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FROM STATUS TO CONTRACT:

THE UNHAPPY CASE OF JOHANN SEBASTIAN BACH

Jonathan Yovel*


Fasch: The people must consider themselves blessed.
Schott: On the contrary. They consider themselves rationalists.

Itamar Moses, Bach at Leipzig¹

In May of 1723, Johann Sebastian Bach was appointed Musical Director and Cantor of the Thomasschule, the city musical academy, in the prospering city of Leipzig.² Bach’s long tenure at the Thomasschule—where he reluctantly undertook to

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² A contemporary newspaper, the Hamburg Staats und Gelerte Zeitung of May 29, 1723, reports from Leipzig: “This past Saturday at noon, four wagons loaded with household goods arrived here from Cöthen; they belonged to the former Princeely Music Director there, now called to Leipzig as Cantor Figuralis. He himself arrived with his family on 2 carriages at 2 o’clock and moved into his newly renovated residence in the Thomas School.” Source: THE NEW BACH READER (Hans T. David, Arthur Mendel & Christoph Wolff eds., New York: WW Norton, 1998) at 102 (henceforth NBR; references are to item number, not page number).
teach Latin and catechism in addition to music and deal with a motley of forces typical of a booming mercantile city, a laboratory for an emerging self-conscious bourgeoisie—was not a happy one. The position, he later ruefully remarked, was “described to me in such favorable terms that finally... I made the change of position.”³ Bach took the job soberly and cheerlessly, having fallen from grace with his erstwhile patron, the young and merry prince Leopold von Anhalt-Köthen, whom he served as Kapellmeister, upon the princely marriage to a princess who “seemed to be unmusical [amusa].”⁴ He was also driven by concerns of providing an adequate education for his four sons, as well as his wish to concentrate on liturgical music, for which there was not much demand—nor the means of performance—in tiny Anhalt-Köthen. Nevertheless, he felt driven away from a place where, he wrote to a friend, “I intended to spend the rest of my life.”⁵

Bach moved from country to city, from associating with carefree, capricious and benevolent landed gentry to navigating the power structures of his new urban employers—a city council of shrewd and exigent merchants, seasoned bureaucrats and well-to-do artisans, determined to get good value in return for every Thaler they spent on city services. Having had to audition for the job and pass an exam in Lutheran theology, he got it after the city council failed to secure the services of his famous contemporary Telemann (who asked for too much money) and of the runner-up, one Graupner.⁶ Bach, a Kapellmeister to a rural aristocracy, moved on to become cantor to the Saxon urban bourgeoisie. He left the pre-modern feudal structure of a

³ Letter to Georg Erdmann, NBR 152.
⁴ Ibid. In fact – which is sometimes overlooked – Bach was not, ultimately, obliged to leave Anhalt-Köthen. Four days before he left the princely winds changed and he was offered to remain there after all. By then preparations were made, inertia was set and the Bach family moved on. The princess, who dies soon thereafter, in fact did keep musical notes among her personal belongings. She liked military things and Bach’s introspective work may simply not have been much to her taste.
⁵ Ibid.
⁶ Graupner was unable to free himself from his bond to the Landgrave of Hesse, whom he served as Kapellmeister in Darmstadt – reminiscent of Bach’s own difficulties in obtaining release from his position in Weimar, earlier in his career. Minutes of the Leipzig City Council of April 9, 1723 (NBR 94).
tiny 1700s court for a devout, materialistic, new-money city ecstatic with the sense of its own progress and modernization (Leipzig enjoyed underground sewage and streetlamps and hosted the most important commercial fair in Germany; it also boasted of the leading law school of the land).

Not less significant—although generally ignored by scholarship—was the matter of Bach’s legal status. Up to this point in his career, Bach always served as a status-determined servant within a feudal hierarchy. This status restricted, or at least challenged, mobility: earlier in his career, when attempting to leave Weimar and the service of a local duke, his seigniorial lord expressed his displeasure by having Bach incarcerated for almost a month for “stubbornly forcing the issue of his dismissal.” In Anhalt-Köthen, too, Bach served at his master’s pleasure, complying with a centuries-old aristocratic order. In Leipzig all that changed. For the first significant time in his career, Bach signed a contract of employment; no longer a servant, he became an employee.

By becoming a contractual employee, Bach has formally moved along what has become one of legal theory’s most celebrated (and contested) theses: Henry Maine’s characterization of modernity as a gradual shift “from status to contract.” In a way, Bach may seem to embody Maine’s dictum, but also the mirage of personal autonomy and empowerment that the new language of contract pretended to entail. Indeed, from legal and civic points of view, Bach has left behind one Europe and joined another. His professional life then turned much to the worse, for a decade at least. While the language and ideology of freedom of contract already informed his new legal position, edging back the set ways of feudal societies, contract as a legal institution was not yet backed by commensurable social structures nor by the moral

7 With one brief exception: earlier in his career, Bach served as organist for the imperial free city of Mühlhausen. He was 22 at the time and quit after nine months. It was in Mühlhausen that he wrote his first cantata (BWV 71), the only one published in his lifetime. The cantata’s title page is a fascinating document: glorifying the councilmen who commissioned it in boldface, it features Bach’s name, in much smaller typeset, at the very bottom (NBR 27).

8 NBR 68.

9 SIR HENRY MAINE, ANCIENT LAW. ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (London: John Murray, 1861) at 170.
implications that contract presumed to express. I return to this point below, after a brief discussion of Maine’s thesis and the emerging philosophy of contract and sociology of the rising bourgeois order that it sought to capture. This is the context in which I want to explore Bach’s travails as a case study of early modernity’s emerging category of “private” law. Reading Bach’s letters from that period, I argue that they express (whether consciously or not is another matter) the specifically contractual nature of his position. When things went bad, Bach began to “talk contract;” so did the city council. This interpretation is based on a close reading of some of his texts that manifests a legal conceptualization of his claims against the Leipzig city council, detailed below.

For modernists and postmodernists alike, Maine’s account, according to which “the movement of the progressive societies has hitherto been movement from status to contract,” has become a benchmark for discussing the jurisprudential transformations of modernity, in particular those preceding the industrial revolution. If a little crude, Maine offers more than an empirical claim: it is an interpretative and rationalizing one, according to which the main organizational principal governing Western societies has shifted, from the pre-modern, feudal modality of comprehensive status to the modern modality of contractual obligation, nested in individuals and corporations who transact and form relations of exchange voluntarily with minimal state intervention (hence “private” law). Contract stimulated the fragmentation of social roles, supported social mobility and – coupled with enhanced legal protections of private property and global mercantilism – supplied the emerging relations of production of bourgeois and capitalist societies with a sophisticated normative framework. Maine’s deterministic outlook is entirely 19th century, expressing in hindsight the rise of the ideology of individualism, subjectivity and agency of classical liberalism, contemporary urbanization processes and the rise of a public sphere that it served. For whereas feudal status is comprehensive in its reach and effects, and is significantly determined as a matter of luck – being granted or thrust on a person – contract expresses the categories of

10 Ibid.
voluntarism, choice, and action. This should not be read as a dichotomy; but as social modalities, Maine has offered a strong interpretative distinction. This, of course, does not mean that contract was not an important social principle in pre-modernity, or that status or other non-contractual forms ceased to play a significant role in social organization later on. What cannot be denied, however, is that as products of the enlightenment, contract as a legal form and classical liberalism as a political model presupposing a theory of human nature, fit each other like glove to hand. Contract was a social principle on which both deontologists and utilitarians could agree: the former basing contract on the obligation to perform on promises in the “kingdom of ends;” the latter, on the belief in exchange propelled by private preferences and the social welfare-generating promise of Adam Smith’s “invisible hand.” With liberalism, contract became the main metaphor for politics (“social contract” in Hobbes, Rousseau and later Locke, all the way down – or up – to Habermas and Rawls), as well as the pertinent expression, in the social sphere, of the autonomy of the self and the rising principle of the will, so forcefully advanced by Kant.

Yet calling some legal relation “contract” does not, by itself, imply the actual presence of any of these values. According to Maine’s status-to contract axis, Bach appears to have moved on ahead: in Leipzig, where he remained for twenty seven years and wrote the bulk of his most important music (some of which was lost), he entered the most significant contractual relation of his life. Yet he would have proved

12 Indeed, as classical contract gradually made way for other forms of regulation in capitalistic societies (as the title of Atiyah’s monumental book catches and indeed exaggerates), critical works show status to be prevalent, or re-relevant, as contract has mutated into new forms of regulating relations both in the public and private spheres in industrial and postindustrial societies.

13 However, according to Gordley, contract as a main principle of social control owes much more to scholastic theories of natural law than to the rising of utilitarian liberalism. My claim, to clarify, is not causal: liberalism may have found in contract an almost-perfect complement technology, even if the emergence of the latter was ideologically and intellectually independent. This is of course not the place to discuss these claims in detail. See JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (Oxford: Clarendon Press, 1991).
a poor example of the sense of progress, personal empowerment and the pursuit of happiness suggested by Maine’s characterization of the contractual stage of history. We know this from several documents he left behind, mostly letters, both official and personal. A few years after moving to Leipzig on his new contract, Bach wrote a moving and pathetic letter to a friend and former classmate, Georg Erdmann, beseeching him to help secure a better position elsewhere. Bach writes: “I find the post is by no means so lucrative as it had been described to me.”

14 Amidst the grievances he lists, Bach complains of an insufficient and insecure income, contingent to a large extent on fees generated from the Thomasschule choir’s services during funerals. Alas, “when a healthy wind blows they [the fees – JY] fall accordingly, as for example last year, when I lost fees that would ordinarily come in from funerals to an amount of more than 100 Thaler.”

15 It wasn’t just about money. The city authorities “have little interest in music, so that I must live amid almost continual vexation, envy, and persecution.”

16 Bach’s revenge was typical: having secured, in 1733, the symbolic title of “Royal Polish and Electoral Saxon Court Composer” to August III, he used that nice addition to his CV to sign his letters to the council and to others, either preceding or substituting for his title as Director Musici Lipsiensis (or likewise formulae).

17 Recurring quarrels with the rector of the Thomasschule (His titular boss in academic affairs) generated endless letters of

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14 Letter to Erdmann, 1730, NBR 152.

15 Those were what George Brassens, two and a half centuries later, called les funereilles d’antan: the funerals of yore, during which the wealthy burghers of Leipzig were set to rest amid as much solemnity and pomp as pious showing-off would allow.

16 Bach’s letter to Erdmann, 1730, NBR 152


18 E.g. NBR 197, 198, 216, 235, 255.
complaint and rebuttal to the city council over trivial matters of school life. Bach’s quarrel with the university authorities over the musical directorship of the university church, the Paulinerkirche, is interesting because, unlike the meticulous contractual relationship with the city council, Bach’s claims in this matter rested entirely on traditional prerogatives. After Bach’s predecessor’s death, the newly assertive university has more or less severed its ties with the Thomasschule and its cantor. In practical terms that meant that Bach lost income from commissions for the Paulinerkirche as well as direct access to the student body, from which some of his singers and instrumentalists were recruited.

There were plenty of other quarrels with the city council, over almost every aspect of his job: teaching (Bach resented his contractual duty to teach non-musical topics), the nature of his musical output (the pious council vehemently condemned any music it suspected of being “operatic,”) internal issues regarding the administration of the school and the student body (including incredibly minute issues of student hierarchy and prerogatives), absences from the city to perform elsewhere or to inspect new organs, and of course money. These were not the kind of fights a servant could have with a lord (we recall Bach’s brief incarceration when he attempted to leave Weimar against his feudal lord’s wishes). Biographically, they must have mattered a great deal to make Bach’s initial years in Leipzig exasperating.

19 See, e.g., NBR 180-186, 192-196. These quarrels were not due to a lack of formal regulation: the Ordnungen und Gesetze, or Rules and Ordinances of the Thomasschule (set by the city council) held 83 detailed sections, conveniently divided into twelve parts. Hans Joachim Schulze, ed, Die Thomasschule Leipzig zur Zeit Johann Sebastian Bachs Ordnungen u. Gesetze 1634, 1723, 1733 (Leipzig 1987); an English translation of the 1733 revision, by Thomas Braatz, is available online at http://www.bach-cantatas.com/Articles/Ordnung1733Translation.pdf.

20 See Bach’s detailed letters of complaint addressed to no less than the instance of last resort, King Augustus II (“The Strong”) who, as Elector of Saxony, was Leipzig’s political sovereign. NBR 119.

21 Bach never had enough competent singers at his disposal, and instrumentalists were a motley crew of Thomasschule alumni, amateurs and a few professionals. In August 23, 1730, he wrote a detailed report to the city council, providing a vivid look into the musical organization of the several choirs he oversaw and provided for the city’s Hauptkirchen and bemoaning the wanting level of available talent (NBR151).
Interestingly, however, in his 1730 letter to Erdmann Bach asks for his help in seeking a position “in your city.” Erdmann resided in Danzig, then an autonomous city living, since the 15th century, under the *Danziger Willkür*, “Danzig Law,” owing only symbolic allegiance to the Polish crown. So although initially unhappy in Leipzig, Bach wasn’t necessarily looking to return to a courtly position; having tasted proto-republicanism, he would remain “contractual Bach.”

Reading Bach’s irate letters of the period is especially interesting when done in conjunction with perusing the contract he signed with Leipzig’s city council. It is a singular document, and none the worse for attempting to locate in it some of the sources for Bach’s future unhappiness. Some of his complaints – about money, tedious duties, overbearing officials, and the subpar musical talent of his students – correlate with several of the fourteen enumerated clauses of the written contract itself. These are reflected in the interwoven legal, social, and political struggles that framed Bach’s normative move from *grace* – the service of a benevolent prince – to *right*, namely, to a transactional framework. But the form does not entail a shift in content. It almost seems as if, instead of allowing Bach to assume governance of his professional life and thus free him from his former status of servitude, the legal form of contract invented new ways of disadvantage and disempowerment. Some of it is apparent in the text of the written contract itself. Contracts are prospective “projectors” of obligation and their language typically enumerates the several

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22 As mentioned above, Bach continually sought – and by 1733 finally obtained – a commission as a “royal composer” to the elector of Saxony (who, in his person, was also king of Poland). That had some political and professional significance, yet did not substitute for his contractual job.

23 NBR 100. In a few places my translation varies slightly from the NBR’s, with no great consequence. E.g.: “Schülern” (Art. 8) simply means “students,” not “scholars;” “Hochweiser” in the preamble is better rendered as “noble and most wise” rather than “honorable etc.;” “Behutsamkeit” (Art. 9) is better captured here by “gentleness” rather than by “caution,” and “regierenden” (Art. 12) means “ruling” or “reigning” or even “presiding,” but not “honorable.” The original German text is included in Werner Neumann and Hans-Joachim Schulze, eds, *Bach-Dokumente*, vol 1, 177-8 (Leipzig and Kassel, 1963).
performances agreed upon by the parties. It is worthwhile therefore to devote some attention to a closer reading of a few sections of this document (the entire text holds a preamble, 14 clauses, a closing undertaking and Bach’s signature). It included such reasonable undertakings as:

- [S]et the boys a shining example of an honest, retiring manner of life, serve the School industriously, and instruct the boys conscientiously (Art. 1);
- Bring the music in both the principal Churches of this town into good estate, to the best of my ability (Art. 2);
- Provide the New Church with good students (Art. 8);

And,

- So that the Churches may not have to be put to unnecessary expense, faithfully instruct the boys not only in vocal but also instrumental music (Art. 6).

Music can be notoriously unruly both in length and character, and the city council would have none of that:

- In order to preserve the good order in the Churches, so arrange the music that it shall not last too long, and shall be of such nature as not to make an operatic impression, but rather incite the listeners to devotion (Art. 7).

For the modern reader, however, some of the most striking clauses regard Bach’s relationship with his employers and freedom of movement and trade:

- Not to go out of town without permission of the ruling Burgomaster currently in office (Art. 12);
- Show to the Noble and Most Wise Council all proper respect and obedience, and protect and further everywhere as best I may its honor and reputation; likewise, if a gentleman of the Council desires the boys for a musical occasion unhesitatingly provide him with same, but otherwise never permit them to go out of town to funerals or weddings without previous knowledge and consent of the ruling Burgomaster and Honorable Directors of the School currently in office (Art. 3);
- Render due obedience to the Inspectors and Directors of the School in each and every instruction which the same shall issue in the name of the Noble and Most Wise Council (Art. 4);
- Shall not accept or wish to accept any office in the University without the consent of the Noble and Most Wise Council (Art. 14).
As far as could be determined, this fascinating document was never analyzed from a legal-historical perspective. Biographers of Bach frequently allude to it when describing the “passage to Leipzig” (although very rarely quote or present the text itself), probing it for signs of Bach’s future unhappiness and the excessive demands made by the city council’s on its director musices. But few treat it seriously as a legally binding, communicative instrument that is supposed to imagine and invent a relationship.

One thing that contracts are supposed to do is organize relations. This means setting out the parties’ reciprocal obligations while incorporating them in relevant social and economic contexts. Tellingly, however, this document does not contain even a single word on what Bach gets from it, what his sphere of authority is and what “proper respect” is accorded him. Nor does it contain details regarding some of Bach’s core responsibilities or provisions as to its duration or termination, except that Bach acknowledges his obligations “on pain of losing my post.”

It is clear, therefore, that this text cannot be seen to hold the entire contract, or represent the entire contractual relationship between the parties. What was included in it, however, was not arbitrary, for some of these issues were precisely the focus of future trouble: limiting Bach’s freedom of movement and his ability to generate income by taking on extra commissions, performances and positions (Arts. 3, 12, 14); his authority within the Thomasschule, later to be challenged by rector and students alike (Arts. 1, 5, 6, 9, 10); even purely musical issues such as a ban on “operatic” music (Art. 7). The council, which obviously dictated the terms with little or no input from Bach, solidified in writing those hierarchical relations it was most concerned with. Bach breached the contract both occasionally and systematically, especially regarding absences from town, militating for a university position (which he reasonably considered his traditional due), sending choirs abroad for various assignments and neglecting his academic duties in the school, some of which he was allowed to outsource (especially the teaching of Latin). It seems he had good cause to complain about a similar treatment by the city council, but their defaults – failure to support his authority, to make provisions for adequately musically trained candidates for the school, to allow him, in good faith, to supplement his modest income, etc. – were not backed up by writing, not part of the text. Bach made frequent claims to the council, yet he could not rely on a textual source of obligation, as the council could when making its claims against him. He was left instead to
invoke oral understandings that were not part of the textual contract, as well as institutional traditions and customs, i.e. fall back on status. The shift to contract was far from comprehensive.

There is an important sense of the contractual here, however, that transcends the specific historical setting. Bach’s case vindicates the theoretical approach known as “relational contract theory.” According to relationalists, contracts are more comprehensive and diverse practices than can be captured by a discrete set of overt provisions, whether written or not. Relationalists see contracts as “obligation projectors,” projecting obligation into the future through a diverse communicative network and drawing normative determination from shifting contexts of application. This certainly applies when considering Bach’s open-ended employment contract, than ran over 27 years, surviving both shifts in personal life and changes in the city, its tastes, and its relations with competing emerging musical centers that became favorite Bach travel destinations. Any strict demarcation that limits the construction of the contract to the written text could not be applicable here. Such standards are a staple of contractual formalism that imagines a strict hermeneutic barrier between what the contract is seen to include and extra-contractual relational context, that may be otherwise normatively significant, but formally amounts merely to legal noise. Bach’s written contract is clearly under-determinate: like rules and other


27 An obvious example is a parol evidence rule (PER). For a relatively liberal example of a PER see Uniform Commercial Code §2-202 (US). For a general
expressions of normative content in general, the governing articulation simply does not hold enough information to be applicable on its own, divorced of context. The contract was never amended formally, but what it meant in reality did change over time, through conduct, strife, tacit agreement and agreement not to agree.

In Bach’s 1730 letter to his friend Erdmann, Bach raises two contractually significant points. This he does after seeking Erdmann’s help in finding a better position, which means he had no qualms about resigning his post for a better one, contract notwithstanding. Bach reports that “[T]he [Leipzig] post is by no means so lucrative as it had been described to me,” and “I have failed to obtain many of the fees pertaining to the office.” These are two distinct claims, and indeed Bach enumerates them almost in the form of a legal pleading. The former amounts to a claim of misrepresentation or even fraud: the city council knowingly, or at least negligently, created false expectations. The latter is a claim of breach of contract: income promised or legitimately expected never came his way. In contractual terms, the former justifies rescission of the contract, the latter – assuming this underperformance amounts to fundamental breach – terminating it. Both would constitute a legal basis for severing Bach’s contractual relations with his employers.

What is especially significant in this letter is that Bach does something entirely different than merely asking for a favor from a well-positioned friend (or so he hoped, as nothing came out of it). The language he employs is that of justification: he justifies his resolve to leave his position by enumerating the city’s failures to perform

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28 This claim is made in some detail in Jonathan Yovel, *Legal Formalism, Institutional Norms and the Morality of Basketball* 8 *VIRGINIA J. OF LAW, SPORTS AND ENTERTAINMENT* 33 (2008).

29 NBR 152.
on obligations due him. This letter, while asking for help, tellingly employs the structure of argument. Typically, such proto-legal arguments are both normative and causal, and this is the case here as well. If Bach left, he writes, that would not be due to an ambition to improve his condition in spite of a constraining contract, but as an almost unavoidable—and justified—consequence of the city’s breach.

In order to support the claim that Bach was in fact making legal or at least proto-legal claims rather than merely complaining, I want to place the structure of argumentation he employs in the context of the prevailing contemporary legal theory of contract, contract’s *ius communes* as it were, as well as in its contemporary popularization through a new generation of celebrity legal authors such as Grotius, Pupendorf and Barbeyrac. This is interesting, for Bach’s movement “from status to contract” coincided with the beginning of a period of legal transition, at least on the level of the legal discourse if not quite yet in actual practice. This was a period that saw the beginning of a disconnect between moral and legal theory, and a nascent withdrawing from the Natural Law tradition that traced its roots to Aristotle and Aquinas. This disconnect was, of course, especially sharp in England, finding its roots in Hobbes and culminating with Bentham, John Austin, and the rise of liberalism and its justificatory model of social contract.30 The tradition more relevant for Bach’s case, however, was that of the contemporary civil lawyers of Germany, France and the Low Countries, who, with all their originality, still used Roman law as an ideal jurisprudential model. We are then in times of transition and overlap between late scholasticism and early modernity. In surveying the relevant law, we keep in mind Bach’s complaint: he was misled; reality didn’t turn out as promised. What are the normative bases and implications of these claims and how are they formed qua claims?

In contrast to later, will-based theories of contract whose normative nexus was the legislating autonomy of the communicating individual (a little on that below), scholastic contract law, in the early 18th century still predominantly a product of the

30 See Atiyah, *supra* note 11. Working in Bentham’s shadow and lacking the latter’s rhetorical prowess, Austin is sometimes neglected as a radical precursor of legal positivism. See *John Austin, The Province of Jurisprudence Determined* (London: John Murray, 1832).
Natural Law tradition, did not regard promise as binding merely because it was given or given in exchange. Using the Aristotelian terminology of “causes,” contract must be justified in terms of its \textit{causa}: it justificatory rational. A Roman text oft quoted by the late scholastics warns that “When there is no causa, it is accepted that no obligation can be constituted by an agreement; therefore a naked agreement does not give rise to an action.”\textsuperscript{31} \textit{Causa}, however, transcended Roman law: it became a general moral principle for the recognition and enforcement of contractual promises. Working from the Aristotelian framework as synthesized with Roman law, such leading medieval jurists as Baldus de Ubaldis and Bartolus de Saxoferrato recognized different categories of \textit{causa}, one based on liberality and generosity, another on commutative justice.\textsuperscript{32} The first is irrelevant to our case. The second means that contract is binding only under conditions of equitable exchange. The basic principle is to avoid unjust enrichment by a party benefiting from an uneven exchange.\textsuperscript{33} Bach certainly thought his services rendered for much less than was equitable and, additionally, expected. Scholastic law followed Aquinas’ assertion that, as the normativity of a promise binds the promisor only under the circumstances in which he intended to be committed, mistake or misrepresentation at the time of formation (as distinct from \textit{ex post} breach of contract), retroactively render the act of contracting involuntary.\textsuperscript{34} Aquinas dealt in similar terms with excuse from performance where the circumstances have changed significantly: unforeseeable circumstances that were not within the scope of expectance of the promisor render the obligation nonbinding, inasmuch as the promisor cannot be held to have

\begin{itemize}
  \item \textsuperscript{32} Gordley, \textit{supra} note 13 at 52-8. There are several sources discussing the late scholastic synthesis in contract law between Aristotelianism and Roman law; for a concise, contextual discussion see James Gordley, \textit{Some Perennial Problems in the Enforceability of Promises in European Contract Law} (James Gordley ed., Cambridge: Cambridge University Press, 2001) at 1.
  \item \textsuperscript{33} From a text by Baldus, quoted in Gordley, \textit{supra} note 13 at 55.
  \item \textsuperscript{34} \textsc{St. Thomas Aquinas, Summa Theologia,} I-II, 6.a.3.
\end{itemize}
consented to perform under them. Without going into technical analysis, in Bach’s detailed letter to Erdmann both claims are indirectly invoked: Bach was not told the truth prior to signing it, and the circumstances of performance were significantly different from those anticipated at the time of the contract’s formation. In scholastic law (as in modern contract law) the former allows the defrauded party to rescind the contract, while the latter may excuse non-performance. In his letter to Erdmann, Bach invokes breach of contract in two senses: the obvious, pertaining to his disappointing de facto income, and a more subtle claim according to which harnessing him with so much administrative hassle and institutional hostility was a breach of specific, if unwritten, relational duties, pertaining to his quality of life more generally. He emphasizes the latter no less than the former – again, not as a mere grievance but as a normatively significant complaint. So if he were to renege on his contract, Bach in fact writes, he would only react to an antecedent transgression.

Now, admittedly, neither scholasticism nor common law had, at the time, what we would call a comprehensive theory of contract law: the paradigms were mostly taken from transactions of sales, land and services. The contractual organization of labor lies in the future, but the principles of equity and causa that came to govern it were similar and application by analogy of these principles became widespread.

Why should this matter? In the centuries leading to the industrial revolution, the movement “from status to contract” required, as Émile Durkheim notes, more articulated law than ever before – in particular private law – to regulate the new forms of social and economic relations. Bach’s position was interesting: not quite out of the scholasticism of the late middle ages, not quite into the forms that would shape early modernity; and in truth, living in both. He was no lawyer, but he was a businessman who conducted negotiations and entered into a multitude of contractual relations. Law was becoming part of life, for him as well as generally. In the 17th and 18th centuries “the doctrines of the late scholastics were taken over and popularized” by a new generation of influential authors such as Hugo Grotius, Samuel Pupendorf and Jean Barbeyrac, among other, more local ones. Tenets of

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35 Ibid at II-II, 88.a.10 and 89.a.9.
36 Gordley, supra note 13 at 65.
37 Ibid at 132.
law were increasingly making their way into general culture. As Gordley puts it in his masterful treaties on the intellectual history of contract law, by the late 17th century “Knowledge of legal principles came to be recognized as indispensable for a liberal education. Law books and legal ideas were disseminated among multitudes of non-lawyers.” It so happened that Bach’s rival to the mastership of the Paulskirche (the university church) was a graduate of the local law faculty, the leading one in Germany then.

I am not arguing that Bach has necessarily read a treaties on contract law. But the thinking of the time incorporated law into normative discourse, which explains the structure and terms of Bach’s thinking about his relations with the Leipzig city council, as expressed in the text discussed above. Bach didn’t just sign a contract – he began thinking like someone who did.

I want to briefly return to a few points of consideration regarding the text of Bach’s contract itself – not its commissive aspect, but its style and poetics. For if we examine it afresh, it is fair to ask – what is this document? A contract, vertrag? A letter of commission? A letter of submission? Such documents differ not only in cultural and legal classification but also as speech acts and in their poetics and semiotics. A letter of commission resounds in the voice of the committing master – individual, organ, corporation or other source of authority; it grants, commands, accepts – and commits. A letter of submission is written from the position and in the voice of the submitter. Committing and submitting: these are similar Hohfeldian acts but inverse speech acts: although both are performed from some position of commissive authority, exercising power over subjected agency (even if it is the servant’s power to submit), they work from separate sets of what J.L. Austin called “felicity conditions,” the constitutive conditions of successful (or at least attempted)

38 Ibid. See also James Gordley, Contract in Pre-Commercial Societies and in Western History, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Tübingen: JCB Mohr) vol. VII, ch. 2, at 7 (1997).

39 Here I apply the well-known analysis of in personam normative relations churned by WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JURIDICAL REASONING (New Haven: Yale University Press, 1964 [1919]).
performance.\footnote{J.L Austin, \textit{How To Do Things With Words} (Oxford: Clarendon Press, 1962; Cambridge, Mass.: Harvard University Press, 1962).} Contracts, with their emphasis on mutual agreement—real or fictional or both—are contingent upon their own felicity conditions (about half of the first term in law school is devoted to those), backed by traditional or novel forms, linguistic conventions and communicative challenges. Normally, contractual language is expected to express the relations assumed and constituted by and between the parties. To understand Bach’s case we must accept that the form of contract is poetically diverse—commissive, submissive, egalitarian and indeterminate all bundled up—just as from a justificatory point of view contract holds no internal promise of egalitarian or equitable relations.\footnote{Citing literature for this critical position can run miles; an obvious starting point and stand-alone is Duncan Kennedy, \textit{Form and Substance in Private Law Adjudication}, 89 Harvard L. Rev. 1685 (1976).}

By itself, Bach’s contract did little to mitigate the extreme disparity in power relations between cantor and a city council a little tired of shopping around. While Bach’s legal status was certainly different from his feudal commission in Anhalt-Köthen, the contractual legal status was not backed by adequate power structures to articulate this new civic and individual technology of control, as presumed by champions of this legal form that was constantly gaining ground in response to both material changes and the nascent philosophy of the enlightenment. In other words: without power to back it up, early forms of contract served to perpetuate subservience while cloaking it in one of the most typically bourgeois/mercantile legal forms (second to, and logically entailed by, that of property). Perhaps this contract’s one-sidedness, and the choice what to include and what to exclude from the written document, should be read as expressing the city council’s nervousness about this relatively loose, new form of control that they increasingly employed in other areas of practice (as well as its mistrust of Bach). Although this was obviously a reciprocal undertaking, Bach’s signature alone (annexed to a seal) appears on the last page.

I want to reformulate this point. Contract—as a social instrument suggesting emancipation from the binding comprehensiveness of status—has failed Bach during his first decade in Leipzig. Why? Was it because contemporary contract was an
inadequate legal instrument to regulate the relations of exchange between cantor and council? Or was his, simply (and thus not very interestingly in any general sense) a bad contract, miserably negotiated from an inferior bargaining position? The most plausible answer is that Bach’s case was in a sense premature, using the form and language of contract in a social context that lacked structures of suitable empowerment, perpetuating class domination and entrenched economic distinctions. What makes the case interestingly modern is that Bach was not taken advantage of by remnants of a fading feudal order, but by certain replications and transformations that were giving way to a capitalist order. The city council, after all, was composed of those who stood to gain the most of the great revolutions of the 18th century. These were the masters of the new, briefly pre-industrial world, not *les aristo*. When the justice of guillotine comes, not their heads would be rolling; they would supply it with materials and spare parts (as well as with the assortment of liberal freedoms) and pocket the public expense.

Bach encountered the shortcomings of contract’s promise when it appeared as a formal principle only. Contract cannot stand alone. It is too vulnerable. In order to function and promote the social benefits that it pretends too, it must operate on a fertile ground of relations that back it up. In other words: contract truly emerges only when it rides on genuine reciprocity, on a shared social understanding of what it means as a social device – when the formalization of exchange is not merely a facade. This is true today, in a globalized world, just as it was in Bach’s days. In modern contract law, this requirement is to an extent—a minimal extent—expressed by “inalienable” relations, such as the immutable contractual principle of dealing in good faith that mitigates some effects of extralegal power relations. In Bach’s case, contract replicated—indeed, possibly reinforced—the extralegal power relations


between the uneven parties: the powerful provider of jobs and the almost desperate seeker of a life-basis for his family and creative life.

If I invoked “inalienable” above, it is because sophisticated contractual regimes impose obligations on parties that restrict the practical significance of bargaining power discrepancies. This means that as a matter of social principle—stronger than mere instrumental policy—society requires people to deal within some boundaries of regulated behavior: it is not so much that assent needs regulation, as competition does (and every negotiation is also a competition). Modern contract law accepts as a truism that if parties are to contract through the state’s license, backed by its sword, they are to accept the kind of minimum level of moral treatment of others that the state sanctions in “private” interactions. By contrast, “contractual Bach” appeared in a society that spoke contract but where contractual agency did not entail much more than the authority to acquiesce to the dictates of the party in the stronger bargaining position.

On the flip side, Bach’s contractual freedom also helped shape his later activities, both musically and biographically. For a salient difference between status and contract is in terms of their comprehensiveness and the fragmentation of social roles and career. Being an employee of the city, Bach was free to engage in other activities and form various contractual relations over the years, as long as they did not run afoul of his chief employment relation. A servant needs his master’s accord; a contractual party is free beyond the limits of the contract. It so happened that Bach was of an entrepreneurial spirit, constantly expanding his extracurricular musical engagements as well as business concerns. He frequently travelled to give keyboard performances – harpsichord and organ – in bigger cities; he gave private lessons to sons of wealthy aristocrats (but had specially reduced fees for talented students of meager means); he examined and was consulted on the building of organs all over Germany; he lent instruments for a small fee and owned a small shop for sheet music and musical books. Bach loved musical instruments and engaged in designing some and amending others, most notably the Silbermann fortepiano, for which at

one point he became a de facto commercial agent. From this point of view contract accommodated him, and Leipzig’s mercantile spirit actually suited him; it took him close to a decade to realize that. He was becoming more and more contractual. Status still served him – he constantly sought a royal commission on the side, but once he got it, it seemed a little anachronistic, a little pompous (not that the city council could be outdone in this respect).

Musically, Bach became less dependent on the Thomasschule since taking over the directorship of the Collegium Musicum, a vital invention of city life: a voluntary, independent organization of students, amateurs and professional musicians that performed weekly concerts in another newly established urban institution, the coffee house. His music moved from church to high street or park (in fair weather the Collegium played alfresco). Directing the Collegium must have been fun, certainly when compared with the performance conditions of the churches, where Sunday performances took place at seven thirty in the morning in “an un-warmed church... singers and players recently dragged from bed and inadequately fed.”45 Bach’s work on religious music diminished, coming almost to a halt by 1740; his new instrumental music and cantatas, such as the humoristic “Coffee Cantatas,” were secular works. Following some of his own theoretically gifted students, Bach developed an interest in theory that led, inter alia, to composing “musicians’ music” such as Goldberg Variations or the unfinished Art of the Fugue.

It is unprofitable to debate whether his association with the Collegium Musicum generated these musicological shifts or the other way around; what is clear is that Bach’s nexus of operation always corresponded intimately with the nature of his compositional work – both when he concentrated on religious music and later, when he didn’t.

As much as Bach was, assuredly, self-driven, one cannot disregard the opportunities that his contractual position accorded him to freelance, in and out of

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45 CHARLES S. TERRY, BACH: THE HISTORICAL APPROACH 83 (Oxford University Press, 1930). Reviewing reports from contemporary visitors, Terry concludes that “we can be sure he never heard his cantatas rendered with even approximate excellence.” Ibid at 93.
the city, marching his choirs to the country for some overtime any chance he got.\textsuperscript{46} Later, set in his ways, he took time off to travel, perform elsewhere and inspect organs – activities that were essential to him but in fact violated a clause in his contract that required him to secure the Burgomeister’s permission to travel (Art. 12). Bach didn’t bother. He was always disdainful of the contractual limitations on his freedom of movement and occupation. Even when his health was failing he enjoyed professional journeys to aristocratic courts as well as to musically ambitious urban centers such as Dresden and Berlin.\textsuperscript{47} None of this would have been possible (at least not in the form of relatively unencumbered freedom of action) had he remained a feudal retainer. The city council’s enmity pestered him and effected his happiness and his income but, as long as it didn’t fire him (a contingency that is noted in his contract), the council could do little, beyond humiliating reprimands, to restrict his movement or professional engagements. No Jail for Bach this time around.

An obvious question would be whether Bach’s hesitant legal move into fledgling modernity had any effect on his music, and of what kind. As tempting as the question appears, it is almost impossible to answer; even speculations are precarious. So much happened to Bach during those years, his sojourn in Leipzig was so long, formed and informed by a diversity of factors, forces and encounters, that absent direct evidence from him (and even with it), isolating one or a group of causal factors as musically significant would be wildly speculative. What is certain, is that the city created opportunities and encounters; and the city meant contract.

This essay, of course, is not about Bach musicology: it is about the partially overlapping stories of Bach and of contract. The overlap concerns the legal relations between the creative, entrepreneurial artist and the community he joined and resented; the tensions, ironies and contradictions—but also usefulness—of contract as a way to tell and reinterpret movement along the proverbial “status to contract” narrative of modernity; what Bach found there, and how this may serve as both a

\textsuperscript{46} A typical reprimand by the city council for such actions appears in excerpts from minutes of a council meeting, NBR 150.

\textsuperscript{47} However, Bach never journeyed out of Germany and, it seems, has never been further than 200 miles away from his birthplace in Eisenbach, Thuringia.
specific story of artistic genius in the shadow of law and a case study for the contractual organization of relations in a transformative period of early modernity.

Appendix: Bach’s Contract with the Council of the City of Leipzig, May 5, 1723.
Source: The Bach Archive, Leipzig
(English Translation follows)
Demnach E. L. waist dieser Stadt leipzig mit seiner Cantone zu St. Thomas und seinem Sitz in hochstehendem Stande von mir gewolligstem zugrunde zu gelassen.

1) daß ich meine Nebenräume in meinem unbemertinen

zugangenen Leben und Maßstab mit gutem Genuss

vollständigen meines Lebens beständig als meinem, welcher

die Nebenräume unentgeltlich informiere,

2) die Mätresse in engstem Gestüt einen die Stadt nach meinen besonderen Wünschen in guter Ordnung aufziehen,

3) Ich vermag, daß allein jeglichem respect

mit Genügsamem unmangeln und die den Freiheit

unendlichen aller Christen borgmäßigen beschaffen und

bestreben, und die mir großer der Rat zu die Nebenräume

meiner Macht zugrund, ihrem unentgeltlichen ob Неonig mit

gute Folgen leiden an ihren eigenen als Durcheinander

auf das Wohl und Zünftigen wie ohne Gewinn.
BACH & CONTRACT

4) Ähnlich als die übrigen, hier einige Beispiele:

5) Ein solcher diesbezüglicher Ausweg wäre in der Musik

6) Voraussetzung ist, dass die Funktionen

7) Die Umgebung der Aufführung in einem Hauptsachen

8) Voraussetzung ist, dass die Funktionen

9) Voraussetzung ist, dass die Funktionen
BACH & CONTRACT

8) Niemandem unbilliges Gewicht zufügen mit gutem Gedenken vorzuführen
9) Die Intelligenz über die natürlichen Gesetze zu folgen, mit den Modus der Zeit zu handeln,
10) Über die Informationen in der Nähe und auch in solchen
    Zeiten gebührend, treu und zufällig befolgen,
11) Und da es folgent, selbstverständlich nicht vorzüglich,
    daß der König nie wieder ihn nächstes Subjektum, ohne zu
    gelten, behaupt oder die öffentliche Anstand gesellt, worin
    halten,
12) Über den vorangegangenen großen Handlungsverfahren
    zu handeln und nicht in der Stadt zugrunde,
13) Zu leicht ungünstige Bedingungen, wie gebannt sind,
    und möglichst den nur noch neuen Einfall von zugeharren,
14) Und der Universität kein Offizium zu für
    gelten. Rührt der Condensammonium pelle und wolle;
Das vorerstige mit angezogen ist und seihat
und in Kraft geht, daß ich Ihnen allein, wie ob
erfolgt, wenig nach kommen und, die herauswird
künftig, darin bloß nicht zuviel mache.

Für Umschreibung und Revers eigenständig
unterschrieben und mit minirem Bust aufgestempft

1725.

Johann Sebastian Bach.
Translation (Source: NBR 100)\textsuperscript{48}

Whereas the Honorable and Most Wise Council of this town Leipzig have engaged me as Cantor of the Thomasschule and have desired an undertaking from me in respect to the following points, to wit:

(1) That I shall set the boys a shining example of an honest, retiring manner of life, serve the School industriously, and instruct the boys conscientiously;

(2) Bring the music in both the principal Churches of this town into good estate, to the best of my ability;

(3) Show to the Honorable and Most Wise Council all proper respect and obedience, and protect and further everywhere as best I may its honor and reputation; likewise, if a gentleman of the Council desires the boys for a musical occasion unhesitatingly provide him with same, but otherwise never permit them to go out of town to funerals or weddings without previous knowledge and consent of the Burgomaster and Honorable Directors of the School currently in office;

(4) Give due obedience to the Honorable Inspectors and Directors of the School in each and every instruction which the same shall issue in the name of the Honorable and Most Wise Council;

(5) Not to take any boys into the School who have not already laid a foundation in music, or are not at least suited to being instructed therein, nor do the same without the previous knowledge and consent of the Honorable Inspectors and Directors;

(6) So that the Churches may not have to be put to unnecessary expense, faithfully instruct the boys not only in vocal but also instrumental music;

(7) In order to preserve the good order in the Churches, so arrange the music that it shall not last too long, and shall be of such nature as not to make an operatic impression, but rather incite the listeners to devotion;

(8) Provide the New Church with good scholars;

(9) Treat the boys in a friendly manner and with caution, but, in case they do not wish to obey, chastise them with moderation, or report them to the proper place;

(10) Faithfully attend to the instruction in the School and whatever else it befits me to do;

(11) And if I cannot undertake this myself, arrange that it be done by some other capable person without expense to the Honorable and Most Wise Council of the School;

\textsuperscript{48} The text that follows brings the NBR translation verbatim; however, see \textit{surpa}, note 23.
(12) Not to go out of town without permission of the Honorable Burgomaster currently in office;
(13) Always so far as possible, walk with the boys at funerals, as is customary;
(14) And shall not accept or wish to accept any office in the University without the consent of the Honorable and Learned Council;

Now therefore I do hereby undertake and bind myself faithfully to observe all of the said requirements, and on pain of losing my post not to act contrary to them, in witness whereof I have set my hand and seal to this agreement.

Executed in Leipzig, May 5, 1723.
[Signed: Johann Sebastian Bach]