

# Chief Justice Wright and the Third Party Beneficiary Problem

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To the nineteenth century legal mind the propositions that no man was his brother's keeper, that the race was to the swift and that the devil should take the hindmost seemed not only obvious but morally right. The most striking feature of nineteenth century contract theory is the narrow scope of social duty which it implicitly assumed. In our own century we have witnessed what it does not seem too fanciful to describe as a socialization of our theory of contract. The progressive expansion of the range of non-parties allowed to sue as contract beneficiaries as well as of the situations in which they have been allowed to sue is one of the entries to be made in this ledger.<sup>1</sup>

## Introduction

The court over which Chief Justice Donald Wright presided between 1970 and 1977 was generally conceded to be one of the nation's most outstanding. Within the last half century, the California Supreme Court had reached a position of eminence that few other state courts could match, with a solid reputation for innovative and widely imitated approaches to difficult problems. The reasons for this development are varied. The state's geographic location at the westernmost reaches of the continent and its remoteness, both temporal and geographic, from the early dominance of the English common law, instilled a spirit of venturousness. Spanish influence antedated that of the English and resulted in a cultural pluralism. Remoteness from major national centers of common law development and a frontier tradition undoubtedly led to a greater tendency toward legislative dominance and innovation than would otherwise have been the case. The necessity of interpreting a large body of legislative enactments and of resolving disputes in a frontier atmosphere in turn spawned an early tendency to judicial activism that has continued into the present era. With the growth of population and commercial centers, and of a bench and bar of high caliber, the preeminent position of the state's highest court was assured.<sup>2</sup>

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1. F. KESSLER & G. GILMORE, *CONTRACTS* (2d ed. 1970).

2. *See generally* G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 292-316 (1976).

By 1970, then, the court was firmly established as one of the nation's busiest and most influential. In the preceding two decades, many influential cases had served to broaden and reorient the traditional understanding and attitudes regarding contract law, including questions of interpretation, parol evidence, and foreseeable detrimental reliance as a basis for enforcement.<sup>3</sup> These cases had received wide notice and assumed importance beyond California's borders. By contrast, the first few years of the 1970's were not conspicuous for either the number or lasting consequence of contract law opinions rendered; the most notable of the court's opinions tended to be centered in other areas.<sup>4</sup> As a result of the state's increasing population and commercial importance, however, the number of contract disputes reaching the intermediate appellate courts remained unabated. Moreover, one of the decade's most significant California Supreme Court contract opinions,<sup>5</sup> which was rendered at the end of the period under review, is already receiving nationwide attention.

Chief Justice Wright wrote for the majority of the court in three notable contract opinions during his tenure.<sup>6</sup> The question raised by the more significant of these will loom large in the future development of the law and is the subject of this analysis.<sup>7</sup> *Martinez v. Socoma Companies, Inc.*,<sup>8</sup>

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3. See, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950). For a discussion of significant opinions nominally falling within the tort area, but with strong contract overtones, see Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972). There is a detailed discussion of the preceding contract cases in Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

4. One should not overstate this point. For example, Chief Justice Wright wrote for a unanimous court in an opinion that held that plaintiffs had stated a cause of action by alleging that late charges, calculated as a fixed percentage of the unpaid principal of a secured loan, were penal and thus unenforceable. *Garret v. Coast & S. Fed. Sav. & Loan Ass'n*, 9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973). The opinion was both significant and innovative in its characterization of the charges as liquidated damages which were then subject to statutory regulation. For a review of the court's concerns mid-point during Chief Justice Wright's tenure, see Goodman & Seaton, *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309 (1974).

5. *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

6. These three cases are: *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976); *Martinez v. Socoma Cos., Inc.*, 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974); *Garret v. Coast & S. Fed. Sav. & Loan Ass'n*, 9 Cal. 3d 731, 511 P.2d 197, 108 Cal. Rptr. 845 (1973).

7. Of less significance because its result was predictable on the basis of past judicial developments was *MacFadden v. Walker*, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971). In that case the court granted relief against forfeiture to a willfully defaulting purchaser of real property. On the history of this development in California law, see J. HETLAND, CALIFORNIA SECURED REAL ESTATE TRANSACTIONS § 3.42 (1970), and J. HETLAND, SECURED REAL ESTATE

found the court on the troubled waters of a claim to recovery by persons not parties to the contract in suit. The case was further complicated by the fact that the federal government was the promisee and the alleged beneficiaries were hard-core unemployed persons residing in a Los Angeles ghetto and claiming benefits for lost wages and employment opportunities as a result of the breach of contract. In writing for a narrow 4-3 majority, which held that the nonparties could not recover as third party beneficiaries of this contract,<sup>9</sup> the Chief Justice produced a workmanlike opinion in the traditional sense. Dissatisfaction with the rationale for the decision stems from a sense of unease and frustration at the failure to allow freer rein to the judicial imagination<sup>10</sup> and to undertake a greater quest for understanding of the social and political context in which the legal controversy arose.<sup>11</sup> The reasons for this unease will become more apparent after a consideration of the legal setting of the dispute, an analysis of the opinion, and a discussion of a suggested alternative mode of analysis. The writer concludes that the court missed an opportunity to deal dispositively with this important aspect of the third party beneficiary problem and that its resolution remains for the future.

### I. The Nature of the Problem

The early common law was simple-minded in the positive sense of that term. In any system built upon precedent, perceived consistency with earlier conclusions has a tendency to become an end in itself rather than merely a means to an end.<sup>12</sup> Few areas of contract law have consistently raised more thorny theoretical and practical difficulties for lawyers, judges, and scholars

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TRANSACTIONS § 2.10 (1974). The course of this development in light of the peculiarities of California land law are discussed in Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960).

8. 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974). See generally Comment, *Third Party Beneficiaries in Government Contracts*, 63 CALIF. L. REV. 126 (1975); Note, *Third Party Beneficiaries—Persons For Whom The Government Contracts to Provide Training and Employment Are Not Third Party Beneficiaries*, 88 HARV. L. REV. 646 (1975); Note, *Martinez v. Socoma Companies: Problems In Determining Contract Beneficiaries' Rights*, 27 HASTINGS L.J. 137 (1975).

9. 11 Cal. 3d at 407, 521 P.2d at 849, 113 Cal. Rptr. at 593.

10. On the problem of creative judicial craftsmanship and the imaginative molding of precedent to meet changing circumstances, see Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

11. This common judicial failure has been commented on widely. See, e.g., J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976); Mueller, *Contract Remedies: Business Facts and Legal Fantasy*, 1967 WIS. L. REV. 833. Drawing examples from legal history, Professor Noonan avers that each of the decisions reached an unfair result because of failure to inject a humanizing element into legal rules.

12. This point, while true, is often exaggerated. See *Prologue* to L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

than the rights of nonparties to enforce contractual promises. The roots of the problem are traceable to the principle of *stare decisis*; the continuing difficulty stems from the incompatibility of third party rights with traditional notions of contract.

In our highly industrialized society, the notion that promises between consenting adults might not be enforced by the legal system seems so strange as to be ludicrous. It is obvious that economic progress and momentum in our modified free enterprise economy are bottomed upon relatively free exchange transactions between willing buyers and sellers. Such was not always the case. Several centuries passed before the idea of private, legally-enforceable bargains gained ascendancy in the common law.<sup>13</sup> Even when fully operative, contract law was framed by *relatively* narrow restrictions; not all promises were enforceable. In time, notions of offer, acceptance, and consideration in the sense of something bargained and given in exchange for a promise became so familiar as to be axiomatic. Given these basic requirements and the necessary capacity to contract, the question in most contract controversies then shifted to the meaning and application of the agreement itself. Here, it was said, the court's function was to discover and give effect to the intention of the parties; that is, the *presumed* intention, for if the actual intention were expressed or otherwise manifest there would be no need for judicial inquiry. Serviceable theories and precedents for dealing with two-party problems of this nature evolved and were refined through a long course of judicial construction and interpretation.<sup>14</sup>

If a third party is added to the contract equation, a party outside the role of either promisor or promisee, a conceptual difficulty arises that has never been satisfactorily resolved by the Anglo-American legal system. Traditionally, for example, if *A* promised *B*, in exchange for consideration from *B*, that *A* would perform some act of benefit to *C*, there was little conceptual difficulty in the judicial enforcement of *A*'s promise at the suit of *B*. Such a cause of action fit neatly within the traditional framework of contract law. In such a suit, the fact that *C* was to benefit from *A*'s promise was immaterial. The action was neither by nor for him in its outward trappings and he was thus not a part of the judicial equation. But suppose that *B* either could or would not sue to enforce *A*'s promise. If *C* himself brought the action, conceptual difficulties reached insuperable levels initially. As might be expected, the early cases held that a nonparty could not enforce a contract promise in an action at law.<sup>15</sup> Recognition of the nonparty's right to sue

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13. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Holdsworth, *Debt, Assumpsit and Consideration*, 11 MICH. L. REV. 347 (1913).

14. H. HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* (1961).

15. See, e.g., *National Bank v. Grand Lodge*, 98 U.S. 123 (1878), where the opinion by Justice Strong reveals clearly the basic difficulty presented to common law courts when third

followed the same tortuous and uneven course of development that the original promisor-promisee right to sue had taken.<sup>16</sup>

Common law judges believed, however, that there was more reason to allow *C* to sue *A* if *A*, by fulfilling his promise to *B*, would be discharging a debt from *B* to *C*. The rationale for their belief rested on the similarity of such an action to that of debt, which played a prominent role in early contract law theory.<sup>17</sup> *C*, in the situation just described, became known as a creditor beneficiary; such a beneficiary was distinguished from the nonparty who was found to be merely the object of a gratuity from the promisee, *i.e.*, a donee beneficiary.<sup>18</sup> If *C* were the promisee's creditor, several matters of concern were satisfactorily answered for the courts. The underlying question of why the promisee chose to benefit the nonparty was answered and that, in turn, helped to obviate the inherent skepticism that lay at the root of many contract requirements such as consideration and a writing.

In addition to the above distinction, an even more difficult problem arose. Surely every person who might benefit in some way by *A*'s performance of his contractual duty to *B* should not be allowed to sue. The overriding issue became how to distinguish the nonparty who had a cause of action from the one who did not. In time the distinguishing characteristic came to this: Was an intention manifested in the *A-B* contract that *C* was to benefit? If so, *C* had the power to sue for breach in his own right if *A* failed to perform, even if there was no preexisting debt relationship between *B* and *C*. If, on the other hand, the requisite intention was not found, *C* did not have a cause of action against *A*. In this latter case, *C* was considered an

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persons sued on contracts made by others: lack of privity and lack of consideration moving from the third party plaintiff. In England, the even earlier and consistent holding that third party beneficiaries could not recover came to be referred to as the rule of *Tweedle v. Atkinson*, 1 B & S 5393, 121 Eng. Rep. 762 (1861). Third party beneficiary contracts are still not generally enforceable by the beneficiary in England, although, as has been observed, various devices are utilized to circumvent this rule. See Comment, *Third Party Beneficiary Contracts in England*, 35 U. CHI. L. REV. 544 (1968). Lack of comfort with the third party beneficiary concept is reflected in early California cases that proceeded on the theory that as to any third party beneficiary, the underlying contract was merely an offer that had to be accepted by bringing an action. See *More v. Hutchinson*, 187 Cal. 623, 203 P. 97 (1921).

16. See 4 A. CORBIN, CONTRACTS § 810 (2d ed. 1960) [hereinafter cited as CORBIN]; 2 S. WILLISTON, CONTRACTS § 354 (3d ed. 1959) [hereinafter cited as WILLISTON].

17. See Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576 (1969).

18. The creditor-donee dichotomy has been the subject of severe criticism primarily for being misleading because of the overlap and difficulty of classification in many cases. Nevertheless, it is firmly woven into the fabric of American law. CORBIN, *supra* note 16, at § 774; WILLISTON, *supra* note 16, at § 356. In RESTATEMENT (SECOND) OF CONTRACTS, § 133, at 290 (Tent. Draft No. 3, 1967) (reporter's note), the terms "creditor beneficiary" and "donee beneficiary" are eliminated and the term "intended beneficiary" substituted with a definition broad enough to encompass both. Despite this suggested change, it is predictable that the earlier and familiar terminology will continue to be used by courts and lawyers.

“incidental” beneficiary and his contractual rights could be vindicated only if *B*, the promisee, chose to bring suit.<sup>19</sup>

The previous discussion assumed a third party plaintiff in a suit in which the underlying contract was executed in a private context. Two major obstacles have further combined and continue to inhibit recovery by an aggrieved nonparty plaintiff suing on a contract in which a governmental entity is the promisee. The first difficulty is rooted in the philosophical premises of democratic government. Governmental action was and continues to be viewed as beneficial by definition. Therefore, every contract made by a governmental instrumentality is aimed at improving the general public welfare. The legal system could not tolerate a situation in which every member of the public could maintain an action in every situation in which he might somehow feel aggrieved. Therefore, it is generally held that a citizen can sue as a third party beneficiary of a government contract only in extraordinary circumstances.<sup>20</sup>

The unarticulated basis of the second obstacle is that enforcement of the duty in the case at hand would result in an intolerably high commercial burden upon the promisor. Most situations in which a member of the public is seeking a remedy as a third party beneficiary involve actions for consequential rather than ordinary compensatory damages.<sup>21</sup> The judiciary has

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19. The RESTATEMENT OF CONTRACTS, § 133 (1932) provides: “Definition of Donee Beneficiary, Creditor Beneficiary, Incidental Beneficiary.

“(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3): (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary; (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds; (c) an incidental beneficiary if neither the facts state in Clause (a) nor those stated in Clause (b) exist.

“(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee’s duty.

“(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.”

20. It has been suggested, both before and after the Watergate revelations, that the essentially benevolent nature of government presupposed by our system has no basis in fact. *See, e.g.*, B. WASSERSTEIN & M. GREEN, *WITH JUSTICE FOR SOME* (1970). Later study may in fact prove that some of the populace’s residuum of good will toward its elected leaders has dissipated with time. *See generally* G. ALMOND & S. VERBA, *THE CIVIC CULTURE* (1963).

21. *See, e.g.*, WILLISTON, *supra* note 16, at §§ 373, 374; CORBIN, *supra* note 16, at §§ 805, 806.

tended to avoid granting recovery in such a situation because of their fear that the economic system might, as a result, become overloaded. Most of the opinions in this area are factually obsolete since they involve private defendant companies performing public functions such as water service. Today, these functions are most often assumed by a governmental entity or by a governmentally created and regulated public utility whose liability for service defaults is tightly circumscribed in exchange for rate regulation and monopoly status.<sup>22</sup>

Though factually inapposite to today's world, the underlying premise of the older opinions appears to exert a powerful influence on the current judicial attitude toward the use of a promise made to a governmental entity as the basis for suit. Chief Judge Cardozo's opinion in *H.R. Moch Co., Inc. v. Rensselaer Water Co.*<sup>23</sup> is illustrative. Defendant had agreed to supply water to inhabitants of the city at a stated rate. Failure to supply water at a critical time led to the destruction by fire of plaintiffs' building. In denying plaintiffs recovery as third party beneficiaries, the New York Court of Appeals emphasized the near-limitless liability a commercial enterprise would face if forced to respond to individual members of the public for damages consequent to such a breach of contract: "An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose . . ."<sup>24</sup> Therefore, the litany concluded, it could not have been the intention of the parties to assume contractual liability in such cases.<sup>25</sup> With this background in mind, an uphill battle for the plaintiffs in *Martinez v. Socoma Cos., Inc.*<sup>26</sup> was predictable.

## II. The *Martinez* Case

The seeds of dispute in *Martinez* were planted as part of the much heralded Great Society movement of the Lyndon Johnson presidency.<sup>27</sup> As was true of most decaying urban areas throughout the United States, the East

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22. Although the basic point remains true, third party beneficiary suits against such private companies continue to arise periodically. See, e.g., *Luis v. Orcutt Town Water Co.*, 204 Cal. App. 2d 433, 22 Cal. Rptr. 389 (1962). See generally J. BAUER, EFFECTIVE REGULATION OF PUBLIC UTILITIES (1976).

23. 247 N.Y. 160, 159 N.E. 896 (1928).

24. *Id.* at 165, 159 N.E. at 897-98.

25. *Id.*

26. 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1973).

27. Johnson's "Great Society Speech" was delivered at the commencement exercises of the University of Michigan, Ann Arbor, on May 22, 1964. The aspect of the resulting "War on Poverty" at issue in *Martinez* stemmed from the addition in 1966 of the Special Impact Program, Pub. L. No. 89-794, § 113, 80 Stat. 1455 (1966), to the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964) (repealed 1972).

Los Angeles barrio was characterized by extraordinarily high poverty, crime, and disease rates—the usual concomitants of chronic high unemployment. Seeking to reverse the flight of small-and medium-sized industries to suburban areas and to provide an incentive for investment in high risk areas, the Johnson administration sought an immediate positive impact by welding a partnership between government and industry that would launch a frontal attack on this steadily-worsening problem.

#### A. Judicial Proceedings

In exchange for federal dollars to cushion the risk factor, the three defendant companies<sup>28</sup> agreed to renovate an unused jail in East Los Angeles and to hire and train a minimum number of certified hard-core unemployed residents of that area.<sup>29</sup> As was unfortunately true of many of the “War on Poverty” programs, the sanguine hopes expressed at the outset for a mutually beneficial and successful endeavor did not reach fruition. It was alleged that a total of \$1,252,200 was received by the defendants but that they failed to perform their contractual promises.<sup>30</sup> The contracts had provided for 1,600 entry level jobs at minimum wage and normal advancement of participants to more skilled and higher level administrative positions.<sup>31</sup> In fact, only 276 persons were hired at all under the contracts, and of these, 229 were terminated.<sup>32</sup>

On behalf of themselves and others alleged to be beneficiaries of the contract between the defendants and the government,<sup>33</sup> the plaintiffs brought

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28. The companies were Socoma Companies, Inc., Lady Fair Kitchens, Inc., and Monarch Electronics International, Inc. Socoma was to receive \$950,000 in federal funds; Lady Fair, \$999,000; and Monarch, \$800,000. 11 Cal. 3d at 398, 521 P.2d at 843, 113 Cal. Rptr. at 587. Relying on an alter ego theory, plaintiffs also named eleven individuals (alleged to be officers of the companies) as defendants on the grounds that they undercapitalized their respective corporations. In addition, three counts of the complaint sought to impose joint venturer liability upon the three corporations. Lady Fair, a Utah Corporation, and the individual defendants associated with it did not make appearances at trial and were not represented on appeal. *Id.*

29. The contracts provided for a 22-year lease of the jail building and a minimum capital investment by each defendant of \$5,000,000. *Id.*

30. *See id.* at 399, 521 P.2d at 844, 113 Cal. Rptr. at 588.

31. Socoma had agreed to hire 650 of the certified hard-core unemployed persons, Lady Fair to hire 550, and Monarch, 400. The workers were to be employed for a minimum of one year at the rate of \$2.00 per hour for the first 90 days and a minimum of \$2.25 per hour thereafter, or at the local prevailing wage rate, whichever was higher. The contracts also contained provisions for the orderly promotion of employees to supervisory positions and for employee stock purchase plans providing for up to 30% ownership in the companies by a procedure specified in the contracts. *Id.* at 406, 410, 521 P.2d at 849, 851-52, 113 Cal. Rptr. at 593, 595-96.

32. According to the allegations, Monarch hired no workers at all. Socoma created 186 jobs of which, it was alleged, 139 were wrongfully terminated, while Lady Fair provided 90 jobs but wrongfully terminated all of them. *Id.* at 399, 521 P.2d at 844, 113 Cal. Rptr. at 588.

33. Plaintiffs claimed that they were members of a class containing “no more than 2,017” persons from the East Los Angeles area who were certified as disadvantaged and thus the only persons eligible for employment under the contracts. *Id.*



a class action for damages caused by the defendants' nonperformance. General demurrers were sustained in the lower courts without leave to amend, apparently on the ground that plaintiffs and the class they allegedly represented were without standing as third party beneficiaries of the subject contracts.<sup>34</sup> Writing for a sharply divided (4-3) California Supreme Court, Chief Justice Wright's opinion affirmed the dismissal of the complaints, holding that there was no evidence indicating that the defendant companies were to be liable to plaintiffs if the companies failed to fulfill their contractual promises.<sup>35</sup>

## B. The Supreme Court Opinion

Against this background, the nature of Chief Justice Wright's opinion in *Martinez* can be amplified. As noted, noncontract parties having enforceable contract rights are classified either as creditor beneficiaries or donee beneficiaries.<sup>36</sup> The former status could not be accorded these plaintiffs because no underlying legal duty from the government to them could be found that would be discharged by defendants' performance of their contract duties. Lacking creditor beneficiary status, plaintiffs were forced to traverse the rockier path as donees of the government contract, and a relatively simple passage to recovery was lost.<sup>37</sup>

### 1. *The Intention to Make a Gift*

Following the first Restatement of Contracts, Chief Justice Wright asserted that in order to acquire the status of donee beneficiary, the promisee must intend either to make a gift to the beneficiary or to confer upon the beneficiary a right against the promisor that is enforceable by an action at law.<sup>38</sup> In the former case, the promisor must have known of the intent to make a gift from the nature of the contract and the surrounding circumstances. While acknowledging that plaintiffs were among those whom the government intended to benefit through these contracts, the court concluded that the fact that governmental programs conferred benefits upon recipients

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34. *Id.* at 397, 521 P.2d at 843, 113 Cal. Rptr. at 587.

35. *Id.* at 402, 521 P.2d at 846, 113 Cal. Rptr. at 590. Justice Burke wrote a dissenting opinion in which Justices Mosk and Tobriner joined.

36. See text accompanying notes 17-19 *supra*.

37. The legal system's concern is with the prevention of fraud and various forms of perjured testimony. In the two-party contract situation, the existence of consideration is thought to obviate this risk since it is assumed that each person, as a tenet of human nature, seeks to benefit himself in most exchange transactions. Thus, it is the fact of consideration rather than equivalences in the values exchanged that is of concern to the system. Where benefit to a non-party is asserted as the consideration, possibilities for abuse are presented. If the non-party is a creditor of the promisee, however, an obvious benefit to the latter results from the promisor's performance and no further indication of intention need be shown.

38. 11 Cal. 3d at 400-01, 521 P.2d at 845, 113 Cal. Rptr. at 589.

who were not required to furnish consideration did not necessarily imply an intention to bestow gifts upon these citizens.<sup>39</sup> Alleviating unemployment, according to the court, was in furtherance of the constitutional mandate to provide for the general welfare and therefore transcended any notion of intent to bestow gifts upon these particular individuals.

In providing for special impact programs, Congress declared that such programs were directed to the solution of critical problems existing in particular neighborhoods having especially large concentrations of low-income persons, and that the programs were intended to be of sufficient size and scope to have an appreciable impact in such neighborhoods in arresting tendencies toward dependency, chronic unemployment, and rising community tensions. . . . *Thus the contracts here were designed not to benefit individuals as such but to utilize the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighborhood.*<sup>40</sup>

This devastating non sequitur was followed by further indications that the court majority was firmly wedded to a "sole Congressional purpose" rationale; that is, it would not entertain the possibility of a dual purpose that would inure to the benefit of plaintiffs.

[T]he means by which the contracts were intended to accomplish this community improvement were not confined to provision of the particular benefits on which plaintiffs base their claim to damages. . . . Rather the objective was to be achieved by establishing permanent industries in which local residents would be permanently employed and would have opportunities to become supervisors, managers and part owners.<sup>41</sup>

After buttressing this phase of the argument by reference to the large capital investment required of each company and the long-term lease they were to assume on the former jail facilities, the court continued:

Presumably, as the planned enterprises prospered, the quantity and quality of employment and economic opportunity that they provided would increase and would benefit not only employees but also their families, other local enterprises and the government itself through reduction of law enforcement and welfare costs.

The fact that plaintiffs were in a position to benefit more directly than certain other members of the public from performance of the contract does not alter their status as incidental beneficiaries. (See Rest., Contracts, Sec. 145, illus. 1: C, a member of the public cannot recover for injury from B's failure to perform a contract with the United States to carry mail over a certain route.)<sup>42</sup>

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39. *Id.* at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.

40. *Id.* at 405-06, 521 P.2d at 849, 113 Cal. Rptr. at 593 (emphasis added).

41. *Id.* at 406, 521 P.2d at 849, 113 Cal. Rptr. at 593.

42. *Id.* (footnote omitted). Apparently convinced that this closing illustration had special relevance to the point at hand, the court was careful to indicate by means of a footnote that this same illustration was repeated in RESTATEMENT (SECOND) OF CONTRACTS § 145, illus. 1, at 77 (Tent. Draft No. 3, 1967). 11 Cal. 3d at 406 n.9, 521 P.2d at 849 n.9, 113 Cal. Rptr. at 593 n.9.

Thus, although the court had initially entertained at least the possibility of recovery on a donee-gift rationale, it quickly foreclosed that possibility without the sustained analysis that the plaintiffs' claim and the court's own explicit uncertainty would appear to have justified, especially in view of the court's initial assertion that plaintiffs were "[u]nquestionably . . . among those whom the Government intended to benefit through the defendant's performance of the contracts . . . ." <sup>43</sup> As the dissent forcefully argued, the principal weakness of the Chief Justice's analysis at this point was its failure to discuss the possibility of a dual governmental purpose, both in enacting the enabling legislation and in concluding the contracts in suit. <sup>44</sup>

## 2. *The Intention to Confer a Right*

With the foreclosure of the donee-gift avenue, there remained one further theory by which the plaintiffs could effectively have asserted donee beneficiary rights: In making the contract with the corporate defendants, was the government's purpose to confer "a right upon the plaintiffs against the promisor to some performance neither due nor supposed or asserted to be due from the promisee [the Government] to the beneficiary [the plaintiff]" <sup>45</sup> Obviously, the most direct method of assuring that nonparty plaintiffs could sue defaulting promisors for breach would have been a provision to that effect in the contract. The Government's bargaining power in the circumstances would certainly have enabled it to insist upon such a provision. Since there was no specific contract term in this regard, however, evidence of such an intention or lack of the same had to be gathered from the "terms of the promise in view of the accompanying circumstances." <sup>46</sup>

In Chief Justice Wright's view all evidence pointed to the conclusion that there was no intention that the plaintiffs should have a cause of action against the defaulting contractors. The provision that disputes of fact arising under the contract were to be resolved through administrative channels <sup>47</sup>

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43. 11 Cal. 3d at 401, 521 P.2d at 845, 113 Cal. Rptr. at 589.

44. As Justice Burke noted in dissent: "The majority contend that the congressional purpose in enacting the Economic Opportunity Act of 1964 (including the subsequent amendments thereto creating the Special Impact Program), and the government's purpose in executing the instant contracts with defendants pursuant to the Act, was to benefit only the general public and particularly the local neighborhoods where these programs were to be implemented. . . . The majority err in the above conclusion because the congressional purpose was to benefit both the communities in which the impact programs are established and the individual impoverished persons in such communities. . . . In accord with this expressed intent, the substantive provisions of the contracts confer a direct benefit upon the class seeking to enforce them." 11 Cal. 3d at 408-09, 521 P.2d at 850-51, 113 Cal. Rptr. at 594-95 (Burke, J., dissenting).

45. RESTATEMENT OF CONTRACTS § 133(1)(a).

46. *Id.* at § 133(3).

47. Administrative review involved determination by a government contracting officer in the first instance, with appeal to the Secretary of Labor and final resort to the courts in certain limited situations. 11 Cal. 3d at 402, 521 P.2d at 840, 113 Cal. Rptr. at 590.

was said to argue against the position asserted by the plaintiffs. The court also felt that if actions such as the present, in which the government was not even a party, were allowed to proceed to judgment, the "efficiency" and "uniformity of interpretation" made possible by administrative procedures would be undermined.<sup>48</sup> But the question of why efficiency and uniformity of interpretation should take precedence over other values was not addressed. Similarly, the court did not explore the possibility of allowing these plaintiffs access to the courts after the exhaustion of their administrative remedies with the degree of concern that would appear to have been warranted.<sup>49</sup>

In addition, the court found in each of the contracts at issue liquidated damages provisions that obligated the defendant contractors to refund to the government, in the event of default, all money received, without interest, plus a stated dollar amount for each employment opportunity they failed to provide.<sup>50</sup> By this mechanism, the court argued, the defendants had bargained to limit their liability for breach of contract. It was likely that the government had used the possibility of limited liability to induce the defendants to make their contractual commitments in the first place; to subject them now to liability to these nonparty plaintiffs in addition to requiring them to pay the amounts specified in the contracts would effectively nullify contractual advantages bargained for and obtained in good faith.<sup>51</sup> While this argument contains more inherent logic than the preceding one, the very existence of the administrative remedy as the primary mechanism for dispute resolution strips the stipulated-damages-as-the-sole-remedy-for-breach argument of its vital force. Nowhere was it provided nor did the court ever intimate that in resolving contract disputes the government contract officer, the Secretary of Labor, or the courts were to be limited by the amounts stated.

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48. *Id.*

49. That this method of administrative dispute resolution has become an increasingly common phenomenon and thus should probably be given a neutral connotation at best was apparently not viewed worthy of consideration by the court. The pervasiveness of such activity is easily documented and a legislative prescription of such a procedural remedy in the type of legislation under discussion is to be anticipated. *See generally* Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513 (1964).

50. 11 Cal. 3d at 402, 521 P.2d at 846, 113 Cal. Rptr. at 590.

51. *Id.* at 403, 521 P.2d at 846, 113 Cal. Rptr. at 590. The dissent took sharp issue with the court's characterization of these provisions as liquidated damages clauses: "These so-called 'liquidated damages' clauses nowhere purport to limit damages to the specified refunds. Nothing in the contracts limits the rights of the government or, more importantly, plaintiffs' class, to seek additional relief. As I noted above, the fact that the government could also sue for breach of the contracts does not affect the rights of third party beneficiaries." *Id.* at 414, 521 P.2d at 855, 113 Cal. Rptr. at 599 (Burke, J., dissenting).

### 3. *The Significance of Restatement Section 145*

To support its finding that there was no government intent to allow plaintiffs' recovery under these contracts, the majority opinion augmented with section 145 the requirements it had erected from section 133 of the Restatement of Contracts.<sup>52</sup> Section 145, which specifically applies to third party beneficiary suits on contracts in which a governmental entity is the promisee,<sup>53</sup> reads as follows:

A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is *subject to no duty* under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failings to do so, unless, . . . *an intention is manifested in the contract*, as interpreted in the light of circumstances surrounding its formation, *that the promisor shall compensate members of the public for such injurious consequences . . .*<sup>54</sup>

The majority responded to plaintiffs' argument that section 145 was inapplicable to the facts of this case by asserting that even if plaintiffs were correct, they still could not recover as third party beneficiaries because section 145 was merely a special application of sections 133(1)(a) and 135; section 145 alone did not confer any independent standing upon a third party plaintiff. Thus, since plaintiffs did not qualify as donee beneficiaries under section 133, they could not recover under section 145.<sup>55</sup> The court then backtracked and, on the basis of evidence of the intended national scope of benefits gathered from the congressional statement of purpose in the Economic Opportunity Act of 1964,<sup>56</sup> concluded that "Section 145 of the Restatement of Contracts does preclude [the plaintiffs'] recovery because the services which the contracts required the defendants to perform *were* to be rendered

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52. *Id.* at 404, 521 P.2d at 847, 113 Cal. Rptr. at 591.

53. For a discussion of the conceptual difficulties surrounding this problem, see text accompanying notes 20-22 *supra*. See also Note, *The Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406 (1957); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 VA. L. REV. 1166 (1968).

54. 11 Cal. 3d at 401-02, 521 P.2d at 846, 113 Cal. Rptr. at 590 (emphasis added and omissions made by the court).

55. *Id.* at 404, 521 P.2d at 847, 113 Cal. Rptr. at 591. Section 133 is set out in note 19 *supra*. Section 135 reads as follows:

"Duties Created by a Gift Promise

"Except as stated in section 140,

"(a) a gift promise in a contract creates a duty of the promisor to the donee beneficiary to perform the promise; and the duty can be enforced by the donee beneficiary for his own benefit;

"(b) a gift promise also creates a duty of the promisor to the promisee to render the promised performance to the donee beneficiary."

56. Pub. L. No. 88-452, 78 Stat. 508 (1964) (repealed 1972).

to 'members of the public' within the meaning of that section.'<sup>57</sup>

The evidence is persuasive, however, that section 145 was misapplied to the facts of the *Martinez* case. In the first place, it was unreasonable to lump the plaintiffs and the class they represented into one category, that is, characterizing all such individuals as intended recipients of a service designed to benefit "some or all of the members of the public" and thus rendering plaintiffs unable to maintain an action in their own right. While plaintiffs and their class did undeniably constitute some of the public, they had a much different status in the context of the instant suit. They were in fact the specific, identified, and certified hardcore unemployed persons residing in the East Los Angeles area who were the subject of the contract between the government and the defendants.<sup>58</sup> Plaintiffs and their class were the only status occupants involved out of the public population of almost two hundred million. The degree of status differentiation between the citizenry at large and the plaintiffs was significant enough on its face to entitle their argument in this regard to much more serious consideration than it received.

The dissenting opinion's approach to this critical issue was considerably more compelling. In its view, the object of section 145 was to qualify the possibly overbroad language of section 133 by requiring that the government-defendant contract manifest a "clear intent" to compensate a member of the public in the event of a defendant-promisor breach.

Section 145 does not, however, entirely preclude the application of the "donee beneficiary" concept to every government contract. Whenever, as in the instant case, such a contract expresses an intent to benefit directly a particular person or ascertainable class of persons, section 145 is, by its terms, inapplicable and the contract may be enforced by the beneficiaries pursuant to the general provisions of section 133.<sup>59</sup>

The dissent's view that section 145 should not bar a cause of action by claimants such as those in the *Martinez* case gains further support if the

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57. 11 Cal. 3d at 404, 521 P.2d at 847, 113 Cal. Rptr. at 591 (emphasis in original). In support of the conclusion that the principle of section 145 applied to these facts to bar recovery by plaintiffs, Chief Justice Wright relied upon the reporter's comment to the same Restatement provision included in the Tentative Draft of the Second Restatement of Contracts. *Id.* at 403 n.3, 521 P.2d at 846 n.3, 113 Cal. Rptr. at 590 n.3. Yet as the dissenting opinion indicated, that comment, when read in light of the stated legislative goal, would seem more likely to lead to an opposite conclusion. *Id.* at 412-13, 521 P.2d at 853, 113 Cal. Rptr. at 597 (Burke, J., dissenting). Members of the general public are designated as incidental beneficiaries, but attention is not directed in the comment to an identified group such as these plaintiffs. Moreover, the concern is to avoid the payment of consequential damages. Nowhere in the section or its comments is there an indication that the promisor's potential liability to third parties for compensatory damages was a motivating force in erecting a barrier to recovery.

58. See note 33 *supra*.

59. 13 Cal. 3d at 412-13, 521 P.2d at 853, 113 Cal. Rptr. at 597 (Burke, J., dissenting).

purpose of that section is considered. The considerations that formed the philosophical basis of this Restatement provision sprang from suits in which consequential damages were sought.<sup>60</sup> The concern was to establish some parameters around enterprise liability and to lubricate the wheels of commerce by allowing persons engaged in entrepreneurial activity to avoid commercial responsibility for consequences unanticipated and therefore unaccounted for in the bargaining transaction that gave rise to the controversy. In the instant case, the plaintiffs' claims fell under two headings. They first sought to recover wages calculated at the minimum rate for twelve months' employment. Such damages are unquestionably compensatory in nature and should clearly have been foreseen and accounted for in precontract bargaining. The specter of prohibitively costly judgments was thus absent. Plaintiffs then sought \$1,000 each for loss of training for each of the jobs the defendants contracted to provide. This claim contained a stronger flavor of consequential damages than did the first; again, however, the element of surprise and excessive, unanticipated expense was absent, since training these specific individuals was surely a basic component of the contract. Moreover, the monetary measure of the value of such training was readily calculable.

The broad reliance placed upon sections 133 and 145 of the Restatement in both majority and dissenting opinions is reflective of the extraordinary influence those provisions have had since they were promulgated in 1932. Few opinions in this subject area have been decided since that time with other than the Restatement framework for analysis. In California, the vitality of the Restatement has tended to lessen the influence and independent development of the statutory provision addressed specifically to the third party beneficiary problem. Originally enacted in 1872, section 1559 of the California Civil Code provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."<sup>61</sup> In fact, this legislative enactment has been engulfed by the Restatement, on the guiding assumption that the code sections embody general common law principles and that those principles are enunciated in the Restatement provisions with respect to the third party beneficiary problem. Not only are the California opinions articulated in terms of the creditor-donee beneficiary distinction, but the dispositive issue in the cases is analyzed in terms of the same "intent to benefit" rationale adopted in the Restatement.<sup>62</sup> Thus, while the statutory phrase "expressly for the benefit of a third person"<sup>63</sup> provided the possibility of an expandable

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60. See text accompanying notes 21-25 *supra*.

61. CAL. CIV. CODE § 1559 (West 1954).

62. For a detailed consideration of the early California cases, see Langmaid, *Contracts for the Benefit of Third Persons in California*, 27 CALIF. L. REV. 497 (1938).

63. CAL. CIV. CODE § 1559 (West 1954).

standard capable of accommodating changes in developments, its impact in this regard has been distinctly muted. It is thus possible to conclude that "its connotative meaning having been destroyed by judicial interpretation, the term 'expressly' has now come to mean merely the negative of 'incidentally.'" <sup>64</sup> It was also entirely predictable that when the plaintiffs in the *Martinez* case relied upon section 1559, the court should give it no force independent of the Restatement guidelines. Chief Justice Wright's opinion in fact devoted only one sentence to the code provision before subsuming it into the Restatement. <sup>65</sup> The dissenting opinion also failed to pursue vigorously <sup>66</sup> the possible use of this section for creative analysis of the state's legislative purposes in enacting section 1559 and the congressional purposes in enacting the legislation under which the contracts at issue were authorized.

In sum, the combination of a variety of factors—each disputed by the strongly worded dissent—led the court to conclude that no third party beneficiary status existed. The result was neither unpredictable nor without precedent. Nevertheless, the opinion is both unsettling and unsatisfying in its failure to plumb sympathetically the social, economic, and political context in which this controversy arose, and to generate criteria for third party beneficiary status in government contract cases.

### III. An Alternative Approach

It was suggested earlier that one danger of a legal system built upon the concept of *stare decisis* is that, at times, precedent has a tendency to be its own justification. <sup>67</sup> That a contract is consensual is axiomatic. When a problem of contract construction arises, the legal system's natural response is thus a quest for the meaning, that is, the intention of the parties who used the terms. Two factors should be recognized in this search for meaning. First, in many, if not most, situations in which the parties are silent upon a given subject, they probably had no intention at all with respect to it. <sup>68</sup>

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64. Note, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights*, 27 HASTINGS L.J. 137, 149 (1975).

65. "Plaintiffs contend they are third party beneficiaries under Civil Code section 1559 which provides: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' This section excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it." 11 Cal. 3d at 400, 521 P.2d at 844-45, 113 Cal. Rptr. at 588-89.

66. The dissenting opinion's consideration of section 1559 is as brief as that of the majority. *Id.* at 408, 521 P.2d at 852, 113 Cal. Rptr. at 594 (Burke, J., dissenting).

67. See note 12 and accompanying text *supra*.

68. "'Intention of the parties' is a good formula by which to square doctrine with result. That this is true has long been an open secret." *Parev Products Co. v. Rokeach & Sons*, 124 F.2d 147, 149 (1941) (Clark, J.).



Second, a legal relation exists, in a fundamental sense, irrespective of the intention of the parties.<sup>69</sup> As a result, although courts speak forcefully and convincingly of having discovered the intention of the parties, this discovery is in fact an agreed fiction. While not ideal, this fiction has proved to be reasonably serviceable over time. At any rate, the doctrine of the "intention of the parties" is firmly established as a constellation in the legal firmament; it is highly unlikely that the notion will be supplanted.<sup>70</sup>

The basic weakness in the court's analysis in *Martinez* was that it hewed too closely and uncritically to a unitary concept of intention to benefit that in turn obscured the reality of the contract situation at hand. If intention is to be a guiding criterion, especially in the third party beneficiary context, the opinion should have reflected the difficulty of the discovery process and the wide variety of factors involved in reaching a conclusion. As Professor Corbin has stated,

the ideas that lie behind such terms as "purpose," "motive," and "intention" are obscure and elusive, as has been found in the criminal law as well as the civil. When a contract is made, the two or more contracting parties have separate purposes; each is stimulated by various motives, of some of which he may not be acutely conscious. The contract itself has no purpose, motive or intent. The parties have purposes, motives, and intentions; but they never have quite the same ones.<sup>71</sup>

The determinative choice being a judicial one, the least that can be expected is a prejudgment consideration of all the relevant data at hand. The *Martinez* court should have moved far beyond its excessively rigid conception of legislative and administrative purpose or intention into a detailed exposition of the motivating forces behind the enactments on which the contracts at issue were based. This would have included an analysis of the Johnson Administration program under which the enabling legislation was proposed, an examination of the factors at work in the Congress that enacted this

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69. "In the making of contracts parties do not often consciously advert to the legal relations that will be created by their expressions. They attempt to make no analysis of those relations, even if they are competent to do so. The existence of legal relations is not dependent upon an intent to create them. If one party makes a promise to another who gives a sufficient consideration in return, these facts will create a right and a duty even though the parties are quite unaware of the law or of what a 'consideration' is. There is no more reason for requiring an intent to create a 'right' in a third party than for requiring an intent to create one in a direct promisee. If any particular intent is required at all, the only intent that is necessary is an intent on the part of the promisee that the performance beneficial to the third party shall be rendered by the promisor." CORBIN, *supra* note 16, § 777 at 25.

70. See Note, *The Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406 (1957).

71. CORBIN, *supra* note 16, § 766 at 14-15.

legislation, and a consideration of the Department of Labor's goals and procedures.

Few national programs in this century have been better documented than those springing from the quest for the so-called Great Society. Few presidents have spoken as often and as forcefully about their desire to improve the condition of individual Americans as did President Lyndon B. Johnson.<sup>72</sup> Congressional debates, comments, explanations in the media by cabinet officers and other bureaucrats, and a general public debate regarding these federal expenditures that became increasingly clamorous and divisive are all a part of the public record. If an understanding of the effect of these factors informed the decision in *Martinez*, there is little clue to this effect in Chief Justice Wright's opinion. Instead, it severely narrowed the permissible scope of section 1559 of the California Civil Code and laid an inadequate foundation for its conclusion that section 145 of the Restatement of Contracts barred a recovery by plaintiffs under the ordinary principles of Restatement section 133. As a consequence, little guidance is provided for the future as to who is or is not an intended beneficiary of a government contract. Meaningful progress toward a resolution of this important question remains for future determination.

### Conclusion

Syllogisms are seductive, and the type of logic that they encourage is likely to lead astray both the unwary and the unadventurous by over-encouragement of a myopic view. The *Martinez* opinion fell prey to the syllogism that suggests that recipients of perceived government largesse must be mere incidental beneficiaries of a contract in the absence of express language to the contrary. If, however, the court had viewed the law as an instrument of social order that advances through a series of self-correcting hypotheses,<sup>73</sup> then the third party beneficiary problem before it would have provided a fertile field for judicial craftsmanship.

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72. "These gigantic aspirations—although clearly unattainable within one Presidency, or one generation—were not, however, intended merely as rhetorical exhortation. They expressed Johnson's intention to embark on a mammoth program of social reform. The climate that made it possible for a President to adopt such large ambitions and to succeed in enacting so many of his proposals was the product of converging historical circumstances. The shock of Kennedy's death, the civil rights movement, an emerging awareness of the extent and existence of poverty, a reduction of threatening tensions between the United States and Soviet Union, all helped Americans to focus public energies and perceptions on the problems of their own country. More important was the deepening confidence that sustained economic growth; steadily increasing affluence seemed now an enduring and irreversible reality of American life. Therefore the problem was no longer simply the creation of wealth—that would continue—but how best to apply our riches to the improvement of American life." D. KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 211 (1976).

73. See generally W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* (2d ed. 1972).

The troubled history of the third party beneficiary concept is well known. Some of the encrustations around it have gradually given ground:<sup>74</sup> for example, privity is no longer viewed as the noblest possible state of "contractual grace." Recognizing that at least a good part of the logic of law has been economics, the legal system has also found it expedient to separate the critical areas of trusts<sup>75</sup> and insurance<sup>76</sup> from general third party beneficiary principles. When faced with status citizen claimants similar to those in the *Martinez* case, a court's most reasonable course may be to draw a sharp distinction between nonparty claimants in private as opposed to government contracts and to formulate separate guidelines for each. The problems—especially the critical ones of intention and purpose—are distinct and would benefit from a separate focus allowing for more conceptual clarity. The question of the promisee's duty to the beneficiary, for example, has never received full judicial amplification in the government contract context. It may be that if such conceptual divisions were drawn, duties toward specific subgroups of the public might be such as to allow them to bring their own actions against the promisor.

Alternatives to contract recovery need to be explored in greater depth. It is likely that at least in some of the government cases, there will be sufficient administrative redress against the defaulting promisor to satisfy fully the interests of the beneficiary. Where suitable redress is not otherwise available, a writ of mandate or similar remedy might be a reasonable alternative. Finally, it may be that, while the intention to benefit individual subgroups of society is clear, allowing individual or class actions by such groups represents an intolerable social burden.<sup>77</sup> If this conclusion is reached, however, it should be stated forthrightly so that its utility and relative merit are open to public view and challenge.

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74. See, e.g., CORBIN, *supra* note 16, § 778 at 28-31; WILLISTON, *supra* note 16, § 354 at 819-20; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

75. See 1 A. SCOTT, *THE LAW OF TRUSTS* § 14.3 (3d ed. 1967).

76. See R. KEETON, *BASIC TEXT ON INSURANCE LAW* (1971).

77. As previously noted, this fear actuated the conclusions of an earlier line of cases represented by *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). See notes 21-24 and accompanying text *supra*. Although not pursued in the opinion, this argument was apparently made with some force by the defendants in the *Martinez* case:

"[T]he only method by which the Federal Government could attract substantial private corporations to participate in the Special Impact Programs was to provide them with such a ceiling of maximum liability, thus insuring protection from astronomical damage claims by intended recipients or beneficiaries of the Program. To fail to provide this protection would have been to dissuade private companies from participation in the program out of the fear that third party beneficiary suits by a class of the literally thousands of intended beneficiaries of the Program would not only inundate the participating corporation but would financially bankrupt it." Brief for Respondents at 21, *Martinez v. Socoma Companies, Inc.*, 99 Cal. Rptr. 767 (1972), quoted in Comment, *Third Party Beneficiaries in Government Contracts*, 63 CALIF. L. REV. 126, 133 n.36 (1975).

