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HIDDEN DELEGATIONS: THE ASSIGNMENT OF CONTRACTUAL RIGHTS AND CONSUMER DEBT

BY

SEANA VALENTINE SHIFFRIN

PETE KAMERON PROFESSOR OF LAW AND SOCIAL JUSTICE

UCLA SCHOOL OF LAW

PROFESSOR OF PHILOSOPHY AT UCLA

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HIDDEN DELEGATIONS: THE ASSIGNMENT OF CONTRACTUAL RIGHTS AND CONSUMER DEBT

Seana Valentine Shiffrin, UCLA·

ABSTRACT

Investigating consumer debt assignment exposes a submerged but significant philosophical tension in contract law's treatment of rights transfers. On the one hand, contract law adopts a highly permissive stance toward rights-transfers ("assignments") undertaken on the unilateral initiative of the rights-holder. On the other hand, it reasonably takes a restrictive posture toward duty-transfers ("delegations"), requiring greater input from the duty's beneficiary about the identity of the duty-holder. Where, however, an assignment integrally, albeit covertly, involves a duty-transfer, then the more restrictive rules of delegation should apply. Debt assignments represent a significant, but not isolated, case of such hidden delegation because, in addition to rights to repayment, creditors have an array of moral and legal duties toward debtors. Recognition of this doctrinal tension should alter our legal treatment of significant cases of assignment and sensitize us, philosophically, to the relational components of economic behaviors often treated as purely transactional.

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INTRODUCTION

Many quotidian modern arrangements involve transferring rights and responsibilities through mechanisms that, among other things, generate new moral and legal relationships. Most of us do not grow our own food, weave our own fabric, or sew our own clothes, but pay others to do those tasks for us. Many parents entrust their children to other caretakers – whether relatives, schoolteachers, or daycare providers – for some portion of the day. These relationships do not only involve one party performing a task for another. They further involve one party exercising normative powers and responsibilities that they acquire from the other party. For instance, growers and weavers are expected to ensure the safety of their products, not exclusively with respect to the buyer's consumption, but also with respect to those hosted by the buyer or to whom the buyer sells or gives their products. The purchaser can serve that food to others without double-checking its safety and can donate clothes without running a home chemistry test for high pesticide levels because the buyer may be relied upon to discharge an array of duties to ensure safe goods. The caretaker does not just watch or entertain the child, but must protect the child and act in her welfare.

An interesting feature of all these examples is that they put some parties into a substantive normative relationship with each other without their specific, mutual consent. The grower is now responsible to the buyer's guest, even though they never transacted.[1] The child and the caretaker now inhabit a normatively thick relationship. Children are dependent on caretakers' execution of their duties, yet children do not choose their caretakers (and many schoolteachers will ruefully confirm that they do not select the children in their classroom).

Another commonplace, but perhaps more troubling, modern arrangement arises out of the focus of this Essay -- the brisk business in the sale of consumer debt. Such sales not only fuel a multibillion-dollar

[1] Notably, the grower cannot attempt to restrict their duties of care to the buyer only. S.M. Speiser, C.F. Kraude, and A.W. Gans, *American Law of Torts vol 5* (Rochester, NY: Lawyer's Co-operative Pub. Co., 2020) § 18:4 (lack of privity is no longer a bar in most product liability cases and increasingly, not in breach of warranty cases); U.C.C. § 2-318 (offering three alternatives that extend breach of warranty liability to remote purchasers and to injuries sustained by purchasers' household members and household guests, or even more broadly to injuries of any persons who would be 'reasonably expected to use, consume, or be affected by the goods').

industry, but they also enmesh millions of people into nonconsensual relationships, as when their student loans, personal debts, medical debts, or mortgages are transferred to creditors with whom the debt did not originate.[2] Borrowers may certainly select their original lender but, generally, they have no control over the various parties to whom their debts are sold. The right bearer of a note may change during the course of a loan repeatedly and, so, the identity of the party to whom the debtor is obliged may change repeatedly. This industry is facilitated by the contractual doctrine of assignment that allows one party to a contract to transfer their rights to performance to a third party, without their contractual partner's consent, thereby reformulating the identities of the contractual parties. That a doctrine of contract law facilitates the creation of non-consensual relationships through the transfer of contractual powers is particularly intriguing, given that consent is a necessary condition of the formation of a contract.[3]

Despite the ubiquity, significance, and interest of these transfers, the theoretical foundations of the legal structure that generates these nonconsensual relationships has been under scrutinized. A closer investigation of these theoretical foundations exposes a substantial, but instructive, philosophical tension in contract law's treatment of important cases of rights transfers. On the one hand, contract law adopts a highly permissive stance toward rights transfers (or *assignments*) undertaken on the unilateral initiative of the rights holder. On the other hand, it understandably takes a more restrictive posture toward duty transfers (or *delegations*). One should not be able easily to slough off a duty to another person who may not be motivated or structurally well situated to discharge it properly. The duty's beneficiary may reasonably insist on protection and input into the matter. If important cases of rights transfers also integrally, if covertly, involve duty transfers, then it is morally, and even legally, inappropriate to apply the more permissive rules of assignment. The more restrictive rules (or their functional proxy) of delegation should apply to protect the beneficiaries of the relevant duties.

I focus on the sale of debt, a significant feature of the modern

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[2] See e.g., Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2013* (Consumer Fin. Prot. Bureau, 2013), 8 at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-practices-act-report-consumer-financial/130213cfpbreport.pdf (last visited 1 April 2022).

[3] See e.g., American Law Institute, *Restatement (Second) of Contracts* (Philadelphia, PA: American Law Institute, 1979) § 17.

economy and a transaction often taken to offer a straightforward, simple example of a permissible assignment. In contesting the idea that the sale of debt does involve a straightforward example of a permissible assignment, I offer details about the US case to show that the sale of debt should trigger the delegation doctrine and its restrictions on transfers. Given the similarities between US and UK markets and US and UK common law, the main points will hold of both legal systems, with appropriate minor adjustments. Recognition of this doctrinal tension should alter our legal treatment of consumer debt assignment and of some other important cases of assignment to provide greater protection for debtors and other beneficiaries of hidden contractual duties. It may also attune us to the more relational components of economic behavior that is often treated as purely transactional.

Part I elaborates a simple, highly permissive model of rights transfers that will be the Essay's stalking-horse. The simple model is familiar and fits currency and tangible property transfers reasonably well. It does not, however, supply a plausible account of how we should treat cases where transfers of rights concomitantly transfer duties as well. This challenge to the simple model is first illustrated using the case of parental rights over their children's education.

Part II makes the case that debt transfers also involve hidden duty delegations. It describes the significance of the identity of the creditor to the debtor and the vulnerabilities of the debtor to the creditor. It is argued that creditors owe a range of duties to debtors in light of these vulnerabilities. Therefore, there is a hidden duty delegation embedded in debt assignment. Given the very serious consequences for debtors associated with facilitating the sale and collection of debts, the permissive rule toward debt assignment should be revisited to reflect the purposes of contract law's more protective delegation doctrine, whether by making such transfers more difficult or by explicitly imposing new obligations on assignees, thereby upending the traditional idea that assignees step into the shoes of the assignor. Debt transfers represent just one example of hidden duty delegations embedded in rights transfers. Transfers of employment contracts offer another example that should, for similar reasons, trigger distinct protections for employees. Not all rights assignments involve duty delegations, though, as a discussion of the rights to tangible property brings out.

Part III answers both theoretical and practical objections to this analysis, considering whether the duties of a transferee are moral or legal and whether it matters, as well as how the law could and should be sensitive

to the economic consequences of restricting free assignment. The Essay concludes with some observations about what the examples of intertwined contractual rights assignments and duty delegations may reveal about the differences between contracts and property.

I. THE SIMPLE MODEL OF RIGHTS TRANSFERS

A. THE SIMPLE MODEL

A simple model underwrites the permissive approach to transferring one's rights on one's own initiative. The simple model divides rights transfers into two types - complete and partial -, determined at the transferor's sole election. A complete transfer involves alienation. I have a right, it's mine to transfer at *my* will, and I give it to you while divesting it from myself. The right you possess after the transfer has the same content and properties as it had when I possessed it. This familiar way of thinking guides our everyday transfers of currency and tangible property such as chattel and real property.

After I give or sell you my eggbeaters, you have the beaters and the ability to do with them what you will, whether to use them as a doorstop, to regift them, or to do some pandemic baking. If I sell them to you for money, the money I receive can be used just as you used it – as a legal method to compensate for exchange. The money has the same legal and exchange value as it had when you possessed it, although my purposes for its use and my personal valuation of it may differ. So too the properties of eggbeaters and your moral and legal rights over them do not vary because of the transfer. In some important way, with respect to what we have exchanged, we have assumed the identical places of the other. Of course, the transfer may be taxed and so I may emerge with less money than you relinquished. That is, the bilateral transaction may elicit a third-party response that imposes a cost, but, as the typical gift case shows, the transfer itself does not alter the content of the thing transferred. The transferee slips on the shoes of the transferor.

Whereas cases of partial transfer have a different cast. Cases of partial transfer involve sharing some of the power contained within the right. The anchoring right-holder retains, rather than alienates, the right and so may place a variety of conditions on the transferee's use of the power. You borrow my eggbeaters, but you may only use them for vegan baking (creating a misnomer on the fly). Representation, on some theories, appears to fit this model. The transferor shares some of her power to make claims on her own behalf to a representative, but restricts the

representative's remit so that the representative is empowered only to the extent that the representative makes claims that serve the represented's interest (or perspective). The representative is the agent of the represented, operating under her instructions.

The simple model has an intuitive appeal, especially in the domain of contract. Contracts are created through the transfer of a decision-right whether to perform a particular act. An agent, through a promise and usually in exchange for consideration, transfers the right to decide whether to perform a specified act to another party. The recipient may decide to demand performance or to waive the right to demand performance. Because this decisional power was transferred in the first instance for consideration, it may seem entirely amenable to a fresh transfer to another party for further consideration.

Despite the intuitive appeal of the simple model, in some significant cases, the simple model of rights transfer misses the complications introduced by two related factors: First, many transfers do not simply involve transfers of rights but also transfers of duties owed to others.[4] Second, the specific normative features of the relationships constituted (in part) by rights of one party against another may pose obstacles to the transferability of the right at the bearer's unilateral will. Further, even when transferrable, the right may alter in content upon transfer. These factors are likely to arise in cases where the rights in question involve future performances that give rise to fresh vulnerabilities, which distinguishes them from many of the paradigm cases of simple property possession that, I hazard, make for the intuitive plausibility of the simple model.

Although debt assignment is often treated as an exemplar for the simple model's philosophical extension past currency, the simple model does not in fact fit the case easily, despite its legal treatment. What appears to be a simple rights transfer cloaks a hidden delegation of duties. Revealing this duty delegation should make a difference to our *moral* analysis of the transfer. (Think of the grounds to the immediate objection to a babysitter who passes off a child to a third party unapproved by the parents; it's a dereliction of duty.) Moreover, it reveals an unsustainable tension in the *law*: its treatment of some contractual rights-assignments is difficult to reconcile with the law's justified strictures on the transfer, the *delegation*, of contractual duties.

[4] I defend this claim with respect to political representation in a companion article, "Democratic Representation as Duty Delegation," forthcoming in the Proceedings and Addresses of the American Philosophical Association.

Where a significant duty-delegation is embedded within a rights-assignment, the transfer should not be treated as so simple – whether morally or legally. The relationship of duty formed by the transfer either calls for a fresh round of consent between the newly tethered parties or should be understood to alter the content of the rights and duties to ensure the protection of the involuntary party to the new relationship.

B. DUTIES INTERWOVEN WITH RIGHTS – THE PARENTAL EXAMPLE

Before turning the focus to debt, let's take a closer look at another example of a rights assignment where the integral presence of a duty is evident. In the United States, constitutional legal discourse about private schooling often speaks in terms of the rights of parents to direct the education of their children.[5] When parents decide between independent and state schools, they are deciding to whom to transfer their power to educate their children. But, in the legal domain just down the hall, that of child welfare, we know that the power parents exercise over educating their children does not stem merely from an autonomy right, but, foundationally, from a duty to their children. Parents have a duty to ensure their children receive an education,[6] which gives rise to a right to make decisions about

[5] See e.g., *Bush v Holmes* 919 So. 2d 392, 412 (Fla. 2006) (in invalidating a public funded voucher scheme, referring to "the basic right of parents to educate their children as they see fit."); *Pierce v Soc'y of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding that a requirement that parents send children to public school unconstitutionally interfered with the liberty of parents to direct their children's education but also mentioning the 'high duty' to prepare their children for life's obligations); *Meyer v Nebraska*, 262 U.S. 390, 400 (1923) (holding that parental liberty rights under the Fourteenth Amendment encompass a right to provide foreign language education to children).

[6] See e.g., *Huber v Bahns*, 2019 Nev. Dist. LEXIS 1233 at *6, *35-36 (Nev. 2019) (court ordered parent to ensure child attended school and awarded temporary and then permanent primary custody of child to one parent, in part, because the child missed numerous days of school and flunked first grade under the other parent's custody); *In re A.V.*, 2003 VT 113 (Vt. 2003) (finding that children were in need of care and support due to educational neglect and truancy after parent's homeschool plan was found to be inadequate and the parent failed to enroll them in public school). See also W.Va. Code § 49-1-201 (2018) (parental failure to supply an education for reasons other than poverty constitutes child neglect); Tex. Fam. Code Ann., s. 151.001 (West 2007) (parental duties include duties to provide an education); *Golay v Golay* 35 Wash. 2d 122, 123 (Wash. 1949) (holding that parents have duties to ensure children receive compulsory education and, depending on their finances, post-secondary education).

their children's education in order to fulfill that duty. We might say similar things about parents' ability to empower child-care workers to look after their children.

Identifying the duty that underlies the right matters in at least three ways. First, the duty substantially constrains the scope of the right. The discretionary powers of parents can only be exercised in ways that serve the duty. This constraint will, concomitantly, limit whom the parents may empower and how those they empower may act. Here, we already see a contrast with transfers of typical chattel or currency, where there are few moral limitations on the identity of the transferee and where some of the point of transfer is to enable different uses of the items than the original possessor put them to.

Second, when parents partially transfer their decision-making rights over their children to specific educators or caretakers, they do not merely transfer a right. The duty that underpins it also travels alongside. The educators cannot make *any* decisions about what the child will spend time doing, but are obliged to make effective and responsible decisions that will contribute to the education of the child. Caretakers do not merely inherit control over children, but also the obligations to support and protect their welfare.

Third, the parents remain ultimately responsible for whether the duty is well executed by the transferee. The transfer does not, even within its proper range, replace the transferor with the transferee and take the transferor out of the picture – even on a temporary holiday. The parent-transferors are not at liberty, just through their discretion, to slough off the duty to their child entirely onto another party, whether for a limited time or *in toto*.[7] Their duty continues to operate in the background. The primary

[7] The adoption process may seem to provide a counter-example. Parents are able to decide to transfer and relinquish their parental rights and duties without the child's consent. Of course, children are not able to supply consent in virtue of their minority status, so it is already a different case, but three additional points further complicate the case. First, most states bar parents from selling their parental rights and duties for money. Rather, their relinquishment is often driven by an incapacity, whether one that is financial, emotional, or situational, to meet their duties, not by financial gain. In this way, it more closely represents bankruptcy than simple assignment. (Cases of surrogacy represent a complication, but not a counter-example, first because it is contested whether surrogates are parents in the first instance and second because surrogacy contracts are intentionally designed to offer compensation for the costs and burdens of gamete donation and carriage, not

duty-holder is still on the hook, even if they have transferred their rights to educate to another party; should the other party fail to execute the duty or fail to execute it properly, the parents are obliged to fill in the gap. As the pandemic brought home to parents around the world, if the school to which they selected to teach their children does not or cannot operate, the parents must resume active service, whether they wish to or not.

The example illustrates that where the source of a right traces back to a duty, that origin story challenges the application of the simple model to the case. Where the right is anchored in a duty, the content of the right transferred is limited by the duty and the duty precludes clean alienability. The same will be true when the right and duty are otherwise intertwined. More generally, the example illustrates the familiar point that the relationship in which the right is embedded will exert an influence on how the right may be exercised. The example of parents and children, however, does not involve the transfer of *contractual* rights (even if the transfers themselves involve contracts) and it involves deeply intimate relations. So, while the relevance of the relationship to the content of what may be shared and what survives transfer may seem obvious, it may also seem limited to cases of intimate relations and not extendable to contract.

II. CONTRACTS AND DEBT ASSIGNMENT

A. THE SIGNIFICANCE OF DEBT TRANSFERS

To assess whether intimate relationships do in fact represent a special case of the transfer of normative powers, let's turn to contract and the case of debt assignment. With respect to the transfer of contractual rights, the common law of contract resembles the simple model, with a couple of qualifications. In the modern era, contract law's basic position is that, generally, as a default rule, contractual rights may be freely assigned and alienated by the promisee without the consent of one's contractual partner (the promisor).[8] In principle, the default rule may be contracted around, but in practice, many jurisdictions disregard non-assignment

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the child.) In other cases, the relinquishment occurs with the consent of the other parent (as in some divorce cases). Second, given the significance of the rights, duties, and their dominant emotional component, there is a strong presumption that their relinquishment (whether due to incapacity or parental willingness) serves the interest of the beneficiaries of the duty. Third, the transfer involves substantial oversight by the state and vetting of the transferee.

[8] *Restatement (Second) of Contracts*, n 4 above, § 317; U.C.C. § 2-210; UCC §§9-318(4) & 406(8).

clauses.[9] The major exception to the simple model's permissiveness occurs where the right is to performance and that performance is personal, so that the duty holder (the promisor) has an obvious, valid reason to object to serving a new right holder.[10] So, where A contracts with B for a performance, A may transfer the right to that performance to C unless B's performance is personal (e.g., a contracted massage or therapy session where it may seem obvious that the right to the performance is limited to the original, intended recipient).

Debt assignment, however, seems like the antithesis of a transfer of a performance of a personal nature.[11] A loans money to B and B promises to repay, with interest. Rather than sending the monthly checks to A's address, when A transfers the loan to C, B now sends the checks to C's address. This may seem as impersonal and unobjectionable as it gets. Such transfers are ubiquitous, often credited as laying the foundation for the modern economy.[12]

But, however widespread, it isn't an innocuous practice. The financial crisis of 2008 was substantially enabled, although not completely caused, by the legal power of assignment.[13] As we know, many of the initial

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[9] See P. MacMahon, 'Contract Law's Transferability Bias' (2020) 95 Indiana Law Journal 485, 507-516 (tracing the evolution toward a regime that favors unilateral assignment and disfavors or invalidates contractual clauses that require mutual agreement).

[10] *Restatement (Second) of Contracts*, n 4 above, § 317. The Restatement puts this in terms of whether assignment effects a material change in the obligor's duty, burden, or the value of performance, noting in the comments that "[w]hen the obligor's duty is to pay money, a change in the person to whom the payment is to be made is not ordinarily material." *Ibid*, comment (d).

[11] Hugh Beale, *Chitty on Contracts vol 1, Part 7, Ch. 22* (Mytholmroyd, UK: Sweet & Maxwell, 34th ed, 2021)(Summarizing UK approach to assignment and concluding "[p]rima facie contractual rights to…the payment of money…do not involve personal considerations and are capable of assignment.")

[12] See, e.g., E.A. Farnsworth, *Farnsworth on Contracts*, (New York: Aspen Publishers, 3d ed., 1999) § 11.2 (quoting H. Macleod's statement that the 'discovery which has most affected the fortunes of the human race…[is] that Debt is a Saleable commodity."); J. Lewinsohn, 'By Convention Alone: Assignable Rights, Dischargeable Debts, and the Distinctiveness of the Commercial Sphere' ms. (2020) (on file with author); B. Bix, *Contract Law: Rules, Theory and Context* (Cambridge: Cambridge University Press, 2012) 112 ("assignments of rights… are crucial to modern commercial life.")

[13] See e.g., R.H. Brescia, 'The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis' (2011) 66 N.Y.U. Ann. Surv. Am. L. 641, 648

loans were questionably extended and problematically structured.[14] Whoever held the loan was therefore at risk. But the fact that ownership of the loans was transferred, then bundled and then parceled into parts, or tranched and transferred again, served as kindling for the frenzy of improvident, sometimes predatory, sometimes discriminatory, and sometimes fraudulent lending.[15] The ease with which risky loans could be sold created demand for a dicey financial product. It diminished the incentive of the initial lender to verify the soundness of the loan carefully

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(locating a primary cause of the financial crisis in the shift from a "lend and hold" business model to a "originate to securitize" model). *See also* D. Whitman, 'What We Have Learned from the Mortgage Crisis About Transferring Mortgage Loans' (2014) 49 Real Prop., Tr. & Est. L.J. 1, 3 (discussing the role of the transfer of loans in the mortgage crisis); G.M. Cohen, 'The Financial Crisis and the Forgotten Law of Contracts' (2012) 87 Tulane L. Rev. 1, 9-18 (analyzing how the transferability of mortgage loans contributed to the risks of the loans).; O. Bar-Gill, 'The Law, Economics, and Psychology of Subprime Mortgage Contracts' (2009) 94 Cornell L. Rev. 1073 (discussing how loan originators in the financial crisis took advantage of cognitive biases and bounded rationality among low-income and new borrowers and how the high delinquency and foreclosure rates resulting from the deceptive terms of subprime loans caused borrowers "substantial hardship"); A.R. Sorkin, *Too Big to Fail: The Inside Story of How Wall Street Fought to Save the Financial System—And Themselves* (New York City, NY: Viking Press, 2009) 5, 89-90 (citing the foundational role of securitization of home mortgage loans in the financial crisis).

[14] See W. Poole, 'Causes and Consequences of the Financial Crisis of 2007-2009' (2010) 33 Harv. J. L. & Pub. Pol'y 421, 424 (discussing the decline of underwriting standards preceding the financial crisis and the rise of subprime mortgage loans granted to households with little repayment ability). Between 2001 and 2006 the percentage of mortgages classified as "prime" dropped from 85% to 52%, while the percentage of subprime mortgages (granted to those with poor credit or little documented income) grew to nearly 50%. M.N. Baily, R.E. Litan, and M.S. Johnson, *The Origins of the Financial Crisis* (Washington, DC: Brookings Institution, 2008), 14-17 at https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf (last visited 1 April 2022). Loan practices were often racially discriminatory as "borrowers of color were targeted for unsustainable, higher cost, subprime mortgages." See L. Rice & D. Swesnik, 'Discriminatory Effects of Credit Scoring on Communities of Color' (2013) 46 Suffolk U. L. Rev. 935, 943.

[15] See, e.g., J.C. Coffee, Jr., 'What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis' (2009) J. Corp. L. Stud. 1, 3-6; R.H. Brescia, n 13 above, 688-90. But see M. Adelino, K. Gerardi, P.S. Willen, 'Why Don't Lenders Renegotiate More Home Mortgages?' (2013) 60 J. Monetary Econ. 835 (arguing that *securitization* in particular does not have a significant impact on modification rates and incentives, although suggesting that information gaps between borrowers and lenders do).

and to steward the borrower through repayment.[16] Likewise, because the acquirer of the loan did not form a direct relationship with the borrower, the follow-on lender lacked full information about the borrower and a sense of responsibility for making the loan, touch points that might serve as the basis for oversight, supportive modification, or compassion.[17] Instead of careful loan generation and supportive debt maintenance, we saw promiscuous lending and then massive foreclosures.[18]

The financial crisis illustrates that the power to assign rights can contribute to momentous consequences. Although inventive financial products, an unusually high supply of money for investment, and lax advisors and regulators all played a major role in the *severity* of the crisis, one should not dismiss the underlying mechanisms by which assignees have an attenuated connection to the promisor-obligor. This attenuated connection often has deleterious consequences for the promisor.[19]

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[16] See, e.g., Brescia, n 13 above, 679-80; D.W. Arner, 'The Global Credit Crisis of 2008: Causes and Consequences' (2009) 43 Int'l Law. 91, 92-97 (arguing that securitization altered lending practices such that "loans came to be made not by banks with an on-going interest in their repayment, but instead by specialists…intent on profiting from charging to arrange loans on not on maintaining interest in the ability of the borrower to repay"); J.C. Coffee, Jr., 'What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis' (2009) J. Corp. L. Stud. 1, 3-6; P. Yeoh, 'Causes of the Global Financial Crisis: Learning from the Competing Insights' (2010) 7 Int'l J. Disclosure & Governance 42 (arguing that the willingness of assignees to buy loans without careful examination fueled loan originators to relax scrutiny of borrowers).

[17] See, e.g., J. E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (New York City, NY: W.W. Norton & Co., 2010) 14, 95; Brescia, n 13 above, 679-682; Sorkin, n 13 above, 102 (suggesting the major banks involved in the financial crisis did not even have a clear sense of what loans they possessed).

[18] See e.g., G.M. Cohen, 'The Financial Crisis and the Forgotten Law of Contracts' (2012) 87 Tulane L. Rev. 1, 18-30 (arguing that the dispersal of investors owning the rights to the loan encouraged foreclosures rather than loan modification); see also A.J. Levitin and T. Twomey, 'Mortgage Servicing' (2011) 28 Yale J. on Regul. 1 (tracing the role that fractured assignment of debt played in generating incentives against modification and that pushed toward foreclosure).

[19] To be sure, many of the inventive financial products driving the financial crisis used other mechanisms in conjunction with initial assignments of the *loan* to achieve attenuated responsibility. The loan might be assigned to a specific trust that then issued securities and those securities might be regularly traded; hence the trust might remain the same, although with a stable of constantly shifting investors who, like assignees of the loan, lack any initial or abiding connection to the borrower but who wield power that affects the conditions of the borrower's performance. Mere reform to the permissive power of assignment over *mortgages*

One could also use debt collectors to make this point. About one in three American adults have a debt, whether from student loans, medical procedures, credit cards or housing, that has been turned over to a collection agent, a process that usually occurs via contractual assignment.[20] The tactics of collection agents are notoriously aggressive, often harassing, and may devastate the lives of debtors, exerting disproportionate effects on communities of color.[21]

There are some structural reasons why assignee creditors, i.e., debt buyers, may treat debtors less reasonably than would the original creditors. Assignees are not responsible for the initial loan and consequently, may have less knowledge and a lesser relationship of responsibility to the debtor than an originating lender would have.[22] Although assignees have some incentives to acquire information to protect their investments, those incentives diminish when the loans are discounted at sale (and sometimes bundled) and the inquiry is unlikely to involve direct, personal contract with the debtor. (At this juncture mistakes may arise and entrench, another nagging issue associated with the debt transfer and debt collection industry.[23]) Moreover, when creditors specialize and obtain all of their business via assignments, their business model does not depend on helping and supporting debtors to generate repeat business.

To my knowledge, there has been no systematic study of the

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would not necessarily address all of the instabilities associated with mortgage-backed securities, especially if they were issued by the initial lender. Yet, the underlying reasons to reconsider the permissive stance toward assignment of the mortgage generate analogous reasons to question the permissive stance with respect to these more sophisticated instruments that represent analogous efforts to exercise power over vulnerable parties at a remove, without those parties' consent, and under conditions that encourage inattention to the responsibilities owed to the vulnerable.

[20] Some creditors hire debt collectors and retain the debt, but many creditors sell the debt to third-party creditors.

[21] See e.g., P. Kiel and A. Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods,* (ProPublica, 8 October, 2015), located at https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods (last visited 1 April 2022) (describing racial disparities in debt collection and how debt collection practices feed on and exacerbate racial economic inequalities).

[22] See also Brescia, n 13 above, 655-693 (arguing that social distance decreases trustworthy behavior and increases the likelihood of predatory behavior).

[23] See, e.g., Consumer Fin. Prot. Bureau, n 2 above, 17-18.

proposition that assignees treat debtors less favorably than original creditors do, although there is some empirical evidence to support the theoretical suspicion. A report by the Consumer Financial Protection Bureau revealed that assignee collectors generate almost five times as many complaints about abusive debt collection practices than do first party debt collectors.[24] Tess Wilkinson-Ryan has studied the converse question and produced some preliminary data suggesting that promisors are less diligent about performance toward assignees than they are toward the original promisee.[25]

To be sure, there is a possible chicken and egg problem here. Anticipation of this dynamic could be a possible explanation of less favorable treatment of promisors *by* assignees and that in turn could be a possible explanation of less favorable treatment by promisors *toward* assignees. On the other hand, collection agencies, a subset of assignee creditors, specialize in debt collection and devote all their time to that one end. Their specialization, rather than anticipation of this dynamic, may serve as a distinct reason why they are so persistent and aggressive. One might add that often they do not have other revenue streams to offset debt losses. Further, because they do not contract with borrowers, their interests in repeat business do not hinge upon maintaining a positive relation with borrowers.[26] Hence, they may have little incentive and no diversified economic cushion that would support their considering waiver, forbearance, refinancing, or other mechanisms of sensitive loan servicing, out of concern for the debtor.[27]

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[24] See Consumer Fin. Prot. Bureau, *ibid*, 15 (2013); see also Note, 'Improving Relief from Abuse Debt Collection Practices' (2014) 127 Harv. L. Rev. 1447, 1449 (2014). Mann and Porter rightly criticize the Fair Debt Collection Practices Act for excluding first-party debt holders from its coverage, but they do not cite evidence of greater (or even equal) levels of abuse by first-party debt holders. R.J. Mann and K. Porter, 'Saving Up for Bankruptcy' (2010) 98 Geo. L.J. 289, 332-33.

[25] See T. Wilkinson-Ryan, 'Transferring Trust: Reciprocity Norms and Assignment of Contract' (2012) 9 J. Empirical Leg. Stud. 511.

[26] Indeed, many debtors are unaware of who possesses their loans and this often works to their disservice. Many debtors fail to respond to collection notices and even suits because they do not recognize the name of the assignee creditor. See Pew Charitable Trusts, *How Debt Collectors Are Transforming the Business of State Courts* (Pew Charitable Trusts, May 2020), 16 at https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (last visited 1 April 2022).

[27] See also Pew Charitable Trusts, *ibid*, 12 ("…debt buyers are among the most active civil court users, and in some states, a small number of debt buyers account for a disproportionate percentage of civil cases filed.")

The devastating consequences associated with the financial crisis and the debt collection industry are unsurprising examples of what may grow from the easy rupturing of the original moral relationship of borrower to lender occasioned by assignment. These examples should pique our moral interest in assignment, but there are further moral and legal grounds of interest in the ability to assign that are not fully captured by reciting its potential consequences.

Consider the general structure of assignment. At first blush, the phenomenon of assignment is somewhat startling. Lender A and Borrower B enter into a promissory relationship for which their mutual consent is important, neigh essential. That relationship may involve A's providing a service such as lending money to B and B's engaging in a temporally expended performance of repayment in return. So, given the thickness of the moral relationship, isn't it odd that A could, on her own, terminate that relationship and constitute another such relationship between B and C, the assignee and new creditor? B starts off in a relationship with A but is now hurtled into a relationship with C – without A's consultation with B or B's agreement.

The urgent significance of consent that once loomed large seems to have receded, but it is mysterious why.[28] After all, it is not conceptually inherent in the right that B transferred to A when making the contract that A would have the power to reconfigure the parties.[29] B certainly transferred to A the right to make the decision *whether* B performs or not (without B's further consent). But, that right should be distinguished from the right to decide *who* makes the decision whether B performs or not (without B's further consent). For A to be empowered to assign the right to payment to C, A must have the latter right (to decide who decides). But, importantly, the latter right is not logically contained in the right to the performance. So, again, how is it that we start with B's picking A as her preferred contractual partner (perhaps even over C!), but then, at A's behest, suddenly, B's wishes no longer matter and B finds herself waltzing with C after all?

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[28] I advance a similar complaint about the way in which the doctrine of mitigation generates pressures on the wronged promisee to contract against her will. S.V. Shiffrin, 'Enhancing Moral Relationships through Strict Liability' (2016) U. of Toronto L. J. 353, 371-75.

[29] See also P. Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge: Belknap Press, 2019) 88-89 (arguing that the change of obligee may represent a material change in the obligor's duty and, in such a case, the power to transfer would not be implicit in the original power possessed by the assignor).

"Not so fast with the rhetoric," you might caution. A waltz is something of a personal service and, as previously mentioned, contract law does not permit the nonconsensual transfer of rights to personal services.[30] But, all that's at stake for standard forms of debt assignment is sending a check to one address rather than another. It's not as though, in an age of massive banks with impersonal service, Citibank occupies a special place in the heart over Chase.[31] The Restatement rule permits (unilateral) assignment except where assignment would 'materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him.'[32] As it's been interpreted, bestowing a personal service on a different client represents a material change but sending a check to a different bank for the same amount does not.[33]

From a sentimental perspective, there's some truth to this response. But, this nearly automated picture imagines an oversimplified relationship between creditor and debtor and, in so doing, airbrushes away some substantial objections the debtor might have about this nonconsensual assignment. As I will argue, these objections are legitimate. They go beyond preference and trace to a hidden duty-delegation that is obscured by the entrenched framing of this nonconsensual transfer as a mere assignment of rights.

Why would B object to C being the recipient of her payments, rather than A? The question, so framed, portrays the relation and the potential

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[30] *Restatement (Second) of Contracts*, n 4 above, § 317(2)(a).

[31] See e.g., J.E. Murray, *Murray on Contracts* (Charlottesville, VA: Michie Co., 1990) § 138(A)(2) ("It should make little difference to the obligor that he must pay a certain sum to the assignee rather than the obligee.")

[32] Murray, *ibid.* See also UCC § 210-2. Article 9 of the U.C.C. is far more permissive of assignment with respect to security interests, including promissory notes and other covered debts, generally overriding other legal restrictions on assignment, but making an exception for cases of enforcement against the primary debtor. See UCC § 9-408 (a)(c)(d). It also does not, however, cover assignments of debt purely for collection purposes. See UCC § 9-109(d)(5).

[33] See, e.g., *Marcuzzo v Bank of the West*, 290 Neb. 809 (2015) (holding that borrowers lack standing to challenge the assignment of their mortgage because it did not affect the obligation to pay); *In re FH Partners, LLC*, 335 S.W. 3d 752 (2011); *In re Veal*, 450 B.R. 897, 912 (2011). But see *Yvanova v New Century Mortgage*, 62 Cal. 4th 919, 937-38(2016) (acknowledging a home mortgage borrower's ability to challenge a *void* assignment but stating more broadly "[n]or is it correct that the borrower has no cognizable interest in the identity of the party enforcing his or her debt.")

objection solely in terms of B's performance obligation to pay money. The fact that money is a central pillar of a commercial relationship doesn't mean all the support beams are made of green paper.

The debtor-creditor relationship has other features that render the identity of the creditor reasonably important to B, the debtor-promisor.[34] The creditor not only has the right to demand payment on the terms agreed to but he also has the power to agree to modify the terms, to waive his right to payment on one occasion or more, to forgive the debt, to treat failure to pay as a material breach, to sue, to seek wage garnishment, and to inflict reputational damage by reporting the debtor to credit agencies for late or missed payments. They also possess substantial information of a confidential nature about the debtor. In some cases, a creditor may accelerate the balance in response to a late or missing payment, levy penalties and higher interest rates, or assess collection costs. In some circumstances, a secured creditor may initiate repossession and foreclosure proceedings or even repossession by self-help.[35]

Although imprisonment for failure to pay a debt is unconstitutional when due to inability to pay,[36] and often violates state and federal law,[37] debtors' prisons have indirectly reemerged in the United States. Many creditors, including Jared Kushner (former President Trump's son-in-law),[38] aggressively pursue arrests against debtors who do not respond to civil court summons. Debtors then face arrest and jail time for contempt of court arising from proceedings associated with civil debt. Creditors use this

[34] The reasonable importance of the creditor's identity to the debtor has been persuasively demonstrated by Paul MacMahon in two important articles. P. MacMahon, 'Rethinking Assignability' (2020) 79 Cambridge L.J. 288 and P. MacMahon, 'Contract Law's Transferability Bias' (2020) 95 Indiana Law Journal 485.

[35] U.C.C. § 9-609.

[36] *Bearden v Georgia*, 461 U.S. 660 (1983).

[37] 28 U.S.C. §. 2007 (2012) (federally prohibiting imprisonment for debt in any state where imprisonment for debt has been abolished); Note, 'State Bans on Debtors' Prisons and Criminal Justice Debt' (2016) 129 Harv. L. Rev. 1024, 1035 (detailing the constitutional provisions of forty-one states and the statutory provisions of the other nine); see also B.A. Vogt, 'State v. Allison: Imprisonment for Debt in South Dakota' (2001) 46 S. Dakota L. Rev. 334, 338-40.

[38] See D. Donovan, 'Jared Kushner's Firm seeks arrest of Maryland tenants to collect debt' (Baltimore Sun, 16 August, 2017) at https://www.baltimoresun.com/news/investigations/bs-md-kushner-arrests-20170812-story.html (last visited 1 April, 2022).

process, and its threat, to extract payment.[39] (In different jurisdictions, some thankfully historical, creditors have or have had the power to enslave the debtor, seize collateral, which has included human beings such as relatives, and to initiate *direct* proceedings leading to incarceration in debtors' prisons.[40]) Most of these powers are exercised at the creditor's discretion, guided by the creditor's attitudes, policies, capacities to withstand change and fluctuating circumstances, and the creditor's relationships, assets, and responsibilities.

So, B (the debtor-promisor) has plenty of reason to be interested in the identity of her creditor given that these factors that influence the

[39] See C. Johnson, 'Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors that Extort Via Debt Criminalization Practices' (2017) 80 L. & Contemp. Probs. 211, 228-45 (describing creditors' demands that debtors appear in court with the aim to use imprisonment as a threat to coerce payment); L. Shepard, 'Creditors' Contempt' (2011) 2011 BYU L. Rev. 1509, 1525-38 (discussing the use of in personam actions by creditors leading to debtor imprisonment and its threat to extract payments). See also, American Civil Liberties Union, *A Pound of Flesh: Debt Collection Report*, (New York, NY: ACLU, 2018), https://www.aclu.org/sites/default/files/field_document/a_pound_of_flesh_debtcollectionreport.pdf; E. Hager, "Debtors' Prisons, Then and Now: FAQ' (Marshall Project, 2 February 2015) at https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq (last visited 1 April 2022).

Imprisonment for failure to pay criminal debt, such as court fees and fines, has also resurfaced with a vengeance. See, e.g., N. Sobol, 'Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons' (2016) 75 Maryland L. Rev. 486. See also B. Colgan, 'The Excessive Fines Clause: Challenging the Modern Debtors' Prison' (2018) 65 UCLA L. Rev. 4.

[40] Imprisonment of debtors for private debts still directly practiced in some jurisdictions, including Israel and Gaza. See Taub Ctr. Staff, 'Israel's Treatment of Insolvent Debtors' (Taub Ctr., 10 September 2013), at http://taubcenter.org.il/israels-treatment-of-insolvent-debtors/ (last visited 1 April 2022) (reporting that imprisonment and travel restrictions may be imposed on insolvent debtors); Y.M. Aljamal, 'As Gaza's economy goes into freefall, the debtors' prison is overflowing' (Mondoweiss, 24 September 2019), at https://mondoweiss.net/2019/09/economy-freefall-overflowing/ (last visited 1 April 2022). For a historical discussion of creditors' treatment of debtors in the Jewish tradition, see Y. Domb, *Ethical Demands on Creditors in Jewish Tradition*, in A. Levine (ed), *The Oxford Handbook of Judaism and Economics* (New York, NY: Oxford University Press, 2010) 221-239.

exercise of creditor discretion vary between individuals and between institutional creditors. The creditor's assignment to another party of her right to be paid by the debtor significantly affects the conditions under which the debtor's duty to pay is exercised.[41] At the time of selecting one's contractual partner, the borrower has reason to be sensitive to the lender's reputation with respect to how the lender uses its powers. Yet, when selling the loan, the lender has little-to-no incentive to assess whether the purchaser of the loan has a strong reputation of responsibility in servicing or a comparable ability to be flexible, where appropriate, about repayment schedules. The assignment is a commercial transaction in which the only currency to which both parties are sensitive is financial – money now in exchange for the future proceeds of a loan, discounted perhaps for the risk of non-payment. The borrower's interests are not represented in this transaction, nor is there much incentive to attend to them.

The foregoing arguments underscore that the debtor has a strong interest in the identity of her creditor and whether assignment occurs. This is both because the identity of the creditor makes a difference to the conditions of the debtor's performance but also because upon assignment, the debtor has to make efforts to establish a new relationship with the new creditor-assignee. But, to many, her interest may not seem like enough to ground an objection to free, unilateral assignment and the lure of liquid markets, just as the debtor's interest that her business rivals not relocate onto her block does not ground a strong objection to their doing so. (Although, as I indicated earlier, it is an abiding mystery why such interests ground a requirement of *mutual* consent as a necessary condition for forming a contractual relationship in the first place but do not ground such a requirement for substituting one party for another at a later stage.)

B. DEBT ASSIGNMENT AS DUTY DELEGATION

It is misleading, however, to think of the debtor's complaint merely in terms of her interests and preferences about the rights holder. Here, we get to the duties that are obscured by the standard discourse about assignment. The debtor's duty is not the 'hidden duty' to which I refer. Her

[41] This argument is made persuasively and in greater depth by P. MacMahon in 'Contract Law's Transferability Bias' (2020) 95 Indiana Law Journal 485. It grounds his powerful argument against a presumption for unilateral assignment. The argument I proceed to make here about duty delegation complements MacMahon's article by offering a reply to the concern here articulated and by exposing a tension between the law's treatment of rights assignment and duty delegation in cases involving future performance.

duty to pay is right out in the open. Rather, I refer to the hidden duties of A, the lender, original creditor, original promisee, and assignor. A's right to payment from B (the debtor) does not stand alone, but is accompanied by a range of duties *to* B. This should not come as a surprise, since describing the powers that A over B has makes evident that the relationship between creditor and debtor is one of mutual vulnerability. To be sure, the creditor is vulnerable to the debtor's ability and willingness to repay. At the same time, the creditor's many moral and legal powers over the debtor render the debtor significantly vulnerable to the creditor. Recall the ability to dun, to sue, to repossess, to foreclose, to garnish wages, to affect the debtor's credit report and otherwise inflict reputational damage, and institute civil proceedings that may predictably lead to arrest warrants and incarceration. The creditor will also possess substantial information of a confidential nature about the debtor.

Arguably, one always has at least a minimal duty to take care with respect to those who are significantly vulnerable to one, a duty to ensure that one acts reasonably and with sensitivity toward their vulnerability, and that one uses one's powers over the vulnerable in a just, responsible manner.[42] Such a minimal duty is not (necessarily) a duty to protect the vulnerable person from their vulnerability, but rather to use one's power over them reasonably, with deliberative concern, and in proportionate response to an accurate assessment and accounting of the relevant facts.[43]

Of course, although the duty to take care toward those vulnerable to one's power is far short of a protective principle, one might worry that even its recognition would yield unmanageable demands given that in thick social circumstances, our networks of interconnection connect us to a wide range of cases of vulnerability. That concern can be addressed. These demandingness concerns have greatest purchase with respect to involuntary, numerous, and unknown connections of vulnerability and hence, it is part of the function of social and political institutions – to organize and discharge

[42] This principle, and the accompanying discussion, focus on the personal and financial vulnerabilities of individual debtors, not corporate or organizational debtors. Hence, the paper's focus on consumer debt. Whether this principle of responsibility holds of creditors toward corporate and other organizational debtors is an important, but more complex, question that I defer to another occasion.

[43] The relationship of the right to the duty differs from the childcare case discussed earlier. In that case, the source of the right was a duty of care and the duty of care gave rise to rights to make decisions necessary for the discharge of the duty. In this case, the source of the duty arises from the discretionary powers that accompany the right.

many of these duties in a collective fashion. By contrast, contractual debt arrangements are distinctive and more contained because the relationship of mutual vulnerability is both known and voluntary chosen on the part of the creditor. It is not overly demanding to contend that with respect to known, voluntary relationships, one has a direct responsibility toward those who are significantly vulnerable to one to treat and manage that vulnerability with deliberative sensitivity.

Supposing that claim were true, then the powers and rights of a creditor do not stand on their own. They should be re-described in conjunction with the creditor's duties to exercise them responsibly, with sensitivity toward the debtor's vulnerability. So, we might say that a lender advances money to a borrower and has a right to repayment in return. But, along with that right come responsibilities,[44] such as to record the debt and the repayments accurately, to answer debtors' inquiries promptly and accurately,[45] to protect confidential information, to consider whether the repayment schedule is realistic and reasonable, to consider requests for refinancing, restructuring, or forbearance in light of changed circumstances, to exercise sound and fair judgment in reporting lapses in repayment to credit agencies, to correct errors in recording and reporting where appropriate, to exercise reasonable judgment and patience, and to take only reasonable, humane measures in pursuing collection efforts.[46]

Notably, these obligations arise in a context in which economic fluctuations and the absence of a strong social safety net, not fault, often account for debtors' delay or inability to pay and this is entirely foreseeable. For individual debtors, systematic relief for the inevitable vulnerabilities generated by these economic fluctuations is increasingly unavailable.[47] Note

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[44] Contemporary literature on the ethics of creditor behavior during the course of a loan is surprisingly scanty. There is, of course, a long history of ongoing thought about usury and the formation terms of lending contracts and some literature about the ethical behavior of creditors upon breach, most famously, *The Merchant of Venice*. There's far less written about how creditors should conduct themselves during the course of a loan's repayment and its vicissitudes. *But see* Domb, n 40 above, 221 (describing some Talmudic injunctions on creditor treatment of debtors, including prohibitions on creditors contacting debtors and requirements to avoid encounters that might cause embarrassment).

[45] See, e.g., 12 U.S.C. s. 2605 (e) (servicers of federally related mortgage loans must respond to written inquiries within five business days of receipt).

[46] See also Whitman, n 13 above, 8-9 (detailing the extensive duties of loan servicers as delineated by secondary-market investors who purchase mortgages).

[47] C. Ondersma, 'Small Debts, Big Burdens' (2019) 103 Minn. L. Rev. 2211, 2222-38 ("After the 2005 amendments to the Bankruptcy Code . . . bankruptcy

the high barriers to discharging credit card[48] and student debt in bankruptcy.[49] Moreover, as detailed above, the range of legal powers available to creditors is substantial. In many circumstances, their invocation would often represent a disproportionate and insensitive response to debtors' struggles.[50]Their invocation is largely independent from close legal oversight.[51] So, in our current legal regimes, it falls largely to creditors themselves to manage these powers ethically and to respond fairly to the precarity that our economic system reliably generates.

Just as parental rights do not stand alone, but are informed and

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became even more complex and expensive and thus more inaccessible for the poorest debtors."); R.M. Lawless, A.K. Littwin, K.M. Porter, J.A.E. Pottow, D.K. Thorne, and E. Warren, 'Did Bankruptcy Reform Fail: An Empirical Study of Consumer Debtors' (2008) 82 Am. Bankr. L.J. 349, 383 (arguing the 2005 bankruptcy bill did not filter out abusive filers in a targeted way, but that its effect was to make bankruptcy more difficult to file and to serve debt collectors).

[48] M.J. White, 'Bankruptcy Reform and Credit Cards' (2007) 21 J. Econ. Perspectives 175, 175-188 (highlighting how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) made it more difficult to discharge credit card and other debt and increased the incentives of lenders to offer more credit cards and larger lines of credit).

[49] See e.g., Insolvency (England and Wales) Rules 2016, SI 2016/1024, art. 9.2 ¶ (1)(b) (excluding student loan debts from inclusion in debt relief orders in England and Wales); Education (Student Loans) (Repayment) Regulations 2009, SI 2009/470, Regulation 80 (UK) (excluding student loans from UK bankruptcy process); D. Rendleman and S. Weingart, 'Collection of Student Loans' (2014) 20 Wash. & Lee J. Civil Rts. and Soc. Just. 215, 271-288 (tracing barriers to discharging student loans in bankruptcy in the U.S.); M. Bruckner, B. Gotberg, D. Jimenez, and C. Ondersma, 'A No-Contest Discharge for Uncollectible Student Loans' (2020) 91 U. Colo. L. Rev. 185, 187-88, 193-94 (documenting that student loans are not automatically discharged in bankruptcy in the U.S. and require additional costly, arduous litigation separate from a bankruptcy proceeding that deters many borrowers from seeking relief). But see A.N. Taylor and D.J. Sheffner, 'Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans' (2016) 27 Stan. L. & Pol'y R. 295 (arguing that a non-negligible number of courts do find student loan borrowers face undue hardship, although much of their data involved uncontested cases.)

[50] A. Roberts, 'Doing Borrowed Time: The State, the Law and the Coercive Governance of 'Undeserving' Debtors' (2014) 40 Critical Soc. 669 (connecting the growth of imprisonment for civil debt to constricted access to bankruptcy and to the growth of the debt-buying industry).

[51] See e.g., *Flagg Bros. v Brooks*, 436 U.S. 149, 161-66 (1978) (finding no state action for self-help repossession actions under U.C.C. and therefore, no constitutional requirement of due process).

constrained by the duties from which they arise, so too the powers and rights of a creditor are informed and constrained by the duties that arise from the relationship of creditor and debtor. To be sure, in the parental case, the decisional rights arise from the care-taking duties; in the creditor case, the duties arise alongside the rights as moral responses to the powers the rights engender. In both cases, the duties and the rights are intertwined and inseparable in two senses: the permissible exercise of the rights is guided and constrained by the duties and the rights and duties cannot be disentangled.

Contemplating the duties of a creditor may sharpen one's sense that the law's permissiveness about nonconsensual assignment is difficult to justify. For, although contract law is wildly permissive about assignment (except for personal services), it is substantially more restrictive about the circumstances under which one may delegate duties. If debt assignment does not merely involve the transfer of rights but concomitantly involves the transfer of duties, then arguably, the permissive treatment of debt assignment is unjustified and a rule that is more sensitive to the duty transfer should apply.

What would the implications be of treating debt assignment as involving duty delegation? By contrast with the common law's approach to assignment, which presumes the permissibility of unilateral, extinguishing transfer, unilateral efforts to delegate duty do not extinguish the transferor's ultimate responsibility. (They are ineluctably only partial transfers.)

First, contractual duties cannot be unilaterally delegated if the promisee has "a substantial interest in having that person [the duty-holder] perform or control the acts promised."[52] Second, even where the duty is delegable, the original duty holder remains on the hook should the transferee fail to satisfy the duty, thereby protecting the promisee from a bait and switch in which a reliable contractual partner is replaced by an unreliable performer.[53] Put in a nutshell, while assignments of mere rights permit a clean break between promisor and promisee, delegations of duties are sticky. They leave a lasting residue and connection between the original promisor and the promisee.

Abstractly, a bar on the unilateral extinguishment of an agent's

[52] *Restatement (Second) of Contracts*, n 4 above, § 318 (2); see also U.C.C. s. 2-210 (1). *See also* Hugh Beale, *Chitty on Contracts,* n 11 above, Vol. 1, Part 7, Ch. 22, §4(f) (summarizing British common law doctrine on delegation).

[53] *Restatement (Second) of Contracts*, n 4 above, § 318 (3).

duties through transfer at the duty-holder's own discretion makes good sense. To be sure, many agents may need assistance to meet their responsibilities and so, constrained forms of supervised delegation may be warranted. But, because the duties in a contractual relationship are guarantees of a performance by a party who may be chosen in light of her abilities and dispositions to perform, it would be strange to permit that party to wiggle her way out of performance and wash her hands of residual responsibility by enlisting a third party, perhaps an inferior performer, to perform instead.

In the case of debt assignment, because the relationship between creditor and debtor is a relationship of vulnerability that generates duties in both parties manage those vulnerabilities with deliberative sensitivity, debt transfer cannot be framed as a pure case of rights assignment. Consequently, the sale of debt should be considered a delegation and the more restrictive rules that govern delegation should apply.

Although the example of debt assignment helps to make these structural points concrete, these points may also hold true of other contractual assignments. For instance, the basic issues to which I have drawn attention will also arise wherever the assignor's transfer involves a transfer of access to sensitive or confidential information. Consider also employment contracts for non-personal services as well as covenants not to compete. Common law courts have often treated these as assignable (without the employee's consent) so long as the assignee will not exercise supervision or direction.[54] But, the employee also stands in a relationship of vulnerability to the employer by virtue of the employer's right to performance, including vulnerabilities to reputational damage, reprimand, demotion, termination, and suit. These substantial vulnerabilities generate duties by the employer to manage them with deliberate and proportionate sensitivity. An employee has many reasons to be concerned about who has the right to her performance where the identity of the right holder may affect how those duties to the employee are discharged.

For what it is worth, not *all* assignments of rights involve hidden duty delegations of the sort that should generate concern.[55] The structure of consumer debt assignment may be profitably contrasted with the transfer of

[54] See e.g., Murray, n 31 above, § 138 (A)(3); *C.H. Little Co. v Caldwell Transit*, 163 NW 952 (1917).

[55] As noted earlier, it is an open and deferred question whether the vulnerabilities of corporate and other organizational entities should generate the same level of moral concern and responsibility. See n 42 above.

(most) tangible property. When I give or sell to you my electric hand-mixer, I transfer my right to use it and to dispose of it to you. For most chattel, the current owner does not have an ongoing *relationship* of duty (whether explicit or implicit) to the prior owner with respect to the object, much less a relationship of substantial vulnerability predicated on how that relationship unfolds, so there are no duties being transferred of the sort I am highlighting with respect to the creditor-debtor relationship. What generates the issue of concern is not the rights-transfer *per se* but the transfer of a right to a future performance that gives rise to vulnerabilities on the part of the performer. This temporal obligation (and its significance) generates duties in two directions and marks a general, though not an ironclad, distinction between tangible property and contract.

There are some exceptions, cases in which property ownership involves a directed relationship, with duties, to another person and not merely control over a thing or place and the general duties not to use things or places in negligent, dangerous, or destructive ways. For example, in some jurisdictions, the owner of a visual artwork has an ongoing legal responsibility to its creator not to destroy it without the artist's permission.[56] The owner of a mere copy of a copyrighted work has an ongoing legal responsibility to the copyright owner not to copy that work or to make derivative works from it.[57] Real property may be burdened by easements in gross.[58] In these cases, ownership involves an ongoing legal duty to another

[56] Visual Artist Rights Act of 1990, 17 U.S.C. § 106A (The author of a work of visual art has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation…and to prevent any destruction of a work of recognized stature…."); California Art Preservation Act, Cal. Civ. Code § 987 (c) (1) (2007) (No one other than the creating artist "shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art."). Artists' continuing interest and investment in what happens to their artworks may ground an argument for the former practice of reversion of copyright.

[57] See 17 U.S.C. §§ 106, 202.

[58] Of course, many easements run with both dominant and servient parcels and thus are not tied directly to specific people, but to whatever changing personnel happen to have property interests in those parcels. Easements in gross are owned by particular parties and so the relation is more directly with a particular person. American Jurisprudence (West, 2nd ed, 2002) Ch. 25, § 10 (an easement in gross "belongs to the owner of it independently of any ownership or possession of any specific land… its ownership may be described as being personal to the owner of it…Because no dominant tenement exists, the easement right does not pass with the title to any land.")

person and those duties follow the sale or transfer of the property. Interestingly, these duties are dominantly negative (not to destroy an artwork; not to copy a copyrighted work; not to exclude) and do not require the sorts of positive actions incumbent upon responsible creditors. Further, the normative relationships they constitute are typically less interactive and the duties of the rights holder are not activated by new behaviors or requests by the other party. Finally, these duties do not involve much situation sensitivity or the exercise of discretion by the duty holder.

By contrast, the duties that accompany creditors' rights involve positive action, interaction, and the exercise of judgment, often triggered by the actions, omissions, or entreaties of the debtor. These duties involve sensitive management of a significant vulnerability of the debtor concerning how the creditor exercises his rights with respect to an ongoing performance occurring within fluctuating economic circumstances largely beyond the debtor's control. The nature of these duties involves the exercise of discretion, which underscores why the identity of the creditor *qua* duty-holder may be especially important to the debtor. While these features do not hold of all contractual relationships, the potential for them lurks within many executory contracts and relational contracts, especially where there is plenty of territory for the implied duty of good faith to traverse.

What about the sorts of examples with which I began? KitchenAid sells me a blender and I then give it to Harry. Harry now may have claims against KitchenAid should its product be defective, and one might think this power generates duties on his part not to harass KitchenAid, make frivolous warranty claims, or post unfair reviews. My transfer put KitchenAid at the mercy of Harry's sharpened pencil without its consent and allowed me to extract myself from my duties of fairness. Why is this different?

I take the differences to be as follows. Those who make artifacts, or food, or who control land have an obligation to render them safe to everyone who may be in contact with them, and everyone has a speech right to review their quality, publicly. The duties to use one's discretion about how to speak and when to complain apply to all sorts of users, not just to owners. The basic rights, duties, vulnerabilities and powers do not arise out of a special directed relationship and are not activated by a transfer, whereas a loan and the duty to repay are parts of a directed relationship between specific parties in which their identities are significant.

But, what about the warranties that accompany some products by virtue of the discretionary promises their manufacturers make (as contrasted

with the safety guarantees that are mandatory and apply to any user, independent of contractual relation)? In general, generic warranties do not raise the same concerns, partly because the relationship is not one in which the relevant performance unfolds over time, subject to shifting winds or economic vagaries and partly because the risks faced by a manufacturer do not involve the same sorts of vulnerabilities associated with the payment of debt or other complex future performances that ground the duties to manage vulnerability with deliberative sensitivity.

To elaborate on these contrasts with the case of debt assignment: First, with product warranties, the central performance has occurred in the past, when the product was manufactured; the good was made and it was either made defectively or not, prior to the sale. Second, the range of morally significant discretion held by the warranty-holder is rather small (whether to complain); the relationship is not one in which the consumer has the power and the responsibility to assess whether lapses in performance should be excused or whether the performer merits assistance from the consumer. Third, the identity of the warranty-holder should make little difference to the warranty-provider; indeed, warranty complaints may perform a public service by alerting manufacturers to problems with uniform goods that many may face whereas debt collection generally serves a mere private purpose.[59] Finally, in myriad ways the stakes are so much lower for the manufacturer from any one consumer's behavior, both because of the manufacturer's structural capacities and resources and because the consequences of these complaints are relatively minor.

Returning to debts: On the supposition that duties are sticky and should not be subject by default to unilateral, extinguishing transfer, the hidden duty-delegation embedded within debt assignment suggests two issues with the permissive common law treatment. First, debt assignments are permitted to occur without the consent of the obligor. Once we acknowledge that a duty delegation is simultaneously transpiring without the consent of the party to whom the duties are owed (the obligor/debtor), this should give us pause because the identity of the duty holder may reasonably matter to the promisor. Second, these assignments are not treated as leaving a residual, back up obligation with the original creditor. This second issue compounds the first. Together, these two reasons support

[59] Depending on the details, however, the case for questioning assignments or upholding nontransferability clauses for specifically negotiated warranties and service contracts may be stronger in those situations where the warranty or service contract was bargained for and tailored to the needs and circumstances of the buyer.

a presumption that rights assignments that harbor a hidden duty delegation should be treated as duty delegations and subject to their more restrictive rules.

Of course, the second issue may be predictable. Given the nature of the creditor's embedded duties, it's hard to fully grasp what it would mean for the delegating creditor to retain responsibility should an assignee fail to satisfy these duties. That is, the sticky model's implications seem evident where a transferred duty involves a discrete action – such as to deliver widgets or pay money. If the delegate does not deliver or pay, the promisee may demand the original promisor to deliver or pay. It is more obscure how, practically, the original promisor may serve as a backup performer where the duty in question is to exercise discretion reasonably and deliberatively. Because the duties inform how the various aspects of the right are to be performed, rather than constituting discrete activities, it may both be difficult to assess breach and even more difficult to demand substitute performance.

For example, if the new creditor declines a forbearance request automatically, rather than considering the debtor's circumstances carefully, the new creditor may have failed to discharge these duties. But, should the debtor appeal to the former creditor to perform in the new creditor's stead, there's nothing simple and effective that the former creditor can do since the former creditor no longer has control over the debt's management. The former creditor can advise the new assignee/creditor about how to exercise discretion responsibly. Fat lot that will do for the debtor. The rights assignment disables the original creditor's abilities to play a backup role, but it is unclear why the creditor should be permitted to disable itself from fulfilling a duty. Given that the residual guarantee of performance by the original obligor cannot be meaningfully vindicated, this adds to a growing sense that the duty is non-delegable and so its intertwined right is not assignable. On this supposition, debt transfers should only be allowed as novations (substituted contracts with a new party) and novations demand bilateral consent.

III. OBJECTIONS TO FRAMING DEBT TRANSFERS AS DELEGATIONS

A. MORAL, NOT LEGAL DUTIES

It may be objected that the hidden duties that have been highlighted are moral, but not legal, duties of the assignor, but that the doctrine about duty-delegation concerns *legal* duties undertaken in the contractual

agreement. To the extent they are not legal duties, then there is no defect in the law's treatment.

Second, the objector might continue that, to the extent that these are legal duties of the contractual relationship, if they are not satisfied, then the debtor could sue the new creditor. Tellingly, however, most of the duties under discussion are duties of discretion. So, while a new creditor may not show the same sensitivity as the former creditor *might* have shown, that does not mean that a refusal to grant forbearance or to refinance falls outside the new creditor's range of appropriate discretion. A debtor may disprefer the acquisition of the contractual rights by the new assignee-creditor, but so long as the new creditor's behavior falls inside the scope of discretion, it is legal and hence there is no incoherence in the law's treatment.

Note that these objections do not pretend to offer a moral defense of the law's treatment of debt assignment, but rather are limited to suggesting that the law's treatment of debt assignment is not legally inconsistent. Since the defensibility of the legal treatment of assignment should be our main concern, this objection, even if valid, would have little force. Escaping the assessment of inconsistency is little comfort against a charge of moral inadequacy. Nonetheless, the objections can be answered in ways that show that our current legal doctrines, understood in terms of their underlying values and not exhausted by their specific applications, should not so readily countenance assignment as they do. Recognition of this tension might offer legal resources for resisting the current treatment of debt assignment through commonplace common law reasoning.

In reply to the claim that these are not legal duties that arise from the contract: some are; some aren't; and, there's some ambiguity. On the positive side, for instance, creditors have legal duties to engage in accurate recording and responsive communication with debtors. They may have some contractual and some statutory duties to protect the privacy of information collected in the contracting process. Repossessors by self-help have legal duties not to breach the peace.[60] More generally, most of the creditor's duties, e.g., those concerning the performance of payment, the modification of the terms of performance, forbearance, and measures of enforcement arguably fall under the implied duty of good faith and fair dealing; as the Restatement puts it: "[e]very contract imposes on each party a duty of good faith and fair dealing in its performance and *its enforcement*."[61]

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[60] U.C.C. 9-609.

[61] *Restatement (Second) of Contracts*, n 4 above, § 205 (emphasis added).

The fact that many of these duties involve a great deal of discretion, many of which in fact and some of which in theory are not subject to substantial judicial oversight, to my mind heightens the case for the view that these duties should not be delegable without the debtor's permission. The variability in how discretion is exercised may give the debtor-promisor a "substantial interest in having that person perform or control the acts promised," thereby meeting the Restatement of Contracts' standard for resisting unilateral transfer.[62] Because the borrower must trust that the lender will be reasonable and exercise discretion soundly (and will remain structurally capable of so behaving), the borrower has every reason to be particular about who her contractual partner is and to object to being compelled to change partners mid-dance.

The objector might press that it isn't the law's business whether and how the creditor discharges his extra-legal, moral duties, especially those that are ancillary to the point of the bargain (the loan and the repayment). Thus, the assignee/downstream creditor's likely treatment of his extra-legal, moral duties is beneath legal notice and that, in turn, cuts against the idea that the law's permissive treatment of debt assignment is in tension with its approach to duty delegation. By analogy, even were we to wield a more robust doctrine of unconscionability that disrupted a wider range of efforts to create and enforce exploitative or unfair contracts than our current practice, there would probably still be a gap between the bargaining behavior necessary to avoid unconscionability and the bargaining behavior necessary to treat one's bargaining partner in a morally exemplary way. Ex hypothesi, agents should, morally, satisfy the latter standard but the law will turn a blind eye so long as the former standard is met. Here, too, it might be thought that the debtor's concerns about the downstream assignee-creditor's approach to her moral duties either generate legally cognizable claims or they do not; if they do not, then those concerns should properly weigh on the downstream creditor's conscience but they also properly fall under the law's radar and should not serve to obstruct any assignment.

This objection, however, does not seem consistent with the features of the cases where the doctrine about delegation does recognize that the obligor's identity is of substantial importance to the obligee. A teacher cannot unilaterally delegate his duties to another qualified person;[63] a singer

[62] *Restatement (Second) of Contracts*, *ibid*, § 318 (2).

[63] *Restatement (Second) of Contracts*, *ibid*, § 318, illustration 5. See also *Woolley v Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1534 (1991) (referring to contracts of actors, artists, managers, sales agents, teachers, and mechanics as 'of a distinctively personal and non-delegable character'); *Auran v Mentor School Dist. No. 1 of Divide*

cannot unilaterally delegate a singing advertisement to another singer.[64] These bars would not be overcome by showing the delegated party had the same legal duties and rights. They would not even be overcome by showing that the delegate was more qualified or generated more sales. What drives these cases is not the idea that the downstream performer might deviate from the average quality of the original performer in a way that the original performer would be liable for should she have a bad day. From a liability perspective, she might have a bad day and yet still be in full compliance with the contract. There is a variable range of qualities within the scope of a legally acceptable performance and this range may include ineffable qualities often specific to the performer. The law recognizes that contractors may reasonably distinguish between contractual partners based on these variables, even when their absence would not ground a cause of action. These variables represent *legally significant* qualities, even if their possession and optimal exercise are not judicially enforceable duties or terms. Yet, they are legally significant in the sense that their absence or presence grounds a legal right to resist a transfer.

Still, an objector may remonstrate that although the singer's purity of tone may not be directly regulable, it is an aspect of the central performance motivates the contract; by contrast, again, the duties under discussion are quite ancillary to the main point of the exchange. I doubt this matters. One does not buy a television in order to obtain a warranty. The warranty will only be relevant should there be a defect in the primary performance; one hopes the warranty will remain entirely inert. Nonetheless, the warranty still represents a set of important duties for which that the seller is accountable. The buyer may reasonably be concerned by the absence of a warranty or a bad record for honoring the warranty, even if the warranty is not the point of the exchange.

Given the embedded duties of the debtor-creditor relation, the range of discretion the creditor wields, and the significant vulnerability of the debtor, we should acknowledge the relation as personal despite our somewhat reflexive tendency to think of financial relationships as impersonal. And, though, banks like Chase, Citibank, and Wells Fargo are, in many respects, interchangeable monoliths, we all know from daily experience that even large institutions have distinctive cultures and policies that affect our interactions and our treatment by them.[65]

Cnty, 60 N.D. 223 (1930) (holding a teacher may not delegate her duties to a substitute).

[64] *Restatement (Second) of Contracts*, n 4 above, § 318, illustration 6.

[65] R. Lieber, 'Which Consumer Lenders Are (and Aren't) Helping the Most'

Indeed, the contention that these are only implicit *moral*, not legal, duties – while contestable – also heightens, rather than diminishes, the case for the claim that the borrower has a substantial interest in performance by the particular creditor with whom the borrower has agreed to transact. If they are moral, not legally enforceable, duties, then there is no further recourse for failure to discharge these duties or for lesser quality performance than anticipated. Hence, the borrower's interests are secured only by the moral good faith of the creditor, the structural capacities of the creditor, the relationship of trust, and the creditor's concern over reputation. So, there is an important reason why the debtor may want to insist on approving the creditor's distinct identity. Notice that in the unconscionability example, the hypothesis is that the two parties agree to a contract with each other even though one party is not in full moral compliance. The critical aspect of the debt case, though, is that the debtor has made no consensual agreement with the downstream creditor. The debtor has made no specific agreement with a party that might lead us to think that the debtor had assumed some of the moral hazards of the new creditor's character and circumstances. So, the examples are not parallel, in important ways.

Of course, it could be objected that the debtor did agree, implicitly, by not contracting around the permissive right to assign. The borrower who is truly concerned about who her creditor is should contract around the unilateral assignment right and should require approval over any assignments. This response ignores the many obstacles to enforcing contractual efforts to preclude assignment.[66] This response also does not

(N.Y. Times, 17 March 2020) at https://www.nytimes.com/2020/03/17/your-money/loan-waivers-coronavirus.html (last visited 1 April 2022) (describing variable reactions of big lenders to loan waiver policies at onset of pandemic); see also Donovan, *supra* note 38 (quoting an attorney who noted that her collection firm, unlike Kushner's, had a policy against body attachment); Mann and Porter, n 24 above, n. 56 (reporting different creditor practices and collection policies); C.K. Reid, C. Urban, and M.J. Collins, 'Rolling the Dice on Foreclosure Prevention: Differences Across Mortgage Servicers in Loan Modifications and Loan Cure Rates' (2017) 27 Housing Pol'y Debate 1, 2, 23 (documenting substantial differences between loan services in the relief offered to borrowers and in their likelihood of modifying rather than foreclosing); L. Ding, 'Servicer and Spatial Heterogeneity of Loss Mitigation Practices in Soft Housing Markets' (2013) 23 Housing Pol'y Debate 521, 522.

[66] See e.g., *Restatement (Second) of Contracts*, n 4 above, § 322; UCC § 2-210; UCC §§ 9-401; 9-406(d) (declaring terms restricting assignment ineffective); but see UCC 9-406(e)(h) (exempting the ban on restrictive terms on assignment for sales of

explain why the default should be a permissive assignment right, especially given the values underlying the law's more qualified approach to delegation. More important, it does not reflect an iota of realism about the opportunity to 'contract around' in relationships of disproportionate power conducted against the backdrop of standard form contracting and consumer debt.

Finally, the argument I have offered grounds a general skepticism about the appropriateness of any broad form of pre-authorized assignment (where assignment involves a hidden delegation) and the sensibility of a rule that would require the promisor's authorization at the time of assignment (or, in the alternative, a more explicit mechanism to protect the promisor's interests). That is, the argument I have offered emphasizes the significance of the particular identity of the promisee even in a relationship that does not involve personal services. A legal regime that was permissive of such blanket pre-authorizations would be insensitive to these concerns, particularly given the standard power imbalance between consumer lenders and borrowers. The informational context in which pre-authorization of assignment would occur is too impoverished to solicit the relevant form of consent to address the fundamental issue.

To recap, I have been using debt assignment as an example of a case of hidden duty delegation that is embedded within what appears to be a simple, mundane rights assignment. A creditor who sells a debt is not merely transferring a right but is transferring a host of duties that are connected to the right to repayment, duties that manage the vulnerability associated with indebtedness over time. For good reason, morally and legally, duties are not easily treated as transferable. The obligee may have a stake in who the obligor is that may be cause to obstruct the transfer altogether. Moreover, even when the transfer transpires, it leaves a residue with the original obligor who must operate as a guarantor that the duty be fulfilled. Put simply, a duty is not a mere chore that one may pay someone else to perform and to shoulder the full responsibility. Because of the myriad ways different creditors may discharge their duties toward debtors and because the discretionary nature of the duties makes back-up guarantor status infeasible, debtors should be able to prevent standard cases of nonconsensual debt assignment and their consent to a substituted party should be secured.[67]

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payments intangible, promissory notes, and individual debtors with respect to personal or household debt). See also MacMahon, n 8 above, for a description of the judicially imposed barriers to success in attempting to restrain assignment through contract.

[67] Here, the 'standard cases' qualification signals some possible exceptions,

B. LIQUIDITY AND THE HEALTH OF THE ECONOMY

A different line of objection may start with the observation that free, permissive assignment enables a flourishing economy. Seeking debtor permission for debt assignment (and implicit delegation) and, thereby, permitting debtors to object to transfers would generate headaches when debtors are unresponsive and have gone to ground. It would also provide opportunities for rent-seeking debtors to generate bottlenecks in debt markets. For both reasons, the rule would ultimately harm borrowers who will find it increasingly difficult to obtain credit from skittish creditors worried about whether they might later need to sell the debt but would encounter substantial obstacles. Perhaps there should be a *moral* bar on unilateral assignment and perhaps our economy should not have been permitted to shift onto these permissive legal rails, but now that these are our legal tracks, it would be too disruptive to shift course.

It's hard to know what weight to afford these claims given the pernicious effects of permissive debt assignment as exemplified in the earlier discussions of the financial crisis of 2008, the unscrupulous and unrelenting behavior of the debt collection industry, and the role of both in wreaking devastation on the lives of the poor.[68] These effects are not coincidental but

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such as cases of incapacity in which a creditor becomes incapable of managing their rights and duties and must transfer them to another party. Thinking in terms of incapacity is also a partial way to justify and describe a system of bankruptcy as a form of mitigation for the predictable casualties of a lightly regulated free market economy that encourages risk taking and has few safeguards on predictable fluctuations outside of many debtors' control. Aggregating the rights and duties in an executor rather than reversing as many transactions as possible is a way to triage and treat fairly the whole host of parties, debtors and creditors, disadvantaged by the induced incapacity. See the further discussion in the text below at the text accompanying note 73.

[68] See e.g., Brescia, n 13 above, 655-693 (describing the disproportionate impact of the financial crisis on minority and lower income communities); Mann & Porter, n 24 above, 304-7, 315 (detailing what is often an 'unbearable,' 'intolerable' daily experience of harassment by collectors at home and at work, which includes creditors contacting external parties); Roberts, n 50 above, 681 (reporting that debt buyers target working class and poor borrowers, using small claims courts to evade formal evidentiary requirements); ACLU, n 37 above, (documenting that one third of all adult Americans have debt that has been transferred to a collection agency, millions of whom are threatened with jail for their debt); C. Albin-Lackey, *Rubber Stamp Justice* (Hum. Rights Watch, 2016) at https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-

have some structural roots in the absence of a consensual connection between the assignee and the debtor-promisor.

Of course, permissive assignment is not the sole cause of these misbehaviors nor would its reformation be the sole or primary remedy to them. Nonetheless, permissive assignment is an enabling and often invisible cause that smooths the way for a range of harmful and immoral practices, both at the debt extension and the debt collection stage. The growth of the debt-buying industry is intertwined with the solicitation of questionable loans with high interest debt in both the credit card context and the home mortgage industry.[69] Reflecting on the relationship between debt assignment and widening economic inequality does not exactly soften one up for arguments about the importance of preserving *this* status quo. The question we should ask is not one about the general impact on the economy, a question that may assign far too much weight to the economic interests of wealthy bankers and corporations, but rather one about the impact of restricting free assignment on the borrowing and repayment experience for more vulnerable debtors, who are mostly the less well off.

Suppose it were true that requiring consensual debt transfer, at the time of transfer, as a general rule would wreak substantial, irreversible economic disruption not only by altering the way big banks do business but by enacting obstacles to transactions to which we may be more sympathetic, such as the extension of meritorious loans to the less well off or the simple sale of an individually held business. The next question to ask would be whether there might be other ways to reflect the underlying concern embedded in the delegation doctrine about the obligee's response to alterations in the obligor's identity.

One approach would be to alter the rules of assignment depending upon who the original debtor/promisor is. In this article, I have highlighted the vulnerabilities of individual debtors. Their vulnerabilities may be of more uniform and urgent concern than vulnerabilities of large business entities, like corporations, and other institutions. The vulnerabilities of such

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buying-corporations-and-poor (last visited 1 April 2022) (reporting the many harms suffered by debtors and reporting that the leading debt buying firm, Encore, claims that it owns or has owned the debt of 20% of all Americans and showing that it files more lawsuits in New York than any other civil plaintiff).

[69] See Roberts, n 50 above, 678-81; see also A. Roberts, 'Financing Social Reproduction: The Gendered Relations of Debt and Mortgage Finance in Twenty-first-century America' (2012) 18 New Pol. Econ. 21 (discussing how women and racial minorities were targeted for subprime loans).

institutions, and the significance of such vulnerabilities, may vary considerably given their sizes and resources.

So, one could imagine restrictions or prohibitions on nonconsensual assignment of contract rights against non-institutional actors (or, more narrowly, restrictions on nonconsensual assignment of rights against non-institutional debtors) or against non-institutional actors, small businesses, and nonprofit institutions.[70] Such restrictions or prohibitions could be explicit or could be achieved by reinterpreting the scope of the 'material burden' exception to permitting nonconsensual assignment.[71] Restrictions short of prohibition that might be considered might include duties on the assignor to (attempt to) consult the promisor prior to assignment, to consider the promisor's feedback in good faith, and to select the assignee/delegate in good faith, i.e. with an effort to identify an assignee whose structure and structural incentives would parallel those of the assignor. Such restrictions might, however, be difficult to enforce satisfactorily. In addition, this approach may not sufficiently protect those made vulnerable by assignments of rights against corporations. For example, as discussed earlier, sales of corporations may embed within them the transfer of duties to individual employees.

Another, complementary approach short of prohibition, but perhaps more easily enforced by the promisor-debtor, would be to alter the legal rights and duties of contractual assignees of contract rights upon assignment when the assignment comes bundled with the sort of duty delegation under discussion. That is, assignees and delegates are generally treated as though they step into the shoes of the assignor (and delegator) and those shoes remain the same size. One could imagine a differential approach, however, that held assignees and delegates to a higher standard. (The transfer tightens the shoes' contours so now they are a little more snug.)

For instance, when the original creditor has a *moral* duty to offer to debtors in need of reasonable accommodations, modifications, and waivers when they are able, their legal duty may extend only as far as what good

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[70] Article 9 of the UCC imagines treating individual debtors differently. See UCC 9-406(h) (overriding legal restrictions on assignments otherwise covered by Article 9 but allowing for potential legal restrictions on assignments of individually incurred debt for personal, family, or household expenses).

[71] See e.g., *Restatement (Second) of Contracts*, n 4 above, § 317(2)(a) (barring assignment when it would materially change the obligor's duty, materially increase the burden or risk imposed by the contract, materially impair the chances of obtaining return performance, or materially reduce the contract's value).

faith requires. In deference to the debtor's interest in the identity of the creditor and the heightened vulnerability that a change in identity may evoke, the law could attempt to mitigate the vulnerability where the change is non-consensual by constraining the discretion of the assignee/delegate. The nonconsensual assignee might, for instance, be subject to legal duties to make *reasonable* accommodations, modifications, and waivers and to document efforts at contact and supportive debt management before resorting to foreclosure, repossession, or other measures that impose large burdens on debtors. In the case of employee promisors, employees should have some say in the terms of any sale of the businesses that employ them. Absent such voice, any employment clauses that work as restrictions on mobility (e.g., non-disclosure clauses and non-compete clauses) should be relaxed or nullified given the change. This approach might be the default or might be applied more sparingly in special exigent cases such as the promisee's death, the promisee's incapacity to operate as a functional holder of rights and duties,[72]a promisor's unresponsiveness or unavailability, and some analogous cases of emergency sales and liquidations of businesses.

Altering the presumption that contractual assignees have the same rights and powers as the assignors whose roles they assume might make assignment less profitable. It would also modestly increase the information requirements for legal compliance, vindication, and oversight. These are potential detractions, to be sure, but they may also be worthwhile costs. Adjusting rights and duties as they transfer responds directly to the legitimate concern of the debtor or employee that she agreed to be subject to the discretion of a particular creditor or employer but not to be vulnerable to his assignee. Adjusting the rights of the assignee/delegate provides an objective measure of protection to the debtor or employee with respect to that very vulnerability without offering the debtor or employee a veto of the transfer, thereby preserving the (stipulated) essential liquidity of the debt market and businesses.[73]

CONCLUSION

To conclude: I have used the example of debt assignment to illustrate a doctrinal tension, at least in some cases, between the contemporary common law's treatment of contractual assignment and its

[72] See text to n 67 above.

[73] One could imagine additional approaches that targeted the assignor. The assignor might be liable for abuses by their assignees, such as the harassment employed by some debt collection agencies. Such liability might put some pressure on assignors to choose assignees more carefully

doctrine concerning duty delegation. The tension arises between the rules and values animating the restrictions on duty delegation coupled with an overly narrow understanding of the duties associated with managing the power relations and vulnerabilities that contracts create and that contract law permits to be assigned unilaterally. The tension should lead us, legally, to question the permission to engage in unilateral rights assignments in some significant cases, at least those involving the vulnerabilities of individuals. It may also be grounds to question whether the content of assigned rights should perfectly mirror the content of the original rights put through the wringer of assignment.

Philosophically, in addition to attuning us to the relational aspects of common financial transactions, the example may offer some further lessons about the divisions between contract and property. The particularity of the directed relationship as well as the specter of vulnerability may play a role in distinguishing the rights associated with promises and executory contracts involving future performances by agents and the rights associated with transfers of real property and tangible property. The uncertainties associated with whether future performance will occur and what quality it will have generate occasions for vulnerability for both parties. Those occasions are often circumvented with transfers, in real time, of real property, tangible property, and fixed intellectual property, where inspections can largely obviate vulnerabilities and where the relevant performances are largely complete upon transfer, not requiring an ongoing relationship between agents.[74] These contrasts offer reason for caution about treating property and contract rights as interchangeable or mutually derivable, despite their essential and regular interplay.

More generally, investigating debt assignment offers a philosophical occasion to start to excavate some of the submerged complexities associated with transferring rights and duties. In particular, understanding rights-transfers and their effects may require understanding the basis of those

[74] Personal and proprietary information differ from these cited forms of property. In part, this is because its possession by a party other than its subject is inherently relational, which is to say that the identity of the possessor inherently matters. Further, the appropriate use and protection of such information requires the sound practice and discretion of its possessor to ensure that the vulnerabilities associated with the information are well-managed. In the paper's main examples, the future performances of the obligor render particularly salient the ongoing relation of duty, but cases of privacy and confidentiality bring out that a future performance is not a necessary condition of a problematic hidden delegation embedded within a rights assignment.

rights, especially whether they issue from or are otherwise entwined with and conditioned on duties, whether those duties are exclusively moral or legal in content. Where they are entwined with duties and situated within an ongoing, directed relationship where vulnerability and discretion are on the scene, we should be wary of any claim of an unencumbered right of unilateral, nonconsensual transfer and skeptical that any such transfer preserves those rights without alteration.

Moral and legal theory have attended closely to some aspects of the transfer of normative powers, but whether its discussion has been about promises, orders, commodification or the disputed alienability of particular rights, most of the attention has been on rights and powers transfers and the range of the transferor's degrees of freedom. The case of debt assignment may teach us that we neglect duties, their transfer, and the impact on other parties to our peril.