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Principled Discretion: Concealment, Conscience, and Chancellors,

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Principled Discretion: Concealment, Conscience, and Chancellors[1]

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The "problem" of judicial discretion in our federal courts is perennial and vexing. Appointed by the President and tenured for life, federal judges are an anomaly in a democratic system such as ours. Their license to choose among rules of law and select precedents for their holdings may be restrained by craft rules, the opinion of peers, and the constraints of the Federal Rules of Civil Procedure, but the same Rules allow the judge great latitude in managing the conduct of pre-trial and trial proceedings.[2] Indeed, the modern federal judge has much of the discretion of the old English chancellor, who determined facts without juries, allowed parties the freedom to amend their pleas and introduce all sorts of evidence in the name of justice, and was capable of creating new remedies when required by novel circumstances.[3] If there was no check upon such chancellor's discretion then, what guarantee have we now that judges will act responsibly toward the parties who submit their quarrels to the court and to the larger community whose members they serve?

History does not teach definitive lessons, but it does offer precedents

1. The author is grateful to William Nelson and the participants in the 1990 New York University Legal History Seminar, Roger Dennis and his colleagues at the Rutgers University School of Law—Camden, Sandra Van Burkleo, N.E.H. Hull, Bruce Mann, Alan Watson, and Ruth Wedgwood for their comments on earlier versions of this essay.

2. Under Federal Rule of Civil Procedure 16, providing for pre-trial conferences, and other rules, that discretion has become an important part of the litigation process. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) celebrating the equitable management of public law suits under the Federal Rules. There is no question that discretionary litigation management is widespread. *See, e.g.*, Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rule-Making*, 137 U. PA. L. REV. 1969 (1989); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); and Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986).

3. For example, today federal courts are permitted to allow amendment of pleading "at any time in its discretion and upon such terms as it deems just" (FED. R. CIV. P. 4(h)), enlarge the time limit on pleading (FED. R. CIV. P. 6(b)), and encourage "a short and plain statement of the claim showing the pleader is entitled to relief" (FED. R. CIV. P. 8(a)(2)) for "no technical forms of pleading or motions are required." (FED. R. CIV. P. 8(e)(1)). The Rules incorporate much of the old equitable process of joinder and set-off. FED. R. CIV. P. 13 (cross claim and counterclaim); FED. R. CIV. P. 15 (amendments); 18 (joinder of claims); 19 (joinder of parties); 20 (permissive joinder of parties); 21 (misjoinder); 22 (interpleader); 23 (class actions); 26-37 (discovery).

on the problem of discretion. Two of our young nation's preeminent jurists, James Kent of New York and Joseph Story of Massachusetts, were sitting chancellors and wrote treatises on equity. They admitted that the discretion of chancellors was much controverted in their day, and in a marvelously subtle exchange, they wrestled with the source of the chancellor's authority to impose justice upon litigants. In their treatment of what appears at first glance to be a very small point—the concealment of material conditions of goods sold by one party to another—they demonstrated that chancellors must simultaneously empower and restrain their discretion by basing it upon conscience, a conscience informed by an explicit theory of moral knowledge. The means that they used, therefore, were rooted not in law (for they acted in the interstices of law; if they merely followed the law, then every valid contract in law would be enforceable in equity), or in equity itself (since, in many areas of contract in the late eighteenth and early nineteenth centuries, they were making the rules, not following them, as they themselves admitted), but in their appreciation of shared dicta of moral philosophy. Implicit in their view of discretion is the claim that chancellors can see behind the facade of formal pleading to gauge the moral intentions of the parties to a transaction, and that it is right and fitting to impose contemporary moral standards upon that transaction.

I. Of Fraud And Two Chancellors: Kent & Story Disagree About Concealment

Arguably, Kent and Story were the two foremost equity jurists in the first half of the nineteenth century. Both were devotees of English law and great students of English equity. Both were treatise writers as well as active judges whose opinions were well reported and widely read.[4] Both spent a good deal of effort on the question of fraudulent contracts—Kent in New York City, a great commercial entrepôt in the new American empire, and Story in Boston, long a center of overseas commerce and trade.

On what seems at first a very small point about the elements of liability for concealment of material conditions in a sales contract,[5] they disagreed. There were no dramatic confrontations, no overruling of cases, no fulminations. In little more than a caveat in his treatise on *Equity*

4. On Kent's influence, see HORTON, JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847 264-306 (1939); on Story, see NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC 383-385 (1985).

5. In this paper I am concerned with contracts for the sale of goods or land, not the conveyance of the land itself. Fraudulent conveyances of land, for example as a way to avert payment of debts (the recipient of the land would often be a relative of the conveyancer, who took the land at a price far below its market value), were very common indeed in antebellum America. *See e.g.*, Bean v. Smith, 2 F. Cas. 1143 (C.C.D. R.I. 1821) (per Story J.) (indebted father's conveyance of farms worth in excess of $14,000 to his sons for less than $2,000 is fraudulent, because purpose is to swear poverty under state insolvency laws and thus avert payment of debts).

Jurisprudence, Story questioned Kent's view of sales contracts in the latter's *Commentaries on American Law*. Kent recognized a concept of mutuality of disclosure in very limited areas. Following Civil Law notions of fraud, though he admitted they seemed to him filled with "scholastic subtlety,"[6] Kent insisted that, when a party concealed defects in his title, the buyer could elect his remedy—rescission or enforcement.[7] True, the quality of the goods sold was not so warrantied as the title to them; if the seller did not actually misrepresent the quality of his product, and both parties had equal opportunity to inspect the goods, a party's want of attentiveness could not save him from a defect. Let the buyer beware.[8] The law could not protect against "indolence and folly."[9]

Caveat emptor? Not quite, for Kent severely qualified the doctrine of no warranty of merchantability:

> But the rule fitly applies to a case where the article was equally open to the inspection and examination of both parties, and the purchaser choosed [sic] to rely on his own information and judgment, without requiring any warranty of the quality, and does not reasonably apply to those cases where the purchaser had ordered goods of a certain character, or goods of a certain described quality are offered for sale, and when delivered, they do not answer the description directed or given in the contract.[10]

If there was no opportunity for inspection, Kent had created an "implied warranty" of salability by insisting that both parties must have equal opportunity to inspect the goods. When both parties lacked equal opportunity to inspect, there was a want of "mutual disclosure." Any intentional concealment or suppression of material facts by the seller

> will be [then] deemed unfair dealing, and will vitiate and avoid the contract. . . . As a general rule, each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.[11]

This was so much qualification of *caveat emptor* that it amounted to repudiation.[12]

Story apparently disagreed. For the chancellor, fraud "properly includes all acts, omissions, and concealments, which involve a breach of

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6. 2 KENT, COMMENTARIES ON AMERICAN LAW 364 (1827-1830).

7. *Id.*, at 373.

8. Kent cited Sexias v. Wood, 2 Caines (2 New York) 48 (1804) (*caveat emptor* is applicable when merchant buyer has chance to examine goods sold to him), a case that Horwitz finds crucial. HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

9. 2 KENT, *supra* note 6, at 380.

10. *Id.*, at 375.

11. *Id.*, at 377.

12. And it was, of the very same *Sexias v. Wood*.

legal or equitable duty, trust, or confidence . . . ."[13] While Story conceded that "in relieving against it [actual fraud] Courts of equity often go, not only beyond, but even contrary to the rules of law,"[14] active concealment of a material fact is grounds for the rescission of a contract only when there is a pre-existing legal or equitable duty owed by the defendant to the plaintiff. The chancellor cannot reach into any agreement and decide that concealment simply violates his conscience. Where there is "a known trust" upon a seller by the buyer, concealment of a defect is grounds for rescission. However, when both parties have met each other "on equal grounds" and no special confidence is implied, there is no positive duty to disclose hidden faults.[15] If the good sense of a party ought to have dissuaded him from believing the seller's extravagant claims, there is no wrong unless a pre-existing duty could be proved.[16] "A Court of Equity will not correct, or avoid a contract, merely because a man of nice honor would not have entered into it."[17] For Story, pre-existing duty and obligation alone required disclosure.

Wherein lay the difference between his views and Kent's? Story insisted that there was a significant distance between his position and Kent's. Story believed that:

> undue concealment (which amounts to a fraud) in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate, and which the other party has a right, not merely in *foro consientiae* but *juris et de jure*, to know.[18]

Kent, according to Story, "has avowed a broader doctrine," which Story thought entailed a general duty to disclose information not equally available to both parties, or open and visible.[19] Story quite rightly saw that Kent's position was elastic enough to reach all cases of contract, "for most material facts may be unknown to one party, and known to the other, and not equally accessible, or at the moment within the reach of both."[20] Story found Kent's version of the chancellor's jurisdiction "not strictly maintainable, or in conformity with that which is promulgated by

13. 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 195 (1836).
14. 1 *Id.*, at 195
15. 1 *Id.*, at 206-207. *See, e.g.*, Conyers v. Ennis, 6 F. Cas. 377 (C.C.D. R.I. 1821) ("If the buyer conceals a fact that is vital to the contract (here his bankruptcy when he ordered the goods), knowing that the other party acts upon the presumption that no such fact exists, is it not as much a fraud, as if the existence of such fact were expressly denied?"). *Id.*, at 378. Story found no conclusive evidence of concealment in this case, however, for the insolvent buyer was still doing business when he committed suicide, leaving his debts and the consignment of rice he ordered in the hands of the administrators of his estate.
16. 1 *Id.*, at 208.
17. 1 *Id.*, at 212-213, 214, 215.
18. 1 *Id.*, at 216.
19. 1 *Id.*, at 216-217.
20. 1 *Id.*, at 217.

Courts of Law or Equity."[21] Story was adamant about Kent's mistake:

> In regard to intrinsic circumstances, the Common Law, however, has, in many cases, adopted a rule, very different from that of the Civil Law; and especially in cases of sales of goods. In such cases, the maxim, *caveat emptor,* is applied . . . And Courts of Equity, as well as Courts of Law, abstain from any interference with it.[22]

Story's admonition was respectful and gentle, but that was Story's way with words. Ironically, as Story, late in life, edged toward Kent's position—"pre-existing duty" could be stretched to cover almost as many contracts as Kent's "equal opportunity"—Kent pulled back from his own earlier views. Kent, retired from the bench, read Story's criticism and recanted. In a footnote added to the fourth edition (1844) of his *Commentaries*, Kent admitted: "The rule here laid down, though one undoubtedly of moral obligation [Story's concession] is, perhaps, too broadly stated to be sustained by the practical doctrine of the courts."[23]

A small difference of opinion apparently clarified by the concession of one of the controversialists? Hardly. Ironically, though Kent later conceded the theoretical point to Story, Kent and Story acted almost exactly alike on the bench, and in their hands the "practical doctrine of the courts" did not follow Story's view, but, rather, Kent's. The chancellor not only claimed to be able to rescind or refuse to order performance of contracts based on gross inequality of exchange, but acted as though he could see behind the formal claims of the parties into the murky world where such inequalities were deliberately practiced. Upon this moral vision—this ability to penetrate the veil of concealment long after the events had occurred—chancellors sitting on the bench rearranged private agreements to do justice.

On the bench where he sat as chancellor of New York for over a decade, Kent looked for patterns of imposition of one party on the other. In *Reigal v. Wood* (1815), Kent voided a debt judgment contracted through a lawyer's fraud, one of whose victims was a defendant in a prior debt case, "old, blind, and helpless" and easily duped by the cunning counsel.[24] In *Barrow v. Rhinelander* (1815), an unscrupulous clerk fooled his employer, cooked the books, loaned money to his employer, and then demanded to be paid the penalty bonds his employer owed him on the unpaid debts. Kent interceded for the heirs of the employer. The merchant victim was "in ill health, embarrassed, and greatly imposed upon and oppressed" by his conniving servant. The chancellor voided the penalty bonds and chancered the debt down to the principle and the orig-

21. 1 *Id.*, at 217.
22. 1 *Id.*, at 221.
23. 2 KENT, COMMENTARIES ON AMERICAN LAW 653, n.a. (4th ed. 1844).
24. Reigal v. Wood, 1 Johns Ch. 401, 406 (1815).

inal interest.[25] In *Howell v. Baker and Clark* (1816) the attorney for a bankrupt farmer was the only bidder present at a sheriff's auction of his client's farm. The attorney bid $10 for a farmstead assessed at $2,000, then sold his new purchase for $1,200 and pocketed the profits. Kent railed at the immorality of the lawyer's conduct and rescinded the purchase and the subsequent sale (the buyer had notice of the lawyer's chicanery). The "gross inadequacy of price"[26] was presumptive evidence of fraud. In *Osgood v. Franklin* (1816), on the other hand, Kent was presented with evidence of a sale of lands below market price but found on inquiry a prostrate seller trying to keep a nearly bankrupt estate afloat.[27] There was some form of concealment in all of these cases, but none turned on it alone.

Kent never argued, in treatise or in decree, that mere inadequacy of consideration—that is, gross difference between price of the sale or purchase and market price of the thing sold or bought—was grounds for rescission or refusal to enforce a contract. Such inequality in the exchange did raise a rebuttable presumption that one party had concealed something from the other. This sort of concealment was most likely to occur when one party had neither the means nor the ability to judge the value of the goods or land in question. Concealment in these sorts of cases went hand in glove with the relative incapacity of the party who came out on the short end of the deal. When this incapacity was due to youth, insanity, or extreme old age, Kent did not need to address the question of concealment. Equity relieved the incapacitated of the burdens of unequal contracts.

When the petitioner in a bill for rescission or the defendant in a bill for specific performance[28] could not demonstrate this sort of incapacity, Kent might construct incapacity from the facts of the case. Kent's best known[29] specific performance decision was *Seymour v. Delancey* (1822).[30] In January 1821, Thomas Ellison, old, feeble, and frequently intoxicated, exchanged two farms worth approximately $14,000 for a third interest in a lot in the town of Newburgh, New York, worth approximately $6,000. Four months later he was dead. His heirs refused to carry through the exchange, claiming it was unfair. The purchasers brought suit in the chancellor's court for specific performance. Kent, citing "sound judicial discretion," thought it "highly discreet and just to

25. Barrow v. Rhinelander, 1 Johns Ch. 549, 551 (1815).

26. Howell v. Baker and Clark, 4 Johns Ch. 117, 120 (1819).

27. Osgood v. Franklin, 2 Johns Ch. 1 (1816).

28. Only the chancellor could order specific performance of a contract. A common-law judge could not do it. Some chancellors believed that they had far more discretion in this latter area than they had in rescission.

29. First noted in 6 DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 696 (1829), and still controversial 150 years later; see HORWITZ, *supra* note 8, at 179; Simpson, *The Horowitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 543, 571-572 (1979).

30. 6 Johns Ch. 222 (1822), *rev'd*, 3 Cowen 446 (N.Y. 1824).

refuse the aid of the court to a specific performance of so hard and so extravagant a bargain, gained from a habitual drunkard, in the last year of his life, and just before his infirmities had begun to incapacitate him entirely for business."[31] As in *Barrow*, *Reigal*, and *Howell*, Kent was very concerned about the capacity of the parties, and he implied that Ellison was incapable of entering into the contract. Had the exchange been more equal on its face, however, Ellison's drinking habits would not have been an issue. Incapacity here was really Ellison's inability to judge the relative value of the two parcels of land.

A note on the character of such exercises of discretion: the petitioners in *Seymour* appealed to the Court of Errors, an unwieldy body of judges and state senators, and there, by a vote of 14 to 10, Kent's decree was reversed. Senator Sudam, whose opinion for the majority of the court has been reported, argued that commercial transactions vital to New York's economy would be impaired if mere inadequacy of consideration was to be a grounds of equitable intervention.[32] As far as Kent was concerned, however, his decision in *Seymour* was still good equity despite its reversal in the Court of Errors:

> Though the decision in that case was afterwards reversed in the Court of Errors, the general doctrines in it were not affected, but admitted. . . . On the reversal, the court of errors stood 14 to 10, and the Ch. J. [Chief Justice Savage] was the only member of the Supreme Court who gave any opinion, and he was for affirming the decree. Such a reversal can hardly be deemed of sufficient force, on the mere footing of authority, to overturn old, and establish new principles.[33]

Story was a chancellor as well as a common-law judge, for every federal judge carried a woolsack in his saddlebags on circuit. What is more, federal rules of equity were not dependent on state rules, but instead on the judges' reading of English rules.[34] On circuit as a trial judge Story heard a good many suits for rescission and specific performance of contracts, and again, like Kent, Story found fact patterns mixing concealment, incapacity, and misrepresentation.[35]

Typical of these was *Doggett v. Emerson* (1845), one of the very last cases that Story heard before he died. From the first years of the republic, Maine timberland was a source of speculation among New England

31. 6 Johns Ch. at 224, 233-234.

32. 3 Cowen at 521, 528, 535.

33. 2 KENT, *supra* note 6, at 383, n. a.

34. 5 U.S. (1 Cranch) xvii (1801) (rules of court were to be English equity rulings); *aff'd* Robinson v. Campbell, 16 U.S. (3 Wheaton) 212, 221, 222 (1818); Boyle v. Zacherie II, 31 U.S. (6 Peters) 648, 657-658 (1832). This was not disturbed by Congress's allowing states to use their own equity rules absent a federal hearing. *See* 4 U.S. Stats. 278 (1828).

35. Of the twenty-three Story opinion on contracts in West's Federal Cases Reports that were on point, none turned on the question of concealment.

merchants and developers. After the Panic of 1837 abated, investors resumed purchase of large tracts of timberland in Maine. On occasion, sellers either misrepresented the product or concealed defects in surveys and condition of the lands they were selling.[36] Without evidence of actual misrepresentation, buyers fell back upon protests against concealment. Unlike Kent, Story required the seller to misrepresent the parcel in speech or writing before he would intervene.

Story came close in *Doggett* to suggesting that the speculative nature of these timber contracts created a special duty in the seller to reveal material defects—for example to inform the buyer of previous logging operations on the parcel, even though the buyer was, in theory, at liberty to travel to Maine and count trees himself:

> It appears to me, that it is high time, that the principles of courts of equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. . . . . The vendor acts at his peril.[37]

However, unlike Kent, Story continued to maintain that the deception must occur by an affirmative "representation made by [the seller] as an inducement to the sale." Silence did not imply fraud.

II. The Stakes Of Disagreement: The Spectre Of Unlimited Discretion

Why did the chancellor's view of concealment of material conditions in contracts of sale in antebellum America matter to any but a small circle of specialists? The real stakes had less to do with sales contracts *per se* than with the fate of courts of equity and the discretion of chancellors. Quietly, almost secretively, in the midst of their difference about the duty one party to a contract owed to another, Kent and Story jointly proclaimed the capacity of chancellors to penetrate the veneer of legal claims and the surface of private agreements to reorder the world. This powerful conception flew in the face of widespread suspicion of courts of equity. Their topic of controversy, sales contracts, heightened, therefore, the stakes of their bid for the legitimacy of equitable discretion.

Sales contracts were a subject of great interest in antebellum America,

36. From my own experience I can say that title search to a parcel of Maine timberland-become-farm in Penobscot County is a journey back into a world of indeterminate boundaries and bewildering surveys.

37. Doggett v. Emerson, 7 F. Cas. 804, 816 (C.C.D. Me 1845).

for the nation's commerce was a growing source of its economic strength. The chancellor's rescission of a contract, because it seemed to him fraudulent, is one of the strongest claims that equitable discretion could make to rearrange the world of private values and actions. The chancellor's refusal to order specific performance of a valid contract, merely because its terms seemed harsh, well might "throw everything into confusion and set afloat all the contracts of mankind."[38] Such intrusiveness without some self-discipline could impose the will of the court upon every business exchange and make each of them subject to the whim of the chancellor, or so it seemed to those intent on protecting the "expectancy" or certainty interest in commercial dealings. In short, rescission of sales contracts raised the same general problem of restraint of discretion as did the existence of courts of equity.

A. The Controversy over Equitable Discretion in the New Republic

In trying to constrain and yet empower discretion, the chancellor in our early republican courts had a very delicate task. In the first years of the new nation, opponents of judicial independence trained their fire on courts of equity precisely because these courts might foster unrestrained judicial discretion.[39] Antifederalists raised hue and cry against the grant of equitable jurisdiction to federal courts because they feared that federal courts sitting in equity, without juries, would be free to impose a federal judicial tyranny upon the states.[40] The antifederalists lost their cause; indeed, lower federal courts were not only given equitable powers, but all federal courts were allowed, under the Judiciary Acts of 1789 and 1792, to determine their own rules of equity, whatever the state rules might be.[41]

Even after this conferral of equitable jurisdiction, equity specialists like Justice Story worried about the principles behind discretion, and warned against the consequences of unconstrained equitable power. As Story noted:

> If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controuling, moderating, and even superceding the law, and

38. Griffith v. Spratley, 29 Eng. Rep. 1213, 1215, 1 Cox Ch. 383 (1787) (Ld. Chief Baron Eyre).

39. P. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 85-106 (1990).

40. For criticisms, *see, e.g.*, *Centinel No. 2* in STORING, 2 THE COMPLETE ANTI-FEDERALIST 147 (1981); *Federal Farmer No. 3*, in 2 *Id.*, at 43; *Democratic Federalist*, in 3 *Id.*, at 60. For the early federal period debate, see HOFFER, *supra* note 39, at ch. 4.

41. Judiciary Act of 1789, 1 U.S. Stat. 79, 82; Process Regulation Act of 1789, 1 U.S. Stat. 94; Process Regulation Act of 1792, 1 U.S. Stat. 276. *See also* 5 U.S. (1 Cranch) xvii (1801), *aff'd* Robinson v. Campbell, 16 U.S. (3 Wheaton) 212, 221, 222 (1818) (rules of court were to be English equity rulings); Boyle v. Zacherie II, 31 U.S. (6 Pet.) 648, 657-658 (1832). This was not disturbed by Congress allowing states to use their own equity rules absent a federal hearing. 4 U.S. Stat. 278 (1828); Process Regulation Act of 1842, 5 U.S. Stat. 516.

> of enforcing all the rights, as well as charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised.[42]

Story was well acquainted with similar cautions against runaway discretion in the writings of English jurists and practitioners. In one of the first modern treatises on contracts and surely one of the most influential books of its kind in its day, *Essay Upon the Law of Contracts and Agreements* (1790), John Joseph Powell seemed to anticipate Story's wariness of equitable discretion:

> It is absolutely necessary for the public at large, that the rights of the subject [i.e. the party in law] should, when agitated in a court of law, depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied there, must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the judge.[43]

The greatest English chancellor of Powell's and Story's day, Lord Eldon, shared their uneasiness. Eldon, for whom Story had great respect and affection,[44] made the point in his famous dicta in *Gee v. Pritchard* (1818):

> I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I have done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.[45]

Eldon's predecessor, Lord Thurlow, similarly reassured litigants and solicitors in his court that the chancellor's discretion was attuned to the times: "And without insisting on technical morality, I don't agree with those who say that where an advantage has been taken in a contract, which a man of delicacy would not have taken . . . it must be set aside . . . ."[46]

During this period, the chancellor's lifeline in the uncharted sea was his conscience. The first chancellors were clerics, and, though their jurisdiction derived from the king's power to grant subjects' petitions for relief, the chancellor's jurisprudence rested upon what they believed to be a substantive ideal of fair play. A chancellor could compel the con-

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42. 1 STORY, *supra* note 13, at 21.

43. 1 POWELL, ESSAY UPON THE LAW OF CONRACTS AND AGREEMENTS x (1790).

44. *See* NEWMYER, *supra* note 4, at 246, 291-292.

45. Gee v. Pritchard, 2 Swans 413, 416, 36 Eng. Rep. 674, 679 (1818). Eldon was referring to John Selden's famous quip that the discretion of the chancellor was a variable as different chancellor's feet: "one Chancellor has a long foot, another a short foot, a third an indifferent foot, 'tis the same thing in the Chancellors Conscience." J. SELDEN, TABLE TALK OF JOHN SELDEN 43 (Pollock ed. 1927).

46. Fox v. Mackreth, 2 Brown Ch. 400, 29 Eng. Rep. 224, 234 (1787-1788).

sciences of litigants to do right by each other based upon his own conscientious view of good faith. As Sir Robert Chambers, Blackstone's successor in the Vinerian Chair at Oxford, argued in his law lectures, it was the chancellor's duty "to protect the weak against the strong, and the simple against the cunning."[47] This was at bottom a moral duty, and it became the conscience of his court.[48] Even Powell conceded that:

> The chancellor is invested with an extraordinary and uncontroulable power to judge according to that which is alleged and proved. He has authority to direct the use of a legal right to an equitable purpose, if he can obtain evidence of facts, which prove, that in *conscience* it ought to be so applied; but the judges of the common law have no such authority, they are to judge according to a strict and ordinary or limited power [italics in original].[49]

The conscience of the chancellor had been the foundation of discretion from the reception of equity in republican jurisprudence. Story himself, after twenty pages of refutation of arguments that equity was unbounded, announced that as "remedial justice" equity was not so "restrained" as law. Within its bounds, its "prescribed forms of proceeding," equity must still "be suited to the different posture of cases."[50] What law left "to the *conscience* and good will of the parties [italics added]" equity often enforced upon the parties.[51] Did this general maxim extend to the "hard bargain" in which one party to a sale claimed it had been grossly mistreated?

B. Sales Contracts and Hard Bargains: The Development of the "Will Theory" of Contracts

Arguably, there was no more important "growth" field of law in the formative era of the American nation than contracts. In the first decades

47. 2 CHAMBERS, COURSE OF LECTURES ON THE ENGLISH LAW, 1767-1773 243 (Curley ed. 1986).

48. The conscience of the chancellor, not the "conscience of the court." Although Lord Chancellor Nottingham is reputed to have said that the conscience of his court was not a personal one but a civil one, he did not mean that the "court" itself had a conscience. Such an assertion would be the most obvious form of animistic fallacy. What Nottingham meant was that the chancellor's conscience, imbedded in his office, his civil body so to speak, was the origin of his authority. *See* BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 89-92 (2nd ed. 1979) (conscience is root of chancellor's jurisdiction); Grey, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192-226 (1976) (equity remains distinct from law and continues to reflect conscience into 17th century); Pound, *The Progress of the Law, 1918-1919: Equity*, 33 HARV. L. REV. 929, 941-943 (1920) (equity in 18th century found ways to get around injustices in Statute of Frauds); Hanbury, *Field of Modern Equity*, 45 L. Q. REV. 196, 203-207 (1929) (equity still infused by conscience in latter 18th century); Thompson, THE DISCIPLINE OF LAW 51 ff. (1979). (arguing that idea of fairness, derived from the conscience of the judge, must not be allowed to disappear from courts). The continuity of conscience is noted in KEETON, ENGLISH LAW: THE JUDICIAL CONTRIBUTION 114-121 (1974). On the importance of conscience in American equity, see HOFFER, *supra* note 39.

49. 1 POWELL, *supra*, note 43, at ix.

50. 1 *Id.*, at 27.

51. 1 *Id.*, at 28.

of the nineteenth century, judicial conceptions of enforceable contracts were changing.[52] As the bargained-for exchange notion of contract emerged as a distinct category of law over the course of the seventeenth and eighteenth centuries,[53] jurists agreed that contracts were the essence of private law. As Powell averred that:

> *Contracts* comprehend the whole business of human negotiations. They are applicable to the correspondence of nations, as well as to the concerns of domestic life. They include every change and relation of private property, and consequently furnish the principle subject, on which all legal and equitable jurisdiction is exercised.[54]

Powell's hyperbole mirrored the growing importance of contractual relationships in the business world.

In the early nineteenth-century, if not before, counsel and judges began to articulate a "will" theory of contracts. In capsule, the will theory regards a contract as the product of the intentions of the parties, a mutual agreement freely fashioned. The parties bring with them their subjective valuations of the goods or services to be exchanged. There is no need to determine whether such calculations are based upon pre-capitalist or post-capitalist market conditions or any particular theory of monetary flow, although such historical context undoubtedly played a major role in the timing of the articulation of the will theory. The will theory is not inherently antagonistic to equitable limitations on the enforcement of contracts, though it does limit the intrusion of all courts once the intentions of the parties are determined. That is to say, one party might still raise equitable defenses to enforcement on the grounds that the other party had misrepresented the goods or used duress. Will can be free and still be the victim of manipulation.

There is still dispute among historians of contract law about the timing of the "rise" of the consensus or the "will" theory of contract,[55] in particular about the appearance of executory contracts among merchants,[56] the demise of the "fair market price" concept,[57] the disappearance of a warranty of quality (a sound price warrants a sound commodity),[58] and the

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52. See FRIEDMAN, HISTORY OF AMERICAN LAW 262-263 (2nd. ed. 1985), (law of sales changing distinctly).

53. ATIYAH, THE RISE AND FALL OF THE FREEDOM OF CONTRACT 448-451 (1979); BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 287-299 (2nd ed. 1979); Oldham, *Reinterpretation of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 GEORGETOWN L. J. 1949 (1988).

54. 1 POWELL, *supra* note 43, at iii.

55. Hamburger, *The Development of the Nineteenth Century Consensus Theory of Contracts*, 7 L. & HIST. REV. 248-254 (1989).

56. HORWITZ, *supra* note 8, at 161-173 and ATIYAH, *supra* note 53, at 419-420 both find that executory contracts were quite rare in the early 18th century and only came into their own at the end of the century. However, both Simpson, *supra* note 29, and Baker, *Review of Atiyah*, 43 MODERN L. REV. 468 (1980), find executory contracts enforced at law much earlier.

57. If there ever was such an animal. *See* Simpson, *supra* note 29, at 580-581.

58. A crucial issue to the defenders of a return to the fair treatment standard. *See e.g.*,

consequences of this timing.[59] But all the contributors to the scholarly literature seem to concede that the "will" theory of contract[60] had established itself in the antebellum era. Indeed, Gulian Verplanck, an early 19th century contract theorist, understood these developments:

> Upon the same grounds of necessity and commercial policy, the courts of England, and of the United States have rejected the civil law doctrine of implied warranties, have held that a full price does not imply any warranty of the character of the article, and even that goods of the lowest value may be described and sold as being of the highest, without the unfortunate purchasers having any recourse to the seller, unless he [the buyer] could prove some positive fraud in the transaction . . .[61]

Indeed, the will theory had begun to restrict the scope of equitable discretion.

Courts of equity had established a beachhead in contract law before the will theory became current. Relying on the conscience of the chancellor, eighteenth-century courts of equity had rescinded contracts and denied petitions for specific performance when one party claimed it had been defrauded.[62] Some early nineteenth-century chancellors, however, seem to have severely qualified the grounds for rescission and refusal of decrees for specific performance: *Caveat emptor* had restricted the chancellor's discretion to fit an advancing market economy.[63]

Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936). Llewellyn could claim to be merely recovering the older, pre-classical contract ideal of mutual fairness. Llewellyn did believe in the equitable basis of such arrangements, or rather, the precedent in equitable usage for rules compelling disclosure, restitution, and the like. See LLEWELLYN, THE COMMON-LAW TRADITION: DECIDING APPEALS 362-371 (1960).

59. *See, e.g.*, Oldham, *supra* note 53 (arguing that general correctness of Atiyah-Horwitz position can be sustained from Mansfield's trial notes and that Mansfield was thus key figure in blunting or delaying transition to will theory of contract).

60. The will theory, tied to the notion of freedom of contract and the equal capacity of parties to bargain for an advantage, is an ideal of contracts as well as a doctrine of contract formation.

61. G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS 12 (1826).

62. The issue of mere inadequacy of consideration today is taken up in RESTATEMENT (SECOND) OF CONTRACTS § 79. According to the RESTATEMENT, mere inadequacy is not grounds for rescission. After throwing out the measure of consideration as a grounds for refusal to enforce a contract, the commentators bring the entire family of equitable considerations back into the question by allowing inadequacy to trigger inquiry into duress, misrepresentation, undue influence, and unconscionable bargains. Proven, any of these four equitable doctrines enable the court to prevent enforcement of contracts. When the vendor has a duty to speak arising only out of his knowledge of a material condition (and not out of a pre-existing duty or a special relationship), then his silence about a material condition can bar enforcement. *See* Kannavos v. Annino, 356 Mass. 42 (1969). Indeed, unconscionability is now a matter of law (a measure of how "equitable" law has become!) under U.C.C. § 2-302. Typically (of a definition derived from the conscience of the chancellor) unconscionability is neither strictly defined nor are its manifestations enumerated in § 2-302. The court knows a sharpster's tricks when it sees them. *See, e.g.*, Jones v. Star Credit Corp., 59 Misc.2d 189 (1969).

63. FRIEDMAN, *supra* note 52, at 264-265; HORWITZ, *supra* note 8, at 160-210.

C. *The Economic Context Of Contract: The Externalist Explanation Of The Difference Between Kent And Story*

How can we explain the difference between Kent's and Story's views on equitable discretion? The answer to this question determines the legitimacy of the chancellor's intrusion into the minds and hearts of the parties to private transactions. And the legitimacy of the intrusion determines the legitimacy of the will theory of contract. Is there an instrumentalist, extrinsic explanation of the difference of opinion between Kent and Story?

Such an analysis might go: Kent was a Tory, a scion of the Connecticut landed elite, and not overly sympathetic to commerce, the cutting edge of a *gesellschaft* in which he and his kind would have diminished influence.[64] Story, on the other hand, might be categorized as an unabashed New England commercialist.[65] In fact, he represented the great commercial houses when he was in practice and demonstrated a thorough familiarity with business practices while on the bench.[66] Story knew first hand the truth of P.T. Barnum's recollection of business practices at a Connecticut general store: "The customers cheated us in their fabrics, we cheated the customers with our goods. Each party expected to be cheated, if it was possible. Our eyes and not our ears had to be our masters. We must believe little that we saw, and less that we heard."[67] At the same time, when Story acceded to a relativistic, subjective rule for consideration, his tone suggested that he only was giving the devil his due:

> Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation, that now unhappily prevails, it would be difficult to determine, what is an inadequate price for any thing sold.[68]

While both men believed in an orderly transition from agriculture to commerce, Kent, more than Story, had an aversion to the circus of speculation.

Kent and Story sat in equity in a period of transition in the law of contracts. All around them judges were abandoning equitable concepts of

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64. *See, e.g.*, HORTON, *supra* note 4, at 220-221. The notion here recalls Richard Hofstadter's idea of a status revolution, in which the old elite had to give pride of place to a new elite and did so with feelings of great self doubt and anxiety. *See* R. HOFSTADTER, THE AGE OF REFORM (1956). This is not strictly fair to Kent—he favored enterpreneurship when it was conducted properly.

65. NEWMYER, *supra* note 4, at 117.

66. *See, e.g.*, Miller v. Smith, 17 F. Cas. 351 (C.D. Mass. 1818), a typical case of buyer ordering goods which were not as advertised (here 100 kegs of "#3" tobacco which Plaintiff found were inferior to seller's usual level of quality). Story told the jury that the measure for damages should be the difference between the actual quality and the usual quality.

67. HARRIS, HUMBUG: THE ART OF P.T. BARNUM 12-13 (1973).

68. 1 STORY, *supra* note 13, at 241.

contract, such as "fair market price" and "warranty of quality," and deferring instead to volitional terms in contracts—obligating the parties to live with their own mistakes.[69]

The emergence of a commercial elite coincided with the rise of the will theory of contracts and led directly to the demise of equitable supervision of the fairness of contracts:

> It was not until after 1820 that attacks on the equitable conception began to be generalized to include all aspects of contract law. If value is subjective [i.e. solely determined by the perception of the parties], nineteenth century theorists reasoned, the function of exchange is to maximize the conflicting and otherwise incommensurable desires of individuals. The role of contract law was not to assure the equity of agreements but simply to enforce those willed transactions that parties to a contract believed [at the time of formation of the contract] to be to their mutual advantage.[70]

Completing the instrumentalist scenario, one might place Kent and Story on opposite sides of the great divide of 1820, a notion fitting the characterization of Kent as a Tory and Story as a defender of the new commercial order. Story's narrowing of the grounds for rescission left more contracts in place, evidence on its face that he accepted the commercial *gesellschaft* behind *caveat emptor*.

In the larger scheme of legal development, there is some truth in the externalist explanation of the difference on concealment and rescission between Kent and Story. But the disputants themselves gave other reasons, citing English precedent, Continental treatises and a body of philosophical writing about moral knowing. Any explanation of their difference, therefore, must include more than just the instrumentalist critique.

III. The Inadequacy Of Legal Precedents As An Explanation Of The Disagreement Between Kent And Story: An Examination of English and Continental Traditions

Both Kent and Story cited English Chancery cases and Civil Law treatises to support their positions. An examination of these citations demonstrates that in and of themselves they are inadequate to explain the disagreement between Kent and Story. To understand the disagreement between Kent and Story, one must look outside legal tradition.

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69. *See, e.g.*, White v. Flora and Cherry, 2 Tenn. 426 (1815); Goulding v. Skinner, 18 Mass. 162 (1822).

70. Horwitz, *supra* note 8, at 162, 181.

A. The English Cases

When Kent wanted to justify his decree in *Barrow*, he submitted "I do no more in this case than has been repeatedly done in other cases" and cited his predecessors in Chancery. He made the same argument in *Seymour*.[71] When Story wanted to trump Kent's reading of the disclosure rule, Story invoked a citation of *Turner v. Harvey* in which Lord Eldon denied that the seller had to give the buyer access to all the seller's information about the property.[72] English precedent marched in orderly array across the pages of their commentaries. One may regard this scrupulous regard for English precedent as academic pedantry, window dressing, or even a mask for some species of insecurity, but both men apparently were sincere admirers of English jurisprudence.[73] One may thus query whether Kent and Story simply were taking sides on two different lines in the English precedent.

Lord Chancellor Hardwicke, the first of the great modern chancellors and the chancellor that Story and Kent most often cited on concealment, was familiar with speculative contracts, contracts that involved fairly complex market transactions,[74] contracts in which the bargained for exchange was not equal, and hard bargains. Hardwicke tried to lay down a rule of thumb for the chancellor's discretion in commanding specific performance, the furthermost reach of his discretion (since specific performance was a remedy only available in the Court of Chancery): "Nothing is more established in this court, than that every agreement of this kind [a future sales contract for timber] ought to be certain, fair, and just in all its parts" or the chancellor would not order specific performance.[75] Did that maxim forbid concealment of material conditions?

Concealment was not a prominent question in *Buxton v. Lister*, but in *Earl of Chesterfield v. Janssen* (1751) Hardwicke obliquely dealt with the

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71. 1 STORY, *supra* note 14, at 217.

72. 1 *Id.*, at 217, n.1 (quoting 1 Jacob Ch. 178).

73. Kent's admiration of English precedent was genuine but not slavish. *See* Raack, *To Preserve the Best Fruits: The Legal Thought of James Kent*, 33 AM. J. LEGAL HIST. 342, 342-46 (1989). Story also had great respect for the common law and its precedents. NEWMYER, *supra* note 4, at 246. They clearly agreed with Story's predecessor on the Supreme Court, William Paterson, himself a chancellor of New Jersey and the drafter of its revised law code: "There is a danger in departing from known and established regulations and usages: whenever this happens the law is perplexed, and at a loss how to advise or proceed . . . and it requires much litigation, a series of decision, and a length of practice before certainty and order can be restored." O'Connor, *Law Reform in the Early Republic: The New Jersey Experience*, 22 AM. J. LEGAL HIST. 116 (1978). Before he became governor of New Jersey, Paterson was a very successful attorney. So were Kent and Story. For the working attorney, certainty in the law is very useful. Wealthy attorneys in this era were also likely to have a full library of English case reports and abridgments; before 1795, reports of American cases were nonexistent. Dallas's Pennsylvania Reports, Wythe's Virginia reports, and DeSaussure's South Carolina Reports began in that year. Five years later, the New York Reports were inaugurated. Memory took the place of written reports; one had to be in court or study under someone who had been in court to know the state rules. *See* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 43 (Goebel ed. 1964-1984).

74. Simpson, *supra* note 29, at 539. But see ATIYAH, *supra* note 53, at 448 and after.

75. Buxton v. Lister and Cooper, 3 Atkins Ch. 383, 26 Eng. Rep. 1020, 1022 (1746).

issue. The Earl of Chesterfield was the executor of the estate of John Spencer, grandson of the wealthy Duchess of Marlborough. Deeply in debt, Spencer had written a "catching contract" with Abraham Janssen. Janssen advanced Spencer £5,000 to pay Spencer's debts with the understanding that if Spencer predeceased his aged grandmother, Janssen got nothing. If Spencer outlived his grandmother, Janssen got £10,000. Spencer consented to a £20,000 penalty bond, a common device in that era to force payment of the underlying obligation.[76] Fortunately for Janssen, the Duchess died before her grandson, leaving him a substantial sum. Unfortunately for Janssen, Spencer followed his grandmother to the grave a year later without having paid Janssen the £10,000. Janssen sought a decree ordering specific performance, to wit, payment of the penalty bond of £20,000 from the estate that Lord Chesterfield administered. Was the underlying contract unconscionable, as counsel for the estate argued?

Hardwicke, sitting with his brethren on the common-law side, divided fraud into five categories which would be widely adopted by later chancellors. The first was actual fraud (deliberate misrepresentation for example); the second was intrinsic fraud (without evidence of the deceit but a contract that no reasonable person would enter without having been misled); third was a contract that preyed upon the incapacity (for example the extreme youth, age, infirmity, mental incompetence) of the victim; fourth was a fraud upon a third party practiced by the parties to the contract; and fifth was a fraud that manipulated the desperate state of the victim. Intrinsic fraud, the second category, touched on concealment of a material condition by a party with superior knowledge. Nothing was concealed from Spencer, however. Having traversed the vast terrain of fraud, Hardwicke, therefore, returned to familiar ground. He chancered the debt upon the estate down to the £10,000.[77]

In his dicta, did Hardwicke attempt to develop a general theory of unconscionability which included concealment? This question is distinct from whether he wanted to develop general rules. He certainly did not. As he wrote at the end of his long career to Henry Home, Lord Kames, Scotland's foremost authority on equity:

> As to relief against fraud no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules how far they [the court] should go [in its discretion], and no farther, in extending their relief against it . . . the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility

76. A penalty bond was a common device to insure payment of the note itself. A claim for payment on it did not require trial on the validity of the underlying debt, an incentive to creditors to lend money if they could induce the borrower to agree to a penalty bond. The chancellor could reduce the award for breach to the underlying debt as long as the penalty was a specific sum.

77. Earl of Chesterfield v. Janssen, 2 Vesey Sr. Ch. 128, 128, 155-159; 28 Eng. Rep. 83, 100-102 (1751).

of man's invention would contrive.[78]

But this aversion to rigid rules does not make Hardwicke's jurisprudence *ad hoc*: underlying his views on equity were more general concerns, foreshadowing the concerns of Kent and Story. Theoretically, Hardwicke's evidentiary rules of thumb could reach into concealment cases as far as Kent's doctrine of "equal opportunity." As Robert Chambers, Vinerian Professor, characterized Hardwicke's jurisprudence shortly after Hardwicke had retired, equity would set aside contracts for "positive or negative fraud."[79] Misrepresentations about price or quality were positive fraud and voided the contract. Concealment may or may not have fit the category of "negative fraud." If misrepresentation was "positive" because it was an act of commission, concealment could be conceived as "negative fraud" because it was an act of omission.[80]

When the relief sought was a decree of specific performance, English chancellors, like Kent, unquestionably regarded "negative fraud" or "surprise" as a bar to relief. The chancellor must be assured that "to merit the interposition of a court of equity in its favor, [the agreement] must be fair, just, reasonable, bona fide, certain, in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, consistent with the general policy of a well-regulated society, and free from fraud, circumvention, or surprise." "Surprise" was concealment, a "circumstance disadvantageous to one party to an agreement . . .

78. Lord Hardwicke to Lord Kames, June 30, 1759, quoted in 1 Story, *supra* note 13, at 196 n.4. In our own more cynical age, we do not assume that there is such a thing as "good faith" and hold it as a standard against the tricks of sharpsters. Instead, we compose lists of acts of bad faith. They frame our inquiry into fraud. "Good faith" is merely an "excluder", a marker of the boundaries beyond which a party may not go. See, *e.g.*, Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). Summers finds that almost all commentators adopt the "excluder" approach. The question one might well ask of such an approach is: what then determines whether a particular act constitutes bad faith? No list of acts punishable as bad faith exhausts that category, which makes its meaning as indefinite, under the excluder approach, as the meaning of "good faith." In effect, the question returns us to Hardwicke's approach: do not try to enumerate the species of bad faith, they are endless in variety. Seek a definition of good faith, and measure all things against it. In response to Steven Burton's criticism of his position, Summers has cobbled a list of six general themes of good faith. See Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HAR. L. REV. 369 (1980); Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981), Summers's answer, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL U. L. REV. 810 (1982) and Burton's replication, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984). In fact, Summers's and Burton's positions are quite close now, although Burton has introduced a somewhat original set of terms which Summers rejects. Neither Burton nor Summers couch their arguments in terms of traditional equitable principles, nor does either of them offer a comprehensive positive definition of good faith.

79. 2 CHAMBERS, *supra* note 47, at 241.

80. Chambers would have the chancellor look to consideration was grossly inadequate, a rebuttable presumption of fraud existed, for "where conditions are manifestly and oppressively unequal, though no fraudulent act appears . . . it is plain there was not fraud there was error." The disparity in the exchange had to be "enormous" to raise the presumption of fraud, however. *Id.*, at 243.

so as to lead the former into a misconception."[81]

The English chancellor's theory, therefore, was sufficient to justify Kent's jurisprudence. However, there is here no bifurcation of precedent that might lead Kent and Story down different paths. England, a nation whose acquisition of an overseas empire and whose extensive trade with Europe had been in place for centuries, was experiencing the turmoil of a national mania for speculation. The South Seas "bubble" had already burst, but it was only the first of many far-reaching enterprises involving land development schemes and commodities futures. The selling and buying of expectations involved consignment and future delivery. Whole industries, for example the tobacco system, worked in this way. The credit that made the system go allowed exploitation of new land and facilitated the flow of manufactured and luxury articles to buyers. The scale of sales and the distance between buyer and seller was increasing throughout the eighteenth century.[82] There is no question that increasing concern in the courts for the security of negotiable paper assisted this transformation.[83]

To these commercial activities Hardwicke's successors bowed, much as Story gave ground to the "gambling spirit of speculation." Chancellors reassured wary merchants that equitable discretion neither ignored nor threatened their bargained for exchanges. As Lord Thurlow announced in *Fox v. Mackreth*, sales contracts often involved visible inequities of exchange, but to overthrow them was "to affect the general transactions of mankind."[84] Powell summarized the latter cases:

> Inadequacy of price, abstracted from all other considerations, seems of itself (upon revision of the best authorities) to furnish no ground on which a court of equity can set aside, or farther relieve a party to a contract; the law of *England* never having fixed any certain proportion, that the price should bear to the thing purchased.[85]

When the seller knew of the lack of quality and concealed it from a buyer who relied on the seller, this was still sufficient circumstance to void the sale.[86] Otherwise, it was bad policy for the chancellor to intrude, "[b]ecause if men, who are *free* agents, with *open eyes* ratify *invalid*

81. *Id.*, at 221,22.

82. See, e.g., T. ASHTON, AN ECONOMIC HISTORY OF ENGLAND: THE EIGHTEENTH CENTURY (1955), *passim*. The market characteristics of the emerging English market economy—sales at arms length; through middlemen, extended distribution of goods; large scale and sophisticated transfers of funds; and the deployment of labor in large scale impersonal manufacturing centers—did not reach into every corner of the realm. Quite the contrary. Pre-market conditions of trade, production, and labor were the rule in much of England. See J. THIRSK, THE RURAL ECONOMY OF ENGLAND (1984). Some pasturing areas did break free of the constraints of custom and become part of international agri-business, but the poorer arable-land farmers did not enter this brave new world quite so readily.

83. R.M. HARTWELL, THE INDUSTRIAL REVOLUTION AND ECONOMIC GROWTH 259 (1971).

84. 29 Eng. Rep. at 234.

85. 2 POWELL, *supra* note 43, at 152.

86. *Id.*, at 152, 154, 157, 158, 159.

agreements, a court of equity will not relieve them."[87] I have not found any English authority to suggest that Powell ignored a more expansive version of equitable rescission of sales contracts with hidden defects.

Therefore, I find little in the English cases themselves that would dictate a disagreement between Kent and Story over concealment of material facts by one party from another. Nothing in the rescission cases, nor in the dissonance between the rescission cases and the specific performance cases, warranted Kent's and Story's differing views of disclosure.[88]

B. In The Shadow of Robert Joseph Pothier

If the English cases they cited did not dictate Kent and Story's disagreement, perhaps it was founded in their reading of the giant of Continental commercial jurisprudence, Robert Joseph Pothier. Both Kent and Story often referred to Civil Law doctrines on concealment in the course of their explication of fraud. Kent was acquainted with the major trends in Civil law,[89] and Story taught himself much of the Roman Law. Both men seemed to have regarded the Civil Law as an alien legal tradition, but one from which much might be learned. Story in particular saw the Civil Law as a source of remedies where Common Law was silent,[90] a function analogous to that of equity in the common law system itself.

Though Civil Law had no formal place in the common law of England, nor in American law, the work of the greatest civil jurist of his time, Robert Joseph Pothier, was often taken into account in any discussion of obligations among English-speaking commentators. Kent and Story were thoroughly conversant with Pothier's treatise on obligations, and on its face, Pothier's position seemed to anticipate Kent's and refute Story's. Could the disagreement between the two Americans reflect a reception by the one and a rejection by the other of Continental authority?

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87. 2 POWELL, *supra* note 43, at 163.

88. According to Lord Denning, late Master of the Rolls:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power.' By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

Lloyd's Bank v. Bundy, Q.B. 326, 339 (1975). Although Denning's argument closely resembles the Roman Law conception of *lesion* [inequality] in contracting capacity, mainstream modern English commentary would stress the narrower grounds of rescission for duress or incapacity rather than the general theory of inequality of bargaining power. See, e.g., H.G. HANBURY & R.H. MAUDSLEY, MODERN EQUITY 698-705 (11th ed., 1981).

89. In Kent's section on contracts in his *Commentaries* there are three discussions of Roman law in the text and eleven distinct citations to Roman law digests or commentators in the notes. This is a span of 23 pages. Kent read and absorbed the *Corpus Juris* as a young man. *See James Kent to Thomas Washington, October 6, 1828.* 9 Green Bay L. Journal, 206-211 (1897).

90. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer.* 28 AM. J. OF LEGAL HIST. 65-70 (1985).

Pothier was a scion of that special class of French nobles—the nobility of the robe. They were not the lazzaroni of *Dangerous Liasons*. Rather, they were the magistrates, professors, and administrators who made the *ancien regime* work when it worked. Pothier, from Orleans, was a brilliant scholar and jurist, at his death perhaps the most influential professor of Civil Law in France. Characterizing himself as a mere compiler of Roman Law, in fact he was pruning that law and merging it with French custom to fabricate a code useful in his own day.[91] Though he died in 1772 and throughout his career basked in the patronage of the *ancien regime*, his theories were adopted almost wholesale by Napoleon and his codifiers. The text of the Code Napoleon on obligations is taken directly from Pothier's essay of the same title.[92]

Pothier called fraud (*dolus*) any "artifice" used by one party to deceive another. If the artifice was used to induce a contractual agreement, which the victim would not have contracted otherwise, the contract was impeachable. Arguably, for Pothier *dolus* included concealment. The deception had to be material and substantial, but if it were, "as a matter of conscience any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts."[93]

Pothier then went further. As with Kent, grossly inequitable exchange was in and of itself a grounds for recision. "For as equity in matters of commerce consists in equality . . . When one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it."[94] Such inequality (or *lesion*) was proof presumptive that "there was an imperfection in the consent of the party injured, for he would not have given what he has given, except upon the false supposition that what he was receiving in return was of equal value."[95] The question of concealment was not mentioned in Pothier's discussion of *lesion*, and he was realistic enough to concede that in commerce "there is a certain latitude within which there is room for the contracting parties to contest."[96] The English legal tradition in which Kent and Story practiced rejected Pothier's civil law, but specific terms from Roman Law filtered into the Common Law. If the Common Law rejected the whole of Roman Law,[97] educated English jurists paid attention to continental

91. LAWSON, ANTON & BROWN, EDS., AMOS' AND WATSON'S INTRODUCTION TO FRENCH LAW (3rd. ed. 1967), 31; Evans, *Introduction*, in POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS (Evans tr. 1853) (1806); Simpson, *Innovation in Nineteenth Century Contract Law*, in SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 178-202 (1987).

92. Book 3, title 3, chapter 2, section 1 of the Code Napoleon is the same as POTHIER, *supra* note 91, volume 1, article 3, section 3, 118. See LAWSON, *supra* note 91, at 31.

93. POTHIER, supra note 91, at 118-119.

94. *Id.*, at 120.

95. *Id.*, at 121.

96. *Id.*, at 120-121, 122.

97. BAKER, *supra* note 53, at 27-28.

developments.[98] Pothier was known and widely respected in England.[99] William Jones's treatise *On the Law of Bailments* (1781) opined that Pothier's work was "law at Westminster as well as Orleans."[100] If all of the English theorizing on the adequacy of consideration and the circumstances of fraud was done in the shadow of Pothier, and Pothier's views amount to *caveat vendor*, English judges did not adopt that doctrine. Pothier, read and admired, did not become authority in England.[101] Nor in America, though he was widely known, if not always carefully read.[102]

Not only did Pothier say much too little on concealment to drive Kent and Story in different directions, Pothier did not advocate equitable discretion as a corrective to law. His notion of equity was built into the law: inequitable contracts simply were not contracts at all. Kent simply misread Pothier to have argued "in conformity with the doctrine of Lord Thurlow, that though misrepresentation or fraud will invalidate the contract of sale, the mere concealment of material knowledge which the one party has touching the thing sold, and which the other does not possess, may affect the conscience, but will not destroy the contract, for that would unduly restrict the freedom of commerce . . . ."[103] Story followed Kent's error, insisting that "[e]ven Pothier himself, strongly as he inclines, in all cases of this sort, to the principles of sound morals, declares that the buyer cannot be heard to complain, that the seller has not informed him of circumstances extrinsic of the thing sold."[104] Story then went on to accuse Kent of going beyond Pothier in too tender a

98. See, e.g., 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (1759-1765). See generally Hamburger, *supra* note 55, at 258-265.

99. Simpson, *supra* note 91, at 181 and after.

100. W. JONES, ON THE LAW OF BAILMENTS 41 (1781).

101. Henry Ballow, a leading English treatise writer on equity, was persuaded by Pothier, but Ballow did not live long enough to see his revised text into print. Sometime after the publication of Pothier's TRAITE DES OBLIGATIONS in 1762, Ballow revised his much admired and often cited A TREATISE OF EQUITY (1737) to say "if there appear to be an inequality [in consideration], though there was no deceit, and all the faults of the thing [sold] were exposed, yet, if the damage be considerable, the bargain ought to be made void." FONBLANQUE, ED., A TREATISE OF EQUITY (5th edition, 1820), 127. note 1 cited Pothier's TRAITE, part 1, chapter 1, article 3, section 4, as well as Grotius, Puffendorf, and Domat. John Fonblanque, the editor and himself an equity specialist, had found the revisions in a draft for a new edition in Ballow's personal papers. To correct any impression that Pothier's views might be the rule in England, Fonblanque added his own note "d" to the text to remind readers that there was no English case that followed Pothier's rule. Instead, fraud had to be proved; it could not be presumed from inequalities in the exchange. The loser who entered the contract with eyes open and capacity unimpaired had to suffer the consequences of his own folly. *Id.*, at 127-128.

102. See 2 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 55-56 (1956). But *See* Stein, *The Attraction of Civil Law in Post Revolutionary America,* 52 VA. L. REV. 403 (1966) questioning the degree of penetration of Civil Law notions into American law. American lawyers like Alexander Hamilton and John Adams were thoroughly conversant with the outline of Civil Law arguments on contract. See 1 Goebel, *supra* note 69, at 6-7 28, 224-227, and Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775,* in 62 LAW IN COLONIAL MASSACHUSETTS, 1630-1800: PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 359-418 (1984).

103. 2 KENT, *supra* note 6, at 386.

104. 1 STORY, *supra* note 13, at 218.

concern for victims of concealed material conditions, when in fact Kent and Pothier (Kent's misunderstanding of Pothier to the contrary notwithstanding) were quite close on the issue.

Story and Kent both felt that they had to confront Pothier for what may be termed academic reasons—Pothier was a major authority who had written on the subject. Pothier's Civil Law was not authoritative in England or America,[105] but could be ransacked for illustrations and supportive citations when convenient. Pothier did not inform Kent's and Story's consciences in a legal sense. Nevertheless the difference between Kent and Story on disclosure did implicate Pothier in an oblique way. Roman Law, turned away at the front entrance of English Common Law and equity, found the back door: Scotland.

Through the accidents of its own legal development, Scotland was always more receptive to Roman Law than her southern neighbor. In the late 17th century, James Dalrymple, Lord Stair, raised Scottish customary law to a new level of learning and authority by fusing it with currents of Continental natural law and Roman Law. A number of his countrymen were studying Roman law in the Netherlands, and brought back Roman-Dutch legal notions to Edinburgh and Glasgow. John Erskine and Henry Home, Lord Kames, Stair's successors as compilers and jurists, moved Scottish law away from dependence on Roman models, but continued to cite the learning of the Civilians.[106] As Roman Law became a subject of study in the preparation of lawyers at the universities, lecturers on moral philosophy infused their courses with Roman legal precepts. Scottish education brought law and morality together.[107]

IV. The Moral Philosophers And The Chancellors

Scottish law did not move south or across the Atlantic, but Roman Law concepts of commercial law permeated other areas of Scottish scholarship. In part this was unavoidable, given the extent to which the Scottish Enlightenment was tied to the rise of commerce. Our Scottish

105. Pothier had other, more devoted followers here. In particular, George Wythe, chancellor of Virginia, cited Pothier with approval on a number of occasions. See Bryson, *The Use of Roman Law in Virginia Courts*, 27 AM. J. OF LEGAL HIST. 135-143 (1984). Wythe cited Pothier in one contracts case to the effect that mistake made contracts void. See Field v. Harrison, Wythe's Virginia Reports 273, 289 (1794).

106. Stein, *Law and Society in Eighteenth-Century Scottish Thought* in PHILLIPSON AND MITCHISON, EDS., SCOTLAND IN THE AGE OF IMPROVEMENT 149-168 (1970); A. CHITNIS, THE SCOTTISH ENLIGHTENMENT: A SOCIAL HISTORY 75-90 (1976); ROSS, LORD KAMES AND THE SCOTLAND OF HIS DAY 21-23, 215-216 (1972). Kames insisted that "artifice" (Pothier's *dolus*), the intention to deceive, would bring relief in equity, for it violated "conscience." KAMES, PRINCIPLES OF EQUITY 65 (4th ed., 1800). Deceit, whether by implicit or explicit means, blinded the victim of fraud, a metaphor reflecting the sensate theory of morals already explored by Francis Hutcheson. *See infra* 76-77. Kames was not himself a slavish adherent of the Civilians' theory of *lesion*. Instead, he believed that fraud had to be proved rather than assumed from inequality of consideration. *Id.*, at 63-65.

107. See CHITNIS, *supra* note 106, at 124-194.

academic mentors were remarkably attuned to the language of commerce and in the main regarded commerce as a tool of progress.[108] Indeed, the academic environment that nurtured their careers and influenced their ideas was a beneficiary of Scotland's new commercial expansion in the middle of the 18th century. It was commerce that had turned Edinburgh from a medieval fortress to a modern city, revived the West of Scotland, making Glasgow a major shipping center, revitalized the universities at Edinburgh and Glasgow, and loosed an explosion of intellectual as well as economic activity.[109]

If Roman Law did not travel well across the Atlantic, the Civilians' notions of mutuality in promises and contracts insinuated itself into a branch of Scottish thinking, teaching, and writing that did travel widely and was very influential in America: moral philosophy. Americans read and absorbed the "common sense" realism of Scottish academic philosophers like Francis Hutcheson. Scholars have recognized the impact of the "common sense" school on our public law, particularly our constitutions.[110] They had an influence on our private law, particularly upon questions of commercial dealing, as well, and none more so than Francis Hutcheson.

Hutcheson was the intellectual godfather of the Scottish Enlightenment. An Irish born and educated teacher and moderate Calvinist much influenced by Third Earl of Shaftesbury and by Locke, Hutcheson held the chair of moral philosophy at Glasgow for almost two decades. Not original in many ways, Hutcheson had a gift for synthesis and simplification, graceful prose and optimism, all of which he combined in his lectures and later in his *A System of Moral Philosophy* (1755). We are concerned with his theory of the origins of the moral sense, of the uses of speech and signs (an early contribution to semiotics), and his application of these to contracts in book two of his *System*.

In a very real sense, everything in Hutcheson's moral philosophy was a prolegomena to his chapters on contract, for Hutcheson saw morals as ingrained in the fabric of human contacts. For him, morality was relational, it enabled people to live and work together.[111] Hutcheson argued

108. *See, e.g.*, ROBERTSON, THE PROGRESS OF SOCIETY IN EUROPE [1769] 29, 36, 63 (ed. Felix Gilbert, 1972). Note that Robertson praised Roman Law and found the "maxims of equity" a great facilitator in the extension of Roman concepts to many lands.

109. See D. DAICHES, P. JONES, AND J. JONES, EDS., A HOTBED OF GENIUS: THE SCOTTISH ENLIGHTENMENT, 1730-1790 (1986).

110. Howe, *Why the Scottish Enlightenment was Useful to the Framers of the American Constitution,* 31 COMP. STUD. IN SOC'Y. AND HIST. 572 (1989). See also G. WILLS, INVENTING AMERICA: THOMAS JEFFERSON'S DECLARATION OF INDEPENDENCE (1978) and G. WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981). Wills may have confused the influence of the early moral philosophers, particularly Hutcheson, with the later writers like Thomas Reid and James Beattie. Hutcheson was far more liberal and tolerationist in his religious views than Reid or Beattie, and far more sensualist in his psychology. Indeed, one may regard the latter two as critics of Hutcheson though they were in his debt.

111. On Hutcheson's role as the forerunner of the Scottish enlightenment, *see. e.g.*, G. BRYSON,

that we learned morals—they were sensate, like our passions. Thus our attachment to property was first and foremost a passion, not a reasoning faculty. We saw and heard and learned to love one another. We all had duties to each other; we were equal in nature, and owed honorable, conscientious concern. The signs we give each other, including promises that amounted to contract, that is, promises that both sides took as binding, possible, and well meant, had thus to be full and fair. We ought to hold no information back, except in war or in harmless diversions. To use signs and words unfairly in contract was thus to breach moral duties. Moral sensitivities were inseparable from law and legal duties. Unlike Story's argument that there might be no pre-existing moral relationship, no obligation, between parties to a contract, Hutcheson found them everywhere.[112] At the same time, Hutcheson recognized the claims of commerce. In a remarkable chapter on coinage, Hutcheson conceded that the value of things was based on individuals' desire for them and that unequal exchanges might represent merely different valuations. Again, the rules were not written in a heaven of forms, but in actual transactions. Value was relative. Mere inadequacy of price, Hutcheson suggested, was not proof of fraud—Story's point.[113]

Kent and Story were exposed to the Scottish moral philosophers—Kent at Yale and Story at Harvard. Neither man appears to be a devotee of the Scots, however, unlike Madison and Jefferson. The two chancellors, however, do cite the work of a moral philosopher who was greatly indebted to the Scots, William Paley. Paley was a popularizer of Hutcheson's philosophy and perhaps the most often read moral teacher of his day.[114] More important for Kent and Story, Paley devoted nine chapters of his *Moral and Political Philosophy* (1785) to contract. For this as much as for his lucid and optimistic moral utilitarianism, Paley was admired by English jurists.[115] Kent cited Paley to the effect that concealment was a moral wrong[116] and Story repeated Paley's logic that because the intent of the party who conceals a defect is the same as the intent of a party who misrepresents his goods, both share in moral obloquy.[117] Both men read Paley as firmly in the Roman Law tradition. That, too, was fair. Though an Englishman who taught at Carlisle, Paley borrowed much from the Scots, particularly from the moral utilitarianism of Hutcheson. Indeed, on early national library shelves the two philosophers were not

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MAN AND SOCIETY: THE SCOTTISH INQUIRY OF THE EIGHTEENTH CENTURY 8 (1968); CAMIC, EXPERIENCE AND ENLIGHTENMENT, SOCIALIZATION FOR CULTURAL CHANGE IN EIGHTEENTH-CENTURY SCOTLAND 38 (1983); CHITNIS, *supra* note 106, at 59.

112. 2 F. HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 3-16, 64-77 (1755).

113. *Id.*, at 53-63.

114. D. MEYER, THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC 7-9 (1976).

115. BAKER, *supra* note 53, at 293.

116. 2 KENT, *supra* note 6, at 379.

117. 1 STORY, *supra* note 13, at 214, n.2

only close neighbors, but often the only moral philosophers the librarians thought necessary.[118]

There is a palpable affinity among Paley and the two chancellors. In the very next paragraph of his *Moral and Political Philosophy* from which Kent and Story quoted, Paley noted that "the faults of many things are of a nature not to be known by any, but by the persons who have used them; so that the buyer has no security from imposition, but in the ingenuousness and integrity of the seller."[119] The underlying rule was based on expectation: "Whatever is expected by one side, and known to be so expected by the other, is to be deemed a part or condition of the contract."[120] Market prices were perfectly legitimate measures of individual valuation; one could charge, or pay, what one pleased. The customs of merchants regulated disputed cases, for merchants might well place different values upon the same thing, according to their anticipation of what they would do with it.

Most of these views were in accord with Kent's and Story's; the only major difference lay in that intractable question of concealment. In Paley, unlike the English jurists or Pothier, however, we get the hint of a bifurcation of doctrine. Paley was trying to straddle Roman law conceptions of innate fairness and market commitments to the flow of trade based on the customs of merchants. His bridge across the two was a theory of moral knowing. Individuals have a moral duty to exercise their faculty of judgment. An example is their duty to examine the reasonability of a bargain. If one conceals a defect to make such an examination by another impossible, one is blameworthy. But one is also blameworthy in having negligently failed to examine a bargain that one could have examined, despite the failure of another to disclose known defects. The source of both conclusions is the same duty—the duty to exercise moral sense. When our own ability to see ought to have been sufficient to discern quality and asking price, and we do not exercise it, the fault is upon our own heads. This is not a market conception of value, but a prior, underlying theory of moral perception.[121]

In Hutcheson and Paley one finds two lines of thought about concealment in contracts. The first line of thought is moral, reflecting the Civil Law ideal of full disclosure and fair exchange. The second is commercial, limiting the Civilians' tenets to cases where one party lacked capacity, was duped, or otherwise harmed by deliberate action by the other party.

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118. *See, e.g.*, the holdings of the Concord, Massachusetts Charitable Library Society traced in Gross, *Reconstructing Early American Libraries: Concord, Massachusetts, 1790-1850*, 97 PROCEEDINGS OF AM. ANTIQUARIAN SOC'Y. 353 (1988).

119. W. PALEY, *Moral and Political Philosophy*, in WORKS OF WILLIAM PALEY 91 (ed. Wayland, 1937).

120. *Id.*, at 90.

121. *Id.*, at 91-94.

Hutcheson and Paley tried to bridge this gap. Kent and Story found themselves on different sides of it.

Fortunately, the two chancellors also received from Hutcheson and Paley reassurance that morals were known through the understanding of ordinary men. Chancellors could consult their faculty of "conscience" and determine the right and the wrong, for every human being had such an understanding—every party to a contract had it—except in cases of individual impairment. People were not inherently sinful, they had innate senses of decency and honor, and when they violated these humane traits, their actions betrayed them to the senses (by which Hutcheson and Paley literally meant the eyes and ears) of the chancellor.[122]

Hutcheson and Paley told Kent and Story that the chancellor had a direct line into the heart and mind of the party who stood before him. Kent admitted as much in 1828; he recalled that when sitting in equity he listened to both sides' factual claims and "I saw where justice lay and *the moral sense* [italics added] decided the cause half the time, and I then sat down to search the authorities until I had exhausted my books . . . ."[123] In effect, Paley had empowered the chancellor to spy out the deceits that Barnum had celebrated, and Kent followed this course. Story was more committed to the "blackletter" rules of law than Kent, but Story's son recalled of his father that his

> devotion to equity . . . created a balance against any such propensity . . . to a bigoted conservatism. . . . His sympathies and tendencies were toward reform. He never considered or administered the law as a fixed and absolute system, incapable of expansion and modification, but as a flexible mould, susceptible of adaptation to the needs of society and the requirements of justice . . . [124]

Both Hutcheson and Paley were moral utilitarians; they assumed that natural moral good sense would lead people to find happiness, and further assumed that this happiness would produce a good society. Kent and Story seem to have followed this general theory in their own belief systems.[125] Neither man was a philosopher but a philosophy so filled with legal sense and so concerned with contractual relationships could hardly fail to spark their interest. Hutcheson and Paley had in any case freed the chancellor's conscience to seek whatever evidences of cupidity which the chancellor perceived to be unjust. In what is surely too rough an analogy, one may say that the moral philosophy saw the relationship between perceiving the good and acting in moral fashion in the same way

122. 1 HUTCHESON, *supra* note 112, at 15-37.

123. Kent to Thomas Washington, October 6, 1828, quoted in Raack, *'To Preserve the Best Fruits': The Legal Thought of Chancellor James Kent,* 33 AM. J. OF LEGAL HIST. 344 (1989).

124. 2 J. STORY, LIFE AND LETTERS OF JOSEPH STORY 582 (1851).

125. HORTON, *supra* note 4, at 115; NEWMYER, *supra* note 4, at 26 and after.

that the conscience of the court saw the relation between evidence and culpability.

We have uncovered the reason why Kent and Story could disagree about concealment in theory and yet act the same way when they heard cases; they could assert the untrammeled authority of conscience while claiming to restrain equity. We should be able to find a similar reliance upon moral faculties in the work of their contemporaries, and we do. Crediting the influence of moral philosophy on contract theory in this era finally enables us to understand the Quixotic arguments of Gulian Verplanck.

Verplanck began with a theory of moral knowing, not with the law itself:

> Let us lay aside the volumes of reporters and civilians, and endeavor without their further help, to deduce for ourselves, from the nature and reasons of things, and our own intuitive views of right morals, the safe and sound principles upon which the true equity of contracts must universally rest.[126]

No theory was useful that was "diametrically opposite to the moral judgments we every hour silently pass on the fairness of men's dealings with each other."[127] Instead, realism in morals rested upon a theory of knowledge—precisely the point that Hutcheson and Paley made. How do we know when the sharp dealer becomes the dishonest dealer, Verplanck asked. "Seek it in some of the plainer truths of political economy" he answered.[128] A frank avowal that the role of the market made rules for knowing, rules that merchants knew from their experience in the market.

From this moral theory, Verplanck moved to the world of actual trade: "all contracts in the way of trade, all purchases of things bought to sell again, are expressly and avowedly made with a view to profit."[129] Such was Verplanck's own experience in the Panic of 1819. There was no way that a court could impose its own conscience upon the business sense of Americans. Price depended solely upon the agreement of the parties. The line between fraud and good business acumen must be drawn on a theory of knowledge:

> It is unjust to take advantage from the suppression of any fact, relating to the object of the contract, such as if known would affect the value of the object in the estimation of any reasonable person, having the same intention as to its use; however he might differ from the actual party in information, in external circumstances.[130]

126. VERPLANCK, *supra* note 61, at 105.
127. *Id.*, at 90.
128. *Id.*, at 100.
129. *Id.*, at 115.
130. *Id.*, at 127.

But (and this is the crucial qualification):

> there is nothing dishonest, or unfair, in using superior sagacity as to probabilities, or in applying greater skill and better knowledge, as to those facts which do not necessarily enter into the common calculations of those who fix the current price, and concerning which no confidence, express or implied, is reposed.[131]

Exceptions might be made in degree for large-scale retail transactions between merchants, but not in ordinary purchases by non-merchants. Thus the rule against misrepresentation was set in a philosophical context: knowing led to moral obligations. Verplanck's conclusion, "that inadequacy in price may afford strong presumptive evidence to an arbitrator or a judge, of some error or fraud in the substance of the contract . . . every trick, artifice, or manuever, calculated to excite false expectations, or to mislead one party for the benefit of the other" was fraud can now be seen to turn on the key idea of "expectation" a matter of perception, not category or innate moral quality.[132]

V. CONCLUSION

One of the great discoveries of modern jurisprudence is that law is not morality.[133] Modern scholars and jurists have learned this lesson too well. True, behind changes in the law of contract in the antebellum era, as with most law in most eras, was an infinitude of individual interests and practical concerns. There is no great moral plan in the development of legal doctrines. Nevertheless, the brief quarrel between Kent and Story over concealment of material defects in sales contracts reminds us that behind judicial discretion lay an entire theory of moral knowing.

Kent and Story were typical of their age, an epoch of moral certitudes, but their need to base discretion upon a theory of moral knowing was inherent in the judging process. As Roscoe Pound, the greatest American exponent of a "progressive pragmatism"[134] argued:

> In general law cannot depart far from ethical custom nor lag far behind it. For law does not enforce itself. Its machinery must be set in motion and kept in motion and guided in its motion by individual human beings; and there must be something more than the abstract content of the legal precept to move these human beings to act and to direct their action.[135]

Owen Fiss's recent essay on "The Law Regained" reiterates the essence

131. *Id.*, at 145-146

132. On Verplanck's status, see Simpson, *supra* note 29, at 596-597. VERPLANCK, supra note 61, at 116-117.

133. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

134. See Hull, *Some Realism about the Llewellyn-Pound Exchange Over Realism*, WIS. L. REV. 921 (1987).

135. R. POUND, LAW AND MORALS 122 (1924).

of Pound's perception of an ethos of discretion: Judges . . . have no authority other than to decide what is just, and they obtain the right to do so from the procedural norms that surround their office and limit their power."[136]

Our own moral theory is more complex than that of Hutcheson or Paley, Kent or Story, and after so many brutalities in our own century, all wrapped in the language of moral superiority, it is not so easy to speak of conscience. If the modern federal judge is a chancellor, and modern critics of the Rules discover in this the same dangers that the Anti-federalists decried,[137] Kent and Story tell us that the discretion of the chancellor is constrained by a theory of moral knowing. Indeed, if the hearts and minds of those who come before our courts are opaque to the judge, if mountains of depositions cease to be evidence of human desires and plans and become mere formalities in a war of formalities, there is no safety for the litigant or the courts.

Fortunately modern judges do not believe their work to be a formal application of self-selecting rules. As Judge Robert Keeton wisely reminds consumers of law:

> Judges are professional decision makers, committed to representing community interests and the community's value system. That value system is in part expressed in authoritative sources [but] . . . . The authoritative sources do not answer all questions a judge may need to answer to decide a particular dispute, however, and the judge is thus required to make a choice, even though a reasoned choice, that is invariably value laden.[138]

If jurisprudents and jurists, litigants and litigators want the decisions of judges to have "reasonable regularity,"[139] that regularity would be suspect indeed if it flouted the values of the community in which the judge sits. Shared moral aspiration—shared conscience—empowers and legitimates the judge's vision today as it did in Kent and Story's lifetimes.

136. Fiss, *The Law Regained,* 74 CORNELL L. REV. 245, 249 (1989).

137. *See, e.g.,* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. OF PENN. L. REV. 909 (1987), MCDOWELL, EQUITY AND THE CONSTITUTION (1982), Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 CHICAGO L. REV. 494 (1986), and GRAGLIA, DISASTER BY DECREE (1976). See also Kaplan, *A Toast [to the Federal Rules],* 137 PA. L. REV. 1879, 1881 (1989) (critics of the Federal Rules want more precision in planning, pleading, and managing cases). Kaplan, a defender of the rules, does not deny the need for periodic modification.

138. KEETON, JUDGING 112 (1990).

139. LLEWELLYN, *supra* note 58, at 217 ("The Law of Lawful Discretion").