

The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations

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This paper presents a new theory of the law of contract: *A legally binding contract exists where an obligation has been voluntarily assumed, is reasonably fair to the party against whom it is enforced, is consistent with society's contractual expectations, and gives rise to no administrative difficulties barring enforcement.* For a contractual obligation to be legally binding, requirements of both voluntariness and fairness must be met. Once minimum threshold levels of each element are attained, voluntariness and fairness may then be balanced against each other, so that a greater degree of one element permits a lesser degree of the other. The various concepts in this thesis, which the authors have called the "balance theory", are explored in detail. The authors apply the theory to several well-known cases, and purport to demonstrate its superior ability to deal with non-exchange obligations now enforced in terms of reliance or estoppel. They also show how the balance theory successfully resolves the problems posed by contracts of adhesion. The theory is contrasted with other current revisionary theories, such as the economic analysis theory of contract and the tort theory. The authors conclude that the balance theory is better both descriptively and prescriptively, that is, in specifying what the courts are doing and what they ought to be doing.

Cet article propose une nouvelle théorie sur le droit contractuel dans la *common law*. Selon la thèse de cette théorie, *un contrat lie lorsqu'une obligation est volontairement assumée et raisonnablement équitable pour la partie à qui on l'oppose; elle doit aussi satisfaire aux attentes contractuelles de la société et ne présenter aucune difficulté administrative empêchant sa reconnaissance judiciaire.* La volonté de s'obliger et le caractère raisonnable de l'obligation sont les deux éléments essentiels. S'il existe une présence suffisante de chaque élément, on peut les évaluer d'une façon réciproque de sorte que l'importance relative de l'un peut nuancer l'importance devant être accordée à l'autre. Les divers concepts de cette thèse, que les auteurs ont appelée la *balance theory*, sont analysés rigoureusement. En appliquant cette théorie à plusieurs arrêts célèbres, les auteurs prétendent démontrer que leur théorie explique plus adéquatement la sanction des obligations sans considération, qui reposait traditionnellement sur les notions de *reliance* ou *estoppel*, et répond d'une façon plus satisfaisante aux problèmes posés par le contrat d'adhésion. La théorie est comparée à la théorie économique des contrats et à la *tort theory*. Les auteurs concluent enfin que la *balance theory* non seulement décrit mieux ce que font les tribunaux, mais aussi indique plus clairement ce qu'ils devraient faire.

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Synopsis

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This paper offers a new picture of the law of contracts. Our project is partly descriptive and partly revisionary. It is descriptive in that we hope to explain what courts and lawyers are doing when they are drafting, repairing and adjudicating contracts. The description is clothed in a new theory, one better able to convey understanding. Our project is revisionary in that we believe the theory we present is better than available alternatives. It is more rational and more just. This claim rests partly on the explicit preferences we incorporate in the theory, partly on the fact that any complete theory is able to treat like cases alike. Our project is revisionary in a different way. Concepts, once put in use, have a force of their own. For example, when the common lawyer first fastened onto the concept of consideration to rule out gratuitous promises, he also found it useful in analyzing pre-existing duties, moral promises, and, at one time, third-party contracts. Some degree of revision is inevitable, because no substitution of concepts is exact. "Obligation" means more and less than "promise", while "fairness" covers much of the ground of both estoppel and consideration, but not all of it. Our theory is meant to involve more than substitution. We hope it will clarify and remove inconsistencies in existing contract case law, while offering a more serviceable and equitable law of contracts.

I. The Thesis

We propose the following theoretical statement of a contract. *A legally binding contract exists where an obligation has been voluntarily assumed, is reasonably fair to the party against whom it is enforced,¹ is consistent with*

¹One author initially preferred stating that the obligation must be fair to both obligor and obligee, but abandoned that because it tended to import the notion of "agreement" into the theory, a concept we consciously avoid, and further, on being challenged to produce a fact situation where it mattered, could think of none. A contract takes on legal importance only where the obligations of a putative obligor are concerned, regardless of the number of obligors or obligees involved.

society's contractual expectations, and gives rise to no administrative difficulties barring enforcement. The conceptual elements in this statement are (1) voluntariness, (2) fairness, (3) society's contractual expectations, and (4) absence of administrative difficulties, or more simply, administrative convenience. The first two elements are variables. The third and fourth elements are constants, independent of other elements, and matters of policy. By calling them constants, we mean that they apply to all contract situations in just the same way. If reasons of evidence, of policy, or of floodgate worries bar recovery in one situation, they will bar recovery generally. The Statutes of Frauds and of Limitations demonstrate this constancy. Slow change occurs, but the change always applies generally. These constants define the range within which the first two elements work.

The elements of voluntariness and fairness are variables. One can think of an equation where the product of the two elements equals a contract: Voluntariness x Fairness = Contract. As voluntariness wanes, there must be proportionately more fairness. As voluntariness increases, the need for official examination of the fairness of the transaction lessens. This is not strictly a weighing test, however, for too great a disparity between voluntariness and fairness will vitiate the contract. Equitable but coerced or paternalistic contracts are not enforced. A threshold amount of each element is necessary.² Once the thresholds are achieved, putative contracts are not simply a matter of meeting or not meeting certain criteria. They involve a weighing of complex contract concepts designed to sanction only desirable pacts. Put in terms of an equation, our thesis states that some threshold of voluntariness plus some threshold of fairness, the requisite consistency with society's contractual expectations, and the requisite administrative convenience give one a legally binding contract.³ Voluntariness and fairness are weighed together, with a given sum necessary to continue with the equation.

²For a further discussion of the threshold requirement, see *infra*, pp. 48-50.

³Put in the form of symbolic logic, the equation would be:

$$((x)V + (y)F) \wedge SCE \wedge AC \rightarrow K$$

The operator " \wedge " signifies conjunction, meaning *each* conjunct must be true; while " \rightarrow " denotes implication. If each conjunct is true, then K (the legally binding contract) is true. Truth for the first conjunct would be met when some minimum quantity (Q) would result. Thus, $Q \wedge SCE \wedge AC \rightarrow K$. This sentence could be strengthened, of course, by the addition of the higher order universal and existential quantifiers. This complication would not, we feel, make the sentence more perspicuous. Our notation deviates from the standard Russellian. His conjunction sign was " \cdot " as found in Definition II of A.N. Whitehead & B. Russell, *Principia Mathematica*, 2d ed. (1925). The reason for the deviation is clarity. We do not wish to mislead anyone into thinking that the sentence is algebraic, where the propositions become quantified and their products form the quantity needed to make a contract. Our sentence requires that each element (proposition) is true, not ripe for multiplication. The conjunction sign we use is found in many standard texts. See, e.g., D. Kalish, R. Montague, & G. Mar, *Logic: Techniques of Formal Reasoning*, 2d ed. (1980) 50, 95.

For the contract then to be legally binding, these first two requirements, as well as consistency with society's contractual expectations, and administrative convenience *all* must hold. We feel that such a test is both theoretically desirable and descriptively valid.

What is important in our definition, but only marginal in others, is the element of obligation. Obligation is not meant to be a substitute for promise, nor do we wish to convey the impression that contracts are made by individuals who intentionally obligate themselves so as to be put under contractual duties.⁴ Certainly, a voluntary act, which can reasonably be expected to create an obligation, is necessary. However, one need not make express promises, believe, or even realize that contractual duties have arisen. The obligation here stands simply for a voluntary act that a reasonable person can assume will bind him or her. The subjective state of mind of an obligor who fails to understand the consequences of his act is irrelevant. Our definition supposes that one engages voluntarily in an act that objectively imposes an obligation.⁵

It will help to understand our thesis if we briefly note the elements not included in this statement. We do not use "promise" because "promise" artificially divides contracts into express and implied-in-fact, a distinction without a difference. If a customer in silence hands a can of soup and a dollar to a cashier in a grocery store, exactly the same thing has taken place legally and in the world of business as if the buyer says "I want this can of soup as priced" and the cashier replies "Fine". The obligation, rather than any search for express promises, offers-and-acceptances, or verbal intentions, should be central. One should be able to employ contract analysis in the case of purchases from a coin-operated coffee vending machine, without reference to such mental geometry as the analyzing of motives, intentions, attitudes, beliefs, *etc.* It is the obligation component that is legally relevant, not one's verity, accuracy, or morals.

We do not use "agreement" because this term is doubly underinclusive. Many contracts involve no clear agreement, including both our coffee vending machine transaction and many ongoing business arrangements. Long-term buyers may regularly be sent goods by a seller and pay for them without

⁴Obligation should not be taken to refer to a legal conclusion. It is meant to refer to what the parties take or can reasonably take to be an obligation when considering their own acts. It is not a legal term of art, such as "negligence" or even "obligation" in other circumstances.

⁵The terms "objective" and "subjective" used here do not refer to any metaphysical or ontological standing. They are imported from the contracts literature and are meant to be suggestive to those familiar with that literature. In using the terms, no commitment to the validity of either contract formation theory or to the utility of the debate ought to be inferred. For a judicial discussion, see *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911), and *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760-7 (2d Cir. 1946).

any agreement being reached. "Agreement" is also only remotely relevant to promissory estoppel cases. The obligor, although held liable, often in fact agreed to nothing. If the obligor induced performance, the question of his or her state of mind cannot, as a matter of equity, bar recovery.

"Reliance" is not used for a complementary reason. Although it is essential in promissory estoppel analysis, it is not a necessary element in all contracts. To find reliance in a just-enacted executory contract is to stretch the term to the breaking point of meaningfulness.

Perhaps the most radical omission is that tortuous and extraordinary concept, consideration. Consideration begins with the dual handicap of being too *ad hoc* to be of general explanatory value and increasingly irrelevant to the many cases that use reliance as a basis for enforcing voluntary obligations. Nevertheless, consideration has been the central concept in the common law of contracts. Its omission might be more palatable to traditionalists if they were to remember that consideration can only be understood as a device for sifting those contracts that should be enforced from those that should not. If the sifting can be accomplished in other more straight-forward terms, then consideration has no special claim.⁶

Finally, we are not using "economic efficiency" because we do not think the courts either do use or should use such a concept. In addition, the voluntariness element, and particularly the fairness element, which are the central variables in our theory, will often conflict with the aim of economic efficiency. In a later section on competing contract models, we explain in more detail why these concepts are not part of our theory. Now let us return to our own thesis to provide a more detailed explanation of the concepts we employ.

(1) *Voluntariness*. An obligation is voluntary to the degree that it is consciously and willingly chosen by the obligor. It is distinguished from the tort obligation — the generalized duty imposed by law on everyone not to behave in a socially destructive manner — and from the duress situation, where the duty is forced on an obligor despite his desires. Contracts allow

⁶It might be thought that consideration has played a key role in allowing formality in contract formation. Given consideration (as once, given a seal), one has a contract. A formal certainty seems thus to be introduced. We disagree. The concept of consideration has become so complex that in those cases where genuine doubt arises as to contract validity, the concept offers little guidance. Where consideration is serviceable, doubt about validity is rarely an issue. We take this question up in a different way in our discussion of the traditional theory of contracts. See *infra*, Part II.

individuals to begin new enterprises, alter social relationships, change employment, purchase goods, insure, dine, post, and publish. Contractual activities are necessary to maintain a society,⁷ and are morally imperative to protect individuality.⁸ It is because they are voluntary that they are lauded ethically, and very often only because they are voluntary that they get accomplished at all. As voluntariness admits of degree, the greater the amount in any particular contract, the greater the likelihood of enforcement. As contracts become more voluntary, the law imposes a greater obligation on those entering the transaction to comply. This has traditionally taken the form of saying that the law will not look to the fairness of a bargain or to the adequacy of consideration. When a party freely and willingly makes a bargain that looks bad in retrospect, respect for social utility⁹ and individual autonomy call for routine enforcement. It was not that courts thought fairness irrelevant. Rather, voluntariness has been accorded a high priority. The paradigm contract is the carefully negotiated agreement to sell goods between parties of relatively equal bargaining power, each of whom could realistically choose not to enter the transaction. It has long been recognized that this paradigm case rarely occurs, but the deviation has not been considered significant. Yet where the deviation has been so large as to be obvious, the paradigm has always been abandoned. Contracts lacking free will (where the obligor was a slave) and lacking selective choice (where the obligor did business with a monopoly) have long been accorded special treatment.¹⁰ More recently, lack of real choice has sometimes vitiated voluntariness in the contract of adhesion, the mass standardized pact where

⁷The fundamental social importance of contract was discussed at length in E. Durkheim, *The Division of Labor in Society*, (G. Simpson, trans. 1933). It is more recently defended in I. Macneil, *The New Social Contract* (1980).

⁸We are in no way suggesting that contract does not allow other desirable goals to be achieved, particularly social cooperation and harmony. We are only stressing the close connection among voluntariness, individuality, and contract.

⁹Mentioning social utility here does not amount to sneaking economic efficiency in by the back door. Utility refers to some measure of the welfare or social prosperity of the individuals in the relevant contracting community. Economic efficiency is merely one component to be factored in. In any case, a goal is not a method. Voluntariness aids utility. That does not mean that utility or some component of it becomes a means for measuring either voluntariness or contract validity. For an example of the sort of utility meant and used here, see J. Glover, *Causing Death and Saving Lives* (1977).

¹⁰Some readers may cringe at the thought that slavery, indentured servitude, or monopoly can be considered *arguendo* ordinary contracts. Our use of extreme counterexamples has a twofold purpose. Theories ought to be constructed and judged by what they admit and what they reject. If it can be shown that a theory admits something we think it ought not to admit (say, that indentured servitude agreements are binding contracts), then we are in a good position to revise that theory. Lawyers too often have the attitude that a set of rules can take the place of theory. Rules allow exceptions, and exceptions to exceptions (as in the case of the rules of evidence and hearsay), and thus remain untroubled by counterexamples. The difficulty with this attitude is that no guidance is provided for future cases. Should one follow the rules, the

there is no negotiation and little voluntariness concerning the details of the agreement. The popularity of standardized contracts has caused a complementary increased scrutiny of the element of fairness.¹¹ This need not necessarily be seen as an abandonment of the values behind the paradigm, but as a recognition of its increasingly empirical rareness. That a contract is form or standardized¹² does not necessarily mean that an obligor chose it involuntarily. He could have decided not to contract, or to contract and make other adjustments.¹³ He might even be pleased with the terms of the

exceptions, new rules or further exceptions? Here one can be sympathetic to the intentions of the logical positivists with regard to scientific statements. They believed that such statements made sense (or had meaning) only if they could, in theory, be verified or at least falsified. See A.J. Ayer, *Language, Truth and Logic* (1936) and *The Foundation of Empirical Knowledge* (1940). New instances test a theory. That the instance is extreme is not a disqualification, but merely a more difficult and revealing test. If, for example, one wishes to say that agreement plus consideration equals a contract, then blackmail contracts are *ex hypothesi* binding. For most, this result is clearly unsatisfactory, and thus such contracts provide a counterexample to the above formulation. (Even if blackmail is a criminal offence, that illegality does not *per se* vitiate the contractual obligation.) Illegality could be added to the formulation, with two results: a quite different formulation, and one which is vaguer and refers to matters outside the contracting realm. This new formulation would fail to tell us *why* illegality should bar suits for breach. Furthermore, it would not clearly define the scope of the exceptions. Should the beneficiaries of a blackmailed trustee be able to recover the value of trust assets turned over to the blackmailer? What should be done with indentured servants wishing to continue in service? What of their relied-upon expectations?

The second reason for counterexample is that certain theories do admit more than the casual observer thinks and many would believe they ought. Slavery was upheld by the traditional theory until abolished by statute or constitutional amendment. That such heinous pacts were enforceable suggests that there was a major flaw in the theory. We believe that flaw to be present in certain economic-reductionist theories as well. Such counterexamples serve as a method for exposing these flaws. That slavery is abolished certainly does not mitigate the culpability of the theory. One remains suspicious of a theory that condones (the counterexample of) slavery.

¹¹"[T]he inevitable result of enforcing all provisions of the adhesion contract, frequently, as here, delivered subsequent to the transaction and containing provisions never assented to, would be an abdication of judicial responsibility in face of basic unfairness and a recognition that persons' rights shall be controlled by private lawmakers without the consent, express or implied, of those affected." *C. & J. Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169, 174 (Iowa Sup. Ct. 1975).

¹²By "form or standardized" contracts, we refer to those contracts that one side offers in identical form to all with whom they contract. These are often offered on a "take-it-or-leave-it" basis, but whatever the conditions of the offer, from parking token disclaimers to hospital workers or dry cleaning receipts, they have become the rule in commonplace contracts. Where, in more important commercial contexts, both sides engage in this practice, the "battle-of-the-forms" begins. See *Poel v. Brunswick-Balke-Collender Co. of New York* 216 N.Y. 310, 110 N.E. 619 (N.Y. Ct. App. 1915) and *Roto-Lith Ltd v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962). See also *Uniform Commercial Code*, §§2-201, 2-204 and 2-207.

¹³For example, where a repairman forces the customer to take the risk of his (the repairman's) negligence when making a repair, the customer could buy insurance from a third party to cover this risk. The cost of insurance plus the cost of repair with the negligence disclaimer may, of course, be no more than the cost of repair absent such a disclaimer.

standard-form contract.¹⁴ However, where the possibility for negotiation is limited, the evidentiary scrutiny for voluntariness must become more strict. Limited choice is still choice, but it is not always sufficient to produce a binding contract.

(2) *Fairness*. Fairness is a moral concept which has been central in legal analysis since ancient times. In using it, we are not suggesting the introduction of an alien or novel concept, but rather the return to an overt recognition of a factor which has always played a role in contract analysis, even though denied by some during the heyday of consideration. Morton Horwitz reports that, "[o]nly in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange."¹⁵ This rejection was more perfunctory than effective. What possible justification, other than fairness, can explain the complex doctrines of consideration? The failures of that set of doctrines suggest that fairness ought to be included directly rather than mediately.

The standard we suggest for fairness is tied to knowledge and foresight rather than to result. The standard states that a transaction is fair if it is one which the parties would have reached had they had sufficient knowledge to understand all relevant aspects of the contract and one where the obligor is not a "bargaining dwarf".¹⁶ Such a standard is presently used to fill in missing terms in so-called implied contracts.¹⁷ The issue is usually what reasonable contracting parties would have agreed upon. It is important to emphasize that the requirement, other than nearness to the terms which

¹⁴Wherever a market is working, one might argue that such form contracts reflect most consumer needs. Thus, in the example of the above note, if all repairmen disclaim negligence responsibility, perhaps consumers are either risk preferrers, or desire the option of third party insurance. Perhaps, the higher prices of repairmen who covered their own negligence forced them out of business, demonstrating (in theory) disapproval of the practice by the consuming market. Our thesis, however, is not committed to any particular view of market efficiency, nor to the more difficult issue of market frequency (i.e., the commonness of pure market conditions).

¹⁵M. Horwitz, *The Transformation of American Law, 1780-1860* (1977) 160.

¹⁶This has certain similarities to the standard of fairness developed in J. Rawls, *A Theory of Justice* (1971).

¹⁷It is also increasingly used in the construction of language in insurance policies. See *Gerhardt v. Continental Insurance Co.*, 48 N.J. 291, 225 A.2d 328 (1966). Professor, now Judge, Robert Keeton has suggested, in his *Basic Text on Insurance Law* (1971) 351, the following formulation of a rule based on such cases:

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

contracting parties not vastly unequal in bargaining power¹⁸ would have reached, is that of knowledge rather than actual fairness of result. The knowledge requirement prevents the fairness standard from collapsing into voluntariness alone, while at the same time it bars outrageous contracts against those who, permanently or at the contracting moment, did not know any better. Long, complicated, and highly technical contracts immediately arouse suspicion, as do contracts which include waivers, penalties, or forfeitures not readily evident at the time the obligation is assumed. Conversely, full knowledge supports enforcement. Financially pressed businessmen renegotiating debts are rarely thought to be in need of protection. They know the options, and, even if hard-pressed vis-a-vis voluntariness by a creditor, are usually held to their pacts.¹⁹ The knowledge required is not that of the reasonable man; it would be closer to that of the reasonable lawyer. Even seemingly simple contracts can have consequences no layman could predict. The knowledge requirement is more demanding than this. A full understanding of the terms includes an understanding of the complexities of the nature of the business enterprise underlying the contract. A life insurance policy may be unfair, and yet not appear so to anyone but an underwriter. The toughness of the standard is tempered by the fact that it is balanced with voluntariness, so that partial compliance is not in and of itself debilitating. We should add, moreover, that keeping knowledge separate from voluntariness avoids the problem of paternalism. If an act could only be

¹⁸We should point out that the balance theory employs two uses of the unequal bargaining position concept: the initial and the secondary. The initial use concerns those situations where the disparity in strength is so great that the obligor is not able to bargain fairly. This fairness problem is usually one of threshold, where the inequality is sufficient to vitiate the possibility of any contractual obligations. It is common in societies where wealth and status are disproportionate, although it can arise anywhere (e.g., between warden and prisoner, or between employer and alien employee who is working illegally).

The secondary use involves specific disadvantages to the obligor because of some infringement of his choices. See the discussion of duress, *infra*, pp. 44-5. This voluntariness problem is usually one of degree, involves duress or coercion, and can be found in an examination of mundane contracts. In the case of the secondary type, there is at least enough equality to allow protection (respect) for the expressed intentions (in the form of the putative contract) of the obligor, with a balancing bearing greater scrutiny to the degree that the inequality infringes on voluntary choice.

¹⁹Financially pressed businessmen should generally not be thought of as lacking in voluntariness when they renegotiate debts on very disadvantageous terms. They almost always have made a series of voluntary choices in the past leading to the situation in which they assume the very onerous obligation. If they exercised bad business judgment in the past, it is no part of the law of contracts to protect them at this stage. In contrast, an employee who, due to an economic recession, has lost his job may be under enormous background duress for which he has no responsibility. A prospective employer or a creditor might impose a very harsh obligation under these circumstances and, if there are disputes, a court might well come to the conclusion that the relative lack of voluntariness should lead them to scrutinize the transaction very carefully for fairness.

voluntary if knowledgeable, the contracting capacity of those who are ignorant, simple, young, uneducated, naive, or just not at the relevant moment informed, would be permanently suspect; their right to contract would be jeopardized. However, to the extent that they are not in a position to bargain because of the vastly greater bargaining power of the obligee — in other words they are dwarfed by his disproportional power — the level of fairness drops. While knowledge is the normal guide to fairness, disparity of power becomes important when sufficient to render the exercise of that knowledge useless. Put differently, prudence can count only when prudence is possible.

(3) *Consistency with Society's Contractual Expectations.* This is a theoretical category. Contracts do not intrude upon our existence in the way boulders or rivers do.²⁰ They are complex constructions, if readily accessible and identifiable ones. Generally, we know them when we see them, even if that knowledge cannot always be put in terms of an identifying theory. Our concepts of voluntariness and fairness remove close contenders from the set of legally binding contracts, but they do not eliminate those things which, while no serious observer would believe them to be contracts, still masquerade as contracts. To unmask these pretenders, we need to extract, partly from lay language and experience, partly from professional tradition and technical concepts, those sets of situations we are trained to think of as contractual. It is from this method rather than from various legal rules that we can say with certainty that an accepted invitation to dinner, a New Year's resolution relied upon by a witness, a vow made to a deity, promises within games or plays, and puffery in sales promotions and advertisements are not contracts. General policy grounds rooted in what society considers to be important behaviour allow us to differentiate between an invitation to lunch and an invitation to buy. Any theory of contract must have such an element in order to avoid being constantly required to distinguish in an *ad hoc* manner acts obviously contracted from acts obviously not.²¹

(4) *Administrative Convenience.* There are large numbers of obligations which are fair, voluntarily assumed, consistent with society's contractual expectations, yet are not enforced by the courts. The reason is administrative convenience. Efficient operation of legal institutions requires rules which deny remedies or enforcement of what would otherwise be legal obligations. One central reason is evidentiary difficulties. Certain contracts are too difficult to establish in court. Oral contracts within a Statute of Frauds, prior

²⁰The idea of intrusion is often attributed to Dr Samuel Johnson, who sought to demonstrate the reality of a stone by kicking it. This ability to intrude physically is used by Quine to develop a theory of language consistent with metaphysical empiricism. See W.V.O. Quine, *Word and Object* (1960), particularly chapters I and II. It is a Quinean kind of intrusion that is impossible for a theoretical category such as contract.

²¹For a more detailed discussion of society's contractual expectations, see *infra*, pp. 51-4.

agreements within the parol evidence rule, and agreements where the action is not brought within the period defined in a Statute of Limitations are of this type. Within the common law proper, an example is the rule that damages may not be recovered if the fact or the amount of loss is too speculative.²² A second reason has to do with the difficulty of enforcement, a reason that once was the almost exclusive province of Equity. Bills for specific performance involving construction, employment, and agency have often been denied for this reason. The element of administrative convenience is so often decisive in explaining and justifying the actions of law officials that any theory which purports to explain, describe, or justify what the law has done in contract must have such an element. Considerations of administrative convenience apply outside of contract, of course. In tort, the main concern is avoiding the opening of the litigation floodgates; in the constitutional law of the United States, the concern is justiciability, what the courts have the competence to judge. However, one needs to keep in mind that administrative convenience has evolved and changed in its reach: courts now oversee contracts they once shrunk from, and they are not now adverse to supplying missing terms.

II. The Breakdown of the Traditional Theory

That the traditional theory surrounding contract law which evolved from Langdell to Williston and reached its theoretical apogee in the first *Restatement* is inadequate is hardly an original observation. The legal literature abounds in criticism. In the traditional theory, the central conceptual ideas are offer and acceptance, consideration, privity, express conditions, expectancy recovery based on the contract (because any measure of fairness other than the contract price was too subjective),²³ and rules of construction aimed at letting the court do no more than carry out the express will of the parties.²⁴ The most important premise of the theory is that each act in the course of contracting is a deliberate move to be answered by a corresponding countermove, where the goal is a perfect match on an inviolate agreement.

²²*Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 314 N.E.2d 419 (N.Y. Ct. App. 1974).

²³See, e.g., Horwitz, *supra*, note 15, 161:

The entire conceptual apparatus of modern contract doctrine — rules dealing with offer and acceptance, the evidentiary function of consideration, and especially canons of interpretation — arose to express this will theory of contract.

...But where things have no "intrinsic value," there can be no substantive measure of exploitation and the parties are, by definition, equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.

²⁴See K. Llewellyn, *The Common Law Tradition* (1960) 38-9, wherein Llewellyn presents the theory admiringly and then proceeds savagely and sarcastically to destroy it. This mix of admiration and sarcastic rejection is as typical of Llewellyn as is his reluctance to come forth with a better theory.

The theory is in many ways admirable. It is complete, elegant, consistent, and simple. We are then left with the question why this theory was increasingly felt to be unsatisfactory. The answer is that the traditional theory, if theoretically sound, is ethically harsh and remote from the workings of most common law jurisdictions where it is used. The incorporation of promissory estoppel and reliance has destroyed its consistency, and in a sense its purpose. Contractual moves or acts which did not correspond to the traditional theory were allowed, while many contracts considered to be most important were left uncovered by the traditional theory. Originally land and housing transactions were treated separately as matters of property law. Later shipping and banking contracts split off to become a part of the law of commercial paper. Admiralty, for reasons of international uniformity, was always kept separate. More recently, two very important classes of bargains, the sale of consumer goods and the contract of employment, have come to be governed in large part by complicated sets of statutory rules, including consumer protection and labor relations acts. Dividing the common law of contracts into separate categories, and then applying the common law theory only to the residue has served to mask the radical failure of the traditional theory.

To justify our proposal of an alternate general theory, we must explain briefly why such a comprehensive picture is worth presenting. One might ask why, if the common law of contracts operates with a defective theory, that theory ought not to be jettisoned. Labor, real estate, commercial paper, insurance and trust contracts are already treated as *sui generis*. Why not just treat all classes of contracts according to their own special properties?²⁵ Construction cases are unlike consumer credit cases, and can be accorded

²⁵A disdain for general theory is widespread among those who see themselves as contract pluralists. For pluralists, contract is too general and diffuse a concept to be useful. Subcategories need to be developed with rules tailored to situations typical of the subcategory (*e.g.*, insurance, employment, sales, or construction). The following is a good statement of that position:

[T]he shortcomings of contract analysis in modern legal literature indicate that even today our understanding leaves much to be desired. The most serious of these shortcomings is the attempt to explain the whole law of contracts in terms of a few fundamental principles uniformly applicable throughout the whole field. Williston's attitude is typical in this respect. . . .

Such a monistic approach serves only to distort the real role which contract has played in the evolution of our society. It results in more or less lifeless abstractions. A realistic understanding of the law of contracts can be achieved only through an awareness of the different functions fulfilled by the various kinds of contract in our society. This diversity of functions leads inevitably to a polytheism of ideals governing the law of contracts. A pluralistic approach may help to explain the many tensions and inconsistencies which become apparent upon a close study of the case law and which cannot be explained satisfactorily under a monistic approach.

F. Kessler & G. Gilmore, *Contracts, Cases and Materials*, 2d ed. (1970) 1-2.

their own rules.²⁶ In a different way, if certain concepts are defective, modifications can make them more suitable. Surely theoretical elegance ought not to get in the way of the best results, as determined on a case-by-case analysis. A patched and plugged doctrine of contracts might be just what is called for. This position of creating small scale *ad hoc* theory to fit a number of discrete categories is very congenial to lawyers trained in the common law tradition.

The primary reason that a theoretically consistent and complete picture is worth pursuing lies in the fundamental justification of all legal systems. This justification can be stated as the imperative²⁷ to treat like persons and like cases alike. Legal systems can be arbitrary, irrational, or discriminatory, but they cannot then be justified morally or rationally. In particular, one cannot begin to understand common law adjudication — with its technical apparatus of *stare decisis*, precedent, analogy, *ratio decidendi* and *dicta* — without appreciating the centrality of the imperative of similar treatment. Such an imperative demands that distinctions be made justifiable, a test which subject-matter categorization fails. B's bid to be a masonry subcontractor on A's construction job may be unlike B's offer to set aside a cement mixer for consumer C to purchase at a later time, for the courts may allow A but not C to recover against a non-performing B. Construction subcontract bargains may be upheld generally without consideration, while consumer lay-away plans may not be. The standard justification for this, however, is that only the former can normally be expected to induce reliance, not that there is some sanctity to the categorization method. If B knowingly induces reasonable reliance through his actions to C, it would be unfair and irrational not to accord him whatever protection A is accorded. The reason behind the rule must extend generally.

The central concept in the traditional theory was consideration, a notion typical of other contract concepts in its theoretical untidiness. Consideration can be best understood by seeing the set of reasons behind it. Its absence could vitiate agreements thought to be too unfair to be enforced. Consideration was a spectacular improvement over its predecessor, the seal. With

²⁶One example is the difference in the area of substantial performance and the right of a breaching party to recover in restitution the value of his part performance. Some jurisdictions used the same rule for all three classes of contracts, but the perfect tender rule of the sales cases, the relatively tolerant substantial performance notions in construction cases, and the struggle about whether a breaching employee could recover back pay show this diversity. See Kessler & Gilmore, *supra*, note 25, 823-45 and 871-911.

²⁷"Imperative" here is more than a grammatical form. It is meant to refer to the semantics of command statements discussed in the philosophical literature. "An indicative sentence is used for telling someone that something is the case; an imperative is not — it is used for telling someone to make something the case." See R. Hare, *The Language of Morals* (1952) 5, and more generally his *Freedom and Reason* (1963).

the addition of promissory estoppel, which protects the reliance interest, it is largely successful in achieving its purpose. That is, problems of fraud, illegality, mistake and duress aside, most contracts one might believe ought to be enforced do have consideration; most that should not be enforced do not. Why then jettison consideration?

The problem lies in the Byzantine nature of consideration. At one time, perhaps with the first edition of Williston's *Contracts*, one could use the traditional contract theory of consideration to understand fairly well what the courts were doing and why. Even then, there were serious problems of fit between the cases and the concept. The traditional concept of consideration would not permit promissory estoppel recovery on gratuitous promises, modification of ongoing transactions where one party was performing a pre-existing duty, or enforcement of a promise motivated by the moral consideration of repaying a valuable benefit which had been conferred gratuitously in the past. Yet, the courts were often enforcing such promises in spite of the doctrine of consideration.²⁸ In trying to develop doctrine that both retains the old concept and incorporates the results of these later cases, consideration has become a patchwork of rules too fragmented to be successful. Fragmentation is fatal in several ways. First, the connection between the cases and the concepts becomes attenuated. Fit in law is like fit in clothing. If the theory needs constantly to be altered, taken in at the waist while making room for a third arm or a second head, eventually it loses its value. It is not a complete failure, it is just not worth the trouble of keeping. Second, continuing fragmentation causes a loss of the predictive value necessary in legal theory. Where rules have exceptions to exceptions to exceptions, one cannot be very certain as to how a particular case, always factually unique, will be categorized. By definition, no central principle organizes a fragmented theory.

However, the most telling failure of patchwork theory lies in its difficulty in complying with the similarity imperative. For example, suppose a contract theory holds that a bilateral contract would arise only if a valid offer were met by a timely acceptance. It subsequently becomes evident in cases of ongoing business relationships that often no offer or acceptance is made for any particular transaction. The theory is changed to allow implied offer and acceptance, or else just to pose the question whether the parties

²⁸To illustrate this, we need only point to the classic coursebook cases from this period: *Ricketts v. Scothorn*, 57 Neb. 15, 77 N.W. 365 (1898) (for promissory estoppel); *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (Ct. App. 1907) (for pre-existing duty); and *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (Ct. App. 1935) (for moral obligation).

intended that a deal had been struck.²⁹ The old theory, *ex hypothesi*, would not consider such transactions to be contracts. A lawyer who once endorsed the old theory but now accepts the change is forced to violate the similarity imperative, at least over time, for like cases are being treated differently than they once were. If this seems a trivial injustice, consider the consequences of a system where the received theory is in constant flux. If one is in doubt as to whether a rule, its exception, or its revision applies,³⁰ the theory, by being fragmented, is unable to provide guidance. Perhaps ongoing relationships that break down ought to be given only restitutionary protection through unjust enrichment. The theory cannot answer questions of this generality. Only the relatively less important questions are answerable.

The same problem arises even if no settled cases were reversed. Let us assume that the fragmentation was due only to new or emerging types of cases, as for example, the first instance of a contract action under an ongoing business relationship to reach the courts. Although the theory is of no use, no harm appears to be done vis-a-vis the similarity imperative. This response misperceives the force of theory while it undermines its integrity. Under traditional theory, a defective acceptance could bar recovery.³¹ Let us call the reason for denying recovery to defective acceptors reason R. When the implied contract in the ongoing relationship was allowed, part of

²⁹This loosening of the requirements for contract formation has culminated in section 2-204 of the *Uniform Commercial Code*:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

³⁰An example occurs in the area of pre-existing duties. We start with a clear common law rule that a new promise is unenforceable when made to a party already obligated by contract with the promisor to perform the duties for which the new promise was given. *Stilk v. Myrick* (1809) 2 Camp. 317, (1809) 170 E.R. (C.P.); *Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 15 S.W. 844 (1891). An exception was created which made the new promise enforceable when the promisee was faced with unforeseen difficulties that made the performance of his duties so burdensome that a fair minded promisor would agree to modify the contract. *Linz v. Schuck*, *supra*, note 28. The revision appears in *U.C.C.* §2-209: "An agreement modifying a contract within this Article needs no consideration to be binding." However, even that revision contains an exception when a modification is in bad faith or is extorted from the promisor by the promisee: Official Comment 2 to *U.C.C.* §2-209. When a contract promise is not clearly within the *Uniform Commercial Code*, a lawyer cannot be sure whether the common law rule, the common law exceptions, the revisions by analogy from the Code, or the exception to that revision will or should be the guide.

³¹Examples are: *Poel v. Brunswick-Balke-Collender Co. of New York*, *supra*, note 12, and *Langellier v. Schaefer*, 36 Minn. 361, 31 N.W. 690 (1887).

R was overturned. That part may be inherent in meeting-of-the-minds cases, silence-as-acceptance cases, mailbox acceptance cases, or in cases where the court indicated that tender had to be absolutely perfect, because tender, as an element of contract definition, was inviolate. That is, even if a case is new, and thus seemingly jeopardizes no rule directly, the reasons behind rules in decided cases are often jeopardized. Part of the wonder of legal theory is the way it is used in various cases. A tug at one part of its shakes the whole. Freely allowing changes for *de novo* cases upsets the integrity of other cases in the legal system. But such a change may be good if the present system is rotten. *Slade's Case*,³² which through the device of the implied promise made *assumpsit* an alternative remedy to debt, contributed to the downfall of wager of law, the technicalities of debt, the need for the seal, and many of the worst aspects of common law pleading. However, continual changes to accommodate *de novo* cases are chaotic, irrational, unjust, and indicate perhaps that a different theory is being followed in fact, even if the new theory has not yet been well enunciated. We believe this to be the case.

The theory we present in this paper is both the one we think many of the courts are employing and one that all courts ought to employ. This identity of the descriptive and the prescriptive is fortunate for matters of economy and for the advancement of our own moral preferences. This is far from coincidental. The common law, when not entangled in procedural strictures of its own making or statutory fetters made by others, is often just and rational. The great contract judges in particular — Coke, Mansfield, Cardozo, Scrutton, Traynor, Denning and Francis — have been able to disregard formal theory when they thought it bad, and achieve justice through new concepts and better analysis of the precedents. The genius of the common law has always been that judges have recognized and followed the best of their colleagues. Its weakness has often been a failure to provide new theory to justify the changed concepts and analysis. Such a failure makes the common law unpredictable and inequitable.

Before we continue with the development of the balance theory, there is one other major difficulty with the traditional theory that needs to be mentioned. The traditional theory assumes that every contract represents a bargain, and it is the bargain that represents the social reality toward which the legal concepts are directed. Thus, offer and acceptance become the legal process by which the bargain is reached; consideration becomes

³²(1602) 4 Co. Rep. 92b, (1602) 76 E.R. 1074 (K.B.).

the reason the bargain is struck.³³ However, bargain is much too restricted a concept to describe the voluntary obligations which will be enforced by courts. Promissory estoppel (the unbargained-for gratuitous promise which is then relied on), moral obligation (the promise given out of gratitude for past benefits conferred), the modification of an existing contract, and the reliance on an unaccepted offer³⁴ are all situations without an exchange where courts enforce a substantial number of promises, but which cannot be explained in terms of a bargain at all. The traditional method of arriving at contract agreement by bargain analysis is clear in theory, but often not evidenced in real life. Most contract transactions evolve in a process where the line between preliminary negotiations and the agreement stage is hard to define. There is frequently great difficulty in identifying precisely who was the offeror, who the offeree, what was in fact the offer and what the acceptance; it is usually obvious only when the parties have reached the stage of agreement. Moreover, the whole range of implied-in-fact contracts are impossible to fit into offer and acceptance analysis.³⁵ In light of all these difficulties, bargain is not only not a useful central concept, it is also misleading.

III. Developing the Balance Theory

Two concepts, voluntariness and fairness, are central to the balance theory of contract. It is our contention that a large number of cases turn directly on the application of these concepts. Thus the theory, even in its most general terms, is of ready use. For example, the scrutiny of liquidated damages to see if they constitute a penalty or forfeiture is a direct application of the fairness concept. However, each concept is broad and in many cases is useful only through the application of subconcepts derivable from the

³³From many possible sources, we cite Justice Holmes' famous statement in *Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379 (1901):

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting.

The centrality of bargain is also vital to the economic analysis school of contract theory. See R. Posner, *Economic Analysis of Law* (1972) 41-6.

³⁴See *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958) [hereinafter cited to P.2d]; *Hoffman v. Red Owl Stores, Inc.* 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

³⁵One author, after over twenty years, still remembers with some embarrassment, the attempt in his first year of teaching to fit the case of *Day v. Caton*, 119 Mass. 513 (1876), a classic implied-in-fact problem, into the analysis of offer and acceptance, which according to his previous learning, had been the way in which contracts were formed.

more general one. Subconcepts are often the focus of particular cases. Duress, fraud, reliance, mistake, consent, foreseeability, implied conditions, and impossibility are examples of such specific concepts. Giving a complete or canonical listing is fruitless. Not only can subconcepts be spelled out at different levels of generality — we can talk about duress or omit it in favor of the broader subconcept of consent — but also new situations in the case law may suggest reference to new subconcepts. It is only the main theory that is determinative. Nevertheless, we shall try to show how several of these subconcepts can be made to work in the balance theory.

Before doing so, we must consider a possible criticism, which is as follows. It is all very well to provide a general theory of contract, but that theory cannot hope to be sufficient to handle all contracts cases. The very generality of the theory debilitates it. Subconcepts will not help. If they are in any sense derivable from the main concept, then they will also be too broad, too general. If they are in fact useful, it is hard to see how they could be derived. For example, fairness, while not a meaningless term, is unable to fashion specific rules. Further, more fairness is controversial — the subject of dispute among moral philosophers, constitutional lawyers, economists, theologians, tort lawyers, and political theorists — such that its utility seems suspect at best, negative or counter-productive at worst. In short, the theoretical skeleton is too flimsy to flesh out.

Part of the attractiveness of this criticism lies in its ability to combine two contradictory ideas: the idea that deriving specific rules is impossible with the idea that deriving specific rules is difficult. The suggestion of impossibility comes from the fact that application of general concepts is controversial, without any apparent consensus or right answer. The suggestion of difficulty comes from the generality itself. If controversy disqualifies a concept, then saying the problem is difficult is a mistake. It can never be done. If it is difficult, however, then while it may not be worth the effort, it is still possible to derive specific rules. Before we look at these two criticisms in turn, let us examine a counterexample to both of them, which is drawn from constitutional law in the United States.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee each person the right to due process of law. In one sense, no concept can be broader than due process. It has no obvious contrary to prevent, as does, for instance, acceptance (silence or rejection of an offer), delivery (failure to transfer property), *ex post facto* (laws previous in time) or freedom of assembly (only individuals or minute groups of people); nor does it suggest an obvious standard. Yet due process has been used to govern large areas of constitutional law, labor law, administrative law, criminal law, *habeas corpus*, and even contract law under consumer protection statutes. Moreover, it has given birth to the direct and useful subconcepts of notice

and the right to a hearing, each of which are explained and employed only by resort to due process. Thus, specific problems such as the right of a postal worker to protest his dismissal or of a prisoner to protest the revocation of earned good time credit can be analyzed through the broad and general concept of due process.

Due process thus offers a legal counterexample to the claim that it is too difficult to use a general concept to fashion specific rules. It is easy to explain why such an anti-general argument is frivolous, even without resort to an example. Concepts never exist in isolation. Contract concepts complement other legal concepts in tort, property, and criminal law. The web formed by this larger set of concepts allows for greater specificity of a single concept. An example of such a constraint on contract voluntariness is the criminal notion of blackmail or extortion. Of course, there is always a difficulty when rules are fashioned in an *ad hoc* manner and seem unrelated to one another. Then the specification of a general concept appears to be without reason. The common law has permitted the borrowing of concepts through reasoning by analogy and through the practice of allowing a case that could be categorized under several fields of law to become a precedent not only in the field dealt with originally by the court, but in other possible fields as well.³⁶

Our formulation makes the specification of rules easier. The reason is that in determining whether a legally binding contract exists, voluntariness and fairness are related. Avoided is any strict all-or-nothing test, as would be found in a model where each concept is independent. Under the traditional theory, a legally binding contract had to have agreement and consideration. As the lack of either was fatal, defining the limits of the rules was critical. In order to avoid endless litigation, the rules took on a certain severity. All gratuitous promises and those based upon moral consideration were bad, while even a penny exchanged satisfied the consideration requirement. The advantage of the dual standard is that artificial cutoff points need not be imposed. In the common case of a sales contract where the buyer waives certain legal rights, there is often a question of how well the buyer examined and understood the provision. Rather than formulate a threshold standard of buyer awareness to enforce the contract, our theory weighs voluntariness against the fairness of the deal. The harsher the terms, the greater is the need to show the buyer voluntarily consented to them. This comparative test lessens the need for minute rules to be derived from broad concepts.

³⁶Individual development apart from the broader context has occurred locally only in cases of statutory construction and administrative law, and even there, hardly in total isolation.

The second objection is that the controversial aspects make the use of our general concepts impossible. As before, the utility, complexity, and widespread acceptance of due process belie the credibility of this objection. Moreover, this objection confuses the difficulty of finding the correct solution with the difficulty of ascertaining a solution from given premises or concepts. Many of the actual concepts of the legal system — free speech, equal protection, reasonable man, proximate cause, beyond a reasonable doubt, negligence, cruel and unusual punishment, legislative intent — have been and perhaps always will be potential sources of controversy. Various conceptions can be possible without any final agreement as to their correctness. Any particular conception may allow derivation of specific rules from general concepts, and, in fact, it is the viability and fitness of the derived rules that provide a test of the appropriateness of the general concepts themselves. The fact that there may be several contenders for the best conception does not mean that each is equally worthwhile, or that one cannot distinguish among them. Sifting among competing conceptions is precisely the job a lawyer is trained to do.

We can now turn to the concept of voluntariness. An obligation is voluntary to the degree that it is chosen consciously and willingly by the obligor. Two subconcepts, duress and consent, are implied by the definition of voluntariness, and they point to one of the persistent and pervasive problems in contract theory. Central to the justification of contract is the idea that one can be held responsible for those acts one voluntarily undertakes. We assess responsibility, which in contract generally means liability, because the party himself chooses to act. Responsibility does not result when the party is coerced into taking a position. The voluntariness of the initial act is analyzed via consent, the freedom to act or not via duress. The paradigm case of a voluntary contract is one into which parties enter without any pressure, fully agreeing to the resulting obligation. Yet, in a sense, most contracts are made because of some pressure; it is pressure that motivates them in the first place. One borrows money, purchases goods, insures, or takes a job to avoid some worse prospect or deprivation. Clearly such promises are considered socially acceptable and, for a number of reasons, do not generally void resulting obligations. Consent and duress allow us to recognize unacceptable transactions, that is, ones where voluntariness is lacking in a substantial way.

Consent governs the scope of obligation. Under certain traditional analyses, consent's close relative, assent, was virtually able to serve as the necessary and sufficient condition for the finding of contract. When one assented to an offer, one was taken to have agreed to the whole of its terms. Consent

is a less agreeable notion. Assent is evidence of consent, but not its guarantor.³⁷ When examining the terms of the bargain, one relies on consent to analyze which terms belong within it. That is, consented terms are not necessarily coextensive with putative contract terms. In simple contracts, for example the sale of a book for a dollar ninety-eight, assent is likely to be determinative of consent. However, if the contracts are lengthy, complicated, standardized, and full of unexpected terms, actual consent to the distinct terms of the pact needs to be examined more closely.

Duress measures voluntariness. Duress is a subconcept almost unusable without the balancing concept of fairness. Traditionally, only physical or illegal (criminal) coercion vitiated voluntariness, as in the case of blackmail. These contracts have a special quality in that the obligee created the duress. Where the obligee was the fortuitous beneficiary of pressure caused by a third party, no duress was thought to be present. Such a test is too crude. Renegotiated loans may be hard but fair, even if the creditor has been the applier of the pressure, while usurious contracts are often cases of real duress. Duress can be considered rather common, for parties are often moved to contract when in some difficulty or potential difficulty. For duress to void a contract, however, unfairness needs to be found: the greater the duress, the less the unfairness required.

Duress presents a special problem for contract theory. A condition for contract is the absence of widespread background duress. Such an absence is not properly part of contract theory, but like the requirements of sentience, language and social order, a necessary preceding condition for its existence. That is, before contract discussion is possible, there must be the possibility of real voluntariness, actual and realistic alternatives. Henry Maine may have been recognizing this when he wrote that modern history is the story of the move from status to contract.³⁸ The truth of this statement is social rather than intellectual. Contract was not discovered like a theory of mathematics; it was made possible through the development of certain economic and social conditions. Where these conditions are absent, voluntariness becomes illusory and contract disappears. Thus, bargains struck at the point of a gun, or in the midst of starvation, rarely qualify as contract.³⁹ Where the background duress of a society is great, putative contracts become a

³⁷"Assent" and "consent" are often used as interchangeable in the contract literature, but their connotations are different and the distinctions are important to our theory. "Assent" is the weaker term and implies passive acquiescence to someone else's proposal. "Consent" carries the notion of an active manifestation of will to obligate oneself made with a clear understanding of the nature and scope of the obligation.

³⁸This idea is discussed in Sir H.S. Maine, *Ancient Law* (1864).

³⁹For a good illustration of the kind of deals struck in times of widespread hunger, including the sale of children, and self-enslavement, see W. Hinton, *Fanshen: A Documentary of Revolution in a Chinese Village* (1966) 17-45.

matter for tort law. But this idea is hardly new to the common law; it lies fragmented in various legal fields. Indentured servitude and monopoly have been virtually eliminated because they both contribute to and are often the result of extreme bargaining duress. Where such situations of little existent voluntariness do occur, rescission or the essentially tort remedy of restitution can mitigate inequities. However, this relief is at the cost of respect for an obligor's intentions, and while often commendable, is certainly not contractual.

Fairness according to the balance theory is not just that which would have been considered fair by the parties at the time of contract formation. Such a test collapses into a search for intention, and because parties never have been and never ought to be held exactly accountable for their every act. The subconcepts of implied conditions and substantial performance illustrate this. "Implied conditions" were used historically to prevent complementary provisions from being considered independently. While Lord Mansfield, the father of the idea, felt the implication could "be collected from the evident sense and meaning of the parties",⁴⁰ it is only because he perceived injustice initially that he looked for such a meaning. Nowhere is the failure to execute perfectly a contractual obligation more benevolently regarded than in the subconcept of substantial performance. What is clear in these latter cases is this: if the parties were in a position to know exactly what would or would not qualify as adequate tender, then the problem would have been averted. Artificial strictures and surprise rejection are considered to be so unfair as to discourage enforcement of express contractual terms. The standard is objective, rather than subjective or dependent upon the individual parties. Thus, where a weak-minded or ignorant party makes a contract that he has considered thoroughly, the contract's fairness remains an issue.

More than voluntariness, fairness usually applies directly rather than through subconcepts. Where there is great disparity in bargaining position or in express terms, or where there exists onerous or unreasonable conditions, the issue of fairness arises quite clearly. Fairness has been applied as an immediate standard, without resort to derived rules or subconcepts, in specific performance cases. Contracts are enforced only where consideration is found to be adequate, the test of adequacy being fairness.⁴¹ Perhaps it is

⁴⁰See *Jones v. Barkley* (1773) 2 Dougl. 684, 689, (1773) 99 E.R. 434 (K.B.), where *Kingston v. Preston* is alluded to.

⁴¹These cases result from separating equity and law, an historical distinction without recent justification. When status was tied to real property, realty merited special treatment. Equity's subsequent jurisdictional boundaries have never been defensible. However, the jurisdiction has provided the courts with a large group of cases in which to inspect the fairness of transactions. In *Seymour v. Delancey*, 6 Johns. Ch. 222, 234 (N.Y. Ch. 1822), Chancellor Kent stated the received English rule to be that a "Court would not carry an agreement into execution unless the contract was *reasonable and fair in every particular*" (citing the case of *Marquis of*

the greater accessibility of the fairness concept — with its evocation of ordinary justice — that makes it less complex than voluntariness.

The subconcept most generally associated with fairness is reliance. It is a subconcept that is a matter for tort law, and, we believe, ought to be handled there and only there. In Part IV, we discuss the weakness of a contract theory rooted in reliance, but a brief word concerning the general difficulties of employing reliance can be mentioned here.

Reliance is an idea that has been broadly and ambiguously used in twentieth century contract theory. Depending on the context, it can describe a certain measurement of damages, a bargained-for executed forbearance, or an unbargained consequence of a promise. It is often considered to be synonymous, or at least coextensive, with promissory estoppel. Let us define reliance here as a change of position by an obligee because of an act by an obligor so as to give rise to putative obligation.

There are enormous scope difficulties in using reliance. If a change of position makes a promise enforceable, what set of facts constitutes a change of position? In one important sense, reliance is ubiquitous. The fact of a promise can always serve to deter further contracting. For example, if A promises to sell B a cow, then, ten minutes after the promise, B can justifiably claim to have relied on the promise by not looking elsewhere for a cow. The further problem then becomes how much weight should be given to the reliance. The famous section 90 of the *Restatement of the Law of Contracts*, adopted and promulgated by the American Law Institute,⁴² suggests

Normanby v. Duke of Devonshire (1697) 2 Freeman 216, (1697) 22 E.R. 1169 (Ch.). The search for fairness allowed him to “conclude, then, that inadequacy of price, of itself, and without fraud or other ingredient, be sufficient to stay the application of the power of this Court to enforce a specific performance of a private contract to sell land” (at p. 241). Fairness in these cases usually amounts to knowledge. Typical is the well-known case of *Margraf v. Muir*, 57 N.Y. 155 (1874). There, the Court refused to enforce a sale of land because of inadequate consideration. The determination of inadequacy was not made by scrutinizing the actual value of the property, but by scrutinizing the knowledge and foresight of the vendor-obligor. “The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus, got from her a contract to convey to him the lot for but a little more than one-third of its value. Such a contract, it is believed, has never yet been enforced in a court of equity in this country” (at p. 158). The Court thus applied in one class of cases the test we are recommending generally.

⁴²The famous standard cited by hundreds of courts in the United States and the subject of much scholarly discussion is set out in section 90 of the *Restatement of the Law of Contracts*, which was approved in 1932. It provides:

§90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION.

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

that we credit reliance only if injustice cannot otherwise be avoided. Given the ubiquity of reliance, such a test threatens to make the entirety of contract enforcement simply a matter of avoiding injustice. Is a little injustice enough, or do we need substantial or even overwhelming injustice? Moreover, what sort of legal system is being devised that blinks at small injustice?

Regardless of the mechanics of computing reliance, the larger question of why an obligee's actions should change an obligor's duties remains. If the obligee is misled, of course, a tort action should lie under some claim of misrepresentation. If A announces that he will build a playing field for public use on his property, should every party who thereby purchases a ball or bat be able to bring suit if A reneges? Moreover, what is the difference between A's announcement and his actions — his letting out bids to landscapers, purchasing athletic-field equipment, and installing lights? A large part of the basis for allowing reliance is to protect those who can reasonably expect that a party's actions were meant to impose on himself a voluntary obligation. When such an obligation is both fair and voluntary and within the class of actions society recognizes as capable of being self-imposed, it should be enforceable regardless of reliance.

Fairness is not entirely without important subconcepts. Two related subconcepts of fairness, capacity and mistake, concern those situations where the conditions of knowledge are suspect. Capacity guarantees the minimal ability to understand. Where it is lacking, because of psychological impairment or minority, contracts have often been held unenforceable against the incapacitated obligor. Stating capacity to be a function of knowledge eliminates the harshness of an arbitrary standard. Incapacity could operate as a presumption that the obligor lacked knowledge, but a presumption measurable by a fairness test. Thus, capacity would be judged in terms of the stated standard of knowledge rather than any objective psychological or age standard. The knowing young and aware disabled would thus be allowed some contracting freedom. A special case of incapacity is fraud, the removal of capacity by the tortious actions of the obligee. Mistake is even more straight-forward. The obligor had a mistaken belief, through a slip of

Section 90 of the *Restatement of the Law Second* [:] *Contracts*, adopted in 1979, changes this formulation in some particulars, but not in any sense which would affect the discussion in the text. This new formulation is:

§90. PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE.

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

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

the tongue or a mistake of fact. The presence of substantial mistake may diminish the fairness of a contract to the point of unenforceability.

The final subconcept of fairness important enough to mention is that of foreseeability. Foreseeability measures the fair reach of contract terms. When one obligates oneself, one does not usually expect to pay whatever damages might result directly from a breach. Thus, few contractors are insurers, and even insurers circumscribe their duties strictly. Because the terms of the contract rarely spell out just what the limits should be — indeed, the potential liability, as the famous case of *Hadley v. Baxendale*⁴³ and its successors⁴⁴ illustrates, is often both surprising and immense — a fairness test is necessary to fix limits.

The fairness test for foreseeability is one of knowledge. Actual fairness of outcome is not the standard, although a grossly unjust burden on the obligor might be evidence of a lack of knowledge sufficient to vitiate fairness. Parties are allowed to make bad bargains. In fact, in many areas — including commodities and stock speculation, real estate deals and insurance — a large number of particular contracts can be very unpleasant for one party. Under the concept of foreseeability, fairness can be used to replace the very nebulous and elusive notion of intention. Traditionally, one way of measuring the scope of contract coverage was to ask what the parties intended. Beyond the obvious evidentiary difficulties of establishing past state-of-mind without any behavioural manifestation, it is clear that in many cases one or both parties gave no thought at all to the actual outcome as a possible contingency. Reasonableness would seem to be the logical standard, but reasonableness here can only mean reasonably fair rather than reasonably efficient or reasonably present in the minds of the parties.

Before the balance test is invoked, there must be a threshold degree of voluntariness and of fairness. Paternalistic contracts, those created in the best interests of the obligor but without his consent, fall below the voluntariness threshold. One well-known example of a paternalistic contract would be that endorsed by John Rawls in creating a just society.⁴⁵ There, fairness is (*arguendo*) achieved — as all prejudice, special pleading, loyalty, and situational foresight are eliminated — but at the cost of denying the obligor the choice of selecting bargaining conditions, and even whether or not to

⁴³(1854) 9 Ex. 341, (1854) 156 E.R. 145.

⁴⁴*Victoria Laundry (Windsor), Ltd. v. Newman Industries Ltd* [1949] 2 K.B. 528, [1949] 1 All E.R. 997 (C.A.); *Koufos v. C. Czarnikow, Ltd (The Heron II)* [1969] 1 A.C. 350, [1967] 3 W.L.R. 1491, [1967] 2 Lloyd's Rep. 457, [1967] 3 All E.R. 686 (H.L.).

⁴⁵John Rawls discusses this when describing his "original position". See Rawls, *supra*, note 16, 17-22.

bargain at all.⁴⁶ At a more conventional level, quasi-contracts raise threshold problems. By definition, this is a context where there is no voluntariness. In many cases, as where an unconscious patient receives medical services⁴⁷ or a minor receives necessities,⁴⁸ the obligor is incapable of consenting. Often the obligation is imposed against the clearly expressed wishes of the obligor.⁴⁹ But these cases, while lacking voluntariness, rate very high on the fairness scale. The fairness component creates the obligation, imposing the promise implied as a matter of law. The obligation, however, is not contractual. Our theory does not say that the results in these cases ought to be different. We merely suggest that quasi-contracts, and the entire matter of the protection of the restitution interest, are an issue of tort liability and ought to be analyzed that way.⁵⁰

The threshold requirement in fairness excludes rash enlistment contracts, those eagerly entered into by individuals who did not understand the full implications of the terms, implications any knowledgeable obligor would dearly like to avoid. A favorite literary rash enlistment contract would be Faust's pact with Mephistopheles.⁵¹ More mundane examples occur in totally one-sided contracts of adhesion.⁵²

The immediate problem in any threshold issue is how much is sufficient: what is required to attain the threshold of voluntariness and fairness? Exact

⁴⁶A similar and more extensive criticism of Rawls is made by Dworkin in *The Original Position*, (1973) 40 U. Chi. L. Rev. 500, reprinted in N. Daniels, ed., *Reading Rawls* [:] *Critical Studies on Rawls' A Theory of Justice* (1975) 16-53.

⁴⁷*Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907); *In re Crisan Estate*, 362 Mich. 569, 107 N.W.2d 907 (1961).

⁴⁸*In re Dzwonkiewicz's Estate*, 231 Mich. 165, 203 N.W. 671 (1925).

⁴⁹*Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909), is arguably such a case. So is any case where a breaching party who has not completed the contract is permitted to recover for his partial performance.

⁵⁰The traditional classifications of problems into substantive areas such as contracts or torts, being rooted in history, is very haphazard and not theoretically consistent. Restitution was brought under the mantle of the contractual writ of *assumpsit* by means of the fictional implied promise and thus came to be called contractual. Moreover, certain classifications have been made for pedagogic reasons. It is almost unthinkable to teach a course about "contract" problems without teaching restitution. This convenience for teaching does not mean that restitution is contractual as a matter of theory.

⁵¹How rash varies with the different accounts. The best known accounts of Faust's downfall are Christopher Marlowe's play *Dr. Faustus* (1593) and Johan Wolfgang von Goethe's *Faust* (1808 and 1833). The fairness of the doctor's pact with the devil varies depending on the account one follows. Questionable contracts are a popular literary theme: Adam's Eden for ignorance, Lear's kingdom for affection, and Shylock's credit for flesh.

⁵²The literature discussing adhesion situations is not inconsiderable. Three good discussions are Wilson, *Freedom of Contract and Adhesion Contracts* (1965) 14 Int'l & Comp. L.Q. 172; Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract* (1943) 43 Colum. L. Rev. 629; and Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study* (1964) 77 Harv. L. Rev. 401.

quantification in matters such as this is not possible, for these concepts are complex and inexact. In saying that some minimal quantity of each must be present, we are suggesting that for a legally binding contract to exist, the obligation must neither be entirely involuntary nor entirely unfair. A test that captures this idea can be formulated in procedural terms used in court. A contract is threshold voluntary or threshold fair if a *prima facie* case of, respectively involuntariness or unfairness can be defeated. The workings of the test change with changing societal notions of voluntariness and fairness, but the test remains constant. Threshold requirements alleviate balancing difficulties as well.⁵³ One does not need to worry about how much bravado is necessary to turn a foolish contract into a legally binding one, nor how much benefit to the obligor will excuse his lack of consent.⁵⁴

We can briefly discuss now the element of administrative convenience before turning to society's contractual expectations. There are many wrongs against which the courts do not choose to protect, and neither these wrongs nor the reasons behind their judicial rejection are uniquely contractual. While these reasons can be framed in terms of subconcepts such as historical precedent, efficiency, and social importance, such formality would be overblown. At one time, many contracts, including most executory agreements, were not enforceable simply because they had never been enforceable. Given the pervasiveness of jurisdiction today, domestic agreements between family members⁵⁵ and church transactions involving religious issues are perhaps the only relics of this practice of freedom from legal regulation, and even their membership is dubious. A more respectable reason, although not one without its detractors, is that of efficiency. There is only a limited time and number of judges to hear cases. The efficiency argument underlies the "floodgates of litigation" concern, and acts as well to bar those cases where evidence is so sketchy that the court cannot easily handle the problem, as with a Statute of Frauds, the parol evidence rule, and a Statute of Limitations. The final reason for adopting the concept of administrative convenience is one of relative social importance. Resources are scarce. Only so much money can be given to the courts. That money needs to be used on the more

⁵³One could solve the threshold difficulties through some arbitrary quantification devices. If ten units of voluntariness and fairness were necessary, and each individually could supply only nine, then a minimal quantity of each would be necessary. Such arbitrary quantification involves the assigning of values without recognizable standards available to guide assignments, a bad practice that can create the illusion of precision.

⁵⁴That these contracts are often voided elsewhere does not solve the problem. Difficulties inherent in collateral suits and the integrity of the contract theory can be avoided only through developing a sound theory.

⁵⁵For a somewhat dated, but still valid analysis, see McDowell, *Contracts in the Family* (1965) 45 B.U.L. Rev. 43.

important cases. Cases perceived to be less important must be barred so the courts can adjudicate matters of higher priority.

This leaves the most unfamiliar of our concepts, that of society's contractual expectations. One can think of a "context" which society considers to be contractual. What is or is not a proper contract changes gradually, but far from imperceptibly. In the last twenty years, plea bargains in criminal cases have come to be perceived as enforceable contracts.⁵⁶ During this century, promises to marry have become very doubtfully so.⁵⁷ The mechanics of these putative contracts have not changed, nor have new contract rules arisen which have the effect of changing what is excluded or included. Change occurs in the beliefs and attitudes of the relevant legal or contract-interested community, and it is a slow change that only rarely results in the enforcement reversals so clearly evidenced by plea bargains and engagements to marry. More common is the shift in legal concepts which alters relations between parties in small ways. We distinguish between a gift and a contract, a promise and a prediction, extortion and a bargain, a tort duty and warranty. The boundaries of non-contractual legal concepts define the character of contract rules. The difficulty of stating what obligations are within the contractual context is related to the ease of recognizing a contract. Both efforts depend upon the abundance of legal concepts which create the situation in which each concept is embedded and has its appropriate place. As these other non-contractual concepts are mastered, it becomes easier to recognize an appropriate candidate for contract.

We use the term "society's contractual expectations" because the concept is societal rather than legal. Social beliefs and attitudes determine what class of things obligate and what do not. The social invitation, to tea or to play cards, is not enforceable because such invitations are thought to be casual: those accepting and acting on them do so at their own risk. Being stood up for lunch, regardless of the expense in time and inconvenience, is a risk the putative obligee must take himself. The changing implications of the contract to marry exemplify this. The vanishing obligation was not a result of a shift in legal doctrine. At one time, to jilt one's fiancée was to diminish seriously her prospects for a future marriage.⁵⁸ Engagement was

⁵⁶For a critical evaluation of this development, see Altschuler, *The Changing Plea Bargaining Debate* (1981) 69 Calif. L. Rev. 652, particularly 695-703.

⁵⁷About one third of the jurisdictions in the United States have by statute abolished contract actions to protect the engagement. See H. Clark, *The Law of Domestic Relations in the United States* (1968) 15. In those jurisdictions where the action still remains a part of the common law, it is rare to find an action for breach of promise to marry. When found it is even rarer that juries would give more than nominal damages to the complainant.

⁵⁸For a strong early nineteenth century expression of this social attitude, see the opinion of Parker, C.J., in *Wightman v. Coates*, 15 Mass. 1, 8 Am. Dec. 77 (1818).

a serious matter. As that seriousness lightened, the perception of obligation diminished concomitantly.

Society's contractual expectations sort out non-binding acts from binding ones most commonly in those cases of an inchoate obligee. Vows to deities⁵⁹ or promises by economic prognosticators in newspapers are serious matters. They can change individual lives and shape social systems. One can imagine individuals being held to the former in a theocracy, to the latter in a plutocracy.

One might try to avoid adopting the concept of society's contractual expectations by taking the position of the rule reductionist. He would argue that the cases mentioned can be accommodated through resort to a series of contract rules such as: (1) contracts must be serious, (2) contractual obligation must be owed to an obligee who can be brought under a court's jurisdiction, and (3) contractual obligations must be more than prediction. More specific rules could somehow accommodate changing notions of criminal plea bargains and contracts to marry, perhaps under some enriched concept covering the importance of what is exchanged. It is difficult to see how the rule reductionist could maintain any theoretical integrity while advocating such a set of rules. Assuming *arguendo*, however, the initial plausibility of such an argument, one set of putative contracts makes such

⁵⁹Promises made to a deity, while obviously not thought enforceable through suit by the obligee, are commonly perceived by the obligor to be binding. Vows of celibacy, loyalty, poverty, faith and service are among such promises, and the behaviour of many cleric and lay believers is evidence of the felt existence of an obligation. A well-known historical example is that made by the learned common law lawyer Thomas More. As represented in drama, he is portrayed as believing that such promises are enforceable in the afterlife, and have a place as binding legal obligations:

Roper: Yes... Meg's under oath to persuade you.

More (*coldy*): That was silly, Meg. How did you come to do that?

Margaret: I wanted to!

More: You want me to swear to the Act of Succession?

Margaret: "God more regards the thoughts of the heart than the words of the mouth" or so you've always told me.

More: Yes.

Margaret: Then say the words of the oath and in your heart think otherwise.

More: What is an oath then but words we say to God?

Margaret: That's very neat.

More: Do you mean it isn't true?

Margaret: No, it's true.

More: Then it's a poor argument to call it "neat", Meg. When a man takes an oath, Meg, he's holding his own self in his own hands. Like water (*cups hands*) and if he opens his fingers *then* — he needn't hope to find himself again. Some men aren't capable of this, but I'd be loathe to think your father one of them.

Margaret: So should I... .

Robert Bolt, *A Man for All Seasons* (1960) 83.

a position untenable. These are campaign promises. Such putative contracts are serious, involve ascertainable obligees, involve the exchange of important goods, and yet are not enforceable. If a candidate promises to balance the budget or to make a particular judicial or executive appointment in exchange for votes, he is making a serious promise. Presumably, voters often act upon such promises.⁶⁰ It is hard to see how one could formulate any general contract rules which could exclude campaign promises.⁶¹ Campaign promises are considered to be serious, but are left to political, rather than legal, enforcement through subsequent elections, lobbying, referenda, and removal from office.

A concern engendered by rule reductionism is responsible, in part, for the widespread fear of abandoning consideration. The concern is this. Individuals make casual deals or promises all the time. They promise X or agree to Y. While they might have good faith intentions about X or Y, they do not want to be held legally responsible for them. This is particularly true in the case of gratuitous promises. Where an individual promises to make a gift, for example, he may plan to do so, but not want to be bound to do so. The rule of consideration eliminates this problem, using the minimal *quid pro quo* requirement almost as a formality to rule out suspect promises.

The balance theory not only uses a different analysis, it leads to different results.⁶² A gratuitous promisor may be bound if he intended voluntarily to be bound, he knew the extent of his commitment, and his promise is of the type society recognizes as putting one under an obligation. What counts as obligatory is not fixed, for it depends on a society's knowledge rather than on a lawyer's. New types of contractual obligation are always possible. Thus the balance theory eliminates specious and casual promises, as does consideration, but it does not eliminate serious promises. Only occasionally

⁶⁰*Cf. Brown v. Hartlage*, 456 U.S. 45 (1982). The Supreme Court struck down as an unconstitutional infringement of free speech the operation of the Kentucky *Corrupt Practices Act*, which had been applied by the Kentucky courts to void the election of a candidate for county commissioner who had promised to lower his salary if elected. The passage of the statute by the State Legislature might well have been motivated in part by the possibility that such a promise if acted upon by the voters, could be construed as an enforceable contract.

⁶¹One can, of course, formulate the specific contract rule that campaign promises are not legally enforceable obligations, but that rule is not derivable from any general contract theory, be it traditional, economic, tort, or ours.

⁶²As long as the seal was in use there was a formal method of stamping a gratuitous promise as serious and thus enforceable. Since the demise of the seal, there has been a general feeling that a gap existed in the legal institution of contract because there was no device to achieve the purpose of binding a serious gratuitous promisor. Refusal to enforce such promises in the modern law has seemingly been based on the administrative problems of proof of seriousness, not on any feeling that, as a matter of theory or policy, such promises should be unenforceable. We do not feel that proof of seriousness is any more difficult than proof of other issues such as "intent" in modern contract.

would the obligee's reliance figure in determining where there is a legal obligation. If by acts not creating a contractual duty the defendant has misled an innocent party into detrimental reliance, the harmful act is what allows a claim, the reliance is the measure of damages, and compensation is a matter for tort rather than contract.

Our theory of contracts, however, puts an additional burden on the concept of society's contractual expectations. This is so because we do not use certain behavioural concepts — offer-and-acceptance, agreement, promise, bargain — concepts that exclude non-contractual situations as well as providing a finer test for putative contracts. "Voluntarily assumed obligation" does not evoke behavioural criteria so clearly. "Obligation" might seem undefined, without a clue as to how it has arisen. However, this is not the case. "Obligation" is in most cases no less evident than "promise" or "bargain". Parties often do not say "I promise", "I offer", "I accept", or "It's a bargain." Yet contractual behaviour falling under these concepts is readily identifiable. That is, there may exist borderline cases, putative contracts, where there is an issue whether an offer is legally valid, but what constitutes offering behaviour is quite uncontroversial. Such certainty remains even when the conceptual nomenclature changes. Contracts, regardless of definition, are initially located by the use of a broad range of concepts, legal and social, which constitute the contractual context. It is because society's contractual expectations locate the obligation so successfully that we can focus our theory on the more complex aspects of contracts.

IV. Competing Theories

Our theory attempts, among its other aims, to re-interpret and explain contract case law through a particular combination of new but not unfamiliar concepts. For purposes of completeness and comparison, we ought to mention and distinguish several other revisionary theories that are current. The most important of these are the economic analysis contract theory and the tort-contract theory.⁶³ The economic theory uses traditional elements of contractual analysis but redefines and unifies them under the conceptual umbrella of the marketplace. The tort theory borrows notions of fairness from tort and substitutes these for bargain analysis in contracts. While both of these competing theories merit a fuller discussion than is

⁶³Other theories than these exist, of course. However, none are as fully developed. One budding theory is that presented in C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981). Fried argues that promises create moral obligations traditionally enforced in contract law, with one's intentions rather than reliance giving rise to the duty. We believe the vagueness of the concept of intention, the difficulties of defining "promise", the rarity of unforced, completely free mutual promises, and the fundamental place of fairness make Fried's theory unattractive.

possible here, we believe it is valuable to examine them briefly and to point out certain obvious difficulties with each.⁶⁴

The economic analysis theory of contracts⁶⁵ suggests that contract is a way of achieving (economic) efficiency for one or both parties in their economic endeavors.⁶⁶ This efficiency is achieved through the actions of individual parties seeking profit (wealth-maximization) through voluntary exchanges. Exchange is made possible through the operation of an open or accessible market. Under the theory the main function of contract law is to make certain that parties who agree to an exchange perform, and this is achieved by making it as expensive to breach as to carry out the exchange. At the same time, it is equally important not to make it more expensive to breach than to perform, so that goods can find their most efficient use. A subsidiary function is to reduce the cost of an exchange by standardizing the terms by which risk is allocated. Performance and term consistency allow the parties to plan ahead, rationalize the vicissitudes of particular deals, and be undaunted by unforeseen contingencies. It has the corollary of discouraging careless behaviour. If unchecked, carelessness can impose costs on those who relied on casual actions of others, leading to inefficiency.⁶⁷ One is entitled to take seriously actions falling under the standardized contract terms.⁶⁸

There is no doubt that such a theory can explain a great number of specific contract rules.⁶⁹ One common objection to the theory is that while

⁶⁴No orthodoxy exists in regard to either theory, and thus a fault of one theorist is not necessarily fatal to others. We are here sketching only the most general features of each theory and putting forth criticisms that are extremely general. Because of this, no particular writer should be considered to be the author of the brief restatements, nor should it be thought that a particular writer will be unable to meet at least some of these criticisms. Any far-reaching rebuttal, though, would change the character of the theories as they are conceived in the legal literature.

⁶⁵The theory discussed here is advanced largely by conservative, monetarist economists often associated with the Chicago School. This particular theory of economic analysis is not the only possible one. More liberal (in the political sense) economic analysis is possible, though not well-represented in the legal literature. See *infra*, note 66 for a bibliography of the former group of theorists.

⁶⁶The most prominent proponent of this type of theory is Richard A. Posner. See his *Economic Analysis of Law*, 2d ed. (1977), particularly chapter IV for a discussion and for a bibliography of other advocates. A sampling of this theory is to be found in A. Kronman & R. Posner, eds, *The Economics of Contract Law* (1979).

⁶⁷If A promises B \$100 for his cow tomorrow, he cannot tomorrow plead he was not serious if B had accepted the offer. A's carelessness is discouraged.

⁶⁸These functions are discussed in Kronman & Posner, *supra*, note 66, 1-7.

⁶⁹Examples abound. For derivation of damages rules, see Barton, *The Economic Basis of Damages for Breach of Contract* (1972) 1 J. Legal Studies 277; for impossibility, see Posner & Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis* (1977) 6 J. Legal Studies 83; for specific performance, see Kronman, *Specific Performance* (1978) 45 U. Chi. L. Rev. 351.

economic analysis can account for many common law rules, it is not the method employed by the courts. Judges themselves are often ignorant of the subtleties of economic doctrine and, in deciding cases, are clearly not consciously using contract concepts to advance economic aims. Thus such analysis, if interesting, might be said to be unimportant.

This objection is only partially successful. If a theory can both explain and predict results, it has some merit, whether those involved employ it directly or not. An anthropologist may be able to observe a society and, by superimposing a model drawn from similar societies, predict judicial results better than a local member of that society. The discovery by Fuller and Perdue that courts were in fact using reliance as a basis for contract analysis without explicitly deviating from the traditional theory of consideration provides an example of a new theory retrospectively explaining cases.⁷⁰ The economic theory can make a special claim to such explanatory power, for the competitive force that causes people to behave efficiently without being aware of it can be thought to apply equally to judges. Where contract rules are inefficient, parties expressly contract them out. Because the courts normally respect the expressed intentions of the parties, inefficient rules are discarded and those rules the parties find useful remain. This special argument has difficulties. Party autonomy is not unlimited, and one cannot always eliminate what one does not like, as the warranty cases epitomized by *Henningsen v. Bloomfield Motors, Inc.* demonstrate.⁷¹ Moreover, in changing contract terms, one often adds to the transaction costs, as well as limiting the potential scope of express terms. An example is the common law limitation on liquidated damages.⁷² Such clauses cannot operate as penalties. Even in those cases where efficiency analysis suggests that the potential obligor would be the most efficient insurer, and thus ought to pay high liquidated damages, the contract will be altered so as to place some of the risk on the obligee. This may prevent some contracts from being initiated, while adding inefficient costs to others.⁷³

The objection that economic analysis is not consciously employed by judges is, as we said, not completely unsuccessful. The argument from efficiency is often available and apparent to the courts but still not used. The fact that an alternate theory is used, yielding different outcomes, makes the

⁷⁰The famous reliance article is that of Fuller & Perdue, *The Reliance Interest in Contract Damages* (1936) 46 Yale L.J. 52.

⁷¹*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

⁷²That the liquidated damages doctrine poses such a problem for economic analysis theorists is recognized by two of them in Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach* (1977) 77 Colum. L. Rev. 554.

⁷³Such costs might be in the form of third party sureties or through higher prices paid by the potential obligor.

case quite different from that of businessmen acting in their own interests but achieving overall efficiency. In the latter case, the specific theory of the marketplace is not explicitly rejected; arguably, it is being unconsciously followed. The rarity of marketplace efficiency analysis in the case law, even when efficiency is obviously a relevant argument, suggests an explanatory weakness in such a theory.

There are more serious difficulties, however, and we shall mention three.⁷⁴ The first is the converse of the difficulty that judges do not explicitly use economic theory in their decisions and rule formulation. The courts, on the other hand, do employ a fairness standard throughout contracts. Notions of promissory estoppel, equity, duress, penalty clauses, consent, substantial performance, equal bargaining position, usury, fraud, impossibility, reliance, and unconscionability all point to the concern which courts have long had with fairness in every facet of contracts. While fairness and efficiency are not necessarily antagonists — anti-trust and restraint-of-trade are areas where the concerns are the same — they have different aims. It would be possible to alter the economic theory to say that in pursuing fairness, efficiency is achieved. However, this rather startling statement, besides being alien to most actual theories, misses the point of the problem: when fairness conflicts with efficiency, which should be chosen? The fact that courts have attached great weight to fairness suggests that efficiency analysis, by its neglect of this concept, is defective.

A second difficulty with the economic analysis theory is that it relies on the discredited traditional theory. Thus the economic theory is not only conservative politically and economically, but conceptually as well. Such a theory assumes that parties bargain freely; that there is the ability to shape the bargain through the remedy of an open and diverse market, that the price of the contract not only reflects a true measure of value, but that the particular value is worthy of legal protection, and that consideration is the central, and perhaps the only, principle on which to base a legally enforceable exchange. As we discussed earlier, it is precisely because the traditional model is faulty that the need for a new theory has arisen. Bargaining disparity may be great, agreement illusory, and price a matter of duress or coercion.⁷⁵

⁷⁴A fourth and perhaps the most interesting difficulty concerns just what values are achieved by this theory, and how they can be justified. A discussion of this matter would take us deep into the problems of ethics and political philosophy. The freedom to bargain is most eloquently defended in R. Nozick, *Anarchy, State and Utopia* (1974), while the supremacy of fairness is defended in J. Rawls, *A Theory of Justice* (1971).

⁷⁵The large quantity of consumer protection legislation alone points to the reluctance of legislators and attorneys to let the exchange stand unhampered. See generally National Conference of Commissioners on Uniform State Laws, *The Uniform Consumer Credit Code* (1968). If they believed the exchange to be free and voluntary, that reluctance would, no doubt, dissipate.

Even if most exchanges satisfied the model of the economic analysis theorists, the legal, as opposed to the purely economic, difficulties would remain. Law suits occur when normal business relations break down. They are expensive and unpleasant. When alternate goods or services are easily available on a ready market, the disincentives to bring suit are great. It is when the market is not working, or when agreement is questionable or the contract price is of disputed value, that suit is brought. The law is concerned with unusual situations, those arising when things have gone wrong. Theories based on models of institutional strength are of little help when the institution relied upon is crumbling. The well-known product liability cases, from *MacPherson*⁷⁶ to *Henningsen*,⁷⁷ illustrate the idea that when the exchange is not a matter of free bargaining, the courts will look elsewhere than to the market for help. The judges must fashion rules for these "unusual" cases because, although perhaps unusual according to some economic models, they are the everyday fare of the courts. Put another way, courts must decide the case before them, not typical cases.

The final difficulty with the economic theory is prescriptive rather than explanatory. Such a theory is a poor one for any legal system. It has never been considered to be the judges' role to aid the economy or to assist in the free flow of capital and goods. His or her job has been to do justice within the framework of the legal system. Cases are individually heard, and the merits of each are appraised. Fairness has always been a dominant consideration. For eight hundred years, that supreme tool of the English law, equity, was set apart as a refuge for those unfairly prejudiced by harsh rules. If it is argued that a political system can no longer afford to accommodate fairness, then that is so much the worse for that system. Exchange is a goal worth pursuing and perhaps, at times, worth pursuing despite unfairness. It should never be the only goal, and we believe it ought to be pursued through the political process as well as through the courts. We shall return to this issue in our concluding section.

The tort theory of contract is less developed and more elusive than the economic analysis theory.⁷⁸ It has arisen not as a consistent whole but as a patchwork criticism of the traditional contract theory, particularly of the

⁷⁶*MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

⁷⁷*Henningsen v. Bloomfield Motors, Inc.*, *supra*, note 71.

⁷⁸Some well-known writers in the contract-as-tort school are P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), and G. Gilmore, *The Death of Contract* (1974). The apocalyptic tone of the titles is often mirrored in the texts. The old idea of contracts is dead, to be replaced by a new order. A lack of continuity is distinctly implied between the old and new. Gilmore goes so far as to see the orders as doing battle — with Corbin and Williston the opposing champions, the *Restatement* the battleground, and consideration the chosen weapon.

concept of consideration.⁷⁹ The theory begins by noticing that contracts are a subset of the theory of liability.⁸⁰ A large part of this subset is concerned with promises, but a promise is neither a necessary nor a sufficient condition for the imposition of liability. That is, certain promises are not legally binding, while reliance can at times convert something less than a genuine promise into an obligation. The concept of consideration, while it helps to sort the potential liabilities from mere benign acts, is too *ad hoc* to constitute a theory, and it cannot begin to be reconciled with any coherent conception of reliance. Apparently, consideration and reliance are just mechanisms for allowing liability to attach in some reasonably fair way. In this respect, they resemble tort concepts of proximate cause and reasonableness. Because the contract concepts are, however, unwieldy and inconsistent mechanisms, the distinction between tort and contract can no longer be maintained. We can observe this change in the courts' reappraisal of contractual obligations. As Gilmore ambitiously states, "speaking descriptively, we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort'."⁸¹ The distinctions between expressed, implied-in-fact, and implied-in-law contracts, or in other words, the distinctions between contract and quasi-contract, collapse. The policy considerations that motivate tort are simply used to examine the variety of events once called contract.

The real attraction of the tort theory is that it neatly places reliance within the tort tradition. Because tort is largely concerned with non-voluntary actions, it can easily accommodate those reliance cases where the obligor did not intentionally wish to be an obligor. As even voluntary obligations entail a degree of reliance, and such reliance can offer a basis for and measure of recovery generally, a tort analysis can unify contract while allowing the more flexible ideas of tort to operate. The objection is that this

⁷⁹Professor Lon Fuller has been credited with a major contribution to contract theory through his development of the "reliance interest" and its two siblings, the "expectation interest" and the "restitution interest". This was done primarily in his classic article, *supra*, note 70. Fuller saw clearly that the famous section 90 of the first *Restatement* was intended only to protect unbargained-for reliance in rather severely restrained circumstances. Bargained-for reliance cases had been easily decided under traditional consideration doctrine. Once Fuller had helped courts and lawyers understand that reliance covered almost all consideration cases as well as the troublesome promissory estoppel issues and the cases of restitution (a subset of reliance), it was possible to begin to demote the unsatisfactory and messy consideration rules and to promote reliance analysis across a wide range of contract issues. Fuller is thus the precursor, if not the founding member, of the tort theorists.

⁸⁰In continental code systems, both tort and contract are taught and analyzed together under the general rubric of the law of obligations.

⁸¹G. Gilmore, *The Death of Contract* (1974) 87.

formulation gets things backwards.⁸² That is, where the obligor voluntarily undertook the obligation, there is protected reliance because of the undertaking, not a valid undertaking because the obligee relied. We are interested in reliance because of the value of the voluntary undertaking.

The tort theorist can make two responses. The first simply argues that expectation alone should not be sufficient to guarantee recovery. Atiyah suggests that expectation is a Victorian notion and executory contracts ought not to be enforced without reliance.⁸³ Given the ease with which one can find reliance,⁸⁴ few contracts worth enforcing seem to be neglected. If the tort theorist wishes to abandon the remainder, a slight moral harm could be considered done. The second response argues that it is because a promise is presumed to provoke reliance that one feels promisors ought to be held to their word. Promises in the form of personal resolutions are not thought worthy of enforcement even if there is an obvious beneficiary, simply because no reliance is possible. It may be that the convention of promising achieves its power because of a latent tie to reliance.

The telling weakness in the tort theory is undramatic but difficult to remedy. Without the idea of voluntariness, the standards for assessing contract enforceability become vague and unpredictable. Such vagueness may be suitable in tort where one does not voluntarily assume obligations on the basis of knowable criteria (although even in tort it seems more the result of a lack of available firm criteria than lack of choice). Where one intentionally assumes obligations and allocates risks under those obligations, certainty becomes more critical. A part of assuming the obligation in contract involves knowing its scope. Voluntariness is a useful and sophisticated tool for sifting through putative contracts. Thus, let us suppose that a tort theorist would suggest that his test for inclusion on the grounds of fairness captures the same set of contracts as a theory rooted in voluntariness as well as in fairness. Under such a supposition, his theory is less satisfactory,

⁸²This is essentially the argument Charles Fried makes in *Contract as Promise* (1981) 18-21. He assumes there and throughout his book that because there is some moral connotation to a promise, there ought to be a legal obligation as well. However, that the moral aspect of expectation interest is co-extensive with the legal aspect is a complicated and far from obviously true statement. Moreover, a great many contracts do not involve promise. This fact, plus the fact that certain promises do not legally bind, point to the inadequacy of basing contract obligation on the convention of promising.

It should be mentioned at this point that the summary of the tort position presented here owes something for its structure to the summary presented at the outset of Fried's book. The account here varies significantly from his, but covers in germ some of the same ground.

⁸³See P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

⁸⁴There is a related problem here which is tied to the administrative convenience concept discussed earlier. The evidence necessary to distinguish expectation from expectation plus minimal reliance is hard to collect.

for even judged by its own aims it is less likely to be successful. Fairness alone offers too little guidance. This difficulty becomes exacerbated when the fairness found is not that of contract outcome but of obligation assumed. Individuals have traditionally been allowed to make unprofitable and unwise contracts. Some of these would be unfair to enforce except for the fact that the obligor voluntarily assumed the obligation. Expecting a court to weigh exactly outcome fairness against the unfairness of preventing the parties from bargaining freely is to expect more than precise and minute analysis. It is to stretch the concept past the point of meaningfulness.

It might be contended that another competing theory worthy of discussion is that of "relational contract".⁸⁵ This position has been most forcefully argued by Ian Macneil.⁸⁶ There are two central theses in this perspective. The first is that contracts are not isolated or discrete transactions as both classical theory and economic analysis seem to assume, but rather are embedded in complex and ongoing personal, social and business relationships. Therefore, any theory of contract which does not distort the reality of contracting ought to take into account the limiting and defining qualities of these relationships. The second thesis, which may be a natural corollary of the preceding observation, is that any adequate theory or model of contract must be pluralistic and rich in classificatory schemes.⁸⁷

The relational theory, even assuming it is properly a theory at all and not merely a string of often incisive observations about contract,⁸⁸ is fraught with difficulties. At the outset, it blurs the conceptual distinctions between legal contract, economic contract, and social contract. In posing such questions as "How is conflict between specific planning and the need to adapt to subsequent change in circumstances treated?" and "How are contractual relations preserved when conflicts arise?"⁸⁹ Macneil never makes clear whether

⁸⁵Prominent among the writings of Macneil which present this position are: *Contracts: Exchange Transactions and Relations — Cases and Materials*, 2d ed. (1978); *The New Social Contract* (1980); *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"* (1981) 75 Nw. Univ. L. Rev. 1018.

⁸⁶Macneil at times backs down from any thought that he is presenting a new theory of contract. "First, it is quite plain that acceptance of this analysis as a jurisprudential framework would work no general overthrow of present transactional contract doctrines." *The Many Futures of Contracts* (1974) 47 S. Cal. L. Rev. 691, 813.

⁸⁷A long list of so-called contract norms appears in I. Macneil, *The New Social Contract* (1980). A different list of important characteristics needed to understand the relational character of modern contract appears in his article *Economic Analysis of Contractual Relations*, *supra*, note 85.

⁸⁸A schema containing most of these factors is presented in Macneil, *supra*, note 86, 738-40.

⁸⁹Both questions are taken from Macneil, *Contracts: Adjustments of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law* (1978) 72 Nw. Univ. L. Rev. 854, 855.

he is writing as a lawyer, an economist, or a sociologist, or even if he thinks these distinctions matter. The loss-avoidance effects of transactions on microeconomic analysis and the consequences of contract conflict on the causes of social stratification and cohesion are interesting issues for the social scientist. They are of only the most marginal relevance in assessing which contracts courts should and do enforce. The balance theory is a legal theory, one which focuses on what judges decide in cases and how they justify or ought to justify these decisions. Macneil is certainly correct to point out that any picture of a lawyer purely as litigator or judge is too narrow. Particularly in the field of contracts or commercial transactions, the role of the lawyer is less to litigate than to plan and to draft. The planning process, however, when the lawyer is performing as lawyer and not as business advisor, is designed to anticipate, avoid or control litigation in the event the social or economic contract breaks down irreparably.⁹⁰ At the point of the breakdown, the ongoing relational aspects of the contract disappear. Their importance to the lawyer takes on a clear and well-understood purpose, which is to define the scope of the obligations assumed by the obligor. Even the most orthodox and conservative lawyer understands the importance of relational components of a contracting situation for this purpose of construction.

A second difficulty with Macneil's position lies with his notions of exchange or "relational exchange".⁹¹ The limitation of the field of contract to commercial or market-type transactions which can be fitted into exchange analysis is a major reason that the classical contract theory with its legal equivalent of consideration seems to us no longer useful. There are too many obligations thought of as contract and enforced as contract which do not easily fit into exchange analysis. Furthermore, the expansion of the exchange notion to include all the complexities of long-term ongoing relationships, such as a ten-year requirements contract, or a corporate merger between a supplier and a customer, is in effect the abandonment of the concept of exchange as it has been understood in contract and economic literature. What is left is too open-ended and amorphous to be useful.

The most serious objection to the relational theory concerns its second thesis. Unlimited pluralism (the listing of an indeterminate number of factors which ought to be taken into account in analyzing or understanding problems) is too diffuse to be useful in judging the enforceability of particular contracts. It is too diffuse even to complete one's legal theory or test it against the results yielded. At an early stage of theory building, it is necessary

⁹⁰We do not disagree that it is often appropriate for the lawyer in the real world to counsel his clients as business advisor as well as litigation avoider, or that these roles can overlap. They are not the same, however, and conceptually and theoretically should be kept separate.

⁹¹This notion is central in the organization of Macneil's contracts casebook, *supra*, note 85.

to assemble factors in order to get an overview of the breadth and complexity of the phenomena which must be assessed. Thereafter, the task of theory construction is to develop models which have descriptive and explanatory power. Criteria of efficiency and elegance suggest that the central organizing principles on which these models are based should be kept to a limited number.

Macneil's work has the merit of showing how the simple model of discrete transactions used by both the traditional and the economic theorists is not sufficiently comprehensive to account for modern contract law. Thus, his work fits into that ongoing project of over half a century which, while criticizing the inadequacies of classical contract theory, has not offered a comprehensive substitute. In particular, Macneil has failed to provide a normative theory of contract, to furnish an account rich enough to serve as the basis of a full-blown theory, and in general, to suggest any method of selecting and weighing particular concepts for use in building a coherent picture of contract law.

The purpose of this diversion through competing theories is not merely polemical. Not only does it show that eclectic and unlimited pluralism is not a contract theory, but also it illustrates the essential role both voluntariness and fairness must play in any contract theory. We shall turn to this point as we look at some typical contract cases.

V. Application of the Balance Theory to Decided Cases

The project of working out our theory in detail and applying it to the entire range of contract problems would be an enterprise requiring several volumes, though we are persuaded that it can be done and would be useful.⁹² If such a project is beyond the scope of this paper, nevertheless we wish to demonstrate that our thesis can explain what the courts have done and should be doing when deciding contract issues. This demonstration requires using the theory to analyze some traditional contract problems through examples. To that end, we have selected relevant contract cases for discussion. These include *Drennan v. Star Paving Co.*,⁹³ *Jacob & Youngs, Inc. v. Kent*,⁹⁴ *Buckland v. Buckland*⁹⁵ and *Williams v. Walker-Thomas Furniture*

⁹²Given the balancing and flexible nature of our theory, that project would not look at all like Williston's treatise or the *Restatements*. We would not provide a collection of fairly mechanical rules, but would show how the balance might be struck across the range of contract problems faced by the courts.

⁹³*Supra*, note 34.

⁹⁴230 N.Y. 239, 129 N.E. 889 (Ct. App. 1921) [hereinafter cited to N.E.]

⁹⁵[1967] 2 All E.R. 300, [1967] 2 W.L.R. 1506 (Pr. & Div.) [hereinafter cited all E.R.].

*Co.*⁹⁶ Each of these four has become a much-cited case in contract law and was decided by a well-known judge. Each case presents difficulties for the traditional theory. Most importantly, perhaps, each raises a fundamental issue that any contract theory must address. These issues, which relate to contract formation, contract performance, duress, and the bargaining positions of the parties, both divide and test the competing contract theories. Their profundity serves to expose the basic nature of these theories.

The problem presented in *Drennan v. Star Paving Co.* is familiar and common. A general contractor about to submit a general bid for an advertised construction project invites bids from subcontractors on a portion of the project. The subcontractor submits a fixed price bid "for prompt acceptance after the general contract has been awarded". The general contractor uses the subcontractor's bid. After this general bid has been submitted and it is too late for the general contractor to withdraw, the subcontractor discovers he has made a mistake in the bid sufficient to turn the subcontract into a substantially losing proposition for him, but not low enough to have put the general contractor on notice that there was an error. The subcontractor notifies the general contractor that he is recalling his bid. After being awarded the general contract, the general contractor (knowing of the revocation) formally accepts the subcontractor's bid. When the subcontractor refuses to perform, the general contractor lets the job out to the next lower bidder and brings suit against the subcontractor for the difference between that price and the bid price.

Before discussing Justice Traynor's opinion in *Drennan*, it is useful to examine the decision of Judge Learned Hand on essentially the same facts in the earlier case of *James Baird Co. v. Gimble Bros., Inc.*⁹⁷ Hand first decided that the subcontractor's bid was an offer. He then dealt with the argument of the general contractor that use of the bid was an acceptance creating a bilateral contract at that point. It was, according to Hand, contrary to the intent of the offeror that acceptance should occur before the general contract had been awarded and formal notification had thereafter been sent. He tested this conclusion by asking whether, if the general contractor-offeree, during the period between the use of bid and formal acceptance, decided not to go forward, would a court have found an enforceable contract in favor of the subcontractor? Concluding that a contract against the general contractor would not have been found, it followed from a symmetry or mutuality of obligation analysis that there should not be an enforceable contract against the subcontractor. Hand then moved to the consideration issue. The general contractor had argued that its reliance in using the bid

⁹⁶350 F.2d 445, 18 A.L.R.3d 1297 (D.C. Cir. 1965) [hereinafter cited to F.2d].

⁹⁷64 F.2d 344 (2d Cir. 1933).

had made the offer irrevocable. Although expressing some doubt about the extent to which promissory estoppel and reliance was or ought to be a part of the law of contract, he assumed *arguendo* that it was, and then narrowly restricted the doctrine to the case where the promise sued on was clearly gratuitous. Where the promise was an offer looking to a bilateral contract, the only way the promisor could become obligated was for the promisee to "accept" in the prescribed way. When a bargain was contemplated, the promisor was entitled to get what he wanted and reliance could not be used to bind him against his will. In Hand's words:

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. To extend it would be to hold the offeror regardless of the stipulated condition of his offer. In the case at bar the defendant offered to deliver the limoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it. That offer could become a promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it. There is no room in such a situation for the doctrine of "promissory estoppel".⁹⁸

Hand felt particularly comfortable with his decision in this situation, because a general contractor could always require a binding contract "conditioned upon the awarding of the general contract" before using the bid. Thus, a general contractor who did not protect himself through an express conditional contract was not entitled to the protection of the estoppel doctrine. Reliance here could not remedy a defective or absent acceptance.

When Justice Traynor decided *Drennan* twenty-five years after the *James Baird Co.* case, he was clearly aware of Hand's decision. On the issue of whether an executory bilateral contract had been formed by the use of the bid, he adopted Hand's analysis. But on the issue of promissory estoppel, he parted company. Traynor felt he had to tie his decision to traditional contract doctrine and he did so neatly. Using section 90 of the first *Restatement of the Law of Contracts*,⁹⁹ and by analogy the reasoning underlying section 45¹⁰⁰ (offers for unilateral contracts are irrevocable after they have

⁹⁸*Ibid.*, 346.

⁹⁹*Supra*, note 42.

¹⁰⁰Section 45 provides:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

The reasoning underlying this provision is contained in Comment b:

There can be no actionable duty on the part of the offeror until he has received all that he demanded, or until the condition is excused by his own prevention of performance by refusing a tender; but he may become bound at an earlier day. The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted.

been relied on by part performance),¹⁰¹ Traynor first found a promise not to revoke. Although he would recognize an express provision by the offeror that the offer was to be revocable at will, he implied as a matter of law or of fact¹⁰² a promise to hold the bid open until a reasonable time after the general contract had been awarded so that the general contractor-offeree would have a chance to accept the subcontractor's offer. The reliance engendered by using the bid made this promise not to revoke enforceable. There is, in the language of traditional contract theory, a legally binding option contract. Traynor justified his decision as follows:

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only *fair* that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.¹⁰³

While Traynor clothes his analysis in traditional contract terms, it is clear from this excerpt that he is not primarily concerned with "promise", but "obligation" ("bound"), and that it is not reliance in a technical sense, but the broader notion of "fairness" that he uses.

The two cases of *Drennan* and *James Baird Co.* are traditionally contrasted in law school contracts courses. It would be easy to subsume them under the single question: "does reliance on the offer by an offeree prior to accepting make the offer irrevocable?" One can discuss then whether Hand's or Traynor's answer to that question is right or wrong, better or worse, more or less efficient. That approach, however, is misleading. The question asked

Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see §90).

¹⁰¹We do not believe that the distinction between bilateral and unilateral contracts has much substantive value. This is in line with much contemporary contract thinking.

¹⁰²The distinction between express promise and implied promise does not strike us as having any consequence with regard to obligation or remedies. The question is whether a voluntary obligation has been assumed and the voluntariness may be expressed in a variety of ways, of which express verbal signal is only one, and probably statistically not the most important at that.

¹⁰³*Supra*, note 34, 760 [emphasis added].

is neither Traynor's, nor Hand's. What distinguishes the two judges and their decisions is their different view of contract law. Hand is a conservative judge working within the traditional (Willistonian) theory. There, of course, the key concepts are bargain and the will of the parties as manifested by offer and acceptance. Within that system, Hand's analysis is correct. There is little or no room in such a view for the working of fairness notions to reach results contrary to what the parties intended or bargained for. In Traynor's picture of contract law, reliance and fairness have become central notions. He is willing to use bargain and intent only when the parties expressly indicate their intent. Thus, he starts down the same road we take of dispensing with intention. When the intent is not clear, the concept of voluntarily assumed obligation provides a better framework of analysis. Furthermore, bargain is unimportant, as it is neither necessary nor sufficient. Instead of bargain, Traynor works with fairness concepts to ascertain the implied understanding of the parties. The real question raised by these two cases is not which decision is better, but which theory is better.

The traditional analysis of this problem suffers from conceptual difficulties. It must be analyzed through the lens of consideration. Hand characterizes the unaccepted offer as gratuitous, although it is clearly neither casual nor benevolent. Having placed it in the category of promise without consideration, the result is obvious and inequitable. There can be no enforcement. Traynor's fairness test is not satisfactory either. His criteria for fairness are too vague. Which offers are irrevocable? Almost any offer may induce reliance. An offer to sell a book may induce the offeree to buy a bookshelf, yet Traynor would surely balk at finding a contract there. Moreover, he wavers between saying that it is crucial that the subcontractor should have known the result of his offer and basing his opinion on a finding of actual reliance by the general contractor. If it was the latter test that was critical, and if the difference between the two lowest bids was equal to or less than the amount the general contractor expected to make as a profit, then there ought to be no recovery. Moreover, if reliance determines the right, rather than the measure, of recovery, then Traynor would have to be associated with the tort theorists and the myriad of difficulties which attend their theory, discussed in Part IV.

Application of the balance theory avoids these difficulties. The subcontractor undertook a serious obligation voluntarily. When looking to fairness, the knowledge of the subcontractor would entail an examination of the business context, the expectations of the contracting parties, trade custom and usage, and the impact of the practices of job peddling and job

bidding on the relevant contracting community.¹⁰⁴ Hand's argument may suggest a certain mitigation of the degree of fairness, if the parties were Willistonian or believed in the mutuality of obligation. The voluntariness, however, is so great, as the building industry survives by entering into such contracts, that, despite any small diminution on the side of fairness, the balance should easily tilt in favour of a legally binding contract.

The second case is Cardozo's well-known decision in *Jacob & Youngs, Inc. v. Kent*.¹⁰⁵ The plaintiff, as a contractor, agreed to build a country residence for the defendant for a price of \$77,000. The plumbing specifications of the contract provided that "all wrought iron pipes must be well galvanized, lap welded pipe of the grade known as "standard pipe" of Reading manufacture". The plaintiff and its subcontractors completed the work and the plaintiff sued to recover the final payment of \$3,483.46. The defense was that some of the pipe in the plumbing was not made by Reading but came from other manufacturers. The pipe was generally embedded in the walls, so substitution of the Reading pipe would have called for destruction of substantial parts of the completed building at great cost. The evidence, according to Cardozo J., established that the substitution was not wilful or intentional, but caused by the oversight and inattention of the plaintiff's subcontractor.

Traditional theory, with its emphasis on the intent of the parties and the express terms of the bargain, would lead to the result that completion of all the construction work was a condition precedent to the duty of the owner to pay for the building and that the owner is entitled to get exactly what he had bargained for. New York case law was clearly committed to this analysis. It had moved from an earlier view that seemed to require strict and exact compliance with contract specifications by the contractor¹⁰⁶ to a very restricted doctrine of substantial performance, under which only very trivial omissions could be excused.¹⁰⁷

Cardozo, like Traynor in *Drennan*, had to work within the conceptual structure of traditional theory. Under that analysis, he said the issue was whether the use of "Reading" pipe was a dependent promise (and thus performance was essential before the plaintiff could enforce the return promise) or an independent promise (non-performance of which would give rise

¹⁰⁴For a discussion of these matters, see Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry* (1952) 19 U. Chi. L. Rev. 237. See also *Southern California Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 726, fn. 7, 79 Cal. Rptr. 319, 456 P.2d 975 (1969).

¹⁰⁵*Supra*, note 94.

¹⁰⁶*Smith v. Brady*, 17 N.Y. 173 (1858).

¹⁰⁷*Spence v. Ham*, 163 N.Y. 220, 57 N.E. 412 (Ct. App. 1900).

to a right to damages, but not to forfeiture of the contract price). In concluding that this was an independent promise and therefore would not bar the plaintiff from recovering on the contract, Cardozo in an often-quoted opinion said:

Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. . . . From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development of legal rules than of practical adaption to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. . . . We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the latter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition.¹⁰⁸

Cardozo is aware of the appeal of the bright line rule suggested by the traditional theory that the express condition is dependent and must be strictly complied with before the contractor can recover on the contract. What is striking from this quotation is how clearly he rejected the appeal to consistency and certainty, how he felt unconstrained by the rigidity of the traditional theory, and how clearly he recognized fairness to be the controlling criterion. The lack of an available alternate theory led Cardozo to contrast symmetry and logic with equity and fairness in the formulation of legal rules. Without a governing theory, however, the balancing endorsed by Cardozo will remain personal to the sitting court. Not all judges possess the wisdom of a Cardozo. If this preference for balancing is incorporated into a general theory, the courts can do more than just aim at fairness; they can achieve it regularly.

Cardozo also rejects intention as an important element in his analysis. While saying that he would give effect to a clearly-expressed, unreasonable position by the owner, he will read into any language reasonable and fair intentions and assumptions. Although it is clear that both parties have voluntarily assumed obligations which are contractual (the builder to construct a house according to specifications and the owner to pay the contract price), the scope of that obligation is determined by fairness through the subconcept of foreseeability. Cardozo employs a balancing test to judge performance,

¹⁰⁸*Supra*, note 94, 890-1.

using a number of factors culled from the findings to measure how substantial the performance must be. These factors include the purpose the owner wanted to achieve by placing the requirement in the contract, the reason for the deviation, the degree of deviation, and the amount of the forfeiture that would be caused by denying recovery to the builder. Only out of this balancing in a particular case should a court decide exactly what it is that the builder has promised to do (at least in the sense of being entitled to recover on the contract).¹⁰⁹ Each of these factors is an element which goes to the fairness of permitting recovery or allowing forfeiture. The issue, formulated in terms of our theory, would be: would the parties have agreed to the performance if they had possessed the foresight to see that a deviation might occur. Cardozo's balanced factors measure this foresight.

Cardozo feels quite comfortable with a balancing approach in contract litigation. One could analyze the opinion by saying that he is using a balancing test to find fairness, or that he is balancing fairness criteria against the element of intention or voluntariness. Whichever approach is taken, it is clear that he rejects the traditional theory in favor of a more flexible balancing analysis which seeks to produce a just result. Put more directly in terms of our theory, the knowledge that a reasonable lawyer would possess, knowledge that strict compliance is required, becomes the standard the obligor failed to meet. His ignorance of the consequences of a failure to comply strictly throws the contract into doubt. Cardozo's two-step test — first to look for an absolutely clearly expressed intention, and failing that, to look for reasonableness — is made more rational. The expression of intent thus becomes one factor in measuring fairness as knowledge.

The third case is that of *Buckland v. Buckland*,¹¹⁰ a decision that rules on the validity of an executed marriage contract. An action for annulment was brought in England by the petitioner Cyril Buckland, an employee of the British government formerly stationed in Malta. While there, he had dated a fifteen year old girl. This fact, and her suspected pregnancy, had brought about his arrest on the charge of corrupting a minor. Buckland spent one night in jail, had his passport confiscated, and had his reservation for return passage cancelled by the police. He protested throughout that he was completely innocent of the charge, and of the specific particulars of defiling the girl at several public locations. His solicitor, his work supervisor, and the police inspector all told him that, innocent or not, he was almost certain to be convicted and imprisoned for two years. His solicitor stated

¹⁰⁹There is, of course, the related possibility of the breaching party, who does not meet the threshold for substantial performance, bringing an action in quasi-contract to recover his restitution interest (benefit conferred less the damage caused by his breach). As we indicated earlier, we regard restitution as a matter of tort, rather than of contract.

¹¹⁰*Supra*, note 95.

also that he would be forced to support for sixteen years the child with which the girl was believed to be pregnant. His sole alternative was marriage. It was this marriage that he successfully had declared void in the lower court. On appeal, Lord Scarman affirmed the decision. He held that:

I have come to the conclusion that the petitioner agreed to his marriage because of his fears, and that his fears, which were reasonably entertained, arose from external circumstances for which he was in no way responsible. Accordingly, in my judgment, he is entitled to a declaration that the marriage ceremony was null and void.¹¹¹

Lord Scarman stated that the case "has given me the greatest anxiety". He believed "that the petitioner was brought into a state of panic by proceedings on an unjust charge";¹¹² and that virtually every individual Buckland encountered in Malta, from the solicitor to the respondent, was blameworthy. However, Scarman does recognize that even if the respondent is by inference "gravely to blame", this is not simply a case of a threatening obligee forcing a coercive contract. Although recognizing that force from a third party can vitiate a contract, he failed to disconnect an obligor's culpability from the consent. If it does not matter who is doing the coercing, then neither should it matter why. The court applied a test of effective coercion (coercion that works and actually produces fear), but coercion only with a certain pedigree.¹¹³ The obligor must have clean hands to claim the defence.¹¹⁴

Scarman's test of fear due to circumstances which the obligor has not caused is inadequate. First, it leaves unsettled the degree and nature of the fear. Would thirty days in prison or a whipping be enough? What of a large fine, loss of employment, forfeiture of pension rights, or causing one's young child to leave school and seek employment?¹¹⁵ Often it is only because one is in an unsatisfactory position, as where there is background duress, that one decides to contract. Scarman also failed to characterize the necessary fear. Fear of starvation may motivate a significant percentage of all employment contracts. Moreover, the causes of fear vary from one individual

¹¹¹*Ibid.*, 302.

¹¹²*Ibid.*

¹¹³The standard is based largely on two precedents: *H. v. H.* [1953] 2 All E.R. 1229, [1953] 3 W.L.R. 849 (Pr. & Div.) and *Griffith v. Griffith* [1944] I.R. 35 (H.C.).

¹¹⁴It should be mentioned that, contrary to what Lord Scarman suggests, the precedents are not unanimous in allowing duress to void marriage contracts or, in general, in treating marriage just like other contracts. For a brief discussion and listing of the divided precedents, see Cheshire & Fifoot *Law of Contract*, 10th ed. (1981) 280-1.

¹¹⁵Traditionally, only a threat to a person rather than to his property would do. See *Ailee v. Backhouse* (1838) 3 M. & W. 633, 650, (1838) 150 E.R. 1298, *per Parke B. (Ex.)*; *Skeate v. Beale* (1840) 11 Ad. & E. 983, (1840) 113 E.R. 688 (K.B.). A threat to a third person has been held sufficient to void the contract by Lord Denning M.R. in *D & C Builders, Ltd. v. Rees* [1966] 2 Q.B. 617, [1965] 3 All E.R. 837 (C.A.) (the obligor's spouse held for ransom).

to the next. The humiliation of penury may be more frightening to a powerful magnate than a whipping and imprisonment to a stoic and seasoned soldier.

The other element of the Scarman analysis, the requirement of non-responsibility, is also inadequate. The non-causation test would be more accurately termed a non-responsibility test, for Buckland's actions are a significant cause of his arrest. No standard of freedom from wrongful involvement is offered. To begin, the Court devotes a considerable part of the opinion to showing why the petitioner should not be convicted of the crime. However, culpability analysis is remote from the contract. If an obligor were blackmailed into signing a contract with a third party, Scarman would appear to want to know whether there was misfeasance by the obligor that caused the threat, for example, where an obligor committed a financial indiscretion years ago that had been discovered by a blackmailer.¹¹⁶ It is unclear why, due to past wrongdoing, one's contractual rights should be forever forfeited. The classic case of the shotgun wedding, where the father of the bride forces a marriage after discovering the couple *in pari delicto*, would then not be voidable, at least on these grounds. Any test that requires equitable spotless hands by the obligor invites (contractual) blackmail.

Scarman fails to offer a measure for judging the obligor's fear or fault. Previous imprudence, indiscretion, negligence, or recklessness can later lead potential obligors to contract in order to avoid loss of home, job, or even family.¹¹⁷ Duress and hardship are, unfortunately, commonplace in modern society, and any analysis must come to terms with them. Scarman's failure to do so typifies the failings of the traditional theory generally. Contracts where one needs somehow to "look behind" or to find the "real" consent are troublesome.¹¹⁸ If the duress is illegal, thus constituting blackmail, then the contract is vitiated. However, the same acts when legal might not count against consent. Conceptually, criminal status would seem to have only the most tenuous logical connection to contract analysis. More fundamentally,

¹¹⁶The entire issue of the contractual and civil ramifications of blackmail is a neglected one. The best discussion is found in Goodhart, *Blackmail and Consideration in Contracts* (1928) 44 L.Q.R. 436. See also *Thorne v. Motor Trade Association* [1937] A.C. 797, [1937] All E.R. 157 (H.L.).

¹¹⁷An interesting case involving a contract made by an obligor in need of money for food and other necessities is *Mulholland v. Bartsch* [1939] 2 D.L.R. 747, [1939] 1 W.W.R. 100 (Alta S.C.).

¹¹⁸*Lloyds Bank v. Bundy* [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.) is a case where a court found lack of real consent because of undue influence, with one justice (Lord Denning) arguing that the unequal bargaining position was the real problem. For a discussion, see Slayton, *The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy* (1976) 22 McGill L.J. 94.

the basic concepts of the traditional theory — offer and acceptance and consideration — are poorly suited to solving duress situations.

Treatment of *Buckland v. Buckland* under the balance theory begins with the concept of voluntariness. Obligations are voluntary to the degree that they are consciously and willingly chosen by the obligor. It is irrelevant that the source of the duress is a third party (the state or possibly the bride's father as a prosecuting witness) or that the threat may have been only implicit (as in *Buckland* the threat was expressly made only by Buckland's own solicitor). By stark contrast to Scarman's analysis, it is also irrelevant whether culpability attaches to the obligor. Scarman was forced to examine what sexual relations existed between petitioner and respondent, a task the Maltese legal system was presumably better equipped to handle. Under the balance theory the degree of voluntariness is exactly the same whether Buckland was guilty of corrupting a minor or not. The justification for this becomes apparent if one imagines the death penalty to be the official punishment for offenders.

The starting point for measuring the degree of voluntariness is to ask what were the possible alternatives to the contract. Given the apparently short time the petitioner had to make a decision (itself a limitation on voluntariness), the only alternative to the contract was the probable two year prison sentence. No all-or-nothing test of lack of consent is needed to judge how severe and how certain a sentence must be. The greater the severity of the penalty and the more certain its chance of occurring, the lesser is the voluntariness. Judged on the basis of time within which a decision had to be made, number of alternatives, severity of the threat and the certainty of that threat occurring, the marriage contract lacks even the semblance of voluntariness necessary to move it beyond the threshold level. Applying our test for the threshold, the obligor has presented a *prima facie* case of duress which was not rebutted by the obligee.¹¹⁹ Therefore, the balance does not come into play. It was, in fact, a prudent deal, made with the advice of counsel, and in that sense, fair.¹²⁰

It is interesting to note that the Court in *Buckland* treated the marriage as an ordinary contract, at least for the purposes of this particular action.

¹¹⁹See *supra*, pp. 48-50.

¹²⁰One can imagine how changed facts could change the balance. A greater number of alternatives, a less severe sentence, a remoter possibility of conviction all could here lead to the possibility of an enforceable contract. However, if the sentence were considerably less severe, but the obligor had not consulted his solicitor and had not known of certain rights he had — had not made a fair contract — then the balance may weigh against enforcing the contract. While the threat of a fine may not dampen voluntariness unduly, its presence when weighed against, *e.g.*, a loan whose terms are over market and whose security requirement is onerous might vitiate a contract.

Regardless of the wisdom of subjecting marriage disputes to contract analysis, it is clear that the scope of the principle for judging the validity of agreements generally, reaches far beyond the increasingly narrow area labeled "contract" by texts and treatises. Disputes, both in traditional non-contract areas, such as real property, and in heavily regulated areas now often thought to be beyond the pale of contract law, such as labor law and insurance, still need guidelines for settlement. In that they encounter the same problems, simple justice requires the use of the same guidelines. The balance theory is a general theory. As such, it is capable of yielding equal treatment across often artificially created (and difficult to justify) legal divisions.

The fourth decision is *Williams v. Walker-Thomas Furniture Co.*,¹²¹ a case illustrating the problems of contracts between parties of unequal bargaining strength. The plaintiff-respondent, a furniture company located in a ghetto area of Washington, D.C., sold on credit household items including an expensive stereo set to the defendant-appellant, who was a welfare mother of seven children.¹²² The sales and credit arrangements were made pursuant to a complicated contract, whereby each purchase price was added to the general amount owed and each payment was credited *pro rata* toward paying off all past purchases. The purchases were deemed to be leases until all outstanding debts to the company had been paid. As Justice Skelly Wright, speaking for the Court, said:

[A]s a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.¹²³

Five years after initiating the contract relationship, defendant made and defaulted on a final purchase. Plaintiff sued in replevin for possession of all the items defendant ever purchased. Defendant claimed unconscionability on two grounds: by reason of past cases;¹²⁴ and by reason of the recently enacted *Uniform Commercial Code*, which was of dubious relevance because it was not in force at the time of the instant contract. The defendant won on appeal. Wright J. found for the majority that the contract may have been unconscionable in large part because the defendant was in a weak bargaining

¹²¹*Supra*, note 96.

¹²²Actually, in the appellate case, two lower-court cases, with a common plaintiff but with unrelated defendants, were joined. We are here disregarding the other joined case.

¹²³*Supra*, note 96, 447.

¹²⁴The cases cited were from other jurisdictions. Even *Scott v. United States*, 79 U.S. (12 Wall.) 443 (1870), although a United States Supreme Court case, was not binding on the federal circuits. The dubiousness of the cases was due in large part to relevant case authority within the jurisdiction which rejected unconscionability as a defense in a liquidated damages contract case. See *District of Columbia v. Harlan & Hollingsworth Co.*, 30 App. D.C. 270 (1908).

position due to economic duress. She thus had no real choice but to sign an unfair contract.

Further, unconscionability was a concern relevant to the issue of enforceability, and one which the lower Court was empowered to consider in order to overturn otherwise binding contracts. The lower Court erred in failing to exercise this power, though the dissent at appeal supported the lower Court's finding.

It was taken for granted in both the majority and dissenting opinions that the contract was unfair. The dissent believed this unfairness to be irrelevant because the contract was valid under the traditional theory. There had been an agreement supported by consideration and no precedent or statute which created an exception for unfairness. Wright's opinion allowing fairness to be considered rejects the traditional theory, but is uncertain as to what direction to take. He makes an instructive false start. He argues that because the case is *de novo*, without controlling precedents, the Congressional adoption of the *Uniform Commercial Code* §2-302¹²⁵ becomes "persuasive authority for following the rationale of the cases from which the section is explicitly derived".¹²⁶ This argument is untenable, its difficulties many. Subsequent statutes are generally considered irrelevant to the resolution of cases arising prior to their enactment, and this would be especially true in contract matters where the reliance of the parties is a major concern. Statutes are usually interpreted as changing case law, and this would suggest here that the legislative belief was that the case law did not regulate unconscionable contracts. Moreover, there were relevant precedents in favor of the plaintiff. Four hundred years of contract law suggest that bargains, unless they are illegal, formally faulty, or subject to some recognized defense, ought to be enforced.

Presumably Justice Wright took this detour through the *Uniform Commercial Code* because he still felt ties to the traditional theory of contracts. He believed in precedent and saw precedent as representing the traditional theory, a theory in which fairness and unconscionability had little place.

¹²⁵The section reads:

§2-302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

¹²⁶*Supra*, note 96, 449.

This involved a contradiction on his part. If unconscionability was not considered in the cases, he would not need to resort to the policy emanating from the *U.C.C.* If it was considered or implied, then the case would not be *de novo* and susceptible to policy reasoning. Nevertheless, it is clear that despite the justification given, Wright wished to reject the traditional theory and to use fairness instead. In so doing, moreover, he attempted to employ a test very close to the one we present in this paper.

Wright's test for fairness is not well-developed, but can, if it flushed out, be seen to share several features with our theory: fairness is defined by a knowledge criterion, much of the work of doing justice is carried forward by voluntariness rather than fairness, and, to determine whether a legally binding contract has been formed, a balancing test is used. Wright puts his test negatively, using unconscionability as a measure of contractual failure:

Unconscionability has generally been recognized to include 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. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.¹²⁷

Wright suggests that ignorance of a contract's terms will not excuse an obligor unless he had little bargaining power. Thus, as voluntariness diminishes, fairness becomes more important. Wright suggests that two rules operate, their applications being a function of the prior finding of whether the obligor had "little bargaining power, and hence little real choice". Because so much rests on such a finding, and because a finding as arbitrary as bargaining power and choice always admit of degree, Wright's test can profitably be expanded into a general balance theory.

Wright also suggests that fairness is an acceptable criterion by which to judge contracts. He seems to be saying that fairness becomes a factor once the usual or traditional rule is abandoned. The test for fairness is that of the *Uniform Commercial Code* §2-302. He suggests that "the terms are

¹²⁷*Ibid.*, 449-50 [footnotes omitted].

to be considered in light of the general commercial background and the commercial needs of the particular trade or case".¹²⁸ This test, if taken seriously, offers either no guidance at all or malevolent guidance at best. The alternative of no guidance results from observing that telling one to consider terms is not the same as telling one specifically how to proceed. The malevolent guidance results from noticing that the commercial needs and background may be far from just. Where indentured servitude, sweat-shop labor deals, or usurious credit terms are the commercial norm, then, by this normative character, there is fairness.¹²⁹ However, Wright mentions a different test, and uses it earlier in the analysis. This can be seen if fairness as knowledge is read into Wright's opinion.

Wright starts with an inquiry into unconscionability. He begins with meaningful choice. This is a function of bargaining power, which is, for Wright, a function of knowledge. He uses the phrases "obvious education", "understand the terms", "maze of fine print", "full knowledge of its terms", and "no knowledge". Because the obligor lacked knowledge, it becomes necessary to scrutinize voluntariness more closely. In the present case, Wright sees "little bargaining power and hence little real choice". Rather than merely throwing the contract out because it is unduly harsh, Wright offers ascertainable criteria for evaluating the obligation.

Williams presents the general problem of so-called contracts of adhesion. While an adhesion contract may be nothing more than a standardized contract adopted for mass use to save the costs of individualized transactions, often these contracts combine weak obligors with harsh, standardized, form documents. Though often considered to be clearly inequitable in their terms, lack of enforcement presents two difficulties. First, inequities aside, these contracts behave just like normal contracts. Any disqualifying test needs to fasten on to the unfair contracts only. Second, if all such contracts were banned, an entire class of potential obligors would lose the freedom of contract. The test found in germ in Wright's opinion and presented here as the balance theory meets these difficulties. The latter difficulty is solved through the knowledge requirement of fairness. Contract law cannot be expected to remedy the social and economic inequities found often and everywhere in the modern world. It can hinder greater resource disparity

¹²⁸*Ibid.*, 450.

¹²⁹The court's alternate test, one enunciated by Corbin, is similarly defective. Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." A. Corbin, *Corbin on Contracts* (1963) vol. I, §128. It is safe to say that the mores and practices of the business community have not always been fair.

by requiring obligors with onerous obligations to have had a complete understanding of their commitments, thus ensuring some degree of justice in all contracts.

The four preceding examples show that many courts have been working with the same concepts we use in somewhat the same fashion we advocate in our formulation. They also show that traditional contract theory cannot adequately explain those results.¹³⁰

The shortcomings of tort theory are clearly illustrated by the case of the simple executory bilateral contract, one which has been enforced without question since *Strangborough and Warners Case*.¹³¹ In *Tymon v. Linoki*,¹³² the defendant, an owner of land, sent a letter on August 22nd to the plaintiff, a prospective buyer, offering to sell him three lots of land for a purchase price of \$3,500. On the same day, the defendant sent virtually the same letter to Hayes, also a prospective buyer. After receiving the offer, the plaintiff called the owner on the telephone and accepted the offer. On September 10th, the plaintiff wrote to the defendant, formally accepted the offer, and enclosed a deposit cheque. On September 9th, Hayes, the other offeree, had also written the offeror, accepted the offer, and enclosed his cheque. Defendant returned plaintiff's cheque and told him that the property had been sold to Hayes. The defendant thereafter executed a formal contract with Hayes. In this action for specific performance, the Court found that the plaintiff had accepted the defendant's offer during the telephone conversation and that there was an enforceable contract between the plaintiff and defendant before there was a contract between the defendant and Hayes; thus the plaintiff was entitled to a decree of specific performance.

Because tort theory makes loss to the obligee central and that loss is a matter of reliance, one would need to search for some reliance by plaintiff between the time of the acceptance and notification by the seller that he

¹³⁰*Williams v. Walker-Thomas Furniture Co.*, *supra*, note 96, may well be a case where the economic analysis theory would reach a different result. There is evidence that ghetto furniture stores in the District of Columbia were not charging unreasonable prices, that their security practices were defensible, and that their profit margins were equal to or lower than furniture stores in other neighborhoods. See Federal Trade Commission, *Economic Report in Installment Credit and Retail Sales Practices of District of Columbia Retailers* (1968), reprinted in part in L. Fuller & M. Eisenberg, *Basic Contract Law*, 4th ed. (1981) 719. The higher costs of selling and of collecting in credit sales (as well as the higher risk of default) mean that the selling practices in a ghetto must be more stringent if there are to be credit sales at all. If the only purpose of contract law is to permit the ghetto dweller to participate in the credit market for household furniture and to ensure that consumer goods are sold to those who value them the most, the operation of the contract terms is economically efficient and therefore permissible. See R. Posner, *Economic Analysis of Law* (1973) 53-5.

¹³¹(1588) 4 Leon. 3, (1588) 74 E.R. 686 (K.B.).

¹³²266 N.Y.S.2d 357, 213 N.E.2d 661 (Ct. App. 1965).

was renegeing on his promise and intended to sell to someone else. The Court does not discuss the possibility of any reliance because, for it, reliance is irrelevant. In the absence of proof of actual reliance, one could maintain the tort explanation only by inferring reliance from, for example, the foregoing of other opportunities. Because the buyer was negotiating to buy this property and assumed he had done so, it is unlikely that he forebore from other better opportunities during this period.

Traditional theory explains the enforcement of the executory bilateral contract on the basis of the exchange of promises, the notion of agreement or bargain.¹³³ However, why the exchange of two unperformed promises should create enforceable obligations has always been a theoretical mystery in consideration analysis.¹³⁴ A balance theorist would not focus on the position of the buyer-obligee here and any loss he might have suffered between the time of the purported acceptance and notification of renunciation by the seller-obligor. Rather, the emphasis would be on the obligor. It is clear that he voluntarily assumed the obligation to sell his land, that the transaction was a fair one, that the situation is almost a paradigm contract within the context defined by society's contractual expectations, and that there is no administrative reason why the obligation should not have been enforced.

Three possibilities for resolution of *Tymon* are open to a tort theorist. The weak position would allow the buyer to recover absent any showing of reliance. Reliance analysis would provide one justification for recovery, but not the only justification. This is essentially the position of Fuller and Perdue.¹³⁵ The ecumenicism of this position is purchased at the cost of theoretical integrity. What this position ignores is that contract and reliance recovery are distinct. How or why the two ought to be linked is a problem left unresolved. Most importantly, the essence of the tort theory is that it protects parties who reasonably rely because they were led to rely. The buyer who can recover without suffering any seeming loss presents an inconsistency to a general theory built upon protecting actual loss.

¹³³This objection to the tort theorist is one that is clearly seen by C. Fried in *Contract as Promise* (1981), but his justification for enforcing the executory bilateral promise is not totally clear. At times he talks about reliance, at other times a kind of reliance that grows out of trust created by the promise; at times he talks of the factor of agreement or consideration (the bargain idea).

¹³⁴Langdell argued that the promise of one became binding because the other had suffered a detriment in binding himself to perform the return promise. When it became clear that this was circular, two alternate explanations were given. Ames suggested that the making of a promise was a detriment in and of itself, apart from whether it was binding or not. Williston argued that consideration in bilateral contracts rested on "a distinct principle". Pollock called the endorsement of bilateral contracts "one of the secret paradoxes of the Common Law". Fuller argued that it was not an issue of theory, but one of the policies, substantive and formal, underlying the requirements of consideration.

¹³⁵See Fuller & Perdue, *supra*, note 70.

The middle position allows the buyer to recover only if he can show that he in fact relied. In the instant case, reliance could be found by trivializing it. If the buyer relied sufficiently to allow specific performance, then reliance has become weakened to the point of ubiquity. Pegging the test of reliance so low does more than trivialize it. It would allow recovery against virtually any promisor, by allowing even a slight change of plans by an obligee to turn every promisor into an obligor. If the middle position was formulated so as to prevent recovery, then it would be vulnerable to the criticism used against the strong position.

The strong position, suggested by some of Atiyah's writings, would bar recovery to the buyer. If there is no reliance, then there can be no recovery. This theoretical integrity has its price. Members of the business community who routinely make executory bilateral contracts, often without thereafter significantly changing their position in any demonstrable way, would find themselves without enforceable deals. The certainty lost when the seal disappeared would pale in comparison to the new burden of showing reliance with every agreement a businessman might make. The strong position is destructive of more than business practices. It would severely limit the freedom to contract, as it is the harm rather than the contractual or expectation interest that would be protected. Parties would be forced to change their plans artificially, even to begin execution of the contract just to seal the bargain. More importantly, the only fair measure of recovery would be a return to the original position. Thus, there would never be an incentive by way of profit to contract.

This brief examination of contract cases leads us to conclude that the balance theory provides better and more theoretically defensible results than those of the traditional or alternate theories. In addition, it comes closer to fitting the real justifications and standards used by many judges. By bringing this analysis to the forefront, it leads to a clearer understanding of contract problems. Finally, it reflects what we and many judges feel ought to be the central concepts of contract analysis.

VI. Justice and Theory Choice

Our contract theory makes two claims. First, it purports to offer and explain a new way to analyze the existing contract case law. Compared to the traditional theory or existing alternate theories, we believe ours is better able to solve the most pressing contract issues, including those where actual

bargaining is minimal.¹³⁶ These issues — including the ongoing implicit business transaction, the form contract, the contract of adhesion, and the deal between parties of greatly disproportionate bargaining power — do more than present occasional difficulties for contract lawyers. Their present solutions lead to theoretical inconsistencies, while their increasing occurrence makes them take on a special and pressing importance. Our second claim is quite different. We suggest that our theory is prescriptively better. That is, regardless of its fit with the past cases and current attitudes of bench, bar and the contracting community, we think the balance theory ought to be followed. It is to a direct defense of this prescriptive or normative claim that we shall now turn.

Our theory holds that for obligations to be binding, they must be voluntary and fair. The two are balanced: a lack of fairness demands greater voluntariness, and contracts which are less voluntarily entered into must be fairer. These two concepts are so attractive that it seems almost unnecessary to provide arguments in their favor. Voluntariness is a constituent of the elusive but highly prized value of freedom.¹³⁷ The right to freedom of speech, religion, or contract, is considered valuable, if not sacred. This because a part of what gives an individual his autonomy or dignity lies in allowing him to exercise this right. Even if the enterprise is unwise, inefficient, or against the individual's own best interest, there is something disturbing in prohibiting his actions. We allow individuals to act and we hold them responsible for those acts. The degree of responsibility for actions is tied to their voluntariness. Being thrown through another's glass window is different than throwing oneself through it. Responsibility, and very often legal obligation, follow voluntariness.

In protecting voluntariness the common law has imposed obligations in tort different than those in contract. The distinction works on several levels. The contractual obligor is held liable for the obligation he assumes, but not for more. Unlike the tort obligor, he does not need to worry about unforeseen consequential damages, for generally, responsibility follows the

¹³⁶This focus on the problems which the traditional theory finds most difficult is common to enterprises other than law. Thomas Kuhn sees it as an indication that science is going on, and sees an intermediate process as usually present between the traditional theory and its successor. This is a breakdown stage, one very evident in modern contract law. See T. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (1970).

¹³⁷Some argue that the idea of freedom as such is incoherent, that there is just a calculus of individual rights. This position is advanced in R. Dworkin, *Taking Rights Seriously* (1977) 266-78. We are sympathetic with this position, but nothing we say concerning voluntariness commits us either way. Voluntariness can be tied to a rights calculus or to freedom generally.

voluntary undertaking, not the results of that undertaking.¹³⁸ Tort seeks to make the obligee whole. If that were the only aim of contract law, contracts executed very recently and negated before actual reliance could occur would not be enforceable. In a more fundamental way, a lack of voluntariness is thought to vitiate the obligation in contract, while in tort, liability may attach even where the obligee could hardly have done otherwise.¹³⁹ The logic behind the distinction is sound. Contract looks to the individual increasing his moral responsibility and legal obligations when he seeks to change his position in the social world. Prior to an action, he owes tort and criminal duties of care which are imposed regardless of his desires and intentions. Because these other duties are imposed without direct consent, they ought to be fair. When duties are self-imposed, a requirement of fairness alone would severely limit one's freedom. That is, by eliminating any contract that is unfair, individuals would be barred from entering into a wide range of speculative, sentimental, or objectively unwise contracts. Moreover, those who lack bargaining power or full capacity could not engage in contracting enterprises at all. One illustration of the difference between tort and contract duties can be seen in the sub-concept of duress. The imprudent contractor can be saved by duress, the imprudent tortfeasor cannot.

Voluntariness is more often glorified than analyzed, however. An undercurrent in the literature of both the economic and the traditional theorists suggests that the law of contracts ought to be no more and no less than the law of voluntarily assumed obligations.¹⁴⁰ We see fairness as equally important, and, in our section on the economic theory, we have discussed the consequences of omitting fairness. Fairness is so deeply imbedded in the very idea of an adjudicatory system which decides rights and duties that it

¹³⁸*Uniform Commercial Code* §2-715 has not changed the concept of consequential damages but has made the recoverable items more specific and probably thereby widened recovery. Still, contract liability is narrower and deeper than tort.

¹³⁹The necessity defense is extremely narrow. See *Williams v. Safford*, 7 Barb. 309 (N.Y. Sup. Ct. 1869); *Bullard v. Harrison* (1815) 4 M. & S. 387, (1815) 105 E.R. 877 (K.B.); and generally W. Prosser, *Law of Torts*, 4th ed. (1971) §24.

¹⁴⁰Such a view is taken by even so sophisticated an observer as Joseph Raz. Raz believes that "[t]he purpose of contract law *should* be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice." While mentioning unconscionable contracts in passing, he is preoccupied by voluntariness. He recognizes this concept to admit of degree, but fails to put forth any analysis of what degree comes to. He thus fails to tell us what partial voluntariness means when unconscionability is relevant and what part knowledge ought to play. See *Promises in Morality and Law* (1982) 95 Harv. L. Rev. 916, 933.

is difficult to picture such a system without it.¹⁴¹ Judges are not trained or appointed to promote economic efficiency, enforce a particular moral code (such as one holding that promises are sacred), or even to promote freedom. Judges adjudicate equities and enforce rights. Fairness is indispensable to the judicial role and to the judicial process. Direct use of the concept of fairness makes explicit what is inherent in the common law, adding the legitimizing effect of institutional candor. Two other reasons favor the direct use of fairness. Exposure helps to ensure that justice remains central to adjudication, and direct use of the concept allows both flexibility and precision in the determination of outcomes.

The value of including fairness can be seen more sharply when potential objections to its inclusion are examined. One objection is that fairness is a crude and inexact tool for adjudication. A second objection is that fairness is subjective or at least problematic and offers no definite guide to the determination of results. Finally, it might be argued that fairness is already well-advanced by specific rules developed over time. The pre-existing duty rule or the parol evidence rule were developed to eliminate certain inequities that more general rules missed. These fairness-specific rules are abundant and offer a better program for achieving the desired results than a direct appeal to fairness.

These objections fail. Fairness has long been used as a useful concept in equity and tort. There, as in contracts, it is fertile in both sub-concepts and specific rules. The metaphysical or ethical status of fairness is no more relevant than is the like status of due process, proximate cause, or negotiability. These concepts are used and useful in the legal community, and are thus, for purposes of the legal system, valid. It might be argued that there is a consensus about which things are negotiable and from this consensus, one can extract answers to questions about those things where negotiability is in doubt. Such a consensus can hardly be said to exist about fairness. Thus, the meaning and use of the concept becomes no more than an individual preference. This argument from consensus — aside from being factually suspicious, for is there really a lack of agreement about which contracts are fair or just or about the consequences of finding unfairness? — misperceives current contract law. The uncertainty about fairness reflects uncertainty about contract, not the other way around. That is, the lack of consensus is due to disagreement about result, and remains even when

¹⁴¹This does not mean that all adjudicatory systems are fair. Few systems, if any, are or have even been close to completely fair. We are only suggesting that in adjudicating rights, fairness is always implicitly an issue. This comes close to C. Allen's suggestion in *Law in the Making*, 7th ed. (1964), that all legal systems include a working notion of equity. Eugene Genevose describes in *Roll, Jordan, Roll* (1974) 25-70 how insignificant the notion of equity was in the slave economy of the American south.

different concepts are employed. The case of *William v. Walker-Thomas Furniture Co.*¹⁴² illustrates this. The prescriptive problems presented by disparate bargaining power and an ignorant obligor begin before the application of contract concepts. If one is presented with a difficult ethical and jurisprudential issue, such an issue is likely to remain embedded in any concepts one uses to analyze that issue. Here, again, the analogy with due process is a close one. Due process is employed to analyze difficult and controversial situations. If one wonders whether capital punishment is not a deprivation of due process,¹⁴³ one is unlikely to find an easy answer by switching to some other concept or set of rules. Moreover, it is the task of the law and the lawyer to solve difficult normative problems. Thus, the fact that fairness is a complex concept, not susceptible of being quickly analyzed, does not debilitate from legal use.

The crux of our theory lies not with its use of voluntariness and fairness, but in balancing them together. The advantage of balancing is clear. Voluntariness, unlike consideration, is not a requirement that is either met or not met. It admits of degree. All-or-nothing inclusion leads to a labored insistence on artificial boundaries. It is as if qualification for a society were based on baldness. If the number to be included were unimportant (as the society served no other function than the celebration of the condition of its members' pates), then the decision whether one hundred thinning hairs, ten thick ones, baldness on top but not in back, and so on indefinitely, though extraordinarily difficult and quite arbitrary, becomes critical. If tallness and baldness were criteria and a balance were the test, then decisions could be based on degree, and to that extent, they would be less arbitrary. Our balancing test does more than rationalize the decision process; it provides a just test. Deference is given to individual expression and initiative, bounded only by fairness. Where that expression is more certain, fairness plays a smaller part. Conversely, many, possibly the majority of contracts, do not involve any individual expression worth protecting.¹⁴⁴ In those cases, the terms of the contract need to be scrutinized more closely.

A balancing test permits a more careful focus on the equities of the particular case. Rules, however specific, will not be perfectly successful in achieving the ends set by those who fashioned them.¹⁴⁵ The requirements

¹⁴²*Supra*, note 96.

¹⁴³The thesis that capital punishment may be a deprivation of due process is discussed in J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 172-9.

¹⁴⁴Commonplace commercial contracts can be restricted without endangering any substantial individual rights. If warranties are altered or liability restructured in simple sales contracts, it would be difficult to locate the liberty being infringed.

¹⁴⁵For a discussion of certain limitation or rules, see J. Raz, *Practical Reasons and Norms* (1975), especially ch. II.

of consideration eliminated all gratuitous promises and all re-negotiated contracts where the obligor's duty remained unchanged. Even if one believes these requirements to be generally good, one can envision instances where they bar contracts that ought to be enforced. Many of the cases that pose the greatest difficulties for the courts are those in which quite satisfactory existing rules yield unsatisfactory results. It is unreasonable to expect the formulators of rules to have the foresight to predict every potentially difficult case. Traditionally, the area of the law that recognizes the uniqueness of specific cases is tort law. There, hard and fast rules are rare, and the ordering and balancing of values is commonplace. We suggest a similarly flexible approach to the diversity of particular contracts.

There is one possible objection to a balancing test on grounds of uncertainty. A non-balancing theory permits the potential obligor to know when a contractual obligation will attach. He can make plans within and about the contracting enterprise, armed with a knowledge of where liability begins and ends. Tort liability is quite different. The intentions and plans of the tortfeasor pale in comparison to the interests of the victim. Tortious enterprises as such are unworthy of legal protection. The balancing that is appropriate to tort is destructive in contract.

This objection is unpersuasive for two reasons. First, there is no reason why contractors cannot accommodate themselves to a change in the rules of contract. Calculations based on balancing can be assessed as easily as those based on the complex and contradictory rules of the traditional theory as continually amended. Any further uncertainty can be contracted out or insured against. Even if one assumes a constancy in firm rules not found in the evolving standards presented by a balancing test, the reading of predictable movements in the law is hardly an unreasonable requirement, particularly when measured against the value of the specific justice such a balancing test serves. The second reason is that there is no justification in any case for protecting heinous enterprises or malevolent expectations. Contractors are already on notice that indentured servitude, usurious loans, and many restrictive covenant contracts will not be honored by the courts.¹⁴⁶ If malevolent contracts are barred, applause rather than condemnation appears in order. A strength of the balance theory lies in the fact that contractual care will extend not only to technical propriety but also to fundamental justice.

¹⁴⁶We should note that our theory of contractual obligation does not exclude certain restrictive covenants, such as those prohibiting sales to particular racial, ethnic, or religious groups. Our theory attempts only to sort out the rights and duties of obligors and obligees toward each other. The duty not to restrict sales of property on a racial basis is not an issue for contract law, but is based on policies akin to a generalized tort duty. We in no way wish to endorse such contracts.

Our theory of contract has quite a different quality to recommend it. It restores contract adjudication to the common law. A smooth-running common law can police legal rules through judicial scrutiny and comparison, because judicial rule-enunciation is not final. Decisions are subject to reconsideration, and scrutinized by opportunistic litigants for irrationality, inconsistency, and arbitrariness. The comparison lies in the practice of drawing guidance from related cases in other legal fields. The requirement to accommodate and make consistent a broad range of cases can check parochial and inequitable tendencies. While the common law has often shown a weakness for rule formalism at the expense of equity, this a danger is unlikely to appear in a theory of contract explicitly recognizing fairness.

Common law can degenerate in several ways, all apparent in modern contract law. At the most elementary level, the growth of distinct categories can lead essentially alike cases to be treated differently. If no difference of substance inheres in the distinctions between implied and express contracts, unilateral and bilateral contracts, and reliance-based and consideration-based contracts, then the values of clarity and simplicity alone suggest eliminating these distinctions. Moreover, whenever a distinction without a difference occurs, it is likely to allow different treatment of like cases, and thus justice more than aesthetics calls for its end. This process of rampant differentiation is repeated at the level of legally distinct fields. Rather than a single law of contract, contractual obligations are treated distinctly in insurance law, labor law, commercial paper, property, criminal law, sales, admiralty, trusts, and contracts proper. The logic of the common law is tied to its ability to notice the successful treatment of issues in one place and use it in another. Restrictions on this process arise when each area is so distinct and sovereign that treatment elsewhere is not normally considered relevant. Disunity stifles growth and re-examination. A more general theory of the type which we endorse would reverse this trend.

Another kind of degeneration is caused by too great a reliance on remedial statutes. We are not attacking the legislative prerogative or the value of well-considered remedial legislation when we point out that in contracts, statutes are a crude and imprecise way of fixing obligation. They apply in all-or-nothing fashion to a specific set of problems, without the flexibility to guide new situations or to cease governing situations no longer in need of remedy. This weakness in statutes is slight where conflicts run along well-defined grounds and involve a class of litigants easy to pick out in advance. Such may be the situation with criminal law or wills, but it is not the case with contracts. Consumer protection legislation is a hit-and-miss attempt to provide remedies missing from the common law. Even if legislation could be effective, however, the piecemeal attempts deflect attention away from the general difficulties by being field-specific. If a certain labor contract,

while binding under the traditional theory, is still unjust, its being struck down by labor legislation may aid the obligor employees, but it allows the theory to remain untouched. The faults of the system are thus protected.

The theory we present is not without its difficulties. It may be pointed out that we have not made clear exactly what things are legally binding contracts, or how the balance should be struck. These are serious problems, but ones that, we believe, the courts can best resolve. Given a strong general theory, the courts can fashion specific rules which would enable them to achieve an appropriate balance in the cases before them. This paper provides such a theory.
