

# (Mis)Understanding Correlativity in Contractual Relations

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*Abstract.* This article challenges the orthodox explanation of the normative connection between contracting parties: The promisee is regarded as having a superior position vis-à-vis the promisor, a position manifesting itself in the promisee's authority or control over the promisor's performance, and supported, in particular, by the promisee's supposed power, or at least some sort of ability falling short of a normative power, to "waive" the promisor's duty of performance. The article demonstrates that this explanation is rooted in a one-sided, and ultimately wrong, understanding of correlativity in contractual relations and suggests a better understanding, one truly capable of accounting for contractual bilaterality.

## 1. Introduction

In contract theory, the normative connection between the contracting parties is typically explained with reference to the promisee's (the right-holder's) supposed superior position vis-à-vis the promisor (the duty-bearer) in an existing contractual relation. This superior position is thought to manifest itself in the promisee's (decision-making) authority or her<sup>1</sup> (exclusive) control over the promisor's performance. More specifically, the promisee is regarded as entitled to decide whether to demand the performance of the promisor's duty (by enforcing it) or to "release" the promisor from that duty (by "waiving" it), which is thought to translate into the promisee's "standing" to decide whether or not the promisor is to perform, and indeed whether or not this duty continues in existence.<sup>2</sup>

<sup>1</sup> To simplify the exposition, throughout the paper the promisee (or any other right-holder) will be gendered female and the promisor (or any other duty-bearer) male, unless otherwise specified.

<sup>2</sup> Not surprisingly, explanations of how a contractual relation *arises* are typically explanations of how such a superior position is created or, in other words, how the promisor (the *prospective* duty-bearer) vests in the promisee (the *prospective* right-holder) authority or control over his performance, which he is normally thought to be able to do by exercising a unilateral power, such as to promise, to consent, or to transfer.

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Clearly, this outlook reflects *correlativity*, which is thought to be characteristic of private law. In a contractual relationship, correlativity is, of course, *reciprocal*, with *each* party having a contractual right correlating with the other party's contractual duty and with *each* party normally having the power to enforce their own right and the other party's duty; it is this reciprocity that is taken to substantiate contractual *bilaterality*. Yet the promisee's superior position is still thought to obtain as far as each instance of correlation is concerned, while any connection between them is thought to have little bearing on how each instance of correlation, taken individually, is understood.

It is not difficult to see that this characterization of contractual relationships mirrors the moral philosophical idea—not infrequently explained on the example of promising—of obligations as normative “ties,” with the right-holder being in the position of “sovereign” in that she holds the normative power to waive the duty-bearer's obligation and therefore can decide the “fate” of the relationship; in other words, with respect to this relationship, the right-holder is the one to determine how the duty-bearer is to act. This is how this idea of sovereignty is expressed by H. L. A. Hart:

We voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties' freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act. The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation to the promisee to do what he has promised. (Hart 1955, 183–4)

Focusing on promising specifically, Joseph Raz argues as follows: “That the promisee has a right that the promissory duty be kept, and a power to waive it and terminate the duty, reinforces the thought that the obligations are meant to be for the promisees” (Raz 2014, 72). Raz emphasizes that the promisee can release the promisor from his undertaking “at any time and at his complete discretion” (*ibid.*); in other words, “it is up to [the promisee] to decide whether to release [the promisor] from the promise or not” (*ibid.*, 73; see also Raz 1984). Similarly, David Owens (2006, 72) observes that “[t]he promisor's obligation is to let the promisee decide, and the promisor discharges this obligation by leaving it up to the promisee to determine whether this promise must be fulfilled.” By invoking the language of normative powers, Owens (2012, 146) emphasizes that “[s]ince the promise must be offered and accepted to be valid,<sup>3</sup> [the power to create a promissory obligation by declaration] is shared between the promisor and the promisee.” However, there is also “a power that resides only in the promisee: only the promisee has the power to dissolve the promissory bond by releasing the promisor” (*ibid.*). Seana Shiffrin sees a

<sup>3</sup> This position can be contrasted with that of Raz, who suggests that the view that the promisee has to accept the promise for it to be binding may be an exaggeration. He provides the following illustration: “I may promise someone in person [...] to come and visit him in hospital tomorrow. He receives the promise [...], saying nothing [...]. My promise is binding, and it requires some imagination to claim that it has been accepted. It is merely that the promisee can release me from the obligation, at any time, including when it is undertaken. He did not do so, which is why I am bound by it” (Raz 2014, 72). However, this difference in the positions on acceptance that Owens and Raz take should not distract us from the point (relevant to this article) that, like many others, they both see the promisee as able *unilaterally* to release the promisor from his duty.

promise as transferring some form of the promisor's right to decide whether or not to perform to the promisee, who in light of this transfer acquires the power to waive the promisor's obligation of performance (Shiffrin 2012, 243–4; see also Shiffrin 2008; 2011). Shiffrin focuses on the moral practice of promising, but like many other theorists, she sees contracts as legally enforceable promises and argues for a closer convergence of the two (see, in particular, Shiffrin 2007). The moral theory of promising has been a source of inspiration for many accounts of contracting, but the idea of the right-holder's "sovereignty" is also prominent in accounts of other private law relations. Focusing on tort law, including but not limited to tort law protecting property rights, Robert Stevens has observed that the right-holder has control over the performance of the duty owed to her, which is "true both within and without the positive law"; "[t]he control of a rightholder, both as a matter of law and morality, is exercised through the ability to waive" (Stevens 2014, 114). More generally, Stevens has argued that "waiver is central to what it is to have a right" (Stevens 2017, 125).<sup>4</sup> Focusing on Roman law obligations, Peter Birks provides us with a graphic picture by resorting to a popular rope or chain metaphor:

An obligation is a rope ... by which we are tied ... Dwell on that image. Here am I with a rope around my neck. We must allow for the other end of the rope. You are holding that. I am under an obligation to you: the picture is of this rope between us, and you in control; the rope is round my neck but in your hand. (Birks 2014, 3)

This paper challenges this outlook, which expresses the idea of the promisee's "relational superiority," and which in this article will be referred to as the "waiver theory" or the "waiver rationale" of contractual obligation.<sup>5</sup> It first asks, in Section 2, whether the position of the promisee can be understood with reference to some conception of a normative or legal *power* to waive a duty (the "strong" waiver thesis);<sup>6</sup> then, in Section 3, it asks whether the promisee could be said to be "empowered," in some looser sense of the word, to *decide* whether the promisor is to (continue to) be under the duty, by either insisting on the promisor's performance or "releasing" him from it (the "weak" waiver thesis).

In answering these questions in the negative, this article makes explicit two distinctions: (1) between having a *power* to waive a duty and having *some control* over the performance of a duty and/or over liability for nonperformance of a duty, and (2) between having control over the *performance* of a duty and having control over *liability* for nonperformance of a duty. These distinctions are not always overlooked, but what is typically overlooked when the correlative structure of contractual relations is considered is that it is not enough to "link" one

<sup>4</sup> But see the caveat made with respect to contractual rights at note 23 below.

<sup>5</sup> It should be emphasized that the article focuses on the (legal) practice of contracting and does not specifically discuss any implications that its argument may have for theorizing about the moral practice of promising.

<sup>6</sup> On a stronger version of the "waiver theory," the promisee acquires, at contract formation, not only a contractual right but also the *power* to waive her right (and the promisor's correlative contractual duty). Which should mean that the promisee is able to (unilaterally) extinguish the promisor's duty of performance. An immediate problem with the proposition so stated is that it is not descriptively true of the common law of contract. Still, it is important to consider this version of the "waiver theory" in detail.

party's duty of performance to another party's right to such performance in order to explain the nature of contractual obligations; each party's contractual right comes with this party's *duty to accept the performance* of the other party's contractual duty. This duty is "connected" to the right of that other party, i.e., the performing party, *to perform* its contractual duty; this connection is as essential for the normative relation that a contract generates as the correlation between the contractual right to performance and the contractual duty of performance. This supposes a different notion of contractual *bilaterality*, signifying that the interconnectedness of contracting parties' rights and duties is more complex than the correlative structure of contractual relations is typically taken to suggest. Contractual bilaterality so understood is incompatible with the idea that the promisee is in a stronger position than her promisor, and this undermines the "waiver theory" of contractual obligation.<sup>7</sup>

Before delving into our debunking of the "waiver theory" of contractual obligation, the notion of waiver that this paper invokes must be clarified. It is often said (in contract theory) that the promisee has the *power* to "release" the promisor by "waiving" her contractual right and, correlatively, his contractual duty, but the term "waiver" is somewhat ambiguous and can be used to refer to various situations that differ in their legal nature. To give a few examples, in the context of contract modification the term is used to refer both to the termination of a contractual obligation and to a variation of contractual terms, both of which usages suppose that the "release" is supported by consideration (or made in a deed); however, the same term is also used to talk about attempted contract modifications in which there is something that amounts to a purported "release," but that for some reason is not *contractually* binding, even though it may have a certain (limited) legal effect. In this context, a distinction is also made between (attempted) contract modification and "mere" forbearance, with respect to both of which the term "waiver" has been used; moreover, the common law doctrine of "waiver" in the sense of forbearance often appears to be treated as substantially similar to the equitable doctrine of promissory estoppel, even though it has been argued that the two are distinguishable (see, e.g., Chitty and Beale 2023, §§ [6-81]–[6-92], [26-001]–[26-050]; Peel and Treitel 2020, 114–30; see also Wilken and Ghaly 2012). It should be clarified that while the doctrinal observations in this article are made with English private law in mind, the article is not meant to be a detailed analysis of what might be called the "law of waiver, variation, and estoppel" (to borrow the title of Wilken and Ghaly's treatise: Wilken and Ghaly 2012); nor is it a discussion of whether using the term "waiver" is warranted in different contexts; rather, it considers various scenarios in which it could be said, even if metaphorically, that the promisee has attempted, successfully or not, to "release" the promisor from his contractual duty to argue that the "waiver theory" of contractual obligation, which supposes some superior position of the promisee, does not work analytically to explain contract law.

<sup>7</sup> It also points to a need to shift the focus from unilateral powers in our analysis of how contractual obligations are created to a conception of contract formation under which we understand contracting parties to exercise a joint power to create an agreement between them.

## 2. The Strong Waiver Thesis: Does the Promisee Have the Power to Waive the Promisor's Duty of Performance?

In order to demonstrate that the promisee has no (*genuine*) power to waive the promisor's contractual duty, this section proceeds in two stages. First, it highlights two truths pertaining to the exercise of legal powers relevant to the issue under consideration and examines how these truths manifest themselves in the exercise of a power that *waives* a legal duty, taking a relatively uncontroversial example of a property owner's power to consent to another's doing what would otherwise be a trespass. Secondly, by contrasting legal relations arising in the context of property/tort law and in the context of contract law, the section considers whether any instance of a promisee's "consent to the promisor's nonperformance" can be explained as her exercising a power to waive the promisor's duty of performance and shows why it cannot.

There are different approaches to understanding (private) legal powers (or normative powers more generally), but at least two truths pertaining to the exercise of such powers can be stated: The exercise of a (private) legal power effects a change in a normative (legal) situation, and it brings about this change normatively, not (merely) causally (see Raz 1999, 103; 1972, 80). There are, of course, different ways in which the second proposition may be expressed: It has been said that the exercise of a legal power grounds the legal change, that the exercise of a legal power explains the legal change noncausally, and that the legal change happens in virtue of the exercise of a legal power.<sup>8</sup> The distinction between bringing about a change in a legal situation in virtue of the exercise of a legal power and doing so in some other way is also often explained with reference to the distinction between the *results* of an act and its *consequences*.<sup>9</sup> How do these truths manifest themselves in the exercise of a power to waive a legal duty, and, more specifically, what does it mean to say that it is the exercise of the power to waive a legal duty that *waives* this duty? An owner's power to consent to somebody's entry onto the owner's land might be a helpful example here: On the one hand, this power to consent can serve as a clear illustration of a power that waives a legal duty, and on the other hand, legal relations arising in this context can be helpfully contrasted with those arising in the supposed waiver of a contractual obligation.

To begin with, how exactly could what would otherwise be a trespass be transformed into a rightful entry by the owner's exercising her power to consent to

<sup>8</sup> The scholarly works in which these different ways of expressing the second proposition have been suggested are not referenced and engaged with here, but for a helpful overview and discussion, see Essert 2015, 139–45. In that work, two cases are contrasted (using an example relevant to the present discussion) to illustrate the difference between, on the one hand, normatively effecting a legal change by the exercise of a legal power the exercise of which is directed at bringing about this legal change and, on the other hand, causing a legal change in a nonlegal way: "In one, I exercise a power to consent to your entry into my home when I invite you over for dinner. The exercise of this power changes what would be a trespass into a rightful visit. In the other, I convince my neighbor to invite you to dinner at her home [...]. Her home is not my home, so I have no legal power to consent to your entry. I can bring about the change (from trespassing to rightful entry) only in the nonlegal way (of convincing her to invite you)" (ibid., 137–8). Convincing the owner to invite you to dinner at her home can *cause* her to exercise her legal power to waive your duty not to enter into her house, but the exercise of this power *waives* your duty.

<sup>9</sup> For a recent discussion, see Penner (2020, 71–5), who also considers a distinction between the exercise of powers and the operations of law. Jeremy Waldron, following Carl Wellman, also expresses the distinction between the results of an act and its consequences by using the terms "legal consequences" of one's action and its "other consequences" or "further consequences" (see Waldron 2000, 54; see also Wellman 1995, 23).

somebody's entering onto the owner's land? If B is under a duty not to enter onto A's land, meaning that B does not have permission or liberty to enter, B's entering onto the land without A's consent would *prima facie* constitute the tort of trespass. However, A, as the owner of the land, has the legal power to waive B's duty not to enter by consenting to B's entering onto the land; once A has done so, i.e., once A's power to consent to B's entry is (properly) exercised,<sup>10</sup> B is no longer under a duty not to enter; he immediately acquires permission or liberty (in Hohfeldian terms a "privilege") to enter. Given that B already had permission not to enter, or, in other words, he did not have any obligation to enter, which is sometimes characterized as a Hohfeldian "half-liberty" or "half-privilege," and assuming that this state of affairs continues to obtain after A's waiver of B's duty not to enter, B has now an option to enter or not to enter,<sup>11</sup> or B has a "full liberty" or "full privilege" and can *decide* whether or not to enter.

It is important to emphasize that the normative change just described is achieved *just in virtue of* A's exercise of her power to consent to B's entry onto A's land, which entails that "nothing else" is needed to achieve this change. Once A's power to waive B's duty not to enter is exercised, and as long as her consent is not revoked, B, whose duty is so waived, is simply not under this duty,<sup>12</sup> regardless of whether or not B appreciates that, and regardless of whether or not he does something in response. Also not material is the kind of attitude B has or has had to complying with his duty: Prior to the waiver, B might have decided to enter onto A's land anyway, i.e., without permission, thus violating his duty, or he might be determined never to enter onto A's land regardless of whether or not he has permission to do so. In any case, A's exercise of her power to waive B's duty does just that—it simply waives B's duty.<sup>13</sup> As has been aptly observed, "[a]s the key effect of the licence is simply to authorize otherwise wrongful action of B, it seems a bare licence can arise simply through the unilateral act of A's permission, without any action of B" (McFarlane, Hopkins, and Nield 2021, 199; see also McFarlane 2008, 502ff.).

If the already familiar language of decision-making is deployed, it might indeed be said that A, as the right-holder, can *decide* whether or not B (or anyone else) is to (continue to) be under a duty not to enter, or, in other words, that the existence of B's duty not to enter depends on A's *decision* as to whether or not to waive this duty by

<sup>10</sup> In most general terms, an owner's or any right-holder's power to consent is exercised through the *manifestation* of her consent; however, what it means for somebody to manifest their consent, and by so doing (properly) exercise the power to consent, is not discussed in this paper.

<sup>11</sup> In the more formalized language of deontic logic, B has both PE  $p$  and PE  $\sim p$ , which gives him OP  $p$  or OP  $\sim p$ , which in turn are equivalents. This is illustrated in Figure 1 below, showing a version of the standard deontic hexagon. This approach to drawing the standard deontic hexagon can be found in Hurd and Moore 2018, 309ff.

<sup>12</sup> It might be emphasized that it is B's *duty not to enter*, as well as A's right that B not enter, that is waived; the state of affairs whereby A's right that B not enter onto A's land is waived does not negate A's property right in the land, nor does the state of affairs whereby B's duty not to enter is waived negate *other duties* that B may, and most certainly will, have with respect to not interfering with A's property right.

<sup>13</sup> It might be apposite to mention that deploying the language of *consent* might create ambiguity to the extent that consent might be taken to presuppose a request. It may be the case that A gives B permission in response to B's request; normatively speaking, however, no request is necessary for A to exercise her power to waive B's duty not to enter onto A's land: A's permission alone negates B's duty.



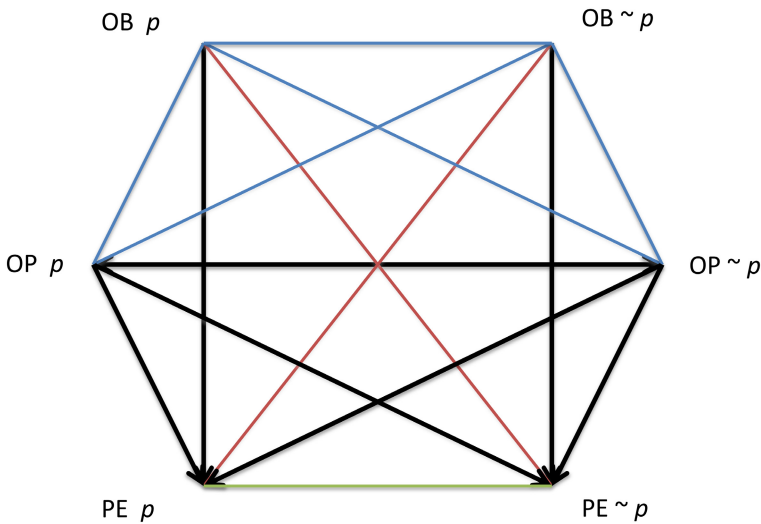


Figure 1. Standard deontic hexagon [Colour figure can be viewed at [wileyonlinelibrary.com](https://onlinelibrary.wiley.com/doi/10.1111/rju.12396).]

exercising her power to consent to B's entry. The reason is that B's duty not to enter can be removed *in virtue of* A's exercising her power, i.e., by a *unilateral* act manifesting A's consent. Can the same be said about the party to whom a *contractual* duty is owed? To answer this question, this section concentrates on two cases: where the promisor's contractual duty is discharged (or modified) by a contractual agreement, and where the promisee is estopped from enforcing her contractual right.

An answer to the above question appears to be straightforward, at least as far as (contractual) agreements to terminate a counterparty's contractual obligation (or to vary its terms) are concerned. It might be said that the promisee is "consenting to the promisor's nonperformance," but if the parties enter into a (contractual) agreement affecting the promisor's duty, it is in virtue of this *agreement* that the promisor's duty is terminated (or modified), and *not* in virtue of either party's unilateral manifestation of consent. The manifestation of the promisee's consent is simply not enough; by consenting to "release" the promisor from his duty of performance, the promisee cannot *normatively* bring about the legal change of having the promisor's duty terminated (or modified).<sup>14</sup> In other words, even if the language of "waiver" is

<sup>14</sup> This is not to say that a manifestation of the promisee's consent to "release" the promisor from his duty of performance does not normatively bring about a change in a legal situation, as would be the case if I convinced my neighbour to invite you to dinner at her home: My suggestion may *cause* her to exercise her power to waive your duty not to enter (see note 8 above), but it would not *normatively* bring about a state of affairs in which your duty is waived, *nor* would it normatively bring about any other legal change. A manifestation of the promisee's consent, then, does normatively bring about a change in a legal situation, and what kind of legal change it is depends on whether the promisee is *offering* to the promisor or *accepting* the promisor's offer to enter into a (new) agreement discharging the contractual duty of the latter. In neither case, however, would this legal change amount to the promisor's duty being extinguished. This article will not elaborate on the relationship between changes in a legal situation that may be brought about by an *offer* or an *acceptance*, on the one hand, and changes brought about by a (contractual) agreement, on the other.

used, the promisee has no *power* to waive the promisor's duty of performance. However, an attempted contract modification in which there is something amounting to a purported "release," which can arise in an estoppel scenario, and which is also referred to as "waiver," may appear to be more problematic.

Can it then be asked whether it is possible to conceptualise a unilateral act manifesting the promisee's "consent to the promisor's nonperformance" in an estoppel/waiver scenario as the promisee's exercising a power that waives the promisor's contractual duty? On the face of it, it might appear that the legal relations (1) arising in this case would display certain similarities with those (2) arising in the case in which an owner waives somebody's duty not to enter onto her land. In both cases, the right-holder does something amounting to a representation to the effect that compliance with the duty owed to the right-holder is no longer required, and in both cases, the duty-bearer acquires a defence to an otherwise valid claim by the right-holder. On closer inspection, however, it becomes obvious that the two cases are fundamentally different: It is only in the second case that the right-holder exercises a (genuine) power that waives a pre-existing duty, or, more precisely, that the right-holder waives her own right, and, of course, the correlating duty.<sup>15</sup>

It might be helpful to begin by clarifying what exactly it means to say that the duty-bearer acquires a *defence* to an otherwise valid claim by the right-holder in the trespass case as opposed to the estoppel/waiver case. It is true that the owner's consent to somebody's entry onto her land is recognized as a defence to the owner's claim in a trespass dispute. It is also true that the promisor is regarded as armed with a "shield" protecting him from the promisee's contractual claim in a dispute in which estoppel/waiver is established. However, (1) the "defence" of someone who has entered onto somebody else's land with the consent of the latter and (2) the promisor's defence in an estoppel/waiver scenario are analytically distinct.

In the trespass case, the owner's consent does operate as a defence to the owner's trespass claim, but (at least) in English tort law, *this* defence might be conceptualized as an *absent element defence* or a denial,<sup>16</sup> which is contrasted with affirmative defences. Another way to express this distinction is by using the terms "justification" and "excuse". Here is how Robert Stevens explains it:

In private law, this distinction [...] reflects the distinction between an *obligation* and a *liability*. Some defenses *justify* the defendant's action, providing a *privilege* (i.e., the defendant is exceptionally not under a duty, or synonymously the plaintiff exceptionally has no right). [...] Other defenses provide the defendant with an *immunity* (the defendant is exceptionally not liable to be sued, or synonymously the plaintiff exceptionally has no power to sue). (Stevens 2020, 533; emphasis in the original)

An owner's consent to somebody's entry onto the owner's land *transforms* what would otherwise be a trespass into a lawful entry.<sup>17</sup> In other words, the owner's con-

<sup>15</sup> See note 12 above and accompanying text.

<sup>16</sup> For a discussion of denials, see, e.g., Goudkamp 2013, 46ff.; see also Goudkamp 2011.

<sup>17</sup> For a brief discussion of how consent operates in trespass to land, see Goudkamp 2013, 67–8. See also note 19 below.



sent removes the “unlawfulness element,” meaning that somebody to whose entry the owner has consented is not, by entering, committing a trespass to begin with;<sup>18</sup> he is not trespassing because he is not under a duty not to enter, and he is not under a duty not to enter because by exercising her power, the owner waives, with respect to this particular person, her right that he not enter and simultaneously negates the correlative duty not to enter. It is important to emphasize that the act manifesting the owner’s consent to somebody’s entry does not just waive the owner’s right to bring a claim (or, in other words, her power to hold the other person liable for trespass) and, correlatively, the other person’s liability for trespass: It more fundamentally negates the owner’s right that the other person not enter and the other person’s correlative duty not to enter.

Conceptualizing the defence in a trespass scenario as an absent element defence or a denial,<sup>19</sup> and not as an *affirmative defence* or, possibly, a defence properly so-called, allows us to avoid the possibility of construing an invitee to someone’s house as *committing* trespass, but *not being liable* for the trespass he has committed because the host’s right to bring an action for trespass is waived.<sup>20</sup> Rather, once consent is given, the invitee is regarded as having acquired a liberty (or “privilege” in Hohfeldian terms) or permission (in deontological terms) to enter; as has already been pointed out, the invitee—who (“independently” of waiver) is assumed not to come under a duty to enter when his duty not to enter is waived—ends up with an option to enter or not to enter because he is neither under a duty (obligation) to enter nor under a duty (obligation) not to enter.<sup>21</sup> It is important to note that an invitee who has been given the owner’s consent but is *not* entering would be acting on the basis of the option available to him. In other words, he would be entitled to *choose (decide)* not to enter; he would not be complying with the duty not to enter, which he *now* does not have.

In contrast, if it is accepted that in a situation of waiver/estoppel, the legal change that ultimately ensues is not a modification of the contract (which is taken to be the position at least in English contract law),<sup>22</sup> the defence that the promisor acquires operates differently from how the consent defence operates in a trespass

<sup>18</sup> Cf. Stevens 2017, 125, observing that “[v]olenti [*non fit injuria*] is not a defence to a wrong, in the same way that contributory fault is. Rather once the right is waived there can be no breach of a duty, and hence no wrong to commit.”

<sup>19</sup> It might be mentioned that conceptualizing the defence in a trespass scenario as an absent element defence or a denial, which is what English tort law does, is not the only possible approach. A different approach appears to be adopted in some US jurisdictions. See, e.g., Goudkamp 2013, 67–8, suggesting that the position in English law might be contrasted with the regime set out in the Restatement (Second) of Torts. However, the point that this section makes about *contract* law does not depend on this specific tort law example or on how typical it is across common law jurisdictions. Rather, the example serves as a clear illustration of a power that *waives* a legal duty, which helps to contrast legal relations in the context of exercising a (genuine) power to waive a legal duty with those arising in the *supposed* waiver of a contractual duty.

<sup>20</sup> Cf. Witting 2021, 325, observing that “[t]he fact that the issue of consent is internalised within the definitions of the intentional torts, rather than treated as an affirmative defence, sends an important message: that it is not wrong merely to touch other people or their property. Coming into contact with another person or their property is wrong only when it is non-consensual.”

<sup>21</sup> See the standard deontic hexagon in Figure 1 on page 7.

<sup>22</sup> See also note 25 below and accompanying text.

scenario. If the promise makes a representation to the effect that the promisor's compliance with the contractual duty is no longer required, and if (in the circumstances) the waiver is effective or the estoppel established, the promisee loses, even if temporarily, her right to enforce the promisor's contractual duty, nonperformance of which would now, because of the representation, not attract any liability; however, the promisor is still under his duty of performance, and the promisee still holds her right that the promisor perform. As long as a case of non-performance is considered, the difference from a trespass scenario is not transparent: neither (not refraining from) entering onto somebody else's land nor failing to perform whatever it is that one has undertaken to do under the contract attracts liability, and so does not give rise to a valid claim. However, the difference becomes conspicuous in the situation in which the promisor does do what he has undertaken to do under the contract.

For example, if the promisee makes some representation to the effect that the promisor can delay performance by one day because a later day would also work for the promisee (e.g., the promisor can perform on April 2 instead of April 1), and assuming that the waiver is effective or the estoppel established, performing on April 2 would not attract contractual liability for the delay in performance.<sup>23</sup> However, it would appear that the promisee's representation does not prevent the promisor from rendering performance on April 1 (i.e., on the day stipulated by the contract); and, more importantly, if the promisor does so, he would be discharging his valid contractual duty. He would not be making a gift as if he had no duty to perform on April 1, and as if his actions directed at discharging his contractual duty were, in fact, in no relation to the existing contract, in which case the promisee would be able to reject the gift; nor would the promisor be breaching a duty to deliver on time as if he had a duty to deliver on April 2, in which case the promisee would be able to reject the earlier performance. Rather, as long as the contract is not modified, a promisor who performs in accordance with the contract performs his contractual duty, the performance of which the promisee is *bound to accept*. Further, if the promisor renders the performance on the day stipulated by the contract, despite the promisee's representation to the effect that the promisor can delay the performance by one day, and if the promisee receives this performance, whatever it is that she receives will be received in consideration under the existing contract and will not be liable to be returned to the promisor as if there were no legal ground for receipt of the benefit; in other words, the promisor is still *entitled* to the performance. To reiterate, neither the promisor's duty of performance nor the promisee's right that the promisor perform is affected in a situation of waiver/estoppel; the fact that the promisor

<sup>23</sup> This example is given in Stevens 2017, 126, as an example of waiving a private right in a contractual context. What Stevens illustrates by this example is that the promisor's performance on April 2 after the promisee's manifestation of her consent to it would not attract liability for not performing on April 1. The value of extending this example here to illustrate a difference in the effect of the promisee's consent in an estoppel/waiver scenario and the owner's consent in a trespass scenario is largely expositional. This article's main interest is not in situations in which the promisee is consenting to a different time or mode of performance but in situations in which the promisee is consenting to "release" the promisor from his duty of performance altogether. It might be added that Stevens cautions that "it would not be possible to waive altogether the promised counter-performance, as if this were done no consideration would remain," which, as it seems, qualifies his position that "it is possible to waive all of our rights" (ibid., 125, 128). See also note 4 above and accompanying text and text accompanying note 24 below.

becomes not liable to be held responsible for nonperformance because the promisee no longer has any “right” to enforce the promisor’s duty means that what the promisee is actually “waiving” is her power to hold the promisor liable for nonperformance, and consequently the latter’s contractual liability (for nonperformance). In other words, “consenting to nonperformance” of a contractual duty owed to you in a waiver/estoppel situation is very different from consenting to somebody’s entry onto your land in a trespass scenario: Only in the latter case, as has already been pointed out, is the very right that the other person not enter, as well as that other person’s duty not to enter, extinguished; in the former case, however, neither the duty of performance nor the correlative contractual right is extinguished.

There is a position that the same principles apply to waiver in the law of torts and in contract law, but this may require clarification. It has been observed, in particular, that “[t]he effect of the waiver is not to vary the contract, any more than my consent to be punched destroys my right to bodily safety, but rather to prevent there from being a wrong committed by the non-performance” (Stevens 2017, 126; footnote omitted). While it seems to be correct that the effect of a waiver is not to vary the contract, it might be observed that exercising my power to consent to your entry onto my land is *not* directed at waiving my property right (which is not a “claim right”); rather, it is directed at waiving my right that you not enter (which is a [negative] claim right), and *this* right is negated by exercising my power to consent (unless and until the consent is revoked). To reiterate, it is my (negative) claim right that you not enter that is waived, not my right to enforce this (negative) claim right (which is a power to hold you liable for a breach of your duty not to enter). If it is realized that my contractual right (which is also a claim right) should be compared to my (negative) claim right that you not enter onto my land, and not to my property right in the land, it becomes clear that the waiver operates differently in tort law and in contract law: In the latter case, what could possibly be negated by my waiver is not the claim right that you perform but only my right to *enforce* my claim right that you perform (which right to enforce is a power to hold you liable for a breach of your duty to perform).<sup>24</sup>

Three further observations about this analysis should be made.

First, as long as (1) it is accepted that the normative change that ensues in the waiver/estoppel case is not a modification of the contract, and (2) it is maintained that the promisor’s reliance upon the promisee’s representation (whether or not such reliance is detrimental), or at least some of the promisor’s *acting* upon that representation, is an essential requirement of the effectiveness of waiver or of establishing estoppel,<sup>25</sup> the ultimate legal change that does ensue in the waiver/estoppel case is not achieved in virtue of the promisee’s representation; rather, it is achieved in virtue of that representation *and* the promisor’s reliance/acting upon it. In other words, the manifestation of the promisee’s “consent to the promisor’s nonperformance” cannot *alone* achieve even the *limited result* of disabling the

<sup>24</sup> See also notes 12 and 23 above.

<sup>25</sup> This article will not be addressing the debates as to (1) whether that which is understood by the waiver and that which is understood by the promissory estoppel are distinguishable in the context of contract modification, and (2) whether some reliance, or at least some acting by the promisor (if it does not amount to reliance), upon the promisee’s representation is an essential requirement in this context. However, see note 26 and text accompanying and following note 27 below.

promisee from holding the promisor liable for nonperformance of his contractual duty. Which would suggest that the promisee does not even have the power to waive the promisor's *liability* for nonperformance of his contractual duty.<sup>26</sup> What the promisee *is* able to do is to create, by her representation, a new normative situation in which the promisor's reliance/acting upon the promisee's representation can effect the normative change of disabling the promisee from holding the promisor liable for nonperformance of his contractual duty.

Secondly, even if it were to be argued that the nature of the doctrine of promissory estoppel is contractual,<sup>27</sup> or, in other words, that promissory estoppel is a way to modify a contract, this argument, even if it were persuasive, would not affect this section's conclusion that there is no *power* to waive a contractual duty. If it were to be argued that promissory estoppel represents an alternative way of contract modification or, in other words, an alternative way of entering into an agreement (not supported by consideration), modifying the existing contract, a question that would have to be asked would be what such an agreement is an agreement about. A first answer might be that it is an agreement to extinguish (or modify) the promisor's contractual duty, while a second answer might be that it is an agreement to extinguish the promisor's liability for breach of his contractual duty. It does not seem to be necessary, for the purposes of the discussion in this section, to consider the merits of the contract-altering view of the nature of promissory estoppel, as (on either of its versions) no *power* to waive a contractual duty can be observed.

On the second view, the promisor's primary duty is not supposed to be affected at all; rather, the contract "modification" only affects the promisor's secondary duties—query, however, whether supplementing the contract with what is, in effect, a "no liability" clause would be effective in this situation. On the first view, the promisor's primary duty is supposed to be extinguished, but here it is not at all clear how this view could be helpful in explaining the law, as it is not what a promissory estoppel can normally achieve, at least as far as English law is concerned. On both views, however, whatever contract modification would result, it would not be achieved in virtue of the promisee's exercising her *power* to waive the contractual duty (or liability for breach of the duty); rather, it would be in virtue of the parties' *agreement* to extinguish the promisor's duty or his liability for the breach, respectively, that the duty or the liability would be extinguished; quite obviously, such an agreement requires *both* parties' consent.

Lastly, the discussion in this section also reveals that the conclusion that has been reached does not depend on whether or not the enforceability of an agreement to extinguish (or modify) a contractual duty turns on the consideration requirement. The importance of making this observation explicit stems from the realization that the conclusion of this section might be criticized as overly reliant

<sup>26</sup> The promisee could have this power if the promisor's reliance, detrimental or not, or at least some acting by the promisor on the promisee's representation were not an essential requirement for the effectiveness of waiver or of establishing estoppel, but (to emphasize) this power would be the power to waive the promisor's *liability* for nonperformance of his contractual duty, and not the power to waive the contractual duty itself, as has already been demonstrated.

<sup>27</sup> The debate on the nature of the doctrine of promissory estoppel is not considered in this article.

on the ineffectiveness of the promisee's representation (not supported by consideration), to the effect that compliance with the promisor's duty is no longer required, while the question of whether or not such representation is, or should be, effective (typically discussed in the context of contract modification) is not infrequently debated; moreover, the discussion often turns on the consideration requirement. In other words, the objection might be that even if the argument in this section fits the law, this argument would fail should consideration no longer be required for contract modification.

That response, however, would misconceive the argument. It is not argued that there is no power to waive a contractual duty because the promisee's manifestation of her consent to "release" the promisor from his duty is not achieving its intended result *for want of consideration*; the argument is rather that there is no power to waive a contractual duty because such a duty cannot be extinguished without the promisor's *consent*, in other words, without reaching a new *agreement* with the promisor (regardless of what, in any given legal system, it takes for such an agreement to be effective). It is not surprising that the actual cases in which the dispute about the effectiveness of the promisee's manifestation of her consent to "release" the promisor from his contractual duty arises normally concern those situations in which the *promisor's consent*, whether explicit or at least implicit, to the extinguishment (or modification) of his duty is not in dispute; were the promisor's consent absent, the question of the effectiveness of any manifestation by the promisee of her consent would not arise at all, and the question whether such manifestation was supported by consideration would likewise not arise, since there would be no agreement in the first place.<sup>28</sup>

This section has thus demonstrated that no instance of a promisee's "consent to the promisor's nonperformance" can be explained as her exercising a *power* (that is, a power as a *jural conception*) to waive the promisor's duty of performance—the power to waive a *contractual* duty. It remains to consider in the next section whether we could still regard the promisee as in some sense "empowered" to *decide* whether the promisor is to (continue to) be under the duty by insisting on the promisor's performance or "releasing" him from the duty, even if the conception of power to waive as a *jural conception* is left aside. The next section rejects such a possibility; in doing so, it takes a closer look at what is normally taken to be the correlative structure of contractual relationships—i.e., the correlation between the contractual duty to perform and the contractual right that the other party perform—and argues for the need also to account for the promisee's duty to accept the performance (of the promisor's duty), "connected" with the promisor's right to perform.

<sup>28</sup> If anything, in such a case, the promisee's representation might potentially amount to her repudiation of the contract. Which would, of course, put her in the position of the breaching party. At any rate, the promisor's contractual duty would remain valid, and even if, in the circumstances, it could not be discharged (by performance) by the promisor, he would still be entitled to damages.

### 3. The Weak Waiver Thesis: Is the Promisee “Empowered” to Decide the “Fate” of the Promisor’s Duty of Performance?

This section first considers two ways in which a promisee, who cannot be said to have any *power* to waive the promisor’s duty of performance, might still be regarded as having some superior position in a contractual relation vis-à-vis the promisor. It then explains why no claim about a superior position of the promisee in a contractual relation can be substantiated even if the conception of the power to waive as a *jural conception*, discussed in the previous section, is put to one side.

A first way in which a superior position of the promisee could be entertained reflects a focus on what might be referred to as the *enforcement aspect* of private legal relations. More specifically, it might be observed that regardless of whether or not the promisor is “keen” to perform his contractual duty, the promisee is the one to *demand* the performance and can, if she chooses, abstain from insisting on the performance or on holding the promisor liable for nonperformance; moreover, to the extent that the promisee might also be regarded as having some power to disable herself from holding the promisor liable in an estoppel/waiver scenario, she might be taken to have some ability to turn the promisor’s *enforceable* contractual duty into an *unenforceable* duty, which some might argue would not be a legal duty at all.<sup>29</sup>

As the discussion in the previous section has made clear, it does not seem to be the case that the promisee has any (unilateral) power to waive the promisor’s liability for nonperformance of his duty (without his *consent* being manifested in his reliance or at least in some acting upon the promisee’s representation),<sup>30</sup> but even if she did have such a power, waiving the promisor’s liability for nonperformance of his duty would not, as a matter of law, affect the duty itself, which duty would still remain valid.<sup>31</sup> Of course, it might be that the position of someone who is under an enforceable duty is different from the position of someone who is under an unenforceable duty, and it is certainly true that regardless of whether the promisee is able to waive the promisor’s liability for nonperformance, she can choose not to demand performance and not to insist on any redress if there is no performance, but this is not enough to substantiate a *general* claim that the position of the promisee in a contractual relationship is somehow superior to that of the promisor in relation to the existence of his duty and its performance. While, as a matter of law, there is nothing unusual about the position of someone who has a valid but unenforceable right (and there immediately comes to mind the status of claims after a limitation period has expired), the position of the promisee, as the previous section would suggest, is special in a different sense. Not only does the promisee have the right to the promisor’s performance, she is also under a duty to accept the performance of the promisor’s contractual duty, which duty, in some sense, is “demanded” by the bilaterally created “rules” of the contract and exists regardless of whether or not the promisee makes any demand; the promisee is not able to

<sup>29</sup> This article does not fully engage with the view that a duty not supported by legal liability is not a legal duty. For a recent extensive discussion, see Goldberg and Zipursky 2020, chap 3. For the original statement of the view scrutinized by Goldberg and Zipursky, see Holmes 1897.

<sup>30</sup> See text accompanying and following note 25 above.

<sup>31</sup> See the examples in the text accompanying and following note 23 above.



change these “rules” unilaterally. In other words, while it is true that the enforcement of the contractual duty is normally “up to” the promisee, in that it is *her* decision to enforce or not, it is not true that the promisee is “empowered,” even in some looser sense of the word, to decide the “fate” of the duty; this way of supposing that the promisee has a superior position vis-à-vis the promisor in a contractual relation does not work.

Another way in which a superior position of the promisee might be conceived would reflect a focus on what might be referred to as the *correlativity aspect* of private legal relations (which, of course, is not unconnected to the enforcement aspect). It might be observed that the whole discussion in the previous section assumes that the promisor is “keen” to perform his contractual duty regardless of any demand by the promisee and regardless of whether or not the promisor would be liable for the nonperformance of the duty, and by making this assumption, it might be objected, the discussion misses the situation in which the promisor is not “keen” to perform, and that it is precisely this kind of situation to which the whole language of “release” might be thought to be primarily applicable. More specifically, it might be argued that it is precisely due to the fact that the promisor cannot decide not to perform without breaching the duty that the position of the promisee is superior to that of the promisor. An immediate response would be that to argue this would be to focus only on one aspect of the contractual obligation and to adopt an impoverished view of contractual duties pertaining to the contractual obligation as a whole, which is precisely what the present article argues against. More fundamentally, it is, of course, undeniable that the promisor must seek the promisee’s “release” if he wants his contractual duty to be extinguished, and if the promisor seeks such a “release,” it is for the promisee to decide whether or not to grant it—but this, it is submitted, is also not enough to substantiate a claim that the promisee has a superior decision-making authority in a contractual relationship.

Any standing to *decide* whether or not the promisor’s duty is to be extinguished is only acquired by the promisee if the promisor—by asking to “release” him, and by effectively making an offer to extinguish (or modify) the contract—presents the promisee with two alternatives between which the promisee can choose; before that, there is no room for deciding, as there are no alternatives between which the promisee could possibly choose: The promisee does not have any *right* that the promisor *not perform*—a right that, together with the promisee’s actual right that the promisor perform, could give her discretion and an option. If the promisee is “keen” to extinguish the promisor’s contractual duty either because the promisee no longer wants the promisor’s performance, or even because the promisee envisages that it is the promisor who is no longer “keen” to perform, the promisee also has to offer the “release” to the promisor, in which case the latter would acquire standing to *decide* whether or not his duty is to be extinguished. In other words, the promisee’s position as a right-holder in the relation between the promisee’s right to performance and the promisor’s duty to perform does not translate into the promisee’s *general* standing to decide whether or not the promisor is to perform and whether or not the duty is to continue to exist. This way of portraying the promisee’s position in a contractual relation as superior does not work either.

It is submitted that to focus (merely) on the correlativity between the right to performance and the duty to perform in order to explain the nature of contractual obligations is to overlook some important implications that the *bilateral* nature of contractual relations requires. To begin with, everyone understands that in the normative relation generated by a contract, not only does A's contractual right correlate with B's contractual duty, but also B's contractual right correlates with A's contractual duty, which suggests that referring to the contracting parties as the promisee and the promisor is not helpful if the contractual relation is considered as a whole; in a contractual relation, each contracting party is both a promisee and a promisor. Any references to the roles of the "promisee" and the "promisor" only make sense if the contractual relation is mentally "severed" in a way that only one of the two instances of correlation is focused upon. Now, there are many cases in which such "severance" is justified and helpful in dealing with specific aspects of a contractual relation (whether in theory or in practice). It is remarkable, however, that such "severance" is also normally deployed in theoretical analyses of a contractual relation as a whole. In such analyses, typically one instance of correlation between the contractual right and the contractual duty (e.g., A's right and B's duty) is focused on, and if explaining how this instance of correlation is connected with the correlation between B's contractual right and A's contractual duty is (thereafter) considered at all, such an explanation is typically assumed to have little bearing on a (prior) explanation of each instance of correlation taken individually. However, not only do these two instances of correlation not exist independently of each other, but their connection gives rise to other instances of correlation between *other jural* conceptions pertaining to the contractual relation, and it is these (additional) instances of correlation, which are of paramount importance for understanding the nature of a contractual obligation, that are overlooked when A is regarded as having a superior position vis-à-vis B *even if* it is only the correlation between A's contractual right and B's contractual duty (and not vice versa) that is under consideration.

To reiterate, in a contractual relation, A's contractual right to B's performance does correlate with B's contractual duty of performance.<sup>32</sup> However, A's contractual *right* to B's performance comes with A's own *duty to accept* B's performance, and this *duty to accept* is connected with B's *right to perform* his contractual duty.<sup>33</sup> It must be emphasized that while A's *duty to accept* and B's *right to perform* are in a sense connected, there is, of course, no correlation between them. Strictly speaking, A's *duty to accept* B's performance correlates with B's *right that A accept* B's performance, and B's *right to perform*, as a *liberty* right (and not a claim right), correlates with A's *no-right that B not perform*; however, B's *liberty* right to perform is protected by B's *claim* right that A accept B's performance correlating with A's *duty to accept* B's performance. It is this connection, i.e., between A's *duty to accept* B's performance and B's *right to perform*, that makes it impossible to regard A, who is the right-holder in the normative relation between A's contractual right to performance and B's contractual duty of performance, as the one to decide the "fate" of B's contractual duty of

<sup>32</sup> Similarly, B's contractual right to A's performance correlates with A's contractual duty of performance.

<sup>33</sup> Similarly, B's contractual right to A's performance comes with B's own *duty to accept* A's performance, and this *duty to accept* bears a connection to A's *right to perform* her contractual duty.

performance and of the contractual obligation as a whole; A is not only *entitled* to B's contractual performance, but is also *bound* to accept it.<sup>34</sup> A's duty to accept B's contractual performance is "demanded" by the contract in the same way as B's duty to perform is "demanded" by the contract. A is as bound by the contract as B, and any "decision" as to what happens to the A-B right-and-duty relationship with respect to B's performance, i.e., A's contractual right to performance and B's contractual duty of performance, cannot be made without the corresponding decision as to what happens to the B-A right-and-duty relationship with respect to B's performance, i.e., to B's right to perform and A's duty to accept B's performance. Thus, when we recognize this aspect of the correlativity that relates contractual parties, we see that *both* parties are in the position of a right-holder with respect to the performance of one of them.<sup>35</sup> This explains why either party's contractual duty can only be extinguished (or modified) by a (new) agreement between the parties; such an agreement is as necessary for contract modification as it is for contract formation.

#### 4. Conclusion

The article has uncovered an "extra layer" pertaining to the interconnectedness of contracting parties' rights and duties—an "extra layer" that reflects, and is reflected in, the bilateral nature of contractual relations, and that makes the interconnectedness of contracting parties' rights and duties more complex than the correlative structure of contractual relations is typically taken to suggest; not only does it distinguish contractual obligations from unilateral obligations, but it also makes contractual relations *bilateral* in a special way, distinguishing them from other legal relations which are bilateral in a weaker sense. Contractual bilaterality so understood does not allow us to conceptualize the position of one contracting party as superior vis-à-vis the other contracting party by regarding one party as having any (unilateral) *power* to waive the other party's contractual duty or even as being "empowered," in some looser sense, to (unilaterally) decide whether or not the other party is to perform its duty or indeed whether or not it is to (continue to) be under its duty. Rejecting the "waiver theory" of the contractual obligation also points to a need to reconsider the orthodox analysis of how contractual obligations are created.

<sup>34</sup> This interconnection is reflected in many aspects of contract law doctrine, and the doctrine of affirmation might be given as an example. It might also be emphasized that in some cases, a party may have additional duties in relation to the other party's performance of the contract (e.g., some duties to "enable" that performance) or, on the contrary, extra powers exercising which may affect the parties' rights and duties (e.g., in some vitiation scenarios), but all this presupposes the basic structure of such rights and duties.

<sup>35</sup> Resorting to the popular rope or chain metaphor, already mentioned in the introduction, H. L. A. Hart emphasizes that "the precise figure [of a bond (*vinculum juris: obligare*)] is not that of two persons bound by a chain, but of *one* person bound, the other end of the chain lying in the hands of another to use it if he chooses" (Hart 1955, 118; emphasis in the original; footnote omitted). It should be clear by now how misleading this popular metaphor is in the case of a contractual obligation, *even if*, it must be emphasized once again, what is under consideration is only one side of the "contractual equation": only the performance of one of the parties.

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