promise will “face constant incentives . . . to pursue their own ends more vigorously than coordination allows”).

intrinsic or extrinsic reasons, be commodified, then this fact counts as a strong reason *against* the promise's enforceability in contract law.

Before explaining these principles, let me clarify their motivation. I offer them not as principles *of* contract law that are actually recognized by courts or some other authoritative source of law. CCP asserts normative claims about the way that contract law should be. Now, because it targets contract law and not some other institution, CCP *does* purport to track to some extent what contract law already recognizably accomplishes. So CCP should not introduce a radically different set of norms that, if followed, would render contract law totally unrecognizable as such. Still, we should not expect CCP to simply rubber stamp all existing legal doctrines in any particular jurisdiction, especially given that jurisdictions have differing contract laws and doctrinal wrinkles. Because the framework supplied by CCP is normative, it is not predictive or historical: I make no claims about how the law will develop in the future and provide no event-based causal explanations for the status quo.

#### A. *Claim (1) of CCP: Enforcing Commodified Promises*

To begin, claim (1) holds that if a promise is commodified, then this is a strong reason favoring enforceability in contract law. The support for this claim flows from the market-based instrumental justification for contract law.<sup>93</sup> To see why, notice that if a promissory right is purchased or sold in a transaction, then there is an outstanding performance due. This is just to say that the promisor has sold to the promisee a right to a future performance of an action. But this is exactly the sort of transaction—commercial, commodified promissory rights and obligations—that the instrumental justification seeks to promote in order to facilitate markets and the benefits that come from them.<sup>94</sup> And to ensure that promises will be commodified, it helps that *the promissory rights and obligations themselves* are purchased or sold, since the purchase or sale of anything is a quintessential market exchange. So the instrumental justification provides natural support for claim (1), i.e., that if a promise is commodified, then this is a strong reason favoring its enforceability in contract law.

Why not adopt a stronger thesis, that commodifying a promise involves a necessary or sufficient reason—not merely *a* reason—to

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93. See *supra* Part I.

94. See *supra* Part I.

enforce that promise? The sufficiency claim is easy enough to reject, since other important doctrinal requirements—such as legal capacity—can and presumably should preclude enforcement when they do not obtain.<sup>95</sup> But why not argue that commodifying promissory rights should be a *necessary* condition of enforceability? The short answer involves the theoretical modesty of the current proposal: there may be cases in which enforcing promises is necessary to avoid grave injustice, even if the promise at issue is not commercial in nature (and even here it will usually be an open question whether recovery would be better described in terms of tort, restitution, or some other civil law category). Antenuptial promises may, in some circumstances, fit this description.<sup>96</sup> And although courts enforce premarital agreements, it is noteworthy that these are not wholly devoid of a commercial flavor, and at the same time courts have exhibited discomfort in enforcing all terms of these agreements.<sup>97</sup> This different treatment can be explained, I speculate, by concerns about over-commodifying relationships that reflect understandings and norms at some remove from the commercial realm (though obviously impacted by it).

This is not the last word on the issue of the enforceability of seemingly noncommercial promises. But recall that CCP is primarily a normative theory of contract law, so it does not aim to accommodate every facet of actually existing legal practice.<sup>98</sup> Indeed, the very fact

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95. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981) (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

96. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (“The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”). For discussions on the topic of nonmarital cohabitation, see Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47 (1978); and Anna Stępień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75 (2016). I thank Brian Bix for the Stępień-Sporek and Ryznar reference.

97. See, e.g., *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (“Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.”). *But see* BIX, *supra* note 2, at 124 (“Many states impose procedural and substantive (fairness) requirements on premarital agreements beyond those applicable to conventional commercial contracts.”). See also Katharine B. Silbaugh, *Marriage Agreements and the Family Economy*, 93 NW. U. L. REV. 65, 71 (1998) (observing that premarital agreements that allocate property in the event of a spouse’s death are “the least controversial” form of premarital agreement and have been “almost uniformly enforced if properly executed”); *id.* (“Premarital agreements have never been treated like ordinary contracts . . .”); *id.* at 72 (acknowledging that although “[t]his greatly oversimplifies the situation,” premarital agreements “are usually enforceable with respect to property, often enforceable with respect to alimony, and rarely enforceable with respect to anything else”).

98. Perhaps no theory could. For skepticism about unified theories of contract law, see, for example, BIX, *supra* note 2, at 1, which argues that “approaches to promises and agreements vary too greatly (both in substantive rules and in procedural constraints and remedial options) from one jurisdiction to another, and over time, for any universal theory to be justifiable (for such a

that CCP does not account for every detail highlights places in existing legal doctrine ripe for reform. This major point is taken up later on.<sup>99</sup>

### *B. Claim (2) of CCP: Non-Commodified Promises*

The second claim of CCP is a negative one. If a promise is not commodified, then this is a strong reason against its enforceability in contract law. What justifies claim (2)? Courts and their supporting legal apparatus are costly mechanisms with limited resources supported by the public. To the extent that a contract dispute arises, courts that have jurisdiction should make sure that the dispute is something within the purview of contract law and its core concerns. Given that contract law should primarily concern enforcing commodified promises, courts should only sparingly—if at all—extend their jurisdiction to claims arising from non-commodified promises.

### *C. Claim (3) of CCP: Promises that Should Not Be Commodified*

Recall claim (3): if the promissory transaction between the promisor and promisee involves commodifying the promissory rights in question, but those rights should *not* be commodified, then this fact counts as a strong reason against the promise's enforceability in contract law. The subset of promises that this claim addresses includes those in which the promises at issue *are* commodified but which should not be, for either intrinsic or extrinsic reasons. In short, CCP claims that if there are intrinsic or extrinsic reasons against commodifying a promise, this counts against enforceability.

An obvious threshold worry is that claims (1) and (3) present mixed messages. Under (1), the fact that a promise *p* has been commodified counts in favor of enforcing it—even if *p* should not have been commodified. But under (3), the fact that *p* should not have been commodified counts against its enforcement. Although this conflict may initially have an air of contradiction, normative reasons often conflict in law and life. CCP can go only so far in guiding jurisdictions to make tough choices when claims (1) and (3) provide conflicting answers. Indeed, it is one of the virtues of CCP that it explains what makes some hard cases concerning enforceability so hard. Jurisdictions wrestling with the question of which promises to enforce can get only so far with

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theory to create more benefits and insights than costs and distortions)." See also Brian H. Bix, *Contract Rights and Remedies, and the Divergence between Law and Morality*, 21 *RATIO JURIS* 194, 206 (2008) ("[T]heories that try to put agreements with such different remedies (and different rules) into a single category distort more than they explain.").

99. See *infra* Part V.

CCP; at some point, substantive debates about the weight of the internal or external reasons against commodifying certain promises—debates which largely coincide with debates about the moral limits of markets—must take the reins.

Another threshold worry concerns whether contract law ought to take a normative stand on individuals' choices about whether to commodify certain types of promises. That is, why should the state (in the name of contract law) stand ready to cast judgment about whether certain promises ought to be commodified? One might think that we should leave it entirely up to the parties themselves; the state should play no independent role in passing judgment. This thought presents a serious challenge to CCP's third principle. But notice that it is a fully general one: for any given kind of attempt to buy or sell something, assuming no third parties are harmed by the transaction and no rights are violated, we can still ask whether the state should intervene to prevent that consensual transaction from taking place. Libertarians deny that this is the case.<sup>100</sup> But as noted earlier, this Article does not defend a particular answer to this question, and for all I write, the libertarian position is correct.<sup>101</sup>

If we assume, however, that banning certain commercial exchanges is morally permissible, then it is a short step away to show that declining to enforce *promises* for *extrinsic* reasons will be morally permissible as well. After all, there is no practicable way to agree to the exchange of, say, one's kidney for cash without one of the parties making a promise of future performance (e.g., surgery or payment). The point generalizes: if prohibiting certain commercial exchanges is legitimate, then so is prohibiting the practically necessary *means* by which those exchanges take place. Enforcing promises via contract law would be just one of those practically necessary means. Similarly, if certain promissory transactions undermine the values and norms associated with promissory morality itself—the very morality that commerce depends on—then there will very likely be *intrinsic reasons* to avoid enforcing certain promises, too. To take an extreme example, a promise to fully and irrevocably give up one's power to promise in exchange for cash should not be recognized in courts of law. Further implications are explored below.

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100. See generally BRENNAN & JAWORSKI, *supra* note 47; ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

101. See *supra* Section II.B.

## V. APPLICATIONS

This Part applies the principles articulated in Part IV. Section A argues that they point towards adopting relaxed versions of two doctrines of contract formation, namely consideration and the so-called English Rule. Section B maintains that CCP helps to justify rules of contract formation that defeat validity, including the so-called donative promise rule and the rule against enforcing illegal contracts. Section C reframes recurring debates about contract remedies as debates about over-commodifying promises, explaining how this might make seemingly intractable debates more tractable. Finally, Section D argues that the present pro-market approach to contract law is compatible with deeply skeptical critiques of both boilerplate and the contract-as-product theory of consumer contracts.

*A. Reforming Enforceability Prerequisites*

CCP holds that courts have a reason to enforce commodified promises unless those promises were commodified improperly. This principle allows us to evaluate enforceability doctrines as well as suggest their reform, albeit tentatively.

## 1. An Intent to Be Legally Bound: The English Rule

Some commentators think the answer to the question of which promises ought to be enforced is clear: a promise should be enforceable only if the promisor and promisee both wanted, intended, or consented to enforcement.<sup>102</sup> English law requires, as an independent element of contract validity, that contracts manifest the parties' intention to be legally bound.<sup>103</sup> Following Gregory Klass, I will call this the English Rule,<sup>104</sup> which is generally not a requirement in the United States.<sup>105</sup>

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102. See Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1437 (2009) ("In England, and in most civil-law countries, the existence of a contract depends, at least in theory, on the parties' intent to be [legally] bound."); see also COOTER & ULEN, *supra* note 1, at 286 ("A promise usually should be enforced if both parties wanted it to be enforceable when it was made."); KIMEL, *supra* note 10, at 136–39 (explaining the significance of the contractual intention requirement); T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86, 104 (Peter Benson ed., 2001) (introducing "explicitly normative terms" to explain what is required to form a "voluntary," enforceable agreement); Barnett, *supra* note 21, at 304 ("[T]he phrase 'a manifestation of an intention to be legally bound' neatly captures what a court should seek to find before holding that a contractual obligation has been created.").

103. See *Balfour v. Balfour* [1919] 2 KB 571, 579 (Eng.); Klass, *supra* note 102, at 1437, 1446–48 (discussing *Balfour* and the so-called English Rule).

104. Klass, *supra* note 102, at 1447.

105. RESTATEMENT (SECOND) OF CONTRACTS § 21 (AM. LAW INST. 1981); Klass, *supra* note 102, at 1437. *But see* Klass, *supra* note 102, at 1438 (describing a more complicated picture, given that



The rule, for present purposes, must be understood as an *independent* prerequisite for enforceability. After all, there is a sense in which parties who knowingly satisfy all the requirements for contract formation in the United States thereby manifestly intend that the contract be legally binding.<sup>106</sup> But the English Rule can change the outcome. Parties A and B make an oral agreement precisely because they falsely believe that oral agreements can never be enforced. In the United States, this mistake would not defeat enforceability (since certain oral contracts are binding and because the intent to be legally bound is not a requirement), whereas the agreement very well might be unenforceable in jurisdictions adopting the English Rule.<sup>107</sup>

So does CCP endorse the English Rule as a formal requirement? At first glance the answer would seem to be no, because the Rule is both over- and underinclusive with respect to the goal of enforcing commercial promises. As for overinclusiveness, even apparently noncommercial promises—like a friend’s promise to attend a wedding—might become enforceable, provided that the friends manifestly intended that the promise be legally enforceable. The underinclusiveness problem arises because parties can, in principle, make commercial promises to one another without necessarily giving a thought to whether the promise will be enforceable in law, or otherwise engaging in conduct that conventionally expresses or objectively manifests this thought.<sup>108</sup> If the English Rule provides a proxy for enforcing commercial promises, it looks like a problematic one.

But it is worth noting that CCP actually has the resources to mitigate the overinclusiveness worry. Recall that commodifying a promise involves treating it as subject to market norms.<sup>109</sup> Notice, moreover, that contract law *itself* qualifies as a set of market norms,

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some states, including Pennsylvania and Minnesota, seem to recognize something like an intent-to-be-bound requirement). Consideration might be construed as a proxy for intent, such that fulfilling all the requirements of contract formation (including consideration) thereby demonstrates intent to be legally bound. But like many proxy-for-*x* arguments for legal formalities, a puzzle remains as to why explicitly providing *x* in lieu of the proxy often fails to count as an adequate substitute for that very formality, especially in cases where proving *x* is easy. Here, the question would be why consideration would still be necessary in cases where a party explicitly expresses his intent to be legally bound. Issues in the vicinity are addressed below.

106. See SMITH, *supra* note 1, at 212–13 (explaining distinct situations in which courts require the expression of a positive intent to legally bind parties to a contract).

107. See RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. a, illus. 2.

108. See 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 2.13 (Joseph M. Perillo ed., rev. ed. 1993):

There seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement.

109. *Supra* Part III.

given its instrumental justification as a market-facilitating practice.<sup>110</sup> So if *X* promises *Y* to do something, and if both *X* and *Y* consent or otherwise signal an intent to regulate that promise pursuant to norms of contract law, then they are treating that promise as though it is subject to market norms, and hence, they are commodifying the promise. Accordingly, under CCP's claim (1), this provides a reason favoring enforcement, even if the underlying promise is not apparently a "commercial" promise. If a promisor and promisee both intend that their promise to attend a wedding will be enforceable, silly though that might seem, they have nevertheless commodified the promise and have thereby given courts a reason to enforce it. Thus, although overinclusiveness may present a problem for other conceptions of commerciality, construing commerciality in terms of commodification mitigates the overinclusiveness concern.

But even if there is a thin, formal sense in which the promisor and promisee have "commodified" their promise to attend a wedding, this does not seem like the kind of commercial exchange that a typical commerce-based theory of contract law has in mind. That promise is exactly the kind of noncommercial promise that should be weeded out—or so one might argue. The English Rule remains overinclusive with respect to these kinds of promises, *prima facie* permitting courts to enforce a broad range of apparently noncommercial promises. But even if overinclusiveness is a concern, nothing follows about reforming the English Rule, which states a necessary rather than sufficient condition of enforceability. Further limiting the class of enforceable promises may just as well involve adding another element of enforceability, rather than revising the English Rule to limit that class. The doctrine of consideration, for instance, operates to further mitigate overinclusion.<sup>111</sup> So even if overinclusion is a worry, it is not obvious that this is a sound complaint against the English Rule specifically, or that it supplies an argument favoring its reform.

But underinclusiveness remains a worry from the perspective of CCP. Accordingly, CCP *prima facie* favors reforming the English Rule. Recall that the underinclusiveness problem arises because parties can, in principle, make commercial promises to one another without necessarily thinking about whether the promise will be enforceable in law or otherwise engaging in conduct that manifestly expresses this thought.<sup>112</sup> Strictly applying the English Rule might operate to render these promises unenforceable even though they are patently

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110. As is clear in the text above, I regard this as one of CCP's features rather than as a "bug."

111. For a discussion on consideration in greater detail, see *infra* Section V.A.2.

112. See CORBIN, *supra* note 108.

commercial. This is a problematic implication if the main justification for contract law is to facilitate markets. For this reason, CCP—and, I believe, any market-facilitating view of contract law’s overall rationale—should discourage strict application of the English Rule. By the same token, as I just noted above, when parties regard the promise to be enforceable, this provides a reason favoring enforceability according to CCP’s claim (1).

Given these considerations, CCP recommends reforming the English Rule from a requirement to a defeasible presumption favoring enforceability. That is, courts should recognize a presumption that favors enforcing promises when promisors and promisees intend them to be legally enforceable. The presumption is justified by the aforementioned point: that treating a promise as though it were legally enforceable counts as treating it as subject to market norms, and hence, as a commercial promise that contract law normally stands ready to enforce under CCP (1). That said, because this reason can be defeated or overridden, the English Rule at best justifies a defeasible presumption favoring enforceability.<sup>113</sup>

This is not a radical suggestion. Indeed, as many commentators have observed, English courts do not in fact apply the Rule strictly in cases involving commercial transactions—even if there is little evidence of a manifest intent to be bound.<sup>114</sup> To get around the intent-to-be-bound “requirement,” courts adopt the evidentiary presumption (some might say, the “fiction”) that those engaged in commercial exchanges intend them to be legally enforceable. English courts themselves have in effect demoted the English Rule already—though the demotion takes a different form.

But there are two reasons this workaround seems unsatisfying. First, the evidentiary presumption masks what is really driving the analysis: the commercial nature of the exchange. Indeed, on my view, the reason that intending to be bound favors enforceability is that it involves commodifying, and hence commercializing, the promise—rather than the other way around. So my way of demoting the English Rule has the benefit of removing the mask. Second, the evidentiary presumption does not cover cases, for example, in which individuals

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113. Reasons counseling against enforceability may in certain cases override. *See infra* Section V.D.

114. *See, e.g.,* Klass, *supra* note 102, at 1458:

English courts have adopted evidentiary rules that effectively preclude litigation of the issue in the vast majority of commercial cases, which constitute the vast majority of contract cases. The most important is the presumption that parties to a commercial agreement that satisfies the other elements of a contract intended to be legally bound. (internal citations omitted).

falsely but manifestly *believed* that their commercial exchanges were not enforceable.<sup>115</sup> These cases defeat the presumption. But I take it as a desideratum that a market-facilitating justification of contract law will give courts reason to enforce even these promises, other things being equal. The role of contract law is to facilitate markets, a goal not contingent on commercial participants' knowledge of law.

In sum, the fact that parties agree that a promise is legally enforceable still matters in determining whether the promise has been commodified and hence whether it should be enforceable. The upshot is that according to claim (1) of CCP, a promisor's intent to be legally bound favors enforcing her promise, but does not necessarily justify the English Rule's making this intent an independent legal requirement. CCP recommends downplaying the importance of intent in these jurisdictions, while elevating its role—to the status of a presumption—in jurisdictions (like many in the United States) where it plays only a peripheral role, if any.

## 2. Qualifying Consideration

CCP also recommends reforming the doctrine of consideration from a formal requirement of enforceability, as it is often understood, to a presumption of enforceability. Under the doctrine of consideration, a promise is enforceable only if exchanged for another promise or something of value.<sup>116</sup> A performance or promise counts as consideration if it is “bargained for,” which means that “it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>117</sup>

At first glance, CCP supports a consideration requirement. Quid pro quo exchanges of one thing (especially currency) for another thing are the paradigmatic form of market exchange, so exchanging a promise for something else appears to commodify that promise straightforwardly.<sup>118</sup> But this view faces apparent counterexamples—

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115. CORBIN, *supra* note 108; *see* RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. a, illus. 2 (AM. LAW INST. 1981).

116. 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:8 (4th ed. 2017) [hereinafter WILLISTON ON CONTRACTS] (“It is therefore generally true that promises, in order to be enforceable, need consideration.”); RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (“To constitute consideration, a performance or a return promise must be bargained for.”). *But see* 3 WILLISTON ON CONTRACTS, *supra* at § 7:8 (“There are, however, numerous exceptions to the rule . . . involving formal contract, and . . . contracts enforceable without consideration.”).

117. RESTATEMENT (SECOND) OF CONTRACTS § 71(2).

118. Indeed, David Gamage and Allon Kedem suggest that satisfying the doctrine of consideration's quid pro quo requirement necessarily commodifies promises. *See* Gamage & Kedem, *supra* note 9, at 1302 (“By its very nature, the use of consideration commodifies a promise

especially when courts recognize a valid contract where the underlying transaction seems patently noncommercial. For example, the casebook staple, *Hamer v. Sidway*, involves a promise made by a nephew to his uncle to refrain from “drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age.”<sup>119</sup> The plaintiff-promisee sued his uncle’s estate, which attempted to avoid payment on the grounds that there was no consideration in exchange for the promised payment.<sup>120</sup> The court sided with the plaintiff, holding that by abstaining from exercising his right to use tobacco (etc.), he had traded a legal detriment in exchange for the promised payment.<sup>121</sup>

The difficulty for the claim that quid pro quo exchanges always involve commodification is that the uncle and his nephew seemingly did not have a “commercial” exchange.<sup>122</sup> The promise in *Hamer* occurred between family members and was seemingly motivated by the desire to encourage the nephew’s good habits—far from the profit-seeking motives or wealth-maximizing goals associated with commercial life. *Hamer* therefore presents a prima facie difficulty for a commerce-facilitating conception of the doctrine of consideration. Either it is not obvious that *Hamer* is correctly decided, or the doctrine of consideration potentially licenses courts to enforce promises that are noncommercial. By failing to screen out noncommercial exchanges like *Hamer*, the doctrine of consideration is, in other words, overinclusive as measured by reference to the underlying rationale of facilitating commercial exchanges.

Once we understand commerciality in terms of commodification, we can appreciate how the result in *Hamer* was correct and consistent with a refined notion of a commercial promise. Recall that CCP explicates commercial promises in terms of commodification, which in turn is defined in terms of treating something as subject to market norms, especially the norms governing purchase or sale. On this view, a quid pro quo exchange of cash for something—in the case of contracts, a promise—is as close to a per se commodification as one can get, given that it is a paradigmatic purchase and sale. Cash exchange is

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by insisting that the promise be exchanged for something of value.”); see also *id.* at 1321 (consideration, even nominal consideration, is necessary to commodify a promise).

119. 27 N.E. 256, 257 (N.Y. 1891).

120. *Id.*

121. *Id.*

122. For this assessment of the case, see Kar, *supra* note 65, at 764, which states, “This was not an arm’s-length transaction in a formal market, and the uncle’s motivations in *Hamer* were apparently at least partly altruistic (to help his nephew) rather than purely self-interested.” For a similar view that *Hamer* represents a noncommercial gift promise, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 42 (1992).

important, here, since currency is itself a medium that aims to facilitate commercial exchanges.<sup>123</sup> So I think that *Hamer* can be readily reconciled with CCP, even though it is less obvious whether this is the case when less precise notions like enforcing “market” or “commercial” promises drive outcomes. Still, *Hamer* illustrates nicely how CCP can reconcile the outcome in that case with a view that contract law should enforce commercial promises: by enforcing commodified ones.

But even if CCP can reconcile the market-based justification of contract law, the doctrine of consideration, and the outcome of *Hamer*, strictly applying the doctrine of consideration remains in tension with CCP or any other view according to which contract law first and foremost aims to facilitate commerce. As many have recognized, the doctrine of consideration blocks certain contract modifications.<sup>124</sup> Under the preexisting duty rule, one’s promise to comply with the demands of an existing legal duty does not constitute consideration sufficient to validate a contract modification; the original contractual terms stand and the modifications are unenforceable.<sup>125</sup> But given that contract law aims to facilitate commerce by enforcing commercial promises, the doctrine operates to undermine that very goal in this instance.<sup>126</sup> Another example involves firm offers.<sup>127</sup> These are enforceable, but overzealously applying the doctrine of consideration would preclude their enforcement.<sup>128</sup> So it is little wonder that the

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123. This is not to say motives are irrelevant to assessing whether a transaction involves treating something as subject to market norms. Exchanging a massive tract of land for one dollar represents a gift transaction; the “motive” for this transfer is to use contract law to effectuate a gift transaction. There may be reasons to validate this kind of transfer given CCP, since the parties evidently want their promises to be enforced under contract law—i.e., a set of market norms. *See generally* Gamage & Kedem, *supra* note 9. But, as will be discussed, CCP also warns that there might be reasons against enforcing the same promise depending on whether the commodification itself is morally problematic.

124. *See, e.g.*, Gordon, *supra* note 6, at 288–90 (exploring the benefits of replacing consideration with a good-faith requirement in contracts); Oman, *supra* note 1, at 215 (arguing that contract modifications should not have a consideration requirement because they are market-based transactions).

125. *See, e.g.*, *Contempo Design, Inc. v. Chi. & Ne. Ill. Dist. Council of Carpenters*, 226 F.3d 535, 550 (7th Cir. 2000) (“[T]he pre-existing duty rule states that promising to perform a duty that already is owed under an existing contract is not consideration, and, thus, a modification to the contract is unenforceable.” (citing 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.21, at 497 (2d ed. 1998))).

126. Oman, *supra* note 1, at 215 (“A market-focused view of contract would counsel in favor of allowing such modifications when doing so facilitates market transactions, even if there is no formal bargain.”); *see* Gordon, *supra* note 6, at 288–90 (removing the consideration requirement would “keep the process flexible and serviceable and therefore facilitate economic exchange”).

127. *See* U.C.C. § 2-205 (AM. LAW. INST. & UNIF. LAW COMM’N 2012).

128. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1114 (1984) (“The shortcomings of [the bargain theory] are striking. For example, it unsoundly renders unenforceable such important types of promises as firm offers . . .”).

Uniform Commercial Code disfavors rigid adherence to consideration doctrine for sales contracts.<sup>129</sup>

These criticisms are not new.<sup>130</sup> Indeed, some commentators have gone further, arguing that the doctrine of consideration is so weak that it in effect permits courts to enforce even some gift promises.<sup>131</sup> But this does not mean that, according to CCP, a bargained-for exchange should have no legal import. It should create a rebuttable presumption favoring enforceability, given that bargained-for exchanges paradigmatically commodify the very things that are bargained for. So like the legal-intent requirement, CCP recommends demoting consideration from a requirement to a presumption.

Although CCP favors demoting consideration from requirement to presumption, let me point out how CCP performs better, at least better than vague exhortations to enforce “market” transactions or “commercial” promises, in justifying the results of certain entrenched precedents like *Hamer*. The overly casual claim that “commercial” or “market” promises should be primarily enforced unsettles, in principle, deeply entrenched precedents like *Hamer*. Perhaps that is the right result, all things considered. But it is not a *necessary* ramification of a market-supporting instrumental justification. By supplying the resources to reinterpret *Hamer* as involving commodification—and hence of commercial concern, after all—CCP shows why *Hamer* can coexist with market-based justifications for contract law.<sup>132</sup>

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129. See U.C.C. § 2-209(1) (“An agreement modifying a contract within this Article needs no consideration to be binding.”); Oman, *supra* note 1, at 215 (observing that the UCC “abolish[ed] the consideration requirement for modification of sales contracts”); see also U.C.C. § 2-205 (firm offers are not revocable for want of consideration for the stated time or, if no stated time exists, a reasonable time).

130. Critics include not only those who view contract law as an instrument of commerce. For an extended argument that the doctrine is incoherent, for example, see CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 28–39 (2d ed. 2015).

131. See, e.g., Kull, *supra* note 122, at 64 (concluding that the modern doctrine of consideration amounts to little more than the proposition that promises to make gifts are unenforceable, while casting doubt on even this claim, concluding that “the law would already be surprisingly close to a rule that promises seriously made are legally enforceable”).

132. Gamage and Kedem argue on efficiency grounds that, because it is difficult to satisfy the doctrine of consideration while respecting anti-commodification norms, courts should accept nominal consideration and should not engage in searching inquiries into the adequacy of consideration. See generally Gamage & Kedem, *supra* note 9. They assume that the parties’ intent to be legally bound should determine whether a promise should be legally enforceable. But if the will of the promisor is what matters most, it is unclear why it is worth trying to justify the doctrine of consideration at all, let alone a specific interpretation of it. The present article turns the intent-to-be-bound assumption on its head: the intent to enforce through contract law tells us that the promise has been commodified and hence is eligible for enforcement.

### B. Reinterpreting Enforceability Defeaters

Let us now focus more directly on the question of the reasons contract law *declines* to enforce certain promises. My main claim will be that, even when a promise is apparently commodified, courts will sometimes decline to enforce it for *intrinsic* reasons (referring to the values or norms of promising itself), and *extrinsic* reasons that stand apart from promising. In short, contract law to some extent already embodies CCP's third claim: that courts have a reason to decline to enforce promises that are improperly commodified. To explore these thoughts, this Section highlights doctrines that, I argue, reflect concerns about improper commodification.

#### 1. Donative Promises

Let us focus specifically on so-called donative promises: promises to make a gift to someone else, which the promisee does not rely upon.<sup>133</sup> If I promise to give you a car, full stop, or promise to give you a car in exchange for a nominal sum that is a transparent pretext to ensure that the exchange formally satisfies the common law doctrine of consideration, then courts may decline to enforce that promise. Courts do not enforce donative promises in contract law in the United States.<sup>134</sup>

Does CCP favor reforming this practice? Once again, under CCP, commodifying the promise—treating it as subject to market norms—provides a reason favoring enforceability.<sup>135</sup> And if the promise is not commodified, or is commodified improperly, then this counts against enforceability.<sup>136</sup> A promise to help a friend move to a new apartment, one that is not exchanged for anything, and which both parties do not intend to be legally binding, will not be enforceable if the promisee fails to arrive and the promisor sues. Nothing about this promise is commodified; nothing suggests that the parties treat the promise as subject to market norms. This comports with the donative promise rule so far.

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133. See Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1 (1979) (defining a donative promise as “promises to confer a benefit by gift”).

134. See, e.g., *Schnell v. Nell*, 17 Ind. 29, 30–31 (1861) (declining to enforce promise of \$200 “in consideration of one cent”); *Fischer v. Union Tr. Co.*, 101 N.W. 852, 853 (Mich. 1904) (declining to enforce promise to pay two mortgages of value totaling \$8,000 in exchange for one dollar); *Dougherty v. Salt*, 125 N.E. 94, 94–95 (N.Y. 1919) (declining to enforce gift promise to pay \$3,000 at promisor’s death or before to family member “for ‘value received’”). Notice that these cases would also flout the English Rule, given that the formal requirements for contract formation obtain and that the parties manifestly intended to be legally bound by their promissory commitments, yet the courts nevertheless declined to enforce them.

135. See *supra* Part IV.

136. See *supra* Part IV.



A trickier case involves a promise that the promisor and promisee treat as legally enforceable.<sup>137</sup> By treating the promise as enforceable, they treat the promise as subject to market norms and thereby commodify the promise.<sup>138</sup> In these cases, CCP asserts that there is a reason favoring enforcement.<sup>139</sup> Makers of donative promises can in effect bootstrap their way into making their noncommercial promises presumptively enforceable—that is, of course, unless there are other reasons to defeat or override the reasons favoring enforceability.<sup>140</sup> Without more, and as I already argued, CCP (1) thus suggests that donative promises should be enforceable, provided that promisors and promisees treat their promise as legally binding.<sup>141</sup>

But this is not the end of the inquiry. Recall claim (3) of CCP: that there is a reason against enforcing a promise if doing so somehow involves improperly commodifying a promise.<sup>142</sup> Are there reasons specifically relating to donative promises that cast doubt on whether trying to commodify them is improper? In other words, are there intrinsic reasons against commodifying donative promises? Some writers have thought so, though without using the same terminology. Melvin Eisenberg in effect tries to justify the rule against enforcing donative promises for the intrinsic reason (my words, not his) that commodifying those promises corrupts the values connected to gift giving.<sup>143</sup> After observing that social practices of gift giving are “driven by affective considerations, like love, affection, friendship, gratitude and comradeship,”<sup>144</sup> Eisenberg claims that making a donative promise enforceable would muddy the motivations that a promisor has for keeping her promise, and that it would “never be clear to the promisee, or even to the promisor, whether the donative promise that was made in spirit of love, friendship, affection, or the like, was also performed for those reasons, or instead performed to discharge a legal obligation or avoid a lawsuit.”<sup>145</sup> He claims that enforcing this kind of promise “would have the effect of commodifying the gift relationship,”<sup>146</sup> adding

gifts made pursuant to simple, affective donative promises would be seriously impoverished, because at the point of the transfer, the promisor’s motives would be invariably mixed. . . . [L]egal enforcement of simple, affective donative promises would

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137. *See supra* Section V.A.1.

138. *See supra* Section V.A.1.

139. *See supra* Section V.A.1.

140. *See supra* Section V.A.1.

141. *See supra* Section V.A.1.

142. *See supra* Section IV.C.

143. Eisenberg, *supra* note 10, at 847–48.

144. *Id.* at 847.

145. *Id.* at 848.

146. *Id.*

move the commodity rather than the relationship to the forefront, would essentially convert the promise into a cash equivalent, and would submerge the affective relationship that the gift was intended to totemize. Simple donative promises would be degraded into bills of exchange, and the gifts made to keep such promises would be degraded into redemptions of the bills. To protect a few promisees, and perhaps a few promisors, an enforceability regime would cut off something very important in social life, and harm donative promisors, and even donative promisees, as a class.<sup>147</sup>

In this passage, Eisenberg suggests that the *mere enforcement of a promise* under contract law tends to commodify that promise. This claim is consistent with our earlier one: that, according to CCP, parties who treat a promise as governed by contract law thereby commodify it.<sup>148</sup> In the passage above, Eisenberg adds that commodifying a *donative* promise, in at least some contexts, degrades or undermines the important noncommercial value of that promise. Refusing to enforce thereby *protects* society's interest in having the ability to make promises motivated by altruism<sup>149</sup>—promises that are, as Aditi Bagchi writes, “freely made” and “freely kept.”<sup>150</sup>

Eisenberg focuses on the ways in which some species of promises are intimately connected with altruistic motives and values. Others have also emphasized that certain promises thrive in extralegal social contexts. As discussed in Part IV, some writers observe that paradigmatic promissory relationships occur within the context of close, personal, private, or otherwise intimate relationships.<sup>151</sup> Legal enforceability determines, and hence has the ability to change, a promise's normative character or value. Aditi Bagchi asserts—more generally and independently of the donative promise rule—that norms that apply to commercial promises differ fundamentally from what she calls “private promises.”<sup>152</sup> And we should expect them to: all parties in commercial contexts are normally expected to be motivated to advance their own self-interest, so it is fully appropriate that the norms governing these kinds of promises seek to maximize overall welfare as between two self-interested agents.<sup>153</sup> Dori Kimel also emphasizes the role that enforceability plays in promoting and facilitating the value of

147. *Id.*

148. *See supra* Section V.A.1.

149. Gordon, *supra* note 6, at 286:

The commercial-gift dichotomy . . . distinguishes between transactions based on self-interest, in which the promisor can be presumed to self-protect, and transactions based on altruism, in which the promisor is thinking more about the donee's interests than his own. The law can protect the promisor's interests in altruistic transactions.

150. Bagchi, *supra* note 10, at 710.

151. *Id.* at 726–27; *see also* KIMEL, *supra* note 10, at 57–89; Shiffrin, *supra* note 58, at 497.

152. Bagchi, *supra* note 10, at 710.

153. *Id.* at 722.

maintaining arm's length relationships.<sup>154</sup> This is useful for building trust between contracting strangers, especially where there is relatively little beforehand; but this same function of contracts threatens to create social distance between intimates when the parties raise the prospect of legal enforceability.

Although this is not the place to engage in an extended discussion of Bagchi's and Kimel's views, my main quibble is that they emphasize the wrong things: it is not legal enforceability per se that affects a promise's normative character or value, it is the commodification—i.e., *the application of market norms and expectations to interpersonal relationships and commitments* that does most of the explanatory work. After all, even though marital commitments are in some sense legally enforceable, marriage cements intimate interpersonal relationships rather than rendering them arm's length ones. Closer to the mark is Eisenberg, who points out the ways that commodifying a promise threatens to alter the normative character of the promise itself—such as through degrading gift promises by blotting out the altruistic motives that ideally drive them.<sup>155</sup> Nonenforcement of donative promises not only protects these altruistic impulses, it avoids snuffing out of existence the very donative aspect of the promise that was attempted in the first place.

Again, this is not to say that Eisenberg is correct.<sup>156</sup> But if he is, then according to CCP's claim (3), there is a reason against enforcing donative promises, since doing so would be tantamount to enforcing an improperly commodified promise. And in cases where both parties *want* a donative promise to be enforced, yet that promise is improperly commodified, then there are strong reasons *both* favoring and disfavoring enforcement. CCP itself does not decide how these cases should be resolved as a matter of doctrinal design. But if the legal system holds that the intrinsic reasons against enforcement are weightier, then a strong rule against enforcing donative promises would prevail. Jurisdictions in the United States arguably have this kind of regime. Alternatively, if the system adopts the view that commodifying a promise by the promisor and promisee provides a weightier reason favoring enforceability despite any reasons against enforcement, then no strict rule against enforcing donative promises will be adopted.

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154. KIMEL, *supra* note 10, at 57–89.

155. Eisenberg, *supra* note 143, at 848–49.

156. For doubts about widely assumed distinctions between gifts and exchanges, see generally Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992).

## 2. Illegality and Public Policy

Earlier we saw that some reasons against commodifying promises are extrinsic and derivative, bearing little relation to the value and normative character of promises as such.<sup>157</sup> Rather, extrinsic reasons disfavor commodifying promises because doing so would facilitate exchanges that are improper for other reasons. If one should not sell one's kidneys, one should not sell a promise to do so. Contract law plays no direct role in prohibiting or highly regulating the commodification of kidneys or other bodily organs—or other goods or services that are arguably not properly commodified. Criminal law and other regulatory domains perform that job.<sup>158</sup> Contract law remains primarily about enforcing commercial, commodified promises with the aim of facilitating markets. Courts should remain cognizant of contract law's subject-matter jurisdiction, so to speak.

But contract law is not wholly silent either. It contains doctrines that authorize courts to decline to enforce certain promissory rights that, in effect, are commodified improperly for extrinsic reasons. The most obvious doctrine is that contract terms are void to the extent that they are unlawful.<sup>159</sup> Another doctrine holds that contracts are unenforceable to the extent that they are contrary to public policy.<sup>160</sup> Under both doctrines, kidney sales contracts would not be enforceable. These doctrines authorize courts to decline to enforce promises, in effect, in cases where promises have been commodified improperly—at least as judged by other areas of law. The doctrines ensure that courts do not facilitate certain morally problematic markets.

CCP's third claim can help justify these doctrines. To see why, focus on illegality doctrine. One obvious justification for it flows from rule-of-law concerns. The law should not create self-undermining incentives for unlawful behavior. Recognizing and enforcing contracts according to which parties are required to engage in illegal activity encourages people to form and follow through with unlawful contracts. The rule of law also requires that the state should not place individuals

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157. *See supra* Part III.

158. *See supra* note 8 and accompanying text.

159. *See, e.g.*, CAL. CIV. CODE § 1598 (West 2017) (“Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.”).

160. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948):

The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

under incompatible legal obligations.<sup>161</sup> Contracts with illegal terms do precisely this, since contractual obligations are legal obligations, and illegal contractual obligations are legal obligations to perform illegal acts. Finally, the state should avoid being complicit and dirtying its hands by facilitating unlawful transactions or expressing approval thereof. The state, when it acts, should strive to act with integrity.

All of these considerations play an important role in justifying the rules against enforcing unlawful contracts or contracts contravening public policy. But notice that rule-of-law concerns are not obviously decisive in explaining and justifying those rules. For one thing, neither the goal of avoiding state complicity nor concerns about “dirty hands” automatically yield the conclusion that the state should take no part in validating the underlying transaction. Tax law allows the IRS to collect payment from illegal transactions, despite any concerns about complicity or dirty hands.<sup>162</sup> For the purposes of collecting taxes, the federal government therefore treats these illicit transactions as sources of income. Implicitly, the IRS’s policy allows other arms of law enforcement to regulate the underlying illicit trade.

Contract law could have been designed in the same spirit, ignoring illegality and awarding damages for breaches of these contracts, leaving it to the jurisdiction of the criminal prosecutors to stop illegal trade. A weaker approach would permit courts to provide partial recognition of the promisee’s rights by awarding only nominal damages, yet refusing to award full expectation damages or specific performance. But with few exceptions, contract law does not permit

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161. LON L. FULLER, *THE MORALITY OF LAW* 65–70 (rev. ed. 1969); *see also* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 *LAW & PHIL.* 239, 240–41 (2005) (describing Fuller’s requirement that law avoid contradictory demands as a requirement of the rule of law).

162. *James v. United States*, 366 U.S. 213, 218 (1961) (“It had been a well-established principle . . . that unlawful, as well as lawful, gains are comprehended within the term ‘gross income.’”); INTERNAL REVENUE SERV., *YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 96* (2016), <https://www.irs.gov/pub/irs-pdf/p17.pdf> [<https://perma.cc/DC4N-DT8J>] (“Income from illegal activities, such as money from dealing illegal drugs, must be included in your income on Form 1040, line 21, or on Schedule C or Schedule C-EZ (Form 1040) if from your self-employment activity.”). Of course there are differences: if the overall aim is to deter rather than promote illegal trade, then collecting taxes from illegal income and declining to enforce illegal contracts are not necessarily inconsistent strategies. Taxing illegal income is a way of accounting for it and for ferreting out individuals who fail to pay and to avoid subsidizing it and “punishing” those who earn lawful income. Famously, Al Capone was convicted of tax evasion. Meyer Berger, *Capone Convicted of Dodging Taxes; May Get 17 Years*, *N.Y. TIMES* (Oct. 18, 1931), <http://www.nytimes.com/learning/general/onthisday/big/1017.html#article> [<https://perma.cc/EG9K-LJW9>]. Meanwhile, declining to enforce illegal contracts or even give them public recognition will, in theory, make procurement of these contracts less likely. That said, nominal damages awards for breach of contract in such cases might very well uphold the principle that generally one should uphold one’s promises, yet fails to award meaningful compensation. In turn, nominal damages might provide the accountability and deterrence benefits that collecting taxes from illegal income claims.

courts to enforce illegal contracts or contracts that run contrary to public policy.<sup>163</sup> This is to say that *promises* to perform proscribed activity are not enforceable *in virtue of the fact that* the underlying trade is banned. So rule-of-law considerations do not necessarily tell the whole justificatory story.

This is where CCP might help justify the rule against enforcing illegal contracts. In addition to strong rule-of-law reasons against enforcing these contracts, CCP's third claim—the idea that contract law has a strong reason against enforcing promises that are improperly commodified—also helps to justify the illegality doctrine. The extrinsic reasons that they are improperly commodified might be the very fact that the legal system elsewhere recognizes them as such. Courts that enforce contract law may lack the institutional competence to determine on a case-by-case basis whether this or that good or service should be treated as appropriately subject to purchase, sale, or some other form of quid pro quo exchange. But if another area of law codifies public disapproval of certain markets, then this suggests that the underlying transaction involves improper commodification. The impropriety of (say) selling kidneys provides extrinsic reasons, whatever they are, for refusing to enforce *promises* to engage in this exchange. If so, then CCP's claim (3) provides an additional reason against recognizing enforceability: that because the parties to the contract improperly commodify promissory rights and obligations, the court has a reason not to enforce them. The reasons are extrinsic since they do not bear a close relation to promising per se; they have to do primarily with the propriety of the underlying transaction.

To summarize, rule-of-law considerations are consistent with CCP and may be the most important justification for illegality and public policy doctrines against enforcing promises. But the rule of law does not appear to suffice to explain why courts generally decline to enforce promises rather than to, say, recognize nominal relief in a way that would avoid creating substantial incentives to break the law. CCP helps to close the justificatory gap, serving to amplify the import of rule-of-law justifications, as well as supplementing them with extrinsic reasons against commodifying promises—reasons against commodification recognized by other areas of law.

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163. See, e.g., sources cited *supra* notes 159 and 160. For the exceptions, see 8 WILLISTON ON CONTRACTS, *supra* note 116, § 19:76, which explains:

In some instances, a sound public policy may demand either the enforcement of an executory illegal agreement or the rescission of an executed one, such as when a denial of such relief by the courts would work a forfeiture disproportionate to the social interest supporting the public policy, or result in harm to those for whose protection such agreements are declared illegal.

*C. Debates About Contract Law's Remedies*

The view that contracts commodify promises also offers a new lens through which to view and extend existing debates about contract law's remedies. Without trying to resolve any disagreements, this Section shows how thinking about remedies in terms of over- and under-commodification might open up new avenues for these debates, while mitigating the looming worry that promise theories of contract law are excessively moralistic.

The relevant debates concern the expectation measure of damages and its critics. Expectation damages, the standard default remedy for breaches of contract, aim to provide the monetary benefit of the bargain to the nonbreaching party—to place the promisee in the financial position she would have occupied had the promisor actually performed.<sup>164</sup> Notably, damages are usually awarded even in cases where specific performance might come closer to providing the benefit of the bargain, and even in cases where that performance is still practicable.

One criticism of this arrangement points out that contract law's strong preference for expectation damages (rather than specific performance) fails to adequately protect promissory interests.<sup>165</sup> One version of this criticism focuses on deterrence, emphasizing that promisors willing to pay the price will not be deterred by expectation damages when a better offer comes along, encouraging opportunistic breaches.<sup>166</sup> This criticism gains traction given that contract law makes it difficult to obtain specific performance and strictly declines to award punitive damages, even though both forms of relief would provide additional disincentives for breaching.<sup>167</sup> That is, when one makes a promise, one promises to perform, full stop, not merely to perform or pay damages; a default rule of expectation damages reflects or

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164. See, e.g., *First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan Ass'n*, 610 F.2d 164, 174 (3d Cir. 1979); 24 WILLISTON ON CONTRACTS, *supra* note 116, § 64:1.

165. See, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–24 (2007).

166. See, e.g., *id.*

167. See, e.g., *id.* But sometimes there is an “exception” to the no-punitive-damages rule where there is an independent tort capable of grounding a punitive damages claim. For an early discussion of this exception, see Laurence P. Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L. J. 284 (1959), which traces the origin of the independent-tort exception in the United States to a case decided in South Carolina in 1904. Importantly, Canada has upheld punitive damages awards in exceptional cases, so I must qualify any suggestion that all common law jurisdictions decline to uphold punitive damages awards—at least to the extent that the Canadian cases can be fairly construed to not require an independent tort for recovery of punitive damages. See, e.g., *Whiten v. Pilot Ins. Co.*, [2002] S.C.R. 595, 596 (Can.) (involving “exceptionally reprehensible” conduct of defendant insurance company). I thank Fred Wilmot-Smith for the *Whiten* case.

encourages the judgment that a promise's content is the latter rather than the former.<sup>168</sup>

Another version of the criticism, more distinctively associated with Seana Shiffrin's work, focuses on the rationale sometimes offered to bolster the law's strong preference both for expectation damages and against supercompensatory relief.<sup>169</sup> The rationale, sometimes stated in terms of efficient breach, insists that it is desirable to allow people to in effect buy their way out of contractual commitments, even if parties in a particular contract do not prefer buyouts.<sup>170</sup> As Shiffrin argues, this thought conflicts with the right way to understand the demands of our promissory commitments, which normally must be kept despite better offers that come along.<sup>171</sup> So the reasoning offered by the law in favor of the expectation measure, taken in isolation at least, is strikingly at odds with the moral reasoning of morally virtuous agents, which the law should try to accommodate.<sup>172</sup>

These arguments favor reforming contract law's remedies regime. One proposal recommends a default of specific performance rather than expectation damages, since specific performance (it is claimed) comes closer to protecting promissory rights;<sup>173</sup> after all, promises *require* performance where possible, rather than cash payment.<sup>174</sup> And if making amends for one's broken promise requires bringing about the closest thing to actual performance, then specific performance (where possible) still looks like the most-favored remedy from the promissory perspective. Indeed, some promise theorists and

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168. Efficient breach theory drew early inspiration from Holmes, *supra* note 64, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."). *But see* Perillo, *supra* note 64, at 1090 ("[I]t has become commonplace to tie the economists' notion of efficient breach to the towering legal authority of Holmes, who is incorrectly cast as articulating the idea of a *right* to breach a contract.").

169. *See, e.g.*, Shiffrin, *supra* note 66, at 162–64; Shiffrin, *supra* note 165.

170. *See* Klass, *supra* note 64, at 367 (claiming that the "simple theory" of efficient breach sought to provide a justification for expectation damages as a default remedy); *see also* Markovits & Schwartz, *supra* note 67 (denying that efficient breach involves a "breach" by reinterpreting contractual obligations as disjunctive obligations to perform or pay compensation).

171. *See* Shiffrin, *supra* note 66, at 164 ("Whereas the contract is supposed to represent a voluntary relation between parties, the efficient breach argument permits the seller to dictate the terms to the buyer and to unilaterally shift to the promisee the task of securing a substitute performance.").

172. *See* Shiffrin, *supra* note 165, at 727–29.

173. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 160 (2002) ("Based on their rationales for the promise-keeping notion, one might imagine that the theory's proponents would have a preference for a remedy of specific performance—requiring the contract to be performed—for such a remedy amounts to a requirement that the promisor keep his word.").

174. *But see* Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009) (arguing that an account of promissory morality grounded in personal sovereignty justifies expectation damages as the default remedy).



their critics share this view about what promise-based theories of contract law should imply.<sup>175</sup>

Taken as “merely” moral concerns, these criticisms and calls for reform may fall on deaf ears. Although Shiffrin has carefully argued that the state must accommodate the morally virtuous without necessarily enforcing moral virtue directly,<sup>176</sup> one may still worry about excessive moralism in the realm of commercial contracts. Or, as others have argued, one may claim that morality’s demands in the market context simply *differ* without doing so in a pernicious way.<sup>177</sup> But if we express the promise theorist’s worries about the design of contract law in terms of concerns about the proper scope of the market, these same elisions seem more difficult to accept, at least if we accept that the state plays a legitimate role in regulating markets and limiting commodification. The legitimacy of regulating putatively interpersonal *promises* lies, in part, on reformulated versions of the promise theorist’s criticisms, stated in terms of the state’s legitimate power to reasonably regulate market transactions.

So how do we articulate commodification-based objections to contract law’s remedies framework to avoid excessive moralism? Consider a trilemma grounded not primarily in the claim that contract law’s remedial regime fails to adequately protect promissory rights, but rather in the claim that that regime either over- or under-commodifies those rights.<sup>178</sup>

Begin with the first horn of the trilemma: the idea that contract law fails to adequately respect the nature of promissory rights *qua* commodities. This horn needs an additional, contestable assumption to

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175. See, e.g., Klass, *supra* note 64, at 367 n.14 (“Many authors assume or argue that the morality of promising recommends specific performance, disgorgement, or punitive damages for breach.”); Shiffrin, *supra* note 165, at 722–23. Originally, Charles Fried claimed that expectation damages supplied the most natural remedy for breach of contract. See FRIED, *supra* note 130, at 18. But this opinion was repeatedly criticized. See, e.g., KIMEL, *supra* note 10, at 95 (criticizing Fried’s “neglect of specific performance”); see also KAPLOW & SHAVELL, *supra* note 173, at 160, 161 n.18 (pointing out that although promise theorists of contract should “have a preference for a remedy of specific performance—requiring the contract to be performed—for such a remedy amounts to a requirement that the promisor keep his word,” Fried “does not even mention specific performance as an alternative to expectation damages”). Fried eventually agreed with this criticism. See Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961, 968 (2012) (“Both the moral criticism and the economic defense of expectation damages persuade me that I had overstated the case for the connection between the promise principle and expectation damages . . .”).

176. See Shiffrin, *supra* note 165.

177. See KIMEL, *supra* note 10, at 22–27; Bagchi, *supra* note 10.

178. At the risk of oversimplifying, there is some indication that Shiffrin’s critique is shifting to a concern that contract law is in a sense too “privatized,” language that resonates with the worry about over-commodifying promises. See Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407 (2016) (arguing against overzealous enforcement of remedial clauses).

get going: that *all commodities are property*. If so, then contract law protects these proprietary rights very weakly as compared to others in a way that undermines their status as such. That is, the first horn insists that contract law does not treat commodified promissory rights in the same way it treats other commodities as a form of property rights, suggesting that these rights receive second-class treatment *qua* commodities.

Let me explain. Assume for the sake of argument that all commodities—all things available for purchase or sale—are a form of property.<sup>179</sup> Now notice the standard civil remedies available for violations of property rights. Protection of property rights—both tangible and intangible—is associated with readily available injunctive relief.<sup>180</sup> If someone is trespassing on land, intentionally or not, a court order permitting the forcible removal of the trespasser is available as a matter of course.<sup>181</sup> Even intellectual property rights are routinely protected by injunctive relief: courts may order the destruction of illicitly printed books.<sup>182</sup> And property rights, when willfully violated, can be enforced with punitive damages.<sup>183</sup>

But if contractual rights are simply a form of property rights, then the common law treats them incongruously. Punitive damages are *not* available in contract, even for intentional or opportunistic breaches of contract.<sup>184</sup> Once again, injunctive relief (specific performance) for

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179. Some scholars ground their theories of contract law in this assumption. *See, e.g.*, Peter Benson, *Contract As a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007); Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009).

180. Guido Calabresi and Douglas Melamed famously regarded the availability of injunctive relief as an earmark of property rules, according to which one's entitlement may not be divested except via voluntary exchange; protecting an entitlement with an injunction allows courts to undo nonvoluntary divestitures. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1116 (1972).

181. *See id.* at 1116, 1127.

182. 17 U.S.C. § 502(a) (2012) (permitting courts to issue reasonable injunctions to protect copyrights); 17 U.S.C. § 503(b) (permitting courts to order the destruction of infringing copies or phonorecords); 17 U.S.C. § 506 (articulating criminal offenses for copyright infringement).

183. *See* Calabresi & Melamed, *supra* note 180, at 1124–27.

184. *See* BIX, *supra* note 2, at 99 (“There are three measures of money damages available, from which the plaintiff must usually make an election: expectation damages, reliance damages, and restitution.”); *see also* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994) (observing a “limitation on available [consequential] damages [like that for punitive damages]” and opining that the limitation “serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise”). As an aside, this is not a compelling rationale. First, we might simply fix a percentage of punitive damages by reference to the underlying expectation damages to enhance predictability, and second, it is not obvious why we should worry about commercial certainty for opportunistic breachers. For the latter point, *see* Solène Rowan, *Reflections on the Introduction of Punitive Damages for Breach of Contract*, 30 OXFORD J. LEGAL STUD. 495, 500 (2010), which argues that “[p]redictability would be unaffected for upstanding businesses which aim to discharge their

nonperformance of contractual obligations is the exception, not the rule; the standard remedy is expectation damages. This is incongruous if promissory rights are construed as a form of property rights; it is tantamount to allowing the breaching party to appropriate the promisee's property without consent.

Of course these features of contract law are peculiar to (most) common law jurisdictions. Civil law jurisdictions, at least formally, appear more receptive to imposing specific performance and punitive damages.<sup>185</sup> So if contractual promises are commodified promises, and if commodities are a form of property, then we have a *prima facie* case in favor of adopting a civil law approach to contract law remedies. Doing so better respects property rights and their consistent treatment under law—and, ironically, also involves strengthening contractual rights in precisely the ways advocated by promise theorists like Shiffrin.

So much for the first horn of the trilemma, which essentially argues that contract law under-commodifies promissory rights. Now consider the second horn, which insists that contract law's remedies currently over-commodify those rights. Recall that some promise theorists worry about either creating incentives for opportunistic and/or efficient breaches or embracing rationales endorsing these kinds of breaches. The overarching worry is that someone willing and able to pay her way out of a commitment will simply pay the price to do so at her discretion. As noted above, this promotes or expresses the wrong kind of attitude towards promissory obligations, which (unless otherwise stipulated) are promises to perform, full stop, not promises to perform or purchase a buyout.<sup>186</sup> Because the worry expressed here points out the risks of commodifying promises in a way that tends to undermine respect for central features of promissory morality itself, this represents an intrinsic reason against commodifying promises in this way. Ironically, on this view, *strengthening* contractual rights reflects a way of reining in over-commodification that threatens to degrade or corrupt promissory practices. Indeed, something like a commodification critique resonates with the kinds of concerns that

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contractual obligations. Those in wilful default, in contrast, are not deserving of certainty and should not be heard to complain.”

185. See 25 WILLISTON ON CONTRACTS, *supra* note 116, § 67:1 (“In some civil law jurisdictions, specific performance is a substantive right, and is the preferred remedy for the breach of a contract.”).

186. For an intriguing discussion of the possibility that all awards of damages, even in the torts context, risk commodifying rights violations, see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993). *But see* ZAMIR & MEDINA, *supra* note 26, at 111 (using money damages awards as evidence against the claim that there is any “necessary link between monetization and commodification”).

Shiffrin has recently raised in her work on remedial clauses, which raises concerns about the “overprivatization” of contract law.<sup>187</sup>

The first two horns of this trilemma, though mutually incompatible, employ worries about commodification that put pressure on contract law’s status quo remedial regime. But a defender of the status quo need not accept either of the first two horns. Consider this argument: perhaps the common law remedial regime is *itself* designed to prevent improper commodification. One concern motivating weak enforcement of specific performance, and nonenforcement of punitive damages, is the risk of routinely allowing plaintiffs to force individuals to perform certain personal services contracts against their will. This looks like forced labor.<sup>188</sup> And this treads too closely to paradigmatic examples of improper commodification, like bonded labor and chattel slavery. More generally, where proprietary rights in another person’s labor are concerned, there is good reason for the remedies used to *enforce* those rights not to be too rigorous. Contract law should not be used to enlist others in de facto slavery or indentured servitude, or anything close to that. The commodification that contract law indulges—the fact that labor is turned into expectation damages or reliance damages in lieu of actual court-enforced labor—actually aims to *prevent* improper commodification, rather than to undermine proprietary rights.

Again, it is not my present aim to settle the dispute between those who endorse a more robust enforcement regime and those who think that the current array of remedies in common law jurisdictions works just fine. But notice that defenders of the status quo arrangement risk being Panglossian. This is the third horn of the trilemma. It might be surprising to think that the current array of remedies in the United States reflects the best or optimal degree of commodification of promissory rights, given how historically path-dependent and contingent they are.

Admittedly, accusations of excessive conservatism or optimism confront any defender of the status quo, so this may not be a terribly worrisome objection—especially for those interpretive theorists who aim to accommodate as many entrenched features of law as possible.<sup>189</sup> The more limited goal of this has been to open up new argumentative avenues by rethinking remedies in terms of commodification and its

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187. See Shiffrin, *supra* note 178.

188. This is a standard worry about overzealous use of specific performance. See, e.g., 12 CORBIN, *supra* note 108, § 65.25 (remarking that specific performance risks “involuntary personal servitude”).

189. See, e.g., Kar, *supra* note 65, at 799–804 (advocating an interpretive theory of law that aims to preserve and account for the doctrine of consideration rather than seek its reform).

moral limits. At a minimum, my hope is that the proffered recharacterization of the remedies debates undermines idle dismissals of promise theory's excessive moralism. Moralism is no more a problem for contract theory than it is for commodification debates generally. Recognizing this counts as progress.

#### *D. Debates About Boilerplate and the Contract-as-Product Model*

The preceding discussion ignores boilerplate contracts, which are ubiquitous and make possible a dizzying variety of market exchanges. They represent an extreme form of commodification of the practice of promising, so much so that they expose an inherent tension between the market function of contract law and its promissory foundation. This tension has been long recognized in one form or another, so the observation I make here in some ways will not be novel. My main goal in this Section is to show how, despite presupposing a pro-market, instrumental justification for contract law, and despite accepting that there is a reason to enforce boilerplate terms, CCP also preserves room for boilerplate skeptics who raise moral concerns about boilerplate practices.

A useful place to start is by laying out a challenge to boilerplate contracts and presenting a conception of boilerplate, so-called contract-as-product theory, that tries to answer that challenge.<sup>190</sup> The challenge comes from the fact that voluntary choice is not only a requirement for contract formation but also plays a vital role in justifying holding contracting parties legally accountable for their contractual commitments.<sup>191</sup> The difficulty is that "accepting" boilerplate terms often looks like only a very weak approximation of voluntary choice, at best.<sup>192</sup> Often it is simply implausible to assert that we have committed to the terms deeply embedded in the fine print, terms that we not only know nothing about but which it would be irrational to try to understand.<sup>193</sup> So justifying boilerplate practices appears to require

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190. Rather than purporting to accurately represent the historical development of the boilerplate-as-product theory in the academy, this reconstruction serves as an expository device.

191. See, e.g., FRIED, *supra* note 130; RADIN, *supra* note 1, at 15 ("[O]ur system is committed to the moral premise that justifies our legal structure of contract enforcement, that premise being that people who enter contracts are *voluntarily* giving up something in exchange for something they value more."); Barnett, *supra* note 21.

192. See RADIN, *supra* note 1, at 82–98 (arguing that autonomy theories, including consent theories and others grounded in voluntary undertakings, lack the resources to explain why we should treat boilerplate terms as binding on consumers).

193. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 3, 8 (Omri Ben-Shahar ed., 2007) ("The novelty of the present analysis is that the same contract forms that are widely assumed to be based on consumer ignorance can be shown to be consistent with competition

something beyond consenting to commitments. There are other critiques of boilerplate,<sup>194</sup> but this one focuses on the problem of ignorance about one's voluntarily assumed commitments and assumes that at a certain point ignorance surrounding those commitments—including their content—is incompatible with their being binding or valid.<sup>195</sup> Boilerplate contracts' routine enforcement by courts has undermined the central role of consent in contract formation and the justification of contract law as a whole. Margaret Jane Radin calls this the problem of “normative degradation.”<sup>196</sup>

Contract-as-product represents one of the main responses to this challenge. Product theorists argue that we should think of boilerplate as part of the circuitry or other intrinsic properties of the product or services we purchase.<sup>197</sup> We do not know much about the technology that makes our laptops work or the code that makes our software run, for example, yet we somehow manage to purchase them successfully at a certain price that fits our willingness and ability to pay.<sup>198</sup> Boilerplate terms just represent further “circuitry” or “software” that make the purchase possible at the desired price. Imposing more functionality on the laptop than the manufacturer is willing to insert on its own may be possible. But that comes at a steep price, literally; gone is our desired price, since often the manufacturer will pass on to consumers the costs of the extra functionality. Similarly, treating boilerplate differently

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under conditions of full information.”). It is uncontroversial that people do not read boilerplate. *See, e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1753 (2014) (“It is now a given that we live in a world in which boilerplate terms are ubiquitous yet unknown, ever present and never read.”).

194. *See, e.g.*, RADIN, *supra* note 1, at 33–51 (arguing that boilerplate leads to democratic degradation because important rights granted by a democratic polity become appropriated by drafters of boilerplate and replaced with a “law” favorable to firms).

195. Omri Ben-Shahar has argued that ignorance is not the problem because, even in the absence of boilerplate, most of us would be ignorant about the law's default rules and cases that govern our agreements absent express choice. *See* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 892 (2014) (reviewing RADIN, *supra* note 1 and calling the problem of ignorance a “distraction”). There is something to this argument, but it seems too quick as presented, as it ignores the possibility that ignorance about our own special obligations and interpersonal commitments that are voluntarily undertaken may pose a special problem, one that calls into question the validity or existence of those obligations or commitments, morally speaking.

196. RADIN, *supra* note 1, at 15. Interestingly, Oman acknowledges consent is “less central” to boilerplate and contractual liability. *See* OMAN, *supra* note 4, at 156. But there is a tension with this stance and the essential role that consent still plays in contract doctrine and theories justifying this aspect of the doctrine, as well as with his acknowledgment that contract law should avoid facilitating undesirable market practices. *See id.* at 160–81.

197. *See, e.g.*, Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006) (raising “the boilerplate puzzle” about why our ignorance of boilerplate terms should raise any special concern as compared to that raised by our ignorance of certain intrinsic features of a product); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970).

198. *See* Baird, *supra* note 197, at 933.

than any other term involves redesigning the software of the contract in a costly way that consumers probably do not want, if it means higher prices.<sup>199</sup>

Construing boilerplate terms as part of the product itself tries to immunize boilerplate against critiques that draw from promise and consent theories.<sup>200</sup> Ignorance is no longer a problem: we are ignorant of the code that makes our software work. Nor is voluntary assent to specific terms: the only relevant assent is to the product-plus-terms in exchange for a given price. How that package is made possible is neither here nor there from the consumer's perspective, absent deception, fraud, or coercion. Boilerplate terms are just absorbed into the product itself.

So what does the framework of CCP have to say about all this? Presumably CCP endorses the enforcement of boilerplate terms.<sup>201</sup> Not only does boilerplate ostensibly involve exchanging promises for a price, but contract-as-product construes these promises as if they have the same metaphysical status as commodities in the narrowest and perhaps most familiar sense—as if these promises were tangible goods that are fungible and produced precisely for the purpose of market exchange. Therefore, insofar as boilerplate commodifies promises, CCP *prima facie* recommends enforcing them just like any other commodified promise.

But this is far from the end of the story. CCP also provides a framework for, and is consistent with, a more skeptical stance towards

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199. For a related discussion of the “price effect,” see Ben-Shahar, *supra* note 195, at 895–96.

200. This does not, of course, entail that boilerplate practices are immune from criticism, full stop. Indeed, rather than resisting the boilerplate-as-product analogy, some prominent boilerplate critics have embraced it, arguing that *ex ante* regulation and public standardization of some consumer products—e.g., consumer safety standards applicable to toasters and toys—should likewise apply to “financial products” and other mass market contracts. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 4 n.1 (2008) (identifying “financial consumer products as a subcategory of consumer products” and “mirror[ing] the well-known argument about the collapse of the contract-product distinction,” and calling for greater regulation of consumer financial products partially on those grounds); see also Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, <http://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/ST5F-JNFH>] (comparing regulations applicable to home-destroying toasters to those that apply to home-destroying mortgages). If boilerplate terms are products like toasters and toys, this eliminates the pretense that ordinary interpersonal commitments—and their attendant norms—provide special reasons to resist *ex ante* public regulation. To see why, notice that if we model boilerplate on arm's length commitments between consenting adults, external intervention by the state initially smacks of worrisome restriction on our freedom to contract, or of paternalism. But if we model boilerplate as consumer products, regulating these products to promote “public safety” seems far less controversial—at least no less controversial than making sure our toys and toasters are not chock-full of lead or likely to explode.

201. To this extent, CCP's verdict accords with that of OMAN, *supra* note 4, at 158–59 (asserting that a market-based foundation for contract law should generally enforce boilerplate terms).

enforcing boilerplate terms, especially as interpreted by contract-as-product theory. That theory asks us to treat promissory rights and commitments, which govern exchanges between firms and persons, as absorbed by products being exchanged. Treating commitments this way, either theoretically or in practice, suppresses the promissory commitment that contractual terms are supposed to represent. The more we conceive of contract terms as stitched into the fabric of goods we purchase, the less obvious it seems that the norms that govern promises—or commitments more generally—govern those terms.

Consider one norm undermined by boilerplate and the contract-as-product theory that supports it. For a promisor to make a promise or commitment, she must at least be in a position to know that she is entering into a binding commitment. This is a quite weak constraint on a theory of promising or committing.<sup>202</sup> Call this the *notice requirement*. That is, if one is not even in a position to know that one is making a binding promise (whether or not one has knowledge of that commitment), it is doubtful that one can make a promise, let alone a binding one.

The notice requirement plays an important, if often overlooked, role in allowing us to *avoid* commitments, ensuring freedom *from* commitments. But if boilerplate commitments are just like product attributes that consumers are not in a position to know about, then boilerplate “commitments” do not satisfy the notice requirement. At its logical extreme, the contract-as-product analogy implies that someone handing you a t-shirt on the street may very well succeed in binding you to certain terms—i.e., a requirement to disclose your email address. You would not know the thread count of the shirt, after all, so why would entering into a wholly unknown commitment be any different? So contract-as-product theory appears consistent with erasing the notice requirement, an important constraint on the formation of a valid commitment.

The t-shirt example is extreme but not that far from reality. Consider “ripwrap” or “rolling” boilerplate. In ripwrap contracts, which purport to bind consumers to terms upon tearing open packaging containing new products, consumers are not in a position to know those terms until they commit to them, and they are often not even in a

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202. Indeed, many accounts of promising hold stronger views, requiring that promisors and promisees share actual knowledge of the content of the proposed commitment. *See, e.g.*, T.M. SCANLON, WHAT WE OWE TO EACH OTHER 295–97 (1998) (arguing, roughly, that promissory commitments depend on a promisee’s having been assured that the promisor will undertake some future action); Erik Encarnacion, *Reviving the Assurance Conception of Promising*, 48 J. VALUE INQUIRY 107, 123 (2014) (defending a principle of promissory morality according to which forming a binding promissory commitment depends on a would-be promisee’s knowing something about a promisor’s intentions).



position to know that ripping open packaging constitutes a form of acceptance to a set of commitments.<sup>203</sup> Consumers that sign rolling contracts commit to terms before they even see them, receiving them later by mail.<sup>204</sup> Although some alleged “notice” is offered, it is often so weak so as to stretch the concept to its breaking point.<sup>205</sup> And the lack of notice is beside the point: notice is not supposed to *substitute for* actual commitment, promissory or otherwise.<sup>206</sup> The notice requirement, as I have articulated it, serves only as a *normative constraint on the validity* of that commitment. So if it is true that there is something like a notice requirement implicit in all morally valid commitments, it is doubtful whether some forms of boilerplate satisfy that requirement. The logical terminus of contract-as-product theory, when put into practice, degrades a crucial moral and conventional norm governing promissory commitments and commitments more generally.

What does this mean with respect to CCP? To the extent that these boilerplate practices (ripwrap, at least) and justifications (contract-as-product theory) erode this notice norm, this serves as an intrinsic reason against commodifying promises in this way, in the sense of “intrinsic” I have already discussed. This, in turn, means that CCP would recognize a reason against enforcing this kind of boilerplate agreement.

I have focused on contract-as-product theory and two types of boilerplate contracts that represent extreme manifestations of that theory. But there are other intrinsic (and extrinsic) reasons against over-commodifying promises that apply to boilerplate more generally.<sup>207</sup> For present purposes it nevertheless remains important to notice how, although CCP does provide a reason to enforce boilerplate (given they involve commodified promises), CCP also allows for countervailing reasons against enforcing certain forms of boilerplate commitments. This means, perhaps surprisingly, that endorsing market-based instrumentalist justifications for contract law does not require enthusiastically rubber stamping boilerplate commitments or

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203. See KIM, *supra* note 11, at 3.

204. RADIN, *supra* note 1, at 11.

205. See *id.* at 93 (“A fortiori, it would at least take a lot of mental gymnastics to argue convincingly that constructive notice is really tantamount to consent.”).

206. See *id.* (“But ‘having an opportunity’ [to read boilerplate terms] does not come near to consent to the divestment.”).

207. See, e.g., RADIN, *supra* note 1. Another avenue for inquiry would examine how boilerplate transforms the rationality of investigating one’s commitments. Plausibly, it is not irrational to investigate the nature and scope of one’s commitments, but boilerplate manages to make this investigation wholly irrational, since we cannot change boilerplate terms even if we do not like them, and because the important legal rights that are often deleted—such as the right to a jury trial—would be invoked only in the unlikely event that something goes wrong.

even having a particularly sanguine view about them. Equally important is that the zenith of promissory commodification—i.e., contract-as-product theory—also counts as its nadir as a form of interpersonal commitment.

### CONCLUSION

Contracts commodify promises. My overall view marries an instrumental, market-based justification for contract law and a promise-based one. The instrumental justification for contract law holds that contract law aims to facilitate markets *by* enforcing promises. This answers one of the main stock objections to promise theories: why enforce promises? The answer is: because doing so facilitates market economies. The instrumental justification also points towards an answer to the second stock objection: which promises should be enforced? The answer: primarily *commercial* promises.

Much of this Article has taken great pains to explicate the idea of a commercial promise in terms of a commodified promise, thereby enabling me to articulate the core doctrines of Contract as Commodified Promise. The doctrines were threefold. First, the fact that a promise has been commodified provides a reason favoring its enforcement in contract law; second, the fact that a promise has not been commodified, or (third) has been improperly commodified, provide reasons against enforceability. Although I present CCP as a view that holds independently of any particular jurisdiction's contract law, some of the view's plausibility does depend on the justification it provides for some deeply entrenched and useful doctrines of contract law, such as the rules barring enforcement of illegal contracts. The argument is thus, in part, interpretive: part of the support for the doctrine comes from its ability to make sense of aspects of legal doctrine that I take to be justifiable.

But if there is one overall takeaway, it is this: recognizing that contracts involve commodifying not just underlying goods or services, but also promises themselves, helps tie together promise-based theories of contract law with commerce-oriented ones, while also opening up new terms of debate between them. Contract as Commodified Promise does this in a way that neither denigrates the import of commercial concerns for contract law nor chides promise theories of contract law for excessive moralism. And surprisingly—as the discussion of contract-formation doctrines and the enduring debates about remedies show—Contract as Commodified Promise provides argumentative resources in favor of doctrinal reform. Robust normative theories should supply these resources.

That said, although commodifying promises is a welcome and necessary means of forming and sustaining modern market societies, there remains a tension at the nexus of promising and commodifying. We saw this tension at work in our brief evaluation of boilerplate. Using the lens provided by Contract as Commodified Promise, we identified ways in which boilerplate and its justifications risk encouraging over-commodifying promises by disregarding important notice requirements that apply to all commitments, promissory or otherwise. In any event, whether understood as a unifying thesis, interpretive lens, normative source of guidance, or way of rethinking moral critiques of contract law, Contract as Commodified Promise counts as a framework worthy of further consideration.