

# THE FIVE JUSTICES OF CONTRACT LAW

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The pursuit of justice is a large part of the law of contracts, but in recent years most of the discussion about contract law has emphasized other values, such as freedom or economic efficiency. “Justice”—as used, for example, in the Restatement (Second) of Contracts—has become a flabby word denoting unexamined intuitions or random contingencies. This article tries to restore justice to its proper place in contract law by providing an analytic framework for discussing its role. It sets out five principles of justice embedded in contract law: (1) Justice as the equal exchange; (2) Justice as the honest wager; (3) Justice as the term that fits; (4) Justice as the deserved return; and (5) Justice as the advantage not to be taken. Each of these “Justices” responds to a distinct social sense of justice, and each helps explain a considerable swath of the actual law of contracts. But they are not always mutually consistent, so together they define a realm of debate rather than of demonstrable outcomes. The concluding section of the article looks at the mechanisms by which that debate works to produce results, and how it fits together with other forces also shaping the law.

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## INTRODUCTION

How does the law of contracts handle the question: “Is the deal fair?”

Here’s the usual story: To be enforceable, ordinarily a contract must be supported by a consideration. But once there is a consideration, in the words of Williston and a great many cases, “the law will not enter into an inquiry as to the adequacy of the consideration.”<sup>1</sup> In other words—except for what is seen as a fitful and unprincipled appearance of the doctrine of unconscionability—the law does not care about the

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1. 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 115, at 239 (1920); *accord* 3 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 7.21, at 456 (Richard A. Lord ed., 4th ed. 2008).

transactional justice, the “who gets what,” of the exchanges it is willing to enforce.

Is this story true? In my view, the proposition is vastly overstated. In fact, the law—both the judge-made law and the statutory law—cares a lot—not exclusively, but a lot—about the justice of exchanges, and this attention affects both the statement of rules and the decision of individual cases. And I mean justice in its core transactional sense as regards trades and deals: Does what is given stand in a just relationship to what is gotten?<sup>2</sup>

Recognizing this realm of debate is important to understanding the law of contracts. When we ignore it, as much modern scholarship does,<sup>3</sup> we try to explain or justify this body of law entirely in terms of standards of freedom, or of efficiency, or of social practice and social trust. Those matter, too. But contract law is—like most general bodies of law—a complex cultural phenomenon, not to be rationalized along a single dimension. Freedom, efficiency, practice, and trust matter—but so does the impulse to justice.

Justice ought to count because the decision to enforce a contract is a decision to bring the positive force of the state to bear. Those who make such decisions rightly want to think they are acting justly when they act.<sup>4</sup> But more fundamentally, justice ought to count because, in a

2. Justice in this who-gets-what sense is usually considered to be conceptually distinct from other values. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 106 (1982) (“Of any contractual agreement, however free, it is always intelligible and often reasonable to ask the further question, ‘But is it *fair*, what they have agreed to?’”). It should be noted, however, that many normative theories interweave freedom, welfare, and justice so that they end up being defined at least in part by one another. *E.g.*, JOHN RAWLS, A THEORY OF JUSTICE 60 (1971) (the first principle of justice is: “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”). Utilitarianism is the limiting case, making justice and welfare maximization into identities. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 3 (Wilfrid Harrison ed., 1967) (the “fundamental axiom” is: “it is the greatest happiness of the greatest number that is the measure of right and wrong”). In its heart, utilitarianism has no real distributive principle, but rather is purely summative. The dictum that Mill attributes to Bentham, “everybody to count for one, nobody for more than one” is simply not treated as other than an accounting statement, as Mill’s own discussion shows. JOHN STUART MILL, *Utilitarianism*, in ON LIBERTY AND OTHER ESSAYS 131, 199 n.1 (John Gray ed., 1991). The other possible utilitarian distributive principle, that the declining marginal utility of resources to individuals may make equality more efficient, is purely contingent. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 28 (2002).

3. As Eyal Zamir concludes after his review of three recent books about contract law by noted American contracts scholars of quite different persuasions: “all three books repeatedly refer to traditional economic analyses of contract law” but do not “discuss distributive justice in any meaningful way.” Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2118 (2014).

4. *See* Seana Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 229 (2000) (in unconscionability cases, “a

market society, making, living within, and enforcing contracts are core ways in which we relate to our society—on a par with (indeed as a practical matter more obligatory than) voting, raising a family, and living within a religion.<sup>5</sup> We are employees and consumers, buyers and sellers, just as we are citizens, parents, and adherents. The aspiration to live in a just society—given a market society such as ours—must include the aspiration that the law of contracts should seek justice.<sup>6</sup>

The evidence that justice does in fact count is there, if we look for it. True, the Restatement (Second) of Contracts starts by embracing the orthodoxy: if something has been exchanged for the promise to be enforced, “there is no additional requirement of . . . equivalence in the values exchanged; or . . . ‘mutuality of obligation.’”<sup>7</sup> As the commentary explains: “To the extent that the apportionment of productive energy and product in the economy are left to private action, the parties to transactions are free to fix their own valuations.”<sup>8</sup> But the law of duress, as also set forth in the Restatement, provides for voiding that transaction if it is the result of an “improper threat” leaving the victim “no reasonable alternative.”<sup>9</sup> A “threat”—which under the Restatement includes the threat not to make a deal—“is improper if the resulting exchange is not on fair terms, and . . . what is threatened is otherwise a use of power for illegitimate ends.”<sup>10</sup> Thus, behind the claim that consideration leaves parties “free to fix their own valuations” there seems to be a substantial legal structure dependent on what exchanges are considered “not on fair terms” and what threats are considered to be “for illegitimate ends.”

More broadly, among other matters, the Restatement makes a judicial assessment as to whether the terms of a deal are fair, adequate, or balanced relevant to the enforceability of an open offer as an option;<sup>11</sup> the enforceability of a modification;<sup>12</sup> relief for unilateral<sup>13</sup> or mutual mistake;<sup>14</sup> relief from failure to perform an apparent condition;<sup>15</sup>

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dominant concern of judges is self-regarding: it is to avoid facilitating the actions of an exploiter”).

5. Thus, “[T]he same right . . . to make and enforce contracts . . . as is enjoyed by white citizens” was the first civil right named in the first Civil Rights Act, passed just after the Civil War. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

6. See generally E. Voyiakis, *Contract Law and Reasons of Social Justice*, 25 CANADIAN J. L. & JURIS. 393 (2012).

7. RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. LAW INST. 1981).

8. *Id.* § 78 cmt. c.

9. *Id.* § 175.

10. *Id.* § 176(2).

11. *Id.* § 87.

12. *Id.* § 89.

13. *Id.* § 153.

14. *Id.* §§ 152, 152 cmt. c.

the application of the foreseeability limitation on damages;<sup>16</sup> and the availability of specific performance as a remedy<sup>17</sup>—not to mention the role that that assessment plays in the portmanteau concept of unenforceability because of unconscionability.<sup>18</sup> On top of all this, there are the two categories of cases that, as the Restatement understands the matter, are part of the common law of contracts but do not fall within the “consideration” rubric at all: the Section 86 “Promise for Benefit [Previously] Received”<sup>19</sup> and the Section 90 “Promise Reasonably Inducing Action or Forbearance.”<sup>20</sup> Both are to be enforced “if injustice can be avoided only by enforcement.”<sup>21</sup> Presumably the substantive fairness of the underlying situation (by definition not an exchange of considerations) is part of determining whether injustice would otherwise result.

But we need not stop with the Restatement. As we shall see, conceptions of justice pervade other common law doctrines, too—such as the boundaries of fraud, or the right to expectation damages. Beyond that, the judges’ sense of what is just is an important part of the law of interpreting contracts, perhaps not doctrinally formulated but yet a crucial part of the law of contracts. Yet further, a social sense of justice plays an obvious role in some of the statutory modifications of the doctrines of the case law; if we are going to be realistic about the law of contracts at the present time, statutes establishing minimum wages, for example, are as much a part of the law of contracts as is the traditionally considered Statute of Frauds.<sup>22</sup>

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15. *Id.* § 229.

16. *Id.* § 351.

17. *Id.* § 364.

18. *Id.* § 208.

19. *Id.* § 86.

20. *Id.* § 90.

21. *Id.*

22. First passed in 1677: An Act for prevention of Frauds and Perjuries, 29 Car. 2 c. 3 (1677). Which statutes should be considered part of contract law, and which are simply part of a special subject, or perhaps part of “regulation” as an entirely different field, is a big question. It has a theoretical component—is there any principled difference between “private” and “public” law?; an institutional component—does it matter if courts are the chief players or not?; and a cultural component—what does the legal sub-culture treat as the boundaries of the concept of “contract?” It seems to me that on any of these views, contract law cannot be restricted solely to the common law. At least statutes enforceable by ordinary plaintiffs through ordinary lawsuits in ordinary courts, and not controlled by administrative agencies, have to be part of the subject. As carried out, such statutes become part of a conglomerate of judge-made and judge-interpreted law, and changes in the law may be registered by one means or the other. Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1579 (2006). Many of the points made in this essay may be applicable to other bodies of law

We commonly underestimate the weight of all these examples because we approach the matter with analytical blinders. We presume that if the law paid attention to the fairness of exchanges, the only possible standard of justice would be equality.<sup>23</sup> Since the law does not routinely require equality, therefore, it must not care about the fairness of exchanges as a general matter. This syllogism breaks down once we see—as we shall—that there are several possible standards of justice for exchanges, not all pointing towards equality. To determine the fairness of an exchange is to enter a realm of debate among these principles, not to apply a simple rule.

At least a large part of the academic literature is also blinded by presuming that contract law, as “private” law, ought to concern itself only with commutative principles. (Aristotle, the origin here, distinguished between rectifying transactions person to person—commutative justice—and the division among all members of society of the wealth or honor of the society—distributive justice.<sup>24</sup>) This restriction has been felt by a great many modern writers of varying stripes,<sup>25</sup> but at least as to the law of contracts in our society, it is misplaced. If one were considering a society where wealth was distributed on a principle separate from the cumulative outcome of individual deals—where, for example, land was the basis of wealth and land was distributed according to martial prowess—the distinction could be made. But we live in a market society, where to survive one has to participate in the market over and over and where the basic distribution of wealth takes place through the very mechanism of the deal.<sup>26</sup> In that

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that implicate both private agreement and administered statutes, but I do not claim to have worked out the analysis.

23. *E.g.*, Aditi Bagchi, *Distributive Justice and Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 194 (Gregory Klass et al. eds., Oxford Univ. Press 2014) (“Without attempting to settle on a single conception here, I take distributive justice to constrain our choice of social institutions in favor of ones that distribute material resources more equally than other social interests, such as efficiency, might dictate standing alone.”). As Elizabeth Anderson, a self-declared egalitarian, says, in regard to the proposition that “all and only deviations from equality need to be justified,” “I do not believe that we should start theorizing from such a controversial assumption.” Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks*, 9 THEORETICAL INQ. L. 239, 260 (2008).

24. Aristotle’s conception is nicely set out in James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1588–90 (1981).

25. *E.g.*, *id.* at 1615–16. *See also* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 56–57 (when moving from corrective to distributive justice, “the justification for legal relief loses its self-evident quality”).

26. This may make contract law different from other common law subjects. Ernest Weinrib attempts to recreate a strong distinction between private and public law, with in turn a strong distinction between corrective and distributive justice. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (Oxford Univ. Press rev. ed. 2012). His strongest

society, the rules determining the commutative justice of contracts will inherently have systematic distributive consequences to be taken into account. And what will be considered a just distribution will be understood to depend partly on the legitimacy of the commutative rules on which it is based. The distinction between commutative and distributive justice loses its analytical force.<sup>27</sup>

The Restatement offers no help in showing us how we should open our eyes. As we have discussed, it recognizes the need to make judgments of justice, but then talks of them in the blandest of ways. For example, a relied-upon promise, in the famous Section 90, “is binding if injustice can be avoided only by enforcement of the promise.”<sup>28</sup> But

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point, in my view, is that to justify a legal verdict we need to justify not only that the defendant ought to pay, but also that he ought to pay this particular plaintiff. But whatever this might mean for the law of torts, the principal subject of his book, it seems to me to have much less consequence for the law of contracts where, in all normal circumstances, this plaintiff and this defendant chose to deal specifically with each other when they made their original bargain.

27. In fairness, I should note some of the disagreement with my stance. It seems to me that both Robert Nozick and John Rawls—often viewed as having diametrically opposed philosophical views of justice—would have disagreed with the mixed view I am advocating. Nozick would have objected to the idea that the end result of the practice of contracting had anything to say about its justice, which in his view depended only on whether each transfer was just. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 151–55 (1974). Rawls (at least as usually read) would have considered the law of contracts not to be part of the basic structure of society subject to his principles of justice; justice entered as a matter of compensating for the results of the system of contracts rather than as a basis for constructing it. For discussion, see Kevin Kordana & David Tabachnick, *Rawls and Contract Law*, 73 *GEO. WASH. L. REV.* 598 (2005) (arguing that this reading of Rawls, although the more common one, does not make sense).

There is also a substantial legal literature discussing whether distributive justice should be left to the social tax-and-transfer system rather than being addressed by the law of contracts. Compare, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 *J. OF LEGAL STUD.* 667 (1994) (leave it to tax), with, e.g., Anthony Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980) (sometimes use contract law). For a recent technical critique of the Kaplow/Shavell thesis, to the effect that what will be efficient is a more complex question, see Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 *YALE L.J.* 2478 (2014). In my view, however, much more than technical efficiency is at stake. There is an understood cultural difference between the distribution created by a just set of market rules and the distribution created by a non-just set of market rules rectified by taxes and social transfers. Even if the tax system could create the same social distribution more efficiently or more reliably, point by point justice is important too. “Accept the unfair deal now, society will make it up to you elsewhere” doesn’t quite do as a statement of justice. There is also a political difference—the difference between “earned” and “redistributed”—which makes one wonder whether the political will to accomplish “redistribution” will be there.

28. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981). This problem is discussed further, see *infra* pp. 775–77.

we are offered no doctrinal specification of what “injustice” is. It is an undifferentiated placeholder left, as far as we know, to the judge’s intuition. Far from being an invitation to be thoughtful and active in the delineation of justice, it is an invitation to focus instead on something else.

If we are going to treat justice properly as part of the law of contracts, we need to do better than that. We need to identify particular elements of justice that will give us an analytical purchase that will help us do the work of being thoughtful in the pursuit of justice. These elements need to be, on the one hand, anchored in our broad social understandings of justice, and, on the other hand, allow us to see what is at stake in specific situations. And they need to address, not “justice” in all its myriad possible meanings, but justice in the transactional sense relevant to the law of contracts, the “is the deal fair?” sense.

My proposition is that there are five such principles. Contract law responds to:

1. Justice as the equal exchange;
2. Justice as the honest wager;
3. Justice as the term that fits;
4. Justice as the deserved return; and
5. Justice as the advantage not to be taken.

As I will try to show, each of these principles is grounded in our understanding of justice. Each states a disciplined way in which specific arguments of justice, as regards the law of contracts, can be framed and evaluated; they are not just a matter of the length of the Chancellor’s foot.<sup>29</sup> Each of them plays a substantial role in the law of contracts as we know it. And while this is an essay, not a treatise, I hope to discuss enough examples to show that, considered together, these principles create a landscape of debate and evaluation applicable to contract law as a whole.<sup>30</sup>

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29. For the history of this phrase, see H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, 50 L. & CONTEMP. PROBS. 7, 27 (1993).

30. I do not claim to have established a theorem that would prove that these five principles are the only possible ones. Of conceivable candidates, they seem to me to be most present in the law and most attuned to transactional justice. If there are more, that would only support my basic thesis that justice is present in contract law and that we can usefully break “justice” down to more specific, analytical parts. A close candidate, most strikingly present in anti-discrimination statutes but with common law reverberations, would be “justice as equal access to the institution of contract.” But that seems to me to have less impact on evaluating the substance of the deal (rather than whether there can be a deal at all) than the five I name.

## I. PRINCIPLE #1: JUSTICE AS THE EQUAL EXCHANGE

The most straightforward principle of contractual justice is this: in a just contract, equal values are exchanged; an exchange of unequal values is unjust. The claim has an obvious intuitive appeal. In the words of Professor James Gordley, an advocate of this principle, “performances exchanged ought to be equal in value so that neither party is enriched at the other’s expense.”<sup>31</sup>

The claim that exchanges should be equal can be made in a strong form—for a contract to be enforceable, there should be equivalents on both sides of the transaction—or in a weak form—contracts in which there is a very substantial disparity in what is exchanged should not be enforced. It is the weak form of the argument that is much more tenable, and much more a part of the actual law. To see why that is so, let us investigate the strong form first.

To determine whether values that are exchanged are equal, we need a standard of value. One possibility, following Thomas Hobbes, is to say that “[t]he value of all things contracted for, is measured by the appetite of the contractors;” but this has the consequence, as Hobbes pointed out, that “therefore the just value, is that which they be contented to give.”<sup>32</sup> This standard is no independent standard of value, but only of consent.

The only alternative to the parties’ idiosyncratic values in a market society, the only plausibly objective standard of value by which to judge what is exchanged, is market value. In practice, however, this standard is not as satisfactory as it might seem. To begin, whether market values should have normative force in relation to a particular contract struck at a different price—since they are nothing other than the accumulation of the values agreed to by other parties in other contracts—might be questioned. But even if the judgment of many buyers and sellers is regarded as the better judgment as to what is fair,<sup>33</sup> a great many contract terms do not have readily available market prices. There are markets in goods, services, and labor, taken by themselves, but are there markets in the oft-accompanying terms such as compulsory arbitration terms, or force majeure clauses, or right of return clauses, or choice of law clauses, or covenants not to compete? Probably not; hypothetical prices for these terms could be ascertained, if at all, only by employing huge data bases and extraordinary statistical manipulations. Finally, except in very highly organized and transparent

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31. Gordley, *supra* note 24, at 1655.

32. THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL* 98 (Michael Oakeshott ed., 1960) (1651).

33. This is Gordley’s answer. Gordley, *supra* note 24, at 1612.

markets, what we take as “the” market price is just a statistical rendition of what is in fact a dispersion of prices which may range closely or widely; and even in very organized markets, this dispersion exists over time, often over a very short period of time. If we take any one of these values (perhaps the median or the mean) as “the” just price, and demand that contracts be made at that price from here on, we prevent the market from adjusting to new information, the very thing markets do best and most usefully.

There is a more fundamental objection as well. Behind the claim that “performances exchanged ought to be equal in value so that neither party is enriched at the other’s expense,”<sup>34</sup> lies a conception of deals as zero-sum transactions: if someone gets more than he gives—is “enriched” by the transaction—he is taking it from the other party. But surely many contracts—perhaps most contracts—on some conceptions of the matter, all contracts—produce a gain from trade, whereby the parties together get results worth more, in their circumstances, than the value of what they give.<sup>35</sup> If we measure that surplus the way negotiation theorists have taught us to do, by comparing the deal made to each side’s best alternative to that deal,<sup>36</sup> it may be substantial. There is no good economic theory as to how this surplus is, over the generality of situations, in fact split—it is a matter of the vagaries of bargaining. And there is no *a priori* reason for saying that the profit should be split 50/50; it is true that both parties equally say “yes,” but beyond the formal assent, contributions to making the deal valuable may well be strikingly different, perhaps incommensurable. But only if we assume that 50/50 is the presumptively right result, can we say that, even though both sides end up better off than if they had no deal, one party’s getting more than the other represents enrichment “at the other’s expense.”<sup>37</sup>

Equality in exchange, taken very seriously, is thus hard to accept. But in its weaker form, as the principle that the law should not enforce contracts that are very unbalanced, its claim is much stronger. From the point of view of the workings of the marketplace, refusing to countenance deals toward the tails of a market dispersion will not prevent gradual recalibration of the market to account for new

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34. *Id.* at 1655.

35. Gordley recognizes this point, but says it can be ignored because it raises only a distributive justice issue, by hypothesis excluded from his analysis. *Id.* at 1615–16.

36. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 100 (Bruce Patton ed., Penguin Books 2d ed. 1991) (a party’s BATNA—Best Alternative to a Negotiated Agreement—“is the standard against which any proposed agreement should be measured”).

37. Gordley, *supra* note 24, at 1655.

developments.<sup>38</sup> From the point of view of distributing the profit from the transaction, the further away from balance the deal is, the more likely it is that one party is engrossing all the profit, and perhaps even enriching itself at the cost of putting a loss on the other party. Problems in assessing the “value” of terms that do not have direct market prices will, it is true, remain, more or less pressing depending on the particular context. But overall the principle in this weaker form has much greater appeal.

And so it has seemed to the judges. Indeed, the point is emblazoned in the usual formulation of the principle as the doctrine of “unconscionability.” Whether a large disparity—most obviously, excessive price in a consumer transaction—can, by itself, invalidate a bargain, is a matter of dispute in the case law. Some cases say yes;<sup>39</sup> the majority say no, and require some defect in the bargaining process as well as the excessive outcome;<sup>40</sup> but of that majority, some say that there is a sliding scale such that the degree of procedural fault needed to make a deal unenforceable depends on how great the substantive unfairness is.<sup>41</sup> What seems clear is that on any of these views disparity matters, but that the degree of disparity needed to show unconscionability is substantial. Consider, for example, what is probably the leading case on the doctrine of unconscionability, *Williams v. Walker-Thomas Furniture Co.*<sup>42</sup> Famously, Judge Wright declares that unconscionability is not simply a feature of the Uniform Commercial Code but rather part of the common law of contracts; he then stipulates that a finding of unconscionability should be based on both an “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>43</sup> What constitutes an “absence of meaningful choice” depends on our understanding of duress, which we will consider later on.<sup>44</sup> For now, we can observe that, on this formulation, what makes a

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38. This point is made with regard to social programs as a whole in Anderson, *supra* note 23, at 261–62 (2008) (“range constraining rules” do not destroy the Hayekian virtues of the market; “signal range can be substantially compressed without degrading signal quality”).

39. *E.g.*, *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) (“\$6,500 price of a water heater for a modest residence, payable at 19.5 percent interest, for a total time-payment price of \$14,860.43.”); *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 888 (N.H. 1973) (alternate holding) (consumers “paying \$1,609 for goods and services valued at far less”).

40. JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE § 5.15, at 446–49 (6th ed. 2012).

41. *E.g.*, *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015).

42. 350 F.2d 445 (D.C. Cir. 1965).

43. *Id.* at 449.

44. *See infra* pp. 784–88.

contract fatally unbalanced are terms “unreasonably favorable” for one party, or, as Judge Wright later phrases the point, “so unfair” to the other party.<sup>45</sup> The distinction between “favorable” and “unreasonably favorable,” between “unfair” and “so unfair,” is the difference between deviating a bit from equality as the market would understand it and being nearer the extreme. Or, as the Supreme Court of Kentucky put it not long ago, there is a difference between unconscionability and “a simple old-fashioned bad bargain.”<sup>46</sup>

This approach—that is, caring about equality but putting the question in terms of “so unfair” or “so unequal”—appears with regard to other doctrines as well. For example, the Restatement (Second) reframes the law of contractual modification from being a question of the presence or absence of a pre-existing legal duty<sup>47</sup> to being a question of whether “the modification is fair and equitable in view of circumstances not anticipated by the parties.”<sup>48</sup> *Angel v. Murray*,<sup>49</sup> a leading case on the meaning of this language, concerned a contract to collect all the trash in the City of Newport, R.I.; when more new houses than anticipated were built, so that more trash than expected was generated, the City agreed to pay more; and that modification was then challenged in court.<sup>50</sup> Having determined that the modification was not made under a threat, and that the number of new houses, 400, was indeed extraordinary for this community, the court upheld the modification saying:

[A]lthough the evidence does not indicate what proportion of the total this increase [of trash] comprised, the evidence does indicate that it was a ‘substantial’ increase. In light of this, we cannot say that the council’s agreement to pay Maher the \$10,000 increase was not fair and equitable in the circumstances.<sup>51</sup>

The Restatement’s requirement that the modification be fair is treated by the court as a requirement that the judges not be able to say that it was clearly unfair.

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45. *Williams*, 350 F.2d at 449–50.

46. *Schnuerle v. Insight Commc’ns Co.*, 376 S.W.3d 561, 575 (Ky. 2012).

47. RESTATEMENT (FIRST) OF CONTRACTS § 76 (AM. LAW INST. 1932).

48. RESTATEMENT (SECOND) OF CONTRACTS § 89A (AM. LAW INST. 1981). The Restatement (Second) followed the UCC’s lead in this regard. See U.C.C. § 2-209 cmt. 2 (AM. LAW INST. 2014).

49. 322 A.2d 630 (R.I. 1974).

50. *Id.* at 632. The lawsuit was apparently brought by disgruntled taxpayers, given standing under state procedure. *Id.*

51. *Id.* at 637–38.

Understood in this somewhat more relaxed fashion, making a direct comparison of the value of what was given to what was received has not been restricted to doctrines, such as unconscionability or modification, that call enforceability of the contract into question. The same core idea has also been used as a principle for understanding otherwise unobjectionable contractual language: when faced with ambiguous language or a contractual gap, construe the contract so that it is not unjust in the sense of being very unequal. The best known modern case exemplifying this line of reasoning is Judge Friendly's opinion in *Frigalment Importing Co. v. B.N.S. International Sales Corp.*<sup>52</sup> There the issue was whether the court's famous opening question, "what is chicken?," should be answered to include the meat only of young chickens more valuable per pound ("broilers" and "fryers"), or also the meat of less expensive old birds ("fowl").<sup>53</sup> The written documents were ambiguous on their face. The opinion tries to resolve the ambiguity in many ways, ultimately deciding that the plaintiff buyer, who claimed that the defendant was required to furnish young chicken at the fixed contract price, had not met its burden of proof.<sup>54</sup> Included in the considerations is this:

Defendant [seller, a middleman] makes a further argument based on the impossibility of its obtaining broilers and fryers at the 33¢ price offered by plaintiff [buyer] for the 2 ½—3 lbs. birds. There is no substantial dispute that, in late April, 1957, the [general market] price for 2 ½—3 lbs. broilers was between 35 and 37¢ per pound, and that when defendant entered into the contracts, it was well aware of this and intended to fill them by supplying fowl in these weights. It claims that plaintiff must likewise have known the market . . . or, at least, . . . was chargeable with such knowledge. It is scarcely an answer to say, as plaintiff does in its brief, that the 33¢ price offered [for] the 2 ½—3 lbs. 'chickens' was closer to the prevailing 35¢ price for broilers than to the 30¢ at which defendant procured fowl. Plaintiff must have expected defendant to make some profit—certainly it could not have expected defendant deliberately to incur a loss.<sup>55</sup>

Although this analysis is phrased in terms of what the parties themselves "must have" thought, that is only part of the story. So put it ignores the possibilities that the plaintiff buyer just thought the

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52. 190 F. Supp. 116 (S.D.N.Y. 1960).

53. *Id.* at 117, 120.

54. *Id.* at 121.

55. *Id.* at 120.

defendant seller was foolish, or ignorant, or a bad calculator—and that plaintiff was happy to make a contract where it not only engrossed all the surplus from trade, but also profited from a loss on the other party's part. It seems that the judgment of what the parties “must have” intended is at least partly based on what it would have been fair for the parties to do. That, at least, is the conclusion a later court reached in citing Judge Friendly's language to support “the rule that, in determining the manifested intent of the parties, a court should construe the language of their agreement against the background of an assumption, absent evidence to the contrary, that the bargaining process was meant to and did result in a fair bargain, made in good faith.”<sup>56</sup> And it accords with the approach taken in the Uniform Commercial Code as regards the implied warranty of merchantability: “In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation.”<sup>57</sup>

The desire to avoid enforcing a contract that is very unequal has also had a substantial impact on the law of remedies. One line of cases has to do with equitable remedies. In *Campbell Soup Co. v. Wentz*,<sup>58</sup> plaintiff, a food manufacturer, sued for specific performance of a forward contract to grow and furnish carrots; the defendant, a farmer, had sold his crop elsewhere once the spot price had shot up.<sup>59</sup> The court held that the ordinary requirements for equitable relief had been met: the particular carrots under contract were sufficiently different from those available in the market, in color, size, and suitability for use in

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56. *SAPC, Inc. v. Lotus Dev. Corp.*, 699 F. Supp. 1009, 1014 (D. Mass 1988).

57. U.C.C. § 2-314 cmt. 7 (AM. LAW INST. 2014). There are also cases that run the argument in the other direction: working from the predicate that the alleged deal would be very unfair to reach the conclusion that the contract was never made. In *Bedell v. Foss*, the question was whether defendant had promised to buy a certain mare for \$73; the defendant denied making the deal and offered evidence that the mare was worth less than the set price; the trial court excluded the evidence; and the Vermont Supreme Court reversed that decision:

In the absence of proof, the presumption would be that each party intended to make an equal bargain; but the evidence as to the value of the mare, offered, tended to show that the alleged bargain was unequal; and as such bargain was testified to by the plaintiff, and denied by the defendant as a witness, the latter was entitled to have the fact, that the value of the mare at the time of the alleged promise was less than the amount that the plaintiff claimed the defendant agreed to pay for her, go to the jury, to strengthen his testimony. And the greater the difference between the value of the mare and \$73.00, the more weight this evidence would have; but what weight should be given to it, is for the jury to determine.

50 Vt. 94, 98 (1877).

58. 172 F.2d 80 (3d Cir. 1948).

59. *Id.* at 81.

making canned soup, as to make damages an inadequate remedy.<sup>60</sup> But specific performance was denied because the contract overall—as shown in terms not directly applicable to the controversy at hand—was too onerous.<sup>61</sup> In particular, the court singled out a clause which allowed Campbell Soup, the buyer, to legitimately refuse to take the carrots under certain circumstances but did not allow the grower even then to sell the carrots elsewhere, thus leaving the farmer with a useless crop.<sup>62</sup> The clauses of the contract were not illegal, but “the sum total of its provisions drives too hard a bargain for a court of conscience to assist.”<sup>63</sup>

To the same effect, there are many cases denying specific performance of a contract to sell real estate because of a large disparity between the contract price and the market price.<sup>64</sup> These cases also typically mention other faults in the bargaining process, and there is some dispute in the cases as to whether inadequacy of price with nothing more justifies refusing equitable relief. But these other flaws taken by themselves apparently would not justify rescission, and the financial disparities are large; if the contracts’ being very unfair is not the entire story, it is a large part of it. For example, here is the court’s summary of the facts in a case decided not long ago in Kansas:

Here, a much younger man who apparently ran several different business enterprises came in contact one morning with an elderly couple whom he had never met before. The couple were both in declining health and living on a modest fixed income. The couple owned a farm worth \$200,000 from which they derived a part of their income. Before the day was over, the young man had a contract in his hands to purchase that farm for a little over 25% of its value. Apparently, the farm had not been on the market before that day. Later and before the closing, the couple changed their minds.<sup>65</sup>

With no direct evidence of fraud, and despite the “elderly couple’s” physician testifying that they were mentally competent, the court still upheld the trial judge’s refusal to grant specific performance.<sup>66</sup> It is

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60. *Id.* at 82.

61. *Id.* at 83.

62. *Id.*

63. *Id.* at 84.

64. *E.g.*, *Hodge v. Shea*, 168 S.E.2d 82 (S.C. 1969); *Dan Barrow Trading Co. v. Hutchens*, No. 94,143, 2006 WL 851397 (Kan. Ct. App. Mar. 31, 2006); *Campbell v. Carr*, 603 S.E.2d 625 (S.C. Ct. App. 2004); *Jensen v. Sw. States Mgmt. Co.*, 629 P.2d 52 (Kan. Ct. App. 1981).

65. *Dan Barrow Trading Co.*, 2006 WL 851397, at \*4.

66. *Id.* at \*3-4.

hard to say the outcome would have been the same, had the deal been struck at market value.

Yet another example of the many places that substantial disparity influences outcomes occurs in the doctrine that limits damages to those that are foreseeable—that is, to the application of the doctrine of *Hadley v. Baxendale*.<sup>67</sup> Courts, says the Restatement (Second), have sometimes imposed extreme requirements of foreseeability to avoid granting damages in cases better understood as involving “an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question.”<sup>68</sup> The black letter of Restatement Section 351 breaks out this idea for separate treatment, saying: “A court may limit damages for foreseeable loss . . . if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”<sup>69</sup>

“Mere inadequacy of consideration will not void a contract”—so says the court in *Batsakis v. Demotsis*,<sup>70</sup> reprinted in many contracts casebooks.<sup>71</sup> If this is an accurate statement of the law, it is accurate only if the full force of the word “mere” is understood. In fact, the word draws two distinctions.

In one sense, “mere inadequacy” contrasts with a large inadequacy in what one of the parties gets from the deal. A large inadequacy, as we have just seen, can change how judges apply doctrines as disparate as those relating to modifications of contracts and to consequential damages. A large inadequacy can change how courts understand the evidence before them and how they interpret the contract at issue. And in jurisdictions that accept the doctrine that an unfair price itself can constitute unconscionability, large inadequacy, as opposed to mere inadequacy, can itself be grounds for not enforcing the contract.

In another sense, “mere inadequacy” contrasts with inadequacy combined with another reason for questioning the justice of the contract. Unconscionability in its more common form, as we saw in the doctrine of *Walker-Thomas Furniture Co.*, has this quality.<sup>72</sup> The discrepancy between what the parties each get matters because the party getting much less is also a party of whom there is reason to say—as will be discussed under Principle #5<sup>73</sup>—advantage has been taken. Many

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67. 56 Eng. Rep. 145 (Exch. Div. 1854).

68. RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. F (AM. LAW INST. 1981).

69. *Id.* § 351(3).

70. 226 S.W.2d 673, 675 (Tex. Civ. App. 1949).

71. *E.g.*, STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 137 (4th ed. 2012); LON L. FULLER ET AL., BASIC CONTRACT LAW 76 (9th ed. 2013); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 93 (6th ed. 2007).

72. 350 F.2d 445, 449–50 (D.C. Cir. 1965).

73. *See infra* pp.778 ff.

other doctrines of contract law share this half-and-half quality; for example, many of the rules applicable to not enforcing a contract on account of mistake: the mistake matters when it results in the contract becoming very unbalanced. The argument for justice as an equal exchange—understood in the way judges understand it—partners with another element of justice to form a powerful composite whole.

But sometimes deals as they work out produce big winners or big losers, and sometimes those contracts are enforced to the hilt. We have only started on the various justice arguments potentially applicable to the enforcement, interpretation, and adjustment of contracts.

## II. PRINCIPLE #2: JUSTICE AS THE HONEST WAGER

There was a time in the common law of the United States when “wager” was considered to be the opposite of “contract.” Wagers were unenforceable—partly out of a sense of the frivolousness of many bets, partly out of a moral stance against gambling. As the Supreme Judicial Court of Massachusetts said, in 1873, when asked to settle a bet as to whether the body of one Dr. Cahill was buried on the left hand side or the right hand side of the main avenue in Holyhood Cemetery: “It is inconsistent alike with the policy of our laws, and with the performance of the duties for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager.”<sup>74</sup> And as the Illinois Supreme Court said, in 1888, with regard to the much more substantial subject matter of contracts on the Board of Trade made for commodities for which delivery was never meant to occur:

[D]ealing in ‘futures’ or ‘options,’ as they are commonly called, to be settled according to the fluctuations of the market, is void by the common law; for, among other reasons, it is contrary to public policy. It is not only contrary to public policy, but it is a crime,—a crime against the state, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and pre-eminently the national sin.<sup>75</sup>

At the same time, many very useful contracts had either the purpose or effect of shifting risks of the unknown. The law patrolled the boundary line using doctrines such as “insurable interest” to differentiate acceptable insurance policies from mere gambles, or an

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74. *Love v. Harvey*, 114 Mass. 80, 82 (1873).

75. *Cothran v. Ellis*, 16 N.E. 646, 648 (Ill. 1888).

“intention to accept delivery” to differentiate acceptable from unacceptable forward contracts.<sup>76</sup>

In many states, gambling contracts in the narrow sense of the term—except as part of a state-sponsored lottery—remain unenforceable.<sup>77</sup> But the line between accepted and forbidden has moved sharply in favor of recognizing speculation as legitimate.<sup>78</sup> Indeed, the whole legal culture has shifted, and it is now common to read general commercial contracts as having, as one of their primary purposes, the allocation of risks of the unknown. For example, in the words of Judge Posner:

A *force majeure* clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller . . . ; if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed-price contract is to allocate risk in this way.<sup>79</sup>

The principal issues today are no longer the presence or absence of speculation, but the standards that make wagers just, and the situations to which they should be applied as the governing measure of justice.

You win some, you lose some. If you win the bet, you expect the other side to pay up; if you lose the bet, you correspondingly accept that you are bound to pay. And the game should not be rigged: it should not be heads I win, tails you lose. He only deserves to win, who could have lost. These are the standards of the fair bet. Millions of Americans believe in these propositions and act on them—if not in their business dealings, then in their games, their office pools, and their online bets. They were undoubtedly salient cultural norms even when gambling and speculation were less legal than they are today. It is not surprising to find them embedded in the law of contracts—not just in

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76. See generally Roy Kreitner, *Speculation of Contract, Or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096 (2000).

77. 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 17.2, at 653–54 (Richard A. Lord ed., 4th ed. 2010).

78. See generally Kreitner, *supra* note 76. For a consideration of where the line should be put today in dealing with life insurance contracts, see MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 131–41 (2012).

79. *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986). The Uniform Commercial Code commentary regarding impracticability as a seller's defense is to the same effect: absent some particular, strikingly unforeseen contingency, market swings are “exactly the type of business risk which business contracts made at fixed prices are intended to cover.” U.C.C. §2-615 cmt. 4 (AM. LAW INST. 2014).

allowing speculative deals to be enforceable, but also in the handling of whole lines of analysis.

A good part of the classic trio of offer, acceptance, and consideration, for example, can be understood as an effort to maintain a policy against unfair, one-sided speculation. The traditional slogans for this were “mutuality of obligation” and “unless both parties are bound, neither is bound.”<sup>80</sup> As a strict statement of the law, they are overbroad; there are of course ways in which one party can become bound while the other is not. For this reason, the Restatement (Second) explicitly eschews “mutuality of obligation.”<sup>81</sup> But, as Professor E. Allan Farnsworth’s treatise explains, the idea makes sense when speculation is at hand. “Requiring mutuality of obligation for bilateral contracts serves the needs of the marketplace, where prices fluctuate according to supply and demand, for it eliminates the possibility that one party will be able to speculate on such changes at the expense of the other.”<sup>82</sup> Accordingly, offers are usually read as requesting a definite return promise before they become binding; and even when a return performance is a possible mode of acceptance, the beginning of performance operates as a promise to carry through and complete the contract.<sup>83</sup> Controlling the danger of one-way speculation is also the spring behind the special rules applicable to options—which is to say, offers which bind one party for a period of time, but not yet the other—whether in terms of their needing separate consideration or in terms of their requiring special assurances of fairness.<sup>84</sup>

A good illustration of the law’s desire to avoid one-way speculation at the expense of the other party appears in cases concerning silence as acceptance. In *Cole-McIntyre-Norfleet Co. v. Holloway*,<sup>85</sup> a leading case, a salesman of the seller (a wholesaler) solicited an order from the buyer (a country store); the order form provided that it was only an offer, subject to acceptance at seller’s home office.<sup>86</sup> When, some sixty days after placing its order, the buyer demanded that the goods be delivered, the seller told him that the offer had not been accepted.<sup>87</sup> In the interim, the United States had entered

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80. On the historical connection between these ideas and cases to enforce wagers (allowed in England), see Val Ricks, *In Defense of Mutuality of Obligation: Why “Both Should Be Bound or Neither,”* 78 NEB. L. REV. 491 (1999).

81. RESTATEMENT (SECOND) OF CONTRACTS § 79C (AM. LAW INST. 1981); see also *id.* § cmt. f.

82. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.2, at 202 (3d ed. 2004) [hereinafter FARNSWORTH].

83. RESTATEMENT (SECOND) OF CONTRACTS § 62.

84. See FARNSWORTH, *supra* note 82, § 3.23, at 344–49.

85. 214 S.W. 817 (Tenn. 1919).

86. *Id.* at 817.

87. *Id.* at 817–18.

World War I and the market price of the ordered goods had advanced about fifty percent.<sup>88</sup> Contrary to the ordinary rule that an acceptance has to be overt, the court held that the seller's intervening silence constituted acceptance of the contract—which is to say, that the buyer deserved his goods at the original prices.<sup>89</sup> The court relied in part on the fact that some of the goods were perishable, and on the fact that the parties, through a salesman, were in continuous communication—reasons why the buyer might have expected a refusal, if there were one, to have been prompt and explicit.<sup>90</sup> But the driving force of the decision is this: “Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves time to himself to see if the contract will be profitable.”<sup>91</sup> The silence-as-acceptance cases in general present this mix of prior relationship and speculative opportunity, with one or the other being given prominence as the facts suggest.<sup>92</sup>

But wagering can happen without market fluctuations, too. A much-litigated fact pattern arises in the insurance context: a buyer applies for insurance; he includes with his application, as requested, a payment against the first premium; the documents say insurance will be provided only upon the company accepting the risk; the company moves slowly; meanwhile the insured event occurs; and the company then says it is not accepting the application and not covering the risk. As the Seventh Circuit recently summarized Indiana law:

[The cases] stand for the general proposition that an insurance company cannot accept an application and a premium from an applicant, giving the applicant reason to believe he is insured, and then, when the worst happens, avoid liability by asserting that the applicant was not an insurable risk after all. In that scenario the insurer would have accepted a premium without accepting any risk, an outcome that [prior cases] recognized, of course, to be patently unfair.<sup>93</sup>

There are many similar cases, some relying on the length of the company's delay and sounding in tort, but still emphasizing the element

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88. *Id.* at 817.

89. *Id.* at 818.

90. *Id.*

91. *Id.*

92. See FARNSWORTH, *supra* note 82, § 3.14, at 278–84.

93. *Kimmel v. W. Reserve Life Assur. Co of Ohio*, 627 F.3d 607, 611 (7th Cir. 2010) (distinguishing, however, the terms of the contractual arrangement actually presented to it as not raising the danger of one-way speculation).

of unfairness inherent in the delay.<sup>94</sup> And, lest it be thought that these cases stand only for the proposition: “let the insurance company pay,” there are cases in which the offeror and the offeree are flipped: the party claiming to be insured waits too long to complete its part in accepting the deal offered to it, and is denied coverage also for anti-unfair-speculation reasons. “An acceptance after the fire comes too late.”<sup>95</sup>

Justice as the honest wager also makes its appearance in the interpretation of what are surely binding contracts. For instance, consider *Cofman v. Acton Corp.*<sup>96</sup> The case arose out of the settlement of a prior suit between the parties; unable at that time to come to agreement on a lump sum payment, the parties agreed that the size of the settlement would depend on the future success of the Corporation.<sup>97</sup> By the settlement agreement—that is to say, the contract in suit—the plaintiffs were entitled to “the sum of ‘X’ times a multiple of 7,500 where ‘X’ equals the ‘price’ of one share of Acton Corporation’s common stock on the Exercise Date less \$7.00”; the plaintiffs could demand payment anytime within three years, and the “price” would be the average of the share’s closing prices for the preceding thirty days.<sup>98</sup> The “price” so calculated on the “Exercise Date” the plaintiffs chose was \$20.54, and they claimed the difference between \$7.00 and \$20.54, times 7,500.<sup>99</sup> However, in the interim the defendant corporation had had a one-for-five reverse stock split, which quintupled the price of each remaining share without changing the value of the corporation as a whole.<sup>100</sup> Defendants accordingly said that the relevant stock price was \$4.11—that is, \$20.54 divided by five—and therefore, since that was less than \$7.00, that plaintiffs were entitled to nothing.<sup>101</sup>

In an elegantly presented opinion, District Judge Keeton first determined that the documents did not address the question presented: “Not a single word or phrase explicitly about stock splits or reverse stock splits appears anywhere in the Agreements.”<sup>102</sup> He then reasoned:

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94. E.g., *Am. Life Ins. Co. of Ala. v. Hutcheson*, 109 F.2d 424, 427 (6th Cir. 1940) (contract); *Barrera v. State Farm Mut. Auto. Ins. Co.*, 456 P.2d 674, 682 (Cal. 1969) (tort).

95. *Indep. Fire Ins. Co. v. Lea*, 782 F. Supp. 1144, 1155 (E.D. La.), *aff’d in part*, 979 F.2d 377 (5th Cir. 1992); see also *Trinity Universal Ins. Co. v. Rogers*, 215 S.W. 2d 349, 353 (Tex. Civ. App. 1948).

96. 768 F. Supp. 392 (D. Mass. 1991), *aff’d*, 958 F.2d 494 (1st Cir. 1992).

97. *Id.* at 393.

98. *Id.*

99. *Id.* at 393–94.

100. *Id.* at 393.

101. *Id.* at 394.

102. *Id.* at 395–96.

Plaintiffs argue that the omission of antidilution language allocates the risk of a reverse stock split to defendants. If that is so, then the inference is likewise compelling that this omission allocates to the plaintiffs the risk of a regular stock split. Such a reading would allow defendants, should market conditions cause the price to rise near the trigger price, unilaterally to deprive the plaintiffs of their expected benefits under the Agreements by splitting the stock. Although plaintiffs gallantly assured the court in oral argument that this would be their position if such an eventuality had occurred, the idea that plaintiffs would willingly have entered into an agreement that allocated such a unilateral right to defendants utterly fails reality testing.<sup>103</sup>

Accordingly, defendants' calculation of the "price" as based on what the pre-split price would have been, was correct, and plaintiffs were not entitled to recover.

As can be seen, this argument to assign risk "X" proceeds by asking how the parties would have assigned risk "-X," and then applies the parallel solution to "X." The inference from the answer to how the parties would have assigned a given risk (i.e., a normal stock split) to the answer for how they would assign the opposite risk (i.e., a reverse stock split) depends on the judge assuming the parties would have provided symmetrical solutions for both situations; that is to say, they would not have created a heads-I-win, tails-you-lose agreement. But if the parties had in fact bargained the point, the result might have been asymmetrical; one party might have been more farsighted, or have had more economic power. The symmetry comes from an unstated principle of justice. It is from making the assumption of a fair gamble—that the parties were fairly allocating the unknown market future of the company's stock, which could go either way—that we conclude, in the judge's term, that to find for the plaintiffs would be to give them a "windfall."<sup>104</sup>

Finally, the honest wager approach to justice, where applicable, provides the most straightforward justification for awarding the standard measure of damages for breach of contract, the lost expectancy, rather than the plaintiff's reliance or the defendant's unjust enrichment.<sup>105</sup> The expectancy is the value of a wager won.<sup>106</sup> If, for

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103. *Id.* at 396.

104. *Id.*

105. There is debate as to whether this connection is not just functionally, but also historically, true. Compare Morton Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974) (expectancy became dominant measure with experience of speculative markets in early 19th century), with A.W.B.

example, an estate were suing an insurer to enforce a life insurance policy, no one would imagine that the company could meet its obligations simply by returning the premiums paid (which, if the policy were recently issued, might be a small sum) rather than paying the promised face value; to do so would be to renege on the bet it had lost. And no one would think that the plaintiff had to produce evidence of some reliance on the policy (such as deciding not to deal with another insurance company) beyond the payment of the premiums. The very purpose of the contract of insurance is to substitute the expectancy for the premiums.<sup>107</sup> Insofar as we take the shifting of risks like this to be a core function of the particular type of contract at issue, awarding the expectancy is simply fulfilling the parties' purposes in making the contract, and society's purposes in deciding to enforce contracts of this type.<sup>108</sup>

Does this principle of justice as the honest wager agree with, or conflict with, the principle of justice as the equal exchange? As the example of insurance that we have just been discussing shows, it depends on one's angle of analysis. Assuming a competitive marketplace, there is probably nothing as equal as the exchange of life insurance premiums for a five-year term of life insurance. More than most prices, this one is known to be fair; it is based on statistical data and actuarial assessment of the risk transferred. But on another view, the contract is guaranteed to produce unequal results: either the insured gets nothing for five years of premiums, or the named beneficiary gets much more than was paid. The same can be said, although with less assurance of fairness at the start and less stark difference at the end, of speculation on many markets.

It is from the latter point of view that justice as the honest wager enriches—or if one likes, complicates—the overall field of argument. Because treating a contract as an honest wager can indeed produce, but also justify, substantial inequality in results, much can turn on whether this principle, or our first principle of justice as the equal exchange, ought to govern a given case. Courts sometimes have to choose which view of justice to pursue. For example, in *Jensen v. Southwestern States Management Co.*,<sup>109</sup> prior landowners had, in several transactions made fifty years earlier, sold their subterranean mineral

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Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979) (expectancy already routinely awarded before that).

106. See Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 787 (1982).

107. See T. M. Scanlon, WHAT WE OWE TO EACH OTHER 302–09 (1998) (“Fidelity and the Value of Assurance”).

108. Another possible justification for using the expectancy measure—applicable in a broader range of circumstances—is discussed *infra* pp.767 ff.

109. 629 P.2d 752 (Kan. App. 1981).

rights to a coal mining company.<sup>110</sup> Included in the conveyances were agreements that the mining company could use the surface of the land also—as needed to remove the coal—upon a payment of \$70 or \$75 an acre.<sup>111</sup> No coal had ever yet been mined, but plaintiffs, the current owners of the land, sued to get a declaratory judgment as to the effect of the agreement, in order to quiet their title.<sup>112</sup> They could not sell their land with the contingent purchase outstanding, because the stipulated price, if the option were ever exercised, was far below the current market price.<sup>113</sup> “The issue to be determined,” in the words of the court, “was whether, if defendant ever decided to use the surface, it could do so by paying \$70 to \$75 per acre, or whether it would be required to pay the current market value.”<sup>114</sup> Or, in our terms, the issue to be determined was whether to pursue the justice of the wager or the justice of the equal exchange.

In the event, the court ruled in favor of requiring the coal company to pay current market value, when and if it decided to exercise its surface rights.<sup>115</sup> Aside from relying on its equitable authority to do justice, and citation of precedents having to do with large disparities in values, the court’s justification came down to this: “The contract price would work a hardship not within contemplation of the parties at the time of making the contract.”<sup>116</sup> But this sentence must be understood as a statement of fairness, not of fact; it was not based on anything known about the actual intentions of the parties who, generations earlier, had made the actual agreements under consideration. Nor did it appear to rely on any part of the written documents. It was, rather, a statement about what the court understood to be the nature and purpose of the transaction, taken as a social type rather than an individual instance. Setting a fixed price for this ancillary feature of a mineral rights contract—perhaps especially because it was an option, and not a two-way bet—was not justly meant to be a way of speculating on land prices for the indefinite future. The result that produced equality—land transferred in exchange for its market value—was a better fit than the result that gave one party a large speculative gain.

On the understanding, then, that our principles sometimes, but not always, conflict with each other—that they proceed from different premises rather than by working out the logical possibilities of a single set—we are ready to consider our third principle.

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110. *Id.* at 753.

111. *Id.*

112. *Id.* at 754.

113. *Id.*

114. *Id.* at 757.

115. *Id. Accord Quarto Mining Co. v. Litman*, 326 N.E.2d 676 (Ohio 1975).

116. *Jensen*, 629 P.2d at 757.

## III. PRINCIPLE #3: JUSTICE AS THE TERM THAT FITS

Once a publisher has agreed to publish a book, how great are its obligations to advertise and promote the book's sales? Once a realtor has found a buyer who agrees to buy a client's property, does the realtor still get his commission if the buyer reneges before the closing? Much of the work of contract law consists of answering questions such as these—questions that assume the basic structure of a relationship, but seek to specify a particular term within it. One could, of course, answer questions of this type by trying to figure out what the particular parties before the court understood their deal to be—but often they will not have had, in fact, any actual, ascertainable, joint understanding. Or one could simply accept what appears to be the industry standard. Or one could try to determine what term would be the most efficient for the parties, or the industry, to adopt. Or—as the courts often do—one can try to find the term that best fits the relationship the parties have otherwise entered. Implicit in this process of locating the term that fits is a principle of transactional justice.

Consider, for example, the celebrated case of *Wood v. Lucy, Lady Duff-Gordon*.<sup>117</sup> Lady Duff-Gordon, a fashion designer, gave Wood, an agent, the exclusive right to market her designs and her indorsements of others' designs.<sup>118</sup> In exchange, Wood agreed to give her one half of the profits from the contracts to place her work he succeeded in making.<sup>119</sup> The agreement was to last at least a year, and then from year-to-year unless terminated.<sup>120</sup> Wood sued Lady Duff-Gordon because, he said, she placed her indorsements through others and kept the profits.<sup>121</sup> Her defense was that, although he had promised that she would get half of any deal he made, he had not promised to do anything to try to make a deal in the first place.<sup>122</sup> Therefore, she said—and the intermediate appellate court agreed<sup>123</sup>—the contract lacked consideration and was unenforceable.<sup>124</sup>

The New York Court of Appeals reversed.<sup>125</sup> Per Judge Cardozo: According to the written document, Wood “does not promise in so many words that he will use reasonable efforts to place the defendant's

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117. 118 N.E. 214 (N.Y. 1917).

118. *Id.* at 214.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 215.

123. *Wood v. Lucy, Lady Duff-Gordon*, 177 A.D. 624, 625 (N.Y. App. Div. 1917).

124. *Wood*, 118 N.E. at 215.

125. *Id.*

indorsements and market her designs.”<sup>126</sup> But “[w]e think . . . that such a promise is fairly to be implied.”<sup>127</sup> Accordingly there was consideration, and the plaintiff could sue for defendant’s breach.

Taken as a matter of the doctrine of consideration, the court’s implication is questionable—and, indeed, the court split four to three. To the extent that consideration is meant to be a formal doctrine—insofar as one of its purposes is to test how well the parties thought out the deal—implying a consideration would seem to allow the court to do the very thing the doctrine insists the parties should have done. But Cardozo explicitly chooses a more functional approach, and perhaps we can agree with him that, although “imperfectly expressed” the written document was “instinct with an obligation.”<sup>128</sup>

In terms of the justice of the transaction, however, the more interesting point is the particular term Cardozo implies. To satisfy the requirement of consideration, the contract could have said that Wood would only have to make minimal efforts to market her merchandise or indorsements. It could, for instance, have said that Wood would have to include her in whatever client list he advertised, to see if anyone showed interest.<sup>129</sup> Why, then, even if the contract was “instinct with an obligation” did the court choose to say that Wood was subject to the particular obligation to “use reasonable efforts?”

Wood was bound to “use reasonable efforts” first and foremost because:

The defendant gave an *exclusive* privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. . . . We are not to suppose that one party was to be placed at the mercy of the other.<sup>130</sup>

This is an argument of fit. It is an argument as to what is an appropriate distribution of responsibilities in a particular type of contract, the exclusive license. Lady Duff-Gordon gave Wood an exclusive license; therefore Wood owes Lady Duff-Gordon “reasonable efforts to . . . market her designs.” Why? Otherwise she would be “at

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126. *Id.* at 214.

127. *Id.*

128. *Id.* (quoting *McCall Co. v. Wright*, 133 A.D. 62, 28 (N.Y. App. Div. 1909)).

129. Indeed, as a matter of the doctrine of consideration the court could have just said that Wood had to pay Lady Duff-Gordon \$100—although perhaps it is hard for a judge to imply a fixed sum.

130. *Wood*, 118 N.E. at 214 (emphasis in original New York Reports version, 222 N.Y. 88, 91) (citations omitted).

the mercy” of Wood. Perhaps Cardozo is speaking of her as a creator—whose designs, because of the exclusivity of the license, cannot reach fruition in production unless Wood is active. Or perhaps Cardozo is only speaking of money—again because of the exclusivity of the license, she risks getting no revenue from her work unless Wood does his part. Either way, it is an argument based on reciprocity, but not, we should note, on any measurable equality. Cardozo’s argument would have the same punch whether the parties were to split the revenues 50/50 or 90/10. The gist is not equality; the gist is fairness: given the way the relationship works, if one party contributes *this* to the joint enterprise, then the other party should fairly contribute *that*.

Cardozo does not go further, but we might, borrowing from John Rawls, suggest that the standpoint for determining this sort of transactional fairness is the judgment of the person who does not know which party he might be.<sup>131</sup> How would you allocate the rights and responsibilities of an exclusive licensing arrangement if you might be one of the Woods of the world, or you might be one of the Lady Duff-Gordons, and you do not know which you will be? You would, says Cardozo, trade the exclusive right to your creative work for the reasonable efforts of the other party to sell it; you would trade your reasonable efforts to sell for the exclusive right to be the salesman.

This approach is an approach of justice. Its essence, however, does not lie in an abstract standard of justice applied by a disinterested outsider (although, of course, it assumes that appearance in an appellate opinion). Nor does it rest on an assumption that the parties are altruistic. Rather, its essence lies in imagining the terms self-interested parties would adopt *if* they did not know which role they would play in the supposed situation *but* would consider themselves bound by the deal in either eventuality. It is these additional constraints that make the result into a principle of justice.<sup>132</sup>

It is easy, of course, to slide from considering the terms stipulated by these hypothetically just parties to the terms set forth by the actual parties to the contract at hand. Talking about the actual parties as if they were just parties (as Cardozo does) has the attraction of obliterating the potential conflict between justice and freedom, and accordingly the slide from one to the other is very common in judicial opinions. Inevitably there are some explicit terms to be considered, so

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131. John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958). The argument of this and the next paragraph is based on this article—but applying Rawls’ thought to a much more contextual situation than he himself would have done.

132. For an alternative analysis of the implied term in *Wood v. Lucy, Lady Duff-Gordon* as dependent on an efficiency norm rather than a justice norm, see RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 94–97 (1990).

the line between the courts' interpreting what the parties actually agreed to, and constructing what is to be implied, is often hazy.

Nevertheless, it seems clear that courts sometimes act in the teeth of the written deal to preserve the reciprocity of the situation. For example, in *Zilg v. Prentice-Hall, Inc.*,<sup>133</sup> the plaintiff author contended that the defendant publisher had inadequately marketed his book.<sup>134</sup> The contract obligated the defendant to "publish" the book but gave it the right "to determine the method and means of advertising, publicizing, and selling the work."<sup>135</sup> Even so, the Second Circuit held that Prentice-Hall had the specific obligation "to promote the book including a first printing and advertising budget adequate to give the book a reasonable chance of achieving market success."<sup>136</sup> The court moved beyond the text to look at what fit the situation. "[W]e believe," wrote the Second Circuit,

that the contract in question establishes a relationship between the publisher and author which implies an obligation upon the former to make certain efforts in publishing a book it has accepted notwithstanding the clause which leaves the number of volumes to be printed and the advertising budget to the publisher's discretion.<sup>137</sup>

"This obligation," added the court, "is derived both from the common expectations of parties to such agreements and from the relationship of those parties as structured by the contract"<sup>138</sup>—on the assumption, I might add, that these are the expectations and relationship of fair-minded parties.

Indeed, justice as the deal that fits is sometimes used as a principle that clearly creates doctrine, rather than in any sense functioning as an interpretation of the parties' deal. This can happen, of course, legislatively. The principle behind Cardozo's opinion in *Wood v. Lucy, Lady Duff-Gordon*, for example, turns up as a stipulated, although defeasible, rule for the sale of goods in the subsequently promulgated Article II of the Uniform Commercial Code: "A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller

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133. 717 F.2d 671 (2d Cir. 1983).

134. *Id.* at 674.

135. *Id.*

136. *Id.* at 680–81. The court also decided that Prentice-Hall had met its obligation. *Id.* at 681.

137. *Id.* at 679.

138. *Id.*

to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.”<sup>139</sup>

Doctrine is also created when the courts forthrightly declare background rules for types of situations considered as a whole (often with limitations as to how easily these rules can be modified by future parties). For example, in *Ellsworth Dobbs, Inc. v. Johnson*,<sup>140</sup> the question for the New Jersey Supreme Court was whether a realtor had earned its commission from a seller when a buyer the realtor had found signed a purchase and sale agreement with the seller, but then defaulted before the closing.<sup>141</sup> The court reasoned as follows:

There can be no doubt that ordinarily when an owner of property lists it with a broker for sale, his expectation is that the money for the payment of commission will come out of the proceeds of the sale. He expects that if the broker produces a buyer to whom the owner's terms of sale are satisfactory, and a contract embodying those terms is executed, the buyer will perform, i.e. he will pay the consideration and accept the deed at the time agreed upon. Considering the realities of the relationship created between owner and broker, that expectation of the owner is a reasonable one, and, in our view, entirely consistent with what should be the expectation of a conscientious broker as to the kind of ready, willing and able purchaser his engagement calls upon him to tender to the owner.

The present New Jersey rule . . . is deficient as an instrument of justice. It permits a broker to satisfy his obligation to the owner simply by tendering a human being who is physically and mentally capable of agreeing to buy the property on mutually satisfactory terms, so long as the owner enters into a sale contract with such person. The implication of the rule is that the owner has the burden of satisfying himself as to the prospective purchaser's ability, financial or otherwise, to complete the transaction; he cannot rely at all on the fact that the purchaser was produced in good faith by the broker as a person willing and able to buy the property. . . . It seems to us that fairness requires that the arrangement between broker and owner be interpreted to mean that the owner hires the broker with the expectation of becoming liable for a commission only in the event a sale of the property is

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139. U.C.C. § 2-306(2) (AM. LAW INST. 2014).

140. 236 A.2d 843 (N.J. 1967).

141. *Id.* at 846.

consummated, unless the title does not pass because of the owner's improper or frustrating conduct.<sup>142</sup>

Clearly this is an argument based on justice; even when the court refers to the expectations of the parties, it is not what the actual parties thought, but what would be thought by a reasonable owner and a conscientious broker. Determining whether the prospective buyer is financial able, and taking the risk that that determination is wrong, rests on the broker as a matter of what "fairness requires." It would seem that the "fairness" at stake takes the point of view just suggested: the fairness seen by the outside observer who could indifferently be broker or seller. The point is amplified by the court's later providing that attempts by any actual broker to contract for more favorable terms would not be allowed "[w]henver there is substantial inequality of bargaining power, position, or advantage between the broker and the other party involved[.]"<sup>143</sup>

But of course in real life people are, or are not, real estate brokers. Decisions like these, applied across a large number of transactions, could have distributive consequences. Whether *Ellsworth Dobbs* would have a substantial consequence in fact, over the class of real estate brokers, is not easy to determine. One would want to know how often a buyer reneges; whether that number can be changed by the broker's reasonable diligence; whether it is common if the buyer does renege for the broker to find a substitute buyer and earn a substitute commission; and even assuming some losses, one would want to know whether brokers would absorb those losses or could pass them on to sellers as a group through higher fees—which in turn would require knowing something about the structure of the marketplace for real estate services.<sup>144</sup> The literature on using decisions of this sort for the purpose of effecting a change in the general distribution of income—most famously, articles discussing the impact of an unwaivable implied warranty of habitability in leased residential housing—suggests that the result is highly contextual.<sup>145</sup>

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142. *Id.* at 852–53.

143. *Id.* at 857.

144. Of course, even assuming an impact, one would also have to decide whether one wanted to help the class of owners or of realtors; it is not obvious, for example, which is richer or poorer.

145. See Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: Milking and Class Violence*, 15 *FLA. ST. U. L. REV.* 485 (1987); Edward Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 *CORNELL L. REV.* 517 (1984).

There is, however, a lot of room between altogether ignoring distributive effects and caring about them only as they impact a broad social distribution. Courts have occupied part of the space. In particular, in the process of deciding what term “fits,” courts have cared whether what would otherwise be a fair allocation of rights and duties between the parties remains fair when it contains a term that can have a very large financial impact on one side. The point has sometimes been expressed as embodying the old equity “policy against forfeiture,” but the range of application is much broader than the refusal to enforce a penal bond.

The danger of a large, one-sided financial impact can figure in the specification of implied terms. What should a building contractor have to do, to earn the contract price of a building? To say that any failure in performance excuses payment is to make (in Cardozo’s words in *Jacob & Youngs v. Kent*)<sup>146</sup> “the significance of the default . . . grievously out of proportion to the oppression of the forfeiture.”<sup>147</sup> “The cruelty of enforced adherence” is, then, one of the factors justifying substantial performance, rather than perfect tender, as the measure of a contractor’s required tender.<sup>148</sup>

The same approach can be seen in the standard interpretation of certain express terms. A large number of cases turn on the question of the import of a term, variously expressed, conditioning payment on a buyer’s “satisfaction.” Especially when what is being bought cannot be returned and resold, so that to excuse payment would constitute a total loss to the other party, the courts normally interpret “satisfaction” to depend on an objective fault, and not merely the buyer’s subjective, if honest, disapproval.<sup>149</sup>

We come closer to the general distribution of income with the question of when workers should be paid. Should the basic assumption be that work is done and then paid for, or that pay is done and then worked for? Whoever goes first takes a risk: if the employer goes first, he risks that workers will take the money and then disappear, or not work, or do bad work; if the employee goes first, he risks that the employer will be bankrupt, or be slow to pay, or attempt to pay less than owed. The common law rule is that the worker must perform before the wage is paid, perhaps based historically on the proposition that “employers as a class are more likely to be responsible than are

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146. 129 N.E. 889 (N.Y. 1921).

147. *Id.* at 891.

148. *Id.*

149. FARNSWORTH, *supra* note 82, § 8.4, at 439–42.

workmen paid in advance.”<sup>150</sup> Still, if the task to be done takes a long time—either because there is inherently a lot of work to do on a particular task, or because the contract of employment stipulates a long period (such as a year) for the employment to last—this produces a substantial shift in resources. Workers have to have enough wherewithal to sustain themselves until the time is completed, or, to put the matter the other way around, until they are paid workers are being asked to contribute a good part of the working capital needed to get the project done. Depending on the particular circumstances, this result might represent a considerable subvention from one class to another. The answer that the law has worked out—and this has been primarily the work of legislatures—is to require the employer to pay after short periods, for instance every two weeks. State statutes of this sort are common.<sup>151</sup> In other words, the law has been rebalanced, so that fair-minded parties might pronounce it just because the combination of rules—pay later but not too much later—has been adjusted to take into account the interests of both parties.

It might at this point be asked: how does this third principle of contractual justice, justice as the term that fits, differ from the first principle, justice as the equal exchange? After all, it is not so far from saying that the terms of a deal are sufficiently aligned that they are fair to each party, to saying that the terms of the deal are equal.

It may be that the impulses behind employing the two approaches are similar. But as working methods they are substantially different.

First, justice as the term that fits escapes from many of the problems of measuring value, and accounting for gains from trade, that bedevil applying justice as the equal exchange in any strict fashion. It is much more focused on the intersection of particular offsetting terms and less concerned with the value of the deal overall. For the same reason, it can more readily accommodate the interests of parties that resist easy monetization. In the fact pattern of the *Zilg* case, for example, both the desire of the publisher to retain its commercial flexibility, and the desire of the author to be known as a successful author, resist full conversion into dollars and cents; in the words of Judge Winter, “up-front money alone cannot fully reconcile the conflicting interests of the parties.”<sup>152</sup>

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150. RESTATEMENT (SECOND) OF CONTRACTS § 234 cmt. e (AM. LAW INST. 1981). The Restatement suggests this explanation, but does not vouch for its historical veracity.

151. See, e.g., W. VA. CODE § 21-5 (West Virginia Wage Payment and Collection Act: employees in general to be paid every two weeks, and can sue in the ordinary courts for payments not made, and for treble liquidated damages and attorney’s fees).

152. *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 680 (2d Cir. 1983).

Second, justice as the term that fits begins its work much more contextually than does justice as the equal exchange. There is a clear tendency in the cases that use this approach to treat the dispute of the parties before the court as exemplars of determinate social patterns and social roles. The New Jersey case on real estate commissions, for example, begins by introducing us to “Ellsworth Dobbs, Inc., a real estate broker, [who] sued John R. Johnson and Adelaide P. Johnson, his wife, and Joseph Iarussi for commissions allegedly earned in a real estate transaction;”<sup>153</sup> but by the middle of the opinion, the parties have lost their personality and we are talking only of the “broker,” the “seller” or “owner,” and the defaulting “buyer.”<sup>154</sup> Reasoning begins from the condition of typical parties so situated. It would seem to follow that what is the fair term to complete the deal as it has been fashioned by social forces may not generate equality as seen from a more abstract point of view.

Third, because the approach is so situated, there is perceptible movement from evaluative premises to factual ones and back again. Although, as we have seen, reasoning about fit can be used to analyze legislation, it is especially attractive to common law judges. It allows them to phrase results in terms of what the parties must have meant, or what the situation calls for, rather than seeming to impose their will on what is otherwise denominated a private transaction. The very fact that the method of “situation-sense,” to use Karl Llewellyn’s phrase for this method, is, as he said, one of those “compounds of Isness and Oughtness”<sup>155</sup>—and therefore appears sloppy to those of certain methodological bents—makes it especially attractive to those who have to decide cases arising from a dispute between, and on a record made by, litigating parties.

All of this should not blind us to the fact that there is indeed an “Oughtness” at stake. The sense of the judge as to what term will fit into the situation so as to make it a just deal, is deeply involved. And with that understanding of justice as the term that fits, we move on to our fourth contender.

#### IV. PRINCIPLE #4: JUSTICE AS THE DESERVED RETURN

Americans believe in distributing returns according to what is deserved. The language of desert is all around us. Because he ran the

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153. *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 846 (N.J. 1967).

154. *See id.* at 850–57.

155. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 61 (1960). For discussion, see Todd D. Rakoff, *The Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation Sense,’* in *GOOD FAITH AND FAULT IN CONTRACT LAW* (Jack Beatson & Daniel Friedmann eds., 1995).

fastest, he deserved to get the prize; because she studied so hard, she deserved to get into college; because he brought in the most business, he deserved to get promoted. “The core idea of desert,” says Professor David Miller, “is that of an agent’s voluntarily undertaking a valuable activity, and as a result deserving benefits whose enjoyment forms a fitting sequel to what he has done.”<sup>156</sup> Sometimes the claim is made in the interest of equality—she did the same thing he did, so she deserves to get equal pay—but very often in the interest of disparity—she did more than he did, so she deserves to get paid more.

Judgments of desert can be made about doctrines appearing throughout the law, and, of course, about the institutions of our society without regard to their legal structure. But looking just to how these judgments appear in the law of contracts, we can divide them into two classes. First, there are cases in which Professor Miller’s “fitting sequel” is an example of desert in a broad social sense: how the culture thinks the story ought to end. Second, there are cases and doctrines where what is at issue is desert in the more narrow sense of rewarding the proper use of the institution of contracting *per se*.

For an example of contract law responding to desert in the broad cultural sense, consider the well-known case of *Davis v. Jacoby*.<sup>157</sup> Told dryly, plaintiffs, Frank and Caro Davis, husband and wife, sued on an alleged contract to make a will in their favor in exchange for their taking care of an old man—Rupert Whitehead, the supposed testator—and his wife, Blanche, until their deaths.<sup>158</sup> The plaintiffs lived in Windsor, Canada, far from the deceased who lived in Piedmont, California.<sup>159</sup> On April 12, 1931, Whitehead wrote a letter to the plaintiffs saying: “So if you can come, Caro will inherit everything and you will make our lives happier and see Blanche is provided for to the end. . . . Will you let me hear from you as soon as possible. . . .”<sup>160</sup> On April 15, Whitehead received the plaintiffs’ reply letter promising to come on April 25; on April 22, he committed suicide; the plaintiffs then left Canada to go to California to care for Blanche until she, shortly thereafter, died.<sup>161</sup> When Whitehead’s preexisting will was then opened, everything had been left to two other people.<sup>162</sup> If a contract

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156. DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 149 (1999). It is worth noting that, as Miller points out, desert is a reaction to what has already happened—a statement of what has been earned—and not, as the utilitarians would have it, a system of incentives designed to induce future useful acts. *Id.* at 136.

157. 34 P.2d 1026 (Cal. 1934).

158. *Id.* at 1026–29. The defendant, Jacoby, was the executor of Rupert Whitehead’s estate. *Id.* at 1026.

159. *Id.* at 1027.

160. *Id.* at 1028.

161. *Id.*

162. *Id.*

saying “Caro will inherit everything” was formed by the letter of April 12 and the reply letter of April 15, the contract was valid; if it was not to be formed until the plaintiffs went from Canada to California, it was not valid because of the rule that death revokes an offer.<sup>163</sup> The trial court ruled that the offer could only be accepted by performance, which in the event happened too late; the Supreme Court of California reversed and found for the plaintiffs.<sup>164</sup> Whether the offer was for a performance or for a counter-promise was, the court said, in doubt;<sup>165</sup> when that was so, the presumption, according to the Restatement (First) of Contracts, was that the offer was to be accepted by a return promise;<sup>166</sup> this was so because, citing Williston on Contracts, “a bilateral contract immediately and fully protects both parties.”<sup>167</sup>

However, no one who has read the actual opinion of the California Supreme Court will recognize it from the statement just made. Most of the opinion consists of an elaborate statement of the facts, of which this, the opening paragraph, is typical:

The plaintiff Caro M. Davis was the niece of Blanche Whitehead, who was married to Rupert Whitehead. Prior to her marriage in 1913 to her coplaintiff Frank M. Davis, Caro lived for a considerable time at the home of the Whiteheads, in Piedmont, Cal. The Whiteheads were childless and extremely fond of Caro. The record is replete with uncontradicted testimony of the close and loving relationship that existed between Caro and her aunt and uncle. During the period that Caro lived with the Whiteheads, she was treated as and often referred to by the Whiteheads as their daughter. In 1913, when Caro was married to Frank Davis, the marriage was arranged at the Whitehead home and a reception held there. After the marriage Mr. and Mrs. Davis went to Mr. Davis' home in Canada, where they have resided ever since. During the period 1913 to 1931 Caro made many visits to the Whiteheads, several of them being of long duration. The Whiteheads visited Mr. and Mrs. Davis in Canada on several occasions. After the marriage and continuing down to 1931 the closest and most friendly relationship at all times existed

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163. *Id.*

164. *Id.* at 1029.

165. *Id.* at 1031.

166. *Id.* at 1030.

167. *Id.* The case is cited as a “leading case” for this proposition. FARNSWORTH, *supra* note 82, § 3.24, at 356 n.5. On this view, the court's sense of justice in the case, avoiding one-way speculation, would be a reflection of the honest wager principle, although that principle seems misplaced for the situation presented.

between these two families. They corresponded frequently, the record being replete with letters showing the loving relationship.<sup>168</sup>

Perhaps some of this detail is doctrinally relevant—feeds, that is, into the court’s later statement that Whitehead “knew from his past relationship with appellants that if they gave their promise to perform he could rely on them,”<sup>169</sup> and thus into the court’s final conclusion that the offer was properly accepted by a return promise. The same cannot be said of the court’s making this point, in reference to the two nephews to whom Whitehead’s will had in fact left his estate: “The evidence is clear and uncontradicted that the relationship existing between Whitehead and his two nephews, respondents herein, was not nearly as close and confidential as that existing between Whitehead and appellants.”<sup>170</sup> That statement, doctrinally speaking, is totally irrelevant: there was no question that the actual will had been properly made, and there was no legal requirement that prevented Whitehead from leaving his estate to whomever he wanted, without regard to the closeness of the relationship; the only question was the enforceability of the supposed subsequent promise to make a different will. Similarly, there was no question that the Davis’ had carried out their promise to care for Blanche Whitehead until she died; there was no need for the court to quote the trial judge’s finding that “during said time Caro M. Davis nursed Blanche Whitehead, cared for her and administered to her wants as a natural daughter would have done toward and for her mother.”<sup>171</sup>

But, of course, what the court wants to say is that the result of its decision is to give the estate to the people who deserve it. Deserve it, not particularly doctrinally, but culturally: the culturally appropriate end to the story of the Whiteheads and Davises is to wrest the estate from the distant nephews and give it to the people who really were family, who loved as families should love and gave care as families should give care. This is not to say that the court’s reliance on doctrine is irrelevant; it is not to say that the same result would have been reached if Whitehead had not made his promise. It is to say that the court finds its application of doctrine easier to reach when supported by considerations of desert, and senses that these considerations will make it more justifiable to the reader, too.

There are lots of cases in which the narrative “statement of the facts” goes beyond what is legally relevant. Surely the mere story-

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168. *Davis*, 34 P.2d at 1027.

169. *Id.* at 1030.

170. *Id.* at 1028.

171. *Id.*

telling instinct accounts for many. But an opinion is usually meant to be, not a neutral document, but a persuasively justifying document. So it is not surprising to find elements of justice embedded in the story telling, too. Stating facts that escape the doctrine, and in doing so make an appeal to common conceptions of desert, is not unusual in contracts decisions, or for that matter in court reports generally.

But there is also a much more cabined idea of desert that is especially attuned to the institution of contract. One place it makes itself known is in the basic measure of contract damages.

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.<sup>172</sup>

So explains the Restatement (Second) of Contracts, and, of course, describing the usual measure of damages as awarding the "benefit of the bargain" is commonplace.<sup>173</sup>

As we have already seen, awarding the expectancy measure is sometimes justified as incorporating the outcome of an honest wager: the losing party pays the promised sum.<sup>174</sup> But a great many contracts, even at fixed prices, are not primarily, or even in significant part, bets against an unknown, unstable future; instead they set the price of a performance in a situation that is expected to, and does, remain stable for as long as the performance takes. If that contract price is the market price, and the contract is repudiated before there are actual expenses of performance to recompense, there are, if we use the standard contract-price-less-market-price formula, no damages: the lost contract can be covered by an identical deal in the market. But what if someone makes a very advantageous bargain, a much-better-than-the-market deal? Then, says the expectancy measure, he gets damages measured by the degree to which his bargain was advantageous.

None of the principles we have so far considered justify this result. As a matter of equality, the deal looks unbalanced from the start; there are no interlocking terms to test for "fit"; and as a matter of the honest bet, the benefit is not the result of a wager—the price, or the terms, may well have been known by the party now claiming recompense to be

172. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981). *See also id.* § 344.

173. *E.g.*, *Donovan v. Backstadt*, 453 A.2d 160 *passim* (N.J. 1982); *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126 *passim* (Tex. App. 2012); *McMurtry v. Wiseman*, No. 1:04 CV-81-R, 2006 WL 2375527, at \*1-2 (W.D. Ky. Aug. 16, 2006); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981).

174. *See supra* p. 753-54.

especially good right when the deal was struck. The Restatement's choice of words suggests that there is an additional principle of desert to be considered. We are "to give him the benefit of his bargain by awarding him a sum of money."<sup>175</sup> If we match this formulation against the idea of desert already quoted—"an agent's voluntarily undertaking a valuable activity, and as a result deserving benefits whose enjoyment forms a fitting sequel"<sup>176</sup>—the Restatement's formulation suggests that being a good dealmaker, making a good bargain, is itself to be viewed as a merit deserving reward.<sup>177</sup> Striking bargains is how one makes his way in our market-based society; reaping the benefit of being good at this activity is the way the story ought to end.<sup>178</sup> This is a broad proposition potentially applicable across the entire domain of deal-making; it obviously can conflict with our first principle, justice as the equal exchange, at many points.

To understand the difficulties inherent in turning this idea of desert into substantive law, we can look at the most important author to adopt

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175. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a.

176. MILLER, *supra* note 156, at 149.

177. There is one further point to be made about awards of expectation damages. An award of such damages . . . was, in a sense, a reward for diligence, skill and foresight. The man who managed to buy at less than market price, the man who had the foresight to buy in advance of changes in the market price, was a man who outsmarted his contracting partner. It was precisely this sort of diligence, skill, and foresight which, it was coming to be felt, ought to be rewarded and encouraged. In the next century, this indeed became the dominant philosophy of the age.

P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 202 (1979) (discussing the rise in awarding expectation damages in English law at the turn of the 18th to 19th centuries).

178. The case of the better-than-the-market deal also seems to escape from Fuller and Purdue's explanation of the expectancy as derivative from the reasons for recompensing reliance. If it is a good deal, its expectation value is beyond actual out-of-pocket reliance, and since by hypothesis it is a better deal than what is otherwise available, its value is also beyond lost-opportunity reliance. Fuller might respond that the law simply uses an overly broad rule for administrative convenience or to reduce insecurity. Possibly; but the common use of "benefit of the bargain" language suggests the problem goes deeper than that. Fuller's analysis is constricted by his desire to remain within a framework of commutative rather than distributive justice. He is quite right to say that the expectancy measure has a distributive impact, but he is wrong for that reason to shy away from justifying it directly. *See generally* Fuller & Purdue, *supra* note 25. Regarding the difficulties in arguing for, or against, the expectancy measure on bases other than the desert argument here stated, see generally Richard Craswell, *Against Fuller and Purdue*, 67 U. CHI. L. REV. 99 (2000).

The provision of the Uniform Commercial Code granting a profit to the lost-volume seller even in the absence of any reliance, U.C.C. § 2-708 (AM. LAW INST. 2014), can also be seen as granting an award for making a deal, in this case, an ordinary profit for an ordinary deal.

this basic stance as the foundation of justice, Herbert Spencer.<sup>179</sup> Amazingly—except for the incredible impact of Darwin on late nineteenth century thought—Spencer begins his treatment of justice with a discussion of “Animal Ethics.”<sup>180</sup> He concludes that the survival of a species, once the altruistic acts necessary to raise the young are over, demands that “after maturity is reached benefit must vary directly as worth: worth being measured by fitness to the conditions of existence. The ill fitted must suffer the evils of unfitness, and the well fitted profit by their fitness.”<sup>181</sup> To reach this result in human society, he then argues, we must allow each person the freedom to act and to “suffer the good and evil results of his actions . . .”<sup>182</sup>

The resulting combination achieves justice:

When we assert the liberty of each bounded only by the like liberties of all, we assert that each is free to keep for himself all those gratifications and sources of gratification which he procures without trespassing on the spheres of action of his neighbors. If, therefore, one obtains by his greater strength, greater ingenuity, or greater application, more gratifications or sources of gratification, than others, and does this without in any way trenching on the spheres of action of others, the law of equal freedom assigns him exclusive possession of all such extra gratifications and sources of gratification. . . .<sup>183</sup>

(This freedom to act includes, of course, the freedom to make deals with willing partners—the freedom of contract.<sup>184</sup>)

Those who are best at an activity deserve to win. What is deserved is in fact unequal. In the game of life, the law ought to be (to use a phrase Spencer invented) “survival of the fittest.”<sup>185</sup>

A moment’s thought will show that Spencer’s argument proves too much. What constitutes “fitness to the conditions of existence” changes as that set of conditions changes. If the conditions were to include physical contest, as in nature, big brutes would be more fit. If contracts are to be enforced as rewards to the fittest, under conditions like that, contracts made under a threat of physical violence ought to be enforced.

179. 2 HERBERT SPENCER, THE PRINCIPLES OF ETHICS (1893).

180. *Id.* §§ 246–49.

181. *Id.* § 247.

182. *Id.* § 272.

183. *Id.* § 301. Despite its use of the word “freedom,” this “law of equal freedom” is a desert principle: its function is to assign benefits to those who deserve them.

184. SPENCER, *supra* note 179, §§ 314–15.

185. On Spencer’s origination of the phrase, see CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 72 (5th ed. 1869).

Thomas Hobbes, who saw contract as a substitute for war, accepted this conclusion, not only in the state of nature but also in organized societies, unless the positive law of the state provided otherwise. “[I]f I be forced to redeem myself from a thief by promising him money, I am bound to pay, till the civil law discharge me. For whatsoever I may lawfully do without obligation, the same may I lawfully covenant to do through fear.”<sup>186</sup> For those who do not accept that conclusion—and of course the actual law of contracts is shy of bargains made “through fear”—there needs to be an explanation for why some “conditions of existence” count in determining which “fitness” is rewarded, and some do not. As Anthony Kronman points out in *Contract Law and Distributive Justice*,<sup>187</sup> all self-interested deal-making involves advantage-taking in the sense that each side, to the extent it is allowed, tries to use what it has to get a better deal. Once we pass the “anything goes” point, when we are asking whether the resulting deal deserves to be enforced—and especially if we are asking whether a contracting party deserves to get the benefit of an advantageous deal—we are judging the value of the different maneuvers we consider legitimate for taking advantage within the contractual setting.

But although we have to accept that what we are doing is making a choice rather than following a rule derived from nature, I think we also have to admit that, although contested, American culture has a lot of Spencer in it. We admire people who are self-reliant. We think that they are central to the working of our economic system. But we go beyond that. We think that individual initiative, independence, and self-reliance are central to our polity and civil society as well. We connect these traits to what we understand by democracy, which, for example, includes not just voting but widespread social action by voluntary civic groups.<sup>188</sup> Effective self-starting and self-interested behavior contributes to, rather than detracts from, the society we value. Exemplars are culture heroes. Our economic system is both expressive of these ideas and a ground upon which they are learned.<sup>189</sup> Initiative and self-reliance are an accepted social ground of desert.

At the same time, we do not admire those who coerce others, or who lie, cheat, or steal. We are not prepared to take social Darwinism that far.

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186. HOBBS, *supra* note 32, at 91.

187. 89 YALE L.J. 472, 478–83 (1980).

188. *See generally* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., 1969).

189. As already noted, it is wrong to think that “desert” is just another name for an incentive to contribute to the general welfare. MILLER, *supra* note 156, at 136. But even if it were, it would not equate, even in contract law, with being an incentive just for economic efficiency. As stated in the text, part of the reason we value self-reliance is for its general social effects, and not just as a contribution to production.

Broadly speaking, our law of contracts straddles these conundrums but with a thumb on the scale for self-reliance. It stipulates many criteria for awarding the successful dealmaker the benefit of his bargain. But by and large they are converted into defenses: doctrinally, merit comprises the absence of fraud, duress, or mistake. The result is that positive reasons for viewing inequalities as just—e.g., he got a good deal by being diligent, intelligent, and telling the truth—become inverted into the failure of the other party to show negative reasons for not accepting those inequalities—e.g., he got a good deal and no fraud was shown.<sup>190</sup> Practically speaking, this leaves a space intervening between those contracts that could be affirmatively justified as a matter of desert and those contracts that offend contract law's defenses, and in this space the superior dealmaker still gets the benefit of his bargain. Many courts have commented that their legal standard in these matters falls short of their moral ideal.<sup>191</sup> Perhaps this should be seen as courts' merely wanting to stick to clear cases in upending the deal the parties have made—a recognition of claims of freedom—but perhaps it also represents a grudging admiration for those who get ahead by coming close to the line without crossing it.

One might think, however, that once the line is crossed, there is no further claim of desert to be made. In a classic case, *Kendall v. Wilson*,<sup>192</sup> the buyers sued to return a machine represented by the seller to be a perpetual motion machine, and to get their money back; in fact the machine was worked by a concealed clock spring.<sup>193</sup> The court sustained the verdict in their favor, saying that the plaintiff had proved that the deception was artful, but need not have gone that far: “for the law will afford relief even to the simple and credulous who have been duped by art and falsehood.”<sup>194</sup> But in fact, desert as self-reliance often becomes a comparative issue. We do not admire people who tell falsehoods. But we also do not admire those who gullibly accept what they are told; we want to encourage them to stand on their own two feet. Often, then, the law of misrepresentation has to strike a balance: how much do we want to penalize the liar by rescinding his good bargain (the usual remedy for misrepresentation); how much do we

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190. This same pattern structures anti-discrimination law, which, when applied to matters such as employment, can be considered right next to contract law even if not of it. The law does not stipulate a positive norm of distribution: it does not demand that the person who will do the job best deserves to get it. Instead, it excludes some of the negative reasons: who gets the job should not depend on the irrelevancies of race, gender, and so forth.

191. E.g., *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808, 808–09 (Mass. 1942).

192. 41 Vt. 567 (1869)

193. *Id.* at 567.

194. *Id.*

want to teach the fool a lesson by enforcing the deal. The Restatement (Second)'s basic rule on the matter—"If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient"<sup>195</sup>—puts the actions of both parties into issue. It requires consideration of both whether one party misrepresented and whether the other party's reliance was justified.

In cases dealing with outright frauds, this approach can be startling. That a plaintiff must show that he in fact relied on the alleged fraudulent statement is not remarkable—otherwise where is the causal connection between the statement and his damage that justifies his being a common law plaintiff?<sup>196</sup> But something other than ordinary doctrinal manipulation is present in cases requiring the plaintiff's reliance on a fraudulent statement to have been reasonable before he is entitled to a remedy. That, if we were to speak for a moment in the language of torts, sets up a defense of contributory negligence to an intentional tort—and that is not the common pattern of the law. It is not a defense to a charge of battery that, after all, the plaintiff should have known better than to walk in a rough neighborhood after dark.<sup>197</sup> Yet some courts accept it here.<sup>198</sup>

Consider, for instance, the fairly recent case of *Crigger v. Fahnestock & Co., Inc.*,<sup>199</sup> described by the Second Circuit as a case where "[v]ictims of a Ponzi scheme brought suit for common law fraud against the schemers."<sup>200</sup> The plaintiffs all told invested \$8 million; very little was returned before their investment disappeared.<sup>201</sup> The intent to defraud was plain. But when the plaintiffs asked the trial judge to charge the jury "that under New York law a plaintiff's negligence is no bar to a fraud claim," the trial court refused.<sup>202</sup> He instead charged:

The law is that a party will not be heard to complain that it has been defrauded when it is eviden[t] that its own lack of due care was responsible for its predicament. . . . Your job is to first determine whether the plaintiffs engaged in enough due diligence relative to their net worth and the resources

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195. RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

196. For broader discussion, see John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1003 (2006).

197. RESTATEMENT (SECOND) OF TORTS § 481 (AM. LAW INST. 1965).

198. *E.g.*, *Wild v. Krenke*, 55 S.E.2d 544, 546 (Ga. 1949); *Williams v. Rank & Son Buick*, 170 N.W.2d 807, 811 (Wis. 1969).

199. 443 F.3d 230 (2d Cir. 2006)

200. *Id.* at 232.

201. *Id.* at 234.

202. *Id.* at 236.

potentially at their disposal to satisfy their burden of diligently asking questions.<sup>203</sup>

On appeal, the finding of the jury for the defendants under this charge—based on a record showing that the plaintiffs were significant investors who fell for a promised return of six or seven percent per month, to be had from an investment barely described to them and lacking a prospectus—was affirmed.<sup>204</sup> “The law,” said the Second Circuit, “is indulgent of the simple or untutored; but the greater the sophistication of the investor, the more inquiry that is required.”<sup>205</sup> Especially in light of the fact that this approach let clear fraudsters off the hook, it is hard to see this statement as other than a comparative determination of desert; in the court’s view, the jury appropriately decided that the plaintiffs deserved to lose even more than the defendants did.<sup>206</sup>

The balance of desert may go even further in this direction in cases of pure non-disclosure, for we may want to reward the party who has discovered, and kept secret, important information—he deserves to keep the fruit of his intelligence and labor—as well as not rewarding the party who has not found out—perhaps through sloth or bad judgment. There is still the problem, of course, of rewarding the party who knows that the other is laboring under a misconception. But the law starts from the baseline set by John Marshall in the famous case of *Laidlaw v. Organ*.<sup>207</sup>

The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe

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203. *Id.* at 235.

204. *Id.* at 238.

205. *Id.* at 235.

206. *Id.* at 238. The doctrinal pattern of cases like *Crigger* could possibly be rationalized as giving sophisticated market players an incentive to generate the public good of policing the market, but I have seen nothing in the cases to suggest that judges are thinking this way. (I am indebted to a discussion with my colleague Steven Shavell for suggesting this possibility.)

For discussion of where the balance between speaker and listener ought to lie in modern consumer law, see Seana Shiffrin, *Deceptive Advertising and Taking Responsibility for Others*, OXFORD HANDBOOK OF FOOD ETHICS (Tyler Doggett et al. eds., forthcoming 2016).

207. 15 U.S. 178 (1817).

the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.<sup>208</sup>

The case law has moved somewhat from this pristine point—and in doing so has exemplified the difficulty Marshall predicted.<sup>209</sup> The trend, for example, is to require the seller of a house to tell the buyer when he knows the house is infested with termites, but not all jurisdictions agree.<sup>210</sup> The Restatement (Second) says that a person's non-disclosure is culpable only "if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing"—about as wishy-washy as a rule could be.<sup>211</sup> Part of the problem lies, of course, in specifying what facts have to be disclosed: of the infinite number of questions the other party might care about, which really do interest him? The temptation is great to simply say: let him ask. But the difficulty is great also because we do think there is a claim of desert on each side. As put by Third Circuit Judge William Clark, somewhat ruefully:

It may be some reflection of the business ethics fostered by a system of individual competition that the parties to a contract are permitted to deal at arms length. I can buy my neighbor's land for a song, although I know and he doesn't that it is oil bearing. That isn't dishonest, it is 'smart business' and the just reward of my superior individualism.<sup>212</sup>

Our internal—or cultural—conflict over how far we value "smart business" and "superior individualism" also shows up in the law of contracts that are not, technically speaking, deals. In the mechanics of the Restatement, contracts require consideration, and consideration requires an exchange. But sometimes, under Section 90, promises are enforced without consideration because the rule requiring exchange is overbroad and leads to injustice. Accordingly, even without exchange, in the formulation of Section 90 of the Restatement:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance

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208. *Id.* at 195.

209. The course of decisions is discussed in FARNSWORTH, *supra* note 82, § 4.11, at 472–78.

210. Compare *Obde v. Schlemeyer*, 353 P.2d 672, 674 (Wash. 1960) (must disclose), with *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808, 809 (Mass. 1942) (don't have to).

211. RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981).

212. *Blair v. Nat'l Sec. Ins. Co.*, 126 F.2d 955, 958 (3d Cir. 1942) (dictum).

is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>213</sup>

Insofar as this reliance-based doctrine is used to enforce promises of what are, socially speaking, pure gifts, justice as we have been discussing it in this article is not implicated; there is not, and never was meant to be, any two-sided deal whose quid pro quo could be assessed. However, insofar as Section 90 is used to reach economic transactions that have gone a bit awry, where the question is whether the ordinary rules defining the enforceable exchange are misshapen, the matter stands otherwise.<sup>214</sup> Should Section 90 be used to avoid injustices caused by over-emphasizing (or over-formalizing) traits of self-reliance and independence in other doctrines? Surprisingly few of the great many cases that have been decided on the authority of Section 90 have considered “if injustice can be avoided only by enforcement” worthy of direct discussion.<sup>215</sup> The Restatement commentary itself suggests an amorphous grab-bag of possible considerations.<sup>216</sup> There is, in short, no established answer to the question just put.

Many of the Section 90 cases arising from commercial circumstances deal with “almost bargains:” parties who are in the course of planning a deal but have not yet tied the knot. Not long after Section 90 appeared in the Restatement (First), Learned Hand warned against courts’ stretching to rescue, in commercial cases, the hapless contracting party who failed to close the deal. “[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.”<sup>217</sup> He continued:

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213. RESTATEMENT (SECOND) OF CONTRACTS § 90.

214. There are also Section 90 cases that exemplify the other line of desert cases: those growing from the general cultural desire to have the story end rightly. *See, e.g., Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 167–69 (Mo. App. 1959).

215. FARNSWORTH, *supra* note 82, § 2.19, at 180.

216. The principle of this Section is flexible. The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee’s reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b.

217. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933).

Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other. But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of ‘promissory estoppel’ is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise. But an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. . . . There is no room in such a situation for the doctrine of ‘promissory estoppel.’<sup>218</sup>

It is clear that this is no longer the law; many proposed commercial deals end up being enforced because of reliance.<sup>219</sup> Nor is it the law that damages in such situations are necessarily limited to out-of-pocket reliance rather than loss of profits.<sup>220</sup> But there is a lingering sense in the cases that serious businesspeople ought to know that any reliance they place on a deal coming through is their own affair until the final deal is struck. As Judge Posner formulated the point, if assurances that the deal will go through “are not reasonably understood as legally enforceable promises there can be no action for promissory estoppel.”<sup>221</sup> Assuming this criterion is not circular, it would seem to refer to the standards of enforceability usually applied to those who are knowledgeable bargainers. To the same effect are decisions refusing to enforce promises that, although relied on, were left too informal for the seriousness of the matter at hand.<sup>222</sup>

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218. *Id.* (citations omitted)

219. FARNSWORTH, *supra* note 82, § 2.19, at 173-74 & n.26.

220. *E.g.*, *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981). For data on when expectation damages are awarded in Section 90 cases, see Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 150 (1991).

221. *Garwood Packaging Co. v. Allen & Co.*, 378 F.3d 698, 705 (7th Cir. 2004).

222. *E.g.*, *Thatcher’s Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 36 A.2d 156, 160–61 (Pa. 1994). There are also situation-specific lines of cases where what constitutes desert-worthy bargaining behavior is more closely examined. For example, there are many cases regarding the question of whether a sub-contractor is bound to its bid because a general contractor relied on it in formulating its overall bid for a project which it then won. Learned Hand’s answer, in the case quoted in text, was that the sub-contractor could withdraw its bid before it was accepted, unless the general contractor explicitly bargained and paid for the contrary. *James Baird Co.*, 64 F.2d at

In short, desert—that is, the reward deserved by those who use the system of contract in the culturally defined proper way—is part of the law of contracts, both of bargained-for deals and of the law of promissory estoppel.

One problem that bedevils desert arguments of this sort is how to handle luck. We commonly set up luck as the antithesis of desert: he didn't deserve to win, he just got lucky. But the grounds of desert relevant to contract law ordinarily include an element of luck in them. This is obvious on the particular level of happening to know an important fact, or happening to ask the right question. More importantly, it is also true on the general level: talent, intelligence, and skill are all partly a result of inherited abilities (usually thought of as "luck") and partly a result of diligent application and practice (usually thought of as "merit"). (And even the ability to be diligent may itself depend on having certain inherited qualities.)

This problem is not unique to the law of contracts. David Miller, previously quoted, says of desert in general: "if . . . we want to keep the concept in a form that captures most of the desert judgments people actually make, then we cannot hope to find a basis for desert that is untouched by contingency."<sup>223</sup> We accept analogous resolutions elsewhere in the law; we accept that negligent driving is actionable if someone happens to get hurt, and not actionable if there is no harm, although the difference may be entirely the result of happenstance. Perhaps the best we can do as regards present matters is to eschew desert when we find that "luck" has been given a questionable helping hand (as in insider trading),<sup>224</sup> and otherwise reward the combination. But the fact that much of what we think is deserved, is partly the result of luck, may make us less enamored of this principle, or at least make us more sympathetic to the problems of those who are unlucky. Which brings us to our fifth principle of justice.

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345. But many modern cases have taken a different view, most famously, *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). What is striking is that the line of cases, taken as a whole, goes deeply into the relative positions of the general contractor and the sub-contractor, and into the possibilities for unfair bargaining tactics if the rule were set one way or the other.

223. MILLER, *supra* note 156, at 148. To the same effect, worked out more completely, see T. Nagel, *Moral Luck*, 50 PROC. OF THE ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES 136 (1976).

224. Farnsworth suggests that, for this reason, Laidlaw might come out differently today if all the facts were known. See FARNSWORTH, *supra* note 82, § 4.11, at 472 n.13, 473 n.31.

## V. PRINCIPLE #5: JUSTICE AS THE ADVANTAGE NOT TO BE TAKEN

Whatever may have been true in some former times, we now think that as a society we have some responsibility for those who are not doing so well: who are old, or ill, or impoverished. How great the responsibility is, is of course contested, but in principle we are not willing simply to say “not our affair.” This care is not thought to be owed as a matter of personal desert; most people would say that medical care for the destitute does not stand on the same footing as medical care for the war wounds of the veteran. Instead, we recognize the reality of seriously bad luck, of “there, but for the grace of God, go I.” We recognize it partly on the self-interested grounds of social insurance; given the contingencies of life, we may actually go “there” some time in the future. But we also recognize it as an element of justice grounded in solidarity: we are all in this society together, so it is right that we look out for each other.

Does this element of justice show up in contract law? Some might think it does not: contract law is based entirely on a model of self-interested action. But that is far too simple a statement. Contract law has for a long time contained elements limiting the advantage that can be taken of the necessitous. The judicial refusal to enforce overweening damages clauses because they are penalties, and usury statutes limiting the rate of interest that can be charged—both very traditional—can both be seen as responding to the sense that a desperate person will agree to anything. The impulse to avoid too much taking advantage is real.

But how far does this impulse go?

We can start our inquiry by considering the obligations of this sort that parties who have already made a deal owe to each other. “Every contract,” says the Restatement (Second) of Contracts, “imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>225</sup> That much is well established; what is up for debate is how substantial the duty is. Certain forms of bad faith action are pretty clearly excluded:<sup>226</sup> tort-like “tricky” behavior designed to undercut the other party;<sup>227</sup> or the effort to reclaim opportunities manifestly given up in the making of the deal.<sup>228</sup> Sometimes affirmative

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225. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981); accord U.C.C. § 1-304 (AM. LAW INST. 2014).

226. See Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201-07 (1968) (concept of good faith as an excluder).

227. E.g., *Market Street Assocs. Ltd. P'ship v. Frey*, 941 F.3d 588 (7th Cir. 1991); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977).

228. E.g., *Greer Props., Inc. v. LaSalle Nat'l Bank*, 874 F.2d 457, 461 (7th Cir. 1989); *Patterson v. Meyerhofer*, 97 N.E. 472, 473 (N.Y. 1912). See Steven J.

efforts needed to make the other party's performance possible are also required.<sup>229</sup> But the heart of the justice question lies in whether the law does, or should, go further to impose some sharing between the parties.

Consider the following situation: the parties are engaged in a long-term cooperative relationship; either their joint endeavor was ill conceived from the start or the external environment has worsened; one party acts reasonably, and within the formal structure of the parties' contract, to preserve its own position; what it does foreseeably harms the other party; and the other party claims that the defendant should instead have acted "in good faith" by taking into account both parties' interests. In such circumstances, while the cases are mixed, several courts have given relief.<sup>230</sup> Naturally their decisions have turned in part on the particular language and cooperative structure the parties adopted, so in part the decisions appear as mere "interpretation." But behind the interpretive choices, more or less acknowledged, lies a sense of justice. The challenge that faces the cooperating parties should be borne, at least to some extent, by both of them.

The logic of the decisions is perhaps most clearly set out in *Parev Products Co. v. I. Rokeach & Sons*,<sup>231</sup> decided in 1941.<sup>232</sup> The setting was the market for Kosher foods.<sup>233</sup> Parev Products manufactured Parev Schmaltz, a vegetable-oil-based shortening that substituted for the traditional Jewish shortening of rendered chicken fat.<sup>234</sup> In the 1920s, Parev licensed the product for a twenty-five year term to Rokeach,

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Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387-92 (1980) (recapturing forgone opportunities as bad faith).

229. E.g., *Fry v. George Elkins Co.*, 327 P.2d 905, 908 (Cal. Dist. Ct. App. 1958); *Goldberg v. Charlie's Chevrolet, Inc.*, 672 S.W.2d 177, 178-79 (Mo. Ct. App. 1984).

230. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 613-14 (2d Cir. 1979); *Parev Prods. Co. v. I. Rokeach & Sons, Inc.*, 124 F.2d 147, 149-50 (2d Cir. 1941); *Feld v. Henry S. Levy & Sons, Inc.*, 335 N.E.2d 320, 322-23 (N.Y. 1975).

Judge Posner's analysis in *Market Street Assocs. Ltd. P'ship v. Frey* rejects extending good faith as far as these cases suggests. 941 F.3d 588, 593-95 (7th Cir. 1991). For critique, see Todd Rakoff, *Good Faith in Contract Performance: Market Street Associates, Ltd. Partnership v. Frey*, 120 HARV. L. REV. 1187, 1190-97 (2007). For another view, see DANIEL MARKOVITS, *Good Faith as Contract's Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272 (Gregory Klass et al. eds., 2014).

U.C.C. §2-306 also seems to require some degree of sharing in the context of an output or requirements relationship; see § 2-306 cmt. 2: "a shut-down merely to curtail losses" is not permissible; but here, too, the cases are mixed. See FARNSWORTH, *supra* note 82, § 7.17, at 366 n.38.

231. 124 F.2d 147 (2d Cir. 1941).

232. *Id.*

233. *Id.* at 148.

234. *Id.* at 147-48.

which sold a wide range of Kosher products.<sup>235</sup> Parev was to be paid a fixed amount per jar sold.<sup>236</sup> Rokeach was given control of the product, including its name.<sup>237</sup> Rokeach could also terminate the contract at any time for a small payment, but agreed not to manufacture “Parev Schmaltz, or any product of a similar nature” after termination.<sup>238</sup>

Rokeach renamed the product “Nyafat,” which it sold under its own label with considerable success.<sup>239</sup> Parev accordingly received considerable royalties.<sup>240</sup> Over time, however, outside competition increased.<sup>241</sup> Other companies entered the solid shortening market with products based on vegetable oil (“Crisco” and “Spry”); these could be sold in the market for Kosher goods even though lard, the animal product they mimicked, could not have been.<sup>242</sup> Rokeach then began selling a new product (“Kea”) under its label, comparable in color and taste to these new competitors, while continuing to sell Nyafat as well.<sup>243</sup> But the market for Nyafat, the licensed product, was threatened by the introduction of Kea.<sup>244</sup>

Plaintiff Parev asked for an injunction against the selling of the new product.<sup>245</sup> Defendant Rokeach countered that, while it had agreed not to compete with plaintiff’s product if it terminated the contract, it had not similarly restricted itself while the licensing lasted.<sup>246</sup> “Undoubtedly extensive freedom of action [for Rokeach] was intended,” said the court, “[a]nd yet that could not have been wholly unlimited, as indeed, defendant properly concedes when it admits that at least tortious competition or destruction of the Nyafat market was not open to it.”<sup>247</sup> But that concession would justify an injunction only if it could be shown that the defendant was purposefully trying to undercut the plaintiff, rather than, as it claimed, trying to meet new outside competition.<sup>248</sup> “The really equitable solution” the court decided “is to permit defendant to sell Kea so long as it does not invade Nyafat’s market if that point is susceptible of proof, as we think it is.”<sup>249</sup> Hence,

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235. *Id.* at 148.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 148–49.

244. *Id.* at 148.

245. *Id.*

246. *Id.* at 148–49.

247. *Id.* at 149.

248. *Id.* at 150.

249. *Id.*

Parev was denied its requested injunction, but given leave to show, through expert testimony, its damages resulting from the displacement of its licensed product.<sup>250</sup> In other words, defendant Rokeach was allowed to pursue its interest in meeting the new competition in the marketplace as long as it compensated plaintiff Parev for the loss its actions entailed; or, if we look at it as a matter of the choices facing Rokeach going forward, as long as it internalized both parties' interests. The parties were joined in a long-term relationship; "a status exists," said the court, "upon which each party should be entitled to rely."<sup>251</sup>

The idea that we voluntarily enter into relationships that generate obligations to take the other party's interests into account—obligations that go beyond explicit commitments—is a well-understood social principle. For example, it lies behind many of the duties friends owe each other. Cases like *Parev Products* are revealing because they show us that the same idea can apply even when we are talking of contracts made between purely commercial parties. They are not fiduciaries vis-à-vis each other, but they are not strangers, either. On this view of the matter, how much they have to consider the other party would seem to correlate with the depth of the relationship.

That conclusion, of course, raises the question, whether a similar, but weaker, principle could be at work when the contracting parties are indeed strangers—or, to restate the question from another point of view, when their only ties are membership in the same society, or in the brotherhood of all people. As is well known, American common law does not have a principle of good faith applicable to parties who are only in negotiation, as contrasted with parties who have already made a deal.<sup>252</sup> But similar ideas can turn up in more than one doctrine.

Ordinarily we assume that parties making a deal are self-interested; ordinarily they are looking to their own advantages. But does the law recognize a point at which that process turns into "taking advantage" in the pejorative sense? A point at which even a self-interested bargainer has to take the position of the other party into account? Clearly as to some matters the answer is yes. For example, it is generally the law that parties are bound by what they communicate—but it has long been the law that if one party makes a mistake, and the mistake ought to be obvious to the other party, that other party cannot snap up the deal "too good to be true" and expect the courts to enforce

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250. *Id.*

251. *Id.* at 149.

252. STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH 330–32 (1995).

it.<sup>253</sup> To take one of many cases, in *Harran v. Foley*<sup>254</sup> the seller had, earlier in the day, demanded of the buyer \$270 for a group of cattle; later, the seller supposedly said he would sell them for \$161.50, which the buyer accepted knowing the cattle to be worth at least \$250.<sup>255</sup> The jury was properly told, said the court, that even if the seller, as claimed, had mistakenly said \$161.50 rather than \$261.50, still the jury could find (as it did) that the seller was not bound at the lower price if the buyer had “good reason for believing the offer was a mistake.”<sup>256</sup>

The Restatement (Second) goes further and also allows rescission on the basis of one party’s mistake, even if not known or obvious to the other party at the time of making the contract, if the mistake “has a material effect on the agreed exchange of performances” and “the effect of the mistake is such that enforcement of the contract would be unconscionable.”<sup>257</sup> (Apparently “unconscionable” in this context simply means substantively very unequal;<sup>258</sup> as we have already seen, our Principle #1 can join forces with other principles to define the just result.)

Almost all of the case law supporting this rule comes from bidders on construction projects, in situations well reflected in the Restatement provision’s first illustration:

In response to B’s invitation for bids on the construction of a building according to stated specifications, A submits an offer to do the work for \$150,000. A believes that this is the total of a column of figures, but he has made an error by inadvertently omitting a \$50,000 item, and in fact the total is \$200,000. B, having no reason to know of A’s mistake, accepts A’s bid. If A performs for \$150,000, he will sustain a loss of \$20,000 instead of making an expected profit of \$30,000. If the court determines that enforcement of the contract would be unconscionable, it is voidable by A.<sup>259</sup>

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253. 2 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 6:58, at 838–39 (Richard A. Lord ed., 4th ed. 2007)

254. 22 N.W. 837 (Wis. 1885).

255. *Id.* at 838.

256. *Id.* at 839.

257. RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. LAW INST. 1981); *Contra* RESTATEMENT OF CONTRACTS § 503 (AM. LAW INST. 1920). This principle is not, in fact, new; Williston recognized it and discussed it in his treatise, although he disapproved. 3 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* §§ 1578–79 (1920).

258. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. c, illus. 1, *with* RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. c, illus. 2.

259. RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. c, illus. 1.

What is at stake in a result like this can perhaps best be seen by contrasting it with our previous principle, that of desert. The same described deal that would produce a loss for the mistaken builder would give the owner an advantageous price he would not be able to replicate elsewhere.<sup>260</sup> Should the owner be able to keep it? His extra profit is only a product of luck (the other party's error) rather than of merit. But at the same time, the bidders' mistakes that show up in the actual underlying cases are matters such as failing to include one of the subcontractors' bids in the final price, or misreading a contract specification, or simple arithmetical error.<sup>261</sup> These errors are easy to show, which may be important from an evidentiary point of view, but they would also seem to be errors that are easy to guard against. One would expect a contractor bidding on a job to be very careful about the price it offers. Seen in terms of the justice of desert, then, the Restatement's example is rather a stand-off, or perhaps even wrong: it seems that the bidder who is not careful and self-reliant is being favored, while the owner who accepts the bid, while not meritorious, is at least innocent: the hypothetical states that the price difference is not so great that B would have "reason to know of A's mistake."<sup>262</sup> To reach the actual result, then, it seems we need another principle. For the owner's unfair "taking advantage"—the feature that would make enforcement unjust—consists only in the owner's insisting on his contract, that is to say, on his profit, after he merely learns how hard it will be on the other party.

How far might such a principle of unfair taking advantage go? Of particular interest in this matter, is the law of duress. But it requires some clearing of brush to see why this is so.

First, our image of duress is a gun to the belly. It does not take much effort to say that any contract made in such a circumstance should be voidable by the victim: the motivating threat is itself a crime. But already by the 18th century, threats of acts that would not be crimes, but only breaches of other legal responsibilities, could lead to invalidation of the resulting bargain;<sup>263</sup> and by the end of the 19th

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260. In these cases, we are only talking about shifting the profit from one party to the other. Rescission is allowed only when the other party has not started to rely, except perhaps by discharging other bidders. FARNSWORTH, *supra* note 82, § 9.4, at 615 (citation omitted).

261. See, e.g., *Curran v. State*, 215 A.2d 702 (N.H. 1965) (contractor discovered his submitted bid was erroneously low because the adding machine used to calculate the total could not record numbers greater than 100,000); *Elsinore Union Elementary Sch. Dist. of Riverside Cty. v. Kastorff*, 353 P.2d 713 (Cal. 1960) (contractor's bid to a school district did not include the cost of a subcontractors' work for plumbing).

262. RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. c, illus. 1.

263. *Astley v. Reynolds*, 93 Eng. Rep. 939 (KB 1732).

century, some threats that would not even be actionable if carried out, could be the basis for a finding of duress.<sup>264</sup> The result is that for the modern law of economic duress there is no clear line elsewhere in the legal system that can be imported to set the limits for the doctrine; the limits are based on our understanding of the practice of contracting itself.

Second, it is common to think of duress as raising issues only of volition: to choose under duress is to have no other choice. But it has long been recognized that this is analytically wrong. “Your money or your life” presents a choice, and the party who chooses to give up his money and save his life, is indeed making what we ordinarily think is the right choice. Duress works by structuring the other party’s choices, not by eliminating them; in the words of the Restatement, the question is whether the threat “leaves the victim no reasonable alternative.”<sup>265</sup> The evaluative work is done by deciding what alternatives are “reasonable.”

Third, while a finding of duress is commonly said to require a “threat,” what constitutes a threat requires specification. In particular, we have to ask whether to be a “threat” the threatening party has to take, or say he will take, action, or whether mere inaction under some circumstances will do. Putting the gun to the belly and saying the trigger will be pulled, is surely to make a threat. Is refusing to sign an agreement one has previously said he will sign?<sup>266</sup> Our temptation is to moralize: inaction becomes a threat when it is done for an improper purpose. But analytically, we can separate the issues, and say that refusing to deal, at least in circumstances where dealing would be the ordinary thing to do, can be considered a threat—but whether using a threat constitutes duress, or is just ordinary business, is a separate question. This is the approach taken in most of the modern legal literature, and in the Restatement:

An ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process. A threat does not amount to duress unless it is so improper as to amount to an abuse of that process.<sup>267</sup>

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264. *Silsbee v. Webber*, 50 N.E. 555 (Mass. 1898).

265. RESTATEMENT (SECOND) OF CONTRACTS § 175.

266. *Hochman v. Zigler’s Inc.*, 50 A.2d 97 (N.J. Ch. 1946) (yes).

267. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a. An alternative lingo would reserve the term “threat” for proposals that would make the other party worse off, while “offer” would be reserved for proposals that would make the other

This analysis opens the possibility that an A who is merely refusing to deal except on very favorable terms with a B who is being driven into the deal by external adversity, can be considered to be placing B under duress. In the famous case of *Post v. Jones*,<sup>268</sup> the contents of the whaling ship *Richmond* that had run aground in the Behring Straits were auctioned off, for a very low price, to the two ships that were near enough to save her crew and her cargo.<sup>269</sup> Winter was coming on, and the destruction of the cargo, if not carried away, was otherwise certain; no one else was around and the nearest commercial port (in 1849) was five thousand miles away.<sup>270</sup> The Supreme Court upended the sale, and gave the rescuers only the salvage money they would be entitled to by maritime law.<sup>271</sup> In the words of Justice Grier:

The contrivance of an auction sale, under such circumstances, where the master of the *Richmond* was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.<sup>272</sup>

*Post v. Jones* was an admiralty case, and has not been a fount of general doctrine. Is it different because of a unique absence of a market? Because there is a well-established admiralty-law alternative remedy in salvage money? Because the customs of the sea imply a greater solidarity among ships and sailors than among the general population on land? Justice Frankfurter thought the case was an appropriate precedent, among others, for finding that the United States should be able to recoup excessive profits extracted from it by Bethlehem Steel in a “take-it-or-leave-it” deal made to build ships under the necessity of fighting a war; but his was a dissenting voice.<sup>273</sup> While the fact has been criticized, there appears to be no general common law doctrine upending contracts based on the mere threat of refusing to deal unless offered an unusually good deal, against a

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party better off—but this would still require further premises to establish the baseline from which to judge “better off” or “worse off.” See ALAN WERTHEIMER, COERCION 204–05 (1987).

268. 60 U.S. 150 (1856).

269. *Id.* at 158–59.

270. *Id.* at 158.

271. *Id.* at 160.

272. *Id.* at 159.

273. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 330 (1942) (Frankfurter, J., dissenting).

background of distress to which the threatening party made absolutely no contribution.<sup>274</sup>

There is, however, a line of statutes, passed in about half the states, that meets these specifications for some emergency situations.<sup>275</sup> These statutes, often called “anti-price-gouging statutes,” typically define what constitutes a covered emergency, specify a range of transactions covered, and prohibit, in varying formulations, raising prices much above the pre-emergency price; in most, although not all, states, private plaintiffs can sue.<sup>276</sup> The California statute, for example, is triggered by an official declaration (federal, state, or local) of a state of emergency; applies variously to consumer goods, motor fuels, cleanup services and supplies, hotels and motels, and so forth; and prohibits charging more than ten percent above the price charged immediately before the emergency was declared (with some provision for a seller’s added costs).<sup>277</sup> Although enacted as a penal statute with stipulated fines, it also provides for civil enforcement through the state’s business code.<sup>278</sup>

In a case brought under the New York statute, *People by Abrams v. Two Wheel Corp.*,<sup>279</sup> a retailer of portable electric generators—following Hurricane Gloria, which left much of Long Island without power for better than ten days in 1985—sold about 100 generators at prices inflated from four percent on up to sixty-seven percent over ordinary list; the retailer could not show that increased costs justified these prices.<sup>280</sup> The Court of Appeals affirmed the lower court’s order of restitution for all the over-charged consumers.<sup>281</sup> Invited by the New York statute’s prohibition of an “unconscionably excessive price,”<sup>282</sup> the court based much of its reasoning on prior learning regarding

274. See Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 754–63 (1982) (arguing that admiralty doctrine should be adopted in common law).

275. CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 288–89 (8th ed. 2012).

276. *Id.* On the arguments surrounding such statutes, see MICHAEL J. SANDEL, JUSTICE 3–10 (2009).

277. CAL. PENAL CODE § 396 (2015–16).

278. *Id.*

279. 525 N.E.2d 692 (N.Y. 1988).

280. *Id.* at 696. This case was brought by the state’s Attorney General as provided in the New York statute, but nothing said in the case seems to have turned on its having been in some sense a public action; the remedy given was merely restitution. Whether the New York statute can be enforced through a private right of action brought by a consumer seems uncertain. See *Americana Petroleum Corp. v. Northville Indus. Corp.*, 606 N.Y.S.2d 906 (1994) (no private right of action implied for merchants).

281. *People by Abrams*, 525 N.E.2d at 696.

282. N.Y. GEN. BUS. LAW § 396-r para. 2 (McKinney 2016).

“unconscionability” as a general common-law and Uniform Commercial Code doctrine:

Thus, a price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors . . . . Here, . . . respondents’ price increases were attributable solely to their use of the bargaining advantage created by the natural disaster—that is, through means that are “ ‘unconscionable according to the mores and business practices of the time and place’ ” . . . because [the state statute] defines the mores governing this business setting and excises the use of such advantage from the repertoire of legitimate business practices.<sup>283</sup>

Should we view these statutes as political special pleading? Or can they be seen as stating part of the general justice of the law of contracts? That about half the states have passed such statutes opens up the latter inquiry. And although it relied on the price-gouging statute, the New York Court of Appeals’ opinion suggests that the same result could be achieved by courts operating under the general doctrine of unconscionability.<sup>284</sup> That doctrine, as ordinarily formulated, already crosses the line where the common law doctrine of duress stops; it does not depend on one party’s having caused the weakness of the other party, only on that party’s having taken advantage of the weakness.<sup>285</sup> It may be that a court would hesitate to undertake routinely a determination of when an “emergency” existed, but so do the statutes; they rely on the general decision by political authorities to declare an official state of emergency, and the courts could, if they wanted, piggy-back on the same bright line. The courts would, of course, have to decide what increase in prices is unconscionable, without the aid that some statutes (such as California’s) give by setting a fixed percentage of increase; but many statutes already leave it to the courts to decide, under some general formula: “excessive or exorbitant;”<sup>286</sup> “grossly in excess;”<sup>287</sup> or, as we have just discussed, “unconscionably excessive.”

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283. *People by Abrams*, 525 N.E.2d at 699 (citations omitted).

284. *Id.* at 695.

285. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (1965); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981). For discussion of unconscionability as an example of individual parties’ being held to recognize the disadvantages of others that they did not cause, see Aditi Bagchi, *Distributive Justice and Private Law*, 60 HASTINGS L.J. 105, 135–41 (2008).

286. IDAHO CODE § 48-603 (2014).

287. MICH. COMP. LAWS § 445.903(z) (2016).

The courts would have the same aid under the general doctrine that they have under the statutes: a preexisting price charged under non-emergency conditions in close temporal proximity. Assuming the usual remedy was restitution of the overcharge, that benchmark would also limit the severity of the doctrine: in any case where the overcharge had been small, the restitutionary remedy would be correspondingly narrow.

A sudden emergency places us all at risk—but some more than others. As a matter of the justice of the law of contracts, do those who are less impacted have an obligation not to take advantage of those who are more so? So these statutes say. One could be more pointed and say that the legal system loses its reason for protecting private property when that property is used to extract a premium from those suffering from the emergency; or, the other way around, that the price for society's protecting property in an emergency is that the property not be used to lord over the unfortunate.

Could this approach extend to non-emergencies? It is very hard for courts to extend the idea of justice as solidarity, of justice as the advantage not to be taken, to the imbalances that are part of everyday life in a market society. The very analysis just offered shows why. What would make it possible for courts to turn the price-gouging statutes into common law doctrine is the built-in structure for the decisions: the existence of a specific emergency, the existence of a pre-emergency comparison price, and the ability to base a remedy upon that price. Without those stopping points, how is a court to know when it has gone “too far”?

But other organs of government, with other bases of legitimacy and other means for discovering truth, can go further. The Fair Labor Standards Act,<sup>288</sup> and comparable state statutes establishing a minimum wage, would seem to embody the view of justice we are presently discussing. Employers must pay the legislatively mandated minimum; no agreement between the parties for a lesser sum, no matter how voluntary by the ordinary test of voluntariness, will be effective: the employee can still sue for the mandated sum for the work done (and in fact for double wages and attorney's fees). This rule rests on an implicit legislative finding of duress by circumstances, of which it is unjust to take advantage. Those who have to work for very low wages usually have little skill and little wherewithal, but they have needs like the rest of us, and in a market society they have to make a deal for their labor to meet those needs. Their obvious necessity—not the result of an emergency, but of an ongoing condition of the society—confers unreasonable power on the other party. The refusal to offer at least a

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288. 29 U.S.C. §§ 201–219 (2012).

minimum wage is a threat—a threat that counts as duress, says these statutes, because, in the words of the Restatement (Second), “what is threatened is otherwise a use of power for illegitimate ends.”<sup>289</sup> What should be the actual minimum rate is of course contested, and subject to some of the same concerns implicated under Principle #1 in deciding how far unequal a contract has to be to be considered too unequal. But the general popular support for a minimum wage exhibited in many states’ efforts to exceed the federal minimum—support that comes from a much larger group than the group of people who would actually benefit—suggests that the principle of justice as the advantage not to be taken has a broad basis.

As does justice as desert, with which, as already pointed out, this principle can be in conflict.<sup>290</sup> But that conflict can be experienced as the need to draw a line, rather than as a need to believe only in one or the other. Probably many people who support higher minimum wage laws also believe in justice as desert even for many other determinations as to what would be just wages. In our popular culture—and in our law—ideological purity has little purchase.

But the fact that we as a group, and many of us as individuals, believe in both these principles, or in fact believe in all five of the principles that have been discussed, raises the questions of why we do not speak of them more often, and of how, now that we do recognize them, we are going to operate in reaching the kinds of decisions the law must make.

#### PUTTING THINGS TOGETHER

As we have seen, there are many ways of thinking about the justice of contracts. They are distinctive ways, often justifying different outcomes. Each of these ideas appears in many of the cases, doctrines, and statutes that comprise the law of contracts. From a practical point of view there seems to be, if anything, too much stuff. Why, then, is justice so often viewed as a marginal part of contract law? Why do we maintain, as said in the introduction, blinders on the matter? We could speculate about that question from a sociological,<sup>291</sup> or historical,<sup>292</sup> or

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289. RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(c) (AM. LAW INST. 1981).

290. Cf. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713–12 (1976) (contrasting ideals of “individualism” and “altruism”).

291. E.g.: Purely as a hypothesis, how about: thinking about justice raises the question of when inequality is illegitimate, which is threatening to judges and legislators, who are part of a dominant class?

292. E.g.: Purely as a hypothesis, how about: the conceptual universe of the late nineteenth century is still with us?

psychological<sup>293</sup> point of view, and each of these speculations would be hard to prove and undoubtedly contentious. Taking the matter just from how the cases, doctrines, and statutes present themselves in the modern context—looking at the matter, if you like, from an interpretive point of view—I would offer the following suggestions as to why it appears to be harder to talk about the justice of contract law than in fact it is.

To begin, as we have seen several times, judges often disguise the fact that they are making judgments of justice in reaching their decisions. The most common way of doing this is to attribute a decision to the intent of the parties. Cardozo, defending his refusal to require perfect tender of “Reading” pipe in *Jacob & Youngs v. Kent* was explicit: “From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention.”<sup>294</sup> But many judges are not that candid; we are often looking at silent, rather than overt, substitution.

As a general phenomenon, this substitution is not news. Nearly a hundred years ago, Corbin lamented that “the courts so frequently construct under the guise of mere interpretation,”<sup>295</sup> while Williston’s treatise had a whole section entitled “Fictitiously imputed intentions.”<sup>296</sup> But it has consequences. To speak of determinations of justice as being determinations of intent turns the justification of the decision from being based on “justice” to being based on “free choice.” Equally important, it tends to turn the decision from being about contracts in general, or about a specific type of contract as a social pattern, into an interpretation of the language and behavior of the particular parties. As a matter of precedent, it invites parties, not to be more just, but rather to be better draftsmen.<sup>297</sup> As a matter of doctrine, insofar as it is successful, it does not create rules, but only unique-to-these-parties decisions.

Next, while it may be an overgeneralization, it seems to me that the academy has done its part to marginalize considerations of justice,

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293. E.g.: Purely as a hypothesis, how about: “justice” is not perceived to be as macho as “efficiency,” and judges are predominantly men?

294. 129 N.E. 889, 891 (N.Y. 1921).

295. Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 741 (1919).

296. 2 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 825 (1920). For further on the history of the use of “intent” to cover active judicial construction, see E. Allan Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860, 862–68 (1968).

297. As Karl Llewellyn said about this judicial tendency: “Covert tools are never reliable tools.” K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

too. To some degree, this is simply the result of professors' attention having been focused elsewhere in the last few decades, especially on the economic analysis of law.<sup>298</sup> But it is also the result of the way in which justice issues themselves became formulated in the post-World-War-II period. There had been an older style of law review article that took very seriously the question of whether the law of contracts adequately insisted on a fair exchange.<sup>299</sup> The post-war emphasis on using detrimental reliance as the carrier of fairness, as exemplified in the Restatement (Second) and elsewhere,<sup>300</sup> did not serve the same function. The reliance theory at its core views a deal as two separate, although cross-cutting, promises, each to be seen in light of the reliance it engendered rather than in light of what it was exchanged for; is the "quid" a just "pro quo" is not part of the analysis. As is apparent in the Restatement (Second)'s formulation of Section 90,<sup>301</sup> this makes any overt consideration of "justice" in the transactional sense into a hanging, ancillary feature, perhaps arguing for or against enforcement, or perhaps arguing for an adjustment of the remedy, but not (as the sparse discussion in the case law shows)<sup>302</sup> conceived as part of the basic reliance paradigm.

What became the other common doctrinal carrier of "justice" in the scholarly literature, unconscionability, did, of course, apply to bargains, to "who gets what." But unconscionability (as indeed its equity connotation suggests) has been viewed as a corrective to be applied only when the core of contract law greatly misfires. That core, it is implied, is solely concerned with other matters, such as freedom. Treating transactional justice as residing in a separate doctrine has, I fear, marginalized it.

Third, the common tendencies to speak of "justice" as if it were easily known, if only we would open our eyes—or, alternatively, as if it were hopelessly complicated, and therefore dependent on each individual's particularistic intuition—are each to be resisted. "What is just?" is open to argument and reasoned judgment just as "What is efficient?" and "What is free?" are. The question "What way of

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298. On the history of contracts scholarship in the recent past, see generally Charles Fried, *The Ambitions of Contract as Promise*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 17 (Gregory Klass et al. eds., 2014).

299. *E.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *POL. SCI. Q.* 470 (1923); John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (pt. 1), 11 *TUL. L. REV.* 345 (1937); John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (pt. 2), 12 *TUL. L. REV.* 42 (1937).

300. *E.g.*, P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

301. *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (AM. LAW INST. 1981).

302. *See supra* pp. 775–77.

drawing the dividing line between requiring an overt acceptance and counting silence as acceptance is most just?” is in this sense no different in kind from the question “What way of drawing the dividing line between liquidated damages and penalty clauses maximizes freedom?” There is no mathematical algorithm for deciding what is just—or what is free—but there are cogent things to be said. That there are several potentially relevant principles of transactional justice, each internally coherent but in many situations not in agreement, does not negate the point. The analytical answers define a realm of debate.

To reach judgment, of course, one will have to have recourse to a more general order of judgment as to which argument is most powerful in the situation at hand. But here, as elsewhere, there are aids to practical reasoning. For one thing, to a considerable extent, although not completely, different principles of justice speak to different types of contracts. A forward contract for the purchase and sale of a commodity, where the buyer does not intend to take delivery but rather to sell the contract to someone else, invites an honest wager analysis. But to take that same analysis, and emphasize only the risk allocations in a contract whose purpose is to jointly produce a building, will often be misplaced; looking for the terms that fit will often have more force for the disputes that actually arise.<sup>303</sup>

For another, even when considering a single kind of case, there is enough analytical power in the differences among the different principles of justice to make more focused argument and justification possible. Take, for example, the much-litigated problem presented by employers’ efforts to enforce employee covenants not to work for a competitor after termination of employment. Almost all American jurisdictions agree that the result cannot be left simply to what the parties have stipulated, that courts should enforce such clauses only if—or to the extent that—they are “reasonable.”<sup>304</sup> But different principles of justice will generate different inquiries as to what counts as “reasonable.” If the concern (following Principle #1) is that the contract (or relationship) of employment containing the covenant was too unequal, then one could look to see whether the contract was balanced overall; did the covenant, for example, come along with a lengthy term of employment, or a promise of substantial severance

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303. See generally Todd D. Rakoff, *The Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation Sense,’* in GOOD FAITH AND FAULT IN CONTRACT LAW 191 (Jack Beatson & Daniel Friedmann eds., 1995).

304. 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 13:4 (Richard A. Lord, 4th ed. 2009). The outlier is California, which by statute does not enforce such covenants at all. CAL. BUS. & PROF. CODE § 16600 (2015–16).

pay?<sup>305</sup> If one's concern (following Principle #3) is that the particular stipulated terms are unnecessarily broad, one could focus on how they mesh the employer's legitimate interests in tandem with the employee's.<sup>306</sup> And if the concern (following Principle #5) is that the employer took unfair advantage of the need of an employee to have a job, then one can focus on how restrictive of the employee the covenant, overall, will be.<sup>307</sup>

Finally, as we have already seen several times, individual legal doctrines can, and in practice often do, combine more than one principle of justice.

There remains, of course, a question of social understanding and vision. How important any one principle of justice is, is a matter of judgment and contest. Some readers of this article may have already decided that they think one of the principles here discussed is of little importance, another of great importance. On the broadest terrain, the equal bargain principle and the not taking advantage principle tend towards social, as well as individual, equality; the desert principle, and to some extent the honest wager principle, tend to justify inequality; and justice as fit probably tends toward equality, but not strongly so.

But, rightly considered, justice as the overall collection of principles should be of interest to all points of view. It is a mistake all too easily made to think that the arguments always array themselves so that justice provides a basis for not enforcing a contract after freedom and efficiency have already made the case for enforcement.<sup>308</sup> Justice can be an affirmative basis for enforcement overall. And justice can be an affirmative basis for enforcing a deal but with additional obligations attached, as, for example, in the UCC's implication of a warranty of

305. See, e.g., *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980) (continued employment for ten years and promotion to more responsible position were "adequate consideration to support the noncompetition agreement").

306. See, e.g., *All Stainless, Inc. v. Colby*, 308 N.E.2d 481, 485 (Mass. 1974) (geographical scope of covenant too broad; "In determining whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest." (citations omitted)).

307. See, e.g., *Henley Paper Co. v. McAllister*, 117 S.E.2d 431, 434 (N.C. 1960) (covenant so broad as to "impose an undue hardship" on employee).

308. Although I have sympathy for the casebook editor's (and contracts teacher's) lament that "you can't teach everything at once," this phenomenon turns up in the organization of many contracts casebooks: by the time exchange justice gets treated, the contract is already presumptively enforceable. This is apparent in the Tables of Contents even of casebooks that otherwise give substantial attention to the issue. E.g., E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS*, at ix (8th ed., 2013); STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW*, at ix (4th ed. 2012).

merchantability in the sale of goods by a merchant, a determination of fit.<sup>309</sup>

The last thing to be said regarding the apparent submersion of justice arguments in the discourse of contracts, is that it is often hidden by the “all things considered” nature of ultimate legal judgments.<sup>310</sup> Principles of justice do not stand alone; in contract law they must compete at least with principles of free choice, social trust, and economic functionality. Sometimes the relationship is spelled out. For example, cases stipulating the implied legally-effective terms of common contracts might rely on “fit” thinking, that is to say, on a justice principle, but then say that the implied term will yield to the choice of the parties, a freedom notion; some of the cases go further and say that the justice analysis will yield only if the choice of the parties is very clearly stated, in effect explicitly prioritizing justice without giving it total dominance.<sup>311</sup> But many of the existing precedents and doctrines are best understood as quieter compromises of several points of view. As regards justice, just as regards the rest of the law, there is, as our discussion has shown, no substitute for critical analysis.

Justice is many factored, and right results may depend on more than justice considered alone. But our law of contracts, and our

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309. On the implied warranty as based on its fit with modern commercial practices, see K. N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936).

310. Whether contract law should be “pluralist” in this sense, or whether it should be organized along a single justificatory continuum, is itself a matter of scholarly dispute. Compare, e.g., ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997) (pluralism good), with, e.g., Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003) (pluralist theories “need, but so far lack, a meta-principle”). See generally Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012). What one considers the ideal legal theory varies with how one’s mind works: some like monism, some variety. But as a descriptive matter, it seems to me irrefutable that contract law as it is practiced has multiple valences. Indeed, even efforts to state a single ideal theory often have to concede that the theory espoused does not cover the entire domain of contract law. It is one of the virtues of CONTRACT AS PROMISE that it made the concession gracefully. FRIED, *supra* note 173. See also Fried, *supra* note 298, at 34 (“[M]y claim in *Contract as Promise* about the relation of the legal regime of contract to the moral institution of promising was not so much wrong as overstated.”).

311. E.g., *Peacock Constr. Co. v. Modern Air Conditioning, Inc.*, 353 So.2d 840, 842–43 (Fla. 1977) (“Our decision to require judicial interpretation of ambiguous provisions for final payment in subcontracts in favor of subcontractors should not be regarded as anti-general contractor. It is simply a recognition that this is the fairest way to deal with the problem. There is nothing in this opinion, however, to prevent parties to these contracts from shifting the risk of payment failure by the owner to the subcontractor. But in order to make such a shift the contract must unambiguously express that intention. And the burden of clear expression is on the general contractor.”).

discourse about that law, will be—and to some extent already is—impoverished if we do not recognize the large part that justice plays within it. Contract is one of the master institutions of our society. The desire for justice is one of the great motivators of human action and of human history. Contract law and justice are, we should recognize, intimately connected.