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## On Discovering Doctrine: “Justice” in Contract Agreement

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# ON DISCOVERING DOCTRINE: “JUSTICE” IN CONTRACT AGREEMENT

PETER A. ALCES\*

## TABLE OF CONTENTS

I. CONTRACT AGREEMENT.....	479
A. Hadley v. Baxendale .....	481
B. Jacob & Youngs v. Kent .....	486
C. Peevyhouse v. Garland Coal & Mining Co.....	490
D. Henningsen v. Bloomfield Motors.....	492
E. Hill v. Gateway 2000, Inc. ....	495
II. CONCEPTIONS OF COGNITION .....	499
A. <i>Patterns</i> .....	500
B. <i>Of Human Agency, Heuristic Function, and a Structure</i> .....	503
1. <i>Human Agency</i> .....	503
2. <i>Heuristic Function</i> .....	505
3. <i>A Structure</i> .....	507
C. <i>“Justice” Conception Perceived</i> .....	512
CONCLUSION: CONTRIBUTION .....	517

Start from the premise that the object of positive legal analysis is to resolve doctrine into matters of fact. That object certainly explains the common ground between such diverse intellectual enterprises as the economic analysis of law (including its iterations in behavioral decision theory<sup>1</sup> and “neuroeconomics”<sup>2</sup>) and so called “critical theory” (from its various perspectives<sup>3</sup>). Each assumes that there is some fact qua empirical

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1. See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); CASS R. SUNSTEIN, *BEHAVIORAL LAW & ECONOMICS* (2000).

2. See Morris B. Hoffman, *The Neuroeconomic Path of the Law*, 359 *PHIL. TRANSACTIONS ROYAL SOC’Y LONDON B* 1667 (2004), available at <http://www.pubs.royalsoc.ac.uk>.

3. These include critical race theory, critical legal studies, and feminist legal thought. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); CATHERINE MACKINNON, *FEMINISM UNMODIFIED* (1987); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986). See generally Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 *OHIO ST. L.J.* 599 (1989) (discussing and comparing law and economics, critical legal

fact that explains why the Law looks the way the Law looks.<sup>4</sup> That fact may be efficiency,<sup>5</sup> or it may be bigotry<sup>6</sup> or some basic biological imperative that defies normative classification.<sup>7</sup> Once “discovered,” the fundamental facts too may lend themselves to construction: One person’s efficiency is the other’s hegemony; what is racism or sexism from one perspective is respect for the individual from the next. Debate is not so much resolved as moved from the level of theory to fact to, perhaps ultimately, invective. But the object of “legal” analysis remains the same: to reveal the facts upon which the analysis is founded. We trust the ostensible objectivity of facts, and even the subjectivity of objectivity we assert as a discernible fact.<sup>8</sup>

This Essay is a further and inevitable variation on that theme. I pursue here what might be termed “doctrinal jurisprudence”: Study of the way facts (including rules) become legal doctrine,<sup>9</sup> specifically here how

studies, and feminist legal thought).

4. I capitalize “Law” throughout to indicate the institution and use the initial lower case “l” to indicate a particular legal norm and thereby reduce the risk of confusing the two.

5. Among the fundamental assumptions of law and economics are that people make rational decisions designed to maximize self-interest; that common law is best understood as a system for maximizing efficiency; and that free markets produce the most efficient use of resources. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 1–2 (5th ed. 1998). For the argument that the normative argument has offered, and continues to offer, more than the positive perspective, see Ian Ayres, *Valuing Modern Contract Scholarship*, 112 *YALE L.J.* 881 (2003). And for the argument that neither positive nor normative economic analysis of contract law has proved worthwhile, see Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *YALE L.J.* 829 (2003) [hereinafter Posner, *Success or Failure*].

6. See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 62 (3d ed. 1992) (questioning whether black Americans have a permanent subordinate status and must accept that as fact); MACKINNON, *supra* note 3, at 4 (inequality and exploitation define male-female interaction); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 6 (1984) (legal reasoning is inherently indeterminate, and law is not neutral).

7. See, e.g., E. Donald Elliot, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 *VA. ENVTL. L.J.* 17 (2001) (explaining environmental law as an “adaptive response by a parasite to facilitate the survival of future generations by preserving” its host (emphasis removed)); Bailey Kuklin, *Evolution, Politics, and Law*, 38 *VAL. U. L. REV.* 1129 (2004) (evolutionary biology can be used to derive normative principles of ethics); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1561 (1998) (evolutionary biology can explain concepts, such as fairness, that would otherwise be irrational).

8. See *infra* note 134.

9. Joseph Raz captures well the dynamic that determines a rule’s elaboration into doctrine: A convention of reference sometimes exists which allows one to refer to a statute, or to the original judicial decision, when citing a legal rule, even though they are no more than the starting-point in the development of the rule, which is in a very real sense the product of the activities of several bodies over a period of time.

These complications mean, of course, that the rule as it is now may include aspects which cannot be attributed to its original creator. They are part of the rule because they are attributable to the author of a later intervention.

JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 213, 229 (1994).

idiosyncratic perceptions concerning “justice” facts support the development of contract agreement doctrine.

Analysis in terms of doctrine is heuristic in nature. That is, doctrine translates a bundle of data; we explain data (when, for example, a promise is enforceable) by reference to doctrine (when, say, there is “agreement”). But like all heuristics, doctrine is both under- and over-inclusive.<sup>10</sup> Doctrine does not formulate enough cases (and so we may adjust the doctrine or create a new exceptional category, like promissory estoppel<sup>11</sup>), or it formulates and determines the result in too many cases (in which event we refine the doctrine or create exceptions to its operation, like impossibility or frustration<sup>12</sup>). It is doctrine we encounter, normally as the elaboration of rules or a law, when we try to make sense of Law or an area of Law such as contract.

This Essay investigates the relationship between the way we encounter data (including laws, and specifically a contract law) and what we may conclude about the Law, as doctrine, that emerges from that encounter. The study is limited to the contract law not because there is necessarily anything unique about contract so far as our encounter with law as data is concerned,<sup>13</sup> but because the subject is fundamental and generally accessible. Further, in the formulation of contract doctrine you can see quite starkly the operation of forces generally at work in the Law. There is

10. So too, rules. See Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW* 31 (Robert P. George ed., 1996) (“There are many bad laws. And there are many good laws that occasionally produce bad results as a consequence of the under- and over-inclusiveness of general rules.”).

11. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

12. Impossibility, or impracticability, discharges a party’s duty under a contract when: (1) the “party’s performance is made impracticable”; (2) “without his fault”; (3) “by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.” *Id.* § 261. Frustration addresses the situation in which a party claims that some circumstance has so destroyed the value to him of the other party’s performance as to frustrate his own purpose in making the contract. *Id.* § 265.

13. But see Hoffman, *supra* note 2, at 1671, suggesting that there is something biologically unique about contract:

It appears that humans, and indeed all intensely social animals, have a predisposition to follow three central behavioural rules: (i) *promises to reciprocate must be kept (contract)*; (ii) reciprocal exchanges must be relatively equal (tort and criminal); and (iii) serious violations of the first two principles must be punished (enforcement). These three rules form the nucleus of a kind of neo-natural law that I suspect is part of our inherited natures, and therefore is both universal and relatively invariant.

*Id.* (footnote omitted) (emphasis added). It might be more accurate to say that this Essay’s focus on contract is not meant to suggest that the observations offered here would not resonate as well in other areas of the Law. In fact, if Hoffman is right, because there is something fundamental about contract, the argument of this Essay may find traction beyond the contract law, as do contract concepts generally.

also something else about contract doctrine that reveals a good deal about our encounter with Law: At several crucial junctures, contract expressly invokes conceptions of morality in the form of references to “justice” and “fairness” in order to resolve recurring sources of controversy. So an appreciation of our encounter with contract doctrine may intimate as well something about the Law-morality dynamic that underlies so much of the Law, or at least so much of the way we talk about Law.

Though the scope of the Essay may seem broad, the goal is really quite modest: to discover a means to describe a *structure* to depict human agents’ encounter with justice-based contract doctrine. The goal is not to describe the constituents or determinants of justice in this or any context—this is not an exercise in consequentialist or deontological theory. There may be nothing more fundamental to contract than the constituents of agreement, and justice is, as this Essay demonstrates, frequently the measure of contract liability. Agreement is the product of a “justice” calculus. At least, that is the case often enough to support the conclusion that you cannot understand what contract means by “agreement” unless you understand the justice component of agreement.

The development and presentation of a structure is crucial to the argument here. A challenge to our current understanding of justice as a determinant of contract agreement is our inability to be certain that we are talking about the same thing when we use the same terms: What you mean by the word “justice”—by which I do *not* mean, your sense of what is just—may be wholly different from what I intend the term to denote (and connote). A structure helps us assure that we are talking about the same thing (or make sense of our conversation when we are not). Also, once we identify law (or rule), Law, and the justice calculus in the structure, we can better investigate the relationship among them. It is a thesis of this Essay that the relationship among laws, Law, and the justice calculus may tell us more than would simply crafting definitions of each in isolation from the other two.

The ultimate conclusion here is that, notwithstanding its invocation of justice, contract (and perhaps all of Law) is essentially *amoral*; that is, there is no such thing as a *fixed* “morality” that can matter in the way Law, specifically the contract law, governs transactor interrelations. That is not to say that there is no such thing as morality. There may well be a phenomenon or network of phenomena that is best described as morality, but that is another thing altogether from saying that that phenomenon or those phenomena can have currency in the sphere of “legal morality”—the

confluence of the coordination, expertise, and efficiency interests that justify Law.<sup>14</sup> I use “legal morality” to describe the moral purposes Law serves.<sup>15</sup> What is crucial about the concept for present purposes, though, is that legal morality pertains only in the case of a relation between or among two or more subjects of Law. Morality simpliciter would pertain no less in the case of an individual actor. Legal morality is a corporate concept that operates just in case coordination, expertise, and efficiency considerations are in play.

The objects here are, admittedly, ambitious, and the course of the argument must effect a certain consilience<sup>16</sup> to support the observations about contract agreement offered. Extant positive legal theories are not up to the task.<sup>17</sup> They just reveal the incongruities without describing their sources. To make more sense of the Law of contract agreement, it is necessary to invoke conceptions of our encounter with data generally and then to formulate an explanation of what it is that we “see” when we

14. In order to grasp what “legal morality” is, it is best to start by positing a reason for Law. That is, why is Law necessary? Would we need Law if all men and women were angels? What is it that Law adds to the admonition “do the right thing”? Answers are offered by Larry Alexander and Emily Sherwin: “If . . . men were angels . . . then posited norms in the form of determinate rules would be necessary to implement morality. Formalistic law is a solution to a cognitive, not a motivational, problem.” LARRY ALEXANDER & EMILY SHERWIN, *THE RULES OF RULES* 232 n.4 (2001). In support of that conclusion, Alexander and Sherwin cite Gregory S. Kavka. *See id.* (citing Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 *SOC. PHIL. & POL’Y* 1 (1995)). “Legal morality” as used here captures what Alexander and Sherwin understand to be the role of “authoritative settlement,” which “solves the problems of *coordination, expertise, and efficiency.*” *Id.*

15. *Cf.* Raz’s “normal justification thesis”:

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.

RAZ, *supra* note 9, at 214 (footnote omitted).

16. Edward O. Wilson explains the term “consilience”: “William Whewell, in his 1840 synthesis *The Philosophy of the Inductive Sciences*, was the first to speak of consilience, literally a ‘jumping together’ of knowledge by the linking of facts and fact-based theory across disciplines to create a common groundwork of explanation.” EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 8 (1998). The syntheses of law and economics, law and psychology, “neurophilosophy,” and “neuroeconomics” would be examples of consilience, efforts to find answers in the coincidence of theory.

17. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (arguing for assessment of legal policies solely on the basis of their effect on individual welfare, without regard to fairness); Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903 (2003) (abandoning descriptive analysis of contract theory in favor of normative analysis); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 967 (2001) (arguing for assessment of legal policies solely on the basis of their effect on individual welfare, without regard to fairness); Posner, *Success or Failure?*, *supra* note 5, at 880 (stating that economic analysis of contract law has failed, but declining to recommend a superior approach).

encounter a legal rule. The consilience accomplished here takes advantage of contributions to our understanding of cognitive theory generally as well as our developing appreciation of the “complex.”

Part I of the Essay will offer an account of five contracts cases that concern the nature of agreement: *Hadley v. Baxendale*,<sup>18</sup> *Jacob & Youngs, Inc. v. Kent*,<sup>19</sup> *Peevyhouse v. Garland Coal & Mining Co.*,<sup>20</sup> *Henningsen v. Bloomfield Motors, Inc.*,<sup>21</sup> and *Hill v. Gateway 2000, Inc.*<sup>22</sup> While that is not to say that those five cases determine agreement fully and completely, it is to say that we cannot understand what agreement in contract means unless we can account for these five cases and the fit between justice and agreement they present. Four of the cases expressly invoke “justice” as the measure or determinant of contract agreement. The fifth relies on “practical considerations” essentially indistinguishable from the elements of the “justice” calculus relied upon by the first four. The cases are not mined for their sense of justice. The cases reveal the contract law’s reliance on justice expressly, even in the course of fixing what may be one of its most prosaic conceptions: the agreement.<sup>23</sup>

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18. *Hadley v. Baxendale* (1854), 156 Eng. Rep. 145 (Ex. Ch.).

19. *Jacobs & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

20. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1963).

21. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

22. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

23. 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, “Promise for Benefit Received” (“extent necessary to prevent *injustice*”), 89, “Modification of Executory Contract” (“if the modification is *fair* and equitable”; “to extent that *justice* requires enforcement”), 139, “Enforcement by Virtue of Action in Reliance” (“The remedy granted for breach is to be limited as *justice* requires”), 158, “Relief Including Restitution” (“grant relief on such terms as *justice* requires”), 173, “When Abuse of a Fiduciary Relation Makes a Contract Voidable” (contract voidable unless “it is on *fair* terms”), 176, “When a Threat Is Improper” (“threat is improper if the resulting exchange is not on *fair* terms”), 184, “When Rest of Agreement Is Enforceable” (“reasonable standards of *fair* dealing”), 190, “Promise Detrimental to Marital Relationship” (“*fair* in the circumstances”), 195, “Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently” (term unenforceable unless “*fairly* bargained for”), 205, “Duty of Good Faith and Fair Dealing” (pervasive duty of “good faith and *fair* dealing”), 223, “Course of Dealing” (“*fairly* to be regarded as establishing a common basis of understanding”), 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”), 260, “Application of Payments Where Neither Party Exercises his Power” (“*just* regard to the interests of third persons, the debtor and the creditor”), 272, “Relief Including Restitution” (if other apposite rules “will not avoid *injustice*, the court may grant relief on such terms as *justice* requires”), 351, “Unforeseeability and Related Limitations on Damages” (“court may limit damages . . . if it concludes that in the circumstances *justice* so requires”), 354, “Interest as Damages” (“interest may be allowed as *justice* requires”), 358, “Form of Order and Other Relief” (“order of specific performance . . . on such terms as *justice* requires”), 371, “Measure of Restitution Interest” (measurement of restitution interest “as *justice* requires”), 384, “Requirement That Party Seeking Restitution Return Benefit” (compensation in place of return of property in

That brief exposition of five seminal contract agreement cases will demonstrate the salience of justice in recurring agreement contexts: We have come to understand contract's central agreement doctrine by direct reference to justice as a tool of analysis, not simply as a trope we might apply after the fact to signify our concurrence with a more fundamental analytical criterion. The cases, we will see, do not simply admonish the next court to do what is just or to reach the result consistent with justice. Instead, they hold that the very contours of the parties' agreement is determined by justice. So in order to formulate that agreement, you must appreciate what terms justice would require. The contract law, then, can be no more accessible to us than can be the conception of justice, and is every bit as subject to idiosyncrasy as our conceptions of justice. Part I presents the five crucial cases to make clear the role of justice in contract agreement in order to support the analysis that follows of the structure of the justice calculus: what we *can* mean when we describe a result as consistent with the dictates of justice.

Justice (as perhaps all constituents of legal doctrine) is the product of cognition. Part II of the Essay first describes a conception of cognitive theory that explains well how we encounter data, including legal doctrine, subject to pervasive heuristic limitations. Our every encounter with data is determined by our prior encounters with data, which ultimately determine what we understand to be our perspective. Our perspectives are dynamic and shift as we are subject to data, and we are constantly bombarded by additional data: We never stand in the same river twice.<sup>24</sup> Over time, certainly, our perspectives become more fixed and more difficult to shift, much as an automobile's fuel efficiency gauge varies more markedly when fewer miles have been traveled than it does after many more miles have been traveled, and just as we learn more in the first year of life than we will ever learn thereafter. Cognitive theory offers an account of our encounter with data and the idiosyncrasies of perception that nonetheless conspire to reveal sufficient consensus for cooperative action, the object of Law. Conceptions of cognition, essentially how we process the constant onslaught of data, can tell us something about how we encounter the data

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restitution "if *justice* requires that compensation be accepted") (emphases added). So "justice" as an analytical device may be a key to much more of contract than we have always appreciated. But the execution of the argument of this Essay is not dependent on more than justice as a determinant of agreement in the five seminal cases surveyed.

24. A common paraphrase of Heraclitus, who actually said: "We step and do not step into the same rivers, we are and we are not." *Homeric Questions* 24.3-5, in *EARLY GREEK PHILOSOPHY* 117 (Jonathan Barnes trans. & ed., 1987).



that is and that becomes Law—for present purposes, the contract agreement law.

Part II then builds on that cognitive theory to offer a depiction of legal rules (the laws that determine, at least in part, what Law is) and describes our engagement with them in terms of complexity theory. The description demonstrates something important about the nature of legal doctrine (here, contract agreement law). I argue that the structure of legal doctrine may be revealed by the same cellular automata complexity theorists use to depict the elaboration of rules in nature. That is not to say that a legal rule is determined in the same way as might be the “pattern” of cells that account for the appearance of natural phenomena (a flower or an animal’s markings), but it is to suggest that the *analogy* to complexity theory’s demonstration in cellular automata may offer a useful reconception of legal doctrine and the relationship between doctrine and what we mean by “justice.”

The second Part concludes by offering a synthesis of cognitive and complexity theory in terms of the contract law of agreement, and the Conclusion of the Essay suggests the answers that might be provided by the structure as well as the questions that remain. The object is to make more concrete the justice calculus in the case of contract agreement, and the possibility is left open that the structure developed may pertain as well to other analytical settings in Law. The emergent structure is a first step, but an important one.

For clarity’s sake, it is worthwhile to present the course of the Essay’s argument at the outset:

1. “Agreement” is a crucial constituent of contract.
2. In important and recurring contract contexts, the existence and extent of contract agreement is determined by reference to a justice calculus.
3. Justice is the product of cognition, in much the same way as our perceptions generally are the product of cognitive processes (heuristic theory).
4. Pattern formation and recognition are idiosyncratic (perception).
5. Cognitive processes rely on pattern recognition and conclusions drawn from the coincidence and dissonance of cognitive patterns (heuristic function).
6. Legal doctrine is determined by heuristic consensus (consensus).
7. Complexity theory may depict progress of a rule through its elaboration by the use of cellular automata.
8. Cellular automata demonstrate that complex forms emerge from simple initial rules.

9. Legal doctrine may be appreciated as such elaboration of simple rules.

10. The structures revealed by cellular automata in complexity theory provide the means to depict the evolution of legal doctrine both over time and across populations.

11. The form of the doctrine that emerges from the justice calculus in contract agreement may be depicted in complexity theory's cellular automata.

12. Understood as a polytypic concept, legal doctrine may coalesce into Law, or it may not.

13. Legal doctrine so conceived may support reconceptualization of the relationships that determine related contract doctrines and the progress of contract doctrines' evolution.

#### I. CONTRACT AGREEMENT

Agreement is the foundation of contract; indeed, it may be that agreement alone is what determines contract, the law of *consensual* relations, from other areas of the Law. The Uniform Commercial Code defines "agreement" as "the bargain of the parties in fact."<sup>25</sup> Section 3 of the Restatement of Contracts is similarly succinct: "An agreement is a manifestation of mutual assent on the part of two or more persons."<sup>26</sup> The inquiry under both formulations is essentially factual: Did the parties' minds "meet," an ostensibly objective inquiry with necessarily subjective determinants. We cannot, after all, look into the parties' minds; we can only infer what we can infer from their statements and actions attending the (asserted) manifestation of intent.

"Agreement" in the contract law is in fact a device, a tool for courts to vindicate particular notions of party autonomy while maintaining, at least apparently, the consensual basis of contract liability. The cases described

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25. U.C.C. § 1-201 (3) (2003) [hereinafter "U.C.C." or "Code"]. The definition of agreement reads more fully, in pertinent part: "'Agreement' . . . means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade . . ." So "agreement" is a construction of facts, *including* what the parties said to one another. The language of the Code, though, nowhere explicitly provides or even suggests that "agreement" is the product of any kind of justice calculus. That is, the Code neither invites us to find agreement nor determines the parties' agreement by reference to what would be "just."

26. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1985). The same section defines "bargain" as "an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." *Id.* Again, the term is defined without reference to justice. In fact, a contract that is voided due to illegality, or that is unconscionable, can nevertheless be a bargain. *See id.* cmt. c. Justice dictates only whether the agreement will be enforced, not whether it exists.

in this Part are admittedly not typical of courts' treatment of agreement. Each, though, is seminal and has determined our conception of contract agreement far more profoundly than the myriad decisions that have found or not found a "meeting of the minds." Because these decisions invoke "justice" (in one case "practical considerations") not just as a measure of, but also as a substantial constituent of agreement, the cases may tell us a good deal about contract's relation to conceptions of morality generally and how that matters to Law.

The cases treated here are among those most often reproduced in the casebooks,<sup>27</sup> so they may have a disproportionate impact on what lawyers (and judges, lawmakers, and law teachers) understand agreement to be. They have also received considerable attention in the scholarly literature and have had a direct impact on the development of statutory contract law. The discussions of the cases take account of the impact the decisions have had on the contract law but focus primarily on the way each uses conceptions of justice to determine the substance of agreement.

Two caveats, of a sort: First, the discussion of the cases that follows is, in fact, a construction of them. I do not doubt that other conscientious readers might reach different conclusions about the cases generally and specifically insofar as the justice criterion of agreement is concerned. None of the opinions includes an express acknowledgment that the case is about the contours of agreement or the relationship between conceptions of justice and the agreement requirement in contract. It is my conclusion that the cases are, ultimately, about the agreement criterion and intimate something important about justice as the determinant and measure of agreement.

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27. A survey of eleven major contracts casebooks published since 1963 (the year of the *Peevyhouse* decision) demonstrates this. All eleven casebooks included *Hadley* and either *Jacob & Youngs* or *Peevyhouse* (eight included both *Jacob & Youngs* and *Peevyhouse*). *Henningsen* was included in seven of the eleven. See RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE (3d ed. 2003) (*Hadley, Jacob & Youngs, and Peevyhouse*); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (2d ed. 2001) (*Hadley, Jacob & Youngs, and Peevyhouse*); JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS: CASES AND PROBLEMS (1978) (*Hadley and Jacob & Youngs*); MICHAEL L. CLOSEN ET AL., CONTRACTS: CONTEMPORARY CASES, COMMENTS, AND PROBLEMS (1984) (*Henningsen, Jacob & Youngs, and Peevyhouse*); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT (8th ed. 2003) (all four cases); LON FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW (4th ed. 1981) (*Hadley, Henningsen, and Peevyhouse*); HARRY W. JONES ET AL., CASES AND MATERIALS ON CONTRACTS (1965) (all four cases); AMY HILSMAN KASTELY ET AL., CONTRACTING LAW (1996) (*Hadley and Jacob & Youngs*); FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS (3d ed. 1986) (all four cases); JOHN E. MURRAY, CASES AND MATERIALS ON CONTRACTS (1969) (all four cases); ROBERT SCOTT & DOUGLAS LESLIE, CONTRACT LAW & THEORY (2d ed. 1993) (all four cases).

Second, the structure that emerges from Part II of the Essay does not support any reconciliation of the cases and so does not entail reconsideration of the cases in light of that structure. The object is not to fashion a structure that “makes sense” of disparate decisions. (Indeed, I do not find anything disparate about the holdings.) Instead, the structure reveals how the necessary idiosyncrasy and therefore variety of justice conclusions supports what we determine to be doctrine in this one discrete area of the contract law.

The point of the exegeses in Part I is to demonstrate the ubiquity of a justice criterion in the contract agreement calculus. A collateral, but no less important, conclusion of the Essay’s construction of the cases is that, to the extent contract is based on agreement and agreement is subject to the dynamic described in Part II, the foundation of contract may be less substantial than we generally (are wont to) maintain that it is. While the consequences for the Law of that conclusion are not pursued here, it suggests an area for further worthwhile study.

#### A. Hadley v. Baxendale

Among the most famous of English decisions that have shaped the American common law, *Hadley v. Baxendale*<sup>28</sup> is, I argue, as much about “agreement” generally as it is about consequential damages specifically, though it is as a source of the consequential damages law that *Hadley* has attracted the most attention.<sup>29</sup>

The facts of *Hadley* are not difficult to grasp, and are timeless in their way.<sup>30</sup> The owner of a mill entered into a contract with a shipper for the transport of a broken shaft to another city where the broken shaft was to be used as the model for a replacement.<sup>31</sup> The mill would be shut down until the new shaft could be obtained and installed.<sup>32</sup> It is unclear whether (or, at least, the extent to which) the shipper was aware that the mill was shut

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28. *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Exch. Div.).

29. See, e.g., Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999); Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563 (1992); Arthur G. Murphey, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT’L L. & ECON. 415 (1989); Paul S. Turner, *Consequential Damages: Hadley v. Baxendale Under the Uniform Commercial Code*, 54 SMU L. REV. 655 (2001). See also U.C.C. § 2-715(2) cmt. 2, 3 (2003) (statutory provision of *Hadley* rule).

30. “*Hadley v. Baxendale* is still, and presumably always will be, a fixed star in the jurisprudential firmament.” GRANT GILMORE, *THE DEATH OF CONTRACT* 83 (1974).

31. *Hadley*, 156 Eng. Rep. at 146.

32. *Id.*

down as a result of the broken shaft.<sup>33</sup> There was delay in delivery, and the owner of the mill sued to recover damages on account of the extended shut down of the mill.<sup>34</sup>

Part of the problem with *Hadley* is the inconsistency between the statement of facts and the court's opinion: It would seem from one report of the facts that the owner had made the shipper aware of the consequences of delay—shut-down of the mill and attendant loss of profits.<sup>35</sup> The court, though, seemed not to have been convinced that the shipper was put on such notice.<sup>36</sup> In any event, the *Hadley* statement of law is clear:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by [the mill owner] to [the shipper], and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally,

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33. *Id.* at 146–47.

34. *Id.* at 147.

35. Eisenberg, *supra* note 29, at 570–71:

When the contract in that case was made, the plaintiffs' employee told Pickford's clerk that the mill was stopped and that the shaft must be sent immediately. Certainly any reasonable person in the clerk's position would have thought that these words were related . . . . The result in the case was at odds with the very rules the court laid down.

36. The opinion included this factual conclusion:

Now, if the special circumstances under which the contract was actually made *were communicated by the plaintiffs to the defendants* [liability for consequential damages would arise] . . . . Now, in the present case . . . the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill.

156 Eng. Rep. at 151.

and in the great multitude of cases not affected by any special circumstances, from such breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; [sic] and of this advantage it would be very *unjust* to deprive them.<sup>37</sup>

Section 351 of the Second Restatement of Contracts formulates the *Hadley* rule in terms that make clear its reliance on conceptions of “justice”:

(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 it if concludes that in the circumstances *justice* so requires in order to avoid disproportionate compensation.<sup>38</sup>

In the Restatement, then, justice is a measure of recovery insofar as it may constrain recovery and insofar as the court will determine foreseeability on an objective basis. More on this below.

The *Hadley* result is codified in Article 2 of the Uniform Commercial Code: “[Seller shall be liable to buyer for] any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know . . . .”<sup>39</sup> The fact and extent of the seller’s

37. *Id.* (emphasis added).

38. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) (emphasis added). While subsection (3) is certainly not a strict restatement of the *Hadley* rule, for present purposes it suffices that the Restatement builds in this way on the *Hadley* result.

39. U.C.C. § 2-715(2) (2003). The provision only expressly provides the seller a means to limit its liability for consequential damages, though buyers too could be liable for lost profits, a form of consequential damage. Under existing Article 2 law, a seller may not have direct statutory license to recover “consequential damages” as such. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7-16(b) (5th ed. 2000). Nevertheless, by permitting recovery for lost profits,

liability for consequential rather than direct loss<sup>40</sup> is fixed (1) by the parties' actual, express agreement (the parties are certainly able to agree expressly that the seller will be liable for a buyer's particular consequential loss—e.g., additional shipping cost) or (2) by inference from the facts surrounding the transaction. It is that second basis of consequential loss recovery that invokes the justice calculus. The Restatement subsection 351(3) construction of the *Hadley* rationale is that in some circumstances providing the buyer recovery for all foreseeable consequential loss would be “unjust.” To the extent, then, that the *Hadley* formulation provides the court a means to determine the quantum of consequential loss compensable by reference to what is “just,” the decision fixes agreement by reference to justice.

Under *Hadley*, damages are recoverable to the extent they were “foreseeable.”<sup>41</sup> “Foreseeability” is not binary: The conception captures instead a continuum. It is the degree of foreseeability that determines the quantum of damages recoverable. The calculus is similar to what we

U.C.C. § 2-708(2) does provide consequential damage recovery for the seller. An interesting question arises as to the buyer's right to contract for a limitation of these “consequential damages.” At least one court has enforced a contract provision *expanding* the seller's remedies beyond those provided by § 2-708(2). *Martin v. Sheffer*, 403 S.E.2d 555, 556 (N.C. Ct. App. 1991). So long as a limitation on damages under § 2-708(2) is reasonable and in good faith, it is difficult to see why such a provision should not be equally enforceable. *See* U.C.C. § 1-302 (2003) (parties may vary from default provisions of U.C.C. by agreement).

Insofar as the Restatement recognizes the courts' power to limit consequential damages on account of lost profits, it would seem that a court would have the means to afford the buyer the same protection as § 2-715(2) expressly provides the seller. *Cf.* Ian Ayres, *Three Proposals to Harness Private Information in Contract*, 21 HARV. J.L. & PUB. POL'Y 135, 139–42 (1997) (urging extension of the *Hadley* rule in order to protect buyers by forcing sellers to provide them information concerning seller's lost profit exposure).

For other Code formulations of consequential damage rules, see U.C.C. § 2A-520(2) (consequential damages resulting from lessor's default include loss from requirements of which lessor “at the time of contracting had reason to know and which could not reasonably be prevented”); U.C.C. § 3-411(b) (person asserting right to enforce unpaid cashier's or teller's check “may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages”); U.C.C. § 4-402 (payor bank is liable to customer for damages proximately caused by wrongful dishonor of check); U.C.C. § 5-111(b) (no consequential damages for wrongful dishonor of draft or demand on letter of credit); U.C.C. § 9-625(b) (person failing to comply with Article 9 may be liable for loss resulting from “debtor's inability to obtain, or increased costs of, alternative financing”).

40. The distinction between consequential and direct damages may be one of degree. Both must be caused by the breach, but direct damages are said to be a necessary result of the breach, while consequential damages are a natural, but not a necessary, result. *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504 (D. Conn. 1975). *See also* *Rexnord Corp. v. DeWolff Boberg & Assoc.*, 286 F.3d 1001, 1004 (7th Cir. 2002) (difference between direct and consequential damages lies in degree to which damages are a foreseeable consequence of breach).

41. *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 147–48 (Exch. Div.).

encounter in the tort cases so far as proximate cause is concerned.<sup>42</sup> Judge Cardozo put it well: “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.”<sup>43</sup> Just as duty is a relative conception, the foreseeability of consequential loss is similarly a function of the parties’ relation and the circumstances attending the transaction: constituents of a justice criterion.

It is to be noted that the test, as it is usually stated is, objective. The *extent* of the recovery is to be measured, not by what the defendant actually foresaw when he made the contract, but by what a hypothetical, reasonable person in the position of the defendant, with the defendant’s knowledge of the circumstances surrounding the transaction, could reasonably have been expected to foresee, had he directed his attention to the effect of a breach.<sup>44</sup>

Professor (and then University Chancellor) John Murray’s formulation of the *Hadley* rule suggests two constituents of the consequential damages calculus pertinent here: First, a court would award consequential damages to the “extent” that the claimed damages were foreseeable,<sup>45</sup> and, second, the particular defendant’s state of mind is not determinative (though it might be probative); it is the reasonable person in the defendant’s position whose state of mind would be construed to fix the extent of that consequential recovery.<sup>46</sup> So the parties’ agreement is determined by

42. See, e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir. 1982) (*Hadley* rule “corresponds to” tort principles limiting liability “to the foreseeable consequence of the defendant’s carelessness”); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (duty of care is expressed as probability of harm multiplied by gravity of harm, compared with burden of taking adequate precautions); *Neering v. Ill. Cent. R.R.*, 50 N.E.2d 497, 502 (Ill. 1943) (duty of care arises when danger is known or should be known to the defendant); *Hale v. Stoughton Hosp. Ass’n*, 376 N.W.2d 89, 95 (Wis. Ct. App. 1985) (like tort damages, contract damages are limited by foreseeability at the time of contract formation).

43. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

44. JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 120, at 785 (4th ed. 2001) (emphasis added).

45. See, e.g., *Askari v. R & R Land Co.*, 225 Cal. Rptr. 285, 289 (Cal. Ct. App. 1986) (consequential damages available “to the extent they were reasonably foreseeable at the time of contracting”) (quoting *Jensen v. Dalton*, 9 Cal. App. 3d 654, 658 (Ct. App. 1970)); *Hydraform Products Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339, 345–46 (N.H. 1985) (recovery for lost profits for sale of stoves available to the extent foreseeable); *Osborn v. Commanche Cattle Indus.*, 545 P.2d 827, 832 (Okla. Civ. App. 1975) (recovery of lost profits is limited by extent of injured party’s expectation interest).

46. *Kerr S.S. Co. v. Radio Corp. of Am.*, 157 N.E. 140, 142 (N.Y. 1927) (“[W]hatever a carrier could ascertain by diligent inquiry as to the nature of the undisclosed transaction, this he should be deemed to have ascertained, and charged with damages accordingly.”); *Brown v. S.C. Ins. Co.*, 324 S.E.2d 641, 646–47 (S.C. Ct. App. 1984) (consequential damages in insurance contract are based on what a reasonable person in insurer’s position “could have reasonably foreseen”), *rev’d on other*



reference to justice, and what is just is determined by reference to an objective standard. Subjective meeting of the mind “agreement” has nothing to do with it.

*Hadley*, then, is about “agreement” and ascertaining agreement by reference to justice.

### B. *Jacob & Youngs v. Kent*

*Jacob & Youngs* is an opinion written by Justice (then Judge) Benjamin Cardozo, and one of those for which the jurist is famous.<sup>47</sup> Plaintiff contractor used a brand of pipe other than that specifically required by the contract for construction of a residence.<sup>48</sup> In fact, the pipe plaintiff used was in all ways (but brand name) identical to the “Reading” Pipe for which defendant contracted.<sup>49</sup> Defendant’s architect directed plaintiff to remove the nonconforming pipe and replace it with the Reading Pipe.<sup>50</sup> Removal would have required breaking through walls.<sup>51</sup>

*Jacob & Youngs*, at one level, concerns the difference between “conditions” and “promises.” Failure of a condition could effect a forfeiture; breach of promise gives rise to an action for damages.<sup>52</sup>

Considerations partly of *justice* and partly of *presumable intention* are to tell us whether this or that promise shall be placed in one class or in another [promise or condition]. . . . There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender . . . and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape

*grounds*, Charleston County Sch. Dist. v. State Budget & Control Bd., 437 S.E.2d 6 (S.C. 1993).

47. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

48. *Id.* at 890.

49. *Id.*

50. *Id.*

51. *Id.*

52. The primary distinction between a promise and a condition is that failure to perform a promise breaches a contract, while non-occurrence of a condition does not. Non-occurrence of a condition, unless excused, will discharge a duty, but it does not give rise to a right to relief. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 11.9 (5th ed. 2003); MURRAY, *supra* note 44, § 99. *See also* 13 WILLISTON ON CONTRACTS § 38:5 (4th ed. 2000) (promise is a manifestation of intent to act or refrain from acting in a certain way; condition is an event which must occur before performance on a contract becomes due). An independent promise must be performed even though the other party has not performed. CALAMARI & PERILLO, *supra*, § 11.25. The opposite is true of a dependent promise. With respect to a dependent promise, the law thus creates a “constructive condition,” by which a party’s duty to perform is conditioned on the other party’s performance. *Id.* § 11.12.

to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of *justice*, the progress is a short one to the conclusion that they may not be so treated without a perversion of *intention*. *Intention* not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. . . .

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a *just result* will be troubled by a classification where the lines of division are so wavering and blurred. . . . The courts have balanced such considerations against those of *equity and fairness*, and found the latter to be the weightier.<sup>53</sup>

For Judge Cardozo, justice will determine agreement and agreement will fix the right to recovery, the substance of the contract. Curiously, just as in *Hadley*, the court's opinion seems inconsistent with the court's report of the facts: "This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here."<sup>54</sup> But the contract did specify Reading Pipe;<sup>55</sup> all that was missing, apparently, was "And we mean it!"

*Jacob & Youngs* is formulated in section 229 of the Restatement of Contracts: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."<sup>56</sup> Of course that is but one reading of *Jacob & Youngs*. The more cynical (or realistic) formulation might be: "To the extent that the court concludes one party is insisting on a performance the benefit of which would be outweighed by the detriment that performance would cause to the other contracting party, the court may excuse that performance." Both versions are prefaced by the "to the extent" limitation, and it may be that the second captures better what Judge Cardozo

53. *Jacob & Youngs, Inc. v. Kent*, 129 N.E.889, 890–91 (N.Y. 1921) (emphasis added).

54. *Id.* at 891.

55. *Id.* at 890.

56. An illustration to this section recites the facts and holding of *Jacob & Youngs*. RESTATEMENT (SECOND) OF CONTRACTS § 229 illus. 1 (1981). Compare the First Restatement formulation: "A condition may be excused without other reason if its requirement (a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance." RESTATEMENT OF CONTRACTS § 302 (1932).

accomplished in *Jacob & Youngs*. It certainly more candidly acknowledges what Judge Cardozo was doing with (to) the parties' intent.

The case makes an important statement about the limits of contract law generally. Insofar as the court was unwilling to enforce the parties' agreement as formulated by them, instead relying on a fictional (though certainly plausible) inferred agreement, *Jacob & Youngs* is, in a real way, a watershed: Even in the face of certain contract language, and without any evidence of overreaching, "agreement" is constrained and ultimately determined by reference to justice.

As such a watershed, the holding of *Jacob & Youngs* is somewhat shocking to the conscience of the conscientious jurist, and so it is not surprising that Judge Cardozo, the unsurpassed judicial rhetorician, included dictum that would both make his conclusion more palatable—seem less revolutionary—and provide later courts a "trap door" to avoid confronting the justice calculus: "This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here."<sup>57</sup> And that is precisely the language that has provided refuge for courts discomfited by Judge Cardozo's reliance on justice unadorned. Two relatively recent cases illustrate the point.<sup>58</sup>

The same New York Court of Appeals in *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*<sup>59</sup> considered a situation where a contractual provision explicitly required a landlord's "written consent to certain 'tenant work,'" and the plaintiff had provided only oral notice.<sup>60</sup> The plaintiff relied on *Jacob & Youngs* to try to circumvent the writing requirement, but the court was unmoved and used Judge Cardozo's trap door to insist upon the strict performance of the express provision.<sup>61</sup> The *Oppenheimer* court reinforced its conclusion by noting that the plaintiff had conferred no benefit on the defendant so there was no issue of forfeiture.<sup>62</sup> Insofar as the court found no issue of forfeiture, there really was no clearly formulated justice conundrum. The fabric of justice would only be strained in cases of forfeiture or something close to it.<sup>63</sup>

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57. *Jacob & Youngs*, 129 N.E. at 891.

58. See generally *Hardin, Rodriguez & Boivin Anesthesiologists Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628 (7th Cir. 1992); *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415 (N.Y. 1995).

59. *Oppenheimer*, 660 N.E.2d 415 (N.Y. 1995).

60. *Id.* at 416.

61. *Id.* at 420.

62. *Id.* at 419.

63. *Id.* at 420.

*Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Insurance Co.* likewise relied upon Judge Cardozo's trap door in a case between a medical professional corporation and a malpractice insurer.<sup>64</sup> The insurer had not strictly complied with the prerequisite terms to the medical corporation's obligation to pay the insurance premium, but nonetheless pressed a claim based on substantial performance.<sup>65</sup> The court acknowledged that the substantial performance doctrine is normally applied in building contracts and operates to avoid a forfeiture where the defect is "both trivial and innocent."<sup>66</sup> The court understood the doctrine to be inapplicable in the case of an explicit condition precedent<sup>67</sup> and reasoned that Judge Cardozo "realized that the doctrine [of substantial performance] did not extend to cases like the one before us, where the plaintiff insisted upon strict compliance with its conditions and has never waived them. . . ."<sup>68</sup> Now it is difficult to see how the owner in *Jacob & Youngs* was any less insistent upon Reading Pipe than the plaintiff in *Hardin, Rodriguez* was upon receiving the financial statement. The *Hardin, Rodriguez* plaintiff did not say "and, we mean it" either. But the court was able to reach the conclusion it reached in *Hardin, Rodriguez* without effecting a forfeiture, and that is probably what mattered. Forfeiture would be an injustice. The agreement was just insofar as its enforcement would not effect a forfeiture.

*Jacob & Youngs* too is about agreement.<sup>69</sup>

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64. *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628 (7th Cir. 1992).

65. *Id.* at 632.

66. *Id.* at 636 (quoting *Jacobs & Young, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921)).

67. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d (1981)):

If, however, the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event. If, therefore, the agreement makes full performance a condition, substantial performance is not sufficient and if relief is to be had under the contract, it must be through the excuse of the non-occurrence of the condition to avoid forfeiture.

68. *Hardin, Rodriguez*, 962 F.2d at 636.

69. Courts continue to cite *Jacob & Youngs* in the context of determining whether a condition was part of (or was material to) an agreement. *See, e.g.*, *Udjur v. Thompson*, 878 P.2d 180, 183 (Idaho Ct. App. 1994) (language in contract regarding "cutoff date" was sufficient to demonstrate that parties agreed to express condition); *Witmer v. Vulcan Methods, Inc.*, 244 N.Y.S.2d 825, 826 (Sup. Ct. 1963) (despite contractor's express obligation to "waterproof" basement, literal imperviousness to water not within contemplation of parties); *Jackson v. Richards 5 & 10, Inc.*, 433 A.2d 888, 895 (Pa. Super. Ct. 1981) (agreements to be strictly construed in order to avoid forfeiture; breach of express conditions of security agreement not material). As *Oppenheimer* and *Hardin, Rodriguez* indicate, courts also generally adhere to Cardozo's aversion to forfeitures. *But see* *Elda Arnhold and Byzantio, L.L.C. v. Ocean Atlantic Woodland Corp.*, 284 F.3d 693, 695 (7th Cir. 2002) (time-essence clause enforced against buyer of farmland who closed one day late, forfeiting \$1.7 million).

C. *Peevyhouse v. Garland Coal & Mining Co.*

This is a damages case, a relatively famous one, in which the court, it seems, uses agreement conceptions in order to limit the recovery to which plaintiff would have been entitled under the standard contract measure.<sup>70</sup> Once again the court formulates the agreement in terms that the parties clearly did not embrace in order for the court to do “justice.”<sup>71</sup>

The lessee-defendant had breached a coal mining lease by not restoring the plaintiff-lessor’s property to the condition the contract required: “[D]efendant specifically agreed to perform certain restorative and remedial work at the end of the lease period.”<sup>72</sup> The estimated cost of the restoration was \$29,000.<sup>73</sup> In fact, had the work been performed the restoration would have increased the value by about \$300 more than the value of the property unrestored.<sup>74</sup> The issue was whether a promisee is entitled to the cost of defendant’s performance (\$29,000) or the value of that performance (\$300).<sup>75</sup> Keep in mind that this is not a case in which the court had to determine damages without reference to the parties’ express agreement regarding the defendant’s contract duty. The contract clearly provided that the defendant would restore the property at its own cost.<sup>76</sup> So “agreement” was directly in issue.<sup>77</sup>

The *Peevyhouse* court began its analysis by noting that in only one prior case it could find, *Groves v. John Wunder Co.*,<sup>78</sup> had the court

70. See generally *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1963).

71. *Id.* at 113–14.

72. *Id.* at 111.

73. *Id.*

74. *Id.* at 112.

75. *Peevyhouse*, 382 P.2d at 111.

76. *Id.*

77. Indeed, Professor Ayres finds *Peevyhouse* to be exemplary in its disregard of the parties’ actual agreement in order to do justice:

Routinely providing interpretive safe harbors would be a judicial innovation. Judicial opinions in contract cases almost never include this information. This failure to provide alternative contractual language is particularly striking where the parties have tried to contract around a default obligation but the court rules that their efforts were insufficient to displace the default. For example, in *Peevyhouse v. Garland Coal-Mining Co.*, the litigants added language to a form contract, apparently in an attempt to contract around the ‘diminution in value’ damage measure that applies in absence of agreement to the contrary. The Oklahoma Supreme Court held that the contract’s additional language was not sufficient to avoid the ‘diminution in value’ default and create ‘cost of performance’ damages instead. Even if the court’s substantive decision was correct, the court erred by not indicating to future contractors what words would be sufficient to produce a cost of performance result.

Ayres, *supra* note 39, at 137 (footnotes omitted).

78. 286 N.W. 235 (1939).

awarded damages based on cost rather than value of performance.<sup>79</sup> The court was unconvinced by *Groves* and found good reason to follow other authority, including *Jacob & Youngs*, to the effect that “[t]he owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.”<sup>80</sup>

The *Peevyhouse* court had an easier time finding apposite tort authority for its conclusion than it did finding contract authority.<sup>81</sup> And the court invoked *justice* conceptions: The damages the plaintiff-lessor sought “would seem to be ‘unconscionable and grossly oppressive damages, contrary to substantial *justice*,’ within the meaning of [a statute that the court deemed determinative, though drawn from a tort setting].”<sup>82</sup> Further,

where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work; however, where the contract provision breached was merely incidental to the main purpose in view, and where 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.<sup>83</sup>

The court did note that if full recovery of the property was “in fact contemplated by the parties, and is a main or principal purpose of those contracting,” a plaintiff in the lessor’s position could receive damages measured by the cost of performance.<sup>84</sup> It is no more clear how the lessor in *Peevyhouse* could have established that the recovery provision was not incidental than it is clear how the owner in *Jacob & Youngs* could have established that “Reading Pipe” means “Reading Pipe.” In both cases, the courts fixed the terms of the agreement in issue by reference to conceptions of justice.

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79. *Peevyhouse*, 382 P.2d at 111–12.

80. *Id.* at 113 (quoting and citing *Jacob & Youngs*, 129 N.E. at 891).

81. *Id.* at 112–14.

82. *Id.* at 113 (quoting an Oklahoma statute) (emphasis added).

83. *Id.* at 114.

84. *Id.*

#### D. Henningsen v. Bloomfield Motors

*Henningsen* is a contract case, not just a products liability case, though it probably has had its most significant impact as a harbinger of strict liability doctrine.<sup>85</sup> The case concerns pre-Uniform Commercial Code sales warranty and limitation of remedy issues that have now been resolved by the U.C.C. in terms consistent with the *Henningsen* holding.<sup>86</sup>

Part of the opinion is about abrogating the privity requirement, so that the consumer (or one in the consumer's household) can bring a warranty action directly against the manufacturer—Mrs. Henningsen sued the retailer and manufacturer of a car to recover for injuries she suffered on account of a defect in the car which had been purchased for her as a gift by Mr. Henningsen.<sup>87</sup> The court believed it was following the developing trend of authority: “The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon “the demands of social justice.””<sup>88</sup>

Henningsen had purchased a car for his wife as a Mother's Day gift.<sup>89</sup> After driving it less than 500 miles, Mrs. Henningsen heard a loud noise under the hood, the steering wheel spun in her hands, and the car veered off the road.<sup>90</sup> The car was damaged and she suffered personal injuries.<sup>91</sup>

85. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). The decision's place in the strict liability canon is assured:

In the field of products liability, the date of the fall of the citadel of privity can be fixed with some certainty. It was May 9, 1960, when the Supreme Court of New Jersey announced the decision in *Henningsen v. Bloomfield Motors, Inc.* The leaguer had been an epic one of more than fifty years. The sister fortress of negligence liability had fallen, after an equally prolonged defense, in 1916. Much sapping and mining had finally carried a whole south wing of the strict liability citadel, involving food and drink; and further inroads had been made into an adjoining area of products for what might be called intimate bodily use, such as hair dye and cosmetics. Heavy artillery had made no less than eight major breaches in the main wall, all of them still stoutly defended.

Then came the *Henningsen* case.

William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791–92 (1966) (footnotes omitted). Of course, with the fall of the citadel so far as strict liability was concerned, some of contract was caught in the cross-fire, collateral damage we may assume.

86. The Code limits a seller's ability to disclaim implied warranties by requiring the seller to explicitly state when she wishes to do so. If the disclaimer is in a writing, its language must be “conspicuous.” U.C.C. § 2-316 (2003). Revised Article 2 would also provide for extension of the seller's warranty beyond the buyer to those who may reasonably be expected to “use, consume, or be affected by” the goods. U.C.C. § 2-318.

87. *Henningsen*, 161 A.2d at 73.

88. *Id.* at 83 (quoting and citing *Mazetti v. Armour & Co.*, 135 P. 633, 635 (Sup. Ct. Wash. 1913) (quoting *Ketterer v. Armour*, 200 F. 322, 323 (D.C.N.Y. 1912))).

89. *Henningsen*, 161 A.2d at 73.

90. *Id.* at 75.

91. *Id.* at 73, 75.

In response to the breach of warranty action, Chrysler, the manufacturer of the car, interposed, *inter alia*, the terms of the warranty disclaimer and limitation of damages provisions.<sup>92</sup>

The plaintiff's action was in part based on breach of warranty.<sup>93</sup> The court concluded that the plaintiff had not read the portion of the sales contract that contained the very limited warranty and limitation of remedy to repair or replacement of defective parts.<sup>94</sup> The defectiveness determination was to be made by the defendant-manufacturer.<sup>95</sup> The court noted that the automobile industry's "marketing practices, coupled with the advent of large scale advertising by manufacturers to promote the purchase of these goods from dealers by members of the public, provided a basis upon which the existence of express or implied warranties was predicated . . . ." <sup>96</sup> The opinion continues:

The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.<sup>97</sup>

The court also relied on decisions from other states, such as *Mills v. Maxwell Auto Sales Corp.*: "It would . . . be repugnant to every conception of *justice* to hold that, if the parts thus returned for examination were, in point of fact, so defective as to constitute a breach of warranty, the appellee's right of action could be defeated by the appellant's arbitrary refusal to recognize that fact. . . ." <sup>98</sup> And *Baxter v. Ford Motor Co.*:

92. *Id.* at 80. The relevant language reads:

[The manufacturer's] obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles . . . . [T]his warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

*Id.* at 74 (emphasis supplied by court).

93. *Id.* at 73.

94. *Id.* at 74.

95. *Id.*

96. *Id.* at 77.

97. *Id.* at 78 (citing *Greenland Dev. Corp. v. Allied Heating Products Co.*, 35 S.E.2d 801 (Va. 1945)).

98. *Henningsen*, 161 A.2d at 79 (emphasis added) (quoting and citing *Mills v. Maxwell Auto Sales Corp.*, 181 N.W. 152, 154 (Neb. 1920)).



“It would be *unjust* to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.”<sup>99</sup>

The *Henningsen* court retained its focus throughout the opinion: “The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon ‘the demands of social justice.’”<sup>100</sup> And, “[a]n instinctively felt sense of *justice* cries out against such a sharp bargain.”<sup>101</sup> The court relied on Justice Frankfurter’s opinion in *United States v. Bethlehem Steel Corp.*: “[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and *injustice*?”<sup>102</sup>

The court found that standardized contracts,<sup>103</sup> such as those before it, resembled “a law rather than a meeting of the minds.”<sup>104</sup> The courts are to

99. *Id.* at 81 (emphasis added) (quoting *Baxter v. Ford Motor Co.*, 12 P.2d 409, 412 (Wash. 1932)).

100. *Id.* at 83 (emphasis added) (quoting and citing *Mazetti v. Armour & Co.*, 135 P. 633, 635 (Wash. 1913)).

101. *Id.* at 85 (emphasis added).

102. *Id.* at 86 (emphasis added) (quoting and citing *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942)).

103. It is worthwhile to note that the Second Restatement of Contracts deals, in section 211, comprehensively with the enforceability of provisions in standard form contracts:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

Section 211 concerns a matter similar to the focus of this Essay but not actually congruent. Subsection (3) of the Restatement provision might just be a particular elaboration of unilateral mistake doctrine in what would most often be the consumer setting. *Cf. id.* §§ 20(2), 201(2). The object of Section 211 is, clearly, to avoid sharp, less than scrupulous, business practices. So you could understand the provision as an effort to give effect to the parties’ actual intent while the agreement cases considered in this Essay reach conclusions diametrically opposed to the terms of the parties’ agreement. The court in *Henningsen* was not concerned with ascertaining what the *Henningsens*

“avoid *injustice* through application of strict common-law principles of freedom of contract.”<sup>105</sup> The court was concerned that the contract “was [not] understandingly made,”<sup>106</sup> and concluded,

*[i]n the context of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase “its obligation under this warranty being limited to making good at its factory any part or parts thereof” signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.*<sup>107</sup>

Notwithstanding the express terms of the parties’ agreement, then, the court rewrote the contract to provide that the purchaser had not relinquished any personal injury claim that might flow from the use of the defective automobile. Of course, insofar as the plaintiff had not read the agreement, it is curious that the court should consider determinative what she would have thought had she read it. But the court was going to make the agreement for the parties, and by reference to principles of justice.

*Henningsen* is noteworthy not just as a foundation of the strict liability law, but as a seminal case about agreement, and about how justice determines agreement.

#### E. *Hill v. Gateway 2000, Inc.*

This is a very important case about agreement, how and when it is formed and the way we discern the terms of a “rolling contract.”<sup>108</sup> The

understood the terms of the contract to be, and there is no indication that the result would have been otherwise had the Henningsens read and understood the contract.

Of course, standardized forms may benefit consumers as well as commercial parties. Forms not only make it easier to contract; they also reduce transaction costs, which eventually leads to lower prices, or so the argument goes. See *Carbajal v. H & R Block Tax Services, Inc.*, 372 F.3d 903 (7th Cir. 2004) (Easterbrook, J.). For worthwhile treatments of section 211, see John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

104. *Henningsen*, 161 A.2d at 86.

105. *Id.* at 87 (emphasis added).

106. *Cf. id.* at 91.

107. *Id.* at 93 (second emphasis added).

108. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). See also Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743 (2002). In the interest of full disclosure, I should note that I was engaged as a consultant and lobbyist by Gateway 2000, Inc. during the course of the deliberations surrounding revision of Article 2 of the Uniform Commercial Code. The positions I took at that time and my construction of *Hill* in this Essay are neither consistent nor inconsistent with one another. The two are inapposite. See James J. White, *Default Rules in Sales and the Myth of*

opinion of Judge Easterbrook is pithy, and seems to rely more on notions of common sense than it does on contract doctrine, should e'er the twain meet.<sup>109</sup>

The Hills brought an action to avoid the arbitration clause included in the terms delivered with their new Gateway computer.<sup>110</sup> The Hills had never actually agreed to the arbitration provision or any other terms but price, quantity, and description of the goods, a computer, at the time of contract negotiation, when the Hills were on the phone with the Gateway operator ordering the computer.<sup>111</sup> Nonetheless, Judge Easterbrook found that they were bound by the arbitration clause because they knew the computer would arrive with some terms not disclosed over the phone.<sup>112</sup> In fact, it may not have mattered a good deal that the Hills were aware or unaware that the computer arrived with additional terms; they appear not to have read any of the enclosed terms anyway and so missed the term that required them to return the computer within thirty days if they did not agree to any of the “enclosed” terms (including the arbitration clause).<sup>113</sup>

Judge Easterbrook cast his opinion in terms of “[p]ractical considerations”: “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.”<sup>114</sup> You could well imagine that the same buyer would be no more interested in reading enclosed terms either, and likely would not. It is the nature of our “contract rich” society that has anesthetized us to proliferating terms. And we can acknowledge, as a rule for the most part, that people do not read, so it does not make obvious good sense to have very much turn on agreement to what goes unread, and what large commercial sellers expect to be (and perhaps count on being) unread.

It is one thing to acknowledge that people do not read and another to decide what consequences the contract law ought to have flow from the failure to read. Recall, had the Hills been good students of the contract law, they would have good reason to believe that the terms in the box, of which they were not made aware—terms which might be a proposal for

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*Contracting Out*, 48 LOY. L. REV. 53, 70–76 (2002) (describing several law professors’ representation of Gateway).

109. *See generally Hill*, 105 F.3d 1147.

110. *Id.* at 1148.

111. *Id.*

112. *Id.* at 1150.

113. *Id.* at 1148.

114. *Id.* at 1149.

modification—could not determine their contract rights. They could have understood that their contract rights were fixed at the time of contracting, when they were placing their phone order.

It is not immediately clear why the Gateway customer service representative could not have disclosed on the phone both that other terms upon which Gateway would insist would be included in the box containing the computer and that by placing the order the Hills were somehow agreeing that if they chose not to accept the proposed modification their only recourse would be to return the computer to Gateway.<sup>115</sup> Judge Easterbrook concluded that the burden was on the Hills to discover the terms, including the accept or return clause, “in advance.”<sup>116</sup> But standard contract theory does come back into Judge Easterbrook’s analysis to bind the Hills: “By keeping the computer beyond [thirty] days, the Hills accepted Gateway’s offer, including the arbitration clause.”<sup>117</sup> So acceptance was accomplished by silence, as the offeror, the master of the offer,<sup>118</sup> could provide.

What Judge Easterbrook leaves us with after *Hill* is something that might be described as “checkerboard contract,” a regime that relies on traditional contract doctrine when it suits and on “practical considerations” when traditional doctrine does not. This is not to criticize Judge Easterbrook’s analysis or conclusion; it is just to point out what *Hill* has done with “agreement” and to suggest what the case may intimate for the future of contract agreement. There may not be anything wrong with mixing doctrine and practical considerations. Indeed, the concept of “agreement” revealed in the other four cases considered here suggests that

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115. That was the conclusion of the court in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), decided three years after *Hill*. See also White, *supra* note 108, at 77 (“Certainly Judge Easterbrook would say disclosing its terms at the time of payment is unreasonable for Gateway, but equally likely is Judge Vratil’s conclusion [in *Klocek*] that such disclosures are reasonable.”). While Professor White was opining about how the *Hill* and *Klocek* cases might be decided under a proposed revision of U.C.C. § 2-207, his observation as well demonstrates the idiosyncrasy of justice analyses, and keeps in mind that the two contrasting views are held by two federal judges. So “practical considerations,” insofar as both judges were taking account of them, lead to indeterminate (in these cases diametrically opposed) conclusions.

116. *Hill*, 105 F.3d at 1150.

117. *Id.*

118. Judge Vratil in *Klocek* was not as certain that Gateway as vendor was the master of the offer: “[T]he Seventh Circuit provided no explanation for its conclusion that ‘the vendor is the master of the offer.’ In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.” *Klocek*, 104 F. Supp. 2d at 1340 (citations omitted). It is curious that in telephone transactions followed by enclosed standard terms in the 21st Century very much of consequence should turn on who did what to whom “first.”

“agreement” is constrained, if at all, by justice, and not so certainly by doctrinal inflexibility.

It is the balance struck or intimated between doctrine and practicality that is most fascinating. For at more than one juncture had Judge Easterbrook relied on practicality rather than doctrine (e.g., were we concerned with practical considerations, we might wonder whether Gateway really thought the Hills would accept by silence, indeed, whether the Hills would read much of the paperwork included with the computer at all) or on doctrine rather than practicality (e.g., terms enclosed with computer but not disclosed at time of contracting could be only modifications for addition to the contract), the opposite result would have followed. Recognizing that Judge Easterbrook vacillated between practicality (“droning voice” of the operator)<sup>119</sup> and doctrine (vendor as “master” of offer)<sup>120</sup> is not to conclude that he reached an inappropriate conclusion, if, after all, the object is ultimately to arrive at an “agreement” and “agreement” connotes a justice calculus. We might be concerned with the predictability or lack thereof Judge Easterbrook’s approach would engender, but it is not obviously less predictable than the analyses in the other four agreement cases considered here. The contract law has always displayed some impatience with predictability as a basis for contract doctrine, anyway.<sup>121</sup>

This Part has demonstrated, by the presentation of five seminal contract cases, that the substance of agreement, the “there [that is] there,” in the case of contracts within the scope of the five cases’ precedential scope, is determined by at best vaguely determinate reference to justice (and, in *Hill*, practical considerations redolent of justice). What, then, does reliance on justice entail, and how can we make sense of (or even predict) its operation in the “next case”? To approach that question, it is necessary to posit a sense of what we do when we bring justice to bear on a problem. That is not to suggest a *test* or definition of justice, say, “justice as fairness”;<sup>122</sup> it is instead to focus on the cognitive process that a justice

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119. *Hill*, 105 F.3d at 1149.

120. *Klocek*, 104 F. Supp. at 1340.

121. See PATRICK S. ATIYAH, PROMISES, MORALS, AND LAW 36 (1981) (“Few would today deny that . . . the fact that promises tend to be relied upon, that they positively invite reliance, is one of the chief grounds for the rule that promises should be kept, and that contracts should be legally enforceable.”). But see E. ALLAN FARNSWORTH, CHANGING YOUR MIND 39 (“It is circular to base the conclusion that the law *should* protect one’s expectation on the premise that the law *does* protect.”).

122. See JOHN RAWLS, A THEORY OF JUSTICE 10–15 (rev. ed. 1999) (principles of justice would be those determined from the “original position” behind a “veil of ignorance”).

calculus entails so that we may concretize the justice process, if you will. That is the object of the next part of the Essay.

## II. CONCEPTIONS OF COGNITION

“Justice” rests uneasily as a noun. It seems to invoke a complementary verb form, a sense captured, perhaps, by the idea of “doing” justice, or “realizing” a just result. At least that is how we must conceive of justice in order to appreciate how it might do the work that the cases in Part I call upon justice to do. Recall that in those cases justice was an analytical and decisional tool, not just a label imposed on a result. So to that end conceive of justice as process; then, allow that justice so conceived would contemplate a *cognitive* process. This part of the Essay asks and answers the question: If we may understand justice as a cognitive (an analytical) process, how might we depict that process in order to discover its operation in contract cases determining the contours of contract agreement doctrine?

This second Part develops a structure of the cognitive and perspectival dynamic that defines human agency and reveals the foundation of the justice calculus. The formulation is throughout self-consciously attentive to the way human agency would need to be depicted in order to arrive at such a structure. Justice, as it operates in the context of contract agreement, is a function of human agency and Law’s relation to justice as the measure or determinant of contract agreement may only be appreciated by reference to the sense of human agency that can support the justice conception. That is, we must first discover *where* in the course of human events the justice sense operates. Then we will be in the position to suggest the relation, and ultimately the structure of a relation, between justice and “legal morality” in the law of contract agreement.

The first following section presents the cognitive conclusions of Howard Margolis, whose identification of “patterns” of thought reveals the necessary idiosyncrasy that justice (and, perhaps, Law more generally) confronts.<sup>123</sup> These patterns are fundamental to the conception of human agency that determines the contours of justice. The second section builds on that conception of human agency to develop a heuristic “theory of everything,” and demonstrates how the justice that matters to contract agreement doctrine depends on the incidents of “the heuristic function.”

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123. See HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION (1987) [hereinafter MARGOLIS, PATTERNS]; HOWARD MARGOLIS, PARADIGMS & BARRIERS (1993) [hereinafter MARGOLIS, PARADIGMS].

From those premises, a structure of justice emerges and supports a metaphor developed from Stephen Wolfram's contribution to complexity theory. Finally, this Part formulates a mechanics of justice perception that depicts development of legal doctrine and how it is Law as doctrine that describes consensus.

#### A. *Patterns*

Margolis sets out to explain the evaluation, even the correction, of scientific theory over time.<sup>124</sup> So his object is not to describe the human engagement of moral questions. But if justice is a conception constrained by human agency, then we can agree that aspects of human agency that impact cognition generally as well may impact the justice calculus, which is a manifestation or product of cognition. The subject encounters data—phenomena—and processes that data in order to formulate and support a conclusion that accommodates thriving in the circumstance.<sup>125</sup> The analogy must be expanded but for now the image works: The justice calculus and cognition are systems that process data.

It is not crucial that each human subject have the same sense of justice (the same *appreciation* of what is just) any more than it is necessary that every human subject have the same visual acuity. Both the justice sense and vision may be less than perfect (by reference to the metaphysically real) in relation to the phenomena they perceive without our needing to say that the inputs for different subjects are different in a way that says something about the data rather than the perception (cognition) of it. By recognizing the possibility (indeed, certainty) of diverse justice or visual perspectives we are not positing that the thing perceived is different.<sup>126</sup>

We reach divergent justice conclusions in cases of contract agreement for some of the same reasons as, Margolis tells us, our eyes occasionally “play tricks on us”<sup>127</sup>—pattern recognition error—though the diversity of

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124. The subtitle of *Paradigms & Barriers* is “How Habits of Mind Govern Scientific Beliefs,” and several chapters of that book concern the Ptolemaic and Copernican systems. See MARGOLIS, *PARADIGMS*, *supra* note 123.

125. This might describe the province of “practical reasoning.” See BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 162 (2004) (“An approach to morality and ethics that focuses on the reasons we have for and against particular actions and choices. The term often refers to or derives from Aristotle’s distinction between practical and speculative reasoning, with practical reasoning being tied to (eventual) action.”).

126. This far we can go with moral realism. See Michael S. Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424 (1992).

127. Margolis spends some time describing optical illusions as indicia of cognitive anomaly. See, e.g., MARGOLIS, *PATTERNS*, *supra* note 123, at 37–39.

justice decisions need not indicate “error”: Margolis’s interest is in making more salient our propensity to err, and in the case of science, to err intellectually. If the bases of the justice calculation are but another species of the same genus, *thought* generically as the primary predicable in this sense, then our propensity to conceive differently in matters intellectual—the justice calculus—is just a particular instance of our human capacity to conceive differently more generally.<sup>128</sup>

From the idea of perceptual discontinuity and idiosyncrasy, Margolis’s work supports analogy to the role of human agency in justice calculi. Pattern formation and identification are the constituents of our justice determinations specifically just as they are the constituents of our cognition generally. So in *reaching* justice conclusions, just as in *solving* a nonlinear equation, we rely on patterns developed in response to our environment as a consequence of the things that make us human.<sup>129</sup> But, also, just as established perceptual patterns may make us blind to “optical illusions,”<sup>130</sup> our patterns of attributes and experience may distort justice determinations. This is not to say that erroneous determinations are excused in some way, or become just “all things considered,” but it is to suggest that with regard to regimes—e.g., justice—that would superimpose morality on other rational exercise—e.g., the Law—it is crucial to conceptualize the existence and substance of divergent justice patterns.<sup>131</sup>

Margolis’s sense of perceptual divergence relies on the necessary role of heuristics in cognition: “Slips in the way we perceive external objects, or in the way we perceive probabilities (and, more generally, in the way we judge logical relations) therefore invite interpretation as equivalent to

128. It could seem that the justice calculus is not the same type of rational process that we think of when we think of cognition. That is, we might conclude that logic is tighter than justice, admits more readily of our identifying the sources of divergence. Perhaps justice determinations are more prone to divergence, or discontinuity, because of the lesser certainty of the constituents of justice. Margolis’s analysis provides a way for us to draw the justice-rationality analogy closely by positing the familiar cognitive processes as subject to the same divergence from strict logic: “Apparently the brain works in a way that produces judgments that very often coincide with the judgments that a strictly logical process would produce. But (given the many exceptions) the actual process cannot be a strictly logical process, and perhaps not a logical process at all.” MARGOLIS, PATTERNS, *supra* note 123, at 20. We see even logical truth through a glass darkly, but that is usually good enough—consider Newtonian physics. Similarly, we see justice at best imperfectly; a phenomenal glimpse of justice is the best we can do.

129. See ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 260 (2000 reprint) (“Much of each brain’s circuitry, at any given moment of adult life, is individual and unique, truly reflective of that particular organism’s history and circumstances.”).

130. See *supra* note 127.

131. Cf. Kavka, *supra* note 14.



*rules of thumb*, which on the whole have led to good results but in certain situations lead to errors.”<sup>132</sup> A consequence, then, of our necessary<sup>133</sup> reliance on patterns in the course of (even moral—including “justice”) cognition, is that we are subject to heuristic “error,” a feature of patterns’ heuristic function. Is such divergence even “error”? And, if it is, is such error “immoral”? In any event, if Margolis is right—and I believe he is—heuristic “error” so conceived is inevitable.<sup>134</sup>

Margolis can go even further, and does. While, he recounts, Freud and Nietzsche recognized “the unreliability of a person’s own account of his behavior and beliefs,” that “unreliability” is the norm: “[Some] psychologists . . . doubt that a person’s conscious reasons for his judgments need have anything to do with his judgments.”<sup>135</sup> Now this observation and discovery of inevitable heuristic error goes further than behavioral decision theory’s description of cognitive bias.<sup>136</sup> The behavioral decision theorist’s response to microeconomic consequentialism concerns the disjunction between perception and utility; it does not explore judgment more basically, as the product of idiosyncratic pattern recognition.

132. MARGOLIS, PATTERNS, *supra* note 123, at 13.

133. *See id.* at 188–97. *See also* ANTONIO DAMASIO, LOOKING FOR SPINOZA: JOY, SORROW, AND THE FEELING BRAIN 110–11 (positing an evolutionary basis of “feelings”).

134. Not all instances of heuristic divergence in the case of justice determinations intimate immorality (on the part of any of the agents) in a sense of the term “immoral” that could matter to legal morality. For example, if I exercise all possible (not merely all due) care in performing an action or forming a conclusion (perceptual or cognitive) and still harm someone or reach an inaccurate conclusion, we may conclude that I have erred but that my level of (extraordinary) care would preclude the assignment of moral blame. That is, there is a difference between “fault” and “culpability,” in the sense of blameworthiness and moral opprobrium. Moral realists, though, would need to go farther and would find immorality in any action that does not realize the morally ideal.

[T]he justification with which persons assert moral propositions may well be (and indeed, presumably is) relative to the information and cognitive resources available to them. It may thus be justifiable for one person to defend the morality of an action while it is simultaneously justifiable for another (possessed of different information or cognitive capacities) to contest the morality of that same action . . . . [T]his claim alone is insufficient to dispel the thesis that moral disputes have determinate right answers. . . . [S]ince we consider beliefs to be justified to the extent that we think that they come close to approximating what is true, it is impossible to construct a theory of moral justification that does not presuppose an independent theory of moral truth.

HEIDI M. HURD, MORAL COMBAT 29–30 (1999). The structure developed in this article offers a “theory of moral justification [in the case of justice as a measure of contract agreement] that does not presuppose an independent theory of moral truth.” *Id.* Dean Hurd’s conclusions may inform “morality” unmodified, but it is “legal morality” (morality at the confluence of coordination, expertise, and efficiency considerations) that is the focus of this study, and it is justice in terms of legal morality that may be captured by the structure posited here.

135. MARGOLIS, PATTERNS, *supra* note 123, at 21.

136. *See generally* SUNSTEIN, *supra* note 1.

The application of Margolis's description of the substance and operation of patterns in cognitive theory to the heuristic function in justice determinations generally and contract agreement specifically is neither obvious nor, without more, sufficiently developed to support a structure. Margolis's patterns are (at least a part of) the framework, but require elaboration in order to reveal the justice relation that may determine contract agreement. That is the object of the next section.

*B. Of Human Agency, Heuristic Function, and a Structure*

To reiterate: Human agents need heuristics to accommodate pattern recognition. We necessarily rely on "clues" from which we infer "the whole pattern" in order to predict the consequences of our actions and to reach judgments. Once we appreciate the mechanism of our communion with what surrounds us in terms of pattern recognition—as Margolis demonstrates—the relation between pattern recognition and heuristics as fundamental to human agency is manifest. Patterns are the bases of our biases, our cognitive errors, and also the triumphs of our reasoning. When we "correctly" identify the convergence of two or more patterns—for example, when we recognize something or equate two things—heuristics serve us; when we mistake the confluence of one pattern with another as necessary rather than coincidental, heuristics fail us (herein of optical illusions) and undermine our reasoning, no less our reasoning about justice. A conception of justice in the context of legal morality must build upon fundamental conceptions of human agency and heuristic function.

*1. Human Agency*

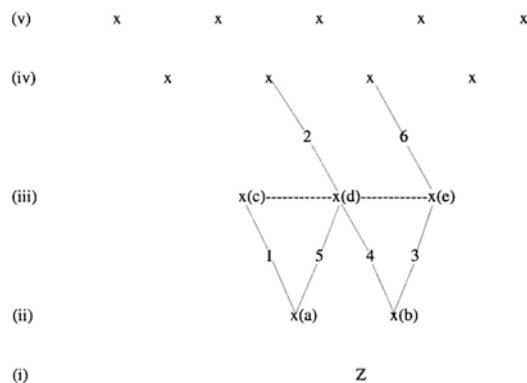
While justice may be more than "thought,"<sup>137</sup> it is thought—pattern recognition—that makes justice as accessible to us as it can be. Further, it is only in terms of the accessible that justice discourse makes any sense for purposes of positing a structure of justice in contract agreement. Law's invocation of a justice calculus depends upon the constituents of the patterns dictated by the heuristic function as a consequence of human agency.

More concretely, think of intellectual patterns as derived from data as well as the connections among data, in network fashion. Reasoning, including a justice calculation, entails progression from one data point to

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137. Certainly moral realists, such as Moore, think that morality has a substance independent of thought. See Moore, *supra* note 126.

the next along the network. The connections are the stuff of rationality and moral reasoning. Start with perceived phenomenon “Z” (Figure 1).<sup>138</sup> There may be data “a, b, c, etc.,” related in ways “1, 2, 3, etc.” for example. For some the perceived data are the same but the relations among them may be different (e.g., 4, 5, 6) and for some others the relations are the same but the data may be different (e.g., j, k, l instead of a, b, c). Either type of difference (and perhaps other types of difference) yields different “patterns,” in the Margolis sense.<sup>139</sup>

FIGURE 1<sup>140</sup>

Differences among pattern perceptions and analyses elicit different responses (including divergent justice *conclusions*) that are not necessarily relativistic in any sense that is inconsistent with moral realism: here, the conclusion that there is *a* just result. The differences may be in the data perceived (is the “x” marked (b) at level (ii) really a “(b),” in some noumenal sense?) *not* in the processing of that data (is “b” really on level (ii) and not level (iii)?)—leading to the ultimate and idiosyncratic justice conclusion (depicted at level (v)). Those perspectival and analytical differences are a function of idiosyncratic perceptual and analytical

138. Cf. MARGOLIS, *PARADIGMS*, *supra* note 123, at 110 (offering a pyramidal schematic of human cognitive processing).

139. *Id.* at 1–4.

140. Cf. MARGOLIS, *PATTERNS*, *supra* note 123, at 110 (offering a pyramidal schematic of human cognitive processing).

context: Your perceptions (represented by “y”) and mine (by “x”) never capture the same thing the same way, quite literally.<sup>141</sup> (Figure 2.) While the moral realist will say that the reality is either your “y” or my “x” (or an “r” that neither of us perceives), that conclusion cannot pertain to a justice determination which is *only* concerned with the *confluence* of your and my perception, the justice determination that matters to legal morality: what can become doctrine.

In order to appreciate the fundamental pervasiveness of the foregoing cognitive mechanism, it is worthwhile to consider further the cognitive power, and the imperative, of heuristic analysis. That is the subject of the next section.

## 2. *Heuristic Function*

The heuristic function assures that we see the same thing *sufficiently* similarly to accommodate our cooperative action (the “x,y” overlap in Figure 2), but there is still heuristic discontinuity. The patterns we each recognize are not the *same* patterns; they are simply close enough.

Two crucial incidents of the heuristic function warrant mention: “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).<sup>142</sup> “Leverage” refers to our ability (or mere propensity?) to focus on regularities without becoming distracted by the particulars that are not pertinent to the perceptual or analytical exercise.<sup>143</sup> The opportunities for discontinuity among subjects’ perceptions and analyses

141. Cf. MARGOLIS, PARADIGMS, *supra* note 123, at 18:

Each cognitive response (seeing things in a certain way on a certain occasion) is intrinsically an individual thing—as much so as having a headache or drinking a gulp of water. Since no two individuals are identical either in their makeup or their experience, no two individuals will share exactly the same cognitive repertoire. . . . We want to understand how what initially are slight variations in habits of mind and experience sometimes have remarkable consequences.

Or, as we shall see, in Stephen Wolfram’s terms: how complex forms proceed from simple rules.

142. “[T]hose aspects of data that are not relevant for whatever purpose one has can simply be ignored.” STEPHEN WOLFRAM, A NEW KIND OF SCIENCE 549 (2002).

143. “[O]ne can avoid explicitly having to specify every element in the data by making use of regularities that one sees.” *Id.* The ability to perceive regularities is a cognitive skill: “[W]e know that when we find regularities, it implies that redundancy is present, and this in turn means that a shorter description can be given. So when we say that we cannot recognize any regularities, this is equivalent to saying that we cannot find a shorter description.” *Id.* at 552. This is a form of leveraging because enhanced perceptual (intellectual) acuity means that the human agent both has *less* data to process and greater ability to process it.

engendered by discrimination and leverage reveals the necessary incongruities among actors' reactions to data. The goal of perception and analysis is heuristic—summarization—but the necessary consequence is discontinuity (i.e., divergent justice conclusions) and that discontinuity may result either from differences in the sensory input (the data) or in the processing of the same data (perceptual and analytical acuity) or both.

FIGURE 2



In contexts where the patterns are close enough *in relation to* the perceptual conclusion we need to reach to cooperate (indicated by the overlapping “xy’s”), we recognize convention, a point of sufficient *social* agreement: i.e., we will agree that the circumstances reveal the justice that establishes contractual agreement. “Close enough” is, after all, good enough with regard to horse shoes and hand grenades, though not in neurosurgery—but still it is all a matter of degree of acuity, of “coarse graininess.”<sup>144</sup> (Indeed, at some nano-level, we might imagine, close enough *is* good enough in neurosurgery.) “Close enough” in one case may not be “close enough” in the next.

In the case of individual (and individuals’) justice conclusions that there is or is not contract agreement on particular facts, an implicit assumption is that we perceive the same data sets in reaching those corporate conclusions. And our perceptual and analytical faculties

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144. See MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR* 29 (1994) (“[W]hen defining complexity it is always necessary to specify a level of detail up to which the system is described, with finer details being ignored. Physicists call that ‘coarse graining.’”).

[a]re continually bombarded by huge amounts of data, in the form of images, sounds, and so on. To be able to make use of this data we must reduce it to more manageable proportions. And this is what perception and analysis attempt to do. Their role in effect is to take large volumes of raw data and extract from it summaries that we can use.<sup>145</sup>

That describes, succinctly, the heuristic function and suggests how conflation of cognitive and complexity theories intimates something important about justice in contract agreement *doctrine*.

Consider “Z” in Figure 2 as the constituting “rule,” say, a justice criterion in the case of contract agreement, and the ensuing data points (the “x’s” and “y’s”) as conventional, phenomenal elaborations therefrom. Each data point marks a reaction to the rule or a reaction to a reaction (etc.) to the rule and triggers progression in the way Margolis describes pattern development and recognition.<sup>146</sup> The “x” and “y” elaboration pyramids of two or more hypothetical human agents may overlap. That is, the justice conceptions of each agent (in terms of contract agreement) share criteria. So long as the facts of the particular contract agreement fall within that overlap, “justice” compels a finding (and fixes the substance) of contract agreement. That is all we mean when we say that we—the two of us, together—find or refuse to find contract agreement by reference to justice. We must understand justice, then, by reference to such a heuristic function.

### 3. A Structure

Complexity theory provides the means to depict metaphorically that heuristic function and its incidents in terms of legal rules (and Law). Stephen Wolfram works with patterns of cellular automata and concludes that we may learn a great deal about how we encounter and process data by studying the process that determines how we experience patterns of input.<sup>147</sup> Wolfram develops his model from the way computers execute a program.<sup>148</sup> Nature and nature’s agents, e.g., humans, elaborate simple fundamental rules much as computers “run” a program. Wolfram’s “new science” is, in the truest sense, fundamental. His crucial discovery is that

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145. WOLFRAM, *supra* note 142, at 548.

146. This conjures to mind Kelsen’s understanding of the “basic norm’s” relation to the norms that proceed from it. See HANS KELSEN, *PURE THEORY OF LAW* 201 (Max Knight trans., 1967).

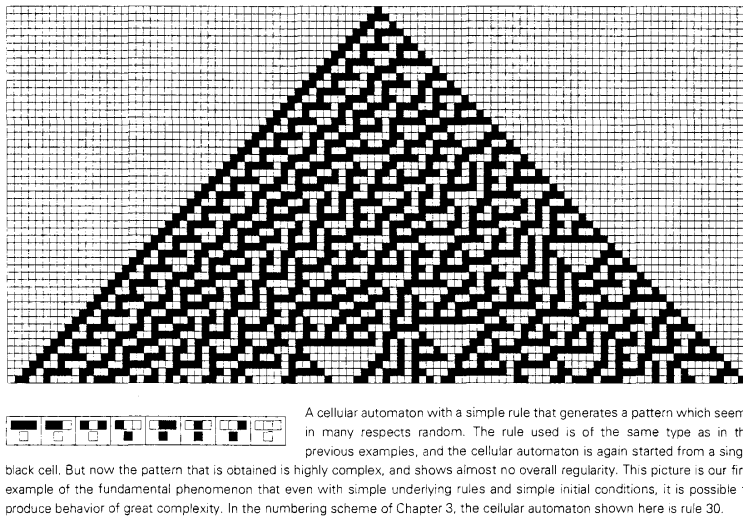
147. See generally WOLFRAM, *supra* note 142.

148. *Id.* ch. 2.

complex systems evolve from simple rules.<sup>149</sup> His work with cellular automata demonstrates visually the progress of a rule through multiple levels of elaboration.

Here is Wolfram's illustration and accompanying caption:

FIGURE 3<sup>150</sup>



Wolfram describes the operation of cellular automata and what they may reveal about complexity: “The cellular automaton consists of a line of cells, each colored either black or white. At every step there is then a definite rule that determines the color [black or white] of that cell and its immediate left and right neighbors on the step before.”<sup>151</sup> The array described by the cells as they are distributed according to the constituting “rule” may reveal a discernible pattern or, alternatively, a random collection of black and white spaces. So the rule may result in a non-random simple pattern or a complex apparently random pattern. If a simple pattern results, we can readily see regularity in the elaboration of the rule. If, instead, what emerges is a complex pattern, an apparently random array, that depicts complexity.

149. *Id.* at 1–4.

150. *Id.* at 27.

151. *Id.* at 24. He is, of course, not describing living cells, but colored squares to be placed in rows one atop the other.

In Wolfram's cellular automata, the "evolution" or "elaboration" of the rule is entirely endogenous: Each step is determined only by the rule and the "data" supplied by the immediately previous step, which data was, in turn, the product of the rule's operation on the data supplied by its immediately preceding step. There is nothing striking about Wolfram's demonstration that simple patterns evolve from simple rules; that is how we would intuit the world works. What is remarkable, though, is his discovery that *complex* arrays likewise evolve from simple rules. Indeed, all complexity is founded on simplicity, on simple rules.

Wolfram illustrates that discovery by demonstrating the elaboration of a simple rule.<sup>152</sup> First, the rule:

[L]ook at each cell and its right-hand neighbor. If both of these were white on the previous step, then take the new color of the cell to be whatever the previous color of its left-hand neighbor was. Otherwise, take the new color to be the opposite of that.<sup>153</sup>

Wolfram then depicts the cellular automaton produced if you start with just one black cell and then apply the rule repeatedly.<sup>154</sup> The result is reproduced above.<sup>155</sup> The elaboration that simple rule reveals is striking: "Rather than getting a simple regular pattern . . . the cellular automaton instead produces a pattern that seems extremely irregular and complex."<sup>156</sup> Wolfram describes that as "the single most surprising scientific discovery I have ever made."<sup>157</sup>

The foregoing, in essence, is all we need of Wolfram's theory to support *analogy* to elaboration of rules in Law. Can the complexity of a cellular automaton rule's elaboration in Wolfram's "new science" reveal something about the nature of legal rule elaboration in Law, the development of doctrine?

The first obstacle to analogy may be the fact that Wolfram's rules are endogenous while Law's rules may be exogenous. But that distinction, I maintain, is a matter of rule construction. It is the constituents and breadth of the rule that determines whether its elaboration is endogenous or exogenous. In the case of a rule such as "justice determines contract agreement" it is difficult to see what could be exogenous—not part of the

152. *Id.*

153. *Id.* at 27.

154. *Id.*

155. *See supra* fig.3.

156. *See* WOLFRAM, *supra* note 142, at 27.

157. *Id.*



justice query—and still be pertinent to operation (elaboration) of the rule. At least in the case of rules that lend themselves to justice-like analyses,<sup>158</sup> elaboration of the rules is determined by endogenous criteria. Even allowing that the constituents and operation of Wolfram's cellular rules are endogenous and the constituents of legal rules and their operation are exogenous, that would, for the metaphorical purposes here, cut just the right way: It should be more difficult to discern the regular pattern in legal rules' operation—more likely to find complexity—than it would in the endogenous world of Wolfram's cellular automata, where we know—because Wolfram has showed us—that even the simplest rules may result in complexity. The simplest rule of law, then, might reveal complexity (for some) in its operation because its operation is not constrained in the way a wholly endogenous rule would be.

Still you might respond that Wolfram's rules lend themselves to certain determinations in the course of their elaboration: After all, the “next” cell is either black or white; there are no shades of gray. The Law, conversely, is all about shades of gray; the laws that matter, those that we study, do not admit of depiction in wholly dichotomous terms. That is true, of course, and seems at first to undermine the analogy.

But there are two responses to that reservation: First, once you realize that “shades of gray” is nothing more than a function of black and white points from a particular perspective—the way black and white television receivers translate all color tones—you recognize that the difference between Wolfram's most basic cellular automata and the mosaic that is legal rules' elaboration is a matter of perspective, of how you are seeing the concentration of white to black shades in the pattern revealed by elaboration of the rule. From a certain remove (a finer “grain”) and after enough elaborative steps (thousands, even millions) shades of gray would emerge even from Wolfram's bi-chromatic cells.

Second, there is no reason that Wolfram's cells must *be* strictly bi-chromatic. The cells could be as many shades of as many colors as we can imagine; all that matters is that the product of their elaboration of a simple rule may depict a simple, predictable pattern or a complex, irregular pattern.<sup>159</sup> Whether and the extent to which we can perceive a regular (non-complex) pattern is *not* a function of the initial rule's complexity, so no matter how simply we configure the initial rule we can get complexity.

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158. *See supra* note 23.

159. Of course, complexity is a matter of degree and perception; so there is probably not, strictly speaking, a dichotomous simplicity and complexity—whether something is complex and how complex it is a matter of perception.

All that Law is concerned with, of course, is complexity. Wolfram's cellular automata tell us something about the relationship between complexity and rules and so—in that way—mimic the elaboration of legal rules.

Most importantly, for Law, Wolfram's contribution to complexity theory provides us the means to depict graphically two legal phenomena: (1) the evolution of a rule over time<sup>160</sup> and (2) the idiosyncrasy of a rule's elaboration—the use pertinent to the focus of this Essay. This second phenomenon combines with the cognitive theory reviewed in the previous section<sup>161</sup> to demonstrate the range of consensus. A minor adjustment in the simplest initial rules may lead to profound differences in the resulting elaboration patterns of those rules. When the elaboration patterns are regular and converge *sufficiently* there is the predictability and consensus essential to Law; where the patterns do not converge—even if there is regularity, predictability—there will be a lack of consensus notwithstanding the similarity of the initial rules. Both minor differences between or among initial rules and minor variations in exogenous factors may yield different patterns. To the extent that Law is inconsiderate or insufficiently considerate of those minor differences and variations, Law fails to account for the necessary idiosyncrasy of human agents that determines the operation of legal rules. For the rule Law cares about is not the statement of the initial simple rule, such as “justice determines contract agreement”; it is the elaboration of that rule, the doctrine, which may be captured in the diverse arrays depicted by Wolfram's cellular automata.

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160. As an example, consider the evolution of the doctrine of promissory estoppel. See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996); Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996); see also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 905 (1985) (promissory estoppel has merged into consideration doctrine and is no longer grounded in detrimental reliance); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 111 (1991) (in practice, liability and remedy under Section 90 turn on promise, not reliance).

On the success of claims based on promissory estoppel, see Robert A. Hillman, *Questioning the “New Consensus” On Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580 (1998) (low rate of success for promissory estoppel claims). But see Juliet P. Kostitsky, *The Rise and Fall of Promissory Estoppel Or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 539 (2002) (high rate of success after controlling for inherently weak claims).

161. See *supra* notes 124–36 and accompanying text.

C. “Justice” Conception Perceived

Wolfram’s conclusion regarding pattern recognition in the case of cellular automata pertains as well to human reasoning including justice reasoning: “I suspect that there are fundamental limitations on what perception and analysis can ever be expected to do. For there seem to be many kinds of systems in which it is overwhelmingly easier to generate highly complex behavior than to recognize the origins of this behavior.”<sup>162</sup> The vagueness of the justice determination in the context of contract agreement, then, may be understood at least in part as a product of the perception dilemma revealed in the heuristic function and its incidents. So the justice determination in any single contract agreement controversy is a matter of *sufficient* confluence among idiosyncratic justice (in the case of contract agreement<sup>163</sup>) conceptions.

That does not, however, account for justice as a contract doctrine. Deriving the basis (more likely, the bases) of doctrine from consensus in measuring contract agreement by justice is in fact an effort to go from complexity back to the inputs that determined that complexity, their “origins.”<sup>164</sup> To posit a structure of justice as doctrine in contract agreement, we need to understand the consensus dilemma, the particular challenge confronting Law once we see Law as a response to corporate heuristic discontinuities, an organizational challenge that essentially asks human agents to respond to stimuli they do not perceive *just because* others perceive them.<sup>165</sup> Law is, after all, “a solution to the problem of the limits of moral knowledge.”<sup>166</sup> Legal doctrine necessarily *assumes*, indeed *is based on the premise*, that morality is not accessible to all of Law’s subjects equally.<sup>167</sup> We may appreciate Law as the effort to make legal conceptions so accessible.

162. WOLFRAM, *supra* note 142, at 550–51.

163. It follows from the foregoing that there *could be* (which is not to say that there are) as many different phases of justice as there are contexts in which justice is determinative.

164. Wolfram explains:

As I have discussed in this book, it 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. Typically the problem is similar to trying to find solutions that will satisfy certain constraints.

*Id.* at 551.

165. So construed, Law is a response to perceptual and analytical incongruity; Law facilitates pattern recognition and reduces corporate heuristic error.

166. ALEXANDER & SHERWIN, *supra* note 14, at 232 n.4.

167. *See* Kavka, *supra* note 14.

The source of the consensus sufficient for Law—the consensus obtainable within the constraints of the dimension depicted by legal morality (coordination, expertise, and efficiency)—is in the scope of the common area among the heuristic patterns of the human agents subject to the Law. The coincidence must be found in the scheme of the connections among the data points in the agents' *corporate* heuristic patterns. The more coincidence among those agents' *corporate* heuristic patterns, the more a law is possible, and, in turn, the more possible Law is.<sup>168</sup> Now we are likely to conclude that insufficient coincidence constitutes randomness. And randomness is a manifestation of amorality, the want of legal morality, the failure of a law as Law. "Random justice" is an oxymoron and contract agreement based on random justice is fatally insubstantial: It fails as doctrine.

It follows, then, that our reactions to rules (as, per Margolis, our perceptions) need not be identical for us to function cooperatively for there to be Law. Were that otherwise, we could not function at all. Figure 2 above describes sufficient interpersonal identity of data perception to support cooperation.<sup>169</sup> Law too relies on *sufficient* (not absolute) identity of perception to support cooperation. Interpersonal discontinuities, idiosyncrasy, assure that we all "see" the elaboration from "Z" (e.g., "justice determines contract agreement") differently. In fact, the dissonance among our elaboration patterns may be so diffuse across a large enough sample as to threaten cooperation. The bases of dissonance, recall, would be both our divergent perceptions of constituting rule Z and the divergent elaborations therefrom that would ensue. So with all that room for idiosyncrasy, how can legal morality realize the consensus that constitutes Law?

The answer may be found in the realm of polytypic concepts:

Suppose we have an aggregation of individuals . . . such that:

- 1) Each one possesses a large (but unspecified) number of the properties in G

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168. Herein too of Kelsen's necessary efficacy of Law, his "principle of effectiveness." See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 366–68 (1946). See also H.L.A. HART, *THE CONCEPT OF LAW* 116 (2d ed. 1994):

[T]hose rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and its rules of recognition specifying criteria of legal validity and its rules of change and adjudication must be *effectively* accepted as common public standards of official behavior by its officials.

*Id.* (emphasis added).

169. See *supra* note 145 and accompanying text.

2) Each  $f$  in  $G$  is possessed by large numbers of these individuals;  
and

3) No  $f$  in  $G$  is possessed by every individual in the aggregate.

By the terms of '3),' no  $f$  is necessary for membership in this aggregate; and nothing has been said to either warrant or rule out the possibility that some  $f$  in  $G$  is sufficient for membership in the aggregate. Nevertheless, under some conditions the members would and should be regarded as a class  $K$  constituting the extension of a concept defined in terms of the properties in  $G$ . If  $n$  is large, all the members of  $K$  will resemble each other, although they will not resemble each other in respect to a given  $f$ . If  $n$  is very large, it would be possible to arrange the members of  $K$  along a line in such a way that each individual resembles his nearest neighbors very closely and his further neighbors less closely. The members near the extremes would each resemble each other hardly at all, e.g., they might have none of the  $f$ 's in  $G$  in common.<sup>170</sup>

The structure posited in this Essay depicts the relation that arises from an understanding of legal doctrine as a polytypic concept. The heuristic function assures that there will be dissonance among idiosyncratic appreciations of rule and rule's application: Each of our Figure 1<sup>171</sup> patterns will diverge, as a function of and within the bounds of human agency. That is, there will be polytypic "consensus" somewhere short of general agreement and that consensus is sufficient to the object of Law.

The coincidence of heuristic patterns elaborated from phenomenal premises assures sufficient consensus for Law to operate even when there is neither identity of data nor identity of constituting rule. The structure, in Figure 2, demonstrates how that can be so. We see legal morality's relation to Law, particularly in terms of Law's "consensus," its doctrine, when we conceive of the polytypic conception of legal morality as

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170. MORTON BECKNER, *THE BIOLOGICAL WAY OF THOUGHT* 22–23 (1959). Beckner recognizes that Wittgenstein "emphasized the importance that concepts of this logical character assume in ordinary language." *Id.* at 23. The Wittgensteinian idea is developed by Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1303 n.47 (1992), and Moore responded to that "criteriological" or "imprecise definition" theory of meaning, *supra* note 126, at 2487. Recognize, though, that the polytypic structure suggested here is not a *theory of meaning* that tells us anything about our use of the word "morality" or any other word, for that matter. It is an illustration of Law's response to the consensus dilemma, a means to structure, to *see* what is operating when Law fixes or reflects consensus. I do not mean to suggest that this consensus is any more than conventional and I do not suggest that this type of convention is anything more than a fact; i.e., I do not suggest it is a value.

171. *See supra* note 138 and accompanying text.

sufficiently coincidental pyramidal constructs. We need not see the same things, we need not start from any more identity than human agency allows in order for the heuristic function to describe legal morality.

To see the analytical affinity between randomness—insufficient heuristic pattern coincidence—and amorality in the case of legal morality, recognize that randomness/amorality is not a matter of existential fact; it is a judgment concerning the phenomenal and therefore subject to all of the vicissitudes of judgment generally. So randomness/amorality is best appreciated as a matter of degree on a legal morality continuum. For us to identify the constituents of a justice doctrine in contract agreement that is substantial, the pattern of justice's elaboration in terms of contract agreement must be discernible, non-random.

Wolfram's conclusions resonate with the justice-legal morality relation so reconceived:

Indeed, what I suspect is that ultimately no useful definition of randomness can be based solely on the issue of what short descriptions [i.e., heuristics] of something may *in principle* exist. Rather, any useful [read 'efficacious'] definition ['doctrine'] must, I believe, make at least some reference to how such short descriptions are supposed to be found [revealed by convention].<sup>172</sup>

"[H]ow such short descriptions are supposed to be found," nonrandomness, discernible pattern, is a function of the observer's perceptual and analytical acuity.<sup>173</sup> Legal morality is, at least in significant part, a matter of predictability, nonrandomness, of pattern by reference to rule, e.g., justice determines contract agreement. For Wolfram, and perhaps for moral philosophers, "something should be considered to be random [compare *amoral*, not consistent with legal morality] whenever there is essentially no simple [perceptually and analytically accessible and predictable] program that can succeed in detecting regularities in it."<sup>174</sup> And it is only intellectually honest to hold open the possibility that one reason no pattern is discernible may be, perhaps in some metaphysical sense, that there *is* no pattern: E.g., justice, at least in this context, may be insubstantial.

If a pattern is inaccessible to human agents, there is no pattern (at least not as to those for whom the pattern is inaccessible and so random). The

172. WOLFRAM, *supra* note 142, at 555 (emphasis added).

173. The reliability of a pattern, of the conclusion that data are not random, is, in turn, a measure of a heuristic's reliability.

174. WOLFRAM, *supra* note 142, at 556.

*fact* that a pattern is manifest, i.e., in convention, acknowledges accessibility and is evidence of a pattern. Law, convention, can *reveal the operation* of legal morality, which is *not* to say that convention can *be* morality.

To sum up, more concretely:

First principles find their elaboration in rules, and that is true of the accessible (e.g., certain contracts must be in writing) as well as of the less accessible (e.g., “justice determines contract agreement”) first principles. In order for us to be able to posit a rule, say, “if x, then yy,” we must have an array on which we would impose that “rule.” Once we have imposed the rule on the array, we discover the rule’s elaboration. Imagine that “if x, then yy” is a generic rendition of a rule such as “justice determines contract agreement,” which would find its too simplistic elaboration in a world where justice is certainly the measure of contract agreement. But there is sufficient disagreement about what is just in the context of contract agreement to question the “ruleness” of “justice determines contract agreement.” Confronted by a world in which seemingly unjust agreements are enforced and just agreements are not enforced, we need to find the source of disjunction between rule and reality. *Hill*<sup>175</sup> and *Klocek*<sup>176</sup> cannot both be right anymore than *Groves*<sup>177</sup> and *Peevyhouse*<sup>178</sup> can both be right. It may be that the rule is not followed: People act inconsistently with the rule. Or it may be that the “rule” is ephemeral, ultimately insubstantial. The doctrine that would capture the rule is only revealed in the rule’s elaboration, not simply in its formulation. And complexity theory, via cellular automata, may demonstrate the product of elaboration, may depict the *Lawness*, the non-randomness, or the not-Lawness, the randomness revealed by that elaboration.

Once the perspectival and cognitive patterns of an array of human actors diverge too much, as a matter of intellectual, temporal, cultural, gender, perhaps even ethnic perspective (“the members near the extremes”),<sup>179</sup> the polytypic coincidence will be too ephemeral, and there will not be sufficient consensus to support Law. There is failure of doctrine and, at the margins, there may be no Law. For example, we could say that “justice determines contract agreement” may be doctrinally vacuous. The structure developed here demonstrates what we could mean

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175. See *supra* notes 108–22 and accompanying text.

176. See *supra* note 115.

177. See *supra* note 78.

178. See *supra* notes 70–84 and accompanying text.

179. See *supra* note 170 and accompanying text.

by that. What we call doctrine may be *revealed in* polytypic consensus; it is *not a matter of* polytypic consensus. The law of contract agreement understood in the process terms of this Essay does not shift as intellectual, temporal, cultural, gender, and ethnic contexts et al. shift; instead, it is the center of polytypic gravity that shifts in relation to that law, and so may shift again. Whether “justice determines contract agreement” succeeds, or even really exists, as doctrine is a matter of finding the center of polytypic gravity in the subject community. Cognitive and complexity theories establish for us that that is all “justice” can mean in terms of legal morality.

#### CONCLUSION: CONTRIBUTION

The cases discussed in Part I invoked a justice calculus to determine the fact and extent of contract agreement. The scope of those decisions is quite broad, and each of the decisions has had a substantial effect on the law of contract agreement. A plausible reaction might be that justice calculus undermines the certainty of “agreement” and ultimately dissolves contract. That, indeed, may be so, if we conceive of contract agreement in terms that are inconsiderate of human agency. We may have all the certainty in contract agreement that we can have, given the aim of legal morality and the realities of human cognition. It is, nonetheless, worthwhile—indeed, even crucial—to appreciate the limits of doctrine in contract, and recourse to a structure derived from complexity theory reveals the causes and contours of those limits.

So the structure developed in Part II neither reconciles nor tries to make sense of the cases discussed in Part I. That was not the object: This Essay does not promote a normative theory; it endeavors only to offer a positive account of doctrine in the context of contract agreement. The structure instead demonstrates how the evolution of a legal rule results in doctrine and what doctrine, schematically, looks like in relation to the foundational rule, particularly when it is the case that the rule (as construed) admits of the idiosyncratic variety a justice criterion accommodates. While I suspect that the structure would depict well the evolution of doctrine in settings that admit of more certainty (less explicitly normative criteria), that need not be the case in order to support invocation of the structure in this important contract law setting.

The structure developed in this Essay effects a consilience: It merges legal, cognitive, and complexity theories to depict what happens as doctrine emerges, and it provides the means to appraise the substantiality (or insubstantiality) of, specifically, a justice criterion of agreement in the



contract law. The hope is that even if the picture is off a bit, it would support further inquiry into the nature and limits of a particular contract doctrine. The structure is a place to start.

Notwithstanding the fact that the object of this Essay is positive and not normative, the structure of legal rules' elaboration that emerges from the analogy to Wolfram's complexity theory may have both positive and normative consequences for the Contract law: *Positively* it may describe the necessary relation between idiosyncratic cognitive experience and the consensus that establishes law. It can depict, graphically, the disaggregating forces that strain the fabric of legal doctrine, both over time and over legal communities (including discrete commercial communities). The structure as well reveals congruities obscured by the terms constituting legal doctrine. For example, insofar as "agreement,"<sup>180</sup> "bargain,"<sup>181</sup> and "unconscionability"<sup>182</sup> occupy the same doctrinal space—or at least overlap—the structure can demonstrate their coincidence at a fundamental level. The same doctrinal redundancy between consideration and promissory estoppel<sup>183</sup> doctrines could as well be made manifest. The viability of the structure would, in fact, be determined by its efficacy in demonstrating those doctrinal tensions in the contract law.

*Normatively* the structure provides the basis to reconceptualize the justice-contract relation and perhaps even the Law-morality relation more generally. If "justice" in the case of contract agreement connotes (or even denotes) a moral inquiry, then the structure challenges us to determine where the moral inquiry intercedes in the course of the pattern or rule's elaboration. Do we determine the morality of a particular prescription or proscription by comparing the result a morality would provide with the

180. See, e.g., U.C.C. § 1-201(b)(3) (2003) (defining "agreement" as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade . . . ."; RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981). Recall *supra* text accompanying note 26 (defining "agreement" as "a manifestation of mutual assent on the part of two or more persons").

181. The Second Restatement of Contracts defines "bargain," in pertinent part: "A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." *Id.* § 3.

182. See *id.* § 208:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

For a discussion of the affinity between the bargain and unconscionability concepts, see Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 63–66 (2001).

183. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

result the rule provides? Or do we find morality in the interstices of the rule's elaborative pattern?

From those premises, what might the structure disclose about perspective so far as legal morality is concerned? Nietzsche's perspectivism captures well, albeit only analogously, the sense of morality that a structure of legal morality could reveal:

There is *only* a perspective seeing, *only* a perspective 'knowing'; the *more* affects we allow to speak about a thing, the *more* eyes, various eyes we are able to use for the same thing, the more complete will be our 'concept' of the thing, our 'objectivity'. . . . Strictly speaking, there is no 'presuppositionless' knowledge, the thought of such a thing is unthinkable, paralogical: a philosophy, a 'faith' always has to be there first, for knowledge to win from it a direction, a meaning, a limit, a method, a *right* to exist.<sup>184</sup>

The structure *emphasizes* the relationship between that moral perspectivism and the genesis, as well as evolution, of legal doctrine. To the extent that we conclude the elaboration of a legal rule is the product of moral forces (both endogenous, as in the case, for example, of "justice" in section 90 of the Second Restatement of Contracts,<sup>185</sup> and exogenous), the structure challenges us to discover where and how the moral calculus intercedes. The structure does not so much provide the answer as it organizes the inquiry.

Extended, complexity theory could ultimately reveal a concept of Law, but that is best left for another day.

184. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 92, 119 (Keith Ansell-Pearson ed., 1994). For a particularly helpful exploration of Nietzschean perspectivism, see BRIAN LEITER, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO NIETZSCHE ON MORALITY 264–79 (2002).

185. Section 90 states:

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*.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (emphasis added).