I. INTRODUCTION

A mode of thinking may be so natural and familiar that it is not easy for adherents to see anything amiss. There is thus a danger, when advocating for conceptual revision, that one’s arguments may simply fall upon deaf ears.

I am grateful, therefore, that Nicholas Sage has taken up the issues that I raised in The Puzzle of the Beneficiary’s Bargain.1 Sage’s comments reflect a sustained and serious engagement with the puzzle that I raised in the Article. Sage’s characterization of my arguments is generally accurate—and, at times, even more succinct or elegant than my own. Even if Sage is not convinced by my solution to the puzzle, the fact that he appreciates the puzzle’s existence and the pressure that it exerts is as much as I can ask.

* © 2016 Nicolas Cornell. Assistant Professor, Legal Studies & Business Ethics Department, Wharton School, University of Pennsylvania. I am grateful for comments from Matt Caulfield and Nick Sage on a draft of this Reply.

In this Reply, I wish to make three points about Sage’s essay. First, I will quickly rehash the puzzle that I raised in the original paper, noting a couple points where my characterization may diverge from Sage’s. Second, I will comment on Sage’s proposed way of resolving the puzzle. Sage thinks that he has a way of dissolving the puzzle that will avoid the need for my significant conceptual revisions. I am not convinced that Sage actually offers much of a solution. Finally, I will respond to two different criticisms that Sage levels against my own solution to the puzzle.

II. CHARACTERIZING THE PUZZLE

The puzzle that I raised in the initial Article involves two contracts: first, a party makes a contract with someone to $\Phi$, and that contract has an intended third-party beneficiary; second, the party makes a contract directly with the third-party beneficiary to $\Phi$. The puzzle arises when one considers whether this second contract is redundant and thus lacking consideration.$^2$

Either conclusion seems problematic. On the one hand, the second contract superficially looks redundant. The third-party beneficiary already could legally enforce the promise to $\Phi$. Thus whatever right the third-party beneficiary gets from the second contract cannot amount to the ability to bring a contract action; the third-party already had that. On the other hand—and here is the puzzle—the second contract does seem to give the beneficiary something new and valuable. For one thing, the third-party beneficiary lacks control over the duty in the first contract, which might be rescinded by the original parties, at least before there has been any reliance.$^3$ Only with the second, direct contract does the third-party beneficiary get control and full assurance that the promisor will $\Phi$.

Sage characterizes the puzzle as arising because “the second contract must create some kind of new obligation” and the challenge is “to distinguish the normative situations created by the first and second contracts.”$^4$ While these ways of putting it are not wrong, I briefly want to flag concerns about each of them—concerns that may be innocent and linguistic or may prove substantive.

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2. Sage is correct to note that I take consideration to be useful simply as a concrete doctrinal indicator for the broader theoretical issue. See Sage, supra note 1, at 3-4, 5. It is not essential to the argument, but a useful device for thinking about it.


First, Sage describes both the first and second contract as creating “obligations” to the third-party beneficiary. In a helpful footnote, Sage explains that “obligation” is meant “in a broad sense to encompass any normative relationship, claim, or liability obtaining as between two parties.” He notes that I may favor a narrower usage. And he is correct about that. While the first contract does create some normative relationship between the promisor and the third-party beneficiary, the obligation created is, I would say, owed to the promisee, not the third-party beneficiary.

Perhaps this is a purely semantic disagreement and not worth dwelling upon. We can use the term “obligation” broadly and ask how the second contract’s obligation to the third-party beneficiary differs from that of first. But I worry that this way of putting the issue papers over things. It seems to me that the second contract creates something altogether new—something owed to the third-party beneficiary where nothing was owed before.

This point connects with a second worry. Sage characterizes the puzzle as requiring an explanation of what distinguishes or differentiates the position of a promisee and an intended third-party beneficiary. Consider, for example, Sage’s description of what motivates the puzzle:

> [T]he 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 [the third-party beneficiary]. 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.

That does distinguish the situations. If we were puzzled simply by what makes the first contract different from the second contract, then this would be a way to see that question.

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5. Id. at 6 n.18.
6. Id.
7. I would say that the beneficiary has standing to complain upon a breach of the first contract, but I think that it only confuses matters to speak of having standing to complain as a form of being owed an “obligation.”
8. See, e.g., Sage, supra note 1, at 12 (“[I]n 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.”).
9. Id. at 6.
But that characterization does not really capture the puzzle, I think. The puzzle is not just how being the promisee or third-party beneficiary might be different in any respect, but rather how being the promisee can add something. The reason why there must intuitively be consideration for the second contract is that we understand that the second contract affords additional control and protection. Put differently, we do not simply want to know that the normative relationship is different in origin, but rather that it is different in content.

Thus, the puzzle is not only about distinguishing the positions of the promisee and the beneficiary, but doing so in a way that explains how the promisee gets something more or of different content, normatively speaking, than the beneficiary. It is not just how the second contract is different in any respect, but how it is different in what it offers.

III. SAGE’S PROPOSED RESOLUTION

Sage tentatively offers an alternative resolution to the puzzle, which would avoid the need for my more controversial suggestion that we dispense altogether with the idea that contract law creates rights and duties of performance. Sage’s idea is that we can distinguish between “direct” and “vicarious” acquisition of the right to performance. As he explains it:

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.

This difference is, undoubtedly, present. It is the difference mentioned earlier between a benefit falling into one’s lap or being acquired through one’s participation.

Sage’s distinction here is important. Although Sage does not mention it, there is doctrinal evidence for the point. The legal relation between promisor and beneficiary created by the first contract is indirect and vicarious. Many features of the case—what would need to be proven or overcome—would be different in the lawsuit based on the second agreement. Infirmities at the time of contract would apply
equally against the third-party beneficiary as they would against the original promisee.\textsuperscript{12} And so would defenses like impracticability and public policy.\textsuperscript{13} These issues would be quite different in a lawsuit based on the second promise. So it is not like the second contract merely provides a more vested version of the same claim as the first contract. Rather, the claims from the first contract are indirect and based on a different formation process.\textsuperscript{14}

Sage thinks that this difference can offer a solution to the puzzle. The second contract is not redundant, in his view, because it involves a new form of acquisition. As he puts it, “[T]he 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.”\textsuperscript{15} We can thus say that the second contract creates a new obligation by appealing to the manner in which the obligation is acquired.

So is this a compelling solution? I think the answer is no. The reason connects up with the point raised earlier about the characterization of the puzzle. While Sage has described a difference, this approach does not explain how the second contract provides something additional, as opposed to something merely different.

Here, again, consideration doctrine can be a useful mechanism for thinking about the issue. You have an obligation not to punch me and, correlative, I have a right not to be punched. I acquire this right—depending on how one conceives it—from morality, tort law, or criminal law. Now, suppose that I agree to pay you $100 in exchange for your not punching me. Is there consideration? Surely not.\textsuperscript{16}

\textsuperscript{12} Restatement (Second) of Contracts § 309(1) (Am. Law Inst. 1981).

\textsuperscript{13} Restatement (Second) of Contracts § 309(2).

\textsuperscript{14} Still, it is not the case that the third-party beneficiary is merely complaining on behalf of the original promisee. Not all defenses against the promisee are also good against the third-party beneficiary. Defenses that are about the promisee or the third-party beneficiary may differ. See Restatement (Second) of Contracts § 309(3)-(4). Thus complainant-oriented defenses (e.g., unclean hands) might apply against the promisee, but not the third-party beneficiary, or vice versa. This makes total sense in my view. It is not that the third-party beneficiary is just pressing the promisee’s complaint indirectly. The beneficiary has a complaint of her own, but one based on the promise to the promisor.

\textsuperscript{15} Sage, supra note 1, at 15.

\textsuperscript{16} See, e.g., 2 Joseph M. Perillo & Helen Hadiyannakis Bender, Corbin on Contracts § 7.11 (rev. ed. 1995) (“Forbearance to commit a tort or a crime is something that is required of all by public law. Such forbearance is not a consideration for a return promise.”). Nick Sage pointed out to me that this proposition is less clear in British law. See
Why not? Sage’s approach offers no explanation. The obligation created by our agreement has, after all, been acquired differently. Whereas before I simply was owed an obligation by virtue of being a person or citizen, once we enter into the agreement, I have “directly participated” in the creation of the new obligation. If all that we care about is whether this is a different obligation, then, surely, in some sense, it is.

But that is not what we care about. What matters here—why there is no consideration for this agreement—is that I have acquired nothing more than what I had before. You already owed it to me not to punch me. Creating another obligation with this same content gives me nothing additional in the relevant sense. This remains true even though a contract suit would involve different elements than a tort suit. And thus there is no consideration.

Analogously, in the puzzle of the beneficiary’s bargain, what needs to be explained is the sense in which the third-party beneficiary gets something additional. It is certainly true that the second contract involves acquiring a right differently than any right would be acquired from the first contract. But if the content of the right were the same (namely, a right to $\phi$), then it is hard to see why there would be consideration for the second agreement.

This is not to say that there is not a grain of truth in Sage’s approach. As I noted above, I agree with his distinction. In fact, what is ultimately important to me is drawing a distinction between being owed a duty and having a complaint based on the breach of a duty owed to someone else. And this distinction can be partially evidenced by the difference between a suit based on violation of one’s own rights and a suit based on violation of another’s rights. But the distinction that I am drawing between having a right and having a complaint is not merely about a difference in origins. It concerns a difference in content—a difference in substantive normative powers. And I believe that only this kind of difference can solve the puzzle of the beneficiary’s bargain.

IV. REDUCTIVISM AND NORMATIVE DIVERSITY

So if Sage’s solution is not enough, should we dispense with the idea of a right to performance in contract? Sage raises a number of

Williams v. Williams, [1957] 1 WLR 148 (Denning L.J.) ("A promise to perform an existing [legal] duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest.").
cogent questions and objections about this solution to the puzzle. I will not address all of them, but I want to comment on two of the primary lines of arguments: Sage’s charge of “reductivism” and Sage’s claim that the central concepts are underdeveloped. I view these two objections as in serious tension with one another. In part because I accept the second worry, I consider the first charge to be misplaced. This will become clear once I turn to the objections that Sage raises.

First, Sage describes my approach as having a “tendency toward reductivism.”\(^{17}\) In particular, Sage suggests that I am trying to reduce normative concepts to others, rather than taking them at face value. As he puts it, “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.”\(^ {18}\) While reductivism need not be a bad thing, Sage clearly views it as having a downside, and, on this, I completely agree. If we want to give a compelling internal account of the law or of normative ethics, we should aim to take normative phenomena on their own terms.

Is my approach reductivist as Sage suggests? I do not think that it is. In fact, quite the opposite—I see my approach as battling against the reductivism of rights-based theorists like Sage.

Contract law affords an opportunity for certain parties to bring a complaint against other parties. My view is that we should take this phenomenon seriously on its own terms. It is tempting to explicate these complaints in terms of rights. This has been the project of influential recent theories under the aegis of “corrective justice.”\(^ {19}\) My view is that—tempting though it may be—we should resist this reduction of complaints into matters of rights. We should be open to the idea that having a complaint may be its own normative phenomenon, separate and apart from rights and duties.\(^ {20}\)

This nonreductivism can, I think, be seen by considering Sage’s other main line of criticism. Sage presses on the question of how, once we disconnect contract law from rights, we can explain its scope and application. How do we know who can sue and be sued, and for

\(^{17}\) Sage, supra note 1, at 11.

\(^{18}\) Id.

\(^{19}\) Cf. Ernest J. Weinrib, Corrective Justice in a Nutshell, 52 U. TORONTO L.J. 349, 352 (2002) (“The injustice that liability rectifies consists in the defendant’s having something or having done something that is incompatible with a right of the plaintiff.”).

\(^{20}\) For more on this project, see Nicolas Cornell, Wrongs, Rights, and Third Parties, 43 PHIL. & PUB. AFF. 109 (2015).
how much, if we do not use rights as our guide?21 This is a fair and important question.

At this point, Sage observes, “Cornell could respond to these objections by developing his conceptions of ‘standing to complain,’ ‘wrong,’ and ‘moral connection.’”22 He suggests that any development of these ideas will ultimately have to be in terms of rights.23 My claim, however, is that we should not so reduce these concepts. As I see it, there is not a single correlative normative relationship, but rather a diversity. We stand in correlative relationships of rights and duties, but also in other relationships in terms of wronging and standing to complain. I concede that my approach requires developing these latter concepts and that more work is needed on this score before we have a fully satisfactory account.24 But my suggestion is precisely that we should take these concepts on their own terms and resist analyzing them in terms of rights. It is possible that relational normativity comes in diverse forms, not all reducible to one another.

My interest in the puzzle of the beneficiary’s bargain is that, by thinking about the position of third-party beneficiaries, we may get a glimpse of what it means to have a complaint without having a right. The puzzle is, in a way, a potential window into a nonreducible wronging and complaint.

21. See Sage, supra note 1, at 8-10.
22. Id. at 11.
23. Id.
24. For some effort at minor progress on the idea of standing to complain, see Nicolas Cornell, A Complainant-Oriented Approach to Unconscionability and Contract Law, 164 U. PA. L. REV. 1131 (2016).