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## THE MORAL IMPOSSIBILITY OF CONTRACT

PETER A. ALCES\*

Contract theory is incoherent; so Contract is amoral. Let me explain.

The *function* of theory is heuristic. The *object* of theory is either normative or positive. The best theorists are able to blur the distinction, often for rhetorical purposes. Legal theory (at least in some of its iterations) depends upon a posited conception of doctrine (and doctrine, too, is heuristic). That is, theory either explains or corrects doctrine.<sup>1</sup> To accomplish that, legal theory is dependent upon a theory of legal doctrine. Contract theory, whether deontological, consequentialist, or pluralist, begins and must end with the doctrine, and must have something to say about doctrine that serves a heuristic purpose (as well as, perhaps, other purposes). My interest is not so much with what Contract theorizing tells us, heuristically, about Contract doctrine; my concern is more with what Contract theory, in all of its extant phases, assumes about the nature of Contract doctrine. In this paper, I will engage each of the foregoing observations about the theory-doctrine dynamic and try to say something by drawing conclusions about the relationships among them.

In efforts to formulate the deontological or consequentialist conceptions of Contract, or to demonstrate that Contract is neither wholly explicable in terms of one or the other type of theory, claims are necessarily made about the nature of Contract as a body of doctrine, claims about what doctrine is. I do not mean simply that theorists disagree about what a *particular* doctrine entails, such

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1. Theory can reveal the implicit unity of its subject, here Contract. See Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 125 (Peter Benson ed., 2001).

as what a court should do in order to apply, for example, the consideration, frustration, or unconscionability doctrines correctly. I acknowledge that reasonable minds disagree about the substance and constituents of those common law Contract doctrines. That is not my point. Instead, I am curious about what it means for a set of rules (say, the set of rules that fixes the parameters of "agreement") to be *doctrine*, the phenomenon that theory would try to explain.

Heretofore we have assumed the accessibility of doctrine as an idea set. Though we might disagree about the theory or theories needed to make sense of that idea set (or the relationship among plural theories), we have largely taken for granted that we are all talking about the same kind of thing when we use the term "doctrine" to describe what it is theory rationalizes. Examination of the nature of doctrine *qua* doctrine could reveal something that would explain why particular Contract theory fits particular doctrine uneasily and why Contract theory generally cannot do the work we would have it do, as we would have it do that work. If we were able to arrive at an adequate Contract theory, we would have established the perspective from which to explain<sup>2</sup> and correct. We could appraise the efficacy of certain Contract rules and the results of those rules' application and operation in terms of the theory. In other words, if Contract theory tells us that Contract accomplishes X, we could decide that Contract fails or succeeds in terms of its realization of the goal Contract theory has identified. For example, were Contract really about facilitating Pareto superior moves, we could consider a Contract rule's operation and decide whether it serves or frustrates that object. Alternatively, if Contract is about autonomy, we could appraise its efficacy at vindicating free will, or a particular deontological theory's conception of autonomy. To the extent that theory is serving a positive function, we could test a particular theory's ability to tell the future, notwithstanding epistemological limitations that might frustrate the predictive efficacy of even the best theory.<sup>3</sup> But ultimately, I argue, we cannot

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2. See T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW*, *supra* note 1, 86, 88-93 (positing theoretical basis of Contract's expectation rather than reliance measure of damages).

3. The so-called "Hand Formula" serves this function in the negligence law. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (1947) (Hand, J.) ("[L]iability depends upon whether B [burden] is less than L [injury] multiplied by P [probability] ...."). It may be that

arrive at an adequate Contract theory, one that can appraise and predict Contract doctrine, because Contract doctrine resists theory.

My conclusion is that, given the nature of Contract doctrine, theory cannot make sense of Contract, that is, cannot make sense of Contract in any way particularly useful to morality. So, at least as far as theory is concerned, Contract is a failure, an abject failure at that. It does not “fly,” at least it certainly should not. But bumble-bee-like it does. Somehow it does. How can that be? I propose that Contract *seems* not to fly as a theoretical matter because we have misunderstood (or, perhaps, incompletely understood) the fit between theory and doctrine. Once we appreciate the theory-doctrine fit, in terms of Contract, we will see how it is that Contract flies, such as it does.

There is something artificial in the lines Contract theory would draw, so therefore something imprecise about the way we would determine what (doctrine) Contract must explain. If we say that our theory of Contract must account for why it is that certain promises are enforceable at law (which seems a pretty good shorthand for the task confronting Contract theory), then does that theory as well have to explain the consequences of promise breach, the damages, or what it means “to enforce” a promise? And if those damages are not always based on the bargain, but say, the expectation interest, does Contract theory have to tell us why Contract can settle on a different measure? If that different measure is indistinct from damages based on another theory, such as restitution or promissory estoppel, does a theory of Contract have to explain why that other measure is appropriate (or inappropriate)?

The temptation to limit the work we would have Contract theory do is powerful. It is usually easier to explain less than it is to explain more. But we fail to explain all that we need to explain at

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Tort is more normatively coherent than Contract, *if*, in fact, the Hand Formula accurately captures Tort and provides a basis for explanation and correction.

our peril: if our theory under-explains, it is not a theory of Contract.<sup>4</sup> There are two phases of that conclusion.

First, a theory of Contract must explain the work that Contract does. If we look to Contract to determine the rights of parties to a consensual relation, when events subsequent to the formation of their contract reveal gaps in their understanding, Contract should provide an answer. So Charles Fried, as far as I am concerned, conceded the failure of his promise theory when he concluded that “[i]t would be irrational to ignore the gaps in contracts, to refuse to fill them. It would be irrational not to recognize contractual accidents and to refuse to make adjustments when they occur. The gaps cannot be filled, the adjustments cannot be governed, by the promise principle.”<sup>5</sup> It is all right that Fried so fixes the limits of his promise principle, but then it would be best to conclude that the

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4. Stephen Smith has identified “four types of accounts” that “are possible of any area of the law: (1) historical, (2) prescriptive, (3) descriptive, and (4) interpretive.” STEPHEN A. SMITH, *CONTRACT THEORY* 4 (2004). Like Smith, I am interested in a Contract Theory that would describe or interpret what it is Contract does. The object of interpretive theory is to reveal an “intelligible order in the [Contract] law.” *Id.* at 5. Insofar as I conclude that Contract is incoherent it might seem that I have foreclosed the possibility of discerning any intelligible order in the Contract law. But that is not so. There are ways to make sense of Contract’s object (or objects) and then to devise an account of how Contract principles go about accomplishing that object. So perhaps the term “*v*” suggests a conceptual integrity that is missing in the Contract law in fact without forsaking the descriptive or interpretive efforts so long as those efforts proceed from the right level of acuity or coarse graininess. A pointillist landscape or newspaper photo is incoherent if we do not achieve sufficient remove, and would be similarly incoherent even from the proper distance unless we had the terms to make sense of it. Similarly the coherence of any area of the law is a function of the perceptual range (the coarse graininess) and the acuity of our perceptual equipment. Contract at some level of abstraction may be described or interpreted, then, so long as we have (1) the vocabulary to formulate what Contract in fact accomplishes, as well as (2) the normative structures (deontological and consequential) into which we may translate it. A description of Contract, for example, as alternatively promise-based for consequentialist purposes and reliance-based for deontological purposes might be coherent; but it might not be morally coherent if our object is to discern a morality of Contract law.

Contract theory is incoherent, then, only insofar as it has, heretofore, failed to offer an account of Contract doctrine and its relation to what Contract accomplishes—what Contract does in fact—and the normative mission of Contract. Only if such an account were available would we be able to conclude that Contract theory is coherent in terms that would inform a moral perspective.

5. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 69 (1981). Fried’s inability to extend his promise theory to all of Contract does, though, provide a good argument for the position that Contract is not just a matter of promising, and that has consequences for theories of Contract generally.

promise principle only explains some of Contract—that part of Contract which Fried believes is based on promise; his is not a theory of Contract.

Second, though a theory of Contract must not embrace legal mistakes, decisions where the courts simply get it wrong, the theory must correct mistakes. Indeed, that is a principal role of theory: theory separates the chaff from the grain. But “mistake” becomes a matter of experience. If a “mistake” happens frequently enough, or is followed often enough (and it is not clear what “enough” would certainly be) then it becomes part of Contract and our theory of Contract must account for it. That does not mean that the theory could not provide the means to compare resolutions of recurring controversies and indicate the superiority of one over another; to the contrary, theory *must* provide the means to do that. So if *Peevyhouse v. Garland Coal & Mining Co.*<sup>6</sup> reached the correct conclusion, and *Groves v. John Wunder Co.*<sup>7</sup> reached the wrong conclusion, theory needs to tell us why that is so. In fact, I would go so far as to say that a (perhaps “the”) test of a theory is its ability to tell us which of two divergent *contracts* decisions is correct and why, or at least why what appear to be divergent decisions in fact are not.<sup>8</sup> A theory which cannot do that is not a theory of Contract, though it may be a theory of something else, such as “promising,”<sup>9</sup> that would have significance (perhaps even *legal* significance) both within and without Contract.

Those two objects of the theoretical enterprise—“explanation” and “correction” would be a useful shorthand—*determine*, then, the sum and substance of the theoretical enterprise.<sup>10</sup> The observations

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6. 382 P.2d 109, 114 (Okla. 1963) (“[W]here the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.”).

7. 286 N.W. 235, 238 (Minn. 1939) (awarding damages based on cost rather than value of performance).

8. A theory of Contract would also have to explain why two common law legal systems can reach different conclusions regarding the operation of fundamental principles; for example, why promissory estoppel may be used offensively or defensively in the United States but only defensively under English law. See SMITH, *supra* note 4, at 233-34.

9. See *supra* note 5 and accompanying text.

10. This may posit a functional theory of theory. On functionalist theories in the law generally, see Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188, 189 (Robert P. George ed., 1992).

about the relationship between doctrine and theory that follow concern the nature of doctrine that theory must understand in order for theory to be able to explain and correct. What has been lacking in theoretical study of Contract heretofore has been an appreciation of the nature of doctrine in its relation to theory. Theory not grounded in a proper appreciation of the nature of doctrine cannot be coherent theory because it cannot explain and correct. And morally motivated Contract theory that cannot serve normative functions—explanation and correction—ultimately can only be amoral.

Part I of this Essay will present an important but not atypical doctrinal challenge: the nature of agreement after Judge Easterbrook's opinion in *ProCD, Inc. v. Zeidenberg*.<sup>11</sup> That presentation will set the stage by providing the opportunity to posit concretely the nature of doctrinal inquiry Contract theory must engage. But still before we can appraise the value of coming to terms with the nature of Contract doctrine and its relation to theory, it is worthwhile to present the prevailing iterations of Contract theory, in broad categories. Part II will do that, albeit summarily, and will take account of both "horizontal" and "vertical" conceptions of theories' interrelation as a concession to pluralism. But just as a theory will not do the work we need Contract theory to do, an amalgam of theories too will not quite do the trick. Even such an amalgam would have to understand doctrine differently than we now do in order to convince. Part III will formulate doctrine in terms that (1) are true to doctrine's operation, and (2) reveal why no single theory of Contract or single theory of Contract theories can fly. Part IV concludes.

### I. A STUDY IN CONTRACT DOCTRINE: "AGREEMENT"

At the outset it is worthwhile to offer a concrete illustration of the type of subject matter for which Contract doctrine and Contract theory must account.

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11. 86 F.3d 1447 (7th Cir. 1996).

*ProCD, Inc. v. Zeidenberg* has become an “instant classic.”<sup>12</sup> The transactional context is familiar: Zeidenberg went into a store that sold packaged computer software and purchased ProCD’s product, essentially an electronic phone directory. Terms disclosed within the box and terms disclosed when Zeidenberg launched the software limited his rights to disseminate the information contained on the software. Zeidenberg ignored the term limiting his right of dissemination and ProCD brought an action to enjoin his (mis)use of the product. Zeidenberg responded that his contract with ProCD was formed when he paid for the software and left the store with it. Anything proposed or imposed by ProCD in the box or on the

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12. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430 n.43 (2d Cir. 2004) (distinguishing “assent first, terms later” software purchases from “pay now, terms later” arrangements such as that in *ProCD*); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (applying *ProCD* to the sale of a boxed computer and noting that “[p]laintiffs ask us to limit *ProCD* to software, but where’s the sense in that? *ProCD* is about the law of contract, not the law of software.”). But see *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 102 (3d Cir. 1991) (“Because a purchaser ... has actually obtained the product, the purchaser may use it despite the refund offer, regardless of the additional terms specified after the contract formed.”).

The commentary aligns largely against Judge Easterbrook. See Roger C. Bern, “*Terms Later*” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 643 (2004) (“Judge Easterbrook’s imposition of the ‘terms later’ contracting rule in *ProCD* and *Hill* was itself devoid of legal, economic, and moral sanction. Thus his opinions in those cases provide no legitimate support for other court decisions or for any uniform law that would validate ‘terms later’ contracting.”); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 487 (1998) (“[T]he opportunity to engage in comparison shopping, so important to the court in theory, does not seem particularly attractive if one must purchase each product to learn the terms governing its use.”); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 682 (noting that cases that adopt *ProCD* “appear motivated by the utility and practicality of easy forms of contracting, and at least some approving opinions seem to fly in the face of doctrinal analysis”).

Other commentators, however, have urged an expansion of *ProCD*. See John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 45 & n.159 (2004) (citing *ProCD* as support for a software publisher seeking to enforce a “clickwrap” agreement); Valerie Watnick, *The Electronic Formation of Contracts and the Common Law “Mailbox Rule,”* 56 BAYLOR L. REV. 175, 188-89 (2004) (“While *ProCD* is not an electronic contracting case and was not governed by the [Uniform Computer Information Transactions Act] ... the official comments to the UCITA note that *ProCD*’s ‘layered’ contracting approach, in which the moment of contract formation is not clear, is the approach adopted by the UCITA.” (footnotes omitted)).



computer screen thereafter could not be part of the parties' "agreement."<sup>13</sup>

Judge Easterbrook's analysis misunderstood the meaning and application of three Uniform Commercial Code sections.<sup>14</sup> And it is not clear that the U.C.C. was in the least pertinent to the issue presented.<sup>15</sup> His analysis of the apposite Contract doctrine, though, is revealing, and demonstrates well the significance of doctrine to theory. You cannot explain (or even posit) the theoretical basis of Contract until you first determine what Contract is, and what Contract is is what Contract doctrine determines it to be. It is worthwhile, then, to sketch Easterbrook's conception of the agreement doctrine.

The opinion starts with the recognition that "[i]n Wisconsin, as elsewhere [everywhere?], a contract includes only the terms on which the parties have agreed."<sup>16</sup> So agreement does not just matter; it is determinative. Easterbrook then seems to shift gears and allow that the *fact of actual* agreement is not determinative; what matters instead, apparently, is the agreement to be bound without actual agreeing: "Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable ... may be a means of doing business valuable to buyers and sellers alike."<sup>17</sup> That conclusion is explained and justified in two ways: (1) by the efficiencies effected by standardized forms, and (2) by examples of standardized forms the enforceability of which we take for granted (or which courts have confirmed).<sup>18</sup> Here some of Easterbrook's reasoning becomes elusive. For example, he suggests that consumers really do (and need to) read the package insert that describes drug interactions in the drugs they buy.<sup>19</sup> Nonetheless, the

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13. *ProCD*, 86 F.3d at 1450.

14. He misunderstands the application and operation of U.C.C. §§ 2-204 (which actually deals with the *timing* of acceptance), 2-207 (which applies even in the case of a single form), and 2-606 (which concerns acceptance of contract subject matter, goods, not acceptance of offers at the formation stage).

15. The issue presented was one of contract formation and so a matter of the common law contract. See U.C.C. § 1-103(b) (2004).

16. *ProCD*, 86 F.3d at 1450.

17. *Id.* at 1451.

18. *Id.*

19. *Id.* ("Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and

point is not that Easterbrook's conclusion is curious; the point is that his conclusion is Contract doctrine. *ProCD* is law, Contract law, and its rule is part of Contract doctrine. It tells us what *agreement*, the foundation of Contract, is. That is true whether or not all other courts agree with Easterbrook on this point.<sup>20</sup> *ProCD* is not an aberration. It seems to be entirely consistent with *Carnival Cruise*

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other vital information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.”). It is hard to tell, but does Easterbrook really think a seller of drugs with potentially fatal interactions could insulate itself from liability to a consumer by simply listing those interactions on a package insert?

20. Some courts have criticized the Seventh Circuit's ruling in *ProCD v. Zeidenberg*. The United States District Court in Kansas, in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000), disagreed with Easterbrook's assertion that the vendor is the master of the offer. The district court, unlike the Seventh Circuit, applied U.C.C. § 2-207 to the additional terms. *Id.* The terms and conditions mailed with the computer represented a counteroffer that would not become part of the agreement unless the consumer explicitly accepted them. *See id.* at 1341. Courts have distinguished the shrinkwrap agreement in *ProCD* from situations in which the consumer is bound to terms before having an opportunity to click “I agree” or otherwise manifest assent. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428-29 (2d Cir. 2004); *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 592-95 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002). One court has denied that, under the analysis of *ProCD*, consent was given when a customer continued to receive satellite service after an arbitration clause was added to the contract. *Mattingly v. Hughes Elec. Corp.*, 810 A.2d 498, 508 (Md. Ct. Spec. App. 2002).

Generally, however, the reaction to *ProCD* has been positive. Courts have supported Easterbrook's holding that contracts can be formed after the customer purchases the product, receives the conditions, and retains the product after having an opportunity to read the terms. *See Waukesha Foundry, Inc. v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1009-10 (7th Cir. 1996); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105-06 (C.D. Cal. 2002); *Lozano v. AT & T Wireless*, 216 F. Supp. 2d 1071, 1073 (C.D. Cal. 2002), *overruled on other grounds by Ingle v. Circuit City Stores, Inc.* 328 F.3d 1165, 1176 n.15 (9th Cir. 2003); *Kaczmarek v. Microsoft Corp.*, 39 F. Supp. 2d 974, 977-78 (N.D. Ill. 1999); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 140 (Me. 2005); *1-A Equip. Co. v. Icode, Inc.*, No. 1460, 2003 WL 549913, at \*2 (Mass. App. Div. Feb. 21, 2003); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998); *Levy v. Gateway 2000, Inc.*, 33 UCC Rep. Serv. 2d (CBC) 1060, 1062 (N.Y. Sup. Ct. 1997); *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 394 (N.Y. Civ. Ct. 2001). Other courts have used *ProCD* to uphold the validity of shrinkwrap, browwrap, and clickwrap agreements. *See O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 516-17 (M.D. La. 2003) (shrinkwrap); *iLan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337-38 (D. Mass. 2002) (clickwrap); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981-82 (E.D. Cal. 2000) (browwrap); *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at \*\*3-4 (Del. Super. Ct. Sept. 3, 1999) (shrinkwrap); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527-28 (W.D. Pa. 2000) (shrinkwrap); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (clickwrap); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 312-13 (Wash. 2000) (shrinkwrap).

*Lines*,<sup>21</sup> a case upon which Judge Easterbrook relied, and which has been good law for quite some time.

So the issue, for purposes of discerning Contract doctrine, may be put in these stark terms: is actual agreement necessary for Contract formation? If actual agreement is necessary, then it makes sense to talk about autonomy and rational choice; that is, it makes sense to understand "Contract" in the familiar sense. But if the basis of Contract liability is not in fact actual agreement, in the form of real, knowing consent to terms, then conceptions of autonomy and rational choice apply quite differently, if at all. Once autonomy and rational choice are gone, there is not much of Contract, as a basis of consensual liability, that remains. Further, if the same consequences may attend your actions whether or not those actions were in fact consensual (the product of actual rather than inferred agreement) then it would be impossible to provide a coherent basis of such consensual liability.

The *ProCD* decision and its engagement of the foundation of Contract—agreement—is just an example. But I would argue that similarly broad swaths of Contract present similar challenges to Contract theory;<sup>22</sup> but space and time preclude that further study just now.

## II. THE PHASES OF CONTRACT THEORY

Theories of Contract are generally either deontological, consequentialist, or plural (some combination of the deontological and the consequentialist). Professor Gordley, though, has carefully demonstrated the ultimate deficiencies of the deontological and consequentialist perspectives and discovered that both need something like Aristotelian "prudence" to ground their commentary.<sup>23</sup>

It may be that for Contract, deontology and consequentialism in their autonomy and utilitarian elaborations are merely two

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21. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (finding a forum selection clause printed on a cruise ticket to be enforceable).

22. The courts' and jurisdictional divergence on issues such as the preexisting legal duty rule, whether moral obligation can support consideration, and terminable at will "contracts" present exemplary contexts.

23. See James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW*, *supra* note 1, at 265.

perspectives of the same conclusion.<sup>24</sup> Autonomy, we may conclude, is vindicated by utility—that is, the measure of your autonomy is your ability to accumulate the things that have utility for you. Utility, in turn, may require autonomy—you cannot make value-maximizing (rational) choices unless you enjoy autonomy, the power to determine your own choices. If those equations (or, at least, symbioses) are trenchant, then it will not be difficult for us to translate doctrine into either deontological or consequentialist terms. Whether the deontology-consequentialist dichotomy admits of resolution in normative theory generally (a point which I need not certainly determine for present purposes), in *Contract* the tension is obscured by the doctrine.

Differences of opinion, then, about whether a particular Contract doctrine is informed by autonomy, a deontological concern, or utility, a consequentialist concern, could reduce to semantic quibbles, or, at most, questions about whether we have gotten (or would even be able to get) the math right. For example, and to draw further on the foregoing presentation of *ProCD*, does Easterbrook's understanding and application of his sense of "agreement" serve interests in autonomy or utility (or both, or neither)? The answer must be "it depends," and it depends on who the beneficiary/victim of the analysis is and what we conceive the autonomy/utility interests (and their relationship) to entail.

The analysis Easterbrook pursues at first seems to focus on utility: transaction costs are reduced by the law's permitting (even encouraging) the use of standard forms.<sup>25</sup> So if we conclude that a standard form can accomplish "agreement," even when there is little or no evidence of actual agreement, the law increases utility. But it may be that the law's accommodating *ProCD* and Zeidenberg's bargain (even if Zeidenberg were not ultimately pleased with the bargain) both vindicated their autonomy and did so at the least cost to them. Indeed, had the law not construed "agreement" as Easterbrook concluded it did, the parties would not, certainly at the margin, have had the ability to realize and enjoy the fruits of their autonomy. Paternalistic law undermines autonomy just as it may

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24. See, e.g., *id.* at 270.

25. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

frustrate utility.<sup>26</sup> So you could tell either a deontological or consequentialist story about Easterbrook's *ProCD* opinion. The terms of the opinion accommodate both perspectives: "Zeidenberg's position ... must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. *But why would Wisconsin fetter the parties' choice in this way?*"<sup>27</sup> And then the justification for standard forms is presented in utilitarian terms as Easterbrook quotes the commentary to section 211 of the Second Restatement of Contracts: "Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution."<sup>28</sup> The opinion is not confused; *both* justifications, the deontological and the consequentialist, point in the same direction.

Some commentators, however, have either assumed or asserted that the deontological and the consequentialist will point in opposite directions, so that it would be necessary to follow one path or the other. Most recently (and perhaps most notably) Professors Alan Schwartz and Robert Scott,<sup>29</sup> following the lead of Professors Louis Kaplow and Steven Shavell,<sup>30</sup> concluded that at least in the case of firm-to-firm<sup>31</sup> contracting, consequentialist—specifically,

26. Though for some—the uninformed or those with bad judgment, for example—paternalistic law functions well: they are better off if decisions are made for them rather than by them. I am indebted to Brian Bix for this observation.

27. *ProCD*, 86 F.3d at 1450-51 (emphasis added).

28. *Id.* at 1451 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981)).

29. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

30. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

31. The commentators recognize that what constitutes a firm is crucial, so they offer a definition:

Any effort to analyze contracts between "firms" thus confronts a boundary issue—how to define a firm for purposes of the analysis. We draw this boundary here by defining a ... firm as (1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm.

Schwartz & Scott, *supra* note 29, at 545. You wonder why the authors could not have just divided the world between contracts where the parties are interested solely in wealth-maximization and contracts in which other interests are implicated. Surely there are individuals more interested in pure wealth-maximization than may be "firms" like Greenpeace or Amnesty International, for example. But Schwartz and Scott do refine their

efficiency—norms should be the sole source of reference for the resolution of Contract controversies.<sup>32</sup> They begin from the empirical judgment that most of the controversies addressed by the common law of contract and Article 2 of the Uniform Commercial Code are such firm-to-firm contracts.<sup>33</sup> Firms do not have the same interest in autonomy that individuals may have and so there is no reason to vindicate that deontological goal at the expense of efficiency. The object of firms is wealth maximization so everything, then, may resolve nicely and neatly into matters of efficiency.

Schwartz and Scott illustrate the consequences of their perspective and conclusion by considering the parol evidence rule, a doctrinal concept certainly akin to agreement. In explaining what courts *should* do under the U.C.C. version of the rule,<sup>34</sup> the authors conclude that a less strict (“soft” version) of the rule should be employed “if courts should consider all evidence that may bear on what the parties meant; it is not justifiable if courts should consider

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model by understanding a firm as the type of entity which enters into many contracts and most, if not virtually all of those contracts, are of a nature such that, assuming courts are unbiased, the courts will reach correct conclusions regarding the parties’ intentions as often as they will reach incorrect conclusions. The cost of courts “getting it absolutely right” would be greater, then, than the benefits to be realized from the enhanced level of acuity. So close enough is good enough, now, in cases of horseshoes, hand grenades, and the typical contracts of firms. The authors do recognize that there are some contracts with regard to which even the largest firms would want courts to get it right:

[W]hen performance of a particular contract is important to the survival of the firm—say, a contract with a major supplier—or when the contract is new and is expected to be widely used, the firm may be unwilling to risk a seriously adverse interpretation. If contextualists are correct that larger evidentiary bases do shrink variance, then parties concerned with variance will likely prefer that courts use a contextualist adjudicatory style.... On the other hand, only unusual contracts have this “bet the ranch” quality. In the typical case, it is good enough that courts get things right on average.

*Id.* at 576-77. It is not clear that the line Schwartz and Scott suggest in that excerpt would have the obvious contours they seem to envision, or whether courts should make some type of threshold determination before deciding what interpretive style to use. What is clear, though, is that the line is, again, not so clearly between individual and firm contracts. Instead the line seems to be drawn or “drawable” on the basis of the incidents of the particular contract. The individual/firm dichotomy is an imperfect proxy for the autonomy-efficiency dichotomy. See Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DEN. U. L. REV. 101 (2005).

32. Schwartz & Scott, *supra* note 29, at 550-54.

33. *Id.* at 544.

34. U.C.C. § 2-202 (2004).

only the evidence that parties, *ex ante*, *want* courts to see.”<sup>35</sup> That conclusion seems to rest an efficiency analysis on an autonomy foundation: the courts should do what the parties *want* the court to do; what champion of autonomy would differ with that conclusion?<sup>36</sup>

Of course the Schwartz and Scott analysis only merges efficiency into autonomy, so far as Contract theory is concerned, if the autonomy that Schwartz and Scott wind up with is the autonomy deontological theory posits. Insofar as consequentialists discern what actors *do* want by reference to what they should *as rational actors* want they are not respecting autonomy in the same way deontological autonomists would. But that would attribute to deontological autonomists a sense of individual autonomy that does not seem necessary to (or even supported by) their thesis. Whether deontologists are founding their autonomy conclusions on Kant,<sup>37</sup> Hegel,<sup>38</sup> or another alternative, nothing constrains them to a view of autonomy that has the subjective trump the objective.<sup>39</sup> Insofar as Contract is about interpersonal transactions, it cannot help but rely on objective manifestation. Peter Benson confirms this:

The existence of these assents [offer and acceptance] as well as the determination of their contents are decided in accordance

35. Schwartz & Scott, *supra* note 29, at 591 (emphasis added); *see also* FDIC v. W.R. Grace & Co., 877 F.2d 614, 621 (7th Cir. 1989) (supporting of the “four-corners” rule, Judge Posner notes that “[p]arties to contracts may prefer, *ex ante* ... to avoid the expense and uncertainty of having a jury resolve a dispute between them, even at the cost of some inflexibility in interpretation”).

36. Schwartz and Scott confirm that construction of their consequentialist argument when they describe the operation of merger clauses:

A merger clause, if honored, would limit the court to the [parties’ integrated writing]. Parties aware that the base was so limited would have a strong incentive to write the contract in [terms as they are commonly understood]. By adopting the merger clause, therefore, the parties signal to the court that this incentive has motivated them to speak in [this majority language]. Thus, a court, even if not persuaded by our more general argument that majority talk should be the default language, should still interpret the inclusion of a merger clause to mean that the parties wrote in majority talk.

Schwartz & Scott, *supra* note 29, at 589-90.

37. *See* FRIED, *supra* note 5.

38. *See* Benson, *supra* note 1.

39. *See* R.D. LAING, THE POLITICS OF EXPERIENCE 5 (1967) (“Since your and their experience is invisible to me as mine is to you and them, I seek to make evident to the others, through their experience of my behavior, what I infer of your experience, through my experience of your behavior.”).

with the so-called objective test. By this test, it is the *manifestation of assent as it reasonably appears to the other party* that is operative in bringing about [Contract] formation. The relevant factor is not its author's state of mind; nor is the expression of assent treated as evidence of his or her mental attitude. Rather, the reasonably construed expression of assent in and of itself, not the thought process that produced it, is the operative factor in formation.<sup>40</sup>

Further:

Since the objective test applies, the relevant point of view is always how what is said or done by one party reasonably appears to the other in the circumstances of their interaction. And this appearance the first party, as a reasonable person, is deemed to know. The cause of contract lies, then, entirely in the interaction between the parties.<sup>41</sup>

Such necessary and inevitable recourse to the objective would seem to undermine even the minimalist autonomy argument to the effect that Contract preserves choice for the sake of preserving choice. What is preserved is the ability to indicate what your choice is, relying on objective indicia to do so. But Contract neither guarantees that your indication will be received as you intend<sup>42</sup> nor that your choice will be respected even if clearly indicated.<sup>43</sup>

At this point it is worthwhile to pause in order to take stock. Recognize that my claim is empirical. I do not assert that Contract *could* not be based on either autonomy or consequentialist bases alone; I assert that Contract doctrine is too imprecise to support the argument that either perspective, or for that matter, even an accommodation of both perspectives, could do anything like explaining Contract. That is not because of the nature of Contract theory; it is because of the nature of Contract *doctrine*. Review of

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40. Benson, *supra* note 1, at 139 & n.27 (citing Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919)).

41. *Id.* at 145.

42. See *Lucy v. Zehmer*, 84 S.E.2d 516 (1954); RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 21 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 71 (1932).

43. And that is true wholly apart from deal-policing mechanisms such as unconscionability and impracticability; consideration, offer and acceptance, and notice of acceptance requirements also confirm the conclusion in the text.



efforts to account for the deontological-consequentialist duality of Contract supports that conclusion and provides the necessary predicate for observations about doctrine.

Professor Michael Trebilcock recognized the potential coincidence of deontological and consequentialist theory:

[E]fficiency values, to the extent that they emphasize Paretian notions of efficiency, might not, in most contexts, sharply diverge from autonomy values; however, to the extent that Kaldor-Hicks efficiency values are substituted for Paretian efficiency values, these values become much more consequentialist and less consistent with classical autonomy values.<sup>44</sup>

Trebilcock is certainly correct with regard to Paretian efficiency and he could come even closer to concluding that Kaldor-Hicks efficiency resonates with autonomy were he to take an expanded but deontologically defensible view of autonomy. That would explain his hedging: “less consistent with classical autonomy values.”<sup>45</sup>

Professor Jody Kraus, though, finds real purchase in a distinction between deontology and consequentialism. He describes the difference as methodological—deontologists and consequentialists come up with different answers because they are answering different questions:

[A]ll contract theories at least implicitly make both normative and explanatory claims.... [T]he crucial second-order disagreement between deontic and economic theories is over the relative priority between explanation and justification, as well as the contest between stated doctrine and case outcomes as sources of law.... [D]eontic theorists are methodologically committed to undertaking the justificatory task first, and explaining particular cases later, while economic theorists are methodologically committed to undertaking the explanatory task first, and justifying the existence of contract law later.<sup>46</sup>

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44. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 247 (1993).

45. *Id.* (emphasis added). It is only to this extent that Trebilcock “rejects the convergence thesis.” Jody S. Kraus, *Philosophy of Contract Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 687, 688 (Jules Coleman & Scott Shapiro eds., 2002) (emphasis added).

46. Kraus, *supra* note 45, at 696.

Even were Kraus right about his characterization of deontologists' and economists' relative methodological commitments (and I am not sure that he is), I do not believe that he has *on the terms he posits* discovered a substantial basis of distinction rather than a rhetorical difference. Deontologists, at least those in the mold of Bensen and Fried (the two Kraus engages), are no less interested in explaining cases and the doctrine cases create in a common law system<sup>47</sup> than are economists (Kraus considers Trebilcock and Richard Craswell specifically). Further, insofar as Kraus offers a methodological distinction based on particular deontological and consequentialist studies, he could establish no more than that "the theories are making different kinds of claims about different things."<sup>48</sup> That intimates that the *values* vindicated by the two different methodologies may be consonant, or at least Kraus has not given us any reason to conclude that they are not.

For present purposes, though, the problem with Kraus's "reconciliation" of deontology and consequentialism in methodological terms is with the impact that a failure to delineate the two perspectives has on our understanding of Contract doctrine. Particularly, and just for exemplary purposes, you can appreciate the deficiencies in a pluralist Contract theory that would posit a vertical relationship among deontology and consequentialism.

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47. Kraus acknowledges that

[b]oth doctrinal statements and case outcomes appear to be co-equal sources of law. Indeed, the relationship between stated doctrine and case outcomes appears to be circular: doctrinal statements are distillations of principles derived from previous cases' outcomes, and case outcomes are ostensibly determined by the application of these distilled principles. The common law seems to consist in this dynamic itself, rather than either the doctrinal statements or outcomes alone. Yet particularly in hard cases, the question of which has priority over the other seems to be forced. Which is the legal wheat to the other's legal chaff?

*Id.* at 692. The distinction Kraus draws then would only seem to matter in "hard" cases, cases in which the doctrine under-determines result. But if doctrine under-determines result, it is not clear how you could say very much about the operation of doctrine in that case, or about a perspective's methodological commitment about doctrine generally based on such a case. That conclusion is reinforced by the conception of doctrine advanced in this paper. Kraus concludes that with regard to such "hard" cases deontologists adopt an *ex ante* perspective and economists an *ex post* perspective. *Id.* at 701-03. I doubt that deontologists are as concerned with the litigants in particular cases when they are writing about doctrine, which is necessarily forward looking.

48. *Id.* at 689.

In a 2001 article, Kraus pursued a “vertical integration strategy” to reconcile “efficiency and autonomy contract theories [by construing them] as [comprising] logically distinct [elements] [within one] unified theory.”<sup>49</sup> Of course, if the distinction between autonomy and efficiency were only a matter of methodological predisposition, then, at least, more work would need to be done in order *to unify* the two in one theory. In the article, Kraus described an earlier methodological effort as distinguishing autonomy from efficiency in terms of what they endeavor to explain: “I argue[d] that four methodological issues often divide efficiency and autonomy contract theories, including the commitment of efficiency theories to explaining case outcomes (and dismissing plain-meaning doctrinal statements) and the commitment of autonomy theories to explaining plain-meaning doctrinal statements (and ignoring or dismissing case outcomes).”<sup>50</sup> That seems to represent a shift from Kraus’s earlier basis of methodological distinction: autonomy *justifies* and efficiency *explains*. What remains, though, is an apparent *ex post* versus *ex ante* basis of distinction: efficiency is forward looking (current litigants as a means to an end) and autonomy is backward looking (current litigants as an end in themselves).<sup>51</sup>

Ultimately, Kraus’s shift, at least in terminology, is of no matter to my thesis; we are not so much concerned with *what* different questions vertically arranged theories may answer; we are instead concerned with whether and how they may coexist vertically. Kraus offers two vertical integration strategies.

First, one theory may be lexically prior to the other, in terms that Thomas Scanlon<sup>52</sup> and John Rawls<sup>53</sup> reveal. One theory, say autonomy, may be lexically prior to another, say efficiency, because the basic structure of Contract is justified in deontological terms while the particular doctrinal elaborations of that basic structure are justified in consequentialist terms.<sup>54</sup> That seems to be just

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49. Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, in 11 PHIL. ISSUES 420, 422 (2001).

50. *Id.* at 437 n.3.

51. Kraus, *supra* note 45, at 701.

52. Kraus, *supra* note 49, at 423 (citing THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (1998)).

53. *Id.* (citing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

54. Autonomy as foundational and efficiency as derivative is the relationship Kraus uses for purposes of his illustration and argument. *Id.* at 425. But there is no reason the two could

another way of saying that, though X may be the foundation and Y the elaboration therefrom, once X is in place Y can be understood as necessarily consistent with X.<sup>55</sup> That begs the question: Are we to entertain challenges to particular assertions of Y as inconsistent with X and, therefore, morally indefensible? Kraus concludes: "Both [Scanlon's and Rawls's] accounts allow other normative principles to determine the kind and detail of the social institutions *consistent with* lexically prior normative principles."<sup>56</sup> We have not resolved the theoretical tension; we have shifted it.

Second, Kraus posits a different relationship between theories that may accommodate their coexistence: Foundational versus Derivative Normative Theories.<sup>57</sup> Kraus also discovers this conception in Rawls, which amounts to the claim such that if you start with a particular normative theory, then all elaborations therefrom *must be* consistent with that theory.<sup>58</sup> That is like saying that if all life is carbon-based, whatever is "alive" will contain carbon. So if the foundation of Contract is autonomy, all explanations of Contract doctrine in consequentialist terms are derivative of that deontological foundation. If Contract "doctrine" exists that is not

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not be reversed. *See id.* at 428. Though if we were to find such a reason we probably would have gone a long way toward resolving the deontology-consequentialism tension in Contract theory (and Law). Kraus does suggest two reasons for the ordering he posits:

- (1) The normative credentials of the economic analysis of law, including the economic analysis of contract law, have not been, and are not likely to be, established, and
- (2) The normative implications of autonomy theories for fine-grained institutional analysis have not been, and are not likely to be, established.

*Id.* at 428. My only reaction is that the arguments could as well be reversed so far as Contract doctrine is concerned; at least, that is what I think all the fuss is about. Kraus does devote substantial space in his *Vertical Integration* piece to the tension he discovers between autonomy and wealth maximization theories. *See id.* at 428-36. Though Kraus recounts bases for doubting the "normative credentials of the economic analysis of law" and the "normative implications of autonomy theories for fine-grained institutional analysis," he seems to assume that there is no reason to doubt the normative credentials of autonomy theories and the normative implications of economic analysis of law for fine-grained institutional analysis. *Id.* at 428. Others have. *See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

55. "Scanlon's moral principle is lexically prior to any other normative principles because it sets out a necessary condition for the legitimacy of any social institution *and any rule within it.*" Kraus, *supra* note 49, at 426 (emphasis added).

56. *Id.* (emphasis added).

57. *Id.*

58. *See id.*

consistent with that deontological foundation, then it is not actually "Contract," but it will not be "not Contract" *just* because it can be explained in consequentialist terms. This too seems to avoid the crucial issue: What is the relationship between deontology and consequentialism in Contract such that we can say that one is foundational and the other derivative? And what contribution can our understanding of Contract doctrine make to our effort to resolve that issue?

Judge Easterbrook's "agreement" doctrine<sup>59</sup> and James Gordley's work<sup>60</sup> demonstrate, in different ways, the incoherence of positing a unitary normative theory of Contract. And Kraus has not managed to make the case for Contract theory's coherence in plural terms.<sup>61</sup> That does not mean that the case for vertical or horizontal pluralist theories cannot be made. That is just to say that it has not yet been made. It remains, then, to suggest why the effort to find coherence has been frustrating and may, ultimately, prove unavailing. The answer is not to be found in the available theories or our understanding of them; it is to be found in our misunderstanding of the nature of doctrine.

### III. DISCOVERING DOCTRINE

Insofar as Contract theory, in order to be a *theory* of Contract, must explain and justify doctrine—that is what doctrinal theories do, after all—we need to start with a conception of doctrine that understands both the constituents of doctrine and our engagement with those constituents.<sup>62</sup> Efforts to offer a theory of Contract are dependent on a comparison of theory with doctrine, so a correct sense of what doctrine is by nature is crucial to the project. Attempts heretofore to develop a unitary or plural concept of Contract theory in a manner considerate of Contract doctrine

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59. See *supra* notes 13-22 and accompanying text.

60. See *supra* notes 24-25 and accompanying text.

61. And so, too, those who build on ideas such as Kraus's "vertical integration" could not convince. See Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1499 (2005) (reviewing SMITH, *supra* note 4) (building a vertically integrated theoretical structure of contract in terms of liberty: "Both values [autonomy and efficiency] ought to be pursued, but where they conflict, autonomy should act as a 'trump' value").

62. Certainly Dworkin did this, but in a far too fictional, or at least idealistic, form. See RONALD DWORKIN, *LAW'S EMPIRE* 226 (1986) (discussing law as integrity).

misunderstand what doctrine is. That is not to say that they misunderstand particular instances of doctrine, or understand particular instances insufficiently; they misunderstand the very nature of doctrine.<sup>63</sup>

Recall that doctrine too (like theory) is heuristic; it abstracts in order to operate at a remove from facts.<sup>64</sup> Certainly if the deontologists were correct about Contract's theory, each Contract rule might expressly incorporate something like "fairness," as, in fact, a number of Contract rules do.<sup>65</sup> Similarly, if consequentialists were right, Contract rules would devolve into something like the

63. The individual patterns of cognition fundamental to Contract theory demonstrate that idiosyncrasy and, therefore, variety determine what we consider to be doctrine. See Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U. L.Q. 471, 499-507 (2005).

64. See *id.* at 513 ("The source of the consensus sufficient for Law ... is in the scope of the common area among the heuristic patterns of the human agents subject to the Law.").

65. There are many other contexts in which the contract law relies on justice, or its cognates, to fix the rights of the parties rather than as an after-the-fact explanation for a decision. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (entitled "Promise for Benefit Received") (using the language, "extent necessary to prevent *injustice*"); *id.* § 94 ("Stipulations") ("to the extent that *justice* requires enforcement"); *id.* § 139 ("Enforcement by Virtue of Action in Reliance") ("The remedy granted for breach is to be limited as *justice* requires."); *id.* § 158 ("Relief Including Restitution") ("grant relief on such terms as *justice* requires"); *id.* § 173 ("When Abuse of a Fiduciary Relation Makes a Contract Voidable") (contract voidable unless "it is on *fair* terms"); *id.* § 176 ("When a Threat is Improper") ("A threat is improper if ... the threat is a breach of the duty of good faith and *fair* dealing."); *id.* § 184 ("When Rest of Agreement is Enforceable") ("reasonable standards of *fair* dealing"); *id.* § 190 ("Promise Detrimental to Marital Relationship") ("*fair* in the circumstances"); *id.* § 195 ("Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently") (term unenforceable unless "*fairly* bargained for"); *id.* § 205 ("Duty of Good Faith and Fair Dealing") (pervasive duty of "good faith and *fair* dealing"); *id.* § 223 ("Course of Dealing") ("*fairly* to be regarded as establishing a common basis of understanding"); *id.* § 243 ("Effect of a Breach by Non-Performance as Giving Rise to a Claim for Damages for Total Breach") (such impairment of value of contract to injured party "that it is *just* in the circumstances to allow him to recover"); *id.* § 260 ("Application of Payments Where Neither Party Exercises his Power") ("*just* regard to the interests of third persons, the debtor and the creditor"); *id.* § 272 ("Relief Including Restitution") (if other apposite rules "will not avoid *injustice*, the court may grant relief on such terms as *justice* requires"); *id.* § 351 ("Unforeseeability and Related Limitations on Damages") ("court may limit damages ... if it concludes that in the circumstances *justice* so requires"); *id.* § 354 ("Interest as Damages") ("interest may be allowed as *justice* requires"); *id.* § 358 ("Form of Order and Other Relief") ("order of specific performance ... on such terms as *justice* requires"); *id.* § 371 ("Measure of Restitution Interest") (measurement of restitution interest "as *justice* requires"); *id.* § 384 ("Requirement That Party Seeking Restitution Return Benefit") (compensation in place of return of property in restitution "if *justice* requires that compensation be accepted") (emphases added throughout note).

Hand Formula in tort,<sup>66</sup> which they generally do not.<sup>67</sup> But Contract doctrine is not so formulated.<sup>68</sup> The real work of doctrine is done “under the radar.” The morality of Contract, Contract’s moral compass, is obscured by doctrine. In a very real way, we may even conclude that that is an object of formulating doctrine.

Because doctrine obscures morality in order to accomplish its heuristic object, the proper way to appreciate the operation of doctrine is by reference to its effect on, for lack of a better word, the “consumer”<sup>69</sup> of doctrine: the transactors, their legal advisors, the courts that apply doctrine (as well as those who teach it and learn it). The “morality” of any law or body of law is directly related to its “predictability”; not predictability in the sense of foreseeability, but the ability to predict what, for instance, the “bad man”<sup>70</sup> would do. The point is crucial and difficult: in order to reach a conclusion about the morality (whether deontological or consequentialist) of a law, we must be able to appreciate the relationship between the law and that morality in linear terms. Linearity, here, connotes our ability to trace a direct relationship between a moral theory, say autonomy, and a doctrinal prescription or proscription that vindicates that moral theory.<sup>71</sup> An example would be a legal rule that says, in a controversy between *A* and *B*, reach the result that best recognizes the autonomy of the parties, or that directs resources to the party in the best position to exploit them. To the extent that doctrine does not take that form—and it *generally* does not—the relation between a particular doctrine, such as the agreement

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66. See *supra* note 3.

67. But see RESTATEMENT (SECOND) OF CONTRACTS § 348 (1981) (setting forth formulaic “alternative” measures of damages where the loss caused by breach cannot be readily quantified).

68. Cf. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 282 (1980) (“[I]t is quite possible to draft an entire legal system without using normative vocabulary at all.”).

69. The perspective of the consumer determines the nature and extent of the doctrine. See Alces, *supra* note 63, at 515-16 (“If a pattern is inaccessible to human agents, there is no pattern .... The fact that a pattern is manifest, i.e., in convention, acknowledges accessibility and is evidence of a pattern.”).

70. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

71. This linearity may be only unidirectional. See STEPHEN WOLFRAM, A NEW KIND OF SCIENCE 551 (2002) (“[I]t is rather easy to generate complex behavior by starting from simple initial conditions and then following simple sets of rules. But the point is that if one starts from some particular piece of behavior there are in general no such simple rules that allow one to go backwards and find out how this behavior can be produced.”).

requirement<sup>72</sup> or operation of a preexisting legal duty rule,<sup>73</sup> and a moral perspective is obscure, even nonexistent. If that connection is lacking, then there is not a linear relation between doctrine and (a particular) morality; the progression from the doctrine's operation to a particular moral result would be random in the sense of not being predictable. That randomness intimates amorality (perhaps even immorality);<sup>74</sup> non-randomness, predictability with regard to the relation between phenomena and a rule which would apply to them, would be morality, or at least could reveal a particular moral perspective. Understanding the nature of doctrine, though, makes clear that such non-randomness is impossible.

Doctrine, in fact, is not the mere statement or formulation of the rule—in restatement or common law or statutory form—but is, instead, the *operation* of that formulation on transactors and transactions; therefore, morality cannot be discovered in doctrine.<sup>75</sup> And because doctrine is not static—it cannot be if it is to be forward looking (and, tautologically, to be doctrine it must be forward looking)—we can only really discover what doctrine is at a point in time and space (broadly construed to include varying transactional patterns).<sup>76</sup> Though we may be able to configure a normative theory (unitary or plural) to account for particular expressions of a rule, we will not have thereby captured the doctrine. Indeed, if we could, it

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72. See *supra* text accompanying notes 13-22 (discussing Easterbrook's approach to agreement in *ProCD*).

73. The rule precludes enforcement of contract modifications not supported by "new" consideration, but may be subject to defeasance by operation of ancillary rules that inartfully, or at least surreptitiously, accommodate enforcement of the modification when the risk of an unconscientiously imposed modification is not present. See generally JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 64 (4th ed. 2001). The Uniform Commercial Code responds to the same problem by focusing directly on transactor good faith, see U.C.C. § 2-209 (2004), and so concedes the indeterminacy of "doctrine."

74. See Alces, *supra* note 63, at 513 ("[W]e are likely to conclude that insufficient coincidence [among the thought processes of the consumers of doctrine] constitutes randomness. And randomness is a manifestation of amorality, the want of legal morality .... 'Random justice' is an oxymoron and contract agreement based on random justice is fatally insubstantial: It fails as doctrine.").

75. See generally *id.*

76. Due to our ability to view doctrine only from a particular point in time and space, we may never be able to predict the direction in which doctrine is headed. Like Heisenberg's Uncertainty Principle, "the more accurately you measure where a particle [for example, contract doctrine or law] is, the less accurately you are able to measure where it's going." Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17 (1989).



would no longer be doctrine in the organic sense that I have in mind.

But we can go even further.

In fact, the object of abstracting as we do to formulate doctrine is to “wring” the morality out of it, to abstract from normative premises to accomplish a heuristic purpose. Heuristics (and, recall, doctrine is a heuristic) necessarily involve both “discrimination” and “leverage”:

“Discrimination” refers to our ignoring portions of the data that can be ignored without impairing the message of the data (reducing the size of the data pattern to make it more manageable). “Leverage” refers to our ability ... to focus on regularities without becoming distracted by the particulars that are not pertinent to the perceptual or analytical exercise.<sup>77</sup>

Those incidents effectively undermine efforts to attribute persistent normative qualities to doctrinal formulations.

Ultimately, any effort to identify the morality of a doctrine is really an effort to tell a normative story about the *progress* of doctrine. We can no more formulate the moral foundation of, for example, the consideration *doctrine* than we can measure the *duration* of the present. Doctrine is in a constant state of morphing and, perhaps, becoming; it is constantly becoming something to some degree—in normative terms—different for each “consumer” of it.<sup>78</sup> We rely on sufficient coincidence of doctrinal perspective to keep the trains running on time,<sup>79</sup> but all we can ever have is sufficient coincidence (and too often—in the case of particularly dynamic areas of the law, for example, “rolling contracts” such as the contract in *ProCD*<sup>80</sup>—maybe not even that).

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77. Alces, *supra* note 63, at 505 (footnote omitted).

78. I pursue this analysis at length in *id.* at 499-511 (drawing on complexity theory to suggest a structure of doctrine's formulation).

79. *See id.* at 513-14.

80. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *see also supra* notes 13-22 and accompanying text (discussing *ProCD*).

## CONCLUSION

This Essay has argued that extant theories of Contract fail because they do not account for the nature of doctrine. Insofar as the object of theory is to make sense of doctrine, it is crucial to appreciate the nature of doctrine before a theory of doctrine will be much help. I have posited a conception of doctrine that reveals why the deontological or consequentialist theories, as well as their iterations in plural form, cannot support doctrine so (and, I would say, accurately) conceived.<sup>81</sup> There are consequences for a morality of Contract in the extant theories' failure to come to terms with the nature of doctrine.

We can appraise the morality of Contract, and Contract's relation to morality (a normative theory such as deontology or consequentialism or some amalgam of the two), by observing the non-randomness, the predictability, even the linearity perhaps, of the progression from a normative perspective to law, Contract doctrine. Legal morality (the normative function Law serves) only has meaning in the phenomenal realm, because legal morality (law's ability to coordinate, to offer expertise, and to provide efficient results<sup>82</sup>) is a corporate concept. Each law and ultimately the Law is moral only to the extent that the common areas among the heuristic patterns that comprise doctrine are non-random, predictable by reference to a normative criterion.<sup>83</sup> That is all legal morality can mean. A failure of Contract theory so far is that it understands that legal morality *can* mean something other than that. Once that confusion is revealed, the inevitable deficiency of Contract theory is manifest. Understanding Law and morality as related, in the manner urged here would understand them, provides the means to appreciate the Law-morality relation in a way that may advance the theoretical inquiry, at least so far as it matters to Contract. If nothing more, it may clear the jurisprudential air.

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81. See *supra* Part II.

82. There can be no "coordination, expertise, and efficiency." LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 14 (2001) (emphases removed).

83. There is no legal morality where the structure those overlapping heuristic patterns create appears—can *only* be perceived to be—random.