1-1-1996

Bankruptcy as a Revolutionary Concept: Good Faith Filing and a Theory of Obligation

Linda J. Rusch
Hamline University School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Linda J. Rusch, Bankruptcy as a Revolutionary Concept: Good Faith Filing and a Theory of Obligation, 57 Mont. L. Rev. (1996). Available at: https://scholarship.law.umt.edu/mlr/vol57/iss1/2

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
BANKRUPTCY AS A REVOLUTIONARY CONCEPT: GOOD FAITH FILING AND A THEORY OF OBLIGATION

Linda J. Rusch

I. INTRODUCTION

Bankruptcy is a revolutionary concept. Obligations created and enforced according to other legal doctrines are excused and altered. Congress has enacted a bankruptcy statute that places very few explicit barriers to a debtor's access to this obligation altering procedure. The courts have responded to the open availability of bankruptcy by erecting a barrier to relief that requires the petition to be filed in good faith. Commentators have discussed whether such a barrier should exist and how it can be justified. To be confirmed, a reorganization plan must be filed in good faith. 11 U.S.C. §§ 1129(a)(3), 1225(a)(3), 1325(a)(3) (1994). In each of the reorganization cases under Chapters 11, 12, or 13 listed above, the court implied a good faith filing requirement in addition to the good faith confirmation requirement. Good faith at plan confirmation focuses on the terms of the plan and the debtor's conduct during the case whereas the good faith filing requirement is directed at the debtor's conduct prior to petition or in the early stages of the case. See 5 COLLIER, supra, ¶ 1129.02[3][a][ii], at 1129-32 to 1129-34.

* Associate Professor of Law, Hamline University School of Law; J.D. 1983, University of Iowa College of Law. I am grateful for the comments of Pat Bauer, Ed Butterfoss, Marie Failinger, Robin Magee, David Moss, Ken Salzberg and Howard Vogel on earlier drafts. Thank you to all members of the Hamline University School of Law faculty who commented on these ideas at a faculty colloquium.

2. See infra notes 18-31 and accompanying text.

good faith should be defined. This article attempts to explain why the courts might feel compelled to erect a barrier to relief in addition to the explicit statutory requirements that Congress put in place.

The courts’ compulsion to erect a barrier to bankruptcy use is puzzling if law is viewed as a tool to further a client’s interests. A careful lawyer would look at the advantages and disadvantages of filing a bankruptcy petition to address the problems at hand and advise the client accordingly. In most areas of com-

---

mercial law and practice, however, the statute is neither the starting nor the ending point in determining acceptable conduct in the particular situation. In addition to the statutes and common law doctrines, parties to transactions and their lawyers look to standards of commercial dealing and fairness in attempting to define acceptable conduct in any given transaction. For example, in the Uniform Commercial Code, a major source of non-bankruptcy commercial law, the foundational concept is the legitimation of reasonable conduct as determined by nonstatutory standards of moral conduct. Those nonstatutory standards of conduct are in turn based upon unwritten value and belief systems regarding acceptable commercial practices.

Similarly, the relationship that exists between debtors and creditors is both bounded and defined by a mixture of legal rules and human expectations regarding how the parties should behave toward each other and third parties. When a party files bankruptcy, the legal rules governing permissible behavior change. Although the legal rules may change, human expectations regarding permissible behavior do not magically change when one party files a bankruptcy petition. Rather, the changes in legal rules that run against previously existing expectations cause divisiveness, conflict and charges of abuse.

One usual behavioral expectation between debtors and creditors is linked to the idea of obligation. A debtor is said to owe an obligation to a creditor and a creditor may owe an obligation to a debtor. The concepts of owing and obligation imply that the party owing the obligation will and should fulfill that obligation. The bankruptcy process allows alteration of previously


8. The idea of a creditor having an obligation to a debtor can be seen clearly in the area called lender liability. For a description of many of the theories of lender liability, see Bruce E.H. Johnson, Lender Liability Litigation Checklist: A Summary of Current Theories and Developments, 59 UMKC L. REV. 205 (1991).

existing obligations.\textsuperscript{10}

The good faith filing requirement which the courts impose as a barrier to that obligation altering procedure raises the following basic question: What values and beliefs shape the imposition of an obligation and what values and beliefs justify altering an obligation? By explicitly identifying those values and beliefs that appear to support the concept of obligation and how current bankruptcy law may run counter to those values and beliefs, one can demonstrate the genesis of charges that a debtor lacks good faith, or is substantially abusing the bankruptcy process. Lack of good faith or substantial abuse are code words for describing human behavior that runs counter to normative behavioral expectations founded on deeply held, but not much discussed, values and beliefs.\textsuperscript{11} Expectations about "proper" human behavior


\textsuperscript{11} See Lawrence Ponoroff, \textit{Evil Intentions and an Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time}, 1993 Wis. L. Rev. 1439, 1443-49 (drawing connection between principles of morality and bankruptcy preferences); Joseph W. Singer, \textit{The Reliance Interest in Property}, 40 Stan. L. Rev. 611, 624-28 (1988) (values and beliefs have always been part of legal discourse even
in the area of obligation center around values and beliefs regarding individual autonomy, proper restraints on autonomy, human rationality, and the possibility of human progress. The courts appear to use the good faith filing requirement as a tool for determining whether the bankruptcy filing is acceptable debtor conduct based upon those nonstatutory values and beliefs.

Placing the good faith filing requirement in the context of values and beliefs regarding obligation is helpful in at least two ways. First, placing the good faith filing requirement in the context of values and beliefs about obligation may help the courts be more thoughtful in their analysis of good faith. If courts identify why the good faith filing requirement is taking place, that knowledge might help to shape the inquiry as well as prompt consideration of whether the inquiry should take place at all. For

if not explicitly recognized as such); Linda J. Rusch, Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope—Stepping into the Fourth Dimension, 55 MONT. L. REV. 9 (1994) (differing values and beliefs are at stake in the bankruptcy theorists’ arguments about the vision of bankruptcy).

12. See infra notes 171-224 and accompanying text. This article does not advocate that the values and beliefs that provide the foundation for obligation are necessarily morally right or morally required. Nor does this inquiry take the position that such identified values and beliefs are the only relevant considerations that should be on the table for discussion. Finally, this inquiry does not mean that once this exercise is over, we will have a blueprint for constructing a bankruptcy law that will eliminate the charge that a bankruptcy filing is “abusive.” In other words, this inquiry is not a reductionist inquiry based on limited guiding principles that can be applied cleanly and quickly to come to a determinative result. Normative expectations about “proper” human behavior are much too contextual, open-ended and fluid for such a reductionist approach. See Steven D. Smith, Reductionism in Legal Thought, 91 COL. L. REV. 68 (1991).

13. This article acknowledges that arguments about legal rules are based in part upon unarticulated and hidden values and beliefs. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 115-17 (1985) (beliefs, morals and ideals must be taken into account in law); LIEF H. CARTER, REASON IN LAW 8-13 (4th ed. 1994) (relationship between legal reasoning and values). By acknowledging the first premise above and openly talking about values and beliefs, we are not doomed to radical indeterminacy and the death of the concept of the rule of law. Rather, openness to that discussion can lead to a more robust and honest debate about our normative expectations for “proper” human behavior. See JOHN A. EISENBERG, THE LIMITS OF REASON: INDETERMINACY IN LAW, EDUCATION, AND MORALITY (1992) (indeterminacy is inevitable); Allan C. Hutchinson, Democracy and Determinacy: An Essay on Legal Interpretation, 43 U. MIAMI L. REV. 541 (1989) (arguing that indeterminacy is inherent in law and not fatal to democratic values); Christopher L. Kutz, Note, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 YALE L.J. 997 (1994) (explaining that indeterminacy not fatal to rule of law concept); Francis J. Mootz, III, Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible, 61 TENN. L. REV. 69 (1993) (explaining that indeterminacy not fatal to rule of law concept); Eric J. Segall, Justice Scalia, Critical Legal Studies, and the Rule of Law, 62 GEO. WASH. L. REV. 991 (1994) (analyzing relationship between rule of law concept and indeterminacy).
example, how can it be bad faith to file for the purpose of altering one particular obligation when the entire structure of the bankruptcy statute allows a debtor to file in order to alter obligations? 14 Second, evaluating bankruptcy as a scheme for altering obligations may help Congress, when it considers bankruptcy reform, 15 to gain perspective on how bankruptcy might better accord with those values and beliefs so as to minimize the charge that filing bankruptcy is abusive behavior. 16

Part II explains both the statutory requirements of a bankruptcy filing and the courts' good faith analysis. In Part III, the dominant theories in contract, tort, and property are examined to identify the arguments made to justify imposing obligations. Part IV then identifies four major values and beliefs that are common to the justification arguments examined in Part III and uses those four major values and beliefs to synthesize a theory of obligation. In Part V, this theory of obligation is used to shed light on the courts' imposition of a good faith filing barrier to bankruptcy relief.

II. THE GOOD FAITH FILING REQUIREMENT

A debtor can file a voluntary petition under any one of four chapters 17 of the Bankruptcy Code. 18 Chapter 7 is designed as a liquidation process 19 and Chapter 11 is designed as a reorganization process. 20 Chapters 12 and 13 are also reorganization processes designed for particular types of debtors. 21

14. See infra note 233 and accompanying text.
16. If values and beliefs are identified that cut across major legal categories, it seems that structuring a bankruptcy law to cohere with those values and beliefs might be possible. Although coherence with existing values and beliefs does not in and of itself justify a law, such coherence might be a necessary first step in justification in a non-positivist sense. See Randy E. Barnett, The Virtues of Redundancy in Legal Thought, 38 CLEV. ST. L. REV. 153, 155 (1990) (arguing that when all modes of analysis converge, then we have more confidence in the correctness of the result).
17. A fifth chapter, Chapter 9, allows municipalities to file for reorganization. 11 U.S.C. § 109(c) (1994). Because a Chapter 9 filing involves a government entity, the considerations involved in determining whether a filing is allowable are sufficiently distinct from the thesis of this article to exclude Chapter 9 from further consideration. See Michael W. McConnell & Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. CHI. L. REV. 425 (1993).
19. 4 COLLIER, supra note 3, ¶ 700.01.
20. 5 COLLIER, supra note 3, ¶ 1100.01.
21. 5 COLLIER, supra note 3, ¶¶ 1200.01, 1300.02.
To file a voluntary bankruptcy petition, the debtor must fulfill very few requirements. For all petitions, a debtor must reside, be domiciled, have a place of business, or have property in the United States. Congress did not require that debtors who file voluntary petitions meet any financial insolvency tests.

Each chapter has some minimal restriction on who can be a debtor under that particular chapter. To file a Chapter 7 petition, the debtor must not be a railroad, an insurance company, or a lending institution. To file a Chapter 11 petition, the debtor must meet the Chapter 7 criteria, except that a railroad may file a Chapter 11 petition but stock and commodity brokers may not. A family farmer with regular income is the only entity allowed to file a Chapter 12 petition. An individual with regular income and noncontingent, liquidated, unsecured debts less than $250,000 and noncontingent, liquidated, secured debts less than $750,000 may file a Chapter 13 petition.

Each chapter also has a provision that allows the court to dismiss the filed petition. Chapter 7 petitions can be dismissed either "for cause" or if the court finds in the case of an individual debtor that owes primarily consumer debts that relief under Chapter 7 would be substantial abuse of the provisions.

23. An involuntary petition will result in an order for relief against that debtor under 11 U.S.C. § 303(h) only if:
   (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or
   (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.
29. 11 U.S.C. § 707 (1994). In Chapter 7 consumer cases, the court has the explicit authority to dismiss the petition for substantial abuse under § 707(b). See David L. Balser, Note, Section 707(b) of the Bankruptcy Code: A Roadmap with a Proposed Standard for Defining Substantial Abuse, 19 U. Mich. J.L. Ref. 1011 (1986);
Chapters 11, 12 and 13, a petition can be dismissed "for cause." Courts have used the open ended concept of "cause" to require that the petition be filed in good faith.

The courts have struggled with how to define good faith. The key inquiry seems to be whether the debtor is abusing the


30. 11 U.S.C. §§ 1112(b), 1208(c), 1307(c) (1994). In each of these chapters, cause includes but is not limited to the inability to reorganize.

31. Determining whether to dismiss a petition for bad faith "requires a difficult distinction between permissible and impermissible motives. Debtors often wish to shelter whatever assets they can from their creditors and the Bankruptcy Code permits them to do so." First Nat'l Bank v. Kerr (In re Kerr), 908 F.2d 400, 404 (8th Cir. 1990). As the Seventh Circuit Court of Appeals stated in In re James Wilson Assocs., 965 F.2d 160 (7th Cir. 1992):

What should count as bad faith in this setting is unclear. It is not bad faith to seek to gain an advantage from declaring bankruptcy—why else would one declare it? One might have supposed that the clearest case of bad faith would be filing for bankruptcy knowing that one was not bankrupt, but the Bankruptcy Code permits an individual or firm that has debts to declare bankruptcy even though he (or it) is not insolvent. . . . The clearest case of bad faith is where the debtor enters Chapter 11 knowing that there is no chance to reorganize his business and hoping merely to stave off the evil day when the creditors take control of his property.

Id. at 170.

As categorized by one commentator examining Chapter 11 cases, the courts generally use one of three tests. See Cuevas, supra note 5. Some courts use an objective and subjective test. Id. at 529-31. The objective component is that the debtor had no reasonable prospect of reorganizing. The subjective component is filing with the intent to harm creditors or abuse the integrity of the bankruptcy system. Id. at 529. Some courts use only the subjective test and hold that a petition is filed in bad faith if the debtor filed the case with the intent to harm creditors or misuse the Chapter 11 process. Id. at 529, 532-34. Finally, some courts use a totality of the circumstances test. Under this test, the courts examine all of the facts and circumstances of the case to determine whether the debtor is abusing the process or the filing undermines the integrity of the system. Id. at 535. Courts using this approach develop lists of the factors that are badges of bad faith and compare the facts in the case to this list of factors. If enough factors are present, then the case is filed in bad faith. Id. at 536-37.
process. Many commentators have sought to identify fact patterns which typify an abuse of the bankruptcy process. The inquiry here, however, is to explain why the courts feel compelled to scrutinize the debtor's behavior to determine whether the debtor is abusing the process. By seeking an explanation for that compulsion in obligation theory, the issues of whether a good faith filing requirement should exist and the appropriate analysis for such a requirement can be more fully understood.

III. OBLIGATION IN LEGAL THEORY

Obligation is the label we attach to the conclusion that something "ought" to happen. In constructing a theory of obligation in law, the first step is to offer reasons why that some-

32. Ordin, supra note 5, at 1796. The following quotes are representative samples of language the courts use. In a Chapter 7 case, the court in Industrial Ins. Servs. v. Zick (In re Zick), 931 F.2d 1124, 1129 (6th Cir. 1991) quoted McLaughlin v. Jones (In re Jones), 114 B.R. 917 (Bankr. N.D. Ohio 1990) for the following:

The Bankruptcy Code is intended to serve those persons, who, despite their best efforts, find themselves hopelessly adrift in a sea of debt. Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors.

114 B.R. at 926. In a Chapter 11 case, the court in Elmwood Dev. Co. v. General Elec. (In re Elmwood Dev. Co.), 964 F.2d 508, 510 (5th Cir. 1992) stated: "The good faith standard protects the integrity of the bankruptcy courts and prohibits a debtor's misuse of the process where the overriding motive is to delay creditors without any possible benefit, or to achieve a reprehensible purpose through manipulation of the bankruptcy laws." In a Chapter 12 case, the court in Euerle Farms, Inc. v. State Bank (In re Euerle Farms, Inc.), 861 F.2d 1089, 1092 (8th Cir. 1988) stated: "The filing of a bankruptcy petition without the intent or ability to properly reorganize is an abuse of the Bankruptcy Code and renders the petition subject to dismissal" (citing In re Turner, 71 B.R. 120, 123 (Bankr. D. Mont. 1987)). In a Chapter 13 case, the court in In re Love, 957 F.2d 1350 (7th Cir. 1992) stated: "[T]he focus of the good faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." Id. at 1357.

33. See supra note 5 and accompanying text. Professors Ponoroff and Knippenberg recognized this fact in their seminal article on good faith filing as a sentinel of bankruptcy policy. Ponoroff & Knippenberg, supra note 5, at 947. They discussed in depth how the courts should determine whether the debtor's conduct is acceptable in a Chapter 11 filing. Id. at 970-91. They posit that the case is initially identified as suspect if it does not deal with multiple defaults and limited assets. Id. at 975. The courts should then closely scrutinize the case based upon two considerations: intent and impact. Intent takes into account the sum of the motives that prompted the filing. Impact takes into account the effect on the community and whether the adversities that prompted the filing could be addressed adequately in another forum. Id. at 976-77.

34. SMITH, supra note 9, at 65.
thing, whatever it is, ought to happen.\textsuperscript{35} Those reasons become part of the justification of the obligation. Those reasons are, in turn, based upon various values and beliefs.\textsuperscript{36}

A person incurs a debtor or creditor obligation that the legal system enforces in areas artificially divided into contracts, torts, and property.\textsuperscript{37} Each area of legal rules so divided comes complete with theorists who attempt to explain why contract, tort and property legal rules should create legally enforceable obligations.

These justification theories are constructed on two levels. The first level asks what principles justify enforcing these types of obligations in general. For example, contract theory at the general level is concerned with the question of whether a promise or conduct of one party should result in a contractual obligation of that party to another.\textsuperscript{38} Tort theory at the general level is concerned with whether any obligation is justified when a person is harmed when two or more persons interact.\textsuperscript{39} Property law\textsuperscript{40} at the general level is concerned with whether one party

\textsuperscript{35} Id. at 47-48. For an interesting discussion on the role of giving reasons in law, see Frederick Shauer, \textit{Giving Reasons}, 47 \textit{STAN. L. REV.} 633 (1995).

\textsuperscript{36} SMITH, supra note 9, at 40.


\textsuperscript{39} See infra notes 75-103 and accompanying text.


\begin{quote}
Property and contract rights are not self-defining. In allocating them, we must often choose between competing principles: between title and possession, between contract and reliance, between freedom and security, between voluntariness and duress. There is simply no way to derive logically the inherent meaning either of contract or of property because each contains
\end{quote}
is under an obligation to accede to the will of another regarding allocation or use of resources.41

At the specific level, justification theory focuses on whether an obligation should be recognized in the context of a particular fact situation. For example, in contract theory, justifications at the specific level center on the question of whether a contractual

within it an accommodation between the contradictory claims of freedom and security. Every entitlement implies a correlative vulnerability of others. This is the Hohfeldian lesson: for every benefit there is a cost; for every entitlement, there is a correlative exposure. . . . Because all legal rights protect some interests at the expense of other competing interests, we must choose whom to protect and whom to leave vulnerable. Property and contract rights do not define themselves for us. We cannot define them without reference to controversial political and moral commitments.


41. See infra notes 104-37 and accompanying text. Conflicting claims to resources come about because resources are scarce. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 31-32 (1988); Carol M. Rose, Property Right, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach, 57 TENN. L. REV. 577, 584-85 (1990). Resolving claims about resources requires some system of allocation of those resources. WALDRON, supra, at 32. Property regimes are the systems used to resolve disputes about resource allocation. Id. Viewing property law at that level of abstraction allows the relationship between the concept of property and the concept of obligation to become apparent. Property regimes give authority to claims that people "ought" to accede to the will of one person or entity regarding the allocation of that resource. Baker, supra note 40, at 742-43. Whenever the concept of "ought" is used, the issue is one of obligation. SMITH, supra note 9, at 26.

Jeremy Waldron has described three types of property regimes: private property, collective property, and common property. Private property regimes are "organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual." WALDRON, supra, at 38. That particular individual has the right to "determine how the object shall be used and by whom." Id. at 39. Collective property regimes allocate property with "a social rule that the use of material resources in particular cases is to be determined by reference to the collective interests of society as a whole." Id. at 40. These regimes allocate use based upon the use most conducive to collective social interest. Id. Common property regimes allocate property based on the principle that "each resource is in principle available for the use of every member alike" and utilize some procedure for determining how to allocate property for use by particular individuals on particular occasions. Id. at 41. In each of these different types of property regimes, individuals who want to use resources will have to accede to the will of the deciding entity regarding the resource. The primary property regime in the United States is the private property regime. Id. at 16-18. The remaining discussion will be concerned with the justification for a private property regime.
obligation should be recognized in a particular fact situation. In torts, the theorists debate about what type of obligation should be created in different fact situations, for example, negligence based obligations or strict liability based obligations. In property, the debate is about what justifies a particular allocation of the resource that then results in the general obligation to accede to the will of the person to whom the resource is allocated.

Those theories are interesting, not for the truth of the matters asserted, but for what light the theories shed on the values and beliefs that animate those theorists' conceptions of those types of obligations. This examination provides a method of constructing a theory of obligation based upon those identified common beliefs and values that cuts across artificial legal doctrinal lines. The following discussion will demonstrate that the theoretical debates about obligation creation and expectations about “proper” human behavior center around values and beliefs regarding individual autonomy, proper restraints on that autonomy, human rationality and human progress. These underlying values and beliefs can then be used to shed light on the courts’ compulsion to erect a barrier to the obligation altering bankruptcy process.

A. Justification of Obligation in General

At the general level, theorists in contracts, torts and property attempt to justify enforcing obligations for two types of reasons. The first type of reason is that enforcing obligations creates a societal good. The other type of reason is that enforcing obligations is necessary to respect the individual’s moral right or ethi-

42. See infra notes 138-46 and accompanying text.
43. See infra notes 147-60 and accompanying text.
44. See infra notes 161-70 and accompanying text. Whether a society chooses a private property regime, has a defensible method of allocation, and consciously assigns attributes to the concept of ownership, is a questionable point. Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1397-1400 (1993). A high level of artificiality exists when speaking of “justifications” for the existing state of affairs. The type of justifications made, however, provide insight into societal values and beliefs.
45. As values and beliefs change over time, theorists’ perceptions of why such rules create legally enforceable obligations also change. Likewise, values and beliefs in different cultures lead to different rationales for enforcing legal rules regarding obligations in those cultures. This article will concentrate on the contract, property and tort justification theories that have been proposed in the legal traditions of the United States in the last century.
cal development, regardless of the effect of such enforcement on society at large.

1. Contracts

Justification theory at the general level has advanced both social good and individual good as reasons for the enforcement of contractual obligations. Two examples of justification theories that rely on a social good as the reason for enforcing contractual obligations are the utilitarian theory and the law and economics theory. The justification theories that advance an individual good focus on the respect for individual autonomy.

Utilitarian accounts of the binding nature of promises focus on the social good that results from human cooperation. Enforcing promises facilitates human cooperation by generating reliance on and trust in promises. A particular promise need not generate actual reliance to be enforceable. Rather, the probability of reliance and the fact that reliance in general is to be encouraged provides a sufficient basis to make the promise enforceable.

The law and economics theorists focus on the social good of efficiency, with efficiency defined as wealth or welfare maximization. Enforcing contracts maximizes wealth or welfare. Parties to contracts agree to an exchange based on their own self-interest to maximize their own wealth or welfare. In addition, the ability to enforce exchanges enhances welfare and wealth for society as a whole because resources are put to the best use through the exchange of the resource to the person who is willing to pay the most for the resource. Using this ratio-

46. P.S. Atiyah, Promises, Morals, and Law 31 (1981); see also Richard Craswell, Contract Law, Default Rules, and the Philosophy of Promising, 88 Mich. L. Rev. 489, 509-10 (1989). (Both Rawls and Finnis use considerations of human cooperation as part of the background values of social good.)
47. Atiyah, supra note 46, at 32.
48. See id. at 39-40, 63.
52. Id.
53. Id. According to Judge Posner, a leading law and economics theorist, "[T]he
nale, contracts in general should be enforced because such enforcement maximizes economic wealth.

Theorists who justify the enforcement of promises based upon the respect for individual moral rights, as opposed to a societal good, focus on the concept of individual autonomy. Two theorists who advance autonomy-based theories are Charles Fried and Randy Barnett.54

Fried's theory to justify enforcement of promises in general is rooted firmly in the tenets of freedom from interference, self-determination, and responsibility.55 The enforcessibility of a promise rests on something other than benefit to another, reliance by another, or a communication of intention to another.56 Benefit, reliance or communication are neither necessary nor sufficient to justify enforcing a promise even though they normally are present when promises are enforced.57 The additional concepts which are necessary and sufficient for enforcing promises are the values of individual autonomy, and trust in and respect for others.58 In Fried's words:

In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make nonoptional a course of conduct that would otherwise be optional for me. By doing this I can facilitate the projects of others, because I can make it possible for those others to count on my future conduct,

fundamental function of contract law... is to deter people from behaving opportunistically toward their contracting parties, in order to encourage optimal timing of economic activity and... obviate costly self-protective measures.” RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1, at 91 (4th ed. 1992).

54. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 57 (1981) (“The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be.”); Randy E. Barnett, A Consent Theory of Contract, 86 COL. L. REV. 269, 297 (1986) [hereinafter Barnett, Consent Theory] (arguing that contract law is part of the concept of entitlements which has the function of “facilitating freedom of human action and interaction”); see Charney, supra note 50, at 1823 (stating that enforcement promotes autonomy of persons by enabling them to bind themselves to a promise); see also Randy E. Barnett, Some Problems With Contract as Promise, 77 CORNELL L. REV. 1022, 1023-24 (1992) [hereinafter Barnett, Contract as Promise] (describing Professor E. Allan Farnsworth's and Professor Samuel Williston's promotion of a will-based conception of contract).

55. FRIED, supra note 54, at 7-8. See Barnett, Contract as Promise, supra note 54, at 1023-24 (arguing promise theory implements liberal principles of freedom to contract and freedom from contract).

56. FRIED, supra note 54, at 11.

57. Id. at 9-11.

58. Id. at 13, 16-17.
and thus those others can pursue more intricate, more far-reaching projects. If it is my purpose, my will that others be able to count on me in the pursuit of their endeavor, it is essential that I be able to deliver myself into their hands more firmly than where they simply predict my future course.

... An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.59

Fried's theory of the binding force of promise is necessarily subjective because it is based on the principle of autonomy from the perspective of the promisor.60 To impose an obligation in the absence of a subjective promise would violate the autonomy principle.61

Barnett, on the other hand, advocates an autonomy-based theory that has both objective and subjective components.62 His consent theory of contracts is based upon entitlements theory.63 Entitlements theory based on individual rights is used "to define the boundaries within which individuals may live, act, and pursue happiness free of the forcible interference of others."64 Contracts is that body of law used to transfer entitlements and to enforce those transfers.65 Once someone holds an entitlement, the holder's consent is a necessary prerequisite to be legally obligated to transfer that right.66 This consent requirement protects the promisor's individual autonomy over the right to the entitlement.67

59. Id. at 13, 16 (citations omitted).
60. See id. at 89 (explaining that even though contract duties may arise on a background of social convention, the search is still for the parties' actual agreement).
61. Barnett, Consent Theory, supra note 54, at 272; Charney, supra note 50, at 1825.
63. Id. at 292.
64. Id. at 291.
65. Barnett, Consent Theory, supra note 54, at 295. Before contract law can be used to transfer entitlements, those entitlements must be vested in someone. Id. at 297. That original vesting is not a matter of contract law, but a matter of property law. Id. at 296 & n.113, 297 & n.115.
66. Id. at 297-99.
67. Id.
Fried and Barnett part company on the issue of whether a binding obligation should be created if the parties do not actually subjectively agree to be bound. Fried would say that a promise has not been made and thus no contract obligation exists. Barnett would look not only at the subjective agreement or non-agreement of the parties but also at the objective indications of an agreement between the parties. Thus Barnett defines consent as a "manifestation of an intention to alienate rights." Even though a party may not have the actual subjective intent to be bound, a contractual obligation arises if the party has by word or contract manifested an intent to be bound. Barnett portrays the objective portion of the consent definition as integral to the protection of "the rights and liberty interests of others." Thus, Barnett views autonomy from the perspective of the promisee as well as the promisor. Whether or not a person has manifested an intention to be bound depends in large part on community conventions regarding language and conduct.

2. Tort

In tort theory, the justification issue at the general level is whether an individual should be obligated to another party who has been injured in an interaction between the two parties. Justification theorists use either a social good or an individual good

68. See FRIED, supra note 54, at 88-89. Fried, however, does not discount the possibility that non-contractual principles such as reliance and restitution might provide recovery. Id. at 89-90.

69. Barnett, Consent Theory, supra note 54, at 301.

70. Id. at 304.

71. Id. at 305-06.

72. Id. at 306.

73. See id. at 307.

rationale to support imposing a tort obligation. Two social good justifications that have been advanced are reducing the cost of accidents or spreading the risk of loss among all members of society.\(^{75}\)

Law and economics theorists focus on accident cost reduction in imposing tort liability. The goal of tort law should be to achieve the optimal level of accidents.\(^{76}\) Tort liability should be imposed when the cost of accidents is more than the cost of avoiding the accident at the margins.\(^{77}\) Rational people will want to avoid accidents when the cost of accidents is more than the cost of safety.\(^{78}\) Imposing liability will encourage people to exercise the proper amount of care.\(^{79}\) The concept of causation serves to connect the injured person with the actor in order to achieve the proper balance of social costs and benefits to influence the parties' behavior.\(^{80}\) This economic explanation is not concerned with preventing all accidents, only with internalizing and balancing of the relative costs and benefits of accidents to

\(^{75}\) These are not the only two instrumental justifications offered. For example, one author has advanced the position that tort law is a dispute resolution mechanism that operates when one party has violated social norms. Steven D. Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987).


\[ \text{Expected accident costs and accident costs must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety.} \]

*Posner, supra note 53, § 6.1, at 164.*

\(^{78}\) Weston, *supra* note 76, at 931. The law and economics school of thought is thus squarely within the utilitarian mode of justification. Steiner, *supra* note 77, at 45. As Professor Fletcher wrote in describing tort liability in the 19th century: "The test for justifying risks became a straightforward utilitarian comparison of the benefits and costs of the defendant's risk-creating activity. The assumption emerged that reasonable men do what is justified by a utilitarian calculus, that justified activity is lawful, and that lawful activities should be exempt from tort liability." George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 563-64 (1972).

For a criticism of the tort liability system as an inefficient mechanism for creating the optimal level of human behavior, see Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CAL. L. REV. 555, 559-90 (1985).

\(^{79}\) *Posner, supra* note 53, § 6.2, at 167-68.

achieve the optimal level of accidents.\textsuperscript{81}

A different social good is achieved through loss spreading. This justification focuses on tort liability as a mechanism to spread the loss suffered in an accident across society as a whole rather than letting the cost lie where it originally fell.\textsuperscript{82} The mechanisms for such loss spreading are not necessarily hinged to any sort of factual causation analysis that connects the actor to the injured party, but could be accomplished through mechanisms such as insurance or administrative regulation.\textsuperscript{83} Loss spreading results in a social good since injured persons are compensated without the expenditure of resources in proving causation or fault.\textsuperscript{84} Proponents of this conception of the social good advocate far reaching reforms of the tort system because of perceived inconsistencies between the goal of loss spreading and current tort doctrine.\textsuperscript{85}

Several theorists advance justifications for imposing tort liability based moral grounds.\textsuperscript{86} These theorists often employ variants on the idea of corrective justice.\textsuperscript{87} Corrective justice as a justification for imposing tort liability can be defined in various ways,\textsuperscript{88} but a common definition is that a party who wrongfully imposes losses on another party is bound to provide a remedy to the injured party for those wrongful losses.\textsuperscript{89} The flexible word

\begin{itemize}
  \item \textsuperscript{81} Weston, supra note 76, at 932; Neil K. Komesar, Injuries and Institutions: Tort Reform, Tort Theory, and Beyond, 65 N.Y.U. L. Rev. 23, 26 & n.9 (1990). For a critique of this rationale, see Sugarman, supra note 78, at 559-90 (critiquing economic view as overemphasizing the real deterrent effect of imposing liability); Howard A. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 CAL. L. Rev. 677 (1985) (critiquing economic view that posits that people are informed rational cost benefit analysts in making decisions about their behavior).
  \item \textsuperscript{82} Weston, supra note 76, at 939-41; Sugarman, supra note 78, at 591-603 (critiquing the current tort system as an inefficient means of loss spreading combined with compensation of the injured party).
  \item \textsuperscript{83} Weston, supra note 76, at 939-41. But see Ellen S. Pryor, The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation, 79 VA. L. Rev. 91, 139-41 (1993) (criticizing one aspect of the insurance theory used to decide what risks a person would want to insure against).
  \item \textsuperscript{84} Weston, supra note 76, at 940-41.
  \item \textsuperscript{85} See Weston, supra note 76, at 942-47; Sugarman, supra note 78, at 648-64 (advocating combination of government taxes to provide compensation to injured and to spread the loss and government regulation to provide proper level of safety).
  \item \textsuperscript{86} Weston, supra note 76, at 957.
  \item \textsuperscript{88} Wright, supra note 87, at 627-29.
\end{itemize}
“wrongful” allows theorists to ascribe different meaning to that word and thereby develop different justifications for imposing tort liability.

Stephen Perry focuses on causation and fault to define “wrongful” and justifies imposing liability if causation and fault exist. He argues that injury in tort is a setback to one’s personal autonomy. Both the person who inflicted the injury and the person who suffered the injury are responsible for that injury because both have personal autonomy to act in such a way that injury results. This idea of responsibility is causally based. But that responsibility alone is an insufficient reason for shifting the loss from the injured party to the other person involved in the injury. According to Perry, the moral principle justifying shifting such losses is fault.

90. Richard Epstein has advanced the view that physical causation determines whether the loss is wrongful. This view is based on underlying premises of absolute property rights and individual autonomy. Richard A. Epstein, Causation—in Context: An Afterword, 63 CHI-KENT L. REV. 653, 654 (1987) [hereinafter Epstein, Causation—in Context]. When someone interferes with those rights through the use of physical force, Epstein argues that the actor should be liable for the resulting losses. Richard A. Epstein, A Theory of Strict Liability: Toward a Reformation of Tort Law 22-29 (1980); Weston, supra note 76, at 970, 972. Epstein also has argued that the concept of assumption of the risk is a “central limitation on the role of causation in general tort theory.” Epstein, Causation—in Context, supra, at 674. The causation concept is most important in cases involving strangers. The ability of parties to contract about the allocation of risk reduces the role of pure causation in imposing liability and applies to many cases including products liability and medical malpractice. Id. at 675.

91. An early proponent of a theory based upon these ideas was George Fletcher. George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537 (1972). He argued that tort liability was imposed when the actor imposed a non-reciprocal level of risk on others. The principle at the base of this liability was that all individuals have the right to roughly the same degree of security from risk. Compensation was required whenever the distribution of risk injured someone who was subject to more than that person’s fair share of risk. Id. at 550-51. The concept of fault connected the party causing the harm with the need to compensate for that harm. Id. at 551. Determining fault depended upon what type of behavior could be fairly demanded from an individual in that situation. Id. at 553.

92. Perry, supra note 87, at 498.

93. See Perry, supra note 87, at 498.

94. Id. at 497-98.

95. Id. at 499. Jules Coleman advocates a view that causation is what determines whether the agent should repair the wrongful loss. He states: Corrective justice imposes on wrongdoers the duty to repair the wrongful losses their conduct occasions.

... What grounds that duty? ... The duty to correct the losses derives not from the agent’s having done the wrong as such, but from the losses being in an appropriate sense the agent’s responsibility. They are the consequences of agency: the agent’s causal powers. They are his fault.

Coleman, supra note 89, at 442-43.

96. Perry, supra note 87, at 499. Coleman argues that “[t]he wrong does not
Notions of fault are based on "epistemic considerations, in the form of belief in or actual or constructive knowledge of causal irregularities . . . ."97 One such belief is that people have control or the possibility of control over their actions.98 Another belief is the existence of a primary moral obligation "not to intentionally or knowingly harm or attempt to harm the person or property of another, or to intentionally or knowingly subject either his person or property to a substantial degree of risk of harm . . . without justification for doing so."99 This moral obligation provides a reason for imposing responsibility for the injury on the person who is causally connected to the injury and said to be at fault using this principle.100

Ernest Weinrib finds justification for shifting losses from one party to another by comparing the fundamental principles of Aristotle's conception of corrective justice to the fundamental principles of tort law. Aristotle's idea of corrective justice is based upon equality of persons and the nature of relationships as bipolar.101 Weinrib argues that the fundamental ordering concepts used in imposing tort liability are the bipolar relationship of the parties and causation which provide the link between the two parties involved in the interaction.102 Weinrib argues that the principles of corrective justice can be used to justify tort obligations because corrective justice is based upon the same bipolar, causation and equality principles.103
In sum, both Perry and Weinrib use causation as a fundamental concept to connect the injurer to the injured party in tort law. Perry advances the further principle of fault based upon not subjecting others to an unreasonable risk of harm. Weinrib, however, focuses on the bipolar relationship and equality of persons to justify imposing liability on another person for harm.

3. Property

In property theory, the justification issue at the general level is whether others should be obligated to respect an allocation of resources to an individual, that is, the justification of a private property regime. Both social goods and individual goods have been advanced as justifications for private property. Justification theories based on social good have been advanced on utilitarian, economic, libertarian, or civic republican principles.

Utilitarian and economic principles focus on the social good of the best or most efficient use of resources. In utilitarian terms, the total average welfare or happiness of the society will be greater if resources are privately owned. This greater happiness as all three focus on the bipolar relationship of “doing and suffering.”

Weinrib, supra note 101, at 424. He identifies Kant’s idea of natural right that the action of one party must be consistent with the freedom of the other. He identifies Hegel’s idea of abstract right as a “prohibition against wronging the physical and proprietary embodiments of someone else’s will.” Id. at 423; see also Coleman, supra note 89, at 443-44 (arguing that requiring the injurer to rectify the loss is not required in a corrective justice justification, but allows for other parties to discharge the duty imposed on the injurer to rectify the loss).

104. A private property regime has as a foundational concept the idea that a resource belongs to a particular person and that particular person has the right to determine how a resource will be used. WALDRON, supra note 41, at 39. The concept of belonging or ownership of a resource does not necessarily translate into a prescribed set of attributes of ownership. Id. at 47-55. That is, a person can be said to own a resource, but not have absolute unfettered power regarding that resource. For example, a person can own a piece of equipment but not be allowed to use that equipment in a way that pollutes the surrounding environment, even if the environment that is polluted belongs to the same person. The attributes of ownership which include the rights, liberties, powers and immunities in regard to a particular resource are not automatically defined by the concept of a resource belonging to a particular person. Id. at 52. The law of property and lawyers’ discussions of property are primarily concerned with defining the attributes of ownership. Id. See also Richard A. Epstein, Property and Necessity, 13 HARV. J.L. & PUB. POLY 2 (1990) (explaining that property law is concerned with the power of the individual to possess, use and dispose of resources).

ness or welfare results from the incentive individuals have to reap the benefit from use of resources. In economic terms, a resource should be owned by a particular person because that ownership creates incentives to put the resource to its best use. Ownership usually means exclusive power to control the use of that resource. Private ownership provides a greater ability to account for the costs of use and make better decisions about the most productive use of the resource using a cost-benefit analysis. Both the utilitarian and economic arguments justify the private property regime because of the effect of such a regime in producing the best use of resources. This conception of private property is said to bring about economic prosperity, or the creation of wealth, in a society.

Another justification for a private property regime based upon a social good is that private property advances the liberty interest of the individual which in turn advances political liberty in society. John Locke's theory of property is based on the idea that individual ownership allows the individual to survive and serves the individual's comfort and convenience.

106. WALDRON, supra note 41, at 6; BECKER, supra note 105, at 65; ALAN RYAN, PROPERTY 53-60 (1987).
107. POSNER, supra note 53, § 3.1, at 32-33; BECKER, supra note 105, at 68-69. But see Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711, 774-81 (1986) (arguing the needs of commercial activity required public ownership of certain types of resources and such ownership is the highest and best use of those resources).
108. POSNER, supra note 53, at 34. See infra notes 127-34 and accompanying text. For a criticism of the economic justification of this attribute, see BECKER, supra note 105, at 71-74.
109. WALDRON, supra note 41, at 8 (citing Harold Demselz, Theory of Property Rights, AM. ECON. REV.: PROC. & PAPERS 351-353 (1967)).
110. Cass R. Sunstein, On Property and Constitutionalism, 14 CARDOZO L. REV. 907, 911-13 (1993). For a critique that suggests that utilitarianism denigrates rather than justifies the institution of private property, see RYAN, supra note 106, at 91-117 (arguing that if private property rights must yield to the general welfare, the utilitarian argument exalts the effectiveness of the security of property as advancing the general welfare more than the equality of property, thus a choice is made on moral as opposed to utilitarian grounds).
111. Locke's conception of property was very broad, including personal rights such as liberty and security. RYAN, supra note 106, at 158; David Schultz, Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding, 37 AM. J. LEGAL HIST. 464, 472 (1993) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 88 (1963)).
112. A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 243-52 (1992); WALDRON, supra note 41, at 157. Waldron criticizes this argument because Locke failed to take into account community based use of resources, presenting as the only choice, private ownership and use or no use at all. Id. at 168-71. According to Locke, the role of government was to protect and defend natural property rights. SCHLATTER, supra note 105, at 160. Locke's defense of private property is based in

https://scholarship.law.umt.edu/mlr/vol57/iss1/2
plified by those using Locke's theory, because such individual ownership promotes the individual's survival, individual ownership of property promotes the individual's personal and political liberty.\textsuperscript{113} As Waldron explains, the attributes of ownership, such as exclusive use of and power over a resource, promotes freedom of choice regarding that resource's use in the economic sphere. The ability to control the material environment is just as important to individual freedom as the political environment.\textsuperscript{114} Additionally, such control helps protect individual privacy in the sense of not having to answer to society regarding the use of resources.\textsuperscript{115} Private property regimes promote the independence of individuals from each other,\textsuperscript{116} self assertion and recognition by others,\textsuperscript{117} the ability to make choices regarding desires or needs,\textsuperscript{118} and individual responsibility for the consequences of decisions regarding resource use.\textsuperscript{119} These personal freedoms are in turn said to foster the political freedom of an individual to stand up to the tyranny of government.\textsuperscript{120}

Civic republicanism theory also regards private property as essential to the liberty interest of individuals. Civic republicanism is based upon a more communitarian, as opposed to individualistic, conception of the common good. Persons participate in public affairs and should have the liberty to do so to advance the common good, not the individual good. As Professor Michelman wrote:

In republican thought, the normative character of politics de-
pends on the independence of mind and judgment, the authenticity of voice, and—in some versions of republicanism—the diversity or "plurality" of views that citizens bring to "the debate of the commonwealth." Republicanism has been, *par excellence*, the strain in constitutional thought that has been sensitive to both the dependence of good politics on social and economic conditions capable of sustaining "an informed and active citizenry that would not permit its government either to exploit or dominate one part of society or to become its instrument," and the dependence of such conditions, in turn, on the legal order. These perceptions irresistibly motivate a republican attachment to rights. These include, most obviously, rights of speech and of property. They may also include privacy rights—perhaps stronger ones than many contemporary liberals would welcome. 121

Private property is necessary to facilitate such participatory citizenship motivated by a concern for the public good. 122 This view of property was wide-spread during the revolutionary founding of the United States and helped inform the debate over the constitutional protections of property. 123

Theorists also justify a private property regime based upon the principle that individual ownership of private property is necessary for the moral and ethical development of a person, regardless of its effect on society at large. Hegel's explication of property is one example of this type of justification. 124


123. See generally Alexander, supra note 122; Michelman, supra note 121, at 1515-24; Sunstein, supra note 121, at 1558-64. As commerce developed, and property became commodified, the role of property changed to the more individualistic notion of satisfying needs and advancing individual autonomy. Alexander, supra note 122, at 329. As the change in the conception of property changed to a more individual autonomy approach, the virtue that used to be associated with participation in public life became associated with individual productivity. Id. at 325.

124. Peter G. Stillman, *Hegel's Analysis of Property in the 'Philosophy of Right'*, 10 CARDozo L. REV. 1031, 1035 n.21 (1989) ("Property is a matter of right and thus intrinsic to freedom. Hegel thus rejects consequentialist arguments for (or against)
Stillman explains Hegel's justification of private property as follows:

[In owning property, men act in the external world. Property is freedom because it gives the individual a scope for action and makes it possible for him to extend and expand his personality. Through their property, human beings dominate nature—liberating themselves from its toils—and create social institutions. In shaping the natural and the social world according to their intentions and goals, men develop and express their own capabilities. In reflecting on the results of their actions, men educate themselves about the world of actuality and about themselves—and thereby prepare themselves for additional action. Property, the embodiment of the free will in the world, is essential for human beings if they are to attain a developed freedom and individuality.]

Margaret Jane Radin is a modern day theorist who builds upon Hegel's theory to argue that private property is integral to an individual's conception of self.

Under private property justification theories, ownership usually means exclusive power to control the use of that resource. Attributes of ownership revolve around the rights of possession, use and disposition. The utilitarian and economic property and insists on private property regardless of its relation to happiness, to the satisfaction of needs, to efficiency or an increase in value, and to utility in any sense.

125. Id. at 1036. In using the term property, Stillman means private property. Id. at 1031 n.1. Waldron explains Hegel's approach to property and individual moral development as follows:

Property-owning is said to be important to the human individual since it is only through owning and controlling property that he can embody his will in external objects and begin to transcend the subjectivity of his immediate existence. In working on an object, using it, and having control over it, an individual confers on his will a stability and a maturity that would not otherwise be possible, and enables himself to establish his place as one in a community of wills . . . . Hegel is adamant that property is necessary: unless he can establish himself as an owner, an individual's development in other areas of ethical life will be seriously at risk.

WALDRON, supra note 41, at 377-38; see also RYAN, supra note 106, at 21-25. For a critique of this theory, see ALAN CARTER, THE PHILOSOPHICAL FOUNDATIONS OF PROPERTY RIGHTS 89-98 (1989).

126. MARGARET J. RADIN, REINTERPRETING PROPERTY 35 (1993) ("The premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.").

127. See BECKER, supra note 105, at 18-21 (listing the following attributes of ownership based on A.M. Honore's listing: the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to se-
theorists advocate near absolute rights of possession, use and disposition. In economic terms, in a world without costs, in order to have the proper incentives to put property to its highest and best use, the designated owner of property must have exclusive control over those rights. Vesting absolute rights in the designated owner fulfills the greatest welfare because absolute rights promote certainty, stability and the incentive to use property wisely.

Richard Epstein also advocates an almost absolute set of property rights using Locke's liberty based argument. Epstein argues that a property owner's rights to possession, use and disposition are not subject to interference without consent or compensation. The only limitation explicitly recognized is that the right to use property must not result in an unreasonable interference with another person's right to use their own property. Epstein traces these rights to his understanding of Locke's argument that government's obligation is to protect a person's natural property rights from interference. The "natural" attributes of ownership, according to Epstein, are the absolute rights of possession, use and disposition without interference from others and without interference in another's similar rights in their own property.

Critics of Epstein's theory argue that what are accepted attributes of the status of ownership, the power of transmissibility, the absence of a term, the prohibition of harmful use, the liability to execution and the residuary character).
Radin argues that the concept of the relationship between property and personhood means that the protection of property rights might vary depending upon the particular property at issue and the strength of its relationship to the development of personhood. Those rights most closely related to personhood would deserve more protection. Radin argues that the normative inquiry is whether a restriction on the owner's exercise of an attribute of use, possession, or disposition is allowable. Radin thus starts with a general rule that no interference with those attributes is allowed. Radin, however, uses a different criterion than the other types of justifications for private property to determine whether a restriction is allowable. Whether a restriction is allowable depends on how essential to personhood the attribute is in relation to the type of property at issue. The more essential the property and the ownership attributes are to ownership are subject to evolving social context regarding the degree of protection accorded those attributes. They further argue that Epstein has not sufficiently justified his trilogy of “natural” property rights. Thomas C. Grey, The Malthusian Constitution, 41 U. MIAMI L. REV. 21, 29-31 (1986); Margaret J. Radin, The Consequence of Conceptualism, 41 U. MIAMI L. REV. 239 (1986).

Joseph Singer critiques this understanding of property as premised on a free market system which does not in fact exist. See Singer, supra note 40, at 644-52. According to Singer, the components of the free market myth center around individual consent and freedom from government control and private coercion. Id. at 646-47. These components do not in fact exist. Whether consent is necessary depends upon the initial allocation of rights. That allocation of rights in turn depends upon social and moral values. Id. at 647-49. Ultimately the entity that decides whether to enforce rights or refuse to recognize and enforce such rights is the government. Id. at 650-52. Thus the whole idea of a free market is a construct built upon implicit unstated premises that cannot be justified without looking explicitly at normative values. For another critique of the idea that ownership means the exclusive right to possession, see JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994).

At the opposite extreme from the absolute ownership attributes is the positivist approach to those attributes. This approach has as the central idea that the only reason an owner is able to exercise any rights of ownership at all is the grace of the enforcing entity, i.e. the government. In this view, all attributes of ownership exist only because the government allows those attributes to exist and does so for reasons unrelated to the justification for having private property rights. See Singer, supra note 40, at 641-44; Robert P. Burns, Blackstone's Theory of the "Absolute" Rights of Property, 54 U. CIN. L. REV. 67, 75-78 (1985). None of the justifications for a private property regime use a positivist approach in describing the attributes of ownership.
personhood, the less acceptable are restrictions on those attributes. Radin’s analysis requires a context specific inquiry before one can argue that a particular restriction on an ownership attribute is justified.

B. Justification for Imposing Obligation in Specific Factual Situations

Even though enforcing obligations in general might be justified according to the above rationales, those rationales do not necessarily provide a justification for imposing an obligation in a particular fact situation. The type of justification for imposing obligation in general, however, influences the type of argument made for imposing obligations in particular situations. This part explores the rationales for imposing obligations in specific fact situations.

1. Contract

In contract theory, the justification at the specific level is focused on the question of whether a particular interaction should create a binding contractual obligation. To determine whether a particular interaction should result in a contractual obligation, the theorists often use the justification at the general level as the foundation for deciding that an obligation should be imposed in a specific situation.

At the general level, utilitarian theory focuses on the possibility of reliance to justify enforcing promises. Restatement (Second) of Contracts § 90 provides expression for the idea that a promisee’s justifiable and reasonable reliance on a promise is a justification for enforcing that promise.

136. RADIN, supra note 126, at 139-42. Radin’s theory has some appeal in the debtor and creditor context in the area of exemptions. Most states provide that certain types of property are exempt from creditor’s service of execution and sale of that property to satisfy debt. The types of property so exempt tend to be personal items without much market value for the creditor, but with personal value for the debtor. See, e.g., MINN. STAT. ANN. § 550.37 (West 1995).

137. Some theorists extend this argument to advocate that it is a human right for all persons to own property. For a further explanation and critique of this argument, see WALDRON, supra note 41, at 377-89, 423-45.

138. See supra notes 47-48 and accompanying text.

The law and economics theorists rely on consideration as a screening device to determine if particular promises should be enforced. The economic justification for enforcing contracts in general focused on the idea of exchange to produce wealth. Consideration is evidence of an exchange and a bargain creating an obligation. Consideration is a formal requirement that purportedly serves the functions of providing evidence, instilling caution in the parties, and providing a clear mechanism for parties to know which agreements are enforceable.

Yoris & Steve Thel, The Promissory Basis of Section 90, 101 YALE L.J. 111, 113 (1991) (promise is basis of reliance cases). See also ATIYAH, supra note 46, at 66-69 (arguing that laying the blame for the harm from a promisee's reliance on the promisor needs an additional justification, that is, actual and reasonable reliance alone does not justify placing the cost of reliance on the promisor). "The extra element, it is suggested, is compliance with some socially accepted values which determine when expectations and/or reliance are sufficiently justifiable to be given some measure of protection." Id. at 67. This additional justification based upon social values is necessary because all promises on which a promisee might actually and reasonably rely are not enforced. Id. at 67. According to Atiyah, utilitarian justifications for the binding nature of promises do not answer the question whether a particular promise should be enforced. The dichotomy between the individual "good" and the social "good" is often times too great. That is, while it might be a social good to enforce promises in general, it might not be in the parties' (or at least one party's) best interests to enforce this particular promise. Id. at 77-86.

140. POSNER, supra note 53, § 4.2, at 96-97.
141. See supra notes 49-53 and accompanying text.
142. THE RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (explaining consideration as follows: "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").
143. Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800-04 (1941); Melvin A. Eisenberg, The Responsive Model of Contract Law, 36 STAN. L. REV. 1106, 1115-16 (1984) [hereinafter Eisenberg, The Responsive Model]; POSNER, supra note 53, § 4.2, at 96-97 (listing several economic functions of the doctrine of contract consideration: (i) reduction of the number of false suits; (ii) reduce inadvertent commitments; (iii) prevents society's resources from being spent on trivial promises or vague promises; (iv) prevents opportunistic behavior). For a critique of consideration as not actually serving those functions, see James D. Gordon III, A Dialogue about the Doctrine of Consideration, 75 CORNELL L. REV. 987 (1990); Mark B. Wessman, Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration, 48 U. MIAMI L. REV. 45 (1993); Barnett, Consent Theory, supra note 54, at 288-89 (criticizing consideration as not fulfilling that function and obscuring the underlying substantive values that determine contract enforceability).

Fried and Barnett rely on autonomy based rationales for enforcing contractual obligations in general and do not necessarily advance a position on determining which promises are enforceable in particular contexts. One could extrapolate from the above described theories, however, that under Fried's approach, a court should enforce a promise if the party making the promise subjectively agreed to be bound. Similarly extrapolating, under Barnett's approach, a court should enforce a promise if evidence exists that the party making the promise objectively manifested an intent to be bound.

In the autonomy based justification, consideration may serve to determine whether the parties have consented to a particular bargain. Once the bargain exists, the bargain is enforced according to its terms in order to put the aggrieved party in the position they would have been in if the bargain had been performed. Similarly, reasonable reliance on the promise may serve to determine whether the parties have consented to be bound by a particular promise.

---

Eisenberg, The Responsive Model, supra, at 1112.

144. Barnett, Consent Theory, supra note 54, at 313.


The advocates of the bargain and reliance theories do not explicitly admit that something other than the bargain or the reliance is the operative justification for enforcing promises. Both bargain and reliance theories, however, implicitly use the concept of reciprocity between the parties based on principles of fairness derived from social norms. See Charney, supra note 50, at 1823-24; Eisenberg, The Responsive Model, supra note 143, at 1111-12 (describing a model of contract law built upon principle of fairness and policies of efficiency and administrability); James Gordley, Enforcing Promises, 83 Cal. L. Rev. 547 (1995) (arguing courts use the concepts of bargain, consideration, and reliance to police the equality of exchange between the parties). Some commentators who have considered contract excuse doctrine as part of the theory of contractual obligation have focused on the issue of parties' consent as augmented by social norms. See Robert A. Hillman, An Analysis of the Cessation of Contractual Relations, 68 Cornell L. Rev. 617 (1983); Sheldon W. Halpern, Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon", 135 U. Pa. L. Rev. 1123 (1987). Unfortunately, the modern day proponents of the bargain and reliance theories do not identify the operative social norms.

The traditional conception of bargain or reliance theories uses a discrete transactional model of contracts, where the paradigm case is between two contracting parties for a one-shot transaction. Ian MacNeil has developed a model of contract law based upon relational exchanges as opposed to discrete exchanges. Robert W. Gordon, Macauley, MacNeil and the Discovery of Solidarity and Power in Contract Law, 1985 Wis. L.
2. Tort

In tort theory, justification at the general level is very much intertwined with the question of whether an obligation should be imposed in a particular fact situation. For example, if the justification for tort obligations at the general level is to achieve the optimal level of accidents, then liability should be imposed in a specific fact situation whenever doing so will encourage that optimal level of accidents. No additional justification is needed at the specific level. Instead, at the specific level, tort theorists debate whether a negligence based or a heightened liability standard should be imposed in a specific fact situation. A negligence based standard would impose liability when the tortfeasor failed to exercise the proper amount of care. A heightened standard would impose liability without consideration of the amount of care exercised.

The economic justification for imposing tort obligation supports both a negligence based standard and a heightened liability standard. The economic argument that tort liability should be imposed to encourage people to take care whenever the costs of accidents outweigh the cost of safety supports imposing liability whenever the actor does not actually exercise that amount of...
A heightened liability standard should be imposed if activities cause harm without regard to the actor's exercise of care or the potential victim's alteration of behavior to avoid the harm. The economic justification for imposing liability to reduce the cost of accidents supports a non-negligent or heightened liability standard when either party cannot avoid the harm if the activity is conducted.

The loss spreading rationale for imposing tort liability accords with a heightened liability standard rather than a negligence based standard. Because the primary goal of imposing a tort obligation is to spread the loss among members of society, the defendant should be strictly liable for the harm when imposing such liability on defendant is a good mechanism for spreading the loss among a broader group of society. Imposing liability only when the defendant fails to exercise the proper amount of care under a negligence based standard will fail to adequately spread the loss.

Under the corrective justice justification theories, the negligence standard is the preferred standard. In Perry's words:

When common knowledge of the relevant causal regularities would lead an agent of average mental capacities to be aware of a sufficiently high level of risk of harm to other persons, taking account of both the probability and seriousness of the outcome, then the action should be treated for purposes of reparation as faulty because it is more appropriate that the agent whose action is being evaluated should bear the loss than that the victim should.

When an action violates that standard, the actor is deemed at fault. Perry's statement of the negligence standard is based on objectifying the action taken and judging the action faulty for the purpose of providing reparation to the injured party. According to Weinrib, the idea of acting with reasonable care has two aspects. First, the reasonable care standard "recognizes that..."
inherent in action is both the inevitability of risk creation and the possibility of risk modulation.\textsuperscript{159} Second, using an objective standard of reasonable care expresses the equal status of the parties in the bipolar relationship, letting neither party’s subjective capabilities control the other.\textsuperscript{160} Thus, both Perry and Weinrib argue that the negligence standard is the correct standard for determining when tort liability should be imposed in particular fact situations.

3. Property

At the specific level, the justification issue in property theory focuses on the allocation of resources to particular individuals. Unlike the contract and tort theories, property theories do not necessarily connect the specific level justifications with the general level justifications.

The allocation of particular resources to particular persons is usually justified\textsuperscript{161} in one of three ways: the labor theory, the consent theory, and the possession theory. The labor theory, derived from Locke’s work, supposes that one acquires a right in property by mixing one’s labor with the resource. The act of “mixing” establishes ownership of the resource.\textsuperscript{162} This theory seems to ultimately rest on a notion of just desert for labor expended.\textsuperscript{163} The consent theory posits that the owner gets the right to a resource based on the consent of others.\textsuperscript{164} This theo-

\textsuperscript{159} Id. at 519.

\textsuperscript{160} Id. Thus, Weinrib criticizes a strict liability regime as denying the legitimacy of acting and the equality of the parties in the relationship. Id. at 519-20.

\textsuperscript{161} The existing allocation of resources exists because of that mix of history, politics and values regardless of whether that allocation is just under a particular justification theory. See Baker, supra note 40, at 743 n.5; Richard A. Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221, 1241-43 (1979).

\textsuperscript{162} SIMMONS, supra note 112, at 254-64. See RYAN, supra note 106, at 28-37; see also WALDRON, supra note 41, at 171-94; Carol M. Rose, Possession as the Origin of Property, 72 U. CHI. L. REV. 73, 73-74 (1985); see generally SCHLATTER, supra note 105, at 151-61 (placing Locke’s labor theory in a historical context as a natural rights theory of property).

\textsuperscript{163} WALDRON, supra note 41, at 201-207; BECKER, supra note 105, at 53-56 (Becker advances this argument to justify the existence of private property as well as to justify the allocation of that property to a particular person). But see SIMMONS, supra note 112, at 260-64 (“Mixing” argument for ownership rests on idea of people as owners and stewards of resources in trust from God. Expending labor on a resource in a fruitful way is good stewardship and in fulfillment of that trust). For a critique of the labor-just desert theory, see CARTER, supra note 125, at 13-50.

\textsuperscript{164} WALDRON, supra note 41, at 149-51; Rose, supra note 162, at 74. See SCHLATTER, supra note 105, at 127-29 (explaining the idea of Grotins that the introduction of property arose from agreement).
ry uses resource allocation as a means of conflict resolution. 165 Finally, the possession theory, sometimes called first occupancy theory, is based on the idea that the first person to possess a resource has the right to that resource. 166 The possession theory is the theory often followed in court decisions regarding appropriation of a resource from the wild. 167 Peter Benson has connected the possession theory to the moral development theory based on Hegel's justification of private property. 168 In order to exercise human will on things and thus be fully human, a person needs to connect with a thing in some way. A person can acquire an exclusive right over the thing by exercising her will on the thing and bringing the thing under her control as long as such control is exercised prior to another person's exercise of will relative to that thing. 169 Respecting a person's exercise of will is integral to respecting the moral development of that person. 170

IV. SYNTHESIS OF A THEORY OF OBLIGATION

Each of the justification theories described above are united by four major assumptions that fall into the categories of values (something thought to be a good) or beliefs (something thought to be true). These assumptions provide a method for synthesizing the obligation theories described above into a single theory of obligation. These four assumptions are individual autonomy, the need for restraint on that autonomy, human rationality, and the capacity for human progress.

A. Individual Autonomy and Restraint on Autonomy

Individual autonomy means the freedom to act or not to act. Autonomy can be both a value (something thought to be a good) and a belief (something thought to be true). The value of and

165. WALDRON, supra note 41, at 150 (outlining the theory of Samuel Pufendorf that property is a "basis for the settlement and prevention of the conflicts which arise naturally out of . . . the problem of allocation").

166. WALDRON, supra note 41, at 285-87, 386-89; Rose, supra note 162, at 74; see generally Epstein, supra note 161. For a critique of the use of the first occupancy theory as a justification for the existence of any property rights, as opposed to a justification for assigning particular property to an individual, see BECKER, supra note 105, at 24-31; CARTER, supra note 125, at 78-86.

167. Rose, supra note 162, at 74-75.

168. See supra notes 125-26 and accompanying text.


170. Id. at 588.
belief in individual autonomy provide a corner post for a synthesized theory of obligation. The importance of autonomy in obligation theory should not be surprising given that individual autonomy is a bedrock principle in both classic liberal and capitalistic theory.

The concept of autonomy is central to liberal theory. Liberalism\(^\text{171}\) is a "political theory of limited government, providing institutional guarantees for personal liberty."\(^\text{172}\) A foundational tenet of liberalism is a belief in individual freedom and autonomy from the arbitrary and capricious imposition of authority based upon the will of other persons and of the government.\(^\text{173}\)

Much of liberal theory is concerned with the protection of individual rights in order to preserve individual freedom and authority.\(^\text{174}\) Most versions of liberalism connect individual rights with the idea of a private sphere that others or the government cannot invade.\(^\text{175}\) This belief in individual freedom and autonomy is in turn based on a conception of each person having equal moral worth and an ability to exercise reason to reach the right result for that individual.\(^\text{176}\)


\(^\text{172.}\) Liberalism and the Moral Life 5 (Nancy L. Rosenblum ed., 1989) (defining liberalism as a "political theory of limited government, providing institutional guarantees for personal liberty").

\(^\text{173.}\) Hallowell, supra note 171, at 87-88, 110-11.

\(^\text{174.}\) Hallowell, supra note 171, at 88-89; see also MacNeil, Bureaucracy, supra note 146, at 913. One of the themes in liberal debate is the role of rights in safeguarding individual freedom and autonomy. See generally Ian Shapiro, The Evolution of Rights in Liberal Theory (1986).

\(^\text{175.}\) Shapiro, supra note 174, at 278; Liberalism and the Moral Life, supra note 172, at 7. The authority of government is dependant upon a contractual relationship between the individual and the state, ultimately resting on the individual decision to consent to be governed so that the government might protect the rights of individuals. Hallowell, supra note 171, at 110, 113-14; Edward S. Greenberg, Capitalism and the American Political Ideal 8-9 (1985). Various versions of the social contract theory have been advanced. See, e.g., Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 857-63 (1985).

Autonomy is also a foundational value and belief in a capitalistic economic structure. At the core of capitalist theory is the view that the individual is autonomous and self-interested. Individuals in the pursuit of their own self-interest are driven to amass capital in order to gain power and control over others.

Autonomy is at the heart of the various justification theories discussed above regardless of whether the justification focuses on the societal or the individual good. The justification theories that posit a social good flowing from enforcement of obligations presume that individuals act autonomously in their own self-interest. When individuals act in their own self-interest, these theorists presume that society as a whole benefits. Thus in contract theory, promises create binding obligations because society is presumed to be better off, either by creation of wealth or cooperation, when individuals exercise their autonomy and make promises in promotion of their own self-interest. In tort theory, self-interested and autonomous persons will avoid accidents, and achieve the optimal level of accident reduction for the benefit of the entire society, when tort obligations are imposed whenever the cost of accidents is more than the cost of safety. In property theory, the self-interested and autonomous individual's ownership of private property promotes the efficient use of resources which in turn maximizes societal welfare or individual liberty to the benefit of society as a whole.

Individual autonomy is also central to the justification theories based on the promotion of individual good. For example, in Fried and Barnett's contract theory, the individual can bind herself as an exercise of her autonomy, which is deserving of respect for its own sake. Similarly, in tort theory, obligation

See id. at 624, 659-64; see also infra note 188.

177. Owen M. Fiss, Capitalism and Democracy, 13 MICHL. J. INT'L L. 908, 908 (1992); Rosenfeld, supra note 175, at 873 (describing Adam Smith's economic system);

178. HEILBRONER, supra note 177, at 43-46.


180. See supra notes 75-81 and accompanying text; Weston, supra note 76, at 1001-06.


182. See supra notes 55-73 and accompanying text; Robert W. Gordon, Macaulay,
is imposed because one person, through exercise of autonomy, damages another individual's autonomy.\textsuperscript{183} Property theorists posit that private property is necessary to the moral development of autonomous individuals, a desired state of affairs.\textsuperscript{184} In each of these justification theories, the idea of individual autonomy is either explicitly or implicitly based on the idea of moral equality of persons. That is, each person's individual autonomy is morally equivalent to another person's individual autonomy.

In sum, all of the justification theories discussed above embody the concept of individual autonomy to act and to be free from the actions of others as a core value. All of the theorists recognize, however, that complete individual autonomy is an undesirable goal. Thus, each theorist wrestles with the problem of defining appropriate justifications for restraints on autonomy. This struggle is not surprising given that both liberal and capitalist theory also grapple with balancing autonomy and restraint on autonomy.

Although individual freedom and autonomy are bedrock principles, liberal theory recognized the need for common authority, or restraint on autonomy.\textsuperscript{185} The difficulty in liberal theory has been how to accommodate the need for common authority with the conception of freedom from authority.\textsuperscript{186} The proffered answer to this issue was to focus on the authority of law as "impersonal, objective, and independent of will . . . eternal, universal, immutable and rational."\textsuperscript{187} If law could meet these criteria, then individuals would not be subjected to the arbitrary and capricious will of other individuals, thus meeting the need for common authority while respecting individual autonomy.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{183} See supra notes 86-103 and accompanying text.
\item \textsuperscript{184} See supra notes 124-26 and accompanying text.
\item \textsuperscript{185} Hallowell, supra note 171, at 88.
\item \textsuperscript{186} Id. at 89.
\item \textsuperscript{187} Id. at 89-90.
\item \textsuperscript{188} See id. at 90; Christopher L. Kutz, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 Yale L.J. 997, 999-1004 (1994). The concept of the objective and determinate rule of law is oftentimes equated with the liberal idea of pluralism, that is, the non-commitment to any dominant conception of the good. William A. Edmundson, Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies, 24 Seton Hall L. Rev. 557, 561 (1993). Hallowell, however, connects the rule of law concept to the respect for individual autonomy free of the arbitrary and capricious exercise of another's will. Hallowell, supra note 171, at 89-90. Regardless of the justification for the concept of the objective rule of law, the
\end{itemize}
Early liberals, however, did not use the positivist concept of law, but rather a conception of law determined by individual reason and conscience, usually influenced by natural law principles.\(^{189}\)

Critical legal studies critique of the concept is that law is neither determinate nor objective. Edmundson, supra, at 562-63; see also Jules L. Coleman & Brian Leiter, Determinacy, Objectivity and Authority, 142 U. Pa. L. Rev. 549, 549 (1993). Exactly what is meant by liberalism's commitment to law as determinate and objective can be debated. Id. at 558-59 (stating that liberalism requires a type of objectivity but not determinacy). Coleman and Leiter argue that liberal conceptions of individual autonomy and freedom from coercions require predictability and justification of legal decisions but not determinate results. Id. at 593. They also argue that liberal rule of law is committed to objectivity because of the need to mediate among conflicting visions of the good. Id. at 595-96. They then attempt to define a type of objectivity that will meet the liberal commitment and perhaps be accurately reflective of legal practice. Id. at 620-34 (describing modest objectivity); see also Heide L. Feldman, Objectivity in Legal Judgment, 92 Mich. L. Rev. 1187 (1994) (describing a concept of "blend objectivity" to apply to legal judgments).

189. HALLOWELL, supra note 171, at 91, 111; see also John Finnis, Liberalism and Natural Law Theory, 45 Mercer L. Rev. 687 (1994). A pervasive critique of liberalism is that it does not support a conception of the public good, but rather supports a pluralistic approach in which the government must be neutral toward any vision of the good life. W. J. Stankiewicz, In Search of a Political Philosophy 130-32 (1993); R. Randall Rainey, Law and Religion: Is Reconciliation Still Possible?, 27 Loyola L.A. L. Rev. 147, 164-65 (1993); see also John Rawls, Political Liberalism 47-48 (1993) (explaining that the challenge of liberalism is to deal with pluralism); Leslie P. Francis, Law and Philosophy: From Skepticism to Value Theory, 27 Loy. L.A. L. Rev. 65, 85 (discussing John Rawl's theory that moral values are an essential element of the law).


Some theorists have advanced arguments that liberalism is not necessarily committed to a pluralistic conception of the good. Stephen Holmes, The Permanent Structure of Antiliberal Thought, in Liberalism and the Moral Life 227, 239-40 (Nancy L. Rosenblum ed., 1989) ("Liberals wholeheartedly endorsed the common good of collective welfare. They distrusted the idea of common good to the extent that 'the
Capitalism also recognizes the need to restrain autonomy in order to produce wealth. This restraint on autonomy appears in the reliance on the institution of private property which restrains another’s autonomy to act with respect to the owner’s property. The concept of private property operates to place power over resources in the hands of individuals so that those individuals can use those resources to amass capital. 190

Obligation theorists also propose various mediating concepts to attempt a reconciliation between autonomy and restraint on autonomy. Contract theory uses the concept of exchange to justify enforcing restraint on individual autonomy. For example, a promise will be enforced if there is evidence of a bargain or exchange given for the restraint on the promisor’s autonomy. Evidence of such an exchange may come in different forms, such as consideration, consent, or even reliance by the other party. This evidence of exchange serves as a screening device for determining whether someone has agreed to restrain her own autono-
The tort theorists also use various concepts to mediate the primacy of individual autonomy with restraints on that autonomy. The law and economic theorists employ the concept of an optimal level of harm avoidance to justify imposing liability and thus restraining autonomy. Such a restraint is justified either when someone fails to correctly balance the costs of safety with the costs of harm for a given act or when the action causes harm regardless of the level of care taken. The theorists who argue that tort liability is justified by corrective justice principles restrain individual autonomy by using the idea of fault. Fault is based upon the objectification of the moral imperative to do no harm to another or upon the moral equality of persons which requires one person to avoid imposing an unreasonable risk of harm on another. These theories rely on the idea that one individual should not impose an unreasonable risk of harm on another as the central tort concept that mediates between individual autonomy to be free to act and the need for restraints on that autonomy.

Property theorists impose restraints on unfettered individual autonomy in two different arenas: resource allocation and resource use. Resource allocation theories prescribe a criterium for such allocation to resolve competition for unassigned resources, such as labor, consent, or first occupancy. These assignment theories restrain individual autonomy through designating the criterium that other individuals must respect in resource allocation.

Property theorists discuss principles that might restrain an individual’s exercise of power over resources assigned to that individual. Most of the theorists advocate almost absolute individual power over the resource use, allowing for restraints on that power only when the cost of enforcing exclusive rights is more than the benefit of those rights. On the basis that pri-

191. See supra notes 139-46 and accompanying text.
192. See supra notes 151-53 and accompanying text.
193. See supra notes 156-60 and accompanying text.
194. See supra notes 161-70 and accompanying text.
195. See supra notes 128-34 and accompanying text. In property theory generally, conceptions of restraint on individual autonomy over resource use seem less accept-
vate property is integral to the development of individual autonomy, Radin argues that restraints on individual power over resource use can be justified if that restraint is not harmful to the individual's development.\(^{197}\)

All of the above theories of obligation thus accept some restraint on individual autonomy. Such restraints are linked to the idea of responsibility to and respect for the individual autonomy of others. Classic liberal principles recognize the role of responsibility to the community\(^{198}\) and that responsibility for the consequences of the exercise of autonomy is integral to a liberal society as part of the respect of others' rights and individualism.\(^{199}\)

Even though liberal theory has been critiqued as equating individual autonomy or liberty with license and freedom from responsibility,\(^{200}\) liberal theory does require at least the responsibility to respect others' autonomy.\(^{201}\)

This idea of responsibility to respect autonomy and restraints on autonomy is implicit in the idea of creating an obligation in general and in imposing obligations in particular situations. The individual to whom the obligation is assigned is responsible for making sure that the obligation is fulfilled.\(^{202}\) The contract theorists assume that when someone is obligated to fulfill the promise because the evidence of exchange exists, the promisor has the responsibility to follow through on that promise. Thus, a failure to fulfill that obligation is rarely excused.\(^{203}\)

---

\(^{197}\) See supra notes 135-37 and accompanying text.

\(^{198}\) Linda C. McClain, Rights and Irresponsibility, 43 DUKE L.J. 989, 1025-26 (1994); see also HALLOWELL, supra note 171, at 88.

\(^{199}\) GALSTON, supra note 189, at 221-27. The concept of responsibility for the outcome of one's actions presumes some level of freedom to act, or free will. J.R. LUCAS, RESPONSIBILITY 11-31 (1993); EDGAR BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY 14-29 (1980). A value of individual autonomy requires a belief in free will.

\(^{200}\) A major critique of liberal theory is the supposed separation of the exercise of rights from the idea of responsibility for one's actions. STANKIEWICZ, supra note 189, at 122-24. This critique alleges that the right be free has come to mean freedom from responsibility to the community and others. Id.; McClain, supra note 198, at 1002-1005 (critique equates liberty with license).

\(^{201}\) See supra note 189 and accompanying text.

\(^{202}\) See supra notes 138-70 and accompanying text.

\(^{203}\) Hillman, supra note 10, at 122. Part of the difficulty in the contract excuse cases is determining when the adversity encountered in fulfilling the contractual obligation would be too much and thus lead the court to excuse the promisor's per-
The property theorists also assume that other people have the responsibility to respect the owner's use of a resource assigned to the owner. Reasons for ignoring that responsibility are rarely accepted. The tort theorists explicitly discuss whether responsibility for fulfilling the obligation must be on the person who is said to be responsible or whether that obligation can be satisfied by other administrative or loss spreading devices.

Autonomy, restraint on autonomy and responsibility provide unifying principles that support the concept of enforcing obligations in general and in specific fact situations. Persons are bound to obligations as part of the respect for their own and others' autonomy using a reciprocal concept of responsibility.

B. Human Rationality and the Capacity for Human Progress

The obligation theories are also linked by a belief in human rationality and a belief in the capacity for human progress. By human rationality, I mean the capacity of humans to engage in the process of justification and reasoning to reach a conclusion. By capacity for human progress, I mean the ability of humans to improve their circumstances or the world around them. Both human rationality and the capacity for human progress are beliefs that provide justification for enforcing obligations.

Liberalism and capitalism share an implied belief in human rationality which supports the value of and belief in individual autonomy. According to liberal theory, individual exercise of autonomy is based upon the respect for reason. The neutral rule of law as a legitimate mediating concept between autonomy and acceptable restraints on autonomy depends upon the ability of
people to apply, in a reasoned way, principles of law to particular fact situations. Capitalism embodies the idea of the self-interested and reasoning individual engaged in activity to amass capital in order to produce goods and services and to gain power over others. Each of the various legal obligation theories also posit a rational person acting according to some rational calculus. Although the calculus is different in each of the respective theories, the rational person construct is pervasive. The obligation theories based on utilitarian or law and economics justifications assume a rational, reasoning actor who makes decisions to enter an exchange and allocate risk in contract law, weighs the costs and benefits of action in tort law, and puts resources to their highest and best use in property law. The theories that rely on the social good of liberty depend upon a rational actor making decisions about resource use to foster personal freedom. The theories based upon obligation as a necessary aspect of an individual's moral rights or ethical development posit a rational actor who makes promises to advance her own interest or engages in conduct which manifests an intent to be bound to a promise. Similarly, in tort theory, the rational actor is in control of her actions and appreciates the degree of risk of her activities sufficiently enough to judge her at fault when she causes harm. The rational actor, in property theory, uses private property to learn about herself and her place in the world.

Human rationality is closely connected to the belief in the capacity for human progress. Liberal theory's faith in reason leads to the idea of the inevitable positive progression of human thought and capabilities. Capitalism, as well, posits using reason and autonomy to generate and amass capital (the surplus

207. See supra notes 186-89 and accompanying text.
208. See supra notes 177-78 and accompanying text.
209. See CARTER, supra note 13, at 8 (stating that a rational justification is the heart of legal reasoning).
210. See supra notes 50-53 and accompanying text.
211. See supra notes 76-81 and accompanying text.
212. See supra notes 107-10 and accompanying text.
213. See supra notes 111-23 and accompanying text.
215. See supra notes 87-103 and accompanying text.
216. See supra notes 124-26 and accompanying text.
217. HALLOWELL, supra note 171, at 131-32.
of production over what is needed to produce) which is then used to generate more production in a never ending cycle of expansion.\textsuperscript{218}

The obligation theories are also linked to the idea of the progressive nature of human capabilities. The law and economics theorists posit that the creation and enforcement of obligation in contracts, torts, and property, fosters the preservation and expansion of wealth,\textsuperscript{219} an idea very similar to the liberal and capitalistic ideas of continuous expansion and progression of human capabilities. The liberty based arguments for private property accept the idea that such property creates or allows individual freedom to act.\textsuperscript{220} Implicit in this idea is the concept that such individual liberty supports the progress of human capabilities in society.\textsuperscript{221} In contract theory, individual development theorists view the enforcement of contracts as essential to an individual's best use of her capabilities.\textsuperscript{222} The corrective justice based tort theorists implicitly rely on the progressive ability of human thought when the standard of care is objective rather than subjective.\textsuperscript{223} The objective standard requires a belief in the ability of human thought to progress beyond the subjective capabilities of the actors involved. The individual development theorists in property view obligation as essential to foster the progression of an individual's development.\textsuperscript{224}

C. \textit{Summary of Obligation Synthesis}

Based on the above described similarities between obligation theories, liberalism and capitalism, several core ideas can be identified. First, individual autonomy is highly valued. Autonomy means the ability to be free to act or to not act. Second, restraints on individual autonomy are recognized when needed to advance autonomy as a value. The value of moral equality of persons requires that an individual's autonomy be restrained at least in those circumstances where an exercise of autonomy would unduly impinge on another person's exercise of that other's autonomy. Part of this mediation between individual au-

\begin{footnotes}
\item[218] \textit{Heilbroner, supra} note 177, at 33-36; \textit{Greenberg, supra} note 175, at 146-47 (describing expansionist need and business cycles of boom and depression).
\item[219] \textit{See supra} notes 51, 81, 110 and accompanying text.
\item[220] \textit{See supra} notes 112-23 and accompanying text.
\item[221] \textit{See supra} notes 120-22 and accompanying text.
\item[222] \textit{See supra} notes 61, 66-69 and accompanying text.
\item[223] \textit{See supra} notes 156-60 and accompanying text.
\item[224] \textit{See supra} notes 124-26 and accompanying text.
\end{footnotes}
tonomy and restraint on autonomy is the relationship between autonomy and responsibility. Autonomous action requires one to bear the responsibility for the consequences of the exercise of that autonomy. Third, each theory has a core belief in the ultimate rationality of human actors. Finally, each theory in some way advances the idea that human capabilities are progressive and expansive.

V. GOOD FAITH FILING AND OBLIGATION

The purpose of this article is to provide an explanation for why courts have felt compelled to erect a barrier to bankruptcy relief that Congress did not explicitly place into the statute. The above synthesis of a theory of obligation provides one way of explaining the courts' compulsion to restrict access to bankruptcy.

The above discussion demonstrates that in a non-bankruptcy forum, imposing obligation is seen as a legitimate restraint on the exercise of individual autonomy. In a debtor and creditor relationship, the debtor's autonomy is restricted by either contractual obligations or tort obligations justified according to those theories. The creditor's autonomy to act against the debtor's property to satisfy the debtor's contract or tort obligation to the creditor is justifiably restricted based on the justifications for private property and based on the attendant restrictions on interference with the debtor's ownership rights. When the debtor fails to satisfy the contract or tort obligation to the creditor, the creditor is given some license to avoid its obligation to respect the debtor's property rights, such as by seizing and selling the debtor's property to pay the contract or tort obligation. 225

These reciprocal contract, tort, and property obligations are in turn built upon the premises of human rationality and capacity for progress. Humans are believed to be rational and to incur obligations in a rational manner, including not incurring more obligations than one is able to pay according to one's responsibility for fulfilling the obligations so incurred. Hand in glove with this rationality is also the belief in the capacity of humans to progress, including creation of enough value to pay obligations incurred. As long as the rationality and progressive capacity

premises are true, obligations are fully satisfied.

In the bankruptcy context, the pre-existing restraints on the debtor's autonomy in contract and tort obligations are recognized as existing and legitimate. Both liquidation methodology and reorganization methodology operate on the principle that the obligations should be satisfied out of the debtor's property. In liquidation, the concept is to satisfy the debtor's obligation out of existing property. In reorganization, the concept is to satisfy the debtor's pre-filing obligations out of a mixture of the debtor's existing and future property.

In the bankruptcy context, however, the belief in the progressive capability of humans is at the forefront. In all of the chapters, the usual rule is that the liquidation procedure or the reorganization plan provides a method of paying pre-filing obligations. Once the creditor has received her entitlement under the liquidation process or reorganization plan, the creditor is prohibited from taking further action to enforce the pre-filing in personam obligation. The provisions for discharging those obligations are premised on the idea that a debtor who has turned over her property to the creditors deserves a chance to start over. A debtor who starts over free of the burden of pre-filing debt has the ability to improve her own circumstances and become a contributing member of society. This is an explicit belief in the human ability to progress.

What is different in the bankruptcy context is what counts as rational behavior. Although the non-bankruptcy context posits rationality as fulfilling one's responsibility to meet one's obligations, the bankruptcy statute appears to allow on its face, a different rationality premise. That different premise is the idea that it is acceptable rational behavior to not meet one's obligations. Steeped in the non-bankruptcy paradigm of fulfilling obligations, the judges look for ways to justify what seems to be an irrational premise. The usual proffered justification for either liquidation or reorganization is the Congressionally mandated fresh

---

226. 11 U.S.C. §§ 524 (prevention of post discharge attempts to collect personal debt obligation), 727 (chapter 7 discharge), 1141 (chapter 11 discharge), 1228 (chapter 12 discharge), 1328 (chapter 13 discharge) (1994).


start for or rehabilitation of debtors. That justification, however, seems to make sense only if the debtor is somehow worthy of that second chance at achieving rationality according to the non-bankruptcy rationality premise, that is incurring obligations that one can pay or satisfy out of one's property. Hence, the judges look for ways to limit the access to the fresh start or rehabilitation procedure to those debtors who are worthy of the second chance.

The search for that worthy debtor is at the heart of the good faith inquiry. In determining good faith, courts look at the debtor's pre-petition conduct, the debtor's motivation for filing, the debtor's overall financial situation, and the effect of the filing on the creditors. Examples of pre-petition conduct that might lead to a finding of bad faith filing includes previous bankruptcy filings, misrepresented or concealed assets, and illegal or immoral conduct. The debtor's motivation for filing is also important. If the debtor filed to frustrate one creditor, obtain an unfair advantage over one creditor, or to accomplish an ulterior purpose other than pay debts, the court might find a bad faith filing. The courts also scrutinize the debtor's overall financial situation to see if the debtor is in financial distress, has a lavish lifestyle or excessive income, or is generally in need of the obligation altering bankruptcy procedure. Finally, the courts examine the effect of the filing on the creditors. While using bankruptcy to resolve multiple debts with multiple creditors is acceptable behavior, using bankruptcy to primarily affect one major creditor is viewed as an illegitimate use of the process. Viewing good faith filing in the context of the values and beliefs that support


230. The Honorable Leif M. Clark & Sharron B. Lane, Having Faith in Good Faith Analysis, 683 PLI/COMM 669 (1994); Ordin, supra note 5, at 1798-1801.

231. Ordin, supra note 5, at 1801-12; Flaccus, supra note 4, at 407-08; Ponoroff & Knippenberg, supra note 5, at 933-38. Ponoroff and Knippenberg also discuss filing for the purpose of obtaining a litigation advantage that could not be obtained outside of bankruptcy. Id. at 938-42. Flaccus also identifies a group of cases she calls serial filings, where the debtor files successive chapter 11 petitions or files successive petitions under different chapters. Flaccus, supra note 4, at 407. These types of cases can also be thought of as strategic filings as the debtor is filing petitions in series in order to restructure debt in a particular manner as allowed under the bankruptcy statute.

232. Clark & Lane, supra note 230, at 669.

233. This is the so-called single asset case situation. See Clark & Lane, supra note 230, at 669; Flaccus, supra note 4, at 405-06; Ordin, supra note 5, at 1813-25; Ponoroff & Knippenberg, supra note 5, at 927-32.
enforcement of obligations and identifying a reason why the courts feel compelled to search for that worthy debtor provides a jumping off point for further questions.

One question is whether courts should be engaged in attempting to determine the worthiness of the debtor to use a procedure that Congress has enacted without an explicit screen for such worthiness. That is a difficult issue involving ideals about the proper division of power between Congress and the courts and about the proper relationship between state and federal governments given that most obligations are created and enforced in a non-bankruptcy context according to state law and by state courts.

Another question this raises is who should decide worthiness, even if such worthiness is a proper question for courts in general. Should bankruptcy judges decide that question as a matter of fact, or should the appellate judges decide that question as a matter of law? Won't it make a big difference what personal background the judges have, if the judge is attempting to decide whether or not the debtor in front of the court is worthy of the process? For example, how does a judge know whether or not a debtor is engaging in a "lavish" lifestyle?

Third, should worthiness be an inquiry at all? What would happen if bankruptcy was an open process with no screening for worthiness? Would the entire structure of interwoven obligations in the non-bankruptcy world collapse if these types of cases were not kept out of the process? Would our values and beliefs in autonomy, restraint on autonomy, rationality and progress be so undermined that our economic structure and our everyday lives would change for the worse?

If worthiness is a proper inquiry, how should worthiness be decided? Should this be an ad hoc, "I know it when I see it" type of inquiry? Can it be structured to make it more predictable without being too overbroad or too underinclusive?

Finally, the good faith inquiry and the search for the worthy debtor who can use the bankruptcy process raise questions about what having a second chance really means. Why do we value

234. Bankruptcy courts are not Article III courts but are structured as adjuncts to Article III courts. 28 U.S.C. § 151 (1988).
236. The purpose of Chapter 11 specifically is a hotly debated topic. See Rusch, supra note 10, at 167-80. That article collects the literature up to 1993. Since that time, the following articles have continued the debate about the purpose of Chapter
the idea and practice of a second chance? What purposes does having a second chance serve? Can the concept of the second chance be structured in such a way as to be compatible with the idea of enforcing obligation?

Requiring good faith filing raises fundamental questions about our values and beliefs about obligations. Understanding that context should help us focus on what is at stake in this issue. Thinking about the above list of questions is the next step in undertaking a thoughtful analysis of bankruptcy availability.


237. Some historically based analyses have looked at the inevitable boom and bust cycles present in a capitalistic economy as part of the justification for the need for a second chance procedure. See generally Rhett Frimet, The Birth of Bankruptcy in the United States, 96 COM. L.J. 160 (1991); Richard C. Sauer, Bankruptcy Law and the Maturing of American Capitalism, 55 OHIO ST. L.J. 291 (1994); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).