

BETWEEN RIGHTS AND RITES: THE IRONIES OF CRISIS AND CONTRACT

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I

INTRODUCTION

Is contract in crisis? Other co-contributors' worthy responses to the question largely fall into two camps, both inspired by COVID-related dislocation. Some focus on prototypical conundrums of contract law doctrine like impracticability or frustration of purpose. There the fundamental question is whether, on one hand, the post-contracting events eviscerated either the means or the logic of performance or, on the other, the contract, expressly or impliedly, allocated the risk of those events. Other co-contributors contemplate the institution of contract law itself, say, how standard contract provisions evolve to reflect circumstances, how the institution adapts to relationships rather than mere transactions, or how the institution fosters unfairness or injustice.

Like others since mid-March 2020, I have observed instances of particular contracts in crisis and therefore am amenable to the doctrinal tools for excusing performance. My son and daughter-in-law had the paradigmatic problem: a large wedding party scheduled for June 2020 for which they executed contracts with a venue and caterer and had remitted deposits totaling \$15,000. Contracts that no longer map well on the parties' expectations as of the time of execution might themselves be in crisis, and the doctrines of impracticability and frustration (and associated risk allocation) could, during potential litigation, determine whether any of the parties' obligations survived. This Essay is less concerned with doctrinal conundrums engendered by the pandemic than what the author perceives as a crisis of reification of entitlements in rights (including contract). That crisis is far less about elements of doctrine than it is of morality; less about the enforcement of rights and more about the holders' willingness to set them aside. During crisis, tunnel-visioned and slavish devotion to abstract contract rights may well be a culprit, not a hero.

What some call "contract in crisis" is thus an opportunity to reflect on the limits of contract law as a formal institution, rather than delving into the efficacy of its constituent doctrines or even how those doctrines might evolve or adapt.

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The thesis, in a nutshell, is that in my non-lawyer incarnations—businessman, parent, husband—being right and having rights were not all they were cracked up to be. In contrast, the core of law and lawyering is the articulation and vindication of rights. Hence, my prior work has explored the intersection of rights and customs in those circumstances in which someone might hold a right but, for reasons of moral compunction, common sense, decency, being a mensch, or some other ought, chooses not to assert the right.¹

A world wholly governed by rights would be like a machine whose metal parts grind on other metal parts, with no metaphoric grease supplied by things like trust, deference, or discretion. Contract rights are simply a subset of that concern. And times of crisis test, or at least highlight, the tension between the grinding metal of rights assertion and the grease of non-legal oughts. The pandemic examples include mask wearing, access to vaccines, and refusals to be vaccinated, but there are other examples of that tension in mundane and critical circumstances, including parking one's car on the street during a snowstorm, queuing at the Department of Motor Vehicles, or receiving compensation as a bank executive during a meltdown of the global financial system. Part II thus explores the extent to which individuals are inclined in modern life to think of entitlements and relationships as rights rather than social obligations, customs, or courtesies. Some are clearly the subject of legal rights, some clearly not, but category boundaries as between rights and courtesies are not crisply binary. It is not a given that the operative norm is legal rather than social. What is clear is that thinking in terms of rights may extend beyond artifacts of positive law and its enforcement institutions; there is a gray area of expectations that might once have been based in family or community norms and values, but which now might fairly be seen as based in rights.

Part III suggests the use of rights to justify everyday expectations is, in reality, less about modernity, rationality, and efficiency than it is simply a different kind of active faith. Such active faith is not unlike resort to the rites of traditional religion and is as fraught with fundamentalism, apostasy, and heresy as the latter. When parties justify behavior, like refusals to wear masks or take a vaccine, by way of rights, they are not usually appealing to a coherent corpus dispensing universal justice. Rather, these parties are more often instrumentally, as weaponized reason, invoking an authoritative source, a divinity of legal conceptions rather than gods. Part IV proposes the irony that rights are, often as not, a thin and perhaps fragile veneer enveloping and mediating our desires. The attribution of rights to entitlements is not as much about modern rationality, reason, and justice as it is rather a thinly veiled power grab, an atavistic holdover from the state of nature in which might determines possession. Whether people justify their behavior by way of God-given rights, on one hand, or the rights of positive law, on the other, the gray area between the extremes of law and custom gets infused with rights-based vindications of behavior rather than common

1. See, e.g., Jeffrey M. Lipshaw, *Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise*, 3 LAW CULTURE & HUM. 82 (2007).

sense, decency, or being a mensch.

The normative take-away is *not* that rights (including contract rights) do not matter. They do. But wise leadership (indeed, wise living) is about continuing to ask, over and over, whether the rights people think they hold are worth asserting.

II

MODERN CHARACTERIZATIONS OF ENTITLEMENTS AS RIGHTS

Thirty years ago, Mary Ann Glendon famously decried the strident and absolutist rights rhetoric that had come to characterize American political discourse, and which had fouled “the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends.”² She focused primarily on rights issues at the constitutional level—privacy, abortion, gay rights, and so on. She observed, however, that rights talk was perhaps less prevalent in family and community environments, and “that cooperative, relational, patterns of living survive in the United States to a greater degree than our individualistic public rhetoric would suggest.”³ Indeed, the cooperative and relational patterns of co-existence Glendon observed persist; however, as with political rights talk, people are now inclined to think of the entitlements and relationships of daily life in terms of rights rather than social obligations, customs, or courtesies. And, once people think about something as a right, it takes some substantial inertia to return to thinking about it as a matter of social obligation, custom, or courtesy. Nevertheless, even in the most sophisticated transactions, contract rights exist (even if not acted upon explicitly) concurrently with non-legal social norms and community values.⁴

Hence, what distinguishes legal rights, like contract rights, from mere social obligations, customs, or courtesies? There is an implicit taxonomy at work. The very question suggests an ability to establish a rule or definition that allows the analyst to place the practice in one category or another. There are circumstances in which one needs to establish whether a particular concept falls within the bucket of “law” or “custom,” but legal and philosophical efforts to answer those questions in binary fashion oversimplify the problem. For example, it may be necessary for a court in a First Amendment case to determine whether a practice is or is not the exercise of religion. Nevertheless, classifying a particular set of beliefs as religious or secular does resist binary resolution.⁵

2. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 171 (1991). Another law professor has recently taken up the problem of rights talk. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021) (proposing a return to America’s original vision of rights in the hands of legislatures and juries, rather than judges).

3. GLENDON, *supra* note 2, at 174.

4. Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987, 1011–13, 1039–42 (2012).

5. See Jeffrey M. Lipshaw, *Can There Be a Religion of Reasons? A Response to Leiter’s Circular Conception of Religion*, 26 J. L. & RELIGION 43 (2010) (commenting on Brian Leiter’s definition of

The effort to define the conceptual bucket of legal norms as distinct from moral norms is itself a mainstay of academic jurisprudence reflected in the work of John Austin, Hans Kelsen, H.L.A. Hart, Lon Fuller, Ronald Dworkin, and others. That jurisprudential taxonomy is difficult when it comes to contract law. Little in its practice or adjudication fits Austin's fairly primitive conception of law as commands of the sovereign.⁶ Perhaps one can discern Kelsen's Basic Norms or Hart's rules of recognition and internal point of view at work, but that means focusing on consideration doctrine, the traditional bane of first-year law students.⁷ The question here is broader: When it comes to what otherwise might be moral or social obligations, why do people resort to contract law at all?

Social scientists likely have as much trouble as legal philosophers in cabining off the institution of contract law, but their work allows one to explore the nature of the demarcation (if any) itself. Susan Silbey's seminal work identifies social practices that are otherwise removed from legal institutions yet which "enact and display deep-seated and relatively systematic conceptions of law and legality."⁸ For instance, Silbey examined the use of space-savers in northern U.S. cities as a means of retaining a street parking place that one has shoveled out after a snowstorm. Her project is to analyze culture "not as an experimental science in search of law but as an interpretive one in search of meaning."⁹ Hence, she finds legal meaning in the artifacts of space saving—chairs, milk crates, tables, dead plants, traffic cones, and a bust of Elvis Presley (among myriad others) along with the narratives of those who engage in space saving.¹⁰ In her view, the participants in this system of "dibs" justify what they are doing not primarily with reference to efficiency or spontaneous order, as at least one economist has suggested, "but to longstanding associations between work and space, i.e. property and law."¹¹

Silbey distinguishes her cultural interpretation from Robert Ellickson's economic thesis that non-legal social norms operate *in place of law*.¹² Instead, she employs insights from anthropology and sociology to demonstrate that those social norms often cannot be understood without reference to legal norms, and vice versa. Silbey's understanding reflects something Austin Sarat and Thomas Kearns characterized as the legal-sociological "great divide." That is, the fault line separating "instrumentalists" who sharply distinguish legal standards and nonlegal human activity and "constitutivists" (akin to Silbey's views) who see

religion and argument that there is no principled reason for the Constitution to single out religion for special tolerance).

6. Brian Bix, *John Austin*, STAN. ENCYCL. PHIL. § 3 (Edward N. Zalta ed., 2022), <https://plato.stanford.edu/entries/austin-john/> [<https://perma.cc/95R7-X698>].

7. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 58 (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 1996); H.L.A. HART, THE CONCEPT OF LAW 56–57 (Jacob T. Levy ed., 2d ed. 1997).

8. Susan S. Silbey, *J. Locke, op cit.: Invocations of Law on Snowy Streets*, 5 J. COMP. L. 66, 68 (2010).

9. *Id.* at 69 (quoting CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973)).

10. *Id.* at 70–74.

11. *Id.* at 89.

12. *Id.* at 89 n.116.

legal meaning as so infused into practices, consciously or not, such that social life is “run through with law.”¹³

Silbey and Ellickson are both assessing practices and justifications that have family resemblances to prototypical legal norms (that is, those most everyone would accept as legal, and which Silbey described as “active and coercive, involving professional mobilization and discourse”)¹⁴ and those social norms that may operate along with or in place of prototypical legal norms. They are both assessing norms and practices through our Enlightenment-tinted glasses. Silbey invokes Locke to interpret expressions akin to “I didn’t shovel out that spot so that you could park your shitbox in it you fucking dickhead,”¹⁵ as property claims arising theoretically from desert (“I worked to create this spot so I own it”),¹⁶ possession/notice (“This is my space and you should know that from the Elvis bust I left there”),¹⁷ or community consent.¹⁸ The models used by Ellickson (and law and economic scholarships generally) are philosophically consequentialist, and if they do not derive directly from the utilitarianism of Jeremy Bentham and John Stuart Mill, they are similar enough in approach to be thought of as utilitarian.¹⁹

The common dilemma among law, economics, sociology, and anthropology is interpreting practices sitting in a taxonomic gray area—that is, those practices featuring characteristics of prototypical custom and characteristics of prototypical law (under any jurisprudential conception) but being neither fish nor fowl. At the margins, it may be hard to tell whether the subject of the observation should be classified as a fish or a bird, but that does not delegitimize the idea that there is a difference between fish and birds. What is less important within that gray area, per Sarat and Kearns, is locating the precise demarcation between rights reified in formal law and social norms that take on cultural meaning akin to rights.²⁰

Take the social practice of queuing. When we lived in Indiana, I needed to renew my driver’s license at the Bureau of Motor Vehicles. It was the stereotype of those offices to walk in, take a number, see from the display above the clerks that there were fifty people ahead of you, and settle in for an hour’s wait. To avoid that, I showed up at the office in the mall on 86th Street at 7:30 a.m., thirty minutes before it opened. I was the first, but not the only one with the same idea. By 7:50 a.m., there were perhaps thirty people in line. At about 7:55 p.m., a young

13. Austin Sarat & Thomas Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 21–23 (Austin Sarat & Thomas Kearns, eds., 1995).

14. Silbey, *supra* note 8, at 89 n.116.

15. *Id.* at 80.

16. *Id.* at 73.

17. *Id.* at 75.

18. *Id.* at 84.

19. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. LEG. STUD.* 103, 104–05 (1979); H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 *GA. L. REV.* 969, 987–88 (1977).

20. Sarat & Kearns, *supra* note 13, at 56.

man walked up to the door, obviously hovering to jump the line. I did not say anything, but several people right behind me did. They asked, “What do you think you are doing?” “I’m in a hurry and I need to get in quickly,” he responded. “Well, you can get in line like everybody else.” He continued just to stand there. The tension, indeed, the threat of violence, was palpable. The pandemic analog is vaccine line-jumping, an issue that has since faded but was a hot topic in the first months after the COVID vaccines appeared.²¹

Queuing is a practice in which modern norms have developed but without law or, as Silbey has suggested for parking space savers, the inference of legal norms by scholars who have studied it.²² David Fagundes describes queuing as a social institution as another example of Ellickson’s “order without law”; one that “arose and persists in the absence of any legally imposed behavioral requirements or threats of state sanction” but is nevertheless a “complex but stable series of social norms.”²³ There are aspects of the norm that resemble law—for example, that “[d]eparting the line means you immediately forfeit your priority, just as abandoning your property means you have relinquished legal ownership of it.”²⁴ Silbey is not wrong to see something lawlike in what the parking space savers are doing. Yet at the prototypical extremes, there is a distinction between norms that are legal and those that are not, even if their definitional efforts falter at the margins.²⁵

That rich gray area between prototypical law and prototypical custom invites a skeptical response: when participants justify behaviors by way of rights or law, they are often simply coating ancient desires and impulses with modern veneer. One of the grand theories of nascent sociology was Ferdinand Tönnies’s attempt to trace changes over time from traditional communities (*Gemeinschaft*) to the

21. Shamus Khan, *How Rich People Will Cut the Line for the Coronavirus Vaccine*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/outlook/coronavirus-vaccine-rich-people/2020/12/18/3a2f188e-40ae-11eb-8bc0-ae155bee4aff_story.html [<https://perma.cc/L85Q-4UHD>]; Stephen L. Carter, *Maybe Vaccine Line-Jumping Isn’t So Bad*, THE QUINT (Mar. 17, 2021), <https://www.bloombergquint.com/gadfly/is-it-ok-to-jump-the-covid-vaccine-line-the-answer-is-changing> [<https://perma.cc/888D-GQRG>].

22. See, e.g., Leon Mann, *Queue Culture: The Waiting Line as a Social System*, 75 AM. J. SOC. 340 (1969) (exploring the formal and informal arrangements made in queues to regulate behavior).

23. David Fagundes, *The Social Norms of Waiting in Line*, 42 LAW & SOC. INQUIRY 1179, 1181 (2017).

24. *Id.* at 1183 (citing William Hansen, *Step in Line! The Etiquette of Queuing*, ENG. MANNER (Jan. 11, 2010)).

25. See Diana Piana, Emilia Schijman & Noé Wagener, *Where is the Law Living? Juridicity and Methods of Research in the Works of Susan Silbey*, 100 DROIT ET SOCIÉTÉ 645, 654 (regarding Silbey’s thesis, “that body of work makes old questions resurface: how to seize legality in its deeply plural and also *situated* nature, compared to other normativities which unfold and concern morality, morals, aesthetics, ideology, etc.? How, yet, not to get everything muddled, to the point of losing the irreducible specificity of law (the criticisms of Kelsen keep all their relevance)?”). Indeed, “to examine law uncoupled from legal institutions,” Ewick and Silbey necessarily acknowledged there is a difference between prototypical positive law, on one hand, and legal culture or consciousness, on the other. The latter is what they called “legality” rather than law. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 22–23 (1998).

impersonal structures of modern civil society (*Gesellschaft*).²⁶ It is easy to mistake the “*Gemeinschaft to Gesellschaft*” thesis for a purely historical account rather than an assessment of social forms and attitudes that have always co-existed, albeit more or less at any given time.²⁷ *Gemeinschaft* is the model of rural or village life, “based essentially on concord, on the fundamental harmony of wills, and is developed and cultivated by religion and custom.”²⁸ It is “a living organism in its own right,” the kind of society in which social norms prevail.²⁹ In contrast, *Gesellschaft* is the model of modern urbanized institutions, “based on convention, on a convergence or pooling of rational desires; it is guaranteed and protected by political legislation, while its policies and their ratification are derived from public opinion.”³⁰ It is a “mechanical aggregate and artefact,” a society of laws and rights.³¹ The mistaken historicity is seeing the progression from *Gemeinschaft* toward *Gesellschaft* as somehow wholly eradicating social norms and customs in favor of rules and rights. The better view, indeed, Tönnies’s own, was to see “the dichotomies he had identified were not time-specific or mutually exclusive, and that contrasting types of institution—and contrasting attributes within a single institution—would always co-exist in any historical setting.”³²

There is an arc of modernization and mechanization, even in queuing. When I was an undergraduate at the University of Michigan in the early 1970s, students earned their entitlement to the best football and basketball tickets by lining up at the ticket office, usually overnight in tents, sometimes for several days. That system has since been replaced by online platforms that use algorithms rather than physical effort to determine priorities. The more the systems are mechanized, the more they will be amenable to the imputation of legal rights exclusively, and the less the subject of social norms. Nevertheless, the modernization of queuing is an arc and not a watershed. There are *Gesellschaft* institutions like the queuing systems of sophisticated operations analysis. Simultaneously, *Gemeinschaft* norms and attitudes surface in everyday encounters like hailing a taxi on a New York City street in the rain or the palpable angst people collectively experienced in the first quarter of 2021 about getting two doses of the Pfizer or Moderna vaccine.

The same ahistorical nuances of *Gemeinschaft* and *Gesellschaft* hold for the concurrent operation of social norms and legal rights in business. Most of the legal scholarship trying to explain or justify the institution of contract law turns ultimately to consequentialist theories of welfare or wealth maximization, on one

26. FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (Jose Harris ed., Jose Harris & Margaret Hollis trans., 2001) (1887).

27. *See id.* at 258 (noting that *Gemeinschaft* continues to exist and define social reality in the era of *Gesellschaft*).

28. *Id.* at 247.

29. *Id.* at 19.

30. *Id.* at 247.

31. *Id.* at 19.

32. Jose Harris, *General Introduction*, in *COMMUNITY AND CIVIL SOCIETY* xxviii (Jose Harris ed., Jose Harris & Margaret Hollis trans., 2001).

hand, or deontological philosophies of promise and commitment on the other. In each case, however, the focus is on the enforcement (or not) of the rights of the contracting parties. Law professors, writing in thought experiments, rarely dwell on those circumstances when somebody has a contract right but sees a good reason not to act on it. But it happens in the real world. Stewart Macaulay introduced a new school of contract law scholarship and teaching with a surprising empirical observation and *academic* conclusion that “business successfully operate[d] exchange relationships with relatively so little attention to detailed planning or to legal sanctions.”³³ Lisa Bernstein observed the cooperative contracting arrangements among southern cotton brokers, one aspect of which might be to set aside contract entitlements when good business sense so dictated.³⁴ As she noted, the stability of the system might be due “to the fact that social norms of honor, particularly when reinforced through group activity and a basic human desire to think of one’s self as trustworthy, are more powerful motivators of transactional behavior than economic models of behavior typically assume.”³⁵ In short, the business world is one in which the legal institutions of contract and corporate law operate either as backstops to, or in parallel with, other social systems.³⁶

But an extra-legal imperative not to enforce contract rights goes beyond so-called “relational contracts.”³⁷ That usually means that businesspeople forego short-term contract entitlements to preserve long-term profitable relationships. In a 1985 article, Ian MacNeil invited theoreticians from diverse schools of thought to weigh in on relational contracting. He described his own theory of contract as one “encompass[ing] all relations among people in the course of exchanging and projecting exchange into the future.”³⁸ In particular, MacNeil described variants of behavioral elements “as they occur in a spectrum of exchange behavior from extreme discreteness to extremely relational patterns.”³⁹ That theory still reflects a utilitarian calculation, discounting the present in favor of the future, as opposed to a social norm of something like honor or the right thing to do.

33. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62 (1963).

34. See Lisa E. Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1754–56 (2001) (explaining that due to cotton industry realities, contractors strongly expect performance, but rely on renegotiation, nonlegal sanctions and market-based damages if breach occurs).

35. *Id.* at 1787.

36. See generally Jeffrey M. Lipshaw, *Contract Formalism, Scientism, and the M-Word: A Comment on Professor Movsesian’s Under-Theorization Thesis*, 35 HOFSTRA L. REV. 23 (2006); Lipshaw, *supra* note 4; Jeffrey M. Lipshaw, *Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin*, 21 CAN. J. L. & JURIS. 399 (2008) (exploring how social norms, including concepts of morality, interact with contract law).

37. See generally Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985) (discussing the development of scholarship concerning relational contract).

38. *Id.* at 523.

39. *Id.* at 524.

Why might businesspeople and others forego a present contract right even in a one-off circumstance? Roy Kreitner generously capsuled the view that underpins this essay:

Lipshaw posits a genuine metaphysical problem (possibly an *aporia*) as one that contract theory should grapple with: there is no simple way for incompatible norms to be binding at the same time, and yet this dual binding-ness [sic] is a central and even routine feature of the life of contract for both sophisticated and unsophisticated contracting parties. Contract theory that ignores this normative plurality is missing something central about the contracting experience, and more generally about the experience of being bound by law.⁴⁰

People sometimes may forego legal rights for reasons having nothing to do with calculations of economic gain or loss, but because foregoing the rights is the decent or honorable thing to do. For example, some years ago, my wife and I owned a little house that we rented to a young couple on a year-long lease. Midyear, they asked to be released from the contract because they were having another baby and the house was too small. We let them out because it seemed like the right thing to do, apart from any legal consideration, and there was no future continuing relationship to preserve. On the other hand, it was not much of a crisis. We did not need the money, nor did we have any interest in the costs, financial or psychological, of enforcing the contract.

The upshot is the more one thinks the rights established by contract law matter, the more likely one may be inclined to think the institution is in crisis when those rights are tested by circumstance. Perhaps my wife and I would have acted differently if we desperately needed the rental income. But to consider rights in crisis without, at the same time, assessing co-existing social norms, including those having nothing at all to do with the possibility of future gain, is misguided. When it comes to getting along with each other, we can walk and chew gum.

III

TURNING RIGHTS INTO RITES

Cloaking your sense of entitlement in an abstract right rather than a social norm certainly falls on the *Gesellschaft* rights end of the continuum. Whether one is talking about utility in economics to measure something abstract and universal about happiness or discussing rights in law to capture something abstract and universal about particular expectations, both are concepts capable of articulation, systemization, reduction, measurement, codification, or the myriad other instrumental uses to which we put good ideas. But there is irony in the manner by which those very abstractions engender dogma more consistent with the traditional *Gemeinschaft* norms. In short, in modern parlance, rights take on a kind of secular divinity, even when the purported rights are quotidian, as in contract. Indeed, on May 26, 2021, my Westlaw search of the database “All state and federal cases” for “sanctity /s contract” (that is, the word “sanctity”

40. Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK L. REV. 915, 921 (2012).

appearing in the same sentence as the word “contract”) produced 907 results. The same search in the “Law Reviews & Journals” database produced 1,345 results.

There is a rich philosophical literature assessing rights talk, particularly the sense that a right is something real.⁴¹ Legal positivists like Kelsen, Hart, and Raz treated legal rights as normative claims, even if they are conceptually distinct from purely moral expectations.⁴² The legal realists were more dismissive of any imputation of metaphysics. American legal realists viewed rights as no more than predictions of what legal officials would do.⁴³ Scandinavian legal realists were skeptical as well. Alf Ross, in the logical positivist tradition, dismissed the concept of a right as metaphysical and, to that extent, meaningless.⁴⁴ Karl Olivecrona wanted to dispense with the concept of a right as some kind of metaphysical force, and instead have it viewed as a real but abstract medium like currency or performative sentences (“With this ring, I thee wed”).⁴⁵ In assessing all of this rights talk, Brian Bix has wisely cautioned philosophers to be circumspect in denying the reality of rights, particularly when, in practice, a right may well be a reason for action and therefore hardly something mystical, mythical, or metaphysical.⁴⁶ Or, as Susan Silbey observed, “law is a construct of human ingenuity; laws are material phenomena People’s ordinary transactions presume an objective world of facts ‘out there,’ yet close analysis of the ways people apprehend that world reveals their own collaborative social construction of those social facts.”⁴⁷ In short, this inquiry is not about the metaphysics of rights; rather, it is about a social construction in which belief in and the assertion of modern rights takes on the aura of religious fervor.

Two particular reactions to crises of the twenty-first century demonstrate the irony of a culture in which many expectations—such as freedom of speech or religion, ownership of a gun, executive compensation—get expressed in rights talk. In his recent memoir, Barack Obama recounted a meeting he convened in February 2009 with chief executive officers of banks and financial institutions. The news had broken that American International Group (AIG), whose London office had issued the credit default insurance supporting the practice of subprime mortgage securitization, was paying its employees \$165 million in contractually obligated bonuses. Despite the unseemliness of these payments in light of AIG’s receipt of over \$170 billion in Troubled Assets Relief Program (TARP) funds, AIG’s chief executive officer told Timothy Geithner, the Treasury Secretary, that AIG’s lawyer had advised “that any attempt to withhold the payments would likely result in successful lawsuits by the AIG employees and damage payments

41. See generally Brian H. Bix, *Ross and Olivecrona on Rights*, 34 *AUSTL. J. LEG. PHIL.* 103 (2009) (discussing legal realist views on the abstract and metaphysical nature of legal rights).

42. *Id.* at 105.

43. *Id.* at 110.

44. *Id.* at 104.

45. *Id.* at 107, 110.

46. *Id.* at 116.

47. Silbey, *supra* note 88, at 327.

coming in at three times the original amount.”⁴⁸ The Oval Office discussion centered on the tension between contract rights and moral obligations. Lawrence Summers, the Director of the National Economic Council, and Geithner acknowledged the problem but thought the government forcing a violation of private contract rights would damage the market system. Robert Gibbs, the press secretary, argued that morality and common sense should prevail over the contract entitlements.⁴⁹ Obama called a meeting of bank and financial institution executives to effectively jawbone them into exercising restraint in the face of widespread public outrage. His reaction to their resistance mirrors my own experience when dealing with rich contractual entitlements that conflict with what otherwise seems like the right thing to do. People who believe in their abstract rights, like executive compensation, can easily justify how they earned them and are loathe to give them up.⁵⁰

Such justifications and rationalizations are instances of seeing one’s indisputably legal right as equivalent to, or at least as important as, conflicting moral imperatives. The example par excellence (as Mary Ann Glendon might have predicted in her criticism of modern political dialogue) has come to dominate much of the discourse of the pandemic: the cloaking in rights talk of objections to wearing a mask or being vaccinated to limit the spread of the COVID-19 virus (including the Delta variant in the summer of 2021). Wearing a mask is really little more than a social courtesy, a demonstration of concern for other people, including those who might be at risk. Two Canadian researchers undertook a study of attitudes underlying mask resistance.⁵¹ Based on survey results, they found that people who did not wear masks were most likely to report that they did not like being forced to do so; they thought masks were ineffective, possibly harmful, or had adverse interpersonal effects; they felt masks were unappealing aesthetically; and they believed wearing them to be an inconvenient habit to acquire.⁵² But the mask resistance was not just personal. As in the flu pandemic of 1918, mask resistance was also organized and political, in the form of protest rallies.⁵³ The researchers observed that “[d]espite the range of anti-mask attitudes, a common theme running through these reports is that protestors believe that mandatory masks are a violation of civil rights.”⁵⁴ Indeed, it is beyond

48. BARACK OBAMA, A PROMISED LAND 294–95 (2020).

49. *Id.* at 295.

50. *See id.* at 296–97 (revealing that after the financial crisis, executives believed reducing their own compensation packages was a sufficient sacrifice and additional government action was unnecessary).

51. Steven Taylor & Gordon J.G. Asmundson, *Negative Attitudes About Facemasks During the COVID-19 Pandemic: The Dual Importance of Perceived Ineffectiveness and Psychological Reactance*, 16 PLOS ONE e0246317, at 1 (Feb. 17, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0246317> [<https://perma.cc/7GQ3-CZE3>].

52. *Id.* at 7.

53. *Id.* at 2. *See also* Christine Hauser, *The Mask Slackers of 1918*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html> [<https://perma.cc/2YYP-ZDWN>] (discussing cultural and political backlash to mask requirements during the 1918 influenza pandemic).

54. Taylor & Asmundson, *supra* note 51, at 3.

dispute that mask wearing and vaccination during the COVID-19 pandemic has often been a statement about political, constitutional, and religious rights.⁵⁵

Rights are, as often as not, the *Gesellschaft* substitute for *Gemeinschaft* rites. In other words, rights talk has often replaced what in the past would have been considered a social or religious obligation. And lawyering in the belief that the outcome of the legal argument is “true” is as close to ritual or dogmatic justification as one can otherwise encounter in modern life. This is not the place for reiteration of the extensive debates about whether there is objective judgment-independent truth in law or even legal “facts” that go beyond the trivial.⁵⁶ Immanuel Kant held the view that humans can reason their way to moral beliefs and conclusions that are correct enough to be thought of as true. Yet reasoning one’s way to moral truth also leads to what Kant called “transcendental illusion”: the mistaking of belief engendered by pure reason for empirical knowledge.⁵⁷ But as applied to the human institution of law and the articulation of rights within it, Connie Rosati captured the correctly skeptical concern that “law is something we make, and the conventional origins of law seem terribly at odds with the idea that legal facts are utterly independent of our beliefs, judgments, attitudes, or reactions concerning what the law is.”⁵⁸ To the contrary, what makes something legally true in easy cases is socially conventional and jurisprudentially trivial. With all due respect to Ronald Dworkin and his theory of legal interpretivism, there is little objective truth, if any, realizable in the resolution of hard cases.⁵⁹ Rather, as Brian Bix observes, “there are right answers for most legal disputes, but for a significant number of legal questions (in this, or any other, legal system) there may be no right answer, no legal truth.”⁶⁰

But the common view that there are indeed objective legal truths accessible by reason, existing independent of one’s own judgment,⁶¹ is enough to make the case that rights talk derives as much from *Gemeinschaft* ritual as *Gesellschaft* reason, even in 2022. Against skepticism about knowable truth about legal rights, one may juxtapose the idea that legal argumentation, while capable even of expression in first-order predicate logic, is nevertheless authoritarian in nature

55. Amanda Hess, *The Medical Mask Becomes a Protest Symbol*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/arts/virus-mask-trump.html> [https://perma.cc/XS72-TBS7]; Teo Armus, *Brooklyn’s Orthodox Jews Burn Masks in Violent Protests as New York Cracks Down on Rising Coronavirus Cases*, WASH. POST (Oct. 8, 2020), <https://www.washingtonpost.com/nation/2020/10/08/orthodox-jews-protest-covid-brooklyn/> [https://perma.cc/M27K-KW8H].

56. See generally Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEG. THEORY 33 (1995); DENNIS PATTERSON, *LAW AND TRUTH* (1999); Mark Greenberg, *How Facts Make Law*, 10 LEG. THEORY 157 (2004); Connie S. Rosati, *Some Puzzles About the Objectivity of Law*, 23 L. & PHIL 273 (2004); Brian H. Bix, *Reflections on Truth in Law*, 8 COSMOS + TAXIS 35 (2020) [hereinafter *Reflections*].

57. SEE IMMANUEL KANT, *CRITIQUE OF PURE REASON* 590 (Paul Guyer and Allen W. Wood trans., 1999) (1781) [hereinafter *CRITIQUE OF PURE REASON*].

58. Rosati, *supra* note 56, at 303.

59. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

60. *Reflections*, *supra* note 56, at 38.

61. Rosati, *supra* note 56, at 282–85.

and more evocative of religion than science. The result is an implicit reverence for the doctrine as a coherent body and further, as dogma, even among those legal scholars who would describe themselves as secular legal positivists (if they thought about it at all). Even the most secular scholars of positive contract and corporate law seem to want to find the underlying conceptual structure, as though there were normative truths or facts in the doctrine analogous to the Standard Model of particle physics or the general theory of relativity. Modern justification of rights, the stuff of legal argument, like religion, justifies or condemns action by derivation of outcomes from authoritative texts.⁶² As Peter Goodrich observed:

Too often we meet the figure whom Doderidge nicely terms the legal temerist, the professor in a blind rush to judgment, intent only on proving his point, his worth and so conforming rather too easily to the almost comical persona of the “authority paradigm”, the dogmatist who cannot stay to explain in any sustained way why she thinks that philosophy, theory, hermeneutics, literature or deconstruction or some imagined spectre bearing that name should be banished, branded, destroyed. As if their opinion somehow carried an unreal and unreasoned weight. Which, of course, is the problem with the authority paradigm.⁶³

I turn to my Jewish heritage to illustrate the similarity of doctrinal corpus in law and religion. Here, unsurprisingly, the practitioners are equally capable of mistaking their doctrine and practices for truth when applying authoritative text to circumstances. For instance, shellfish are not kosher, but one of our rabbis once said, “I don’t think God really cares whether we eat shrimp.” What he meant was that the central insight was the spark of divinity, of the singularity. In Judaism, it is a god so abstract that the name in Hebrew is the Tetragrammaton consisting of the Hebrew letters “*Yod, Hay, Vov, Hay*” (YHVH), unspeakable and barely defined (probably something like “I am what I am” or “it is what it is”). Our rabbi’s implication was that the spark of divinity is what matters, not the rituals human beings design to remind themselves of that spark on a regular basis.

Even worse is the corruption of divine ideals when human beings elevate to the same level of divinity the ritual, the doctrine, and the liturgy that they, not YHVH, created. What matters is not keeping kosher but infusing daily life with reminders of the spark of the divine. But when the ritual or the dogma themselves become divine, disputes over the religious legality of eating shellfish or secular entitlements resist resolution by discourse, and likely call on one of the interlocutors to have a conversion experience.⁶⁴ “If reconciliation is to occur, then one of us must forsake reason-giving, (non-rationally) reject our old rule, and (non-rationally) accept a new rule, thereby ending the dispute.”⁶⁵ Kant observed

62. See Geoffrey Samuel, *Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously By Scientists and Social Scientists?* 36 J.L. & SOC’Y 431 (2009) (arguing that law operates under an “authority paradigm,” where judges make governing assertions free from the normal constraints of scientific method).

63. Peter Goodrich, *Intellection and Indiscipline*, 36 J.L. & SOC’Y 460, 477 (2009).

64. Brian Ribeiro, *Philosophy and Disagreement*, 43 CRÍTICA 3, 6–9 (2011).

65. *Id.* at 8–9 (citing LUDWIG WITTGENSTEIN, ON CERTAINTY (Denis Paul & G.E.M. Anscombe trans., 1969)).

the same possibility of corruption of rational religion: “The illusion of being able to accomplish anything in the way of justifying ourselves before God through religious acts of worship is religious *superstition* just as the illusion of wishing to accomplish this by communion with God is religious *fanaticism*.”⁶⁶ God really wants good life-conduct, but “historical faith routinely claims that God’s judgment is based instead on our doctrinal commitments and liturgical observances.”⁶⁷

Even to modern sensibilities, the Jewish mystics can be remarkably persuasive on the illusiveness of ideal truth, its corruption by human interpretation, and its replacement by worship of human-made rituals and artifacts. In the mystic tradition, what Moses heard from God at Sinai, the seminal Jewish religious moment, was the sound of *aleph*, the first letter of the Hebrew alphabet. The ironic insight is that, in Hebrew, the *aleph* has no sound.⁶⁸ Rav Avraham Kook, himself a mystic and the chief rabbi of Palestine during the British Mandate, contended there is spiritual heresy by the corruption of YHVH as soon as one tries to express YHVH in human terms, even in prayer or ritual.⁶⁹ My preferred name for God is the Kabbalists’ “Ein Sof,” which means “there is no end.” It is both the most abstract conception of God in the Kabbalah (a school of Jewish mysticism) as well as a wry commentary on the human teleological tendency: “Guess what! For all your sense of ends and purposes, there aren’t any, or at least none that you can really come to terms with.” From that perspective, suggesting that you have a right not to wear a mask or get the COVID-19 vaccine sounds as silly as the notion that God actually cares about eating shrimp.

Jewish tradition is particularly helpful in revealing the commonalities of religious and legal argumentation because of the Talmud, the great code and commentary of religious law. The Talmud is the set of tractates in which rabbis in the first centuries of the Common Era dissected biblical text and applying it to, among other things, civil issues like torts and contracts.⁷⁰ One form of Talmudic argument is called *pilpul*. Serious treatments consider it to be “a means to join each [aspect of Talmudic] Law to its Biblical prooftext.”⁷¹ Nevertheless, the logic can often best be described as hair-splitting. It appears in Harry Kemelman’s

66. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 162 (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1793).

67. Lawrence Pasternack & Courtney Fugate, *Kant’s Philosophy of Religion*, STAN. ENCYCL. PHIL. § 3.7.5 (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/entries/kant-religion/> [<https://perma.cc/6BQC-U93D>]; KANT, *supra* note 66, at 158–59.

68. LAWRENCE KUSHNER, THE RIVER OF LIGHT: SPIRITUALITY, JUDAISM, CONSCIOUSNESS 62 (1995).

69. ABRAHAM ISAAC KOOK, THE LIGHTS OF PENITENCE, THE MORAL PRINCIPLES, LIGHTS OF HOLINESS, ESSAYS, LETTERS, AND POEMS 261–67 (Ben Zion Bokser trans., 1978).

70. See, e.g., Benjamin Shmueli & Yuval Sinai, *Liability Under Uncertain Causation: Four Talmudic Answers to a Contemporary Tort Dilemma*, 30 B.U. INT’L L. J. 449 (2012); Tsureil Rashi & Andrew A. Schwartz, *Contracts Capsized by COVID-19: A Legal and Jewish Ethical Analysis*, J. BUS. ETHICS (2021).

71. David Shasha, *What is Pilpul, and Why on Earth Should I Care About It?* HUFF. POST (May 22, 2010), https://www.huffpost.com/entry/what-is-pilpul-and-why-on_b_507522 [<https://perma.cc/QK8L-RBYS>].

series of murder mysteries in which David Small, a bookish Conservative rabbi in a thinly disguised model of Marblehead, Massachusetts, would use his skills as a Talmudic logician to help the local Irish-Yankee police chief solve murder cases.⁷²

In one instance, at the end of Kemelman's *Saturday the Rabbi Went Hungry*, a wealthy and religious old man has made a vow to the president of the synagogue board to fund the addition of a chapel, designed by the president, to the main structure of the synagogue. The old man dislikes the design but is equally hesitant not to keep his vow. He asks Rabbi Small for what is in effect a legal interpretation. The rabbi invokes the rule of *shatnes*, from the twice-repeated biblical injunction not to mix linen and wool in clothing. The logic is that the repetition means that the rule goes beyond cloth and constitutes a rule against inappropriate mixtures. Since the design of the chapel clashes with the design of the main building, it is forbidden by the rule of *shatnes*. The rabbi suggests instead that the chapel design would be appropriate as a free-standing building in the synagogue's cemetery. The old man happily accepts the rationalization, and the story concludes.⁷³ In another instance, the public address in the synagogue sanctuary breaks just before Yom Kippur services, and the rabbi argues to the distraught cantor that singing without the use of electronics was in fact the correct result under Jewish law.⁷⁴

That was a benign (and fictional) use of *pilpul*. In the case of the cantor, the rabbi's wife, who has heard the discussion, says with a smile, "That was a terrible *pilpul*." The rabbi agrees but observes that for thousands of years *pilpul* was a means of allowing the rabbi to justify what his good sense has already told him the result should be. Moreover, it "converted into a blessing something that has to be tolerated anyway. It made him feel pious and devout rather than aggrieved."⁷⁵ But *pilpul* need not be benign and, in that form, resembles much legal argumentation about rights. As one commentator observed,

Pilpul occurs any time the speaker is committed to "prove" his point regardless of the evidence in front of him. The casuistic aspect of this hair-splitting leads to a labyrinthine form of argument where the speaker blows enough rhetorical smoke to make his interlocutor submit. Reason is not an issue when *pilpul* takes over: what counts is the establishment of a fixed, immutable point that can never truly be disputed.⁷⁶

It is "the rhetorical means to mark as 'true' that which cannot ever be disputed by rational means."⁷⁷

Pilpul is the demonstration that all doctrine, legal or religious, derived from an authoritative yet unattainable ideal truth is a corruption of that ideal.⁷⁸ If legal

72. HARRY KEMELMAN, *SATURDAY THE RABBI WENT HUNGRY*, IN *WEEKEND WITH THE RABBI* (1969).

73. *Id.* at 365–70.

74. *Id.* at 177–78.

75. *Id.*

76. Shasha, *supra* note 71.

77. *Id.*

78. That may make me sound like a critical legal scholar, which I am most decidedly not, but I am

argument, like *pilpul*, traces back to an authoritative text or doctrine, the advocates' ascriptions of a kind of divinity to the doctrine, or at least an ideal doctrinal coherence approaching the divine, make some sense. Such ascriptions of authoritativeness, if not a quasi-divinity, to doctrine occur regularly and across legal subject matters. No less an icon than Karl Llewellyn told new law students eighty years ago that the work of a lawyer or judge in determining the law proceeds on the assumption "that all the cases everywhere can stand together. It is unquestionably the assumption you must make, at first. If they can be brought together, you must bring them."⁷⁹ And despite the distinct possibility that rule application is indeterminate as a matter of pure logic (there is no rule for the application of a rule),⁸⁰ there is a strong teleological pull to Dworkinism: that every problem has a single correct answer in terms of its fit with the prior doctrine and its justification as a good outcome. One only has to read some of the debates on the Association of American Law Schools' contracts listserv over knotty doctrinal puzzles to see that in practice.

In tenuous cases, legal *pilpul*, or hairsplitting, can smack of the absurd. But it can underlie serious academic debate like the one I had with my friend Stephen Bainbridge over the shareholder wealth maximization principle. That is a concept that many believe is fundamental to the doctrinal corpus of corporate law, but it actually decides cases in only the rarest of bizarre circumstances.⁸¹ Bainbridge maintains, axiomatically, that the purpose of the corporation is exclusively for the benefit of the shareholders. That is *a* purpose but not the only purpose. Bainbridge recently called out another scholar's characterization of a corporation as a "real entity" as, in Felix Cohen's famous coinage, transcendental nonsense.⁸² Even there, the *pilpul* of our debate justification had an ironic appeal to metaphysics.⁸³ I did not think the thesis Professor Bainbridge criticized was

not the first to tread this path. *See generally* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

79. K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 50 (1960).

80. *See* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 202 (G.E.M. Anscombe trans., 3d ed. Blackwell 2001) (1953); Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937, 943 (1990) (explaining Wittgenstein's "sceptical paradox"); Linda Ross Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 UNIV. CIN. L. REV. 727, 733–34 (1999) (discussing how judgment and application of reason to the natural world are "uniquely human functions").

81. *See* Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345 (2021); Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285 (2021) [hereinafter *False Dichotomy*] (discussing the Business Round Table and its statement on the purpose of a corporation)].

82. Stephen M. Bainbridge, *The Corporation is not a Real Entity and to Argue the Contrary is "Transcendental Nonsense"*, PROFESSORBAINBRIDGE.COM (Apr. 5, 2021), <https://www.professorbainbridge.com/professorbainbridgecom/2021/04/the-corporation-is-not-a-real-entity-and-to-argue-to-the-contrary-is-transcendental-nonsense.html> [https://perma.cc/JKT3-BAM3] (responding to a piece by Eva Micheler, *Company Law - A Real Entity Theory* (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783696 [https://perma.cc/4ZLL-FZFZ]).

83. Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 289–90 (2021) (discussing my claims regarding shareholder wealth maximization).

nonsensical. I suggested, in response, that one person’s abstract thinking could be another person’s transcendental nonsense. The Latin root “corp” at the core of a “corp-oration” is a powerful metaphor for a body and probably did not get there randomly. As I wrote earlier, “I cannot even refer to the ‘body’ of Delaware corporate law doctrine without invoking the corpus metaphor that pervades the thinking of even the most anti-metaphysical proponents of positive law.”⁸⁴

IV

THE MODERN STATE OF NATURE - WAR BY WAY OF REASON

If it is not already clear, there is some justification for skepticism about whether resort to modern institutions of rights, like the institution of contract law, reflects the triumph of civil and reasoned discourse over brute authority. Locke set down his thesis on the natural rights of man in the last decade of the seventeenth century, but it only followed Thomas Hobbes’s darker vision by a matter of some forty years: “this warre of every man against every man” where “notions of Right and Wrong, Justice and Injustice have there no place.”⁸⁵ Reason is never more the slave of the passions than when employed after the fact to justify actions taken in furtherance of brutish desire. There is no evidence of a historical watershed after which every hallmark of the state of nature wholly disappeared or sublimated itself to expressions consistent with reason, civil discourse, and the rule of law. The world still provides evidence of Hobbes’s state of nature: the condition that “there be no Propriety, no Dominion, no Mine and Thine distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it.”⁸⁶

The competition between Lockean and Hobbesian conceptions of the world continues in the gray area practices this Article examines. When it comes to interpreting the cultural significance of parking space savers, perhaps Lockean rights and reason have the upper hand over Hobbesian war. Susan Silbey’s point is that interlocutors undertake the practice and debate its propriety within a framework of competing property rights— “it’s my labor that created the space,” versus “it’s public space owned by the city.”

But it is still a gray area. The space savers may feel entitled to any spot that they can obtain by triumphing over another for the sake of the benefit of the parking spot to them and the loss to the rest. That is consistent with the equally compelling and harsher Hobbesian view of human nature as inherently governed by self-interest:

“[E]very one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has Right to every thing; even to one another’s body.”⁸⁷

84. *False Dichotomy*, *supra* note 81, at 369.

85. THOMAS HOBBS, *LEVIATHAN* 1, 104 (Christopher Brooke ed., 2017) (1651).

86. *Id.* at 105.

87. *Id.* at 106.

Moreover, there is no active and professional mobilization of legal institutions in connection with parking space savers. The distinct possibility remains of enforcement of the “right” to the shoveled space through vigilante justice.⁸⁸ Compare queuing. It can occur within a recognized system of rights that operate without a formal legal system. But there is no guarantee that it will, even in modern societies. “Queuing in an organized fashion is virtually unheard of in [Israel], where shoppers tend to congregate in an unruly mass next to the counter each waving the purchases they want in front of the cashier’s eyes.”⁸⁹ As another described it, “Israelis do not have the queue-standing gene They just seem to stand around in a bunch and then use their elbows to move forward when the train or bus arrives or when going through a building’s security entrance.”⁹⁰ Or if there is a queue, people find their friends and cut in ahead of others (a custom so prevalent it inspired the term “Israeli queue” for a particular set of priority algorithms in data processing and operations research).⁹¹ As to this taxonomically blurry practice, Hobbesian war prevails over Lockean reason.

But combining Locke, Hobbes, and the argument from authority gives us the worst of all possible outcomes. Someone grabs what they want and then rationalizes the behavior by appeal to the god of rights rather than the biblical god. The rationalization is no less an instance of reason as slave to the passions simply because it occurs in 2022 as opposed to 1738 (about the time Hume coined the phrase).⁹² The ironic difference between *Gemeinschaft* and *Gesellschaft*, to take Silbey’s point, is the extent to which social practices of everyday life are infused with rights talk and rights culture that, at least at the margins, come to resemble religion talk. And the same corruption of the ideal is apparent. What is a thin theory of liability but another version of *pilpul*, seeking to justify a particular practice or outcome by linking it to an authoritative text?

Legal rhetoric, even in mundane disputes, justifies outcomes as just, even when everyone knows the rhetoric puts ideals and justice in service of instrumental ends.⁹³ Weaponized reason may be gentler than a gun or a club, but it is still a weapon capable of misfiring and becoming dogma. As Kant observed, one need not be a bungler or a sophist to be led astray by reason:

[T]here is a natural and unavoidable dialectic of pure reason . . . that irremediably attaches to human reason, so that even after we have exposed the mirage it will still not cease to lead our reason with false hopes, continually propelling it into momentary

88. Silbey, *supra* note 8, at 82.

89. *Queuing is Bad for your Bottom Line*, ISRAEL21C (Oct. 6, 2008), <https://www.israel21c.org/queuing-is-bad-for-your-bottom-line/> [https://perma.cc/68MQ-L33A]. The insight about Israeli queuing comes from a story Susan Silbey told me about a trip there in 1973.

90. Marina Shemesh, *The Subtle Art of Standing in a Queue in Israel - A Survivor’s Guide*, A LETTER FROM ISRAEL (Dec. 12, 2019), <https://www.aletterfromisrael.com/2019/12/the-subtle-art-of-standing-in-queue-in.html> [https://perma.cc/A3C7-C6CZ].

91. See Nir Perel & Uri Yechiali, *The Israeli Queue with Priorities*, 29 STOCHASTIC MODELS 353 (2013) (discussing a two-class, single-server, preemptive priority queueing model).

92. DAVID HUME, A TREATISE OF HUMAN NATURE 462 (Ernest C. Mossner ed., 1985) (1739).

93. Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC’Y REV. 727, 742 (1989).

aberrations that always need to be removed.⁹⁴

That is particularly true when reason is the tool by which we justify what we desire.

Most recently, the outbreak of the Delta variant of the COVID-19 virus coincided with another outbreak of ironic legal and political *pilpul*. Vaccination rates in the “red” states lag the “blue” states by wide margins,⁹⁵ and outbreaks of the Delta variant of the virus have been more severe in those states.⁹⁶ Vaccination is at least arguably less a matter of social courtesy than mask-wearing. Yet far-right politicians and media have made opposition to mandatory vaccinations, either by governments or private employers, a matter of constitutional and legislative right.⁹⁷ “My body, my choice” as an anti-vaccination slogan strikes proponents of abortion rights as hypocritical; why should one claim the right to contribute to the spread of a deadly virus on the basis of freedom of bodily autonomy from government inference when women are not accorded the equivalent freedom?⁹⁸ There is no problem being both pro-choice and pro-vaccination nor any inconsistency in holding both views simultaneously. But if one believes, as a matter of first principles, the unborn child has rights separate from those of its mother, the avenue for a *pilpul* justifying the apparent inconsistency of bodily autonomy becomes clear.

Hence, the normative point is to reduce the ubiquity and fervor of rights talk not about fundamental human rights but about matters that simply do not deserve that passion. Indeed, “[i]f the concept of human rights is to be useful, we must distinguish *human* rights from the *legal* rights of particular societies, and from other desirable social objectives.”⁹⁹ It means giving up, at least a little, one’s self-focus and ability to rationalize one’s interest in business transactions and social interactions. Stewart Macaulay and Lisa Bernstein documented the intervention of wisdom and practicality in business transactions, going beyond the mere assertion of contract rights. That may well have no more profound basis

94. CRITIQUE OF PURE REASON, *supra* note 57, at 386–87.

95. Katie Adams, *States Ranked by Percentage of Population Fully Vaccinated: July 30*, BECKER’S HOSP. REV. (Jul. 30, 2021), <https://www.beckershospitalreview.com/public-health/states-ranked-by-percentage-of-population-vaccinated-march-15.html> [<https://perma.cc/MJ4S-CBN2>].

96. Centers for Disease Control and Prevention, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=Risk [<https://perma.cc/76ZH-KEEK>].

97. Elaine Kamarck, *COVID-19 is Crushing Red States. Why Isn’t Trump Turning his Rallies into Mass Vaccination Sites?* BROOKINGS (Jul. 29, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/29/covid-19-is-crushing-red-states-why-isnt-trump-turning-his-rallies-into-mass-vaccination-sites/> [<https://perma.cc/B7CC-4SBU>]; HUSCH BLACKWELL, *50-State Update on Pending Legislation Pertaining to Employer-Mandated Vaccinations*, HUSCH BLACKWELL (Jul. 1, 2021), <https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations> [<https://perma.cc/3RG9-43DJ>].

98. Molly Jong-Fast, *My Body, My Choice? The Paradox of Republican Anti-vaxxers*, VOGUE (Jul. 14, 2021), <https://www.vogue.com/article/my-body-my-choice-the-paradox-of-republican-anti-vaxxers> [<https://perma.cc/PE2W-B8UF>].

99. MICHAEL FREEMAN, *HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH* 6 (2d ed. 2011) (emphasis in original).

than a rational calculation of the long-term costs of holding onto rather than waiving or renegotiating a right. Nevertheless, the manner in which people cling even to seemingly immaterial or trivial rights is astounding. As President Obama observed of the bankers' insistence on *their* rights, I have seen business executives react to crisis by holding fast to contract rights rather than exercise the good sense to back off. Or what could possibly be so abhorrent about the courtesy of wearing a mask to protect others from COVID-19 that one resorts to individual freedoms to justify the refusal?

This is the final irony in the modern reification of rights. President Obama invoked his Kansas grandmother as a representation of "what a banker was supposed to be: honest. Prudent. Exacting. Risk-averse. Someone who refused to cut corners, hated waste and extravagance, lived by the code of delayed gratification, and was perfectly content to be a little bit boring in how she did business."¹⁰⁰ Overcoming the power of rationalization requires its own kind of faith, an *affective* rather than *calculative* response. How does someone achieve that affect? There are aids, but they are more evocative of *Gemeinschaft* ritual than *Gesellschaft* rights. In South Africa, the concept is called *ubuntu*, the idea that "you can't exist as a human being in isolation."¹⁰¹ Even in a modern constitutional democracy, the *Gemeinschaft* sentiment underlies the country's *Gesellschaft* constitutional principles. This sentiment evokes "humanness; social justice; fairness; the rehabilitation of offenders; the maintenance of law and order; and recognizing a person's status as a human being."¹⁰²

In Western culture, someone as unlikely as the theologian Martin Buber proposed a solution that would help even "the leader of a great technical undertaking" in tempering *Gesellschaft* rights with *Gemeinschaft* sentiment.¹⁰³ Buber called for something called "dialogue," a check on rationalization and justification that is the stuff of rights talk. It is, however, an exercise that emanates more from the heart than the brain:

"It can neither be interpreted nor translated, I can have it neither explained nor displayed; it is not a what at all, it is said into my very life; it is no experience that can be remembered independently of the situation, it remains the address of that moment and cannot be isolated, it remains the question of a questioner and will have its answer."¹⁰⁴

People can check "this warre of every man against every man" not by argumentation but by the insight obtained by hearing and accepting what others say to them. One is not required to satisfy the questioner, but only to hear the question: "[t]he basic movement of the life of dialogue is the turning towards the

100. OBAMA, *supra* note 48, at 296–97.

101. Clinton Foundation, *The Spirit of Ubuntu* (Jul. 14, 2012), <https://stories.clintonfoundation.org/the-spirit-of-ubuntu-6f3814ab8596> [<https://perma.cc/T4UL-LQBP>].

102. William C. Rhoden, *An African Ideal Crosses Borders, Hearts and Minds*, N.Y. TIMES (Jun. 3, 2010), <https://www.nytimes.com/2010/06/04/sports/04rhoden.html> [<https://perma.cc/GAN5-NNTG>].

103. MARTIN BUBER, BETWEEN MAN AND MAN 44 (Ronald Gregor-Smith trans., 2002) (1947).

104. *Id.* at 14.

other.”¹⁰⁵ For all his lyricism, Buber was pragmatic about dialogue. Dialogue is a relationship in which we hear the questions of another; it is not altruism, and it is not love.¹⁰⁶ Indeed, Buber wanted to be clear it is not about other-worldly mysticism, but a way of approaching this world. The goal is the quotidian not the pure break-through.¹⁰⁷

This is hardly pie-in-the-sky utopian clamoring for a return to tribal cultures. I, too, am a creature of the *Gesellschaft*—a former corporate executive who teaches business law unapologetically as an honorable pursuit. The point is to call on some *Gemeinschaft* wisdom rather than feverish rights talk, particularly when coping with business and social crisis. Sometimes private individual rights (and being right) are not all they are cracked up to be.

V

CONCLUSION

Institutions like contract law adapt. Whether they are in crisis likely depends on the viewpoint of the participant or the observer. A long-time contract law professor, now told that the year-long six-credit course will be a one-semester four-credit course, is entirely capable of claiming that contract law is in crisis. Contracts and contract law largely map on relationships (“smart contracts” being the thing-like exception that proves the rule), and they are so rarely expressed (in jurisprudential lingo) as anything resembling the will of the sovereign. For these reasons, assessing the adaptation of contract law means exploring a fascinating overlap of law, sociology, philosophy, and politics. If mind-numbing boilerplate and click-through terms and conditions really offend the body politic, the institution will adapt either through legislation, common law doctrine, or custom. The institution does not appear to be in any particularly unusual crisis.

There can be crises of civility, rationality, good sense, and extremism. Protagonists and antagonists in culture and other wars will undoubtedly call upon abstractions like contract rights (or their absence) in furtherance of their passions. It takes teachers and leaders to deconstruct abstract and intangible conceptions, like contract rights, as palpably real things and to be able to articulate why either (a) they are not worth asserting, or (b) even if worth something, they ought not to be asserted.

105. *Id.* at 25.

106. *Id.* at 24.

107. *Id.* at 41.