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Third-Party Beneficiaries and the Nature of Contract

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In The Puzzle of the Beneficiary's Bargain, Nicolas Cornell describes a jurisprudential puzzle concerning contract law's treatment of third-party beneficiaries and contends that, to resolve the puzzle, we must radically revise our understanding of contractual obligation. This Response raises some difficulties for the revised understanding of contractual obligation that Cornell proposes. It then suggests an alternative way of resolving Cornell's puzzle—one that leaves our ordinary understanding of contractual obligation intact.

I. INTRODUCTION.....	1
II. AN OLD PUZZLE: SUCCESSIVE CONTRACTS FOR THE SAME PERFORMANCE.....	3
III. A NEW PUZZLE: THE BENEFICIARY'S BARGAIN.....	5
IV. CORNELL'S SOLUTION.....	6
V. DIFFICULTIES WITH CORNELL'S SOLUTION.....	8
VI. AN ALTERNATIVE APPROACH?.....	12

I. INTRODUCTION

What is a contract? As Arthur Corbin pointed out, there are at least two different things this question might mean.¹ The first is entirely familiar: we might be asking, How is a contract created? Here, at least the beginning of an answer would be supplied by the doctrines of contract formation, especially the offer and acceptance

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1. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 169 (1917).

and consideration doctrines. The second thing the question might mean, by contrast, is somewhat more obscure. This is in part because no particular legal doctrine is devoted to supplying an answer. The second thing we might be asking is, What does the formation of a contract bring about? Once the parties have satisfied the requirements of contract formation, what kind of obligation do they now owe each other that they did not owe before?

It is natural to think that contract formation must bring about some kind of new obligation, because the law treats parties who have formed a contract differently from persons who have not. For example, a contracting party's behavior may be condemned as a "breach," and she may be ordered to "remedy" that breach by paying money or performing a specific action. One way to explain the special treatment of contracting parties would be to connect this treatment to a distinctive kind of obligation that contract formation creates.² The character of the obligation might be revealed by, for example, the rules of contractual remedies, because the remedies are designed to vindicate the obligation or repair its breach. In this sort of way, various doctrines of contract law, though they do not directly define what the parties owe each other, might supply circumstantial evidence.

Nicolas Cornell's brilliant article, *The Puzzle of the Beneficiary's Bargain*, uncovers some new evidence of this sort.³ Cornell notices that the law's treatment of third-party beneficiaries, when considered alongside some other commonplace features of contract law, gives rise to a puzzle. This puzzle is a variation on a much older one that troubled the great contract scholars of the last century. To resolve Cornell's puzzle, we may have to revise our understanding of contractual obligation. Indeed, if Cornell is correct, the required revision is radical: we must abandon the notion that a contract confers a right to contractual performance.

This Response begins by briefly recapitulating Cornell's puzzle and outlining his proposed solution. Because the solution is radical, we may be forgiven for having doubts about it. The Response outlines a few such doubts before suggesting an alternative, less radical, solution. Rather than abandoning the notion of a right to performance in contract law, we should attend to Corbin's distinction between the

2. However, some have doubted the utility of this approach. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52, 53 (1936).

3. See Nicolas Cornell, *The Puzzle of the Beneficiary's Bargain*, 90 TUL. L. REV. 75 (2015).

character of an extant obligation and the way in which an obligation is created.

II. AN OLD PUZZLE: SUCCESSIVE CONTRACTS FOR THE SAME PERFORMANCE

What kind of obligation does contract formation bring about? We might be tempted to answer by saying that the contractual promisor incurs a *duty to provide the promised performance*.⁴ If she incurs such a duty, it seems to be a short step to explaining the normal remedies for breach of contract, which require the promisor to perform (specific performance) or pay a sum of money calculated to place the promisee in the same position as she would have been if the promisor had performed (expectation damages).

However, around the turn of the twentieth century, leading scholars on both sides of the Atlantic realized that this understanding of contractual obligation gives rise to a puzzle: the puzzle of successive contracts for the same performance.⁵ Imagine that a promisor *A* enters into a first contract with *B*, promising to provide a certain performance φ . Subsequently, *A* enters into a second contract with *C*, promising to provide the same performance φ . For example, *A* promises *B* that she will shovel the snow off the sidewalk on *B*'s street; *A* then promises the same thing to *C*, who lives on the same street. Does the second contract create a new obligation? Or is it redundant, adding nothing to what *A* already owes under the first?

Well, if a contractual promisor simply incurs a *duty to provide the promised performance* (φ), the second contract is redundant. Both contracts purport to create the same duty. Thus, there is no point in making the second contract.

But surely, we tend to think, that cannot be correct—surely the second contract imposes some kind of new obligation. Imagine that you are the promisor *A*. Would you really think of yourself as being in the same normative situation after your second contract with *C* as you were in after your first contract with *B*? Or imagine that you are *C*. Surely your dealings with *A* must have had *some* effect and were not redundant. To account for these intuitions, we must revise our understanding of the obligation that contracting creates.

Stated in this way, the puzzle of successive contracts is purely theoretical; however, it arose out of a concrete problem prompted by

4. See *id.* at 79.

5. See *id.* at 88-93.

the doctrine of consideration.⁶ Consideration doctrine requires that, for the formation of a valid contract, there must be some new detriment incurred by the promisor or new benefit conferred on the promisee. Accordingly, there is no valid contract where a promisor purports to incur an obligation that she already owes. (This is the preexisting duty rule.)⁷ Consideration doctrine therefore threatens to—and in historical case law, sometimes did—render a second contract for the same performance void.⁸

Yet as Cornell stresses, while the potential invalidity of the second contract gives the puzzle of successive contracts a practical bite, the theoretical question at its root, about the character of contractual obligation, arises independently of the vagaries of the common law of consideration.⁹ The theoretical question would arise even if there were no doctrine of consideration. From this perspective, consideration doctrine is notable primarily because it functions as a sort of redundancy test, thereby supplying circumstantial evidence of what a contractual obligation is.¹⁰

The great scholars of the last century solved the puzzle of successive contracts by refining their understanding of the obligation that a contract creates. Previously, they were tempted to say that the promisor incurs a *duty to provide the promised performance*. They revised this formulation in a way that, in retrospect, seems obvious: they said that the promisor incurs a *duty to the promisee* to provide the performance.¹¹ Under this revised formulation, there is no redundancy in the case of successive contracts as long as they are made to different parties. The first contract establishes *A's duty to B to ϕ* ; the second establishes *A's duty to C to ϕ* .

According to this revised understanding, a contractual promisor's duty is *relational*: it is owed to a particular person. Consequently, we can say that wherever the promisor has a contractual *duty*, a corresponding *right* exists, held by the person to whom the duty is owed (here, the promisee). If *A* owes a duty to *B to ϕ* , we can

6. *See id.*

7. *Id.* at 108.

8. *See id.* at 88.

9. *Id.* at 114.

10. Approaching the puzzle from the practical perspective of the consideration doctrine may also be helpful because this steers us away from metaphysical quandaries concerning the identity of indiscernibles (i.e., if two qualitatively identical obligations are created at different times or in different places, are there two obligations or just one?). Certainly, this Response will attempt to avoid such issues.

11. *See* Cornell, *supra* note 3, at 91-98.

equivalently say that *B* has a right against *A* to φ . As Wesley Newcomb Hohfeld would have put it, a duty is always “correlative” to a right.¹² Thus, as Cornell notes, the solution to the puzzle of successive contracts was Hohfeldian in spirit.¹³

This solution was eventually reflected in the English case law and later in the first *Restatement of Contracts*, and it continues to underpin the common law’s modern consensus that the second of two successive contracts for the same performance, made with different parties, is *not* void for want of consideration.¹⁴ Following the adoption of this solution, the practical and theoretical puzzle about the nature of contractual obligation was resolved for many decades. Until now.

III. A NEW PUZZLE: THE BENEFICIARY’S BARGAIN

Now, Cornell raises a new variation on the puzzle of successive contracts for the same performance: the puzzle of the beneficiary’s bargain. He notices that the solution to the older puzzle does not account for a complication that arises once we accept that a contract may give a third-party beneficiary the ability to enforce it or obtain damages for breach.

Under judge-made law in the United States and the statutes of other common law jurisdictions such as England, a contract made for the benefit of a third party will in certain circumstances entitle that party to sue for performance or damages.¹⁵ This approach has its critics, but it is well established, and strong arguments can be made on its behalf. In any event, Cornell’s puzzle proceeds on the basis that this approach is valid.

With that in mind, consider another case of successive contracts for the same performance. Imagine that *A* contracts with *B* that *A* will shovel the snow off *B*’s street *and* that both parties understand this contract to be for the benefit of *C*—an elderly neighbor who also lives on the street—entitling *C* to sue for performance or damages. Subsequently, *A* enters into a second contract with *C*, promising to shovel the snow off the street. Is the second contract redundant?

Once again, stated in this way, the issue is purely theoretical, but we can restate it as a concrete doctrinal problem, asking whether the second contract fails for want of consideration. Indeed, Cornell has

12. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

13. Cornell, *supra* note 3, at 96.

14. *Id.* at 95.

15. See *id.* at 105-07.

found cases addressing the problem in those terms. Courts in the United States have split: some courts have upheld the second contract, while others have found it redundant and therefore void.¹⁶

We can see why one might think the second contract is redundant. According to our revised understanding of contractual obligation, under the *second* contract—the ordinary, non-third-party contract—*C* acquires a *right against the promisor A to performance*, which is correlative to *A*'s duty to *C* to perform. Then the question is, What obligation did *A* *already* owe *C* as a third-party beneficiary of the *first* contract? On one plausible view, because the third-party-beneficiary doctrine allows *C* to enforce the first contract, *C* must have acquired a *right against the promisor A to performance*. On this view, the second contract is redundant.

Can that conclusion be correct? Cornell thinks not. He believes the second contract must create some kind of new obligation.¹⁷ This is certainly not as obvious as it was in the case of the older puzzle. However, the following is one way to motivate the thought that the second contract must involve something new, over and above the first contract. Imagine that you are *C*. Is there not a difference between your receipt of a benefit generated by the agreement of two other parties, *A* and *B*, and your claim to that same benefit based on your own agreement with *A*? In the first situation, a benefit created by other persons falls into your lap, as it were. In the second, you directly participate in the benefit's creation.

This or some other line of reasoning should, Cornell thinks, prompt us to revise our understanding of either ordinary contractual obligation or the obligations owed third-party beneficiaries, or both. Only then will we have the conceptual resources to distinguish the normative situations created by the first and second contracts in Cornell's puzzle.

IV. CORNELL'S SOLUTION

Cornell's approach to resolving his puzzle proceeds in two stages. First, he asks us to abandon the notion that a third-party beneficiary acquires a *right against the promisor to performance*. Cornell accepts that the promisor owes some kind of obligation to the third party—who is entitled enforce the contract or obtain damages for breach.¹⁸

16. *See id.* at 82-86.

17. *See id.* at 99-102.

18. The term "obligation" is used here in a broad sense to encompass any normative relationship, claim, or liability obtaining as between two parties. Cornell uses the term in a

However, Cornell thinks that this obligation arises not because the third party has a right to performance, but because the promisor's failure to perform "wrongs" the third party, who then has "standing to complain" about the wrong.¹⁹ Why, we might ask, does the promisor's failure to perform "wrong" the third party if the third party has no "right" to performance? The third party is wronged, Cornell says, because the third party is "morally connected" to the breach of a contractual duty that the promisor owes—albeit a duty that the promisor owes only to the contractual promisee.²⁰

In essence, then, Cornell solves his puzzle by understanding a third-party beneficiary to have not a *right against the promisor to performance*, but rather *standing to complain about a wrong* that occurs when the promisor breaches a duty owed to someone else. Cornell suggests that this sort of "standing to complain" is a familiar feature of our moral life. When someone breaches a duty, even if that duty was not owed to you, it may "be appropriate for [you] to resent the breach, complain . . . , demand compensation, or forgive the perpetrator. The natural applicability of this package of moral practices and emotions shows that [you are] morally connected to the action in a special way, albeit not as a rightholder."²¹

By understanding a third-party beneficiary to have standing to complain about a wrong, rather than a right against the promisor to performance, Cornell resolves his puzzle. What a third party obtains from a contract for his benefit now looks quite different from what an ordinary contractual promisee obtains, according to the revised understanding of ordinary contractual obligation that we developed earlier.

Yet Cornell does not stop there. He thinks that once we have revised our understanding of the obligation owed a third party, as he suggests, we are also impelled to revise our understanding of the obligation owed an ordinary contractual promisee. "[C]ontract law gives [the third party] essentially the same claims and powers that it gives to any party to a contract. Thus, if third-party beneficiaries do not have a legal right to performance in contract law, why say that even a promisee has a legal right to performance?"²² Liberated by the

narrower sense in a forthcoming paper. See Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. (forthcoming 2016) (manuscript at 3), <http://ssrn.com/abstract=2659669>.

19. Cornell, *supra* note 3, at 117-20.

20. *Id.* at 118.

21. *Id.*

22. *Id.* at 122.

discovery that we can replace talk of “rights” with the notion of “standing to complain,” Cornell wants us to pluck the rights out of contract law wherever we find them.

Second, then, Cornell contends that we should abandon the notion that the contractual promisee acquires a legal *right against the promisor to performance*. Instead, Cornell says, the obligation owed a promisee arises because the promisor’s failure to perform “wrongs” the promisee, who has “standing to complain” about the wrong.²³ Why does the promisor’s failure to perform wrong the promisee if the promisee has no legal right to performance? Cornell suggests that the promisee is wronged because she is closely connected to the breach of a duty owed by the promisor, albeit a duty of the promisor’s that is not *legal*, but *moral*: the moral duty to perform one’s promises.²⁴

In Cornell’s view, the puzzle of the beneficiary’s bargain remains resolved because we can distinguish the normative situations of a contractual promisee and a third-party beneficiary. A promisee has standing to complain about the promisor’s breach of a moral duty that the promisor owes her. A third-party beneficiary has standing to complain about the promisor’s breach of a duty owed to someone else, the promisee.

V. DIFFICULTIES WITH CORNELL’S SOLUTION

Cornell has proposed a radical revision to our understanding of contract law. Before joining his revolution, we should take stock of what we might lose if it succeeds. It turns out that we have quite a lot to lose. There are a number of respects in which Cornell’s account lacks the explanatory power of a “rights based” account of contractual obligation. For ease of exposition, let us focus on Cornell’s proposed understanding of the ordinary contractual obligation owed a promisee, rather than of the obligation owed a third-party beneficiary—though what is said about the former will apply, *mutatis mutandis*, to the latter.

The first difficulty with Cornell’s account is that it does not adequately determine *who* can sue or be sued in the event of a contractual breach. His account is insufficiently relational.

Contract law as we know it normally allows only the *promisee* to sue for breach of a contract (again, leaving aside third-party beneficiaries for the moment), and the law normally allows only the *promisor* to be sued. This makes sense on the view that a contract

23. *Id.* at 120-23.

24. *Id.* at 123.

creates a correlative right-duty relation between a promisor and promisee. According to this view, only the promisee can sue because only she holds a contractual right against the promisor; only the promisor can be sued because only she owes the corresponding duty.

By contrast, Cornell's account would allow someone to recover for breach of a contract as long as she has "standing to complain" about a "wrong" done to her, and she may be "wronged" when she has a "moral connection" to the breach of a promissory duty. The difficulty with this account is that it cannot explain why the promisor and promisee, rather than other persons, should be the normal parties to a lawsuit for breach of contract.

We can imagine persons other than the promisee who should be able to sue according to Cornell's account. For example, a witness to a contract might plausibly argue that he is morally connected to its breach such that he has standing to complain. Perhaps the promisor solemnly swore to perform in front of this witness, who was chosen because of his special relationship to the promisor or because of some other recognized moral authority. Or, to take another example, persons harmed by the breach of a contract could argue that they have standing to complain. Imagine, for example, that a vacant lot is sold to a developer, and its development will enhance the value of the surrounding property. Then, the seller reneges, and thus the lot remains vacant. The owners of the surrounding property could plausibly argue that they have standing to complain. (If you do not feel the force of these examples, construct your own: imagine any situation where you would be seriously morally aggrieved by the breach of a promise, even though you are not the promisee.)

Likewise, we can imagine persons or institutions other than the promisor from whom the promisee might seek reparation for the kind of "wrong" Cornell envisages—a moral connection to a breach of promissory duty. That I am morally connected to a breach of promissory duty in no way necessitates that reparation for the breach must come from the person who committed it. Everything depends on the nature of my "moral connection." For example, on the view that someone harmed by the breach of a contract is morally connected to it such that he has standing to complain, one could plausibly argue that any reparation should come from the government, which has a responsibility to ensure that its citizens do not suffer grave harm. (Similarly, the government might be obliged to set up a fund to compensate those who suffer collateral damage when an important corporation or industry fails.)

Of course, Cornell could respond to these objections by developing his conceptions of “standing to complain,” “wrong,” and “moral connection” so that they are more determinate, singling out only contractual promisees as entitled to sue for breach and only promisors as potentially liable. However, any development along these lines that is sufficiently rigorous will bring us back to something similar to the notion Cornell wants to reject: the promisee and promisor stand in a special relation of correlative right and duty. Where such a relation obtains, the promisee’s legal claim and the promisor’s liability are really the same thing, just viewed from different perspectives. Only on the basis of this kind of relation can the promisor and promisee be identified as the necessary parties to a suit for contractual breach.

The second difficulty with Cornell’s account is that it does not adequately determine what a party can sue *for*. His account does not specify the content of contractual obligation.

One way to raise this difficulty is to ask, What remedies should be awarded in response to a breach of contract? In particular, why should the normal remedy be an order for performance or an award of damages designed to make it as if performance had occurred? These remedies seem to make sense if the promisee has a right to performance. By contrast, on Cornell’s account, they are not easily explicable. A Cornelian contractual promisee is closely connected to the promisor’s breach of her moral duty to keep her promise, and thus has standing to complain about the breach. However, there is no reason to think that the promisee’s complaint in this situation must be redressed by an award of specific performance or expectation damages.²⁵ (Indeed, those awards are often ludicrous responses to complaints about mere breaches of promises. Think about some of the promises you have been made that were broken. Surely, the only appropriate response to many of those breaches was an apology.)

Another, perhaps less obvious, way to raise the same difficulty is to ask, Why is the occasion for intervention by the legal system in contractual cases a “breach” (i.e., nonperformance)?²⁶ Applying Cornell’s account, we can imagine behavior other than nonperformance that could give the promisee “standing to complain.” The promisee might have standing to complain, for example, when the

25. Some have suggested the contrary, however. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE* 17 (1981).

26. “[A]ny non-performance is a breach.” RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (AM. LAW INST. 1981).

promisor does exactly what she promised, but does so with the knowledge that the promisee would prefer her not to. Say I promise to give you one of my paintings and then learn, through mutual friends, that you would prefer not to have it because it is ugly and you will nonetheless feel obliged to hang it on your wall. I subsequently decide, out of spite, to perform my promise. Here, you arguably have standing to complain, but you are not complaining about my nonperformance.

Again, Cornell could respond to these objections by developing his conceptions of “standing to complain,” “wrong,” and “moral connection” so that nonperformance, and only nonperformance, amounts to a “breach” and so that the natural remedy for a breach is an order for performance or payment of the monetary equivalent of performance. However, by this point, we will have returned to something like the notion Cornell wants to reject: a contract confers a right *to performance*.

Finally, it is worth noting two related points about Cornell’s methodology and, in particular, the tendency toward reductivism in his account. First, as Cornell gamely acknowledges, his proposed revision of our understanding of contractual obligation is at odds with a remarkably pervasive and deep-rooted idea in the law itself: a contract creates a right to performance and a corresponding duty to perform. “It would be hard to overstate how widespread and entrenched this way of thinking about contract law is.”²⁷ The idea of a right to performance and a corresponding duty appears frequently in black-letter expressions of the law, but it is lodged even more deeply than that. Crucial aspects of contract doctrine presuppose the idea, making little sense without it. As just one example, the very possibility an assignment of contractual rights presupposes that there is some kind of right, entitlement, or interest in performance that may be assigned. What could a contractual promisee assign, on Cornell’s account—the standing to complain about a potential wrong that may or may not occur in the future?

Second, and relatedly, Cornell’s account seems peculiarly determined to explain each normative phenomenon that it encounters not on its own terms, but in terms of something else. His account effectively proceeds on the basis that the normative phenomena of contract law can be explained only by explaining them away. Cornell begins with the familiar idea in modern law that a third party may have

27. Cornell, *supra* note 3, at 121.

a right against the contractual promisor to performance. However, he explains this away: the third party does not really have such a right, but rather standing to complain about something else (the breach of a duty that the promisor owes the promisee). Next, however, Cornell immediately explains away *that* normative phenomenon: the promisee does not really have a legal right to performance, but rather something else (standing to complain about the breach of a moral duty).²⁸ At some points, Cornell even hints that he is tempted to cash out his notion of “standing to complain” in terms of other phenomena: the emotions, sentiments, or reactive attitudes that people tend to have toward a promisor’s conduct.²⁹

What is the alternative to this reductivist mode of explanation? We must reach an understanding of contractual obligation that reveals the concepts in the law to be essentially adequate. Rather than explaining away the legal phenomena by reducing them to something else, we may be able to understand them on their own terms. Is there a solution along these lines to Cornell’s puzzle?

VI. AN ALTERNATIVE APPROACH?

Recall the puzzle of the beneficiary’s bargain: we want to say that when a third-party beneficiary of one contract enters into a second contract with the promisor for the same performance, the second transaction is not wholly redundant. There must be *something* new. And, in order to identify something new in this situation, we are tempted to distinguish the kind of obligation a promisor owes a promisee from the kind a promisor owes a third-party beneficiary.

To find an alternative resolution of Cornell’s puzzle, it is worth reconsidering the source of these motivations. Why not just accept that the second contract in Cornell’s hypothetical is redundant? And why, in particular, should we be tempted to eliminate any potential redundancy by identifying a difference between the kinds of obligations owed a promisee and a third party, respectively?

One good reason to distinguish the obligations owed a promisee and a third party would be the existence of some difference with

28. Why stop there? We could proceed to say that, although there appears to be a breach of a moral duty owed by the promisor to the promisee, the promisee in fact only has standing to complain about something else, a moral duty that the promisor owes herself. And then we could say that, although the promisor appears to owe herself this duty, there is in fact no such duty; rather, the promisor merely has standing to complain about her own failure to remain consistent over time.

29. See Cornell, *supra* note 3, at 117-18.

respect to what each of those parties may sue *for*. If each were entitled to different remedies, for example, this would be circumstantial evidence that each is owed a different kind of obligation. However, as we have seen, there is no essential difference with respect to what a promisee and a third-party beneficiary can sue for.³⁰ Once a contractual benefit is vested in a third party, he can sue for the same remedies as a promisee. Accordingly, the circumstantial evidence supplied by contract remedies doctrine does *not* indicate that distinct kinds of obligations are owed a promisee and a third party. The evidence suggests the obligations are the same.

Another reason to distinguish between the obligations owed a promisee and a third party might be supplied by the doctrine of consideration. As we have seen, if the second contract in Cornell's hypothetical is wholly redundant, it may be void for want of consideration. However, at least from a theoretical perspective, we should be reluctant to let the doctrine of consideration drive us to conclusions about the nature of contractual obligation.³¹ Consideration doctrine is notoriously difficult to justify or even explain. It is a peculiarity of the common law that does not appear in the same form in other systems. Throughout the common law's history, there have been recurrent attempts to abolish it, in whole or in part. These attempts continue today. They continue because lawyers recognize that, in many cases, the rules of consideration seem to serve no real purpose and indeed produce clear injustice. For the same reasons, the application of consideration doctrine has, throughout its history, been marked by judicial evasion and sleight of hand; the doctrine has also become riddled with exceptions. The preexisting duty rule, in particular, has been modified in some jurisdictions.³² All this suggests that if the doctrine of consideration is the only motivation for Cornell's puzzle, the solution should be to reform or abolish that doctrine.

What does this leave us in terms of motivation for the puzzle? Previously, we tried to motivate the thought that the second contract in Cornell's hypothetical is not redundant in the following way. Imagine that you are the third party *C*. Is there not a difference between the first contract, pursuant to which you receive a benefit generated by two other parties, *A* and *B*, and the second contract, in which you generate

30. See *supra* text accompanying note 22.

31. Likewise, our views about the novation situation that Cornell discusses may point toward reforming the doctrine of consideration, rather than revising our understanding of contractual obligation. See Cornell, *supra* note 3, at 101.

32. See, e.g., *Williams v. Roffey Bros.* [1991] Q.B. 1 (Eng.).

a claim to that same benefit through your own agreement with *A*? In the first situation, a benefit created by other persons falls into your lap, whereas in the second, you participate in its creation.

We might label this thought by distinguishing a *direct* from a *vicarious* acquisition of a legal benefit or claim. A contractual promisee acquires her claim to performance directly, in that she participates in its initial creation through the process of offer and acceptance and the exchange of consideration. A third-party beneficiary acquires his claim to performance only vicariously or derivatively: the claim is initially created by other persons, the contracting parties, prior to and independently of the third party's participation. Only subsequently does the third party participate in acquiring the claim, by deciding whether to accept or reject whatever the contracting parties have chosen to confer. (The third party must make such a decision at some point—at least, by the time he sues the promisor for performance or damages or when he declines to accept whatever it is that the contracting parties want to give him.)

Something like the idea of a vicarious or derivative acquisition is reflected in many of the ways that lawyers talk about the third-party-beneficiary doctrine in contract law. Courts today express this idea when they say, for example, that the third-party beneficiary “steps into the shoes” of the promisee.³³ The idea is also reflected in legal analogies between contracts for the benefit of third parties and other doctrinal mechanisms for conferring benefits. (These other mechanisms may also be used to circumvent limitations on third-party recovery in contract law.) A well-known analogy from the scholarship of recent decades is the so-called “new property.” The position of a third-party beneficiary to a contract resembles that of a citizen who has had a relatively stable benefit conferred on him by the government, who may then be regarded as acquiring a kind of property right to the benefit.³⁴ Older analogies compare the contract for the benefit of a third party to a trust, agency, or bailment relationship.³⁵ One (or both)

33. See, e.g., *Tex. Farmers Ins. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994), cited in Cornell, *supra* note 3, at 117 n.162.

34. See Antony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985) (discussing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)). Waters also notes the analogy to a suit for restitution of property: the third party may be conceived as suing for restitution of a special form of intangible property, “the property in the promise,” which the promisor wrongfully detains when she fails to perform. *Id.*

35. See Melvin Aron Eisenberg, *Third Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1368 & n.49 (1992).

of the contracting parties may be conceived as holding the benefit of the contract “on behalf of” the third party as his trustee, agent, or bailee. The third-party-beneficiary contract has also been compared to the “constructive delivery” of a gift or deed, which may confer a legally enforceable gratuitous benefit prior to any act of acceptance by the donee.³⁶

A distinction along these lines between direct and vicarious acquisition, then, may be the source of the motivation for Cornell’s puzzle. However, if that is the case, we may have been looking in the wrong place for a solution. This motivation for the puzzle need not drive us to say that the extant obligation a promisor owes a promisee differs from the obligation that a promisor owes a third party. Instead, we may merely conclude that the obligations owed a promisee and a third party, respectively, are *created* in different ways—directly and vicariously. Recall Corbin’s distinction between, on one hand, the character of an extant obligation, and on the other, the way in which that obligation is created. The distinction that we are motivated to draw between the position of a promisee and a third-party beneficiary of a contract may go to the manner of creation, rather than to the character of the obligation itself.

On this approach, the second contract in Cornell’s hypothetical would in one sense involve something new. Previously, the third party only vicariously enjoyed the benefit of an obligation that was created by other parties. Now, by entering into a contract with the promisor, he directly participates in the creation of an obligation. This difference may be the source of our inclination to deny that the second contract is wholly redundant. In another sense, however, the second contract is indeed redundant. It is redundant because there is no reason to distinguish the character of the obligation that it creates from that created by the first contract.³⁷ This leaves us free to retain the conventional understanding of what both a promisee and a third-party beneficiary of a contract acquire: a right, against the promisor, to the contractual performance.

36. *See id.* at 1377. Cornell’s proposed solution to his puzzle has a similar structure: the third-party beneficiary is said to have “standing to complain” about a transaction that occurs independently of him, between the promisor and promisee. Similarly, Melvin Eisenberg claims that a third party is permitted to enforce the contract in order to realize the contracting parties’ objectives, rather than the third party’s own. *Id.* at 1386, *discussed in* Cornell, *supra* note 3, at 119.

37. *See supra* note 10 and accompanying text.