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Peter A. Alces
William & Mary Law School, paalce@wm.edu

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CONTRACT RECONCEIVED

Peter A. Alces

Nature, as the saying goes, makes no jumps and passes from extreme to extreme only through a mean.

John Ray

I. INTRODUCTION

The context of exchange determines the substance exchanged, and context is the expression of relation. That conception of the province of Contract reformulates doctrine in a way that implies the operation and cooperation of the elements of exchange in a manner not appreciated by the current models. The revised perspective, a reconception of the substance and function of the basic building blocks of Contract, reveals the evanescent but, paradoxically, substantial foundation of the law governing the enforcement of promises. Principles of philosophical naturalism confirm the coherence of this reconception.

We have a good deal to learn from conceiving of Contract as akin to science—from formulating the fit between Contract jurisprudence and the "scientific" form of inquiry to reveal the limits of our explanations for why and when promises bind. While there is a developed vocabulary to inform

* Rollins Professor of Law, The College of William and Mary School of Law. I thank those who attended colloquia at the Washington and Lee University and College of William and Mary Schools of Law where drafts of this paper were presented and, specifically, my colleagues Richard Hynes, Alan Meese, Alemante Selassie, David Snyder, and Cynthia Ward, whose reactions to previous drafts and conversations with me contributed to the finished product. I am, of course, solely responsible for the deficiencies that remain.

1 JOHN RAY, Preface to METHODUS PLANTARUM (1682).

2 Understand that the Contract "science" posited here is not a reprise of the "science" of the Nineteenth-century formalists, whose scientific aspirations...were based on the idea that legal principles were "out there," beyond the reach of conscious decision-makers in the same sense as the principles of natural science. The formalists believed that the task of legal scholarship was to describe those principles, and then construct prescriptions that would be fully dependent on them.

Edward L. Rubin, Law and the Methodology of Law, 1997 WIS. L. REV. 521, 525. The argument advanced here does not hold out hope for an immanent law awaiting discovery. Instead, the argument of this article is for reconception of the elements of Contract in a manner that would facilitate focus on the elements' interrelation in order to provide a means to appreciate degrees of promise enforcement rationalized in terms of the extent of the damages avoidable.

For discussions of the formalistic legal "science," see Thomas Grey, Langdell's Orthodoxy, 45 U.

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the Contracts pedagogy, the lack of descriptive (and prescriptive) precision frustrates efforts to order Contract theory in a manner that would distinguish change from progress. When the object of scientific inquiry provides a template, the fabric of Contract becomes manifest in epistemological patterns that accommodate a richer sense of the fit among the values, principles, and rules that inform resolution of recurring controversies.

You get the sense from Paul Hoyningen-Huene's construction of science:

The following may be said about all science, whenever conducted:

—Science studies nature, or the world.
—Science aims at an understanding of nature or the world which captures its order with maximum precision and universality.
—Science's orientation toward this goal demands that it search for a set of propositions exhibiting maximal internal coherence and maximal correspondence with nature or the world.
—Science is mostly detail work; it strives toward its understanding of nature or the world by way of precise understanding of the individual aspects of nature or the world.
—Science proceeds empirically; in other words, the acceptability of propositions is strongly regulated by observation and experience.
—Therefore, there exists a universal characterization both of the production methods of scientific knowledge and of the type of arguments that may be used in support of claims to such epistemic status.

To the extent that the word "science" in that excerpt could be replaced by "Contract theory," the sense of science proposed here is captured by Hoyning-Huene's conceptual framework:

3 The vocabulary includes, for example, consideration, offer, acceptance, agreement, capacity, and bargain. These terms are only intended as exemplars of the rational units that have currency in the Contract law. They recur throughout this paper as representatives of the analytical tools that they signify, not as the sum and substance of Contract.

4 Goetz and Scott acknowledged at the outset of their inquiry into the basis of Contract that "common law 'bargain theory' is classically simple: bargained-for promises are presumptively enforceable; nonreciprocal promises are presumptively unenforceable. But this disarmingly simple theory has never mirrored reality." Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1261-62 (1980).


Edward Wilson has also offered conceptions of science:

Science is neither a philosophy nor a belief system. It is a combination of mental operations that has become increasingly the habit of educated peoples, a culture of illuminations hit upon by a fortunate turn of history that yielded the most effective way of learning about the real world ever conceived.

EDWARD O. WILSON, CONSLIENCE 42 (1998). "[S]cience to put its warrant as concisely as possible, is the organized, systematic enterprise that gathers knowledge about the world and condenses the knowledge into testable laws and principles." Id. at 53 (emphasis added).

6 It might likewise be worthwhile to replace the word "nature" with the term "human nature." What remains, though, is to circumscribe the scope of Contract, to determine where Contract ends and some other legal category, perhaps Tort, begins. That distinction is substantial only if there is a fixed or even
Also, replacing the term "nature or the world" with "the enforceability of promises" captures the dual descriptive and normative functions of this reconception: Contract theory's orientation toward the goal of understanding the enforceability of promises "demands that it search for a set of propositions exhibiting maximal internal coherence and maximal correspondence with" the reasons why we enforce promises and the circumstances in which contracts are performed.  

The formulation of Contract theory too is "detail work," no matter the perspective of the Contract theorist. While it may usually suffice to apply rules of general application (the writing requisite, for instance), the apologist for the rule (the statute of frauds) will recite reasons for the rule (perhaps cautionary and evidentiary) that vindicate a more fundamental fixable distinction between the law of consensual and nonconsensual relations. The formulation of that distinction presents a formidable challenge, and one without the scope of this study. For present purposes, to appreciate the parallel between theories of science and theories of Contract, it suffices to recognize that the word "world" in the Hoyningen-Huene excerpt does not undermine the Contract as science proposition. Instead, it saves the same place in science as the term "consensual exchange relations" might in Contract theory.

Similarly, we could conclude that copyright, and perhaps all of intellectual property law, is a Contract system insofar as it orders consensual exchanges of value. While we can say that rules governing consensual exchanges are the stuff of Contract, it is not necessary (indeed, it may be erroneous) to conclude that Contract governs only consensual relations. Consent has become (perhaps never was more than) a label for a point on a continuum at which a court for reasons related in part to the fact-finder's perception of the promisor's state of mind would enforce the promise. It is at best a conclusion, not a particularly worthwhile analytical tool. So it might not shock the conscience of too many to enforce "promises" that are not the product of consent in the colloquial sense.

7 HOYNINGEN-HUENE, supra note 5, at 23.

8 The inquiry might be further expanded to take into account the role of the judicial process in the enforcement of contracts. That would focus the inquiry on theories of adjudication in Contract and, here, is subsumed in a general inquiry into the science of Contract. Courts provide one setting in which promises are enforced, but they are neither the exclusive nor even, perhaps, the dominant form.


9 E. Allan Farnsworth, the Reporter for the Restatement (Second) of Contracts, has explained:

Attempts at justifying the statute of frauds in this country stress the functions of a formality such as a writing. Its original purpose was evidentiary, providing some proof that the alleged agreement was actually made and all its provisions perform this function to some degree. A few provisions perform other functions as well. The suretyship provision performs an important cautionary function, by bringing home to the promisor the significance of the promise and preventing ill-
principle, intent\textsuperscript{10} or consent,\textsuperscript{11} which is in turn vindicated by some even more fundamental value, such as individual autonomy.\textsuperscript{12} The detail work of Contract theory, then, is in identifying the interests implicated in the resolution of disputes arising from exchange relations. That requires an understanding of the bases upon which the assumption of an exchange relation are premised as well as the reasons why those bases maintain currency.

The object of the “detail work” is the identification and elaboration of “a set of propositions exhibiting maximal internal coherence and maximal correspondence with”\textsuperscript{13} extant Contract practices and is “strongly regulated

considered and impulsive promises. The land contract provision performs a significant channeling function, by furnishing a simple test of enforceability to mark off unenforceable agreements from enforceable ones. It is noteworthy that the most durable and well-regarded of the statute’s provisions are those that fulfill more than just the original evidentiary purpose.


Farnsworth developed (or at least, described) the contours of a so-called intention principle in his CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 38 (1998) (“T]he intention to be legally bound is a basis for commitment.”). Professor Farnsworth did not describe intent as the exclusive basis to support commitment; he also found room for the operation of a reliance principle: “‘No one can change his mind to someone else’s disadvantage.’” \textit{Id.} at 2 (quoting Papinian, \textit{in 4 THE DIGEST OF JUSTINIAN} 50.17.75 (Theodore Mommsen & Alan Watson trans., 1985)).

Randy Barnett, for example, has suggested that a consent theory supports Contract, but at the level of values rather than principles. \textit{See} Randy E. Barnett, \textit{A Consent Theory of Contract}, 86 COLUM. L. REV. 269 (1986). Craswell effectively revealed the deficiencies of Barnett’s analysis and conclusion. \textit{See} Richard Craswell, \textit{Contract Law, Default Rules, and the Philosophy of Promising}, 88 MICH. L. REV. 489, 523-28 (1989). But the point here is not that consent, however construed, explains all of Contract; it is only to suggest the relationship between values and principles and among values, principles, and rules. The parameters of that trichotomy are considered in Peter A. Alces, \textit{Regret and Contract “Science,”} 89 GEO. L.J. 143 (2000). Indeed, it is not even necessary, for the purpose of demonstrating Contract as science, to establish certainly the existence of values that generally animate principles that, in turn, animate Contract rules. Jurisprudential analyses of Contract that do not identify viable fundamental values, are even skeptical that there are such jurisprudential units in Contract theory, would still support a Contract as science model. Farnsworth and Craswell each proceed from perspectives not informed by a unitary fundamental value, or at least have noted their inability to identify that value in terms that would advance Contract theory: “My own belief is that no single explanation will suffice and that the answer is a complex mix of explanations that focus on both promisor and promisee. The instances in which promises should be enforced are too varied to be shoehorned into the confines of a single rationale.” FARNSWORTH, supra note 10, at 37. Craswell writes,

Thus, ethical theories about what kind of promises to make usually derive from theories about the particular subject matter of the promise (helping the poor, etc). They do not derive from theories about promising as such.

The same could be true . . . concerning the ethical consequences of having made a promise. That is, there would be nothing illogical in believing that the conditions under which it is excusable to break a promise to the poor have no connection (in the sense of being linked by any common theory) with the conditions under which it is excusable to break a business promise, or a promise to a friend. If that were the case, there would be no point in asking questions about the nature of the commitment represented by promises in general. One could speak of the commitment represented by charitable promises, or business promises, but it would be useless to search for any general, unifying theory of promises.

\textit{Craswell, supra}, at 492.

\textit{12} \textit{See} CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (arguing that conceptions of individual autonomy are fundamental to contract liability).

\textit{13} HOYNINGEN-HUENE, supra note 5, at 23.
by observation [of] and experience [with] those practices. So to understand Contract it is not enough to read the car rental agreement or disclaimer of liability on the back of a receipt or ticket, even if a court would enforce the terms of those writings. To understand Contract you must make sense of the ways the parties to those writings actually behave in the course of the exchange relation that the writings memorialize (and the way they resolve disputes arising from the relation is only one indicator of the parties' contract).

The last of Hoyningen-Huene's postulates presents perhaps the greatest obstacle to the Contract science: Can we say that, in Contract theory, "there exists a universal characterization both of the production methods of [Contract] knowledge and of the type of arguments that may be used in support of claims to such epistemic status"? An object of this Article is to respond to the challenge that postulate presents for development of the Contract model. Ultimately, though, this challenge may be related to the unitary theory question, and perhaps is similarly insoluble in the current state of the art.

The reconception of Contract offered here entails the progression of argument through several steps:

1. There is a discernible intellectual model of science that provides an inevitable framework for intellectual inquiry;
2. The model may be appreciated in terms of Contract;
3. There is an affinity between the philosophical naturalism of American Legal Realism, a science of adjudication, and the reconception of Contract as a science of doctrine formation that is a constituent of adjudication;
4. Philosophical naturalism provides an intellectual framework that can account for the adjustment of paradigm in response to crises;
5. Resolution of crises in science entails a reevaluation of the relation among the elements of phenomena;
6. Incommensurability undermines the application of Contract doctrine;

14 Id.
16 For one view of the role of dispute resolution, see K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941):
Cases (enough of them) do make an intractable body of behavior, to be seen and to be recorded, whether it 'fits' or not. It is our experience, further, that patterns, attitudes, and strains which are peculiar in the culture make themselves felt rather rapidly in the trouble-cases. The felt strains and stresses then give leads for inquiry not foreshadowed in the anticipatory plan.
17 HOYNINGEN-HUENE, supra note 5, at 23.
7. Incommensurability is exacerbated by crises;
8. Contract reconceived responds to crises in the doctrine by enhancing our understanding of the interrelations pertinent to the enforcement of promises; and
9. Study of those relations, as relations rather than as fixed and invariable structures, reveals the fit among values, principles, and rules that determines Contract doctrine.

The three principal parts of this Article develop that analytical framework.

Part II begins by describing the familiar model of contract formation drawn from the Restatement (Second) of Contracts. It describes the elements of Contract as well as the prevailing model’s description of their combination. From those premises a sense of incommensurability emerges that supports a reconception of Contract in terms of the relation among the constituent elements in a manner confirmed by analyses of rules and decisions at the margin of the traditional model. Contract “at the margins”—promissory estoppel, consequential damages, and unconscionability—reveals a perspective to reconceive of promise enforcement generally. Part III then presents a reconception of the elements of exchange relations, taking account of recent jurisprudential observations concerning naturalism and the parallel between natural science and law. This Part relies upon epistemological studies of scientific discovery and development. Finally, Part IV posits a relationship among the constituents of Contract that draws upon studies of scientific inquiry to describe how an adjustment of our conception of those constituents’ interrelation may advance our understanding of the law governing exchange.

The incremental steps offered in this reconception of Contract do not either claim or endeavor, deus ex machina, to correct hundreds or even thousands of years of human experience that support contemporary Contract. For the most part, Contract law has it right; I do not argue that we systematically fail to discriminate correctly between those promises that should be enforced and those that should not. It is not coincidence that the elements of Contract doctrine reflect an elaboration of the values, principles, and rules that inform our reaction to exchange relationships. Contract doctrine is, to an important extent, organic, the necessary consequence of our aspirations and limitations. Indeed, we will see that many of the rules of Contract are formulated in terms that are consistent with what a naturalistic perspective would predict. But our patterns of contracting activity evolve as a consequence of several factors, including the maturing (or coalescing) of our values, our greater understanding of consequentialist theories (and their consequences), and technological pressures on the formation of interdependent relationships (as well as the resulting redefinition of property interests). The evolution of transactional forms increases the dissonance between our relatively static language of Contract and the important relationships to which that language pertains as a matter of law.
Appreciation of the science of Contract may at least constrain the growth of that dissonance and perhaps, in some contexts, demonstrate a viable path to greater consonance between Contract terminology and Contract reality. Throughout, the object remains the resolution of tension between phenomena and substance, subject and object.

The rhetoric of Contract generally captures a linear inquiry: We look for the satisfaction of each element until we have achieved Contract. But a conception of Contract consonant with the modes and object of scientific inquiry, as formulated in this Article, contemplates our sensitivity to the interdependence of the elements of Contract. The combination of the elements, more or less of one compensating for more or less of another, determines the extent to which a promise supported by the interrelation of those elements is enforceable. That perspective captures what we do in deciding whether a promise will be enforced.

At the outset, it is crucial to make clear the relationship between Contract theory and scientific inquiry that provides the basis for the argument advanced here. To that end, Part II posits a Contract model derived from common-law principles. That exposition is designed to facilitate a “scientific” conception of the fit among the elements of the model. The word “science” invokes certain epistemological (and even political) conceptions, so the sense in which Contract may be a matter of scientific discovery determines the utility of Contract science. The inquiry must begin, then, by coming to terms with terms.

II. THE CONTRACT MODEL OF PROMISE ENFORCEMENT RECONSIDERED

The premises of Contract are formulated in several sections of the Restatement (Second) of Contracts. And though the structure of the provisions suggests that Contract is the sum of constituent parts, closer examination reveals that the crucial concepts proffer shades of the Contracts calculus, potentially coincident properties of an exchange relation. The depiction of the nature and interrelation of the elements of Contract presented in the sections of this Article that follow reveals that if we understand the

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In the assessment of damages the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration. The language of the decisions sounds in terms not of command but discovery. We measure the extent of the injury; we determine whether it was caused by the defendant’s act; we ascertain whether the plaintiff has included the same item of damage twice in his complaint.

Id. at 52.

19 Of course, the word “contract” too invokes certain intellectual and even emotional responses. To say that one party has a contract with another is to say that some performance is due, and that may be a normative judgment as well. Indeed, the science of Contract may be no more than the study of when some performance is due by reference to a package of expectations arising from communication. The “justness” of the expectations will be no less in issue than the form and substance of the communication and, in fact, may be inextricably intertwined with the mechanics of the communications.
elements of Contract as separate and several constituents which combine to satisfy "contract,' we misunderstand the basis of promise enforcement. The foundation of promise enforcement is in the constituent's cooperation, not merely in their coincidence.

A. Reconception of the Additive Formula

This section presents the conception of Contract depicted in the Restatement. It demonstrates the impotency of understanding that model in simplistic "additive" terms. Indeed, understanding Contract as the mere cumulation rather than dynamic coordination of constituents obscures rather than illuminates the tensions informing the formation of enforceable promises. Section 1 of the Restatement defines "contract" as an enforceable "promise." Section 2, in turn, provides that a "promise" is a "manifestation of intent." Then Section 3 defines "agreement" as a "manifestation of mutual assent" and "bargain" as an "agreement to exchange." As a gloss on the bargain concept, the official comment to section 3 explains that a bargain is the product of "offer" and "acceptance." Section 17 concludes that the formation of a "contract" requires a "bargain" (recall, the product of offer and acceptance) in which there is an "agreement" ("manifestation of mutual assent") and a "consideration." And, finally, section 71 explains that for a "promise" to constitute "consideration," it must be the product of "bargain." The sum and substance of those definitions' interrelation compels the conclusion that the basis of promise enforcement is the inference of volition.

To decide whether a promise is enforceable, within the Restatement structure, you cannot follow the formation rules and say, for instance,
“Contract=Agreement+Bargain+Consideration,” because Offer and Acceptance are constituents of Bargain and also constitute “manifestation of mutual assent,” or Agreement. And Consideration is the product of Bargain. The elements, such as they are, are not identifiable in isolation but only operate in interdependent combination. They provide alternative means to find the inferable volition that the Restatement deems requisite to the enforcement of a promise.

There is flexibility in the Contracts terminology: A range of facts will support the legal conclusion of promise enforceability. What matters more to the Contract model urged here is that there is flexibility in the relation among the elements of Contract. Different transactional patterns invite us to understand the elements in relation to one another. In fact, given the substance of the elements, they may only be appreciated in relation to one another because they are built on the same foundation. They are, to a significant extent, tautological: They ask the same or very similar questions.

At the risk of oversimplifying, but for the sake of offering the contrast starkly, it is worthwhile to formulate the familiar model of Contract in these terms: A promise that represents the coincidence of an Agreement, a Bargain, and Consideration is enforceable. If any one of those elements is missing, the promise is not enforceable, not at all. You could give each of the elements a value of 1, and, requiring that we stay in whole numbers, conclude that unless the sum of the addition is 3, the promise is not enforceable.

The more accurate reconception of Contract could contemplate the same essential elements—Agreement, Bargain, and Consideration—but give each a value on a scale of, say, 1 to 10. Then the sum of the constituent parts, again staying with whole numbers, could be anywhere in the range 0 to 30. From that premise, you could imagine that there is sufficient basis for the inference of volition when the sum of the constituents is, for example, 24. So long as we arrive at any combination of A, B, and C that equals 24, we will enforce the promise in issue that is the product of A, B, and C. And once we get that far, we can recognize an extent of promise enforcement, which becomes a measure of the inference of volition (perhaps our certainty of that inference) and determines the damages awardable.

The contrast between those alternative conceptions may be depicted graphically:
The area to the right of each curve would describe the combination of constituents, in this case the fit between bargain and consideration, necessary and sufficient to promise enforcement. The simple additive formula \((5+5=10=\text{Contract})\) is represented by the right-angled curve \((x)\), or Leontief Technology,\(^{29}\) and alternative placements of the fixed point \(C, C_1\) (for consideration) or \(B, B_1\) (for bargain) would represent alternative judgments about the conception of the relationship between two constituents of promise enforcement. (It would be possible to conceive of more dimensions but not possible to graph their cooperation here, in two dimensional representation.) Curve \(y\) depicts a reconception of Contract that would operate were we to say that the relation among the points described by the curve would support promise enforcement if the combination of bargain and consideration were in the form \(6+4\), or \(7+3\), or \(8+2\). Curve \(z\) would depict the relation supporting enforcement of Contract that takes an additive form such as \(8+4\), or \(11+3\), or \(15+2\) equals promise enforcement.

Curves \(y\) and \(z\) are consistent with the reconception of Contract posited in this Article. The difference between them is the difference between the conclusion that there is a direct relation between the relative degrees of bargain and consideration (curve \(y\)) and the conclusion that we need more than a single unit of one constituent to compensate for a single unit less of the other. I draw no conclusion here about the relative merits of the conceptions depicted by curves \(y\) and \(z\). The claim here is more modest: Curves \(y\) and \(z\) both more accurately capture the relation of Contract constituents that describes promise enforcement.

It is the difference in contour of the curves that distinguishes the reconception of Contract from the static conception suggested in the Restatement formation provisions. Superimposed on that conception may be the idea of the “extent” of promise enforcement. In this way, the range of promises enforceable and the damages recoverable for their breach may be appreciated on a continuum.

Contract so formulated accommodates a conception of the elements of promise enforcement in relation to one another, a conception confirmed by the common inquiries captured by each of the elements: Bargain is the product of offer and acceptance;\(^{30}\) whether a communication is an offer or acceptance turns on the context of the communication and the form of the original as well as responsive communications;\(^{31}\) so whether there is a bar-

\(^{29}\) For a definition and description of the Leontif Technology, see Hal R. Varian, Microeconomic Analysis 16 (1984).
\(^{30}\) Restatement (Second) of Contracts § 3 cmt. d.
\(^{31}\) See John Edward Murray, Jr., Contracts (3d ed. 1990).

The scores of cases that have sought to determine whether, in a given set of facts, an offer has been made, are notoriously deficient in suggesting clear guidelines to determine whether an offer exists. A glance at modern cases often reveals an admission that “[i]t is impossible to formulate a general principle or criterion for its determination.” The rationale for this less than helpful conclusion is based on the nature of the question to be determined, which is a question of intention—a question of fact—that can only be determined by considering the objective manifestations of the
gain is a function of the relationship among the constituents of bargain. Further, insofar as the basis of bargain is the same as the basis of agreement—inference of volition—and the same as the basis of consideration as well (“mutual promises that are the product of bargain”), the three elements really provide alternative approaches to the fundamental inference of volition calculus. Therefore, an understanding of the three elements—Agreement, Bargain, and Consideration—that recognizes their common basis (the inference of volition) provides the means to put the determination of promise enforceability on a continuum, to conceive of the extent of promise enforcement, and thus to resolve ambiguity in the damage measure or in the decision to enforce some promises that are constituents of the “contract” and not to enforce others.

We want Contract doctrine to minimize the confusion engendered by perceptual discontinuities. Wholly apart from perceptions of the facts (“What did he say?”), we want to provide the means to determine when the facts support the Contract element conclusion (“What facts, if established, constitute a manifestation of assent or intent?”). To the extent that the elements of Contract are dependent upon one another, then, that perception dilemma (the second parenthetical question, “what facts . . .”) can be ameliorated if we conceive of Contract in terms that emphasize and give effect to the interrelation. The more clear the terms of the offer, “I offer X if you will agree to Y,” the less certain the terms of the acceptance need to be; “OK” would probably suffice. Similarly, the more certain we may be that what one party offers is a “promise,” the more likely we will be to conclude that the return undertaking is a “consideration” therefor because the parties’ communications will be the product of “offer” and “acceptance,” or, a “bargain.”

Also, if we may both agree that there is a contract but disagree about the bases therefor, we would encounter the type of consensus dilemma:

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32 Cf. Farber & Matheson, supra note 24, at 933 (“Whether manifestations rise to the level of a promise depends on various factors, including the clarity of the manifestations, the nature of the relationship between the parties, and the circumstances surrounding the manifestations.”).
33 See Alces, supra note 11, at 157 (“The limits imposed on intellectual perception may obscure inquiry on too fundamental a level.”).
34 See id.

[T]he extent that Values are only revealed in responses to recurring interreactional contexts, the variety of contingent experiences and reactions to interreactional contexts may present insurmountable obstacles to consensus. Though there may seem to be shared understanding and appreciation of a fundamental Value, the constituent bases of consensus may be different in ways that matter in some but not other contexts. That is the consensus dilemma, which would be revealed to the extent that the same statement of Values generates different Principles for different actors (and, in turn, different Rules).

Id. (footnote omitted); cf. HOYNINGEN-HUENE, supra note 5, at 147 (“In certain stages of scientific
that may undermine the development and application of Contract doctrine. You could conclude that there is a contract because there was enough agreement in light of the consideration in issue. I might conclude that the circumstances surrounding the transaction provide the basis to infer a bargain irrespective of the amount in issue. While we both have concluded that the promise is enforceable, we have reached that conclusion for reasons that are not transparent if the elements of Contract are not appreciated as interdependent but, instead, as discrete elements—the coincidence of which determines the enforceability of a promise. The deleterious effects of the consensus dilemma, though perhaps not entirely avoided, are reduced significantly when the nature of Contract formation rules is conceived in terms that accommodate rather than frustrate the application of the familiar forms to evolving transactional patterns. The perception and consensus dilemmas, as construed here, obscure an incommensurability problem that undermines the evolution of Contract in response to shifting patterns of contracting activity. That problem is treated in the next section. Recognize first, though, that a conception of Contract as the product of the interrelation of familiar (though not always fully appreciated) elements of enforceable promises provides the means to fix a common vector on which to determine the extent to which a promise is enforceable: the damage measure.

Lon Fuller and William Perdue, in terms that have guided the Contracts understanding of generations of lawyers, recognized in their seminal Reliance Interest article that contract damages resolve into the accommodation of three often coincident “interests”: the reliance, restitution, and expectation interests. Their conclusion is that, though the Contract damages rule is expectation, or “benefit of the bargain,” a careful reading of the cases reveals that courts often vindicate the reliance measure, putting the nonbreaching party in the position she would have been in but for the defendant’s breach.

Crasswell pointed out that Fuller’s analysis does not explain cases in which, for example, the restitution or reliance measure could exceed the expectation measure or the expectation measure would provide the nonbreach-development we may find coherent traditions in which there is no agreement on basic ontological questions.” (footnote omitted).  


In 1936, Lon Fuller and William Perdue published an article they called “The Reliance Interest in Contract Damages.” In the history of contract law, and of American legal thought in general, this article stands as a towering classic. It changed forever the way we think about monetary remedies for breach of contract. It also exemplified Fuller’s particular brand of jurisprudence, showing the power of his critique of formalism.

Id. at 99.


37 Fuller & Perdue, Part 2, supra note 36, at 418 (“The cases ... show, we believe, that the contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does in the textbooks.”).
ing party less damages than would one or both of the alternative measures.\textsuperscript{38} That response, though, fails to capture the sense of Fuller's "interests." A richer understanding of the three alternatives—restitution, reliance, and expectation—as describing interests vindicated by the award of damages rather than certain dollar measures on a continuum\textsuperscript{39} confirms that Fuller was describing the perspectives that in combination determine the award of damages rather than ostensibly certain measures that the courts have confounded.\textsuperscript{40}

Conceived in the way Fuller's coincident interests may be construed, the damages awardable in a breach of contract action, the extent, in other words, to which a promise is enforceable, fixes the conception of Contract that most accurately depicts what we do when we determine the Contract formation issues.\textsuperscript{41}

\textbf{B. Incommensurability and Promise Enforcement}

Understanding the elements of promise enforcement in relation to one another and recognizing that the cooperation among them fixes the contours of Contract provides the means to overcome the incommensurability that might otherwise undermine the development and application of promise enforcement doctrine. Recent inquiry into the existence, nature, and potentially deleterious consequences of incommensurability in the law informs the reconception of Contract posited in this Article. This section pursues that inquiry in terms that may resonate in Contract formation. A 1998 Symposium issue of the \textit{University of Pennsylvania Law Review} investigated in considerable depth, over five hundred pages, the potential impact of the incommensurability phenomenon on the law.\textsuperscript{42} Actually, a substantial

\textsuperscript{38} See Craswell, supra note 35, at 138-54.
\textsuperscript{39} See Alces, supra note 11, at 166-68.
\textsuperscript{40} Id. at 166.
\textsuperscript{41} And, not incidentally, that approach to damages is consistent too with what we expect the Tort law to accomplish. Just as the Tort damages create incentives to avoid the consequences of negligence, the Contract damages, similarly appreciated, create incentives to avoid the consequences of breached promises by providing an award that reflects the extent of our certainty about the parties' intentions to be bound.
\textsuperscript{42} Symposium, \textit{Law and Incommensurability}, 146 U. Pa. L. Rev. 1169 (1998). Craswell treated the consequences of incommensurability for the law:

I focus on justifications for decisions because this is when incommensurability becomes important for the law (as well as for welfare economics). It is one thing to ask, in the abstract, whether a beautiful mountain gorge can meaningfully be valued on the same scale that we use to value cheaper electricity. But this question has the most bite when the law for some reason must choose between these values—for example, if there is a proposal to build a dam that would flood the gorge. Welfare economics purports to offer a basis for evaluating that decision and for justifying one choice rather than the other. My interest in incommensurability, therefore, is in the extent to which it undermines this justification.


On the similar but distinct issue of interpersonal utility comparisons, see Herbert Hovenkamp, \textit{Legis-
portion of the issue was devoted to the definition of incommensurability followed by rationciation about its existence. 43 The focus of the Symposium pieces may best be described as "choice incommensurability." 44

43 Matthew Adler captured the context:

What is incommensurability? And what is its significance for law? I here delineate, in a very brief and introductory way, the answers that the Symposium participants provide to these questions. As a threshold matter, let me note that this Introduction focuses upon the incommensurability of options or choices, and not the incommensurability of other items (such as values, goods, reasons, life-plans, and norms) that are sometimes described as "incommensurable." Although it remains an open philosophical question whether the incommensurability of values, goods, and so forth can always be reduced to the incommensurability of options—and I mean to take no position on that question here—I think it fair to say that the articles and comments in this Symposium are centrally concerned with options or choices rather than with other purportedly incommensurable items.

Id. at 82.


The incommensurability thesis holds that people cannot always value options along a common metric that is normatively justified. Most advocates of this thesis argue that people can choose among options, but that the choice depends on qualitative differences between options that cannot be reduced to vectors on a single dimension of evaluation.

Id. (footnote omitted). The tenor of Posner's definition makes clear the threat that incommensurability, as construed in the Symposium and generally, represents for consequentialist analyses such as positive economics. If actors cannot make choices by reference to some quantification that may "be reduced to vectors on a single dimension of evaluation," it would be difficult to conclude that rational choices produce aggregate welfare gains. Incommensurability would even undermine the basis of self-interested action, a tenet of microeconomic theory and the economic analysis of law. If I cannot make choices along a single dimension of evaluation, it is impossible to compare my choices with one another or to compare my choices with anyone else's choices. Richard Craswell, though unwilling to admit the substance of incommensurability, argued that incommensurability would not undermine welfare economics. See Craswell, supra note 37.

Richard Warner also defined incommensurability in terms that confirm Adler's formulation: "Reasons are incommensurable when, and only when, they cannot be compared as better, worse, or equally good." Richard Warner, Does Incommensurability Matter? Incommensurability and Public Policy, 146 U. PA. L. REV. 1287, 1287 (1998). So construed, incommensurability is an insurmountable obstacle to public policy. "In forming public policy, we should select the policy supported by the best reasons." Id. Incommensurability makes it impossible to do that.

Matthew Adler's principal contribution to the Symposium offered perhaps the most comprehensive definition of Incommensurability:

Incommensurability: A Practical Definition

(1) Options are incommensurable, by a particular scaling procedure, for an agent, with respect to a particular normative criterion, if in light of that criterion the agent has (normative) reason not to use that scaling procedure in choosing between those options.

(2) Options are incommensurable, simpliciter, for an agent, with respect to a particular normative
While it would be of limited utility to try to capture the substance of the incommensurability debate generally and as pursued in the Pennsylvania Symposium, it is possible to present the Contract sense of the issue by referring to a point raised by Michael Trebilcock. He considered the enforceability of a woman’s promise to become the mistress of a millionaire in return for the millionaire’s paying the medical expenses of the woman’s son. The woman would not otherwise be able to afford the care for her son. Trebilcock concluded that in resolving the Contract law question of whether the woman’s promise should be enforced, “it seems difficult to avoid a moral base-line . . . approach if we are to give effect to the moral intuition that most of us are likely to feel.” In incommensurability terms, the Contract dilemma is that we cannot make a choice—sexual favors for medical expenses—because doing so would require placing both sides of the “transaction” on the same “vector,” to use Posner’s term; or, if we prefer Adler’s more elaborate rendition, the agent of decision (whether to enforce the promise), “has (normative) reason not to use [a particular scaling procedure] in choosing between those options.” The particular scaling procedure could be money or some other form of consideration; in the case

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45 See TREBILCOCK, supra note 8.
46 See id. at 91.
47 Adler, supra note 44, at 1384. We could as easily conform the second and third Adler incommensurability alternative definitions to the Contract question, by saying that “with respect to a particular normative criterion [say, the inviolability of one’s body, or, more generally, human dignity, the agent [and you can conceive of the Contract law as the agent] has reason not to use any scaling procedure in choosing between those options [enforce promise and child receives medical care, refuse to enforce promise and child dies but mother’s bodily integrity is maintained].” Id. Similarly, with regard to the third definition, we may say that given the “totality of normative considerations,” value of human life, inviolability of body, “the agent has reason not to use any scaling procedure in choosing between those options.” Id.
Trebilcock posited,\(^4\) the woman would receive medical treatment for her son (on which we can fix a dollar value—the cost of the services) in exchange for sexual favors (on which we cannot, or will not, fix a dollar value). The reasons for our inability or reluctance to put a price tag on the consideration flowing from the woman to the millionaire are not important for the purposes of making the incommensurability point. It suffices to say that we can diagram the Contract law problem in incommensurability terms.

In fact, we could probably find many examples of “bargains,” not greatly different from Trebilcock’s, in which Contract does concern itself with “notions of human dignity and self-respect.”\(^4\) Depending upon how broadly we cast the “human dignity and self-respect” net, we might discover contractual settings in which a bargain implicates those notions but will be enforced by the court. For example, though a court might not enforce a promisor’s undertaking to perform sexual acts in exchange for money, courts do put a value on sexual services in awarding damages for loss of consortium.\(^5\) Contract law does honor bargains that seem to put a price on (or limit the price of) love in the enforcement of prenuptial agreements.

Incommensurability, to the extent that it implicates Contract, forces us to figure out whether making a choice between two alternatives is the product of any real comparison “along a common metric”\(^5\) or instead a less rational (if not irrational) choice determined by what may be idiosyncratic valuations. We may not be able to compare apples and oranges by saying that one is more a fruit than the other; we are able, though, to decide to eat an apple rather than an orange.

The idea that law is compromised by the inability of even similarly situated transactors to make choices because the alternatives presented are incommensurable triggers a subtly different but profoundly more disconcerting conclusion. According to incommensurability theory, rational choice is subject to the vicissitudes of substantially different scaling processes. We cannot put a price on the sacrifice of “human dignity and self-respect.” And that remains true notwithstanding the fact that we do just that type of price fixing all of the time. The fact that we do it does not mean that doing so is the product of rational choice.

We can take issue with the conclusion that choices are incommensurable in the way posited by those who are preoccupied with incommensurability of choice. But we cannot fault the conclusion that incommensurability, to the extent it exists, may undermine the function of

\(^4\) Trebilcock actually drew the hypothetical from ALAN WERTHEIMER, COERCION 10, 225, 229 (1987).
\(^4\) TREBILCOCK, supra note 8, at 91.
\(^5\) Though this arises in the context of Tort, the bargain valued is the bargain between the direct tort victim and the party whose right of consortium is compromised by the tortfeasor.
\(^5\) Posner, supra note 44, at 1185.
the law. So if there is a substantial incommensurability problem in Con-
tract, as Contract is currently conceived, there is a fundamental problem
with Contract. A reconception of Contract could place the determinants of
promise enforcement on a common vector by emphasizing the extent of en-
forcement by reference to the relation among the elements of bargain. In
that way, Contract could capture the dynamic relation among those ele-
ments in the same way that Tort balances the determinants of negligence li-
ability.

Tort liability is often articulated using Judge Learned Hand’s negli-
gence formula: \( B < PL \). This reduction to formula guides application of
the law of many nonconsensual relations in terms that cut across different
categories of Tort liability. But it would be incorrect to conclude that Tort
is necessarily any more of a science than is Contract. All we can conclude
with confidence is that, so far, Contract liability has not been expressed in
the same succinct formulaic terms as has Tort.

C. "New Math"

This subpart reveals the decisional dynamic in three Contract contexts,
promissory estoppel, consequential damages, and unconscionability, to
demonstrate analytical formulae that provide the means to overcome the
static conceptions that would obscure the promise enforcement calculus. It
is not coincidence that the dynamic interrelations resolve themselves, ulti-
mately, into matters of degrees of promise enforcement. They do so by
overcoming the incommensurability that otherwise results from misunder-
standing the constituents of Contract.

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52 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
Since there are occasions when every vessel will break from her moorings, and, since, if she does,
she becomes a menace to those about her, the owner’s duty, as in other similar situations, to pro-
vide against resulting injuries is a function of three variables: (1) The probability that she will
break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precau-
tions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probabil-
ity be called \( P \); the injury \( L \); and the burden \( B \); liability depends upon whether \( B \) is less than \( L \)
multiplied by \( P \); i.e., whether \( B \) is less than \( PL \).

Id. Cardozo captured the same idea of interrelation among rational units in legal analysis with his fa-
mous postulate from \( \text{Palysgraf} \): "The risk reasonably to be perceived defines the duty to be obeyed and
risk imports relation; it is risk to another or to others within the range of apprehension." \( \text{Palsgraf v. Long Island R.R. Co.}, 162 N.E. 99 (1928) \).

53 In addition to negligence, the defect calculus in the strict products liability law draws on Hand-
like balancing. See \( \text{RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 cmt. f} \) (1998).

54 But Goetz and Scott have offered a formula to determine the Contract damages calculus:
Let \( p \) be the promisor’s reasonable, subjective assessment of the probability that he will perform a
promise under an existing legal rule calling for damages of \( D \) in the event of breach. For the dam-
gege rule to deter all promises with net social costs and encourage those with net benefits, the
amount of damages awarded must satisfy the following equation:

\[
(1 - p)D = (1 - p)R - pB
\]

where \( R \) and \( B \) are the values of detrimental and beneficial reliances, respectively.

Goetz & Scott, supra note 4, at 1281.
Recognize that it is the terminology of Contract that gives rise to incommensurability (frustrating the "repeatability" of Contract analysis) by positing the determinative indicia in terms that obscure their operation on a common metric. The language of Contract defies the type of balancing we see in Hand’s Tort law formula. The same variables afforded the same valuations by different subjects assume different object shapes. Even if we attribute the same unit values to an element of Contract by agreeing, for instance, that where there is an “agreement to exchange” there is a bargain, persistent glitches will still undermine the type of consensus that would reduce subject-object dissonance. To decide whether there has been an “agreement to exchange,” two observers may each emphasize different elements of the actors’ relative positions to support the conclusion that there was or was not a bargain and therefore an enforceable promise.

The two hypothetical observers may share the same perception of the underlying facts, agreeing that A said this and B said that, but the observers may construe those facts differently, even though both constructions are within the terms of the elements’ definitions. One observer might be comfortable finding a bargain if the subject matter of the contract were a fungible commodity but would not be willing to infer volition where the subject matter is a unique good. The other may feel constrained to find a bargain notwithstanding the subject matter of the communications between A and B. Alternatively, one may be more willing to find a contract the less the value in issue or the more certain the parties’ expression of their intent. So long as the promise enforcement inquiry is limited to agreement, bargain, and consideration (as well as their constituents), it would be difficult for the two observers to place their different conclusions (choices)—for example, there was an acceptance or there was not an acceptance—on the same vector, one which reflects the range represented by the fungibility or uniqueness of the subject matter, the value of the subject matter, or the more certain the expression of acceptance (for example, signature versus “point and click”).

Were the elements of promise enforcement, though, appreciated in interrelation so that we could acknowledge that a more casual form of acceptance supports the enforcement of some promises but not others, and were the product of those interrelations amenable to expression as the extent of the parties’ bargain, then we would have provided the common vector on which the observers’ conclusions would be commensurable. That is not a concept foreign to the promise enforcement law. In fact, we accomplish

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55 RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981). That idea is acknowledged in Section 211 of the Second Restatement, concerning so-called “standard terms”:

Where [a] party has reason to believe that the party manifesting . . . assent [to a standardized agreement] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

id.
that type of dynamic analysis in at least three contexts under the current regime: promissory estoppel, consequential damages, and unconscionability.

I. Promissory Estoppel.—The promissory estoppel doctrine of the Restatement (Second) of Contracts section 90 provides for the enforcement of promises to the extent necessary to avoid injustice.\(^{56}\) The apposite comment explains that “the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy.”\(^{57}\) But the parallel between the damage measure in the promissory estoppel and consideration contexts is not perfect, as an illustration to the Restatement provision reveals:

A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for $18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying “Everything is ready to go. Get your money together and we are set.” A sells the bakery taking a capital loss on this sale as well. Still later, B tells A that considerably more than an $18,000 investment will be needed, and the negotiations between the parties collapse. At the point of collapse many details of the proposed agreement between the parties are unresolved. The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and grocery and for his moving and temporary living expenses. Since the proposed agreement was never made, however, A is not entitled to lost profits from the sale of the grocery or to his expectation interest in the proposed franchise from B.\(^{58}\)

Wholly apart from issues of whether a trier of fact could have found, if pressed to do so, the elements of a contract on those facts (Agreement+Bargain+Consideration), the damages calculus of section 90 does not, by its terms, constrain A to recovery of reliance as opposed to expectation damages. The provision’s only admonition with regard to damages is that they be “limited as justice requires.” It is not at all clear that justice would necessarily limit damages to an amount less than the benefit of A’s bargain. And if the law would accommodate such a result under section 90, what is gained by approaching more clear consideration cases any differently?

\(^{56}\) Subsection (1) of § 90 explains that

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

\(^{57}\) Id. § 90(1) (emphasis added).

\(^{58}\) Id. § 90 cmt. d (emphasis added).

\(^{58}\) Id. § 90 cmt. d, illus. 10. The illustration is based on Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965).
In the last fifteen years or so, the fit between promissory estoppel and consideration-based theories of contract enforcement has been studied in some depth by commentators who have read essentially the same primary sources and reached diametrically different conclusions. The object of their study has been to discern what promissory estoppel adds to the law of promise enforcement: Do the courts enforce promises not supported by consideration on which the promisee has not relied? And, in cases in which courts have enforced promises not supported by consideration, have courts used a reliance rather than expectation measure of damages?

In a striking article published in 1985, Daniel Farber and John Matheson proposed a new standard of promise enforcement, based on their reading of the cases, that would dispense altogether with the reliance requirement and provide instead that a promise is enforceable when made in furtherance of an economic activity. So long as the promise made is in the furtherance of economic activity, the decisions, as Farber and Matheson read them, do not require that the promisee demonstrate actual reliance on the promise in order to enforce it. Further, they found the standard measure of recovery in cases of promissory estoppel is the expectation, benefit of the bargain, measure.

Six years after Farber and Matheson, Edward Yorio and Steve Thel confirmed the earlier study's conclusions but emphasized to a greater extent the award of expectation damages in the promissory estoppel setting and the relationship between the quality or certainty of the promise and the extent of recovery. Yorio and Thel concluded that "courts respond to a policy of enforcing serious promises."

Two more recent contributions, though, question the conclusion that courts routinely dispense with the reliance requirement when enforcing promises on an estoppel basis. Robert Hillman read a sample of cases

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59 Farber & Matheson, supra note 28.
60 The authors reported that they "collected every case in the past ten years citing section 90 of either Restatement, and categorized the outcomes." Id. at 907. The accompanying footnote explained: Shepard's Citations, Restatement of the Law, Vol. 9, No. 3 (May 1985), identified 222 of such cases. These cases formed our primary data base. As an alternative measure of the popularity of promissory estoppel, we ran a LEXIS search (Genfed and States libraries) for cases since January 1, 1980, that use the term "Promissory estoppel." We also reviewed the 540 cases identified by this search. Many of these cases, however, merely mentioned the doctrine without applying it. The numbers and percentages discussed in subsequent footnotes are all based on the primary data base of 222 cases.
61 Id. at 907 n.14.
62 Id. at 930.
63 "R]ecent cases are heavily weighted towards the award of full expectation damages." Id. at 909; see also id. at 909 n.24 ("The courts addressed the issue of the extent of recovery in 72 of the cases in our data group. In only one-sixth of those cases was recovery limited explicitly to reliance damages. Full expectation recovery was granted in the remaining five-sixths of the cases."). The authors also recognized and noted that the two measures, reliance and expectation, may produce the same dollar amount results. Id.
65 Id. at 129.
drawn from the years 1994-96 and found that reliance continues to matter, and indeed is determinative, in promissory estoppel cases. Hillman also reread the cases upon which the earlier studies had relied and found that the authors of those studies had either misread the cases or not credited constructions of those decisions consistent with the recognition of a continuing role for reliance. Further, he found that the cases in his sample demonstrated "the courts' flexibility in awarding either expectancy or reliance damages, thereby debunking the conclusion that courts favor expectancy damages in promissory estoppel cases."

Sidney DeLong reached a conclusion similar to Hillman's in his 1997 contribution to the promissory estoppel debate. Arguing that enforcement of promises without a showing of reliance undermines commercial expectations and yields inefficient results, DeLong read the cases as supporting the conclusion that reliance remains an integral element of promise enforcement on the basis of estoppel. He drew on a two-year sample of cases and concluded that "[c]ontemporary courts rigorously enforce section 90's requirement that the promise induce actual reliance by the promisee."

Not a single one of the opinions surveyed by DeLong adopts Farber and Matheson's contention that actual reliance need not be proved so long as the promise is made seriously in furtherance of a commercial activity, or Yorio and Thel's contention that actual reliance is unnecessary if the promise is one that is likely to induce reliance. "Every single opinion that mentioned the matter instead affirmed the Restatement requirement that the plaintiff actually rely, some of them adding that the reliance must be 'substantial' as in the first Restatement version."

The lines are drawn and the means to reconcile the commentators' divergent reading of the case law is elusive. For present purposes, though, it

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66 Id. at 582 n.15.
67 Id. at 588.
69 Id. at 948.
70 Id. at 984 (footnote omitted).
71 It would seem that one explanation for the conflicting conclusions may be in the nature of the relationship between promise and reliance in the promissory estoppel setting. An expression is a promise,
is not necessary to impose harmony on the dissonance; there is something to be gleaned from the divergent studies’ agreement with regard to the damage measure.

Fuller and Perdue recognized the amorphous nature of the expectation and reliance damage measures in their Reliance Interest article over half a century ago. The commentators lined up on both sides of the contemporary promissory estoppel issue, too, recognize the essential identity of the two measures. More to the point here, though, is the commentators’ consensus regarding the degree or extent of a promise in terms of the extent of the enforcement of that promise. The more certain the proof of the promise, the more likely the court is to award the greater measure of recovery, generally the expectation measure: “[R]eliance damages may be awarded when expectation is difficult to prove or when the promise at issue is not sufficiently definite to justify a promissory remedy like specific performance or expectation damages.”

That recognition of the essential identity of the expectation and reliance measures supports the conclusion that the damages recoverable for breach may be, and in fact necessarily are, the product of a weighing of conflicting considerations, including considerations pertinent to the “seri-
ousness" of the underlying promise and the certainty of the parties' undertaking. Other commentators have noted courts' willingness to adapt the damage award to the relative bona fides of the contracting parties.\(^75\)

If we recognize that reliance matters in the promissory estoppel context, as the later studies confirm,\(^76\) and we recognize that the extent of reliance may fix the measure of damages in a successful promissory estoppel action, then it is clear that Contract now contemplates enforcement of a promise to an extent. It is, then, not inconsistent with Contract doctrine to contemplate enforcement of a promise by reference to all of the determinants of the parties' bargain—the relation among the elements of Contract formation and the particular promise for which the nonbreaching party seeks enforcement.\(^77\) Rather than fixing a promise/no promise boundary, a winner-take-all calculus, we may acknowledge in the damage measure an extent of the promise, and enforce a portion of the undertaking to the appropriate extent given the circumstances surrounding the promise.

2. Consequential Damages.—Insofar as consequential damages law is in fact a matter of finding the bargain and then enforcing it, awarding reasonably foreseeable damages limited as "justice so requires in order to avoid disproportionate compensation,"\(^78\) Contract law is deferring the extent of promise enforcement inquiry to the damage stage and then resolving it by reference to vague justice conceptions rather than by acknowledging that consequential damage doctrine is a restatement of the contract formation premises. Consider a relatively recent case-law elaboration of the consequential damages rule that reveals the rule's affinity with formation doctrine.

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\(^75\) See Michael B. Metzger & Michael J. Phillips, The Emergence of Promissory Estoppel as an Independent Theory of Recovery, 35 RUTGERS L. REV. 472, 500 (breaching promisor's culpability may determine recovery of lost profits); Yorio & Thel, supra note 63, at 139 n.177 (citing E. ALLAN FARNSWORTH, CONTRACTS § 2.19, at 100-01 (2d ed. 1990)) (expectation appropriate measure against breaching promisor who acts in bad faith).

\(^76\) See DeLong, supra note 68; Hillman, supra note 65.

\(^77\) Cf. James Gordley, Enforcing Promises, 82 CAL. L. REV. 547, 582-84 (analyzing cases of "gratuitous agency" and finding that relief in such cases "can be explained by a simpler principle than detrimental reliance: that promises that entail little cost to oneself are binding").

\(^78\) The Restatement (Second) of Contracts provides:

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

In *Evra Corp. v. Swiss Bank Corp.*, a ship charterer, Hyman-Michaels, entered into a contract with the owners of the Pandora to charter that ship. Payments pursuant to the charter contract were accomplished by Hyman-Michaels's causing its bank, Continental Illinois, to debit the Hyman-Michaels account and send a telex to Continental's London office for retransmission to Swiss Bank, which would then deposit the amount “wired” into the account of the Pandora's owner. When one of the periodic payments came due, Hyman-Michaels followed its normal procedure. Continental, in turn, sent a telex to its London correspondent, and that bank sent a telex to Swiss bank, which did not timely credit the account of the Pandora's owner, who terminated the charter as was the owner's right upon not having received the payment when due.

Hyman-Michaels brought an action against Swiss Bank, alleging that its failure to effect the wire transfer caused Hyman-Michaels to lose an advantageous contract. Charter prices had risen and it would not be possible for Hyman-Michaels to get as good a deal on the same or a comparable vessel. The United States Court of Appeals for the Seventh Circuit, in an opinion written by Judge Posner, analyzed the facts in terms of Contract, notwithstanding the lack of a written agreement between Hyman-Michaels and Swiss Bank. The court relied on the reasoning in *Hadley v. Baxendale* and *Siegel v. Western Union Tel. Co.* At issue was the existence and nature of Swiss Bank's promise to Hyman-Michaels, though Judge Posner used the term “undertaking.”

If we were to apply a simple bargain analysis, it would be difficult, strictly speaking, to find the stuff of bargain. There was no face-to-face meeting and no haggling over price (Hyman-Michaels paid no fee to Swiss Bank). Indeed, it is difficult to see what direct benefit Swiss Bank would have received from Hyman-Michaels on account of the transfer. Nonetheless, the court invoked Contract principles from *Hadley* and *Siegel* to determine the existence and extent of Swiss Bank's liability to Hyman-Michaels. And *Siegel* confirmed the rule of *Hadley* insofar as the defendant was no more aware of the potential loss to the plaintiff than the defendant in *Hadley* had been.

The *Evra* court created the bargain and then found that there had been no breach of it. Because Hyman-Michaels had been “imprudent” in its efforts to effect the payment to the Pandora’s owner, Swiss Bank was not liable for its failure to credit the owner's account:

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79 673 F.2d 951 (7th Cir. 1982).
80 156 Eng. Rep. 145 (1854). *Hadley* was described by the Seventh Circuit as "the leading common law case on liability for consequential damages caused by failure or delay in carrying out a commercial undertaking." *Evra Corp.*, 673 F.2d at 955.
81 37 N.E.2d 868 (Ill. App. Ct. 1941) (action against telegraph company for misdirection of money order that caused plaintiff pecuniary loss).
82 *Evra Corp.*, 673 F.2d at 955.
Hyman-Michaels is a sophisticated enterprise. It knew or should have known that even the Swiss are not infallible; that messages sometimes get lost or delayed in transit among three banks, two of them located 5000 miles apart, even when all the banks are using reasonable care; and that therefore it should take its own precautions against the consequences—best known to itself—of a mishap that might not be due to anyone's negligence.83

Recognize that those observations, pertinent though they may be to the ultimate liability determination, have little to do with the bargain between Swiss Bank and Hyman-Michaels.

The point here is not that the Seventh Circuit did or did not reach the correct conclusion. Focus instead on the way that the conclusion flows from conceptions of bargain that do not seem to be contemplated by the likes of “agreement to exchange.” Offer, acceptance, and consideration are inapposite. It is the amount of money at stake (on both sides of the deal) the relative sophistication of the parties (a large corporation and international bank), and the physical relation of the parties (separated by 5000 miles), that determined the contours of the bargain.

The court also noted a parallel between its decision, construing Hadley, and the Tort law generally: “The amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care.”84 Of course, in support of that conclusion Judge Posner cited Carroll Towing,85 the source of the Hand Formula. The Evra opinion also invoked Palsgraf:86

These were circumstances too remote from Swiss Bank’s practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should install more machines in the cable department, any more than the falling of a platform scale because a conductor jostled a passenger who was carrying fireworks was a prospect that could have influenced the amount of care taken by the Long Island Railroad.87

Judge Posner found the stuff of Contract bargain in Tort duty, or at least appreciated the affinity (though it is not necessary to equate the two, and I do not posit that equation). This review of Evra reveals the decision’s focus on the interrelation of factors pertinent to liability—discovery of a (limited) bargain and enforcement of its terms. It does not suggest that all of the Contract bargain analysis resolves into a matter of Tort duty, but it is no great leap to appreciate that Judge Posner found something in the Hand Formula applicable to the Contract question.

3. Unconscionability.—Similarly, the unconscionability rule of the

83 Id. at 957.
84 Id. at 958.
85 159 F.2d 169, 173 (2d Cir. 1947); see supra text accompanying notes 52-54.
86 Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (1928); see supra text accompanying notes 52-54.
87 Evra Corp., 673 F.2d at 958 (citing Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (1928)).
Contracts restatement provides the reviewing court a means to reformulate the bargain of the parties on account of some deficiency in the bargaining process. Once a court finds that a portion of a contract is unconscionable, the court may adjust the offensive term in a way that will avoid an unconscionable result. The object of the provision is to avoid the consequences of an ostensible bargain when the facts reveal that the apparent mutual assent was insubstantial—that the agreement complied with the forms of Contract but did not support the inference of volition that is the basis of promise enforcement.

That process, finding that an exchange of promises gave rise to a contract but limiting enforcement of the constituent promises, is consistent with the reconception of Contract urged here, and demonstrates the law’s capacity to make distinctions that will determine the extent to which a particular promise may be enforceable. If a contract contains a provision pursuant to which one of the parties surrenders her right to bring an action on the contract in court and instead requires that disputes be submitted to arbitration, the court reviewing that contract could invalidate the arbitration clause by finding it unconscionable.

That is no different in kind from a court’s finding that, in light of the fit among the elements of Contract formation, the damages to which one party would be entitled upon the other’s breach is to be determined by reference to the extent to which we may be certain of our inference of volition. This does not reproduce the unconscionability calculus, because the object here is not to determine which terms of the contract are enforceable or whether the contract is enforceable at all. Instead, this provides the means to explain decisions in which the courts find that the parties did not enter into a contract ab initio because there was no bargain. Once a court decides that the relationship between the parties was not the product of contract, then the court will either leave the complaining party without a remedy or fix a measure of damages by reference to some measure other than the benefit of the bargain, the expectation measure.

The reconception of Contract urged here also explains a court’s willingness to find enough of a bargain to enforce some promises but not others without finding the unconscientious overreaching that is the basis of unconscionability. Consider the opinion of Judge Easterbrook in a decision that impacts the evolving law of contract formation: Hill v. Gateway 2000, Inc. Hill is a case about bargain, and it is also a case that treats the interrelation among offer, acceptance, and bargain. The facts presented for-
shadow issues that will arise as classical conceptions of offer, acceptance, and bargain evolve. Judge Easterbrook's generic presentation of the facts and issue captured the transactional dynamic:

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent? 90

The case would be governed by article 2 of the Uniform Commercial Code, but that statute provides for the application of common-law contract rules unless "displaced" by Code provision. 91

The buyer, the Hills, tried to avoid the operation of the arbitration clause that was included among the terms packaged with the computer but not disclosed in the course of the telephone conversation during which the Hills ordered the computer. The terms included with the computer provided that the buyer would be bound to those terms if they retained the computer for thirty days. The Hills did so.

The arbitration clause was not the product of bargain, in the traditional or at least colloquial sense, insofar as it was not mentioned at the time the parties traded offer and acceptance. In fact, the telephone order-taker did not even expressly mention that contract terms would be shipped with the goods. The most that the court could say was that "the Hills knew before they ordered the computer that the carton would include some important terms." 92 Gateway advertisements impart that information. Easterbrook described what bargain has become:

Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. . . . Competent adults are bound by such

90 Id. at 1148. The facts of the case are a bit richer than that brief rendition, but Easterbrook's statement of them in terms of the Contract issue accommodates the application of his analysis to a broader array of more technologically sophisticated contracting forms.

91 See U.C.C. § 1-103 (2000) ("Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.")

While it is not so clear that Section 2-207 of the Code is wholly inapposite on the Hill facts, the court treated the Contracts issue as a matter of common law and thereby said something about the common law bargain concept. See Hill, 105 F.3d at 1148-50.

92 Id. at 1150.
documents, read or unread.93

Bargain may arise from the receipt of unread forms even where there was no opportunity to read them before receipt. While that idea is not without precedent in Contract law,94 it does present the bargain concept in stark relief.

As the survey in this Part has disclosed, when we make the best sense of Contract, notwithstanding the impediments created by the language of Contract, we do so by distilling transactional patterns through the Contract terminology. The next Part describes the advantages of imposing a naturalistic perspective on the reconception of Contract.

III. SCIENCE AS ANALOGY OR CONTRACT AS SCIENCE

To drop the quotation marks from “science,” in the sense of a Contract “science,” it is necessary to appreciate the way the suggestion of empirical integrity is intended. Contract is not likely to resolve itself ultimately into something with the elegance of \( E=mc^2 \), but the reason for that may have nothing to do with the complexity of Contract or relative simplicity of relativity. It is not difficult to resolve Contract, or Contract principles, into representations of equivalence, and commentators have done just that.95 It is not clear, however, that such formulae advance the inquiry the same way they would if the object of the formulae were to describe a quantitative relationship.

This Part of the Article delineates the object of scientific inquiry in terms that suggest Contract analysis parallels by identifying the constituents of science revealed in studies of scientific revolution. That may only be accomplished, however, after developing an understanding of such a Contract science as a phase of naturalism in jurisprudence. The presentation of those premises confirms the contribution of that perspective to the development of a frame of reference that will more accurately order the relationship among the elements of Contract and provides the basis for an appreciation of Contract’s response to crisis.

A. Naturalism and Contract Theory

Perhaps the best recent exposition of naturalism in jurisprudence is provided by Brian Leiter’s investigation into the “naturalized jurisprudence” of American Legal Realism.96 He discovered common ground be-

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93 Id. at 1149 (emphasis added).
94 Perhaps, the best example of its application is Section 2-207 of the Uniform Commercial Code, but that provision does not actually enforce terms which the parties in fact had no opportunity to read.
95 See supra note 54.
tween the legal realism of Karl Llewellyn, \(^{97}\) Jerome Frank, \(^{98}\) Underhill Moore, \(^{99}\) Herman Oliphant, \(^{100}\) and Leon Green \(^{101}\) and the naturalistic philosophy of W.V. Quine. \(^{102}\) It is, occasionally, unclear whether Leiter is merely drawing an analogy or concluding that legal realism is naturalized jurisprudence. Though he used the term “analogy” in the body of his Re­thinking piece, \(^{103}\) his ultimate conclusion is that “the Realists were not bad legal philosophers, but rather prescient ones, philosophical naturalists before their time.” \(^{104}\) It is not necessary to resolve that tension. What matters for the instant study is the relationship between the scientific predisposition (and what that is) and an epistemology of the cooperation among the constituents that determine the operation of Contract law.

First we must identify the character of science that supports its comparison with legal analysis. Then it will be worthwhile to delineate the qualities of scientific inquiry that make it both inevitable and, ultimately, inevitably incomplete. The fact that a Contract science will not yield foun-

\(^{97}\) E.g., K.N. LLEWELLYN, THE BRAMBLE BUSH (1930); Karl N. Llewellyn, A Realistic Jurisprudence—the Next Step, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931).

\(^{98}\) E.g., JEROME FRANK, LAW AND THE MODERN MIND (1930); Jerome Frank, Are Judges Human? 80 U. PA. L. REV. 17 (1931). Leiter noted the “Frankification” of realism: “the now dominant tendency to treat Jerome Frank’s particular interpretation of the Core Claim as identical to Realism.” Leiter, Rethinking, supra note 96, at 269. Leiter concluded that the Core Claim of realism “is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law.” Id. at 275. The Frank corollary, if you will, focuses on the personality of the judge in the adjudicatory process: “[T]he Stimuli affecting the judge [multiplied by] the Personality of the judge [equals] Decisions.” Jerome Frank, Are Judges Human? Part Two: As Through a Class Darkly, 80 U. PA. L. REV. 233, 242 (1931).


\(^{100}\) Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71 (1928).

\(^{101}\) Brian Leiter cited Leon Green’s casebook, THE JUDICIAL PROCESS IN TORT CASES (1931), as an exemplar of teaching materials composed in the realist tradition, organized “not by typical doctrinal categories . . . but rather by the situation types in which harms occur.” Leiter, Rethinking, supra note 96, at 283 n.77.

\(^{102}\) See, e.g., W.V. Quine, Epistemology Naturalized, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69 (1969). Leiter also noted that several other philosophers, including Jerry Fodor, David Armstrong, David Lewis, Jaegwon Kim, and Alvin Goldman, have contributed to the naturalism development: “[I]Indeed, it would not be wrong to say that it is the distinctive development in philosophy over the last thirty years.” Leiter, Rethinking, supra note 96, at 286-87.

\(^{103}\) See Leiter, Rethinking, supra note 96, at 294-95 (“We can find, I shall argue, analogues of both steps [of Quine’s argument for Replacement Naturalism] in the Realists’ approach to the theory of adjudication.”).

The analogy, simply put, is this: just as philosophic pragmatists [such as Quine] hold that it is a criterion of acceptability for particular epistemic norms that they work for us as humans—e.g., by helping us predict sensory experience—so, too, it is a criterion of acceptability for a theory of adjudication for the Realists that it work for lawyers.

Id. at 309.

\(^{104}\) Leiter, Rethinking, supra note 96, at 315.
dational imperatives in no way diminishes the application of naturalism to determinants of why promises bind. Elaboration on those analyses support the application of Leiter's understanding of the forms of naturalism to the science of Contract in terms that suggest at least analogy between theories of scientific revolution and the evolution of Contract doctrine (and theory).

1. Science Described.—To conclude that a subject matter is a science is to say something about the mode of inquiry that determines the accumulation of knowledge about that subject matter. The term "science" denotes a relationship between phenomena and theory, and connotes a rigor of methodology supported by measurable verifiability. 105 Scientific conclusions are susceptible of proof, by which we need mean no more than reproduction. In law that reproduction takes the form of principles or rules, statutory or common law. So appreciated, science is not a qualitatively different rational experience; instead, it is a quantitatively superior rational experience. Perhaps it is a form of hubris to assert a science of Contract, in the first instance, or maybe the reference need contemplate no more than an aspirational standard. 106

Larry Laudan recognized that science is a label properly affixed to a

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105 Edward Wilson offered a catalog of the features of science that distinguish it from "pseudo-science":

[F]irst, repeatability: The same phenomenon is sought again, preferably by independent investigation, and the interpretation given to it is confirmed or discarded by means of novel analysis and explanation. Second, economy: Scientists attempt to abstract information into the form that is both simplest and aesthetically most pleasing—the combination called elegance—while yielding the largest amount of information with the least amount of effort. Third, mensuration: If something can be properly measured, using universally accepted scales, generalizations about it are rendered unambiguous. Fourth, heuristics: The best science stimulates further discovery, often in unpredictable new directions; and the new knowledge provides an additional test of the original principles that led to its discovery. Fifth and finally, consilience: The explanations of different phenomena most likely to survive are those than can be connected and proved consistent with one another.

WILSON, supra note 5, at 53.

106 The natural sciences have been offered as the "best extant example" of the nature of knowledge. LARRY LAUDAN, PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH 1 (1977). Conceived as a judgment on the epistemological integrity of the natural sciences, that conclusion concurs with the appraisal of Thomas Kuhn, whose work on scientific revolution has touched many disciplines, including law. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996). Indeed, every legal commentator who has referred to "paradigmatic shift" or some close variant thereof probably owes an unacknowledged (and even unrealized) debt to Professor Kuhn, whose work endeavors to describe what it means for a paradigm to shift in the natural sciences, at least. See, e.g., Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 HARV. L. REV. 741, 751 (1982) (drawing on the Kuhnian sense of paradigm). Kuhn observed, in terms that distinguish scientific inquiry, that

The scientist must . . . be concerned to understand the world and to extend the precision and scope with which it has been ordered. That commitment must, in turn, lead him to scrutinize . . . some aspect of nature in great empirical detail. And, if that scrutiny displays pockets of apparent disorder, then these must challenge him to a new refinement of his observational techniques or to a further articulation of his theories.

KUHN, supra, at 42 (emphasis added).
certain degree of epistemological integrity when he posited the distinction between empirical and conceptual problems. That is consistent with the structure of the continuum urged above: “Science” is a label that may be affixed at that point at which a conclusion may be verifiably stated in empirical terms. Kuhn’s characterization, too, is consistent with the view of science asserted so far in this Part because a more discrete area of inquiry, one constrained by certain epistemic borders that exclude inapposite noise, is more likely to realize the level of repeatability we associate with a science.

In comparing the natural and social sciences, Laudan has elaborated on the characteristics distinguishing natural science:

It is frequently claimed that the sciences alone are progressive and cumulative, while other areas of inquiry exhibit changes of fashion and style which cannot be meaningfully described as progressive. . . . [I]t is sometimes said that the sciences can discover when their assumptions are wrong, but the humanistic disciplines cannot; it is frequently alleged that the sciences are “self-corrective,” but that the nonsciences lack that crucial characteristic.

He was not ultimately convinced by those bases of distinction, and offered an alternative: “What has stood in the way of recognition of the cognitive parity of the sciences and the nonsciences has been a simplistic identification of (scientific) rationality with experimental control and quantitative precision.”

Focus on “experimental control and quantitative precision,” even if that focus is incomplete, is but part and parcel of a conception of science as demarking a constrained field of intellectual inquiry, one in which the two qualities inhere. First, there are a limited number of variables; when the variables became too great in number, the field ceases to be a science. Second, the variables are susceptible of sufficiently precise formulation such that they achieve the scientific level of repeatability, which is itself not a fixed point but instead a level contingent upon the capacity of the perceivers’ consensus regarding the subject-object relation. The extent to

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107 LAUDAN, supra note 106, at 48.
108 Id. at 191 (footnote omitted).
109 Id.
110 Id.
111 See supra note 34.
112 “Scientific progress would thus consist not in a ‘drawing closer to the truth’ in the sense of a progressive approximation of the true nature of things but rather in an ever-improving ability to identify purely object-sided equivalence.” HOYNINGEN-HUENE, supra note 5, at 57. Hoyningen-Huene also provocatively asserted (in terms that may have some resonance with the consensus dilemma) that “two
which it is appropriate for any field of intellectual inquiry to be characterized a science is dependent upon those two characteristics and the relationship between them.  

That conclusion, then, depicts science as a label affixed to an intellectual pursuit at a certain point, a matter of degree. In the case of athletic prowess (by way of illustration), the point is determined by the combination of the practitioner’s (theorist’s) physical, perceptual, and intellectual acuity. In purely intellectual pursuits, the point is determined by the practitioners’ (or community’s) rational perceptions. So the conclusion that something is a science is no more than the conclusion that the subject-sided perception in fact reflects accurately the object-sided phenomena to the extent that the relationship between subject and object is repeatable (and in that sense rationally accessible) to the community subjecting that relation to analysis.  

Understood as describing a relation among variables in terms of perceptual acuity rather than an intellectual endeavor qualitatively distinct from other modes of intellectual activity (perhaps, what we might call the arts), a sense of Contract science emerges. We will have formulated a Contract science when we depict the study of exchange relations in terms that conceive of such relations as the product of a limited number of variables susceptible to sufficiently precise formulation. The object of conceiving of Contract as science is to then support the imposition of theories of the variables’ interrelation on recurring patterns of coordinated behavior. Preliminarily, though, the sections that follow must complete the foregoing description of science in terms that have currency in the law.  

2. Science as Inevitable.—Randy Barnett drew a distinction between two approaches to jurisprudence, particularly in the Contracts context: He concluded that the legal realists’ approach is to list the factors determinative of a particular result, while those whose approach Barnett described as “legal theory” endeavor to describe the fundamental principles that animate the

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stimulus situations rather count as equivalent [or, you could read, measurably verifiable] if they agree in those features which, for biological reasons, are perceptually efficacious, even if they differ in their perceptually inert aspects.” Id.

113 To put that idea succinctly, albeit roughly, for Ted Williams and Tony Gwynn there is a science of hitting a baseball thrown upwards of ninety miles an hour; for the casual fan (and, indeed, many professional athletes), hitting is not a science.

114 That is not to admit, though, that every relation that may be captured in empirical terms certainly confirms scientific analysis. The fact that there is a “Hand Formula” describing portions of the law of nonconsensual relations is not sufficient to conclude there is a “Tort science.” There may be, but B<PL is probably more of a means to focus inquiry than certain proof of that level of subject-object coincidence measurable verifiability that confirms science. The elements of the formula may lack the fixed characteristics, the sufficiently precise formulation that accommodates science. The formula does succeed as a shorthand abbreviation of the relation among variables (or, at least, a plausible relation among variables) even if it does not have all of the descriptive or predictive qualities associated with science.

coordination of the factors relevant to the resolution of a controversy. Ultimately, the dichotomy Barnett posits is false, or at least incomplete, but his inquiry does confirm the conclusion that the object of Contracts theory scholarship is to get to the bottom of the consensual relations question: We inevitably ask why promises bind.

The literature is rich with commentators offering fundamental theories of Contract. In a recent contribution, Richard Craswell surveyed a large sample of modern Contract theory in the course of his critique of the Fuller and Perdue Reliance Interest article. Craswell described Contract theory proceeding from microeconomics, contractarian moral philosophy, retributive and expressive theories of remedies, distributional theories of

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116 Id. at 1414.
117 See Alesis, supra note 11, at 154-56.
118 Craswell, supra note 35, at 106-36.
120 Craswell described the Contractualists as subscribing to “the premise that just or moral rules consist of those rules to which all parties could agree under some sort of ideal circumstances.” Craswell, supra note 35, at 111. See JOHN RAWLS, A THEORY OF JUSTICE (1971) (“veil of ignorance”). T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) was formulated by Craswell as asking “what a reasonable moral agent could consent to, or what rules could be justified even to those who find themselves disadvantaged by the rule in any particular instance.” Craswell, supra note 35, at 112 (emphasis in original). See also Thomas Scanlon, Promises and Practices, 19 PHIL. & PUB. AFFAIRS 199 (1990) (considering circumstances under which promises ought to bind).
remedies, corrective justice models, and ideological theories consonant with capitalism or, alternatively, socialism. Comprehensive review of those perspectives is not necessary here; suffice it to say that the object of each is to posit the foundation of Contract. What the catalog discloses is an attraction to the unique normative interest that the commentator urges the law of consensual relations should vindicate.

Even those, like Craswell, who eschew reliance on a single animating theory of Contract conclude that the phases of Contract may be delineated by context, the suggestion being that when the cases are put in their correct categories, generalization is possible, and within those categories fundamental values are (or may be made) manifest. Michael Trebilcock, in his comprehensive survey of the contexts in which freedom of contract principles operate (and, occasionally, fail to operate), carefully cataloged the transactional variables that should determine the enforceability of a promise when one party demurs. Trebilcock’s perspective is informed by positive economics, and so he resolved difficult cases in microeconomic terms.


Fuller and Perdue’s reliance on Aristotelian conceptions of distributive justice provide the illustration of this fundamental theory of Contract. Craswell, supra note 35, at 122-28. It is not clear that Fuller and Perdue pursue that line of analysis and argument in any substantial way, see Alces, supra note 11, at 162, but for present purposes it suffices to note that the distributational justice perspective provides the type of foundational theory of Contract that confirms the inevitability of the scientific inquiry in determining why promises (should) bind. For the argument that Fuller and Perdue advocate a distributive perspective in the Reliance Interest article, see Todd D. Rakoff, Fuller and Perdue’s The Reliance Interest as a Work of Legal Scholarship, 1991 Wis. L. Rev. 203.

Craswell did not specifically attribute a capitalist value system to any particular Contracts theorist’s assertion of a fundamental basis of Contract. He suggested the coincidence between the award of expectation damages and capitalistic free market conceptions:

The only other theory that has even been suggested by modern scholars is one that attaches ideological significance to the expectation and reliance remedies. Specifically, this theory sees expectation damages as the remedy most appropriate to individualism, capitalism and the free market; while reliance and restitution damages are seen as better suited to collective ideologies such as socialism or communitarianism.

Craswell, supra note 35, at 128-29. Craswell did acknowledge that Patrick Atiyah relied on individualism and free market principles to support both the primacy of reliance damages and the enforceability of the fully executory promise where neither party has relied on the other’s promise. Craswell, supra note 35, at 134 (citing P.S. Atiyah, Promises, Morals, and Law, 202-12 (1981)).


See supra note 11.

Trebilcock, supra note 8.

Trebilcock discusses “The Choice of Optimal Legal Framework for Regulating Surrogacy Contracts”:

Commissioning parents are now bearing a risk that they would not bear in the absence of a right of repudiation and are likely to discount the surrogacy fee offered accordingly. They are also likely
The exposition in this section of the Article captures the tension between two competing ideas central to the assertion of a reconception of Contract. First, theorists who approach exchange relations law from a variety of perspectives each endeavor to identify the essential kernel of Contract in their theory. The illustrations drawn from Craswell’s survey confirm that conscientious conceptions of Contract share a common goal—identification of the elemental key to why we enforce some promises and do not enforce others. Second, Contract may not be a unitary concept. That is, following the suggestion of Craswell, Farnsworth, and Trebilcock, we may conclude that one theory or another (or one group of theories or another) may explain the resolution of some cases that we group under the Contract heading but be entirely impotent to guide resolution of other cases which we also describe as raising Contract issues.

Contract reconceived should provide the means to demonstrate how doctrine can both accommodate different views of the foundation of promise enforcement and provide a nexus of reconciliation among the disparate contexts in which Contract operates. The conception of Contract as the sum of fixed parts obscures the variability of the constituent elements and the interdependence among them. It is incomplete, at least, to say that “A+B+C=Promise Enforcement.” And it is unlikely that we would be able to reconcile different views of Contract if we insist on the additive relation among its constituent parts. But if we recognize that “A in relation to B in relation to C equals the extent of Promise Enforcement,” then we have discovered a means to respond to the tension between the search for the unifying theory and the adaption of the fixed idea “Contract” to the variety of contexts in which promise enforcement is at stake.

If we allow that different facts admit of different resolutions because they invoke different rational and emotional responses, then we must accommodate focus on those different reactions in order to establish the categories that in fact accommodate the better resolution of controversies. The object of categories, and, in turn, of applying a particular principle and rule matrix to phenomena within the same category, is to avoid controversy to re-apportion payments from the pre-delivery period to the delivery juncture to induce waivers of the right of repudiation; as the Coase theorem in law and economics would predict, in many contexts parties will attempt to bargain around constraints the legal system imposes on them. However, making the two sides of the exchange more simultaneous arguably confronts the birth mother with a more reasoned choice.

Id. at 54 (citing Ronald Coase, The Problem of Social Costs, 3 J.L. & ECON. 1 (1960)). Interestingly, though, even when Trebilcock approached diverse Contract contexts as presenting value matrices sufficiently distinguishable to require results not reconcilable by the application of mechanical Contract rules, he demonstrated that, at least in some settings, efficiency criteria cannot rationalize the resolution of difficult cases. When Trebilcock considered the hypothetical case of a single mother who “agreed” to become the mistress of a wealthy suitor in return for the suitor’s payment of expensive medical care for her child, he was unable to find in the economics literature a source of decision that completely displaces a “moral base-line approach.” Id. at 91. In fact, he acknowledged that in an array of recurring, albeit relatively marginal, contexts, “to enforce transactions . . . is likely to violate basic notions of human dignity and self-respect.” Id.
when it is possible to do so, by providing guidance to transactors, and to re­
solve controversy when it is not avoidable, by providing certain bases of
resolution. It is not an overstatement to observe that the crises in Contract
have been a product of trying to force square pegs into round holes. 129 A
reconception of Contract that focuses on the interrelation of determinants to
reduce the dissonance between subject and object may facilitate an apprecia-
tion and application of doctrine more consistent with the objects of consen­
sual relations law however we may formulate them. Before the
consequences of that conclusion may be revealed, it is helpful to appreciate
the parallels between naturalism in philosophy and Contract science.

3. The Phases of Naturalism.—Brian Leiter has traced the develop­
ment of naturalism in philosophy and has found parallels between the de­
development of legal realism from the mid-twentieth century and the rise of
natural science models in contemporary philosophical inquiry. 130 While Le­
iter’s very important contribution presents a convincing case for his ulti­
mate thesis about the affinity between Realism and philosophical
naturalism, 131 the value of his work for present purposes is in Leiter’s for­

129 Consideration doctrine provides an example of a fixed rule that operates inconsistently in varied
rational and emotional contexts. Consider Duncan Kennedy’s formulation of Lon Fuller’s conclusions
regarding consideration:

According to Fuller, consideration was a doctrine that served different purposes. It was indeed a
form (like the seal, the requirement of an acceptance to make a contract, the parol evidence rule, or
the statute of frauds) and could be assessed as a form in terms of the functions of formalities. But
it was also a substantive restriction on freedom of contract, justified by the functional reasons for
refusing to enforce particular kinds of promises.

Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consid­
eration and Form,” 100 COLUM. L. REV. 94, 103 (2000). Kennedy also observed, following Fuller, that
the consideration doctrine works more or less well depending upon the context into which its operation
is introduced. The more the doctrine’s application is invoked in a manner consistent with its fundamen­
tal formal and substantive objects, the more effective consideration is to vindicate the rational and emo­
tional reactions to promise enforcement. Kennedy formulated Fuller’s Consideration and Form in these
terms:

Viewing consideration doctrine as a formality, we ask the extent to which, in any given situ­
ation, it promotes the evidentiary, cautionary, and channeling functions Fuller peremptorily assigns
to formalities. Viewing the doctrine as a restriction on freedom of contract, we ask whether the re­
striction confines enforcement appropriately, given the goals of securing private autonomy, com­
pensating reliance, and preventing unjust enrichment. A striking move in the article is to ask (with
respect to consideration viewed as a formality) to what extent the “nature of the situation” allows
accurate fact-finding ex post, cautions people ex ante, and clearly distinguishes the moment when
we pass from merely moral to legally binding obligation.

Id. It seems that consideration, the doctrine, is a shorthand for some thing or things more fundamental,
at least in terms of Kennedy’s construction of Fuller, which is a fair one so far as it goes.

130 See Leiter, Naturalism, supra note 96; Leiter, Rethinking, supra note 96.

131 Leiter, Rethinking, supra note 96.

The Realists came of intellectual age in a positivistic and naturalistic culture, and their approach to
jurisprudential questions bears the mark of that origin. With the benefit of philosophical advances
of the last thirty years, we are finally in a position to recognize what most jurists have
missed: that the Realists were not bad legal philosophers, but rather prescient ones, philosophical
naturalists before their time.

Id. at 315.
mulation of the phases of naturalism. The distinctions he draws are consistent with the reconception of Contract urged here.

Leiter distinguished methodological from substantive naturalism and then, within methodological naturalism, further distinguished the two categories of “replacement” and “normative” methodological naturalism. Methodological naturalism captures the science in philosophical inquiry by subscribing to the view that “philosophical theorizing should be continuous with empirical inquiry in the sciences.” Leiter then divided methodological naturalism into two categories which, we might suggest, describe poles on a continuum rather than fundamentally different forms: He distinguished “Hard Methodological Naturalists,” who “want ‘continuity with’ only the hard or physical sciences” from “Soft Methodological Naturalists,” who “seek ‘continuity with’ any successful science, natural or social.” Leiter confirmed that scholars writing from the evolutionary biology perspective are exemplars of Hard Methodological Naturalism.

It may be, then, that the analysis and argument of this Article is Realistic jurisprudence in a philosophical naturalist’s vein. Leiter and the Realists for the most part were positing a theory of adjudication—how and why courts decide cases the way they do. The object of this Article is, at least, once removed. This study imposes principles of inquiry and order drawn from the natural sciences (like philosophical naturalism) to learn more about the substance of and relationship among the doctrines that comprise the Contract law. It provides the step that is a necessary predicate of a theory of adjudication, a means both to study how values, principles, and rules in Contract interact in fact and how conceptions of them might be recast to make them more effective (ultimately transparent) components of a system of Contract, including Contract as a system of adjudication.

Leiter recited several philosophers’ formulations of “naturalism.” Leiter, Naturalism, supra note 96, at 80-81. Two in particular capture well the sense of the term that best supports the thesis urged here:

[N]aturalism ... [i]s not just the view that man can be seen as part of nature—in one sense or another this would surely be accepted by everyone—but that the nature of which he is a part is to be understood according to the canons which emerged in the seventeenth-century revolution in natural science.

Id. at 81 (citing CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE 2 (1985)). “The [naturalistic] idea is to make sure that our philosophical theories are compatible with science. ... [T]his means that in our philosophical theories we are to make use only of those properties that are either reducible to or supervene upon properties that science countenances. ... Science constrains philosophy.” Id. (citing Richard Foley, Quine and Naturalized Epistemology, 19 MIDWEST STUD. IN PHIL. 243, 243 (1994)).

Leiter, Naturalism, supra note 96, at 81.

Leiter recited several philosophers’ formulations of “naturalism.” Leiter, Naturalism, supra note 96, at 81. To the extent that Hard and Soft Methodological Naturalism describe points on a continuum, we may also imagine that a science, any science, is in a constant state of “development” along that continuum. That is, yesterday’s soft methodology may “firm up,” if you will, to the point where it becomes a hard methodology. It is ultimately a matter of gaining control of variables, eliminating noise, and thereby progressively diminishing the dissonance between subject and object until we can make more accurate approximations of the reality that is the subject of the “science.”
Leiter also placed his naturalism in philosophical-historical context by noting that we may attribute a “Speculative Methodological Naturalism” to Hume and Nietzsche:

Hume and Nietzsche . . . both construct ‘speculative’ theories of human nature—modeled on the most influential scientific paradigm of the days (Newtonian mechanics, in the case of Hume; nineteenth-century physiology, in the case of Nietzsche)—in order to explain various human phenomena, like the character of morality. Their speculative theories are ‘modeled’ on the sciences most importantly in that they take over from science the idea that natural phenomena have deterministic causes.\(^{136}\)

The Speculative Naturalists’ approach, in turn, may be distinguished from what Leiter terms “Substantive Naturalism”: “either the (ontological) view that the only things that exist are natural or physical things; or the (semantic) view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry.”\(^{137}\) Leiter did not find Substantive Naturalism a “promising” avenue of jurisprudential inquiry.\(^{138}\) Granted, if we measure the relative jurisprudential efficacy of Leiter’s two forms of naturalism (methodological vs. substantive) as means to make sense of adjudication, a methodology may be the best that naturalism can provide at our current plateau of understanding and in terms of the level of generality we deem acceptable.\(^{139}\)

We could, for example, craft a rule of consideration to accommodate judges’ enforcement of some promises (those we want judges to enforce) and refuse to enforce others (those that we do not want them to enforce).\(^{140}\) A Substantive Naturalism would succeed in formulating, even institutionalizing, that distinction if it provides a reliable means to assure that our iteration of consideration provides the judges the guidance to draw the

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\(^{136}\) Leiter, *Naturalism*, supra note 96, at 83 (footnotes omitted).

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) At this juncture, it does not matter how we might distinguish the first group of promises from the second; all that matters is that we can divide the world of promises into those two categories and then use a rule of consideration to signal to triers of law how that distinction should be respected.
We could then conclude we have realized a science of adjudication when the formulation of consideration determines resolution of the distinction between promises we want enforced from those we do not and if it works consistently across a sample we deem repeatable. But it is a matter of degree, and our current level of adjudicatory acuity often falls short of what could reasonably be deemed empirically verifiable. That is, for whatever reasons, we are unable to determine results in contested cases by reference to the legal formulations that guide triers of law. Bridging that gap completely is certainly beyond our current science and so, as Leiter suggests, the best we can do is avoid logical mistakes by invoking a naturalistic methodology.

Leiter also drew a distinction between Replacement and Normative Naturalism: "According to Replacement Naturalists, the goal of theorizing is description or explanation; according to Normative Naturalists, the goal is regulation of practice through the promulgation of norms and standards." That is the contest between "is" and "ought." Contract theory, at its most ambitious, pursues both of those goals, and, indeed, it might be difficult to divorce the two objects completely in any event. Even the Replacement Naturalist may, ultimately, have in mind a consequentialist object. That is, the full and complete description or explanation may accommodate a normative program: looking at why people behave the way they do in order to change their behavior in a manner consistent with a particular normative perspective. While the "is" and the "ought" may be distinguished, the line may be fine enough to blur in less than optimal light. Nonetheless, the distinction is an important one that has received considerable attention in philosophical ratiocinations and is likely to remain a subject of philosophical inquiry.

Leiter posited the distinction, though, not for purposes of exploring it at length but rather to focus his argument on the symbiotic relationship between American Legal Realism and Replacement Naturalism. Leiter reprises Quine’s conception of what Hilary Kornblith dubs the “replacement thesis”:

A Replacement Naturalist in any branch of philosophy holds that: For any pair of relata that might stand in a justificatory relation—e.g., evidence and theory, evidence and theory,

\[\text{distinction}^{141}\]
reasons and belief, causal history and semantic or intentional content, legal reasons and judicial decision—if no normative account of the relation is possible, then the only theoretically fruitful account is the descriptive/explanatory account given by the relevant science of that domain.  

We need not conclude, yet, that no “normative account of the relation” between legal reasons and judicial decision “is possible.” Leiter only needed to go so far to draw a parallel between Legal Realism and philosophical naturalism. Just as the Realists, if Leiter was right, used such a scientific approach to discover theories of adjudication, a Contract science can inform a perspective to discern the operation and cooperation of Contract doctrines as both adjudicatory and transactional determinants. 

In fact, it would be incomplete to conceive of either adjudication or transaction without the other. It may be that to understand Contract in the context of adjudication one must first understand Contract in the context of transaction. So a science of adjudication (perhaps Realism) must first be considerate of a science of Contract doctrine. Contract science is the rationalization of Realism at the level of doctrine. For example, before we understand how the consideration doctrine operates in litigation, we would need to appreciate its operation as an element of the transaction giving rise to the litigation. While the two—adjudicatory consideration and transactional consideration—may be, indeed almost certainly are, related, they are not the same as objects of scientific inquiry.

The success of Realism as a science of adjudication bodes well for the success of a transactional Contract science. Just as Realism has helped reframe our conceptions of how cases are decided by revealing the contingent nature of rules of decision by diminishing the subject-object dissonance, reformulation of Contract doctrine in terms that diminish subject-object dissonance (the subject’s recognition of promises that bind from among the array of promises that objectively should bind) is similarly a scientific inquiry and similarly consistent with philosophical naturalism.

Footnotes:

145 Leiter, Naturalism, supra note 96, at 86-87.

146 In Leiter’s terms, the “legal reasons and judicial decision” relata standing in a “justificatory relation,” are akin to the subject-object dissonance that is the province of science as conceived here. Consider:

Theories of adjudication are concerned not with the relationship between ‘evidence’ and ‘scientific theory,’ but rather with the justificatory relationship between ‘legal reasons’ (the input, as it were) ‘object,’ in scientific terminology) and judicial decision (the output) ‘subject’: theories of adjudication try to tell judges how they ought to justify their decisions, that is, they seek to ‘ground’ judicial decision-making in reasons that require unique outcomes. The Realists are ‘anti-foundationists’ about judicial decisions in the sense that they deny that the legal reasons justify a unique decision: the legal reasons undetermine the decision (at least in most cases actually litigated). More precisely, the Realists claim that the law is rationally indeterminate in the sense that the class of legal reasons—that is, the class of legitimate reasons a judge may offer for a decision—does not provide a justification for a unique outcome. Just as sensory input does not justify a unique scientific theory, so legal reasons, according to the Realists, do not justify a unique decision.

Leiter, Naturalism, supra note 96, at 93.
The realistic theory of adjudication may remain more static, or at least less dynamic, than the doctrine it applies. Shifting transactional patterns may strain the operation of rules more than they would the way judges and juries respond to the components of judicial decisions. Comparing theories of scientific revolution with conceptions of evolution in Contract doctrine confirm the utility of an appreciation of Contract as science.

B. The Evolution of Contract Theory

Science errs, and not occasionally. In fact, the story of science is a story of error, often compounded but also often corrected. There are means to measure scientific progress; for example, Larry Laudon finds progress in enhanced problem solving capacity. What matters here though, for the reconception of promise enforcement, is that we conceive of science as a progression from greater to lesser subject–object dissonance. So conceived, a science of Contract is revealed as no less a science than, say, astronomy. When Copernicus confirmed the error of Ptolemy, we were closer to understanding the relative positions of the Earth and Sun. There was less dissonance between the object (the Earth’s movement relative to the Sun) and the subject (our understanding of that relative movement). Other examples abound.

1. Theories of Scientific Revolution.—To capture the sense of science that would inform a reevaluation of promise enforcement in Contract, it helps to take account of the literature on the nature of scientific development. Contract, as an intellectual inquiry, evolves as does science: as an intellectual inquiry. An appreciation of the parallels between adjustments of understanding in science and the development of Contract doctrine reveals the nature of Contract “science.”

a. The Kuhnian Structure of Scientific Revolution.—In The Structure of Scientific Revolutions, Thomas Kuhn endeavored to put the...
evolution of scientific theory in intellectual context by describing in generic terms the course of paradigmatic shift in, primarily, the natural sciences. He began with a definition of paradigm,\textsuperscript{150} and from there described how crisis causes paradigms to shift. That description has been an enduring, but controversial,\textsuperscript{151} contribution of Kuhn's theory: "Failure of existing rules is the prelude to a search for new ones."\textsuperscript{152}

It is when the paradigm begins to fail, or at least fails to respond to newly discovered phenomena, that there is "crisis" which, in turn, signals the advent of a new paradigm that resolves puzzles insoluble during the period of normal science under the prior, now deficient, paradigm. The process Kuhn described is a gradual one, both in "hard science" and law: "There is no sharp dividing line. Instead, by proliferating versions of the paradigm, crisis loosens the rules of normal puzzle-solving in ways that ultimately permit a new paradigm to emerge."\textsuperscript{153}

Kuhn's work is a landmark and has attracted responses both from those interested in the course of scientific revolution and from those concerned with epistemology. The two sections that follow consider the contributions of two commentators in particular whose responses to Kuhn invoke ideas that support a reconception of Contract.

b. Laudan's Theory of Scientific Growth.—With Laudan, as with Kuhn, the object is to distill from commentary on scientific revolution, or evolution, the distinctive substance of science in terms that facilitate reconception of Contract. Though Laudan was responding to Kuhn and

\textsuperscript{150} "[Scientific revolutionaries] shared two essential characteristics. Their achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing modes of scientific activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve." \textit{Id.} at 10. Achievements that share these two characteristics I shall henceforth refer to as "paradigms," a term that relates closely to "normal science."

It is paradigm that structures scientific inquiry, much as it is legal doctrine, say, the "bargain" requirement, that structures legal discourse. What, at first blush, distinguishes the two areas of inquiry would be the sense of precision: Both "gravity" and "bargain" are labels for phenomena rather than explanations for the relationships they describe. We may not know what gravity is, but we have no trouble finding its manifestations. Conversely, we may think we know what bargain is but we have more trouble agreeing upon its manifestations. In both instances, though, we use the terms to practice science, that is, to reduce subject-object dissonance. Gravity describes two bodies' attraction; bargain describes when a promise binds. Were it not for paradigms, we could not develop concepts because all we would have would be masses of data without an organizing principle to define their interrelation: "In the absence of a paradigm or some candidate for paradigm, all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant." \textit{Id.} at 15. "[E]xisting theory ... predict[s] factual information of intrinsic value." \textit{Id.} at 30. A corollary of that observation might be that theory also restricts the factual information deemed to be of intrinsic value.

\textsuperscript{151} See \textsc{Hoyningen-Huene}, supra note 5, at 141–43; Imre Lakatos, \textit{Falsification and the Methodology of Scientific Research Programmes, in Criticism and the Growth of Knowledge} 91 (Imre Lakatos & Alan Musgrave eds., 1970); \textsc{Laudan, supra note 106, at 73–76.}

\textsuperscript{152} \textsc{Kuhn, supra note 106, at 68.}

\textsuperscript{153} \textit{Id.} at 80.
found deficiencies in Kuhn’s conclusions, there is much in Laudan that complements Kuhnian theory and in doing so confirms the plausibility of Contract science. In applying Laudan, as in applying Kuhn, discerning the connection between Contract and science is not accomplished by making Contract more empirical but, instead, by conceiving of science in less empirical terms:

[E]mpirical problems are frequently solved because for problem solving purposes we do not require an exact, but only an approximate, resemblance between theoretical results and experimental ones. . . . As should be clear, the notion of solution is highly relative and comparative in a way that the notion of explanation is not.

We solve problems because we agree to solve them; it is expedient to do so, and constant focus on explanation rather than solution would confound the problem-solving process.

What emerges is a picture of constantly shifting variables, subject and object that are not fixed but actually elusive, defying resolution by reference to constant values:

*the overall problem-solving effectiveness of a theory is determined by assessing the number and importance of the empirical problems which the theory solves and deducting therefrom the number and importance of anomalies and conceptual problems which the theory generates.* Most often, of course, progress occurs as a result of all the relevant variables shifting subtly.

Analogously, from that perspective, static conceptions of, for example, offer, acceptance, agreement, bargain, and consideration are a drag on rather than a key to development of consensual relations law.

Laudan also exposed the real danger of our conceiving of an intellectual construction, a theory or methodology, in terms that do not recognize the impact the construction has on understanding phenomena and reducing subject–object dissonance; static conceptions retard progress:

Even before specific theories are formulated within a tradition, and continuously thereafter, a research tradition will often strongly influence (though it does not fully determine) the range with which its component theories must grapple.

... 

If, for instance, the *methodology* of a research tradition specifies—as it will—certain experimental techniques which alone are the legitimate investigational modes for determining what are the data to be explained, then it is clear that only ‘phenomena’ which can be explored by those means can, in

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154 See, e.g., LAUDAN, supra note 106, at 73-76.
155 *Id.* at 23.
156 *Id.* at 68.
principle, count as legitimate empirical problems for theories within that tradi-
tion.157

The research terminology fixes the scope of inquiry, the "box" out of which
we seldom stray, as in Contract the terminology of the doctrine fixes the pa-
rameters of analysis.

c. Hoyningen-Huene’s Reconstruction of Kuhn’s Scientific
Revolutions.—Much of Hoyningen-Huene’s treatment of Kuhn focused on
the gap between subject and object that it is the province of science to
bridge. At the outset we must acknowledge that almost by definition it is
impossible to bridge the subject–object gap. There is simply no way to be
certain that what I describe as red looks to me the same as the red you de-
scribe looks to you. More prosaically,

We are here dealing with a “pathway of doubt” vis-a-vis our phenomenal
world which might more precisely be called ‘the way of despair. For what
happens on it is not what is ordinarily understood when the word “doubt” is
used: shilly-shallying about this or that presumed truth, followed by a return to
that truth again, after the doubt has been appropriately dispelled—so that at the
end of the process, the matter is taken to be what it was in the first place. On
the contrary, this path is the conscious insight into the untruth of phenomenal
knowledge.’158

There is, then, from Hoyningen-Huene’s perspective, an overwhelming
impediment to explanation in Laudan’s sense. The best we can do is re-
duce subject–object dissonance; we can not resolve it completely. That is
“despair” in the natural sciences.

The empiricism of the natural sciences is a matter of degree. So we
make the case for the reconception of Contract not by asserting the empiri-
cal verifiability of Contract conceptions but by revealing that the resolution
of subject–object dissonance in the hard sciences is not a different type of
intellectual exercise than is the resolution of fact (stimuli)–law (sensation)
dissonance in matters of jurisprudence. The value of obscuring if not actu-
ally obliterating that empirical line in the sand is not in its denigration of the
natural sciences by association with the social sciences. The value is in
nurturing a different conception of the terminology and intellectual con-

157 LAUDAN, supra note 106, at 86-87. Laudan offered an example that captures well the Contract
parallel:

A classic example of this process is offered by nineteenth-century phenomenological chemistry. Scien-
tists in this tradition argued that the only legitimate problems to be solved by the chemist
were those which concerned the observable relations of chemical reagents. Thus, to ask how this
acid and this base react to form this salt is to pose an authentic problem. But to ask how atoms
combine to form diatomic molecules cannot conceivably count as an empirical problem because
the methodology of the research tradition denies the possibility of empirical knowledge of entities
the size of atoms and molecules.

id. at 87.
158 HOYNINGEN-HUENE, supra note 5, at 67-68 n.12 (citing and quoting G.W.F. HEGEL, THE
PHENOMENOLOGY OF SPIRIT 49-50 (A.V. Miller trans., 1977)).
structions that are the agents of Contract.

Such a perspective may also help distinguish instrumental doctrine, real aids to understanding, to reducing subject–object dissonance, from dogma, slogans that label decisions after the fact but afford little guidance to understanding. That is, we can say that A’s promise to B is binding, gives rise to a Contract, if B may enforce that promise to the extent of, perhaps, B’s expectation interest, once there is a sufficient meeting of the minds of A and B given the context in which their deal proceeds. We can also say that A’s promise to B forms a Contract if the promise is the product of bargain. Which formulation is better law?

The more dynamic sense of agreement, a sufficient meeting of the minds, accommodates an appreciation of the interaction among the values, principles, and rules and between some values and others, some principles and others, and some rules and others, that comprise Contract. We may depict a particular quantum of agreement as a bargain. So conceived, the rational units of Contract are aids to understanding rather than impediments to analysis. We can, to answer Craswell, rationalize our belief that “the conditions under which it is excusable to break a promise to the poor [in fact do have] connection . . . with the conditions under which it is excusable to break a business promise, or a promise to a friend.”159 Actually, we resolve the tension not by demonstrating that there is no connection between the two contexts, but by offering a richer sense of the interrelation between and among the rational units of Contract at work in those two contexts. And to rationalize apparently dissonant conclusions in a range of transactional settings, some more evolved than others, is to appreciate and give effect to the best traditions of scientific revolution.

The following section confirms that a reappraisal of the function of legal conceptions is appropriate and worthwhile by demonstrating that Contract doctrine necessarily assumes the intellectual shape, if you will, of the constituents of the “harder” sciences. It is only when we deny such properties of Contract that we exacerbate rather than reduce subject–object dissonance in the Contract law.

2. Theories of Scientific Revolution Applied to Contract Evolution.— Contract terminology, because it is at least once removed from Contract in fact, has obscured the evolution of Contract theory. We continue to resolve Contract questions into matters of consideration, offer, acceptance, bargain, and the like. But it is necessary to recognize how accepted Contract terminology may even retard the evolution of Contract.

You get a sense of the way Contract terminology works if you apply Kuhn’s conception of the way paradigms work to Contract. Paradigms impose a structure on rationalization that sufficiently accommodates consen-

159 Craswell, supra note 11, at 491.
sus. The consensus dilemma\textsuperscript{160} assures that there will be more apparent than real consensus, but, for most purposes, that is good enough. It generally matters more that we agree consideration is an element of Contract than it does that we agree why it is indispensable. In most cases, close enough is good enough, and certainly no less in Contract science than in the natural sciences.

It is not, then, surprising that Kuhn’s description of paradigms in science evokes Contract conceptions: “Scientists can . . . agree in their identification of a paradigm without agreeing on, or even attempting to produce, a full interpretation or rationalization of it.”\textsuperscript{161} The Contract rules of consideration, offer, acceptance, and bargain comprise a paradigm based on the principles of intent or reliance.\textsuperscript{162} “A full interpretation or rationalization” of that Contract paradigm would require reliable conclusions about the values that support the intent and reliance principles that in turn support the paradigmatic rules.

Recall that Laudan, too, recognized the relative nature of solution and distinguished that from our expectations for explanation: “[T]he notion of solution is highly relative and comparative in a way that the notion of explanation is not.”\textsuperscript{163} It is not a great leap for students of Contract to appreciate the parallels between Laudan’s view of problem solving and what we do in deciding when a promise binds. If we will enforce a promise only when it is the product of bargain (the “theoretical results”), determining when a particular promise is in fact a promise and coincidently is the product of something we call “bargain” (the “empirical result”) is not a matter of “exact” but only “approximate” resemblance.

Laudan also revealed the dynamic of scientific explanation. Our expectations evolve: “Unless we acknowledge that the criteria for acceptable problem solutions do themselves evolve through time, the history of thought will seem enigmatic indeed.”\textsuperscript{164} Newtonian physics answers enough questions short of the speed of light, but we need relativity to make sense of black holes. “Bargain” explains arms’ length transactions between nineteenth-century artisans, but we need revised conceptions of inferable volition to make sense of “point and click” contracting. What was always an approximation, a shorthand for and shortcut to intent, becomes a means to frustrate rather than effectuate expectations when technology and transactional patterns shift.

\textsuperscript{160} See supra note 34.
\textsuperscript{161} KUHN, supra note 106, at 44.
\textsuperscript{162} This, at least, is a popular conception. See P.S. Atiyah, PROMISES, MORALS, AND LAW (1981); FARNSWORTH, supra note 10; Fuller & Perdue, supra note 18; see also S. Toulmin, Does the Distinction Between Normal and Revolutionary Science Hold Water?, in CRITICISM AND THE GROWTH OF KNOWLEDGE 39, 40 (1970).
\textsuperscript{163} LAUDAN, supra note 106, at 155.
\textsuperscript{164} Id. at 26.
The fact that our Contracts terminology, its faults notwithstanding, does not wholly undermine transactions (at least not yet) is a function of the relationship between the forms (for example, consideration, offer, acceptance, bargain) and the phenomena they seek to order. In turn, the continued efficacy of those forms is a product of their relationship with a level of consensus, and evolving transaction patterns; and those two constituents (consensus and transaction) are themselves interrelated. The level of consensus is determined by the frequency, familiarity, and accessibility of the transactional pattern. The extent to which the Contract forms work, and this is a matter of degree, is determined by the fit among them in a context—by their interdependence.

Contract conceptions such as consideration, offer, acceptance, and bargain obscure the relationships that determine their cooperation. It may be that P.S. Atiyah captures the correct sense in his attribution to David Hume of the animating principle of Contract: “Promises are binding for reasons of human convenience.” But that is no more instructive, in the way science instructs by reducing subject–object dissonance, than it would be to say that Contract is a good thing, or a bad thing. Just as the standard Contract terminology often gets us no (or not much) closer to the how and why of promise enforcement, Contract theory that is inconsiderate of the relationship between and among the (1) rational units of Contract (captured in its terminology), (2) consensus about them, and (3) evolving transactional patterns, ultimately frustrates rather than serves the evolution of Contract theory.

The question remains: If our Contract terms work against us by forcing the dynamic into a static mold, why do we continue to conform our thinking about the enforceability of promises to the forms that the terminology dictates? The answer must certainly be that the terminology, even if it is not the best aid to understanding or resolving recurring controversies, does not get in the way. It may be that, over time, as transactional patterns evolve, our answers become less exact and more approximate because the object of the answers is solution, not explanation, and the terminology obscures explanation in order to accomplish solution. To capture the extent to which Contract has become a slave to its methodology, ask yourself why “bargain,” in the “agreement to exchange” sense, matters. It may be that, in fact, bargain does not matter beyond its role in discouraging the evolution of Contract theory. While it is premature to reach that conclusion, posing the question formulates the application of Laudan to a reconception of Contract.

To appreciate the more complete picture, consider Hoyningen-Huene’s identification of the cause for despair in the natural sciences: the fundamen-

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166 RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981). “[A]greement,” in turn, is defined as “a manifestation of mutual assent on the part of two or more persons.” Id.
tal untruth of phenomenological knowledge. If that "despair" gets in the way of understanding the interaction of molecules, imagine how it might confound a science of Contract. In fact, there is no need to imagine; the proliferation of theories of promise enforcement suffice to confirm the teleological and deontological cacophony of Contract. 167 Hoyningen-Huene observed that Kuhn recognized the great phenomenological divide.168

This section and the preceding sections have brought into focus the fit between the natural sciences and Contract science. They established the predicate that Contract, the study of the interrelated values, principles, and rules determining when promises bind, shares fundamental premises with the modes of inquiry that resolve the problems confronting the natural sciences. The next section confirms the affinity between the naturalist per-

167 Kuhn’s 1969 Postscript made that point vividly in the context of the natural sciences:

Notice now that two groups, the members of which have systematically different sensations on receipt of the same stimuli, do in some sense live in different worlds. . . . To the extent, of course, that individuals belong to the same group and thus share education, language, experience, and culture, we have good reason to suppose that their sensations are the same. . . . But where the differentiation and specialization of groups begins, we have no similar evidence for the immutability of sensation. Mere parochialism, I suspect, makes us suppose that the route from stimuli [object] to sensation [subject] is the same for all members of all groups.

KUHN, supra note 106, at 193. Hoyningen-Huene described that as Kuhn’s "critical epistemological standpoint." He explained,

[from the particular critical epistemological standpoint characteristic of Kuhn’s theory . . . the assumption of the pure object-sidedness of . . . stimuli is no longer tenable. The premise that the world I (and other members of my community) take to be real, is, in the same way, the real world for all humans, which appeared so self-evident from the natural standpoint, is now called into question. . . . Any substantive assumption about the nature of stimuli constitutes a prejudice in favor of some particular phenomenal world (or some particular class of phenomenal worlds) and is thus to all appearances a methodological error.

HOYNINGEN-HUENE, supra note 5, at 46-47. That sensory nihilism is unnerving, but does provide an explanation of intellectual tension within and across disciplines. For social scientists, who probably to an extent think of such political conflict as the determining characteristic of their discipline, it may be particularly striking to recognize that even physics, if we are to take the critical epistemological viewpoint seriously, is the product of the political forces, broadly defined, that shape all human interactions and therefore all consensus regarding subject-object dissonance.

168 HOYNINGEN-HUENE, supra note 5.

On this issue, Kuhn himself claims at one point that, at least for scientists, a transcendence of one’s own phenomenal world complete enough to allow an unbiased survey of all possible phenomenal worlds is impossible, though a scientist situated in a given historical context might face a choice between two possible phenomenal worlds. We must therefore conclude that Kuhn would deny the possibility of such a completely neutral standpoint for the philosopher or historian of science as well.

Id. at 68 (citing Thomas S. Kuhn, Discussion in F. SUPPE (ED.), THE STRUCTURE OF SCIENTIFIC THEORIES 509 (1974)).

That realization provoked Kuhn to conclude that political power has determined the course of scientific inquiry; at least that is the spin put on Kuhn’s observations: "Thus, both Kuhn and Feyerabend conclude that scientific decision making is basically a political and propagandist affair, in which prestige, power, age, and polemic decisively determine the outcome of the struggle between competing theories and theorists." LAUDAN, supra note 106, at 4; cf. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) (treating relationship among law, individualism, and capitalism).

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spective and the reconception of Contract offered here in terms of the strain that evolving transactional patterns impose on the ostensibly fixed structures governing promise enforcement.

C. Categories of Contract

Contract is not monolithic: This Article demonstrates that even in response to the simple question "When does a promise bind?", the answer must be, "It depends." It is not enough to put the hypothetical "A promises B to build an arc"; before we know whether what we are talking about really is a "promise" we need to know who A and B are and, probably, what an "arc" is. As transactional patterns evolve, the static rules, the fixed forms, deteriorate because the relationship among them evolves coincidentally. Contract can and does respond to that evolution; but it may do so haltingly and, therefore, quite imperfectly.

For the most part, our response to deterioration of the rules is to promulgate exceptional categories which, in time, become less exceptional. In an ultimately worthwhile contribution to the literature, Melvin Eisenberg surveyed the operation of the unconscionability doctrine as a limitation on the bargain principle. He concluded that in four categories of Contract cases the bargain principle defers to the unconscionability doctrine: exploitation of distress, transactional incapacity, unfair persuasion, and price ignorance. Though each of those contexts is the product of a number of factors, a common denominator seems to be the sophistication discontinuities that result among diverse transactors. But Eisenberg's study reveals only one way in which Contract may "conform" to factual scenarios that strain its fabric: the creation of exceptional categories. There are certainly

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[169] Eisenberg, supra note 106. The work's economic analyses may be incomplete, but elaboration on that conclusion would be beyond the scope of this Article and, in any event, is not crucial to the argument here.

[170] Professor Eisenberg offered a conception of bargain to support his analysis:

By bargain, I mean an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other. . . . By the bargain principle, I mean the common law rule that, in the absence of a traditional defense relating to the quality of consent (such as duress, incapacity, misrepresentation, or mutual mistake), the courts will enforce a bargain according to its terms, with the object of putting a bargain-promisee in as good a position as if the bargain had been performed.

Eisenberg, supra note 106, at 742. For the expression of the unconscionability doctrine, Eisenberg relied on the Uniform Commercial Code § 2-302 and the RESTATEMENT (SECOND) OF CONTRACTS § 208 formulations. Id. at 750-51.

[171] The hypotheticals that Eisenberg built to support his discussion of the four unconscionability contexts are neither dependent on nor the product of transactional evolution that has rendered the older forms unsuitable to contemporary contexts. Evolving transactional patterns would exacerbate rule-context dissonance in ways similar to those investigated by Eisenberg but on a broader scale. That is, for example, the information asymmetries that give rise to unconscionable price ignorance may be more common as the subject matter of Contract becomes more complex, say, computer software, and the forms of contracting more expeditious, such as "point and click" contracting.
other examples of Contract terminology's failing Contract analysis. 172

Roy Kreitner demonstrated the malleability of Contract in terms that support the observations offered here. 173 Gambling contracts are generally unenforceable. 174 Gambling is an allocation of risk. Contracts are an allocation of risk. All contracts are a gamble. That progression, with the appearance, if not the substance, of syllogism, captures the paradox that Kreitner analyzed in terms that expose the evolution of the foundation of Contract.

The challenge for Contract, so far as gambling is concerned, is to distinguish between those allocations of risk that are legitimate, for example, insurance contracts (betting you or a loved one will die), and illegitimate allocations of risk, for example, betting on a poker game (in a state that has not legalized that activity). 175 Kreitner traced the historical development of the distinction and offered observations that betray the contrast between the static nature of Contract rules and the dynamic nature of Contract practice: "While a twenty-first-century reader may be mildly surprised at the connection between commodities trading or insurance and gambling, for the nineteenth-century mind, the topics were almost inextricably linked." 176

Kreitner described the development of Contract that ultimately came to support a distinction between legitimate and illegitimate allocations of risk by reference to the parties' intent. The proscription against gambling contracts, a fixed rule, gives way to transactional realities, and in so doing reveals the risk inherent in all Contract:

The practice of wagering is controlled by the court's reserving its power to invalidate contracts made with the express intention of circumventing the prohibition on gambling. But this power is no longer exercised by applying a simple label of wager; instead, the court shows itself willing to delve deep into the facts in order to distinguish the good wager from the bad wager. . . . The court thus recognizes the difficulty of upholding an analytical distinction between transactions that can be characterized as wagers and those that can not, and, abandoning that distinction (without saying so overtly), takes the affirmative step and responsibility of distinguishing between legitimate and illegitimate transactions. 177

Note particularly the emphasized language. It tells a story not just of the courts' solution of a characterization issue in a class of contracts; it depicts

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172 Perhaps, most notably, the development of promissory estoppel marks the failure of traditional bargain conceptions. See supra text accompanying notes 56-77.
174 See id. at 1096 n.1.
175 "Whether at the turn of the century or today, labeling transactions as wagers is one way to limit freedom of contract." Id. at 1098.
176 Id. at 1099.
177 Id. at 1121 (emphasis added).
the state of Contract science. Kreitner described an instance in which the courts do not acknowledge that the lines they draw are not defined by prevailing Contract categories and the relationship among the elements of Contract. What makes Kreitner’s contribution so important is not that he brought attention to an instance of Contract incongruity; he illustrated much more. The good vs. bad wager (enforceable vs. unenforceable promise) dichotomy Kreitner revealed is very much a product of general Contract science, not an anomaly.

The commentators who have redefined Contract by drawing distinctions among recurring contexts by reference to information asymmetries 178 will only get so far. It is one thing to distinguish the sale of a tractor from one farmer to another from the sale of a Thunderbird from Ford to a consumer. We can fashion rules to take into account the parties’ relative sophistication. 179 But in the course of doing so we merely invoke the vengeance of Occam’s razor—obscuring the fundamental principle by proliferation of rules.

This is not to argue, however, that we would be better off constructing vague statements designed to include every contingency without appreciating important bases of distinction. That would accomplish no more than a confirmation of H.L.A. Hart’s ascriptive language: 180 the pronouncement of legal conclusion rather than the description of a “hard fact” about the phenomenal world. 181 Contract requires more. That more is the subject of the next Part.

IV. SYNTHESIS

This Part, first, describes the problems that emerge from an appreciation of the ascriptive nature of the term “bargain.” It then considers the impact of context on the determination of interrelations. Finally, it suggests the course of further inquiry that would inform reevaluation of the constituents of Contract.

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178 See supra note 11.


180 See H.L.A. Hart, The Ascription of Responsibility and Rights, 49 PROC. ARISTOTELIAN SOC’Y (n.s.) 171 (1949); H.L.A. Hart, Definition and Theory in Jurisprudence, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21, 23-6 (1983), both cited in Schauer, supra note 44, at 1221 n.18, in the course of his discussion of “thick descriptions,” descriptions which use words that “are not only descriptive, because, in the process of describing, the describer is also making or subscribing to a normative or evaluative claim made by someone else or by society at large.” Id. at 1221 (citing PHILIPA FOOT, Moral Arguments, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 96 (1978); JUDITH HARVY THOMSON, THE REALM OF RIGHTS 10-20 (1990)).

181 Frederick Schauer, supra note 44, at 1221. Actually, at an extreme, it is difficult to think of very much language that is not “ascriptive” in the Hart sense or “thick” in the Foot sense, at least so far as Schauer comes to terms with those conceptions.
The term "bargain" is a conclusion; its invocation describes the circumstances from which consequences necessarily flow. If there is a bargain there are enforceable promises and sanctions for their breach. The term, then, is not an analytical device. It merely restates the question. Now, this might not have always been true. When the circumstances in which mutual promises were to be enforced were less clear, bargain answered an important question—it told us that a promise was enforceable when it was the product of bargain. That was a contribution to the law at a time when the enforceability of promises was not taken for granted. Also, bargain provides an explanation of consideration.\footnote{See O.W. Holmes, The Common Law (1881).} Insofar as the cautionary and evidentiary qualities of consideration\footnote{See Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800 (1941).} might be satisfied by a writing, bargain preserves another role for consideration.

Further, bargain distinguishes a range of fact patterns in which promises would be enforceable because they were mutual from one in which promises might not be enforceable because they were not mutual. Unbargained-for promises could still be enforced, but to do so we would need to find the elements of promissory estoppel or some other bargain surrogate\footnote{Perhaps, even, misrepresentation. See Gordley, supra note 77, at 580.} satisfied.

But it is the ascriptive character of bargain that engenders the incommensurability that, in turn, exacerbates rather than reduces subject-object dissonance. For example, if we take bargain to connote an "agreement to exchange,"\footnote{Restatement (Second) of Contracts § 3 (1981).} we engender incommensurability by inviting, even requiring, analysis that is dependent on subjective, and necessarily inaccessible, determinants. Whether two minds in fact "meet" to form agreement is a matter of degree insofar as one mind can never be superimposed on another without some dissonance between them. Nevertheless, we can say that they "meet" when the dissonance is within acceptable parameters—even when their consonance depends on qualitative differences among variables that cannot be reduced to vectors on a single dimension of evaluation.\footnote{Cf. Posner, supra note 44, at 1185 (describing incommensurability as the circumstance in which "choice depends on qualitative differences between options that cannot be reduced to vectors on a single dimension of evaluation"). Adler’s definition, see supra note 44, works less well in this setting because, for the sense in which the incommensurability considered here operates in parallel conceptions of bargain, values are not implicated. But they certainly could be, and then it would be worthwhile, even necessary, to invoke Adler’s alternative definitions of incommensurability. It is not necessary, though, to consider that enhanced level of complexity in order to make the point asserted in the text.}
If, instead, we focus on the relation among elements that actually determines when a promise will be enforceable, then we replace the incommensurability of bargain with a set of vectors that do admit of comparison. We may not agree that there has been a “meeting of the minds,” but we could agree that, empirically, “[p]ayment preceding the revelation of full terms is common”\textsuperscript{187} in an array of recurring transactional contexts. Further, we will be able to better discern the relationship among that set of vectors and shifting transactional patterns. The challenges presented by new contexts (for example, the advent of “point and click” contracting or its successor) may be seen as amenable to a shift in the relation among those vectors. So long as the rational unit, bargain, is the product of the interrelation of context-dependant variables, we may think of those variables in terms that vindicate comparison among them to appreciate better the character of the rational unit itself, and so respond to the perception dilemma.\textsuperscript{188} We then reduce consensus error, the misleading signal sent when different actors reach the same conclusion for different reasons (thereby giving the appearance of consensus by masking the constituent disagreements).\textsuperscript{189}

We can imagine that in Hill\textsuperscript{190} the value of the goods, the regularity of the transactional pattern, the sophistication of the transactors, the buyer’s right of return, the contract term in issue, and perhaps other considerations as well, combined to support the court’s conclusion that the buyer’s promise was enforceable, notwithstanding the fact that the buyer “agreed” to it without perhaps ever having seen it. There was bargain enough; had the price been higher, the transactional form (a phone order) less common, the Hills less sophisticated, the contract term in issue more onerous, the court may have concluded that there was no bargain, no enforceable promise. Contract science merely requires that we acknowledge the interrelation of factors that supported the court’s determination. In time, we may come to appreciate those elements as well as others as constituents of bargain. For now it suffices to make the point that we are likely to understand Contract better if we replace bargain with generic statements of those variable and interdependent considerations and that Contract science makes clear the good sense of referring to bargain enough, good sense obscured by analyses that mask the constituents of bargain. Contract so reconceived also demonstrates that it is not merely context that determines the enforceability.

\textsuperscript{187} See supra text accompanying note 93.
\textsuperscript{188} See supra note 33.
\textsuperscript{189} For example, you and I might both agree that a particular representation of a promise should not be enforced, you because you believe that the promisor lacked capacity and I because I believe that there was not a sufficient memorandum of agreement. Similarly we could both agree that there was not a bargain in fact, you because of the timing of the responsive communications between the parties and I because the subject matter of the contract was not fixed with sufficient certainty. If all we have to label the pertinent rational unit is “promise” or “bargain,” then the ascriptive nature of the terms camouflages dissonance as consonance.
\textsuperscript{190} Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).
of a promise, but the constituents of context that do so.

Recall Richard Craswell’s conclusion that it is the transactional setting, primarily the relative economic power and sophistication of promisor and promisee, that determines the enforceability of a promise. That suggestion is correct, but incomplete. Before we can decide whether there was a bargain, we need to take into account the question that the bargain calculus endeavors to answer. If bargain matters with regard to the damages issues, as in *Evra*, we may conclude there is no bargain. If we use bargain to determine the nature and extent of the promises made by the transactors, as in *Hill*, we may decide that, given the particular term in issue, there is *enough bargain* to support enforcement.

While we are comfortable generally analyzing the course of the parties’ communication to see if we conclude there has been an accepted offer, we do not acknowledge that what constitutes an exchange of offer and acceptance in one setting, with transactors at one level of sophistication, will not constitute an offer and acceptance in the next, and it should not. “Point and click” might suffice to form an agreement that the person sitting at a personal computer agrees to update her email address at the request of the service provider, but it would likely not suffice if the service provider were trying to enforce the individual’s promise to send five hundred dollars each month to the provider to remain on a mailing list. A court trying to resolve that distinction in terms of fixed and invariable rational units of Contract will likely need to obscure its analysis. Contract science accommodates a focus on the relation among those same rational units and in terms of context.

It is such a focus on the interrelation among rational units that responds to the incommensurability that undermines the operation of Contract doctrine. Recall *Evra* and Judge Posner’s application of the Contract doctrine governing consequential damages, derived from *Hadley v. Baxendale*. Reasonable people could, and did, reach different conclusions about Hyman-Michaels’s right to recover the full economic loss it suffered when it lost the valuable ship charter as a result of Swiss Bank’s failure to effect the payment instruction. Judge Posner’s opinion recited the rule of *Hadley*: “consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them.”

The court’s analysis, though, took account of factors unrelated to the plaintiff’s having actually apprised the defendant of the potential loss:

191 See *Evra* v. Swiss Bank Corp., 673 F.2d 951, 955-56 (7th Cir. 1982).  
192 See *Evra* v. Swiss Bank Corp., 673 F.2d 951, 955-56 (7th Cir. 1982).  
193 See *Evra* v. Swiss Bank Corp., 673 F.2d 951, 955-56 (7th Cir. 1982).  
194 See *Evra* v. Swiss Bank Corp., 673 F.2d 951, 955-56 (7th Cir. 1982).
[Swiss Bank] knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named *Pandora*. But it did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels. And it did not know that Hyman-Michaels knew the Pandora's owner would try to cancel the charter, and probably would succeed, if Hyman-Michaels was ever again late in making payment, or that despite this peril Hyman-Michaels would not try to pay until the last possible moment and in the event of a delay in transmission would not do everything in its power to minimize the consequences of the delay.\(^1\)

The court apparently would have been satisfied if the defendant were aware of the extent of the plaintiff's potential loss, without regard to whether the plaintiff had actually notified the defendant of that potential.

Ultimately, the court fixed the terms of the bargain, and thereby the extent of the defendant's exposure, by reference to the relation between the parties: "'[T]he animating principle of *Hadley* . . . is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so.\(^2\)"

That is an elaboration of the Hand Formula, B<PL, in the Contracts context. It is the relation among the variables, for which B<PL provides the shorthand, that determines the parties' *bargain*. That application of the Hand Formula in Contract may appear starker because *Evra* straddles the Contract-Tort divide.

The reconception of Contract to restate the relations among rational units in Contract and to reformulate those rational units facilitates a healthy transparency in doctrine. The consequential damages rule of *Hadley*, the Restatement of Contracts,\(^199\) or Article 2 of the Uniform Commercial Code\(^200\) is an application of *bargain*. It fixes the parties' allocation of risk by reference to a B<PL-like Tort formula.\(^201\) Parties drafting a consequential damages provision before a loss, as well as courts fixing the parties' allocation of risk for consequential damages after the fact, do so by reference to more rich contextual fabric than would be the case if the relations between the risk and the parties' relative standing in relation to that risk were not a part of the calculus. There is room in the application of the rule for consideration of the attendant principles and the values informing them that would be obscured if the rule were simply that consequential damages are not recoverable unless expressly provided for in a writing memorializing the parties' agreement.

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\(^{197}\) *id.* at 956.

\(^{198}\) *id.* at 957.

\(^{199}\) See *supra* note 78.

\(^{200}\) *id.*

The court is able to reach a result considerate of context because the Hadley consequential damages rule diminishes incommensurability by responding to the perception and consensus dilemmas. The inquiry is stated in terms of what the parties constructively understood (responding to the perception dilemma) and in terms of what result is fair (invocation of the utilitarian Hand Formula-like balancing: Who was in the best position to avoid the loss?). Without that structure, we would be left with an investigation of the parties' bargain in fact: Did they agree to a particular allocation of the risks attending their transaction? They certainly did not—the best we can do is structure their bargain after the fact.

Hadley and Evra fix the bargain (with regard to consequential damages) and demonstrate how Contract can respond to incommensurability by focusing on the relation between transactional context and bargain. Contract science would invoke that type of context-determined statement of Contract doctrine for all of the rational units of Contract, but would also go further. It would recognize that the relative consideration exchanged can determine the sum and substance of bargain: Would we get the same result if misplacement of the telex resulted in the plaintiff's loss of $50, $500, or $5,000? Would we get the same result if, in fine print unread by the bank receiver of the telex, there were a legend to the effect that by agreeing once to accept a payment telex the bank would be liable for the full amount of any consequential loss occasioned by its failure to handle properly a payment telex in the future—in which case the terms of the parties' offer and acceptance would be in issue?

From those premises, the sense of Contract reconceived emerges: The context of exchange determines the substance exchanged and context is the expression of relation. That statement may be subject to corollaries that capture the role of familiar rational units in the Contract mosaic. For example, with regard to bargain, we may conclude that a constituent of context is the inference of agreement. Such a corollary assures that the rational unit, agreement, is maintained but constrained. The extent to which the parties' accomplish their transaction pursuant to the agreement inferred from their expression is an element of context, and thereby may determine the substance of their exchange more accurately than sterile conceptions of bargain alone.

While the basis of promise enforcement is the inference of volition, the recitation of the Contract formation rules provides scant guidance concerning the proper bases upon which that inference may be founded. The constituents of Contract must be derived from the array of factors that determine the inference of volition and provide the means to identify the extent of promise enforcement. That description could become the basis of prescription, and thereby inform a restatement of the Contract relation that better reduces the incommensurability that increases rather than diminishes subject–object dissonance. We will not have honestly approached the Contracts question until we confront why and how transactor sophistication and
the value of the consideration in issue determines the scope of the inference of volition. That inquiry would facilitate our putting the indicia of volition on a metric to reveal the bases of promise enforcement.

Prerequisite to that reformulation is, of course, a survey of the sources of law that have refined the scope of promise enforcement in evolving transactional settings. But such a survey will not advance the law if the object is appreciated as simply an exercise in distillation, tying together not inconsistent pronouncements of general desiderata. The ameliorative reconception of Contract requires that the fundamental elements be established in terms that recognize their interdependence and that do not obscure the possibility of recognizing the extent of enforcement in Contract generally, rather than in the exceptional cases of promissory estoppel, consequential damages, and unconscionability.

Recognizing that Contract may be rationalized from a variety of perspectives, it is worthwhile to make the elements of promise enforcement transparent so the formation rules and their application do not obscure the operation of the considerations that determine the inference of volition. If the rule is that we enforce a promise to achieve certain utilitarian ends, consider B<PL, it is not clear what is gained by camouflaging that premise in our elaboration of the bargain calculus. Similarly, if the object of a formation rule is paternalistic, consider the consideration doctrine, the formulation of the rule should reveal and not hide that paternalism.

If we are able to depict utilitarian and paternalistic objectives starkly on an enforcement continuum, we will be able to make better sense of disagreements about the extent of enforcement. We may also be able to tailor a better result to vindicate the right amount of paternalism on the facts presented and thereby provide more accurate bases for reliance in recurring transactions. And to the extent that reliance is an important justification for the enforcement of promises ab initio, a body of Contract formation rules that orders the determinants of the extent of enforcement on a common vector facilitates Contract as it diminishes the subject-object dissonance that it is the province of a Contract science to redress.

V. CONCLUSION

In his insightful commentary on the methodological structures legal theorists have sought to impose on jurisprudential inquiry, Edward Rubin described the causes of the law’s failure to find refuge in the natural sci-

202 See supra text accompanying notes 119-125.
203 See FARNSWORTH, supra note 10, at 45-46.
204 See id. at 38-42; see also Eric A. Posner, Law and Regret, 98 Mich. L. Rev. 1468, 1470 (2000) ("The most plausible answer to the question of why promises are enforced, is that by enforcing promises, the law enables people to make commitments that they would otherwise not be able to make, and these commitments allow people to obtain good things in return (cash, services, goods)").
205 Rubin, supra note 2.
What underlies the cumulation of scientific knowledge is a unified theory of causality. . . .

It is precisely such a theory that legal scholars lack. They lack it because they are not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to prescribe alternatives. This does not lend itself to the notions of causality that lie at the base of natural science and its cumulative method. It does not, moreover, involve the sort of statements about external reality that can be verified or falsified by data, the process through which the cumulation of scientific knowledge is effected.266

Rubin’s conclusion derives from the distinction he draws between data (what scientists study) and events (what the law studies and regulates). For Rubin there is something more elemental about data: “The distinguishing characteristics of data, as opposed to events, is that they are generated, defined, and given significance by the academic discipline that studies them.”207 In contrast, “[j]udicial decisions, legislative enactments, and administrative regulations . . . are neither discovered in law libraries nor unearthed in the field, but generated by nonacademic actors.”208

That dichotomy is ultimately unconvincing. It loses sight of the fact that actors’ actions and reactions in a particular context, such as the context of commitment, are data. And for purposes of a reconception of Contract, it is every bit as much data as the discovered artifact. Appreciation of that relationship between the law of promise enforcement and the constituents of Contract is the basis of the reconception of Contract proposed in this Article.

The argument is not that legal decisions may be studied as would be the interaction of elements on the periodic table. The argument is that by studying actors’ reactions to the elements of Contract we can fashion a re-appraisal of the constituents of promise enforcement and as well develop a perspective to inform a reconception of those constituents and their interaction that would better—more accurately, at least—depict the foundations of promise enforcement. It may be that such a perspective effectively converts Rubin’s “events” into the “data” that he believes it is the province of science to study.

The reconception of Contract urged in this Article is a reconception informed by naturalism, a means to acknowledge and confront the subject–object dissonance that compromises the ability of extant Contract doctrine to respond to the challenges presented in evolving transactional contexts. It is, ultimately, tinkering at the level of rules to provide the common vectors on which we may describe reactions to issues of promise enforcement. Our

266 Id. at 527-28.
207 Id. at 525.
208 Id. at 525-26.
familiar forms frustrate realization of that object by exacerbating incommensurability. Reliance on a sense of the elements of Contract in a manner inconsiderate of their interrelation and their ultimate conformity on an enforcement continuum by reference to the damage measure obscures the data behind the characterization of events.

We can do better.