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SYMPOSIUM: PHILOSOPHY OF LAW

AGREEMENT, MISTAKE, AND OBJECTIVITY IN THE BARGAIN THEORY OF CONTRACT

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The law of contract, or at least that aspect of it which flourishes properly under the name bargain theory, lends itself quite smoothly to a standard form of philosophical examination. Although conceptual analysis may be as unpopular with lawyers as it is popular with philosophers, what this Article attempts seems little more than a refinement of the sorts of analytical distinctions that a lawyer must make at critical junctures. He may wish that such work could be avoided, but if it is, it is avoided on pain of proceeding arbitrarily. I believe that the law of contracts itself probably is too complex and variable to be wholly captured in a univocal theory; with that in mind, I propose this analysis of the classic bargain theory.

I. AGREEMENT

From the standpoint of an Hohfeldian theory of contractual obligation, one characterizes the act of making an offer as creating a liability for the offeror and giving a power (to obligate) to the offeree.¹ Helpful as this may be, it does not explain sufficiently the role of agreement in contract law. When parties have reciprocal

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1. See generally Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). This approach can be found in several essays collected in READINGS IN JURISPRUDENCE ch. 11(b) (J. Hall ed. 1938).

obligations under a bilateral contract (both parties have made a promise), it is said that they have an agreement.² After the fashion of Hohfeld, the term "agreement" must have its "chameleon-hue" bleached out and its true colors made fast.

P.S. Atiyah begins his book on the law of contract by stating: "Every system of law has found it necessary to devise . . . machinery for the enforcement of contractual rights, that is to say, of rights which depend ultimately on the agreement of the parties concerned."³ Shortly thereafter in characterizing the objective theory, he says: "It is one of the most fundamental features of the law of contract that the test of agreement is objective and not subjective. In other words, it matters not whether the parties have really agreed in their innermost minds . . . but whether their conduct and language are such as would lead reasonable people to assume that they have agreed."⁴ There is a *distinction* to be made between being in agreement and having an agreement. This distinction will be explicated in Sections II and III. Atiyah's words are not atypically ambiguous; so even when an author is moderately clear that an objective *theory* concerns the existence of an *agreement*, the argument is coupled invariably with an assault upon *consensus ad idem*, said to be a "mystical" requirement that the parties be *in agreement*.⁵ The general purpose of this Article is to support a thesis that the classic bargain theory of contract is ill-coupled with a view of an *agreement* that does not require the parties to be *in agreement* at all. Certain clues to this idea are found in the difficult law of mistake. The outcome of this Article should be a better understanding of objectivism in contract law.

II. BEING IN AGREEMENT

C.L. Stevenson's distinction between disagreement in belief and disagreement in attitude serves as a starting point for a discussion of the semantics of being in agreement. Stevenson writes:

Let us begin by noting that "disagreement" has two broad senses: In the first sense it refers to what I shall call "disagreement in belief." This occurs when Mr. A believes *p*,

2. I shall not discuss unilateral contracts as *agreements*, for it seems that every agreement must at some point have been executory on both sides. That is not possible within a unilateral contract.

3. P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 1 (1971).

4. *Id.* at 4.

5. See G. CHESHIRE, C. FIFOOT & M. FURMSTON, THE LAW OF CONTRACT 20 (8th ed. 1972).

when Mr. B believes *not-p*, or something incompatible with *p*, and when neither is content to let the belief of the other remain unchallenged. . . .

In the second sense the word refers to what I shall call "disagreement in attitude." This occurs when Mr. A has a favorable attitude to something, when Mr. B has an unfavorable or less favorable attitude to it, and when neither is content to let the other's attitude remain unchanged.⁶

Stevenson builds into these senses more than simple non-coincidence of the same beliefs and attitudes. It is a stronger conception than what a social scientist might call a lack of consensus. Parties in disagreement are not content to let it remain so; parties in disagreement will seek to *reach* agreement.

When parties are not agreed, either they disagree or they simply lack being in agreement. The latter is a weaker concept that contains the former. Furthermore, people who are in agreement either have *reached it* with respect to one another or they simply *are* agreed, by accident or whatever. If they have reached it, then they probably began from an initial position of disagreement. Parties who resolve disagreement need not have reached *an agreement*, though resolving it could have been a part of a process of bargaining. Hence, reaching agreement, *i.e.*, resolving disagreement by making beliefs or attitudes coincide, is a process that can be compared with another process, the outcome of which is *an agreement*. What involvement there may be of these two together is important.

The argumentation in the process of *reaching agreement* could be reconstructed along the lines of one of Stevenson's examples of disagreement in attitude:⁷ Proposal from Mrs. Smith (favoring the cultivation of the four hundred only); counter-proposal from Mr. Smith (favoring the cultivation of only old poker-playing friends). Or the process could be reconstructed along the lines of an example of a disagreement in belief: Proposal from Mr. A (believing that most voters will favor a proposed tax); counter-proposal from Mr. B (believing that most voters will not favor it). Although this is not Stevenson's manner of presenting his ideas, he should be willing to agree that the propositions in parentheses are respectively attitudinal and doxastic. If Mrs. Smith accepts Mr. Smith's counter-proposal, their disagreement is resolved; they are in attitudinal

6. C. STEVENSON, *FACTS AND VALUES, STUDIES IN ETHICAL ANALYSIS* 1 (1963).

7. *Id.* at 2.

agreement. Mr. and Mrs. Smith "feel" the same. This would have been achieved, if necessary, by means of the Stevensonian devices of "emotive meaning" and the "dynamic use of words"—at least, if one is to accept the rest of his theory.⁸ Procuring agreement in belief, on the other hand, calls for a "descriptive use of words." The important points are that parties who lack agreement, that is, who are not in agreement, *can* reach it, that this process may be described within a simple format of proposal and acceptance, and that there is not yet *an agreement* existing. In this process one's belief, proposition, or attitude is proposed for adoption.

Minds meet, hands do not. This satisfactory state between them is not an agreement. Neither person is bound by the stability and nothing is breached in a change of mind or heart. The common purpose of reaching agreement is for the thought and action between the parties to run in a more coordinated fashion. This purpose can be accomplished without an agreement being reached.

The "propositions" involved here are predicative expressions: *A* is someone believing *X*, and *B*, who agrees, is someone believing *X*; and *A* and *B* are persons favoring *X*. One can say then that certain belief states or attitudes are true of certain persons together, or, just as well, that the expression "believing that the earth is round" is true of a great number of people. It is widely agreed that the earth is round. No finer analysis is needed than this, though some persons have a more sophisticated understanding of the earth's shape; they agree in their beliefs at one level but do not agree at a more detailed level. There is no proper general level of description for agreement itself as long as the expressions can carry a truth-value. The question, then, that bears upon "objectivity" is to what extent must parties be in agreement in order for them to have an agreement. This will not be generally answerable without some understanding of the requirement of what I shall call the "depth" of like-mindedness (how far in agreement) of the two parties. For example, if *A* believes he is selling pigs and *B* believes he is buying cats, the depth of agreement is very shallow; one truthfully can say that they are agreed that they are contracting for animals. To what extent such disagreements will affect the claim that there is an agreement is as important as it is difficult.

I will now characterize more fully the logic or semantics of the

8. See C. STEVENSON, *ETHICS AND LANGUAGE* 41-46 (1944). This Article will not attempt to defend Stevenson's theory.

process of *reaching* a state of doxastic or attitudinal agreement. The point here is to find the similarity of this process to the process of *bargaining*, in which after a play of offer and counter-offer an agreement is struck. Consider these features of *reaching a state of being in agreement*. Every proposal has a source. This source will be a party, either a single person or a group of the same mind. That which is performed by the proposing party is *making an offer*, for example, by uttering the words appropriate to offering his opinion. Though such proposals can be made to the world at large, every recipient of the offer will be a person.

There must be at least two persons for agreement to exist. An offeree has the capability of accepting an offer, that is, of coming to believe or favor the substance of the offer. One may be an offeree without accepting an offer that is made just as one may be a proposer though no one accepts the proposal that is made. For agreement to be *reached* between parties, the acceptance must come from the person or group to whom the offer was directed.⁹ If *A* directs his offer only to *B* and the offer is accepted by *C*, it would not be correct to say that *A* and *C* *reached* agreement. The parties in the roles of proposer and offeree may change roles; counter-proposals reverse sides in the debate.

Because making a proposal and accepting one are performances (acts), they can be datable occurrences in the lives of persons. One may abstract from these performances to talk of *the proposal itself*, just as one may abstract from the performance of commanding (as an act) the thing (requirement) commanded.¹⁰ The proposal itself, called here *the proposition*,¹¹ can be thought of as that upon which the parties reach agreement and, more broadly, that which is true of people as a belief or attitude.

The substance of a proposition will be a belief or an attitude, and nothing else. One proposition could be a mix of beliefs and attitudes. But it is possible for *A*'s beliefs and attitudes at time 2 (t_2) to be in agreement with the beliefs and attitudes of *B* as they were at time 1 (t_1), though *B* no longer holds these at t_2 . Thus sometimes

9. See 1 A. CORBIN, CONTRACTS § 56, at 235-36 (1963).

10. See N. RESCHER, THE LOGIC OF COMMANDS 27-30 (1966).

11. To prevent ambiguity, a term is needed that cannot be used as a "performative utterance," see J. AUSTIN, HOW TO DO THINGS WITH WORDS (J. Urmson ed. 1962); hence, "the proposal itself" is unsatisfactory, having the same defect as would "the offer itself." See R. HARE, THE LANGUAGE OF MORALS 17-24 (1952), in which Hare uses the word "phrastic" to indicate what I have called *the proposition* and "neustic" to indicate the performative characteristic of the utterance, in this case, *proposing*.

it is *persons* who are in agreement and sometimes it is belief and attitude propositions that *agree*. When agreement has been *reached*, then it is definitely *persons* who agree; if agreement has not been reached, there still may be *propositional* agreement.¹²

Both the subject matter of the proposition and that the proposal has been made must be communicated to the offeree before agreement has been *reached*; in return the acceptance of the proposal must be communicated to the proposer.¹³ If the offeree misunderstands the substance of the proposition, his act of acceptance does not put the parties into agreement. A proposal that is not sincere (the predicative expression is not true of the speaker) cannot be accepted, thus preventing agreement. Likewise, a lying acceptance will not put the parties into agreement even though the offer or proposal was genuine.

If there is any proposition impossible of belief or favoring attitude, then it is impossible for two people to be agreed on it. Nevertheless, people can believe or favor anything logically coherent, even things inconsistent with beliefs and attitudes previously affirmed.¹⁴

Can one person act as agent for another in reaching agreement? Clearly, the answer is no because acceptance is *adoption* of a belief or attitude and this cannot be accomplished by agency, even if the principal is prepared to believe anything.

In brief, this section has described the informal semantics of a process by which people are agreed because they have *reached agreement* by putting themselves into the same belief or attitudinal states. Although this process might resemble bargaining, it is quite obvious that I have not yet described the notion of *an agreement* that binds, however true it is that when people *reach* agreement, they expect to remain agreed for a reasonable period as if they were bound.

III. HAVING AN AGREEMENT

This section will examine the concept of an agreement and will parallel the semantic analysis of reaching agreement in the pre-

12. This distinction will emerge as especially important in considering contracting by non-instantaneous means of communication. See text accompanying notes 83-91 *infra*.

13. Parties can be in agreement even though they are unaware of that fact although they will not have *reached* that state. Also, misdirected proposals may be accepted (adopted) by an unintended recipient, thus putting the parties into agreement *without* its being *reached*.

14. If someone actually holds inconsistent beliefs, one should not say that he agrees with both parties who disagree on the same matter. It is correct to say that he cannot, until he changes his inconsistent beliefs, be in agreement with anyone on the topic.

vious section. The same patterns will be used. *Reaching an agreement* must be partly a process of proposing and adopting beliefs and possibly attitudes, but it is ultimately a process of negotiating and bargaining that leads to a trade or exchange of *promises*. What follows is an attempt to list most of the factors relevant to the "logic" of the subject.¹⁵ The purpose is to verify and to explicate the difference between being in agreement (through having reached agreement) and having an agreement (arrived at by a process of bargaining).

Every offer has a source in a person or group. Offerors communicate their offers by certain linguistic or written performances (for example, "I shall sell you my car for \$200."). Offers can be addressed to specified parties, to parties indeterminate within a specific range, or to all the world.

There must be at least two parties for an agreement to exist.¹⁶ Offerees have the capability of accepting an offer by certain performances (they possess an Hohfeldian "power") during the life of the offer. Every offer must be open to acceptance, though it need not be accepted; a non-offer cannot be accepted.

The offer has a content that often is called the offer itself; there is also the content of the acceptance. Offers and acceptances consist in conditional and unconditional promises from offeror and offeree, respectively. These will express propositions indicating what is promised. Parties have *an agreement* when they exchange promises; the offeror makes a promise conditional upon the offeree's unconditional promise. The offeror's promise is automatic with the other's promise.

Normally acceptance must be communicated before there is an agreement. Identical offers crossing in the mail show that the parties are *in agreement* but not that they have *an agreement*. Misunderstandings between the co-contractors *may* affect a contract and an agreement; misunderstandings *must* affect parties who wish to be in agreement. An insincere offer may be accepted and an agreement may exist even though the offeror does not intend to keep his promise. The same is true of an insincere acceptance, because it too is a promise.

15. The persons in the roles of offeror and offeree can interchange. Typically the offeror and the offeree are distinct entities, but group-parties can have some common members, so in that way one might offer something to oneself and accept it. (In the law of contract this is a situation seldom thought desirable.)

16. This is analogous to the analysis of the logic of commands, see RESCHER, *supra* note 10.

The aim and method so far is disambiguation. Both agreement processes begin with some individual proposal and end in acceptance by another person, but the logical shape of the offer or proposal differs depending upon whether the speaker hopes to reach an agreement or merely to come into agreement with the other party. This no doubt is the nub of the matter but there are other interesting differences.

One difference appears when one asks whether the person addressed can accept on behalf of another. There is nothing problematic about agency in the case of being in agreement; it cannot be done. Still agents can bargain and accept on behalf of principals in the context of law. Would it be wrong to say that the principal has entered into *an agreement* with the third party? It would be perverse to say that there is not an agreement. The institutional structure (the set of constitutive rules of the social practice) allows a principal to "take the risk" of his agent's actions even though he might have bargained differently in person. Of course, when the agent engages in the operative act, the principal may be completely unaware of the terms, so at no depth is he in agreement with the other at that time. It is no surprise that there is felt to be a tension or theoretical conflict within the classic bargain theory between agency and the so-called privity of contract.¹⁷

This observation, familiar to contract lawyers, raises the foremost question in this Article: What is the relation between having a bargain and being in agreement? Of course there is no problem in one direction, for to be in agreement is not sufficient for an agreement to exist. But if there is *an agreement*, must the parties be in agreement to any extent or depth? The objectivism expressed in the above quotation from Atiyah,¹⁸ would seem to suggest that parties need not be in agreement to have an agreement. A statement by G.H.L. Fridman about consideration suggests an even more extreme view. Fridman writes: "It [consideration] represents an attempt to formulate the basis of contract in terms of how a transaction could be interpreted by an outsider not personally involved in the intimacies of the transaction, but coming to it without any knowledge of what actually happened"¹⁹ Is such hard objec-

17. See CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 450 & 470.

18. See note 4 *supra* & accompanying text.

19. Fridman, *The Basis of Contractual Obligation: An Essay in Speculative Jurisprudence*, 7 LOYOLA OF L.A.L. REV. 1, 24 (1974).

tivism appropriate to the bargain theory of contract with which it so often is associated?

Two more remarks are apposite here, one about being in agreement and the other about the offer present in the process within which the formation of a contract occurs. First, parties in *agreement* clearly have certain common propositions true of them and these predicative expressions refer broadly to their states of belief or attitude.²⁰ Nothing more seems necessary to understand this point, except to emphasize that persons in agreement are not only so with respect to certain subject matters, but are also in agreement at depths; as a consequence of this, *A* and *B* can agree with reference to the same thing and then disagree as the description becomes finer or more complete. As will be illustrated later, parties to the same transaction may lack agreement with respect to some aspect or element of the affair and be in agreement on another. Does a legal writer rightly declare that all this is and ought to be thought irrelevant to the question of whether or not the parties had an agreement? Does one locate the bargain most competently by consulting some objectively underinformed outsider? It remains to be seen.

Secondly, whereas being in agreement in its paradigm instances is a *brute fact* (true or false irrespective of "society"),²¹ having an agreement is an *institutional fact* defined by existing legal and social structures and practices. Thereby, an offer capable of becoming part of an agreement may be given a life or duration. This temporary liability that the offeror places upon himself might have to be reconciled with the *brute* character of being in agreement. In other words, one will have to ask whether it makes factual sense, in brute terms, for contractors *M* and *F* to be in agreement with one another even though *M* has changed his mind on the terms of his offer to *F* but failed to revoke in time. Is one forced to objectivism because a contractual offer may outlive the doxastic state with which it was conceived?

IV. THE BARGAIN SCHEMA OF THE CLASSIC THEORY

The schema presented in this section is neat, simple, and mostly impracticable. It is too simple for the complex world in which agreements and contracts must work. Yet it is the deep, formal ideal, in

20. The present focus will be on agreement in belief, though agreement in attitude may turn out to have great importance, not initially appreciated.

21. See J. SEARLE, *SPEECH ACTS* 50-51 (1969).

my judgment, of the bargain theory and although, like a groundhog, it is out of sight and often ridiculed, it casts a shadow. The bargain theory, in brief, is that an agreement is present in every bilateral contract, constituted by a trade or an exchange of promises in which each is the price of the other. The metaphor of *purchase* is powerful here, as when one gets a hold upon a slippery surface. "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable".²² This is a definition of "consideration" and so one might, with equal justice, speak of the bargain theory of consideration. Mr. Justice Holmes wrote:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.²³

Consider contractors *M* and *F* and their mutually lawful concern or interest, *LI*. *M*'s part will be indicated by *LI*_{1*m*}, *LI*_{2*m*}, and so on, and similarly, *F*'s by *LI*_{1*f*}. When *M* makes a promise to *F* (*MprFLI*_{1*f*}) he understands himself to have made a certain promise with a certain content not unattractive to *F*. When *MprFLI*_{1*f*} is communicated, *F* will understand it and does not reject it out of hand.²⁴ Although there is a promise, there is not an agreement; there is not one even after *F* makes true *FprMLI*_{1*m*} unless it is clear to both *M* and *F* that the one is exchanged for the other. This is why the offer-acceptance structure is useful; it brings out the element of purchase, of trade and exchange. *M*, from the offeror's position, says *MprFLI*_{1*f*} will become true if *FprMLI*_{1*m*} becomes true. When *F* accepts, the former becomes true; there is now an exchange, for each has purchase on the other's promise. Hence, an offer from *M* is a conditional promise, that is, one with a pre-condition or antecedent upon its automatic occurrence which is satisfied and met by an unconditional promise from *F* to *M*. Additions like conditions precedent can be built in without difficulty. Thus if *F* wants to consult

22. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 60, quoting F. POLLOCK, PRINCIPLES OF CONTRACTS 133 (13th ed. P. Winfield 1950).

23. O. HOLMES, THE COMMON LAW 293-94 (1881).

24. The usual view is that, though a promise need not be accepted, it must not be rejected.

his lawyer before acceptance is final, then what he says can be expressed as $FprMXLI_{1m}$. (X) means *on the approval of F's lawyer*.

Consider the following schemas:

- (a) M believes $MprFLI_{1f}$;
- (b) F believes $FprMLI_{1m}$.

These formulas may seem a little odd in that they presuppose that people could have false beliefs about their own conduct and about any beliefs that are a part of that conduct. The answer is that one must capture this concept in order to discuss the law of contract because persons will have beliefs (true or false) about what they have promised to do. These formulas allow for that idea, and therefore, odd or not, they are necessary.

Furthermore, in the classic bargain theory, ideally both sides are aware of the agreement they have made; so not only are the parties suitably in agreement (as I shall argue) *within* an agreement itself, but they are in agreement as well that they have *reached* the agreement. This ideal is expressed through the standard rules that offers must be communicated to offerees and the acceptances must be communicated in response, and, as well, in the rule that revocations of offers must be communicated in some reasonable fashion to the addressee of the original offer.²⁵ Therefore, M and F ideally share a second-level belief that promises have been exchanged; each believes that the other believes that he has traded his promise for the promise of the other. But if there is a bilateral lack of agreement in the terms of the contract (in the propositions of the promises) then it will look like this:

- (i) F believes that M believes $MprFLI_{2f}$ but M believes $MprFLI_{1f}$;
- (ii) M believes that F believes $FprMLI_{2m}$ but F believes $FprMLI_{1m}$

Each believes something false about the beliefs of the other with respect to the promises exchanged. This would be a form of bilateral failure *in* agreement. Because the shared second-level belief that promises had been exchanged is false, it follows that they have not

25. If noninstantaneous methods of communication are used, then an indeterminate situation can arise; that is, a notice of acceptance, dispatched at t_1 , could reach the offeror at the same time, t_1 , that a notice of revocation, sent at t_1 , reaches the offeree, i.e., at t_1 . Which is to be effective, the acceptance or the revocation? Is there a contract or not? The usual solution given in our law is regularly sought by appeal to objectivism. The pertinence of that solution to the argument will have to be examined.

exchanged promises at all. Therefore, they do not have an agreement. A correct exchange would be one in which *M* believes that *MprFLI_{1f}* is traded for *FprMLI_{1m}* and *F* believes *FprMLI_{1f}* is traded for *MprFLI_{1m}*. Promises interlock; there is a *nexus*, a "relation of reciprocal conventional inducement."²⁶

The shadows of this idealization can be seen in many places. Mistake²⁷ is the best place to observe them. The view, perhaps now defunct, that requirements contracts contain "illusory" promises is another example. Some contracts, unilateral contracts for example, do not fit the schema because they are not agreements, and there are contracts that were not *reached* in a process of bargaining (standard form contracts). The common tendency even today to regard these contracts as necessary evils must show the influence of the bargain ideal.

V. ERROR AND MISTAKE

The above schema assumes that for one contractor's promise to be the price of the other's, for one promise to be traded for another, and for the offeree's answering promise to meet and satisfy the "pre-condition" placed upon the offeror's promise, each contractor must have understood (made no mistake about) the other's beliefs or intentions. In the real world the bargain theory must settle for a good deal less than this happy joint grasp of the bargain struck. But in the shadow of the ideal, a disagreement as to the proposals and their contents (the propositions of the promises) would be fatal to the contractual *nexus*. A failure to be in agreement will not void an agreement. It is not that precision never is achieved or that it never is expected and demanded. Frequently, employer-union contracts are understood very thoroughly by both sides; parties know what is exchanged for what. That these types of contract were unenforced by common law courts was not because the joint grasp of the terms was atypically thorough!

The law of mistake is complex partly because there are many types of thing about which one may err; furthermore, because there

26. HOLMES, *supra* note 23. For a discussion of the phrase see 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES 241 (1963). See also Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 354, n.51 (1969), in which the author notes: "As a practical matter, the requirement of 'mutual inducement' between promise and consideration has always tended to lead to an exploration of subjective factors clustered around the idea of 'motive'."

27. See notes 33-45 *infra* & accompanying text.

are two parties, both may err or only one may err. Mistakes themselves may be shared or distributed or may be both great and small. A discussion of mistakes provides evidence for the claim that within the bargain theory it is more in order to demand that parties to a contract be *in agreement* than is allowed by some of those who would present the classic theory objectively. Certainly courts have thought that some failures to be in agreement will affect the viability of an otherwise binding legal agreement.

At the outset it is convenient to set forth two taxonomies, one for *error*, understood to be made by an individual, and the other for *mistake*, understood as something within the relationship between erring persons. But first let me set forth some hypothetical facts. Assume this array, simple enough but sufficient together to illustrate the significant possibilities of error and mistake in contractual relations:²⁸ There are two parties, named Banks and Diver. There are three sunken vessels, Nina, Pinta, and Santa Maria. Nina is to the left of the lighthouse, Pinta is in front, Santa Maria is to the right, and there is no vessel in the bay behind the lighthouse. Nina contains a great treasure, Pinta contains no treasure, and Santa Maria holds a moderate one. A contract is made that provides that Diver direct a salvage operation on Santa Maria for Banks, who had asked Diver to undertake it.

These hypothetical facts can be used to illustrate and distinguish the various types of possible errors and mistakes.

Types of Errors

- 1a: about the existence of a thing,
- 1b: of a person;
- 2a: about the indefinite description of a thing,
- 2b: of a person,
- 2*: about something's fundamental nature;
- 3a: with respect to one's actual interests,
- 3b: to one's antecedent interest;
- 4 : over the contractual intentions of the parties;
- 5a: about the identity of a person,
- 5b: of a thing.

28. The following material is richer than is strictly required for the main theme. On the other hand, there is a virtue in the attempt to be complete; from the standpoint of theory, knowing which types of error or mistake are thought irrelevant is just as important as understanding why another is legally effective. Errors about what the law is have not been included; this seems to be a severable problem. Nor will mistakes of the type *res sua* (when the offeree already owns the item he accepts) be discussed.

Application of the Types of Errors to the Hypothetical Facts

(1) One may believe that *there exists* a fourth vessel in the bay behind the lighthouse; there is not. This is an error about the fact of some *thing* (1a); the same error can be made about the existence of a *person* (1b).

(2a) One may believe falsely that Nina is to the right of the lighthouse. This is an error concerning a *fact about* something, in this case the subject-matter of a possible agreement. It is a matter of what philosophers call indefinite description.²⁹ Even if one states that the vessel Nina is a member of the class of vessels named "Nina," one has indefinitely described her. Errors with future reference (bearing on "frustration") are included here, as well as errors that have to do with the type of thing that is the subject of the agreement.

(2b) Banks may believe falsely that Diver is famous in the salvage line. This is also a matter of indefinite description respecting the class to which a *person* belongs. Diver is also a member of the class of persons named "Diver." Furthermore, it is possible for someone to err about a feature of himself, as when Banks believes that he can afford the services of Diver.

(3a) One may believe that Santa Maria has a great treasure and therefore is most worth salvaging of the three. If this is false, then one has erred in the light of one's attitudes and interests.

(3b) But one's attitudes and interests it is sometimes said, provide the motive of the contract; here one is speaking of one's expectations rather than of the actual outcome. Thus one may err also in believing that Santa Maria is the most likely ship to have the treasure, even though against the odds, she actually might have it.

(4) Diver may believe that Banks intends him to salvage the vessel in front of the lighthouse. This is an error about the proposal itself, the proposition, of the offeror or the offeree. The offeree errs about the other's belief of the substance of the promise *F* makes. Here one seeks the *terms* of the contract.³⁰

29. An indefinite description is one that places something into some class by virtue of a feature it has. For example, if someone is red-headed, he is a member of the class of red-heads.

30. An attentive reader will note that for perfect balance—working outside the context of any relation between the parties—error 4 should be classified as a subset of error 2b; the error is one about an indefinite description applied to a person. The error is about that person's beliefs that he is a member of the (unit) class of those who believe that he has promised. . . . But the singular importance of errors 4, about contractual intentions, for the bargain theory will justify their isolation in this taxonomy.

(5a) Banks may believe falsely that the man who accepted his offer is *the* Diver. This is a matter of personal identity. Any description will be definite, that is, uniquely denoting, as for example, "The one and only man who directed the salvage of the Q.E."

The reasons for distinguishing a person's identity (self-identity) from his properties or attributes are well-known. Cheshire, Fifoot, and Furmston, somewhat bleakly, remark: "It is tempting, indeed, to suggest that a person's identity is but an amalgam of his various attributes."³¹ But this temptation will be fatal. If, for example, one holds that Banks is nothing more or less than the set of properties or attributes he had at the time of the agreement, two consequences follow, the second of which is of legal interest. If Banks, for instance, had his natural hair at the time, then the (empirically) false statement, "Banks had no hair at the time," is a logical contradiction; and, if Banks should lose his hair, he ceases to be the person who made the contract with Diver (who, I shall assume, has not changed at all). On the statement by Cheshire, Fifoot, and Furmston, a change of property is a change of personal identity.

(5b) These considerations apply equally well to physical objects and animals; they too can be described definitely. These non-persons, of course, will be the subject matters of contracts. Identity here will equally make a difference. If I order one pile of hay and you deliver its neighbor, I probably could repudiate the contract.

Each of these errors is an error over a matter of belief; one believes falsely that a certain kind of fact obtains. When people disagree as a result of such errors, there is what was labeled above a disagreement in belief. Might parties' *attitudes* have any place in the discussion here? One could not rightly apply the class of errors 3 because the definition of that class depends upon fixing values by some means not therein established, though attitudes could be that means. The value of something, therefore, is not thought of as a property of it, although strictly speaking whatever value it has will establish for it class membership with things of that value. Attitudes, like beliefs and contractual intentions, are features of persons, and so errors about them would be 2b. Errors about someone's attitudes present no problem of classification, but the *fact* of attitudes might be important to the taxonomy itself. Errors of indefinite description (2a,b) are sweepingly characterized without respect to what has come to be called in the law *fundamental natures*. Imagine

31. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 230.

someone with an elephant named Bertha for sale. This animal is a member of many classes (the classes of trained beasts of burden, large objects, grey colored things, bearers of the name "Bertha," etc.) The owner could sell Bertha under any of these indefinite descriptions, although a buyer would most likely come forward if the seller described her as an elephant however perfectly accurate all the other classifications are.

Why are some classifications more "fundamental" than others? Attitudes could be appealed to usefully in giving the answer. Therefore errors with respect to a fundamental nature shall be indicated as 2* (the (a,b) distinction already signals the importance we attach to ourselves).

In this short list of the "metaphysical elements," error with respect to a writing is not itself an element; when one errs in this way it usually will be over a term of the contract or the identity of the document. Various forms of miscommunication, misinformation, mishap, miscreancy, and misjudgment will be the causes of all errors; I would distinguish further the kind of error there is from where and how it occurred. How and where may well bear upon what one thinks justice demands, but "ambiguity-mistake"³² and "writing error" are not initially useful or deep characterizations any more than "stupid mistake" or "Oval Office error" would be.

When these errors infect relations between parties who might be thought to have formed an agreement, there is a mistake.³³

Types of Mistakes

- (A) Bilateral: both parties are in error.
 - (i) Collective, same error;
 - (ii) Distributive, different errors.
- (B) Unilateral: only one party is in error.

Application of the Types of Mistakes to the Hypothetical Facts

(A)(i) When both parties are in error (bilateral mistake) the substance of the error may be *collective* so that, for example, both parties believe that Santa Maria is in front, thus sharing the same false belief pertinent to the subject matter of the contract. This

32. See S.J. STOLJAR, *MISTAKE AND MISREPRESENTATION, A STUDY IN CONTRACTUAL PRINCIPLES* (1968).

33. There is a tendency for lawyers to restrict the word 'mistake' just to cases in which the mistake is operative in vitiating a contract.

example is one of erroneous indefinite description (2a). There also can be collective mistakes about the fact of something (1a,b) as, for example, when the parties together believe in the existence of a fourth vessel in the bay. In the above hypothesis, however, the vessel exists. Hence their contract has a subject matter. Parties also might share errors respecting their interests and attitudes (3a or 3b) and, possibly, be jointly in error about a party's identity (5a).³⁴ On the strictest understanding, if someone is self-conscious at all, he could not err about self-identity.

Of the several related errors remaining, collective mistakes about personal properties (2b) are, of course, quite possible, but the subset of collective mistakes over intentions (A)(i-4) is as puzzling as it is important. A contractual intention is the content or proposition of a promise, not the intent a speaker has to enter a contract. Could there be a *collective* mistake (identically by both *M* and *F*) about the content of any of their promises to each other? Assume *arguendo* that *F* promises that the oats are old. *M* believes that *F* promises old oats. If the oats are new, there is a collective mistake, but not over contractual intentions; it is (A)(i-2a) by my labeling. If there are no oats in the relevant world, it is (A)(i-1a).

To produce (A)(i-4) one must allow for the situation in which *F* believes that he has promised new oats, but in truth has promised old oats; this is what it is to err about one's own contractual intentions. Is that absurd? If *F* never can err about his own contractual intentions, then, if *M* believes what *F* believes, there never could be *logically* a collective mistake over intentions. If *M* does not believe what *F* believes, then there is a mistake, but it is *distributive*—the category to be described next. The temptation is great to pronounce that one cannot err over the content of one's own promise and equally that no one else could share an error. But such a view does not take into account the variety of errors and truths that relate to anything that might be promised. *M* points to a sack of oats and (conditionally) promises the offeree "That sack of old oats for \$Z." The sack, however, contains *new* oats. There is perfectly good sense in saying that *M* is both correct and incorrect about what he has promised. And the offeree may share his error; *M* has promised old oats, but he has also promised *these* oats. In this sense there can be collective mistakes over contractual intentions.

34. For example, Diver may not be the person he believes himself to be, and Banks may know no better. This of course exposes a nest of ambiguity, and sorting it out would require a discussion of the various ways in which a person has identities.

This explanation further proves the necessity for the somewhat odd sounding formulations in Section IV of offerors and offerees having beliefs about what they promise ("*F* believes *FprMLL_{1m}*"). The lesson to be derived here is that the question of whether parties must be in agreement to have an agreement requires further analysis. Being in agreement in an ordinary sort of sale of goods contract, for example, will have a vertical and a horizontal dimension. The move from *oats* to *new oats* is vertical or "going deeper"; the move from *new oats* to *these oats* is horizontal. A court that insists that the parties be in agreement may find agreement along either or both axes. Strictly speaking the collectivity of error and what it does to contracts is not relevant to my main question because people who make wholly and solely collective mistakes are in agreement. Their problem is that there has been *error*.

The final error that can be collective is the one indicated by 2*. Not every class into which a thing may be placed is of equal importance to trading people. The attempt to discuss 2* matters in the cases generally produces remarkable verbal agonies and outright fallacies. The famous case of *Sherwood v. Walker*³⁵ contains a line of reasoning that appears to progress something like this: Though *X* is the same *X* it always was, it possesses previously unrecognized properties, and thus *X* is really something else; therefore, old *X* does not now exist. In *Sherwood* a contract was avoided by the defendant because the subject matter, a cow named Rose 2d of Aberlone, was thought incorrectly by both parties to be barren. Finding this (A)(i-2*) situation, the defendant owners refused delivery; the plaintiff was unsuccessful in his action. The judge wrote:

The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding [re 2a, 3b] [T]here is no mistake as to the identity of the creature [5b]. Yet the mistake was not of the mere quality [2a] of the animal, but went to the very nature of the thing [2*]. A barren cow is substantially a different creature than a breeding one [re 2*]. . . . The thing sold and bought had in fact no existence [1a].³⁶

Therefore, the contract was void. The judge, at the least, is saving the defendant from a bit of bad luck and perhaps from carelessness with respect to the value of his own livestock. But it generally is held

35. 66 Mich. 568, 33 N.W. 919 (1887).

36. *Id.* at 577-78, 33 N.W. at 923-24.

that no contract can exist if a subject matter for it does not exist also.³⁷ In *Sherwood* the judge appears to connect the consequences of *res extincta* [re (A)(i-1a,b)] with a mistake over the subject matter's substantial or fundamental nature (A)(i-2*). Of course they both may be void ab initio through the same general rationale, but it is a fallacy to equate the two kinds of error in order to draw that conclusion.

As was noted at the beginning of this analysis of mistake, the discussion was intended to be richer than is strictly required by my thesis. But this is no more than to provide the sort of logical map needed to find one's way to the topic under discussion. I do not wish to attack or defend contract rationales in the area of bilateral collective mistake; the parties *are* in agreement, however erroneous the beliefs that they have in common may be.

The subject of collective mistake should not be left without mentioning impossibility or frustration of a contract. This does not constitute a separate type of error, prediction-error. However it is caused, frustration is the result of a 2a error and sometimes a 2b error. The activity required for the performance of the contract was such that its description (and the description of the parties) conjoined with a full description of the circumstances, subject matter, etc., would have shown the impossibility.³⁸ If it turns out that the coal mine or the farm will not yield as required under the contract, the error is over a fact about the subject matter and anything else that is descriptively relevant in the situation. Again, there is nothing in this sort of problem to answer the question of how frustrated contracts should be viewed by the law.

(A)(ii). The substance of a bilateral mistake may be *distributive* so that one party believes that Santa Maria is in front and the other believes she is at the left. They are both in descriptive error (2a) but distinctly so. But consider the error taxonomy.

(1a,b) A distributive error in this context is impossible. One party must say that something exists, and the other must deny it; logically the mistake has to be unilateral because only one side can be wrong.

37. See CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 204-13. This view has been challenged successfully. See Honoré, *Reference to the Non-existent*, 46 PHIL. 302 (1971).

38. Surprisingly, Gilmore states: "See the opinion or speech of Lord Atkin in *Bell v. Lever Brothers, Inc.*, L.R. 1932 A.C. 161 (1931), where the suggestion that the two categories ('mistake' and 'frustration') are identical was put forward for, so far as I know, the first time." G. GILMORE, *THE DEATH OF CONTRACT* 139 (1974).

(2a,b) One party may believe one fact about the subject matter, and the other may disbelieve it while believing some other fact instead. If both parties should err, there would be a distributive mistake.

(2*) If the fact that something is a treasure ship is of a fundamental nature, then should Diver think it is the skeleton of a sea monster and Banks think it is an undersea temple of Atlantis, there is a mistake embodying this kind of error. An analysis of this situation more likely would lead to the view (if to anything) that the parties had made error 4 on the terms (over contractual intentions). If this is correct, then one will not find discussion of fundamental natures, roots, and essences unless the parties are in agreement, though in error.

(3a,b) Here are errors in believing (3a) or expecting (3b) that the contractual performance will provide one with properties which one values. An error 3b harms one's motive in having made the contract. If both parties think that the contract will make them jointly famous and it does not, the mistake was collective; normally, when both err, they do so about different values, distributively.

(4) Cheshire, Fifoot, and Furmston say that a "mutual mistake" occurs when "each party is mistaken as to the other's intention, though neither realizes that the respective promises have been misunderstood."³⁹ "Distributive mistake" is a weaker concept than that; "mutual mistake" is constrained to error 4. A distributed error of that sort is the most important for my purposes because the failure to be *ad idem* is just that. If Diver believes Banks takes himself to have promised to pay for work in front of the lighthouse, and Banks intends Diver to work to the right and believes that Diver understands this, the parties are not in agreement. Though it may appear exotic initially, I should not rule out the logical possibility of both parties being in error over their own contractual intentions. It will be a matter of some concern whether this consequence is acceptable in the bargain theory; can one find a *bargain* when neither party gets what he or she expected?

(5a,b) Errors about identity can be distributive, though a case of mistaken identities without elaborate fraud is unlikely. Furthermore, when the error is not about persons but about things, references to identity are likely to be really about new properties, as with *Sherwood's Rose* 2d. A court is much more likely to understand and

39. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 221.

respond to a complaint resting upon the properties of some thing than upon its mere identity alone, so plaintiffs will want to find a difference that makes a difference.

Lawbooks often conclude that when the mistake is collective (or common or mutual), then if the contract's validity is affected, it will be a result (in my terms) of the *error*, not the *mistake*.⁴⁰ But, if the mistake is distributive (or mutual), then if the contract is affected, it is because of the *mistake* and not the *error*.⁴¹ This alone should be sufficient to demand a marking of the distinction. To repeat, the concern here is not with all the rationales; I am merely mapping-in the sorts relevant to my thesis that the bargain theory is necessarily more at home with the requirement that the parties be in agreement than is allowed by those who conjoin it with hard objectivism. To this end there is no pressing need to discuss bilateral collective mistakes.

(B) Unilateral mistake is defined as a mistake in which one and only one side is in error. This definition says nothing about the state of mind of the non-erring party; it could occupy any place along a continuum from complete awareness of the other's error (with an accompanying intent to deceive) to perfect oblivion about it. The discussion in Cheshire, Fifoot, and Furmston of unilateral mistake adds to (B), which is itself a weak statement, the epistemic constraint that the unerring party must *know* about the error: "If B is ignorant of A's erroneous belief, the case is one of mutual [distributive] mistake, but, if he knows of it, of unilateral mistake."⁴² But this treats ignorance as error. If two men are ignorant of each other's beliefs on women's liberation, it does not follow that they are in error (or that they are correct) about each other's beliefs. In fact, an explanation for this English oddity is that "unilateral mistake" has become a label for cases involving the error of personal identity (5a). Because in virtually all personal identity litigation one side is said not to err about the other, it would seem that the phrase has tended to lose its weak sense (B) and become more restricted. Yet this conceptualization of things in the limited light of error 5a may be more premeditated than it appears. Anson puts no such constraint upon the term.⁴³

(1a,b) The subject matter referred to in the contract will either

40. *Id.* at 213.

41. See W. ANSON, *LAW OF CONTRACT* 274-76 (24th ed. A. Guest 1975).

42. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 203.

43. See ANSON, *supra* note 41, at 286.

exist or not. If and only if parties lack agreement or disagree can one party only be in error. If there is no subject matter, then the contract is void at common law. It is difficult to imagine why anyone would enter a contract thinking that the subject matter did not exist, but it is not impossible to do, and if he were wrong in his belief, other things being equal, there would be a contract.

(2a,b; 2*) There seems no reason why these errors could not be all onesided on some occasion.

(3a,b) This error, even if known to the other side, is not usually of itself enough to affect the bargained contract. An exception to this would be if the court determined that misrepresentation was involved in inducing the contract. In such a case the plaintiff might receive either the remedy of rescission or damages.

(4) For damages to be awarded for misrepresentation, the mere representation must logically be converted into a term; otherwise, there would be no breach of contract upon which to sue for damages. Aside from this, can there be a unilateral mistake on a term of a contract? If it is allowed, as I think it must be, that *M*, an offeror, can be in error about his own contractual intentions, then there are two possible cases. In the first type of case *M* is incorrect about his own contractual intentions in the offer, but *F* is right; *M* errs and *F* does not. Now one needs to know the relative epistemic condition of the non-erring party, *F*. If he is unaware of the offeror's error over the proposition of the contractual offer, there is a contract. *F* has accepted *M*'s offer even though *M* was not clear about his own commitment. There is a unilateral mistake, yet a contractual nexus is formed. Admittedly this is an odd circumstance, but it is entirely possible unless one wants to show that no one can err about his own contractual intentions. It seems likely that *M* would be estopped from defeating the contract by relying upon his own error. What if *F*, the non-erring party, is aware that *M* was in error? This brings one to the problems of silence, concealment, and the duty to speak. The rules, to the extent that they are clear, are complex and unnecessary to discuss. If such a duty is violated, one effect could be to give *M*, the erring party, the right to avoid the contract at his option (in case of fraud) or to let him repudiate the contract and appeal for a rescission (in case of some more innocent attitude on the part of the non-erring party). Still, a contract existed initially.

In the second type of case, *M* is correct about his own intentions in the offer, but *F* is in error. The case is certainly unilateral because only one party errs. However, this sort of problem looks just like a bilateral distributive mistake involving error 4. The difference is

that when discussing (A)(ii-4) I assumed that neither party was "right" and merely characterized it as a failure of *nexus* (one in which the offeree in the acceptance did not meet the precondition or antecedent of the offer). It seems that either conceptualization is permissible, though on some occasions (B)(4) may be the more natural of the two, for instance, when the offeror is very dominant in the bargaining situation insofar as he is offering something quite unmistakable, at least to anyone in his position. So in this way, unilateral mistake (B)(4) and (A)(ii-4) tend to meld together; this, as will be explained in the postscript, is part of the plausibility of Cheshire, Fifoot, and Furmston's narrower, epistemically constrained definition of unilateral mistake.

(5a,b) There is no problem about (B)(5b); when it can be established that there is some item that is univocally the subject matter or part of it, one party can have it right and the other have it wrong. The interesting issue that one must examine in treating (B)(5a) involves the identities of the contracting parties. If *M* errs in thinking that he is addressing *F* or *F* himself errs in thinking that he is responding to *M*, there is another sort of failure to be in agreement to which a classic theorist might point.⁴⁴ One can imagine a plain innocent case as when the postman delivers an offer to the wrong address and the recipient, perhaps aware of the error, believes that he can accept it nonetheless. There will be no contract because all offers and acceptances, as a matter of their classic logic, are addressed—sometimes indeterminately or loosely, though not this time—and only addressees can accept. This unilateral mistake occurs when and only when a genuine offer is "accepted" by a person to whom it was not addressed, or when an acceptance is directed to one who had not made the offer. The question of fact in court will be to whom or by whom the offer was addressed. The defendant seeking to avoid the contract will say that it was not addressed to or by the plaintiff who is seeking to enforce it.

Summary

This completes the survey of errors and mistakes, the assimilation or feeding-in of error to mistake, and it concludes the mapping of the terrain within which is to be located the evidence of the importance of "agreement" to the ideal of the bargain at the heart

44. There is the exotic possibility of making one's own identity a term, but that is irrelevant to the present task.

of a contract. Just as error 1a is dominant in cases of collective bilateral mistake (A)(i), and just as error 4 is dominant in distributive mistake (A)(ii), so 5a errors are dominant in cases of unilateral mistake (B). The next step is to illustrate precisely what the failure *in agreement* is in the latter two situations. (There is no failure in agreement in a collective mistake.)

VI. CONSENSUS AD IDEM CASES

Courts in common law jurisdictions have avoided contracts as being void *ab initio* because the parties had not *reached agreement* on the terms. Such decisions clearly are grounded in the bargain schema that I characterized at the beginning of Section IV as classic in its neat and general impracticability.

In *Raffles v. Wichelhaus*,⁴⁵ A believed he promised B to buy the cotton of the October vessel, *Peerless*. B believed he promised A to sell the cotton of the December vessel, *Peerless*.

1. A believed falsely that B believed he promised to sell him the cotton of the October vessel;

2. B believed falsely that A believed he promised to buy the cotton of the December vessel.

Each side believed he made a promise but with respect to distinct subject matters. The further error now is one of definite description (5b). As noted above, identity errors offered in pleadings are unusual but, as this shows, it is possible for them to appear. There is no error of indefinite description with respect to the name: both parties were correct in thinking that the ship was a member of the class of ships named "*Peerless*." And neither party was in error about the date of sailing of the ship with respect to which he made his promise; one cannot say, therefore, that A erred (2a) in believing that the ship sailed in October or that B erred in believing that the ship sailed in December. What they did err about was a question of *the ship*, not about a property of it.

It seems simply that the judges found a want of *nexus*, though

45. [1864] 2 H. & C. 906. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 223, summarize the facts as follows:

A agreed to buy and B agreed to sell a consignment of cotton which was to arrive "ex-*Peerless* from Bombay." In actual fact two ships called *Peerless* sailed from Bombay, one in October, the other in December. Upon proof that the buyer meant the October vessel and the seller the December vessel, it was held that the buyer was not liable for refusal to accept cotton dispatched by the December ship.

Raffles has been "reinterpreted" by many commentators. Cheshire, Fifoot, and Furmston state: "[S]ince there were no circumstances which would clearly indicate to a disinterested spectator the one [cargo] rather than the other, it became impossible to determine the sense of the promise."⁴⁶ But there is no mention of a disinterested spectator in the case; instead one reads: "[The contract was for cotton ex *Peerless* from Bombay.] There is nothing on the face of the contract to show which *Peerless* was meant. . . . That being so, there was no consensus ad idem, and therefore no binding contract."⁴⁷ Atiyah has reinterpreted it as follows: "The case is certainly unusual in that the ambiguity was incapable of resolution by the Court on the basis of what a reasonable man might have thought."⁴⁸ Such an incapacity might exist, but it was not mentioned as the basis of the judgment given. Professor Gilmore writes: "If *Raffles v. Wichelhaus* was the only exhibit to prove that the courts, well past the mid-point of the nineteenth century, were approaching the problem of formation of contract from a purely subjectivist point of view, we would not have got very far. There is, however, no dearth of other supporting exhibits."⁴⁹

*Scriven Brothers & Co. v. Hindley & Co.*⁵⁰ provides another example. During an auction, the plaintiffs intended to sell tow while the defendants intended to buy hemp. The defendants bought tow and refused to pay the price they had bid successfully. The contract was avoided.

1. *P* believed falsely that *D* believed he promised to receive tow;

2. *D* believed falsely that *P* believed he promised to deliver hemp.

Clearly they were wrong about each other's intentions in a distributive way. Is there also an identity error? The normal sort of identity error is one in which there are two members of the same sort, such as "*Peerlesses*," and a mix-up occurs. Now one could say that the tow-hemp problem is *more* like the usual cases of property confusion than identity confusion; bales of properties, after all, were being auctioned. The problem is one of sorts or types, and I have distinguished a special *sortal* error (2*) as distinct from a mere property error: any type of thing, I have assumed, is a collection of properties true of self-identical individuals. The problem goes back to

46. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 223.

47. [1864] 2 H. & C. at 908.

48. ATIYAH, *supra* note 3, at 58.

49. GILMORE, *supra* note 38, at 39.

50. [1913] 3 K.B. 564.

Sherwood,⁵¹ in which the judge pronounced a fertile cow another sort of thing from a barren cow. What makes the present tow-hemp decision in favor of the defendants (who claim there is no contract) plausible is that there was no univocal, bargainable type of item; no one claimed they were in agreement over "some fiber." Thus, there was no exchange of promises because both parties made promises incapable of interlocking in a transaction of goods for money.

In *Scriven Brothers*, Justice Lawrence accepted the finding of the jury which he said was "that the parties were never *ad idem* as to the subject matter of the proposed sale; there was therefore in fact no contract of bargain and sale."⁵² Such a finding, which is made in the shadow of the classic theory, of course will be handed down in an adversary setting; the plaintiffs had argued that the defendant bidder should be estopped from arguing the failure to be in agreement. The court rejected this argument. Had the court accepted the estoppel argument, however, a contract would have been found which in truth lacked a *nexus*. At places like this the pure classic theory shows its impracticability but not its impotence. The ground of the plaintiff's estoppel argument was not that a "disinterested spectator" would have thought that the parties were in agreement. Also, the basis of the decision itself was not, as Cheshire, Fifoot, and Furmston argue, that "[o]wing to the ambiguity of the circumstances it could not be affirmed with reasonable certitude which commodity was the subject of the contract."⁵³ The decision was that there was no *consensus ad idem*. The plaintiff had argued that the defendant was careless and should not be allowed to rely on his own error. The judge determined that if anyone was careless, it was the plaintiff. Several conclusions may be drawn about *Scriven Brothers*.

A judge under the influence of the classic bargain theory need not turn his back on the question of why no *nexus* was effected when there seemed to be one. Thus he may use the schema only up to a point, after which he will estop those who mislead others by their carelessness in seeming to be in agreement when they are not. There is a difference between a shadow and a black hole; to show that *consensus ad idem* has worked an *influence*, it is not required to show that it consumes all that come within its ambit. There was, in *Scriven Brothers*, no appeal to the reasonable man even though

51. 66 Mich. 568, 33 N.W. 919 (1887). See notes 35-36 *supra* & accompanying text.

52. [1913] 3 K.B. at 568.

53. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 223.

it was allowed that "no *consensus*" need not always carry the day for a defendant. Arguably therefore, the estoppel possibility could protect the consensus requirement against abuse by setting rational limits on its use.⁵⁴

Because I am attempting to use cases to illustrate a thesis and not to prove what is and always will be contained in the very idea of a contract, it is unnecessary to compound the data. Still, consideration of a passage from another English case, *Smith v. Hughes*,⁵⁵ is useful. The defendant had intended to purchase old oats and the plaintiff to sell new.

It only remains to deal with an argument which was pressed upon us, that . . . the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds to the fallacy of confounding what was merely a motive [re 3b] operating on the buyer to induce him to buy with one of the essential conditions of the contract [re 4]. Both parties were agreed [in agreement] as to the sale and purchase of this particular parcel of oats [re 5b]. The defendant believed the oats to be old [error 2a], and was thus induced to agree to buy them [re 3b], but he omitted to make their age a condition of the contract [re 4]. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them.⁵⁶

Surprisingly this case often is cited as an example of objectivism;⁵⁷ it seems the very opposite. In seeking the terms of the contract, the judge looked for that about which the parties *were* in agreement (*ad idem*). As noted in Section II, *being in agreement* is a matter of depth and extent. The judge in this case was not impressed with the likelihood or importance of an error about a thing's "fundamental nature" (2*).⁵⁸ However, the judge finds the parties *in agreement* by moving horizontally, from qualities, motives, values, and natures to identity. The parties were in agreement on

54. As will be seen, one of the great worries of the "objectivists" is that defendants will always win merely by reporting their inward thoughts and waving the back of their hand in the air.

55. [1871] L.R. 6 Q.B. 597.

56. *Id.* at 605. The letters and numbers in the brackets refer to the taxonomy in Section V.

57. See, e.g., ANSON, *supra* note 41, at 287, 290-91 (*Smith v. Hughes* used to illustrate objectivism and the estoppel safeguards).

58. Perhaps the American judge in *Sherwood* might have thought differently about this point, given that the defendant could *only* use old oats for his horses.

identity. There was no 5b error; therefore there was a contract. That the defendant had not taken care to establish whether the oats were old (though he had had a sample) was relevant, and so the bargain was safeguarded against a defendant's reliance upon his own indifference. Yet the point is that the parties were found to be in agreement.

VII. THE PARTIES TO THE BARGAIN

This Article concerns the *formation* of contracts, and so the question of the exact legal consequences of certain types of defects is beyond its scope. Nevertheless, the typical consequence of innocent unilateral mistake is that the contract is void ab initio,⁵⁹ and the common consequence of fraud is that the contract is voidable at the option of the innocent party.⁶⁰ The rules of fraud are complex and need not be discussed here. But once again the relationship between the bargain schema and a problem about the identity of parties can be explained. When *M* sets a promise for *F* of LI_{1f} within an offer and *F* makes a promise to *M* of LI_{1m} in exchange, there not only must be the happy nexus of correct beliefs about the contractual intentions, but also the addressed parties must be those engaged in the exchange or bargain. So when there is a unilateral mistake (B)(5a), it broadly has this shape: $MprFLI_{1f}$ for LI_{1m} and $QprMLI_{1m}$ for LI_{1f} . If parties believe that they have an agreement, they are in error and the agreement is void because *Q* is an intruder in the bargain. Of course, a *range* of addressees is possible, but it must be a part of the structure of the offer as addressed. The classic analysis explains why contracts are void when there is innocent unilateral mistake; it is because of misacceptance or misoffer. Either a genuine offer is accepted by someone for whom it was not intended or there is the "acceptance" of some offer that was not made.

The estoppel safeguards help explain why fraudulent contracts are voidable as part of what John Rawls might call partial compliance theory.⁶¹ Such a theory tells one what to do when something has gone wrong; the real world fails to fit the ideal when people generate mistakes intentionally, and some policy must determine

59. See CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 226 in which the writers express doubt as to whether an innocent mistake can be unilateral. See notes 100, 102-04 *infra* & accompanying text.

60. *Id.* at 226-30.

61. See J. RAWLS, A THEORY OF JUSTICE 8 (1972).

what is to be done. It will be a compromise, as these things tend to be, resulting in the voidable agreement. But its visage is not wholly foreign to its genesis.

Two English cases illustrate how the bargain ideal will appear in this context. In *Boulton v. Jones*,⁶² Jones addressed a written order to Brocklehurst for leather hose. Boulton, who recently had taken over the business, filled the order. Jones refused to pay on the ground that he had intended to deal with Brocklehurst. The identity of the offeree was important to Jones because he intended to set off the cost against debts owed by Brocklehurst. Did Boulton know of Jones' intention to deal with the former owner, Brocklehurst? It was established that he did know, but that he discounted it. Jones was successful in establishing that the contract was void ab initio; Boulton, though at Brocklehurst's former location, had no right to accept the offer and fill the order. There was no fraud; as it was a case of innocent unilateral mistake, there was no bargain.

*Lindsay v. Cundy*⁶³ is a case in which a person pretended to be someone else. Blenkarn, the villain, sent an offer to Lindsay for some goods. He made his signature appear to be "Blenkiron & Co." and gave the true street name, but his own number on that street. After Blenkarn received the goods, he sold them to a third party. Lindsay sued the third party for conversion. The defrauded person was the addressee of the offer, but from whom did the offer come? If it "must" have come from Blenkiron & Co., there would be no contract for there was no offer from them. But if Lindsay is thought to deal with *the party at the address given*, then there was a contract for there was an offer from *that* party. The House of Lords, unanimously reversing the trial judges, held for the first understanding;⁶⁴ the legal consequence was that, because there never was a contract, the third party was liable for conversion:

[H]ow is it possible to imagine that in that state of things any contract could have arisen between the Respondents [Lindsay] and Blenkarn, the dishonest man? . . . With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever.⁶⁵

62. [1857] 2 H. & N. 564.

63. [1876] 1 Q.B.D. 348.

64. *Cundy v. Lindsay*, [1878] 3 App. Cas. 459.

65. *Id.* at 465.

Here the bargain ideal actually draws together the failure to know with whom one is dealing and the absence of contractual *consensus*. That is, if *M* is dealing with *Q*, there is no way his mind could meet with *F*'s such that both *M* and *F* would share a true second-order belief that promises had been exchanged. Thus the bargain ideal is very much behind the rule that there actually be an existing person whom the fraudulent person purports to be, as when Blenkarn purports to be Blenkiron. The court then will point to the failure of that extraneous party to be *in agreement* with the defrauded person and be able to conclude that there could not have been *an agreement* between them.

VIII. THE OBJECTIVE THEORY OF CONTRACT AND THE OBJECTIVE TEST OF AGREEMENT

It is difficult to find first-rate statements. Holmes, who accepted objectivity, writes: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, [the law] must go by externals, and judge parties by their conduct."⁶⁶ Can this mean that when the actual intention of the parties is known that *that* will be irrelevant? Or is its basis the different view that "internals" never can be known by anyone? Arguments from the Devil's ignorance seem to assume that state; Chief Justice Brian is quoted favorably by Cheshire, Fifoot, and Furmston for his 1478 statement "that the intent of a man cannot be tried, for the Devil himself knows not the intent of a man."⁶⁷ But if that is true (I do not think that this was Holmes' view), then obviously there is only one kind of approach, and call it either subjective or objective, it cannot matter with respect to finding the intent of a man. But I will not follow Brian on this point; I shall assume that sometimes the Devil knows the intent of man and that he has sometimes even known when he agreed with men's thinking. Thus, if it is not to assume too much, what the Devil knows so might we.

The question must be which approach, the subjective or the objective, will be most congruent with what I have called the classic bargain theory of contract. I have gone into detail about the law of mistake to show that it is very companionate with a bargain

66. HOLMES, *supra* note 23, at 309. This statement occurs in Holmes' remarkable reconstruction of *Raffles* in which he completely ignores the judges' justifying their decision by the absence of *consensus ad idem*.

67. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 20 (citations omitted).

schema; of course, having certain safeguards attached is necessary because the failure in agreement may be due to certain acts of deceit or carelessness upon a contractor's part. The objective approach sometimes is understood to be nothing more than this: when such deceit or carelessness exists, the responsible party is estopped from relying upon the failure *in agreement* even though it is the truth. For example, the words of Judge Blackburn in *Smith v. Hughes*⁶⁸ show this understanding:

I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke*. . . . If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.⁶⁹

So "if the parties are not *ad idem*, there is no contract, unless" The elipsis provides a place for the evidence that an estoppel should be imposed upon someone who is attempting to take advantage of his own indifference to the grounding of a bargain in genuine agreement. This sort of objectivity is no threat to a bargain theorist. It does not rest upon a general devilish scepticism about intentions; in point of fact, there is in it a direct claim to *know* about the relevant *subjective* condition, as it was at the time, of the *actually* deceitful or careless party, as well as of the innocent party, who *had a real belief* which was a reasonable one upon entering the contract. Of course it is a hazard of the bargain schema, as elsewhere, that someone might try to cheat with it; as is stated in *Tamplin v. James*,⁷⁰ "the Defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupu-

68. [1871] L.R. 6 Q.B. 597.

69. *Id.* at 607.

70. [1880] 15 Ch. D. 215.

lous."⁷¹ But safeguarding against hand waving cheats is to be distinguished from self-slaughter to avoid cuckoldry. Thus the first quite important conclusion is that the objectivism introduced as a criterion for estoppel is nothing more than a demand that parties in a dispute declare reasonable beliefs and an inhibition of those persons who would try to take unreasonable advantage of contractual defects of their own creation. A standard of reasonableness enters here, not through an objectively underinformed outsider "who comes to it without any knowledge of what actually happened," but through an assessment of actual beliefs as they are recognized to be. Such actual subjective beliefs may not be allowed legal effect if they are judged to be unreasonable. This form of bargain-suited objectivism will be called *the requirement of subjective reasonableness*. Someone not satisfying that requirement is estopped in his endeavors.

The best objectivism begins from another set of facts and not from scepticism, deceit, or carelessness. As Corbin puts it: "[O]ne may be 'bound' by a contract in ways that he did not intend, foresee, or understand. The juristic effect (the resulting legal relations) of a man's expressions in word or act may be very different from what he supposed it would be."⁷² This ignorance is not that to which the sceptic points (because one may remove it by legal learning) and it need not be from carelessness (because not everyone may study law).

The possibility that one might be committed to certain unforeseen consequences of contracting occurs because one has placed oneself into an objective, institutional structure by the exercise of that power of acceptance that obligates the offeror. But one must stress that these are the consequences or the entrainments of lawful contracting and need play little or no role in the *formation* of a contract between *M* and *F*. Thus writers such as Corbin who mention the objective character of a contract have in mind a commitment more constraining than may be appreciated initially by the contractors themselves. Think of what most people actually know of the contractual responsibilities of legal infants. If "objectivity" here refers to what it is like altogether to have a contractual relationship, then objectivity is quite compatible with a coordinated subjective test of contractual intentions. That is, one may be a legal institutionalist and observe, like Corbin (rightly, I believe), that

71 *Id.* at 217-18.

72. 1 A. CORBIN, CONTRACTS, § 9, at 21.

commitment may overreach (and even underreach) that about which the parties had reached subjective agreement, yet still require some reasonable depth or extent to it. It would be incredible that an objective theory could be thought to allow in one breath a *bargain* within which there was a total conscious lack of consensus at any plausible level.

There can be an objective theory of contract (and of an agreement) that stresses the institutional structure into which contractors step, and an objective test of agreement that establishes the way in which parties to a contract need not actually be *in agreement*. The theory need not entail a hard objective version of the test in which it is announced that the law cares not for what a man believes he promises or for what he thinks he has been promised in return. One may contrast a theory with a test here because, before any testing is possible, one requires theories (rule-systems) representing institutions such as that underlying *having an agreement*; once the theory of the institution is laid down, there can be tests of recognition.

Being in agreement leans heavily toward the side of brute facts (facts that might be described without the evocation of any rules defining an institution). Then one merely tests for them, as when one attempts to determine whether two people can be said to have the same belief-propositions true of them. There may be different ways of testing for brute facts, some more probing than others, some more susceptible to deception than others, some very effective but morally unacceptable, and so on. Often, then, when writers urge an objective test of agreement, they mean that one must adopt a testing technique of a certain kind rather than another. One of the worst techniques must be uncritical concurrence with the responses of an interested litigant. But it would be unfair to saddle a subjectivist with that kind of foolishness. So it would be equally strange to say that what someone really intended is wholly irrelevant to the issue of whether or not he made a bargain. That is, it would be quite *possible* to test like that for a contract, but thereafter all talk would be misleading of the "price of the promise" theory of consideration, the *nexus* in the communicated acceptance of communicated offers, and generally of reciprocal inducement.

There can be no serious dispute about the objective *theory* of contract; there is no point in trying to imagine exactly what a subjective theory would say, but to be interestingly different it would require attacking the idea that contractors enter upon a rule-following activity, the rules of which define the very comprehension

that one may have of what is being done by contractors in their interaction. The classic bargain process described in Sections II-IV is the deep ideal of that structure; brought to practice, it requires certain further rules to safeguard it. If this argument is accepted, the *objective test* of whether or not the contractors are in agreement must be the focus of my criticism.

This objective approach, understood as testing for the existence of the contractual *nexus* by means of the judgments of reasonable but underinformed persons, is hostile to the classic bargain theory, however rarely this seems to have been recognized by its advocates, amongst whom are Holmes⁷³ and Williston.⁷⁴ Looking to reasonable third parties is departing from the classic estoppel solution. Corbin is remarkably clear in contrasting these two kinds of tests:

[The parties] are bound in accordance with the meaning that reasonable third parties would give to their expressions without regard to the meaning given by either of the parties themselves. The actual decisions do not justify this statement.

It is certain that the purpose of the courts is in all cases the ascertainment of the "intention of the parties" if they had one in common. The court may be convinced that they did so, in spite of their conflicting assertions in subsequent litigation.

.....
In the process of making a contract, the actual and proven intent of either of the parties should not be disregarded, unless he knowingly or negligently has misled another person to his injury. If no other person has been so misled, it should make no difference what expressions would have been chosen by other reasonable or intelligent users of language or what meaning the expressions actually used would have conveyed to such third persons.⁷⁵

Why should one turn toward that hard objective test rejected by Corbin and away from the requirement of subjective reasonableness, in which it is asked whether the recipients of promises given in the formation of bilateral contracts had reasonable beliefs about what they were being promised? It could be the influence of that devilish scepticism mentioned above, yet this is doubtful; Holmes seems to have assumed that for the purposes of moral judgment, though not the law, one does pass upon inner states of mind.⁷⁶

73. See note 66 *supra* & accompanying text.

74. See Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919).

75. 1 A. CORBIN, *supra* note 72, § 106, at 476-77 (footnotes omitted).

76. See HOLMES, *supra* note 23, at 80 & 135.

Whether it is scepticism or not at the backdrop, the assumption is made that the reasonable third person brings to attention certain common, publicly knowable standards to assess the manifested situation of the litigants. The *consensus ad idem* test is the natural one; imposing community standards to find intentions is unsuited to the classic bargain ideal. As a strong solution to the admitted hazards of the subjective test, the hard objective test imposes public standards, thought to be more easily known than people's real consent. One explanation could be that a more cautious scepticism than that required by the argument from the Devil's ignorance is coupled with a philosophy of public standards. Undoubtedly, bringing such standards to contract, however appropriate in tort, is classically uncontractual. Bringing public standards to contract is something that is done (through illegality, capacity, etc.) but the question here is whether it is appropriate to bring them in *now*, at the terms, when seeking people's contractual intentions.⁷⁷

Hard objectivism in testing for consensus is first of all an expression that judges and jurors, like the rest of mankind, do not read minds. Indeed, one looks instead to what was done, said, and written down. In doing this the civil judge and juror are of course in no different predicament than anyone else, notably the criminal judge and juror. Yet the latter must arrive at plausible beliefs about what was true inwardly (subjectively) respecting certain accused persons.⁷⁸ Of course, ordinary people in making judgments about someone's moral character must do the same sort of thing.⁷⁹ Thus, hard objectivism is not legally tenable, at least not without some further justification that would constrain it to the law of contract, or at most entirely to the field of civil law. The justification for this could come in the form of a theory of public standards of civil responsibility. Such standards would be distinguishable from those of the criminal law by the total absence of subjective requirements. Though the evidence is not strong for the following idea, it does seem that there is a profound association in the minds of some lawyers between the

77. Of course, my thesis is not that one never must do this; my thesis is that it must be recognized as ill-suited to the classic bargain theory.

78. In England when, in the House of Lords, it was said to be otherwise, as in *D.P.P. v. Smith* [1961] A.C. 290, Parliament stepped in with the Criminal Justice Act 1967, c. 80, § 8, to expel the reasonable man.

79. Sometimes those who describe the situation in the civil law, and especially in the law of contract, seem to forget these facts when they flirt with rather extreme forms of behaviorism, which if true would render much of the theory of criminal law and morality epistemological nonsense.

lower standard of proof required in the civil law and hard objectivism; that is, because the law of contract focuses upon "outward manifestations of assent," the balance of probabilities standard is quite good enough and the appropriate one for the scrutiny of such "phenomena."⁸⁰ However, there is no necessary connection between that which is a subject matter of examination and the level of evidence that should be applied to it. One could have a low standard *vis à vis* some very difficult subjects or a very high standard for the easy problems. If there is a justification for non-subjective contract law standards, it will be by establishing grounds for the elimination of the influence of the bargain ideal.⁸¹

The second matter that should be examined before turning to writing is the argument from postal acceptance. For sheer popularity, nothing can beat this argument for purporting to prove that contract law is objective.⁸² In *Byrne v. Van Tienhoven*,⁸³ an offer to sell some goods was mailed on October 1. Atiyah writes:

This letter was received and a telegram of acceptance was dispatched on 11 October. Meanwhile, on 8 October, the offeror posted a withdrawal of his offer, but this did not reach the offeree until 20 October. It was held that the dispatch of the telegram of acceptance completed the contract despite the fact that *at that time* a revocation was already on its way. The case is a striking illustration of the objective approach of the law of contract, for in actual fact there was *no moment of time at which both parties* were agreed on the making of the contract⁸⁴

Notably, this argument does not rest upon a general devilish scepti-

80. See generally CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 20.

81. The purpose here is not to defend that ideal, but to make it clear so that its implications can be observed easily. The following quotation is useful for that purpose.

The "actual intent" theory, said the objectivist, being "subjective" and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the "objective" standards as a necessary adjunct of a "free enterprise" economic system. In passing, it should be noted that they arrived at a sort of paradox. For a "free enterprise" system is, theoretically, founded on "individualism"; but, in the name of economic individualism, the objectivists refused to consider those reactions of actual specific individuals which sponsors of the "meeting-of-the-minds" test purported to cherish. "Economic individualism" thus shows up as hostile to real individualism.

H. BERMAN & W. GREINER, *THE NATURE AND FUNCTIONS OF LAW* 585 n.1 (1972).

82. See, e.g., ATIYAH, *supra* note 3, at 47; CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 42-43; ANSON, *supra* note 41, at 46-47.

83. [1880] 5 C.P.D. 334.

84. ATIYAH, *supra* note 3, at 47 (emphasis supplied).

cism. It is thought to be *known* that the parties were *never* in agreement; one must not confuse not knowing subjective states with knowing what subjective states are not. It is known, says Atiyah, that the parties were not in agreement at any same moment in time. The heart of the argument is that the law tests agreements objectively because, although there was a failure to be in agreement at the moment of acceptance, an agreement was effected between them.⁸⁵

Institutional rules define the relevance of purely factual matters to the institution. Lawyers understand the difference when they talk of legal facts and non-legal facts; for example, whether "this is a stolen good" is not something that is merely a matter of fact like "this is a rock." Yet if the rock is stolen, that mere matter of fact is made relevant by the institutional rules that surround legal conceptions (ownership, property, thief, possession, etc.). Hence it is a mistake for a charge of possessing stolen property to be levied against someone if the previously stolen property is in the possession of the police at the time the offense is said to occur.⁸⁶ Lawyers speak of legal impossibility in such a case. But there is the "property" itself, in the layman's non-legal brutish sense of the term.⁸⁷ It was suggested earlier that *being in agreement* inclines very much to the brute side of things and that *having an agreement* is very much an institutional fact. If a set of institutional rules is perfectly harmonious in its applications to the world, the understanding of the relevant brute facts could remain quite unaffected by the institution. But if the rules of the institution do not mesh all the time, there might be some distortions of the purely brute character of the relevant, typically non-legal facts. The rules in the law of contract

85. One might take advantage of the fact that nothing more is being attempted in this Article than a description of the idea of a bargain within the law that gives that notion its fullest expression. So I could argue that some other theory of contract law is behind the rule about postal acceptances. But such a maneuver seems to me unnecessary; it might be required of the so-called "will" theorist who insists that for an agreement to exist the parties must have been in agreement at some same instant of time. See Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 807-08 (1941). The rule about postal acceptance does "refute" that theory of contract. My question is whether it refutes the requirement of subjective reasonableness and the bargain theory of contract. To believe that it does, in my opinion, is to misunderstand the way in which institutional rules, which define the structure of an agreement and indicate how it is to be reached, can interact with brute facts, of which being in agreement is an example.

86. See, e.g., *Booth v. State*, 398 P.2d 863 (Okla. Crim. 1964).

87. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913).

concerning the requirements of communication of offer, acceptance, and revocation do occasionally conflict or produce indecision.

When the method of communication is noninstantaneous, as with the post, a disharmony is produced if a notice of acceptance reaches the offeror at the same time a revocation by the offeror reaches the offeree. Which is to be effective, the acceptance or the revocation? Is the resolution of this indecision in favor of the offeree by allowing the act of posting to be dominant a proof of objectivism in the hard sense? Does that so distort the ideal of *consensus ad idem* that one must declare that what the parties actually intended is quite irrelevant, and perhaps (in the interests of business certainty)⁸⁸ even undesirable to consider? To believe that hard objectivism is entailed by this sort of institutional metarule for the resolution of rule conflicts is quite wrong.⁸⁹ One still may remain quite interested in what the parties were thinking when they offered and accepted; the objective underinformant does not get a market for his intelligence so simply.

To explain just how minor the distortion of "in agreement" must be to save face, I will refer to the Hohfeldian analysis mentioned in Section I. According to that analysis, the offeror, in making an offer, places himself under a liability of having a duty imposed upon him by the offeree's acceptance.⁹⁰ Accordingly, there is an instant of time at which a power (of acceptance) is created and there is another instant when an obligation or duty is created (by the act of acceptance). The institutional rules permit contractual offers to have lives; otherwise all communication would have to be instantaneous. Offers remain open until there is an effective revocation. Think of what it is then to be in doxastic or attitudinal agreement. Why must it be required, on pain of hard objectivity, that an appropriate test must fix the belief states of the offeror at the time the offeree accepts (creating the obligation) rather than at the time the offer was made (creating the power)? If *M*'s offer carries with it a certain

88. As for business certainty, G. H. Treitel says:

The rule is in truth an arbitrary one, little better or worse than its competitors.

When a contract is made by post, one party or the other must for some time be in the dark as to the precise moment at which the contract becomes binding.

English law favours the offeree and chooses to leave the offeror in the dark.

G.H. TREITEL, *THE LAW OF CONTRACT* 23 (3d ed. 1970). So there is going to be some uncertainty and some certainty when communication is slow.

89. One must ask exactly what a *legal rule* is; what I have referred to as a *metarule* is often given as a paradigm of a legal rule. See Dworkin, *Judicial Discretion*, 60 J. PHIL. 625 (1963).

90. See notes 1 & 87 *supra* & accompanying text.

proposition and *F*'s acceptance, which establishes the contract, carries the same proposition, why might someone feel that the parties may not be in agreement in a brute fashion quite suited to the institution of having an agreement?

No one who accepts the bargain conception of contract *could* take the view that the content of an offer may just float about until the moment of acceptance. Of course this life capacity may have the consequence, when the actual mind of the offeror is changeable, that there may be no instant of time when parties were in agreement. But is it necessary at all to being *in agreement* that there always be (surely there *may* be) such instants? Philosophers regularly express their agreement with persons long dead, the Platos and the Kants, even though their lives never overlapped an instant with these men. But are not these philosophers nevertheless in agreement? Being in agreement is essentially a matter of a coincidence of attitude and belief propositions. Having an agreement is necessarily a relation between persons; though one may agree with the dead, one may never have an agreement with them. The type of "*in agreement*" therefore required for the bargaining institution is hardly a distortion from the normal brute situation at all in which two living people think alike at some moment. Therefore the popular argument from postal acceptance totally fails to establish an objectivism in which the belief-states of offerors and offerees are irrelevant to the question of whether or not they had *an agreement*. Finally, to test the reasonableness of someone's subjective belief is not to be indifferent to his belief; it is that *subjective* state which is the very subject of an evaluation.

IX. WRITING AND PAROL EVIDENCE

The lawyer who accepts the theory of hard objectivism as a matter of course will do so partly because of his understanding of the consequences of a writing. The purpose of this section is to examine the lawyer's natural inclination to accept hard objectivism.⁹¹

91. The central argument throughout the preceding part of this article has been grounded upon an appeal to what might be called conceptual intuitions. The reader has been asked to see the incompatibility of the very ideas of reciprocal consideration and reasonable observation, and to recognize that a bargained-for exchange of mutually induced promises cannot be rightly understood as something better known to the non-involved underinformant who had no part in the dealing himself. A more empirical route to this conclusion would be through an examination of the rules of *interpretation* used by courts to settle questions over the meaning of written terms. The question one asks about each rule is whether it is designed to find the meaning as it would appear to the objective observer. What one might expect to

When there is a writing and each party has put his or her name, ecks, or mark to it, is there no defense available to someone who thereby agreed without being in agreement? That which would permit essentially a zero depth is no obvious friend of the ideal of well-considered exchanges. J.R. Spencer writes about hard objectivity:

It is a platitude to say that the law of contract exists to enforce agreements, and that agreements are what people have agreed to do, not what officious people with no interest in the matter would think they had agreed to do. It may be acceptable for the law occasionally to force upon *one* of the parties an agreement he did not want; but surely there is something wrong with a theory which forces upon *both* of the parties an agreement which *neither* of them wants.⁹²

The reasons one party may end up with what "he did not want" is that he may be estopped from relying on his own wrong and so be held to an agreement he would have preferred to escape. But the consequence that both parties may be held entirely to terms that neither intended is certainly anti-bargain *and* is implied by the possibility of officious intrusion. But Spencer's bullet has been bitten, as the following quotation by Lon Fuller demonstrates:

The principle of private autonomy [the bargain ideal], properly understood, is in no way inconsistent with an "objective" interpretation of contracts. Indeed, we may go farther and say that the so-called objective theory of interpretation in its more extreme applications becomes understandable only in terms of the principle of private autonomy. It has been suggested that in

find here is legal ambivalence; if so, for my argument, I need no more. The bargain ideal has worked a powerful influence, but it does not explain everything. Thus, the tensions present in a non-univocal law of contract are pointed out below.

Consider the *ejusdem generis* rule: "The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply." ANSON, *supra* note 41, at 150. Or consider the rule: "The words of written documents are construed more forcibly against the parties using them." *Id.* Anson remarks that these rules are not rules of law and are "therefore subordinate to the parties' real intention." *Id.* They are hard objectivist rules; another rule quoted in Anson is subjectivist in its mood:

"An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the *whole of the agreement*, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."

Id. at 149, quoting *Ford v. Beech*, 11 Q.B. 852, 866 (1848).

92. Spencer, *Signature, Consent, and the Rule in L'Estrange v. Graucob*, 32 CAMB. L.J. 104, 113 (1973).

some cases the courts might properly give an interpretation to a *written* contract inconsistent with the actual understanding of either party. [Here Fuller cites 1 WILLISTON, CONTRACTS § 95 (rev. ed. 1936).] What justification can there be for such a view? We answer, it rests upon the need for promoting the security of transactions. Yet security of transactions presupposes "transactions," in other words, acts of private parties which have a law-making and right-altering function.⁹³

Fuller and Williston accept the possibility of a bilateral distributive mistake in which each party errs as to his personal contractual intention—the variant possibility of (A) (ii-4). Of course, it is my view that the bargain theorist will want that kind of mistake to have a legal effect; Fuller and Williston presumably do not, at least not when the contract is in writing.

The parol evidence rule can be stated in such a way as to be a virtual tautology:

When the terms of a contract are set forth in a writing which the parties regard as the complete agreement between them . . . , evidence of prior agreements, statements, promises, or negotiations, whether oral or in writing is not admissible for the purposes of contradicting or adding to or varying the written contract.⁹⁴

That is logical.⁹⁵ The interesting question is whether one party may be allowed against the other to alter, abrogate, or augment in some way the plain sense of what was written by arguing that was not his (or their) meaning or intention. Whatever is used as the ground of his argument, whether parol evidence or new additional writing, what force can it be allowed in his defense? The question of the "completeness" of the writing is of most interest if new writing is brought in; if parol evidence is presented the question probably will be over the bearing of the disagreement between the writing and the word. Of course, the defendant's contention may be either that the writing was meant to be supplemented by the oral matter or that there is some inconsistency between what was signed and what was

93. Fuller, *supra* note 85, at 808 (emphasis supplied). What Fuller calls the principle of autonomy is mainly the bargain ideal, in my opinion.

94. A. COPPOLA & H. KATZ, *THE LAW OF BUSINESS CONTRACTS* 91 (1975).

95. "A good indication of the confusion surrounding the rule is the insertion in a contract of a provision declaring that no agreements other than those in writing have been made. If the writing is complete, other agreements cannot be shown and if incomplete, they must be shown." Comment, *The Parol Evidence Rule: A Conservative View*, 19 U. CHI. L. REV. 348, 353 n.25 (1952).

said.⁹⁶ The issue is not rectification because the parties disagree and are not merely asking the court to make the document consistent with the prior agreement.⁹⁷

Now the question should be whether the courts have been influenced by the bargain ideal in their handling of parol evidence or whether the approach has been entirely hard objectivist. If one took the view that whatever one signs is that to which one is committed, then clearly there would be complete indifference to the subjective states of contractors. That, however, has not been the position of the courts. For one obvious counter example, there is the ability to rectify what has been written should the parties be in agreement that this should be done and should the court accept their word. When this happens there is a clear case of a court not forcing something upon both parties which neither of them wants. Another type of counterexample is "collateral warranties" which have

been held to exist in defiance of the terms of the written contract where one party has made it clear that he will not enter into the contract unless a term contained therein will not be enforced or where the principal agreement contains an exemption clause which he is assured will not be relied upon.⁹⁸

It is these latter sorts of situations, having an adversarial character, which must be considered. One thing can be said with certainty about oral evidence as against written. It is less reliable as truth, especially when given by an interested defendant attempting to escape the document's unattractive obligations. Also, if parol evidence is accepted, it is done so on subjectivist grounds, that is, the court in this context does *not* say that a reasonable man would have expressed orally that which now is claimed to establish an unwritten contractual right or obligation at variance with the document. Courts do not believe or test parol evidence objectively; if they believe it at all, they believe it is true. One must remember the distinction between saying that *M*'s belief, *X*, was reasonable and saying that *M* will be taken to have believed *X* because a reasonable man would have believed *X*. The former subjective approach is compatible with giving legal effect only to reasonable beliefs.

Will courts ever give this kind of subjectivity any legal effect?

96. As, for example, if the plaintiff had said that he would not enforce the exemption clause appearing in the standard form that the defendant signed.

97. See *CHESHIRE, FIFOOT & FURMSTON*, *supra* note 5, at 217-19.

98. *ANSON*, *supra* note 41, at 128 (citations omitted).

They may; in cases involving rectification or collateral warranties, no call is made upon hard objectivity. This is so obviously true in the former as to require no argument;⁹⁹ the latter is perhaps less obvious. The argument here would be that the extent to which parol evidence is admitted in the face of a written document is the extent to which there is the influence of the classic ideal. Although courts may incline to favor the written word over the spoken in litigation, this is simply because, *prima facie*, it is better evidence about the subjective intentions that existed; this judicial inclination can be stated as a rule of law and as such it can be seen as an aspect of the institutional practice. However, the parol evidence rule is conveniently flexible and does not preclude the discovery of a collateral contract that can modify frankly the terms of the principal contract; this maneuver is a tribute to the bargain theory of contract. The practice is designed to bring the contract back to the true intention of the parties when no rectification can be agreed upon.

What of the person who signs without reading or without even asking for some explanation? The normal rule is that he or she is bound; litigants cannot rely on their own carelessness. Yet this constraint is better understood as a safeguard upon the ideal of contractual *nexus* than as an attack upon it. But there is the defense of *non est factum*. For example, imagine *M* is told that the contract he earlier examined is on the kitchen table for his signature. He signs without reading. It is a completely different document. He can plead *non est factum* and nullify the contract. Similarly, if his signature is acquired by fraud or misrepresentation, the contract may be repudiated, although this time it will not be void *ab initio*.

In summary, the magic thought to be in writing and the parol evidence rule are signs of two objectivisms of the hard objective test of agreement as well as the innocuous objective theory of contract. The anti-bargain elements of the former are undoubtable, but equally undoubtable are the influences of the bargain ideal in permitting rectification and collateral contracts. Even the person who signs without reading has escape routes and liabilities that are (excepting *non est factum*) identical to the safeguards and liabilities of the bargain ideal. Just as lack of *consensus ad idem* will not harm a contract when there has been indifference or carelessness on the part of the person trying to avoid or repudiate it, so, with equal force, carelessly signing an unread document will not free one from

99. CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 219.

the contractual obligation. Both estoppels reveal a failure to be in agreement, and though such agreement is essential to the pure ideal of bargain theory, practical justice must be reckoned with. Similarly, in cases of fraud and of misrepresentation, the contract becomes voidable whether it is written or oral. Is the parol evidence rule friend or foe of the bargain ideal? It seems that it is far friendlier than some lawyers are inclined to think.

X. POSTSCRIPT ON "UNILATERAL MISTAKE"

In conclusion, I shall make several observations, as promised, on the odd handling of unilateral mistake in the English textbook by Cheshire, Fifoot, and Furmston. The oddity is the epistemic rider that is added that one side must be taken to know of the other's error or else the mistake is "mutual." They say that "[i]f B is ignorant of A's erroneous belief, the case is one of mutual mistake, but, if he knows of it, of unilateral mistake."¹⁰⁰ But, on the contrary, ignorance is not erroneous belief. Thus when *M* does not know of *F*'s error, the mistake is not necessarily bilateral; only one party, *F*, is in error, and the other party merely lacks knowledge.

In distinguishing (A)(ii-4) from (B)(4) in Section V, it was noted that for (B)(4) types to exist independently there must be a well discerned subject matter to serve as a contractual groundpoint about which one party is right and the other wrong. In the different circumstances of (A)(ii-4) the problem is a failure of *nexus* and each side (in usual cases) is equally "right" about his or her own intentions. The actual difference then between unilateral mistake ((B)(4)) and mutual mistake (Cheshire, Fifoot, and Furmston) turns on whether there is a definite subject matter; when parties are at "cross-purposes," as it is sometimes put, there is no such groundpoint and the mistake cannot be unilateral but *must* be two-sided because each errs about the other.

If the epistemic rider is not required for correct conceptualization, of what use is it? Anson's use of "unilateral mistake" is entirely straightforward: "[T]he mistake is on one side only."¹⁰¹ Usually when one person knows of another's error but does not tell him, there is something untoward going on. In fact, not telling is the sort

100. *Id.* at 203. In point of fact, the textbook actually goes further than this statement in that the epistemic rider is treated as both sufficient—as above—and *necessary* to someone's mistake being unilateral.

101. ANSON, *supra* note 41, at 273.

of "one's wrong" of which courts regularly estop people from taking advantage. Consider that there is a kind of continuum of wrong, from conniving, conscious deceit to blind indifference. The epistemic rider on unilateral mistake forces cases of it toward the "conscious" end of the continuum, which explains the preponderance of rogues and fraudulent persons in *Cheshire*, *Fifoot*, and *Furmston's* discussion of this mistake.¹⁰² The consequence is that the "mutual" mistake cases, (A)(ii-4), tend to the "indifferent" end.¹⁰³ In many of these cases, the defendants, though oblivious to the plaintiff's error, are found to have had some responsibility for it and so are estopped from escaping the agreement on the ground of mutual mistake. In short, there is a family connection between the epistemic rider and the estoppel safeguards of the bargain theory.¹⁰⁴ So the remarkable fact is that the (B)(4) situation is the form in which the consensus-estoppel cases appear; that is, one side errs about a definite subject matter and the other for some reason is unaware of the error while being aware of the groundpoint. The approach of *Cheshire*, *Fifoot*, and *Furmston* conceals this form of situation and resolves likely cases into either (A)(ii-4) or (B)(5a), that is, distributive bilateral mistakes with respect to contractual intentions (there is no groundpoint) or into ones of unilaterally mistaken personal identity (in which contractual intentions need not even figure). But cases of one-sided mistakes over contractual intentions, (B)(4), are the ones manifesting estoppel safeguards because there is a subject matter about which error occurs and the courts decide who must take the responsibility for the defect in agreement. What *Cheshire*, *Fifoot*, and *Furmston's* rider does is bifurcate the various bases for estoppel (the wrongs) and conceal the importance of cases where there is an established subject matter about which only one side errs. This is done to secure hard objectivism by making the bargain ideal seem less used, if not rather inapplicable, as a general theory. Because the theory in *Cheshire*, *Fifoot*, and *Furmston* is launched upon a fallacy, the rest is suspect; the authors' "mistake," I would urge, should remain upon their side only, is not something of which we need remain unaware, and is a wrong for which they must take responsibility, at least in the eye of the devotee of the bargain ideal.

102. In discussing *Boulton v. Jones*, 2 H. & N. 564 (1857), a clear case of innocent one-sided error, they remark: "But on the facts as a whole it is perhaps more reasonable to treat the mistake as mutual." CHESHIRE, FIFOOT & FURMSTON, *supra* note 5, at 226.

103. *Id.* at 221-23.

104. See *id.* at 20, in which the writers promote hard objectivism and treat *consensus ad idem* as a foreign import or, if not that, as at least a mystical aberration.