

2001

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Jody S. Kraus
Columbia Law School, jkraus1@law.columbia.edu

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Recommended Citation

Jody S. Kraus, *The Methodological Commitments of Contemporary Contract Theory*, THE OXFORD HANDBOOK ON JURISPRUDENCE AND LEGAL THEORY, JULES L. COLEMAN & SCOTT SHAPIRO, EDs., OXFORD UNIVERSITY PRESS, 2002; UNIVERSITY OF VIRGINIA SCHOOL OF LAW, LAW & ECONOMICS RESEARCH PAPER SERIES WORKING PAPER No. 01-2 (2001).

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UNIVERSITY OF VIRGINIA SCHOOL OF LAW
Law & Economics Research Paper Series

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Working Paper No. 01-2
May 2001

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The Methodological Commitments of Contemporary Contract Theory

Jody S. Kraus[†]
University of Virginia Law School

The turn of the twenty-first century has marked a renaissance of scholarship exploring the philosophical foundations of the economic analysis of law. This renaissance reflects the increasing efforts within particular disciplines to understand the relationship between philosophical and economic theories of law. These efforts are nowhere more evident than in contemporary contracts scholarship. As in private law scholarship generally, economic analysis is the dominant paradigm in contemporary contracts scholarship. But alongside the vast body of economic contracts scholarship produced over the last thirty years, a core body of philosophical contracts scholarship has steadily developed in relative obscurity. Although these two bodies of scholarship have largely passed each other like ships in the night, they have begun to take occasional notice of one another over the last ten years. Two prominent economic analysts of contract law have undertaken the most extensive efforts to engage the philosophical contracts scholarship. In his recent book, Michael Trebilcock assesses the compatibility of two prominent theoretical approaches found in contemporary contract scholarship.¹ Most philosophical contract theories

[†]I thank Barry Adler, Jules Coleman, John Goldberg, Steve Hetcher, Chris Kutz, Stephen Perry, Bob Rasmussen, Alan Schwartz, Bob Scott, and Scott Shapiro for helpful comments. I also thank participants in workshops held at the University of California at Berkeley's Boalt Hall (GALA seminar), the George Mason University Law School, Vanderbilt University Law School, the University of Virginia Law School, and the Sixth Annual Analytic Legal Philosophy Conference at the University of Chicago Law School.

¹MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993)[hereinafter *Limits*]. I follow Trebilcock in focusing almost exclusively on single-value, or "monistic," contract theories, and do not consider multiple-value, or "pluralistic," contract theories. Pluralistic contract theories advert to autonomy, efficiency, morality, social norms, policy, experience, and other values to explain and justify contract doctrines. Trebilcock ultimately indorses this approach, as does Melvin Eisenberg. The challenge for these theories, like the challenge for pluralistic normative theories in general, is to explain how their explanations and justifications can be defended in the absence of a master principle for ordering the competing values they invoke. The theories I consider here purport to provide explanations and justifications derived from the single value of either autonomy or welfare,

are grounded on some notion of autonomy. Economic contract theories are grounded on some notion of efficiency. According to the “convergence thesis,” contract law “simultaneously promotes individual autonomy and advances social welfare.”² Therefore, autonomy and welfare theories will converge in their recommendations for the substantive content of contract law, even though their bases for those recommendations may be incompatible.³ If true, the convergence thesis obviates the need to adjudicate between autonomy and welfare contract theories. Either perspective will yield the same results. Trebilcock carefully assesses and rejects the convergence thesis. If Trebilcock is right, we can no longer believe these two ships are traveling different routes to the same destination. One of them is heading in the wrong direction.

In a highly influential article, Richard Craswell argues that autonomy theories of contract are deficient because they have no implications for the content of contract default rules. As Craswell construes them, the most prominent autonomy theories of contract are at least loosely based on a philosophical analysis of promising. Because Craswell believes that economic theories do address the content of default rules, the implication of his thesis is that most autonomy contract theories are seriously deficient compared to economic theories. Taken together, Trebilcock’s and Craswell’s theses set an agenda for contemporary contracts scholarship by raising anew the question of the relationship between autonomy and economic theories of

however defined. They therefore purport to explain and justify contract law by rendering it coherent under a single explanatory/justificatory principle.

²*Id.* at 22. Trebilcock’s principal source for the claim is Milton Friedman’s famous statement that “[t]he possibility of coordination through voluntary cooperation rests on the elementary– yet frequently denied– proposition that both parties to an economic transaction benefit from it, *provided the transaction is bilaterally voluntary and informed.*” MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 13 (1962).

³In the philosopher’s parlance, the convergence holds that autonomy and welfare theories of contract are intentionally incompatible but extensionally equivalent.

contract law. Trebilcock's thesis argues for assessing the relative merits of each approach in order to adjudicate the contest between them.⁴ Craswell's thesis constitutes an opening salvo in that contest. His thesis suggests that autonomy contract theories are inferior to economic contract theories insofar as they cannot provide answers to many of the central questions of contract law. A third possibility is that both kinds of theories might be combined to produce an overall theory that takes advantage of the strengths, and avoids the weaknesses, of each kind of theory.⁵ But in order to judge the relative strengths and weaknesses of autonomy and economic contract theories, these theories must share the same objectives. To the extent they do not, neither theory is to be preferred over the other. They are, in effect, theories about different things. One theory can be judged superior to another only to the extent both are attempting to answer the same questions and share similar methodological commitments.

In this Chapter, I identify a set of methodological commitments that help explain why autonomy theorists (which I shall also refer to as "deontic" theorists), and economic theorists (which I shall also refer to as "consequentialist" theorists) often find themselves at cross purposes. I examine the theories of Charles Fried and Peter Benson, two of the most extensively developed

⁴However, Trebilcock claims both deontic and consequentialist theories are "valid in their own right." Because he lacks a "meta-theory that weights and ranks these various values," he argues that both values should be pursued in various social and legal institutions according to those institutions' relative competency. Trebilcock, *Limits*, *supra* n. 1, at 248.

⁵I outline the structure such a theoretical effort might take in Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, PHILOSOPHICAL THEORY, supplement to NOUS (forthcoming 2001); Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, JOURNAL OF SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY (forthcoming 2001). For attempts to provide a limited Rawlsian justification for choosing efficient rules in particular legal contexts, *see also* Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, THE JURISPRUDENCE OF CORPORATE AND COMMERCIAL LAW (Jody S. Kraus & Steven D. Walt eds., 2000); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L. J. 353, 357-67 (1988).

autonomy theories of contract law.⁶ Based on an analysis of these theories, I argue that autonomy theories tend to treat the doctrinal statements as the principal legal data for contract theory to explain and justify, accord primacy to the normative task of contract theory, and require that contract theory explain and justify the conceptual distinctiveness of contract law. In contrast, economic theories tend to treat the outcomes of cases as the principal legal data for contract theory to explain and justify, accord primacy to the explanatory task of contract theory, and aspire to explain away, rather than explain, the conceptual distinctiveness of contract law. I argue that apparently first-order conflicts between autonomy and economic contract theories in fact are implicit, second-order conflicts over legal methodology. As a result of these methodological differences, adjudicating supposed first-order disputes between autonomy and economic contract theories is sometimes tantamount to an “apples-oranges” comparison: The theories are making different kinds of claims about different things.

Craswell’s objection that autonomy theories cannot provide a theory of contract default rules appears to point to an additional difference in the methodological commitments of autonomy and economic contract theories. In Craswell’s view, autonomy theories are committed to the ex post perspective in adjudication because they claim that the resolution of contract disputes must be derived from the parties’ agreement. But by definition, the resolution of a contract dispute that falls within a contractual gap cannot be decided based on the parties’ agreement. Thus, Craswell concludes that the autonomy theories cannot address the problem of contractual gaps because of

⁶Randy Barnett also has a well-developed theory of contract law, but as it has developed it no longer clearly qualifies as a purely deontic theory. I explain Barnett’s views and assess the extent to which it evidences the methodological commitments discussed here, in “Theories of Contract” to appear in E. Zalta (ed.), THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (on-line) (L. Murphy & J. Raz (eds.), sections on philosophy of law).

their commitment to the ex post perspective in adjudication. Because economic theories are committed to the ex ante perspective in adjudication, they have no difficulty in addressing the problem of contractual gaps. Surprisingly, however, the commitment of autonomy theories to the ex post perspective in adjudication need not disable them from addressing the problem of contractual gaps. Whether it does depends on their understanding of the moral basis of autonomy, their views on the nature of law, and their understanding of the scope of contract law. Thus, I will argue that Fried's theory provides a perfectly coherent approach to filling contractual gaps, while Benson's theory does not. In Fried's case, the deontic commitment to the ex post perspective is not nearly so wooden to constitute a structural impediment to gap-filling. Rather than reflecting incompatible views on the permissibility of the ex ante perspective, the dispute between Fried's autonomy theory and Craswell's economic approach on the question of gap-filling turns out to be a disagreement over the kind and weight of evidence necessary to justify ordinary interpretations of intent. I therefore argue that opposing methodological perspectives in adjudication only sometimes account for the first order disagreements between deontic and economic contract theories.

The methodological differences between autonomy and economic contract theories in part are grounded in opposing views about the nature of law and legal theory. Thus, I conclude that contract theory cannot avoid the larger questions of jurisprudence that confront all legal theories. In debates between contract theories that have the same methodological commitments, the explanation and justification of contract law is genuinely at stake. But in debates between contract theories that endorse opposing methodological commitments, it is the methodological commitments themselves, rather than contract law, that are at stake. At the very least, this

suggests that genuine advances in explaining and justifying contract law will require contract theorists to uncover and make explicit the second-order positions their theories implicitly endorse. A complete theory of contract law, however, would not only articulate but also defend its jurisprudential foundations.

I. FOUR METHODOLOGICAL ISSUES IN CONTRACT THEORY

In this Part, I present the four methodological issues that divide contemporary autonomy and economic theories of contract. Although I believe the opposing methodological positions associated with each kind of theory can plausibly be viewed as natural developments within the different intellectual histories of each perspective, I take no position on whether any of them are contingent or necessary features of deontic or economic theories.⁷ My present purpose is to demonstrate that the autonomy and efficiency theories I consider do in fact evidence the methodological tendencies I describe, and that by attending to them, apparently first-order disputes can be revealed to be second-order disputes.

A. *Doctrine as Legal Theories v. Doctrine as Legal Data.*

Contemporary economic and deontic legal theories can be viewed as alternative responses to the doctrinal scepticism of legal realism and the doctrinal cynicism of critical legal studies.

Broadly understood, legal realism views the legal doctrines and arguments in opinions as obscuring

⁷Ironically, it is the association of the ex post perspective in adjudication with deontological theories, and the ex ante perspective in adjudication with economic theories, that holds out the most promise as being logically compelled by each theory's foundational principle. Yet this is the one methodological opposition that, upon analysis, turns out to explain the substantive disagreements between autonomy and economic theories of contract only for particular kinds of autonomy theories, such as Benson's. Economic objections to the first order claims of the more prevalent kind of autonomy theories, such as Fried's, cannot be traced to the conflict between the ex post and ex ante perspectives in adjudication.

more than they reveal about the real grounds of decision, though realists themselves differ about what those real grounds are: psychological idiosyncrasies of the judges, policy preferences, and uncodified commercial norms are all factors different Realists emphasize.⁸ Critical legal studies shares the skeptical view of legal doctrines and arguments, but reduces all judicial decision-making to 'pure politics,' ignoring the other factors that the Realists emphasized. Both economic and deontic legal theory take doctrine seriously. They hold that legal doctrine can be explained and justified by a theory that makes it coherent. Indeed, both implicitly acknowledge that demonstrating the coherence and intelligibility of legal doctrine is a precondition for its justification. And each claims to provide an account that accomplishes both tasks. It is therefore tempting to conclude that these theories differ only with respect to the substantive explanatory and normative principle each employs. To explain and justify legal doctrine, economic theory relies on a principle of efficiency, while deontic theory relies on a principle of autonomy. But while both kinds of theories agree on the importance of legal doctrine, they disagree over the nature of legal doctrine.

The common law method requires judges to interpret the law based on the rationales and outcomes of past judicial decisions. The dispute between deontic and economic theories concerns the ultimate relationship between law, judicial statements of legal doctrine, and case outcomes. Both doctrinal statements and case outcomes appear to be co-equal sources of law. Indeed, the relationship between stated doctrine and case outcomes appears to be circular: Doctrinal statements are distillations of principles derived from previous cases outcomes, and case

⁸See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS LAW REVIEW 267 (1997).

outcomes are ostensibly determined by the application of these distilled principles. The common law seems to consist in this dynamic itself, rather than either the doctrinal statements or outcomes alone. Yet particularly in hard cases, the question of which has priority over the other seems to be forced. Which is the legal wheat to the other's legal chaff?

Economic theory takes the view that the law consists in the best principled account of case outcomes, whether or not that account constitutes a plausible interpretation of doctrinal statements.⁹ The implicit assumption underlying this view is that the ultimate touchstone for legal interpretation is case outcomes, rather than doctrinal statements distilled from them. Like legal realism and CLS, economic analysis does not take the doctrinal invocations and restatements as legal data to be explained. Instead, it treats doctrines as mere *theories* of case outcomes. Therefore, in hard cases, which make up the bulk of appellate court decisions, economic analysis takes one of two interpretive approaches. First, if the semantic content of the relevant doctrinal statement seems to under-determine the result because its essential terms are vague, economic analysis claims to interpret the meaning of these terms by using economic principles to systematize ordinary intuitions about their use. For example, some economic theories claim that common intuitions about whether reliance on a promise is reasonable are generated by an inchoate and unarticulated analysis of whether the promisee's decision to rely was based on an accurate

⁹In this respect, economic analysis shares the view of law that Dennis Patterson attributes to Langdell: that "the state of the law could be divined from underlying principles." Dennis Patterson, *Symposium on Taking Legal Argument Seriously: Taking Commercial Law Seriously: From Jurisprudence to Pedagogy*, 74 CHI.-KENT. L. REV. 625, 626 (1999). However, although this view underwrote Langdell's first attempt to identify (or perhaps impose) the set of principles defining contract law, the success of his attempt had the effect of canonizing those principles into doctrines that came to be regarded as the law itself. Thus, even while Langdell subordinated doctrinal statements to outcomes in divining the law of contracts, the very act of stating the underlying principles serves to subordinate subsequent outcomes (and prior inconsistent outcomes) even as it grounds its own claim to authority in case outcomes, rather than doctrinal statements.

discount of the probability of the promisor's performance. Second, if the semantic content of the doctrinal statement is inconsistent with the efficiency account of the cases decided under the doctrine, economic theory simply ignores the semantic content of the doctrinal statement entirely, substituting the economic principle in its place.¹⁰ Economic theory therefore treats the process of adjudication as a "black box" and views legal theory as offering explanations of what's inside the black box.¹¹ On this view, law consists in whatever principles best explain the outcomes, not the express reasoning, in judicial decisions. Doctrinal statements are mere evidence of the law, rather than constitutive elements of law itself. Because the law is constituted by case outcomes, the legal theorist's job is to provide the best available principled account of those outcomes, without regard to the doctrinal statements judges offer in defense of their decisions.¹²

In contrast, deontic theory rejects the view that the law consists in whatever principle best unifies case outcomes, irrespective of the express reasoning offered by the judges who decide them. Instead, deontic theory treats doctrinal justifications offered by judges as constitutive

¹⁰Thus, under the first approach, economic analysts can plausibly claim that their interpretations provide a rigorous and operational, but still faithful, account of what most people would take those terms to mean. But under the second approach, economic analysts provide analyses of cases that simply cannot qualify as plausible interpretations of the plain meaning of the doctrine language. A clear example of such an analysis is the economic interpretation of the bargain theory of consideration, discussed in the next section. The economic theory interprets the requirement that consideration be actually bargained for as a requirement that the promise be made in a "bargain context," even if no actual bargain takes place.

¹¹As one deontic theorist puts the point, "I submit, without taking the time to prove it, that most legal economists have little or no theoretical regard for common-law reasoning. For most, the common law is a black box producing grist for the efficiency mill. The fact that common-law rules so often appear to be efficient remains a mystery and one that economists have long since given up trying to explain." Randy E. Barnett, . . . *And Contractual Consent*, 3. S. CAL. INTERDIS. L.J. 421, 437 (1993).

¹²Economic analysis does use doctrinal statements as devices for sorting factually similar case outcomes into categories of cases that likely share the same principled explanation. This view was sometimes expressed by Karl Llewellyn, the principal drafter for Article 2 of the U.C.C., who praised Article 2 for its usefulness as "*an easy and effective filing system*" for cases. Karl Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. LAW REV. 367 (1957), at 369.

elements of the law. Outcomes serve as constraints on plausible interpretations of these doctrinal statements, but do not in themselves have independent legal significance. This view draws support from Dworkin's approach to jurisprudence and Rawls' approach to political philosophy. According to Dworkin, judges properly decide hard cases by interpreting the law in the best light possible, subject to the constraint of fit with the reasoning of past judicial decisions.¹³ For Rawls, one of the formal requirements for the justification of state coercion is that the justifying reasons be publicly available. No matter how compelling otherwise, those reasons cannot justify state coercion unless the state publicly offers them as its ground for coercion.¹⁴ Thus, deontic theories take doctrinal statements seriously as sources of law, rather than as mere evidence. Instead of viewing them as failed, naive theories of case outcomes in need of reconstruction, deontic theories typically seek to identify the deeper philosophical principles that underwrite them.¹⁵ Thus, unlike economic theory, deontic theory treats doctrinal statements as constitutive of the law even when their plain meaning fails to determine a result in a particular case. Deontic theorists either accept such legal indeterminacy or undertake interpretive strategies that reveal a more determinate meaning. But unlike economic theorists, deontic theorists will never adopt a view of the law that is inconsistent with the plain meaning interpretation of doctrinal statements, even if that view provides the best available, principled explanation of case outcomes. Thus, the criterion of fit

¹³RONALD DWORKIN, *LAW'S EMPIRE* (1986).

¹⁴*See* JOHN RAWLS, *POLITICAL LIBERALISM* (1993)[hereinafter *Political Liberalism*]. Of course, the idea of public justification and public reason much richer than this. The core of the idea of that public justifications can invoke only those normative claims with which all reasonable people agree. *See id.* Chapter VI.

¹⁵However, a deontic theorist could reject the legal significance of disembodied outcomes without embracing a plain-meaning interpretation of doctrines. Although most deontic theorists implicitly endorse a plain-meaning interpretation of doctrine, the essence of their disagreement with economic theories lies in their rejection of the legal significance of disembodied outcomes and their view that law consists in the doctrines invoked in judicial opinions, however interpreted.

with outcomes provides the dispositive constraint on legal interpretation for economic analysts, whereas the criterion of fit with stated judicial reasoning provides the dispositive constraint for deontic theorists. As a result of their disparate jurisprudential views about the status of doctrines and outcomes, deontic and economic theorists regard each other's theories as mistaking legal chaff for legal wheat.

B. Normative v. Explanatory Primacy

Legal theory is both a normative and explanatory enterprise. Most contemporary contract theories at least implicitly pursue both enterprises simultaneously. Deontic theorists routinely take themselves to be providing both an explanation and a justification of contract doctrines (although they do not typically take themselves to be providing explanations of case outcomes). Economic theories are also most naturally construed as offering both an explanation and a justification of contract law, where contract law is conceived as those principles that best unify and predict case outcomes (whether or not they constitute plausible interpretations of stated contract doctrines). Indeed, as an analytic matter, if an explanation is prerequisite to understanding, then explanation is logically prior to justification. How could a theorist justify a doctrine without first understanding it? Thus, deontic theorists must explain contract doctrines before they can justify them. And the economic theorist's explanatory project can be viewed as the logically first step in providing a justification of case outcomes, whether or not the economic theorist ultimately undertakes the second step of providing a justification of outcomes she has explained.

Some economic theorists, however, disavow either the explanatory or normative enterprise of contract theory. Traditional economic analysis make no explicit claim to provide self-sufficient justifications of case outcomes, but instead claims only to identify an efficiency

principle that renders case outcomes coherent and provides a basis for predicting how courts will rule in future cases.¹⁶ By disavowing the normative enterprise, these theories avoid confronting the well-known philosophical objections to consequentialist justifications generally, and efficiency justifications in particular. Conversely, much of contemporary economic contract theory claims solely to be identifying efficient solutions to traditional problems in contract law, rather than explaining and normatively assessing existing contract doctrines. By disavowing the explanatory enterprise, these theories avoid the need to reconcile their abstract efficiency analyses with the inconvenient twists and turns of contract doctrine as applied in actual cases. Some of the theorists who present economic analyses in this way embrace consequentialism, and reject deontology, as the correct normative principle.¹⁷ Others simply remain silent, and therefore agnostic, on the normative force of efficiency principles. But even these theorists would argue that efficiency analyses must be at least relevant to the overall normative assessment of legal rules.

However, even the economic theories that claim to be either purely explanatory or purely normative have at least implicit explanatory and normative implications. These theories try to explain judicial decisions, and judges at least implicitly claim to be exercising justified state coercion. Unless judges are in bad faith or systematically mistaken about the justification of their decisions, by explaining their decisions as efforts to promote efficiency the economic theorist

¹⁶Richard Posner's presentation of the economic analysis of law provides a classic example of its explanatory priority: "In contrast to the heavily normative emphasis of most writing, both legal and economic, on law, the book emphasizes positive analysis: the use of economics to shed light on the principles of the legal system rather than to change the system"). RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* xx (Third Edition 1986)

¹⁷A notable recent example is Lewis Kaplow and Steven Shavell's recent effort to defend a purely normative economic analysis of law, including contract law. See Lewis Kaplow and Steven Shavell, *Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy*, 114 HARV. L. REV. 961 (2001). For an assessment of their project, see Jules L. Coleman and Jody S. Kraus, *Review of Kaplow and Shavell's Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy* (Fall, 2001).

implies that the goal of efficiency is at least a plausible basis for justifying the exercise of state coercion. Thus, although the traditional economic theorist disavows the normative enterprise to avoid the need to defend the normative credentials of efficiency principles, it is fair to assume she finds the goal of efficiency a normatively plausible ground for the exercise of state coercion. Similarly, although some contemporary economic theorists disavow the explanatory enterprise, their normative enterprise inevitably presupposes an explanation and normative assessment of existing contract law. The problems for which they propose efficient solutions are framed in terms of existing doctrines, and by implication their proposed solutions constitute a critique of existing doctrinal solutions. For example, contemporary economic contract theorists have written extensively on the problem of identifying the most efficient remedies for breach of contract. Although these theorists often make no express claim to have explained existing contract doctrines, their project presupposes some explanation of the doctrines defining contractual obligation and breach. Because they endorse the goal of efficiency as the correct one for the law to pursue, by demonstrating the unique efficiency of a proposed new doctrine they necessarily criticize the existing doctrine. Indeed, many contemporary economic analyses begin by demonstrating why existing doctrinal solutions are inefficient and then proceed to design a more efficient doctrine to replace it.

The fundamental difference between deontic and economic contract theories is not that one is exclusively normative and other exclusively explanatory. Despite strategic efforts to disavow one or the other enterprise, all contract theories at least implicitly make both normative and explanatory claims. Instead, the crucial second-order disagreement between deontic and economic theories is over the relative priority between explanation and justification, as well as the

contest between stated doctrine and case outcomes as sources of law. Deontic theories not only take doctrines to be their principal object of inquiry, but also accord priority to justifying these doctrines. The primary goal of deontic theories is to demonstrate that contract law is a morally and politically legitimate institution, rather than to explain how contract law determines outcomes in particular cases. In contrast, economic theories are principally concerned to explain how contract law determines outcomes in particular cases. Both kinds of theorists acknowledge the importance of both justification and explanation. But deontic theorists are methodologically committed to undertaking the justificatory task first, and explaining particular cases later, while economic theorists are methodologically committed to undertaking the explanatory task first, and justifying the existence of contract law later.¹⁸ Therefore, deontic theorists reject economic theories because they endorse the principle of efficiency, which deontic theorists regard as an implausible normative principle. For the deontic theorist, there is no point in explaining law with a principle that holds out no hope of justifying it. Similarly, economic theorists reject deontic theories because they employ autonomy principles, which economic analysts regard as wholly inadequate to explain case outcomes. For the economic theorist, there is no point in justifying law with a principle that holds out no hope of explaining it.¹⁹

¹⁸Economic analysts typically explain and justify the distinctions between different areas of law on grounds of comparative institutional competence. For a superb overview of this kind of analysis, *see* NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

¹⁹It is worth noting as well that economic analysts are often skeptical that the autonomy principle has normative power in contract law because the vast majority of transactors are corporations rather than individuals. The autonomy stakes in corporate transactions are, at a minimum, less direct in contracts between people acting as agents for corporations than in contracts between people acting in their individual capacity. But this is not to say that autonomy values are not at stake when corporations act. Both the autonomy of the agents and of the individuals represented by the corporations may be at stake. Nonetheless, deontic theorists bear the burden of explaining how autonomy principles apply in contracts between corporations.

C. The Origins of Methodological Disagreement

The dispute over the relative priority of the normative and explanatory enterprises of contract theory may simply reflect the different theoretical goals of deontic and economic theorists. Deontic theorists tend to be philosophers who find normative questions inherently interesting. The tools they bring to bear in legal analysis are most naturally suited to the normative enterprise. Deontic theorists therefore may prize justification over explanation in legal theory.²⁰ Economic analysts, however, tend not to be philosophers and instead find explanatory questions inherently interesting. The tools they bring to bear in legal analysis are most naturally suited to the explanatory enterprise. Moreover, many non-economist lawyers have been attracted to the economic analysis of law precisely because it attempts to provide fine-grained explanations of case law. Some lawyers might have a passing interest in understanding the moral or political justification of legal institutions. But all lawyers (and most law professors) have a professional obligation to understand particular case outcomes. The economic analysis of law has thus been fueled both by its instrumental value to lawyers and law professors in understanding case outcomes as well as its inherent interest to economist lawyers.

These intellectual origins may explain not only the different priorities of deontic and economic contract theories, but their different conceptions of legal explanation and justification as well. For example, economic analysts typically seek explanations of decided cases that yield

²⁰Deontic theorists uniformly accord priority to the normative enterprise of contract theory. That enterprise is to assess whether contract law is justified. In principle, this enterprise is neutral on the question of whether contract law is justified. However, most well-developed deontic theories of contract law engage this normative enterprise by setting out an affirmative argument for the justification of contract law. For example, both Fried and Benson provide an affirmative justification for contract law. But in itself, the priority of the normative enterprise of contract theory has no necessary stake in demonstrating that contract law is in fact justified. The normative enterprise simply seeks the correct answer to the question of whether contract law is justified.

predictions for undecided cases. Such explanations would therefore be falsifiable. Deontic theorists, however, typically do not attempt to explain outcomes in particular cases, much less to predict outcomes in undecided cases. But they insist they have explanations of cases nonetheless. Consider a contracts case in which a court applies the doctrine of promissory estoppel to allow one party to recover. A deontic theorist might explain the court's decision by asserting that the court found the promisor to have acted wrongfully by making and breaking a promise on which the promisee reasonably relied. Given that finding, the principle of corrective justice supports recovery because it requires wrongdoers to compensate their victims for the harm they wrongfully cause. This deontic explanation of the case holds that the court's ruling is based on its attempt to pursue corrective justice, and insofar as the court succeeds in that task, this explanation constitutes a justification as well.

But the economic analyst would find this explanation insufficient because it fails to identify any criteria, let alone operational criteria, for determining when a promisor acts wrongfully by breaking a promise and when a promisee's reliance is reasonable. Because the deontic explanation of the case leaves the critical concepts of wrongful conduct and reasonable reliance unanalyzed, it cannot explain why the court deemed the promisor to have acted wrongfully and the promisee to have relied reasonably. It therefore does not provide an explanation of why the promisee prevailed in that case but the promisee in another promissory estoppel case did not. The deontic explanation would simply hold that although both courts were pursuing corrective justice, one court found wrongful conduct and reasonable reliance and the other did not. The deontic theory's claim is therefore conditional: If the court's judgment on these critical questions is correct, then its ruling is justified by the principle of corrective justice. Thus, state coercion

enforcing the court's ruling is justified provided the state is justified in pursuing corrective justice.

In contrast, the economic analyst of contract law might explain why the promisee in one promissory estoppel case prevailed and the other did not by "reconstructing" in economic terms the courts' findings on wrongful conduct and reasonable reliance. For example, economic analysts, such as Charles Goetz and Robert Scott, have argued that in winning promissory estoppel cases the promise was made in a bargain context, while in losing cases the promise was made in a non-bargain context.²¹ A bargain context is one in which the promisor would have made the promise even if it were clear to her that the promise would be legally enforced. The underlying economic theory predicts courts will enforce promises in the former but not in the latter contexts, and claims that by doing so, courts maximize overall net beneficial reliance on promises in society. Enforcing promises in bargain contexts increases beneficial reliance without significantly reducing the underlying activity level of promising itself. In contrast, enforcing promises in non-bargain contexts, such as typical intra-familial contexts, decreases net beneficial reliance. Promises made in non-bargain contexts are typically so reliable that there is little to gain by making them legally enforceable, and legal enforcement will significantly reduce the underlying activity level of promising in these contexts. Although this economic account explains the case outcomes, the deontic theorist will find it wanting for at least two reasons. First, the principle it relies on does not in itself provide a basis for justifying the exercise of state coercion. Second, it explains the case outcome by explaining away the court's own express justification for its ruling. As we have seen, deontic theorists are concerned to explain the court's express basis for its ruling

²¹See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261 (1980)[hereinafter *Enforcing Promises*].

rather than particular case outcomes.

Both deontic and economic contract theorists implicitly believe they are putting first things first. Since the deontic theorist seeks justification, the first task is to select a plausible justificatory principle. The second task is to determine the extent to which contract law can be understood as justified by that principle. Since the economic analyst seeks explanation, the first task is to generate a theory that parses case outcomes. That in turn will reveal the genuine reasons courts implicitly use to decide cases. Only after these genuine reasons are discovered can the question of whether these rulings are justified be raised. If we don't understand the true bases of contract case outcomes, then we cannot assess whether those outcomes are justified. But the deontic theorists will respond that their theory does identify the genuine reasons courts use to decide cases and, unlike economic theories, corresponds to what courts say they are doing. They will argue that not all reasons can be given operational definitions that facilitate falsifiable predictions. In some cases, they argue that the content of these reasons-- for example, the semantic content of the terms "wrongful conduct" and "reasonable reliance"-- is *developed* through the practice of the common law and cannot be determined in advance.

Thus, the implicit disagreements between deontic and economic contract theories over the status of doctrinal statements and outcomes, and the relative priority of the normative and explanatory enterprises of legal theory, reflect deep controversies surrounding the nature of legal explanation and justification. This divide helps explain why each kind of theory typically regards the other as seriously deficient, if not pointless.

C. The Distinctiveness of Doctrinal Areas

For the same reasons economic analysis does not take the semantic content of doctrines

seriously, it also rejects the significance of traditional distinctions between apparently different bodies of law. Similarly, because deontic theory takes doctrinal distinctions seriously, it takes the differences between areas of law seriously and therefore seeks to explain them. Thus, although both economic and deontic theories seek to unify the legal doctrines within a given area of law, economic theories seek to unify apparently diverse areas of law under the same principle of efficiency, while deontic theories often seek to explain and preserve the distinctiveness of apparently different areas of law by emphasizing how different principles are required to explain, and therefore to justify, different areas of law. The deontic theorist's concern to provide an account of the distinctiveness of an area of law often derives from the view that any adequate explanation of the law must take seriously the terms in which the law itself is cast. If private law doctrines are at pains to distinguish between claims arising in contract and those arising in tort, then an adequate explanation of the law governing contract and tort must provide a principled account for the distinction between contract and tort. If stated legal doctrine presents that distinction as essential, then an adequate explanation of those areas of law must identify a principle according to which these areas of law are essentially different.

In addition, the tendency of deontic contract theories to seek to identify principles distinctive to contract law may, as an historical matter, stem from the formalist doctrinal origins of contract law. The central organizing doctrines of modern contract law were in large measure conceived—really pre-conceived—by Christopher Columbus Langdell and his followers. In organizing the first law school casebook, Langdell sought to impose order on the chaos of cases on contract law. Langdell imposed that order by culling through thousands of cases and selecting the ones that provided the best evidence of what appears to be an a priori, formalist theory of

contract far from self-evident in the case law itself. According to Gilmore's stylized account, that theory "seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Since the ideal was unattainable, the compromise solution was to restrict liability within the narrowest possible limits."²² Holmes then developed Langdell's anti-liability concept further by confining the scope of consideration using the bargain theory,²³ and Williston subsequently subordinated the subjective to the objective theory of intent.²⁴ Despite Corbin's later success in adding the doctrine of promissory estoppel to the otherwise unified and coherent doctrinal edifice built by Langdell, Holmes, and Williston, contemporary contract doctrine still invites a formalist explanation and justification. It's apparent internal doctrinal unity and coherence, together with the centrality of anti-liability doctrines, suggest the possibility of a singular, principled, individualist account implicit in the law itself. Philosophers with training in the theories of Kant and Hegel would naturally be drawn to formalist bodies of law that lend themselves to moral and political justification derived from first principles based on autonomy and liberty.²⁵ The modern, quasi-scientific approach to law favored by economic analysts, in contrast, dismisses formalistic doctrinal language in favor of cold hard facts, like case outcomes. And like all scientific theories, economic analysis seeks the broadest account of the data possible. An a

²²GRANT GILMORE, *THE DEATH OF CONTRACT* 15 (1995). Gilmore may be a bit tongue-in-cheek here.

²³*Id.* at 22-3.

²⁴*Id.* at 47-9.

²⁵The suggestion that proponents of deontological moral theories might have been attracted to contract law because of contract law's origins in Langdellian formalism is not meant to suggest, however, that deontological contract theorists would accept the particular formalist features Langdell ascribed to contract law. For example, Fried, a Kantian contract theorist, rejects the consideration doctrine even though it is a central pillar in Langdell's formalist edifice of contract law. It is the aspiration to formal, internal coherence that might invite the application of the deontological formalist normative systems, not necessarily all of the particular formalist features contract law has acquired.

priori restriction of an explanation's domain to the historically arbitrary boundaries of doctrinal categories is anathema to the scientific self-conception of economic analysis.²⁶

Thus, because of their opposing views on the nature of legal explanation and their divergent intellectual histories, deontic and economic theories each embrace a criterion of success that the other regards as a criterion of failure.

E. The Ex Ante and Ex Post Perspectives in the Context of Adjudication

The contemporary divide between deontic and economic theories of contract law is thought to reflect a fundamental difference in their conception of private law adjudication. It is natural to align deontic theories with the ex post perspective, and economic theories with the ex ante perspective in adjudication. The argument parallels the debate in analytical jurisprudence over how judges should decide cases. Everyone agrees that judges should take an ex post perspective when deciding easy cases. But in hard cases, the views seem to differ. Deontic theory regards common law adjudication as properly confined to deciding disputes exclusively on the basis of pre-existing rights and duties. Therefore, even in hard cases, deontic theories take an ex post perspective on the legal rules at stake in common law adjudication. The adjudication is guided by considering the retrospective effect of the decision on the pre-existing rights of parties. Economic theorists believe judges must decide hard cases by establishing new rules that create prospective rights and duties.²⁷ Since litigants in hard cases have incurred sunk costs, no

²⁶For a discussion of the scientific self-conception of economic analysis, see Brian Leiter, *Holmes, Economics, and Classical Realism*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, 285-325 (S.J. Burton, ed., 2000)(with a reply by Jody S. Kraus at 326-332).

²⁷The classic debate between these positions took place twenty years ago, when Richard Posner faced off against Ronald Dworkin. Posner argued that judges should decide hard cases by creating a rule that would be in most parties' best interest going forward. Dworkin argued that such a rule was unfair because it failed to respect the rights of the litigants. Dworkin's objection was, in essence, Kant's objection to treating persons as mere means

efficiency objective can be served by focusing on them. Thus, economic theory treats common law adjudication, especially of hard cases, as the effective equivalent of legislating new legal rules. It therefore analyzes the legal rules at stake in common law adjudication from an ex ante perspective by focusing exclusively on the prospective effects of judicial decisions. The deontic theorist rejects the economic theorist's ex ante approach as violative of individual rights and the basic Kantian maxim to treat persons as ends in themselves and not as mere means: To decide a dispute between two litigants by selecting the decision rule with the most desirable prospective effects is to use the litigants solely as means to the collective ends of society, not as ends in themselves.

On this view, the nub of the disagreement between deontic and economic approaches to the common law adjudication of hard cases lies in their different conceptions of law and the law-making process. In its simplest form, the dispute is whether there are right answer in hard cases. Dworkin famously answers this question in the affirmative. Indeed, Dworkin's interpretive theory of law requires that judicial reasoning in hard cases is best explained as an effort to identify what the law already requires, rather than what the law should require in the future. Of course, the right answer thesis is controversial. Positivists among others have argued forcefully against it. If Dworkin is right, however, then the ex ante perspective urged by the economic analyst directly conflicts with respect for individual legal rights. The ex ante perspective would countenance rights violations any time adoption of the most desirable rule going forward would yield a result

rather than ends in themselves. Dworkin conceded that Posner's position was perfectly defensible in the context of legislation, which has prospective effects only. But because the purpose of adjudication is to resolve disputes, its effects are, first and foremost, retrospective. See e.g., Ronald Dworkin, *Is Wealth a Value*, 9 J. LEGAL STUD. 191 (1980); Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980); Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 191 (1980).

contrary to the existing rights of one of the parties. Indeed, Dworkin has argued as much. But if Dworkin is wrong, and there is no right answer in genuinely hard cases, then no decision in the case could be violative of the parties' pre-existing legal rights. On this view, it would presumably no longer be cogent to object to the economic analyst's ex ante perspective on the ground that it might yield results violative of the litigants' pre-existing legal rights.

Of course, this is a grossly oversimplified simple account of the jurisprudential foundations underlying the dispute between ex ante and ex post perspective on adjudication. Even positivists who reject Dworkin's right answer thesis and his interpretive theory of law may have powerful objections to the ex ante perspective in common law adjudication, depending on exactly how that perspective is defined. But the point is that these general debates in analytic jurisprudence seem to fuel the perception that deontic and economic contract theories are subject to the same methodological divide. Deontic contract theory is supposed to object to the ex ante perspective because it holds that the function of courts is to vindicate individual rights, rather than to create them. For the economic analysts, the deontic objection is based on a naive and unsustainable conception of legal rights and the process of adjudication. The common law process in hard cases is and must be a substitute for legislation. Thus, the conflict between economic and deontic theories of contract law is perceived to derive from the inherent tension between the ex ante and ex post perspectives in the common law process of adjudication.

The ex post/ex ante divide in analytic jurisprudence is genuine, and it does seem to explain the first-order disagreements between economic theories and Benson's contract theory. But despite the claims that this divide provides the grounds for mutual criticism of deontic and economic contract theories generally, disputes typically attributed to this divide turn out to be

disputes not over fundamental jurisprudential questions but rather ordinary questions of contract interpretation. As consideration of Fried's theory reveals, the deontic commitment to the ex post perspective in adjudication is fully consistent with allowing ex ante concerns to enter under proper circumstances. Those circumstances depend on how one understands the nature of moral and legal rights, and their relationship to the social conventions that underwrite our ordinary expectations.²⁸

The remainder of this Chapter presents the contract theories of Charles Fried and Peter Benson. My objective is neither to defend these theories, nor even to identify the principal substantive objections against them. Rather, I present the essential and representative features of each theory in order to identify their underlying methodological commitments, and to illustrate how these commitments can provide systematic explanations for many of the apparently substantive disagreements between autonomy and economic theories of contract law.

II. CHARLES FRIED'S *CONTRACT AS PROMISE*

Contemporary deontic contract theory begins with Charles Fried's "Contract as Promise." Fried's analysis ranges over a wide spectrum of contract doctrines. An examination of selected doctrinal discussions in Fried's book illustrates how this classic example of a systematically developed deontic theory of contract law (1) accords primacy to the normative rather than explanatory project of contract theory, (2) is designed principally to establish the distinctiveness of contract law, (3) views doctrine as the legal data to be explained and does not seek to explain case outcomes, and (4) accords primacy to the ex post over the ex ante perspective, but

²⁸*See infra*, Section IID.

nonetheless accommodates many of the same kinds of ex ante considerations central to the economic analysis of contract law. The first three of these methodological commitments are integrated features of Fried's theory.

A. *Normative Primacy, Distinctiveness, and Doctrinal Statements as Data*

Fried's theory constitutes an explicit defense of the claim that contract law provides a ground of legal obligation distinct from any other area of law.²⁹ He states that he is defending the "classical view of contract proposed by the will theory"³⁰ against critics who deny the will theory, or any theory based on one principle alone, can unify contract law and establish its distinctiveness from other private law areas.³¹ Fried's central argument for contract law's distinctiveness is that it is the only body of law devoted exclusively to enforcing promissory obligations.³² At times,

²⁹"I begin with a statement of the central conception of contract as promise. This is my version of the classical view of contract proposed by the will theory and implicit in the assertion that contract offers a distinct and compelling ground of obligation." CHARLES FRIED, *CONTRACT AS PROMISE* 5-6 (1981).

³⁰*Id.* at 6.

³¹Fried is quite clear that his theory is, first and foremost, a response to three kinds of extended attacks on the internal coherence and distinctiveness of contract law then current in the contracts literature (the attacks are by Atiyah, Friedman, Gilmore, Horwitz, Kennedy, Kronman, and Macneil.) Indeed, at the outset of his project Fried writes, "I shall just set out [the main thrust of these critics' views] so that my readers may be clear what I am reacting against." *Id.* at 3. Each attack denies that contract law can be rendered both distinct and internally coherent by any principle, including the will theory's principle of self-imposed obligation. The first attack relies on historical analysis to demonstrate both distant and recent history of collective control over a large range of issues that should be free from such control according to the will theory of contract. Fried responds to this attack by defending the normative, rather than explanatory, credentials of contract as promise. He asserts the ancient ancestry not of contract as promise but of the promise principle itself. He then argues that historical and contemporary vacillation in the social acceptance of the promise principle has no bearing on its moral validity. The second attack rejects the will theory because it cannot explain contractual recovery based on reliance or past benefit. Fried responds by relegating cases based on reliance or past benefit to areas other than contract law, such as tort law. The third attack argues that the notion of a self-imposed obligation is itself incoherent. Fried defends the coherence of the principle of self-imposed obligation by endorsing a Kantian rights theory based on the moral significance of trust. *Id.* at 83-91. Each of Fried's responses reflects his view that contract law can and should be conceived as an internally coherent and distinct area of law exclusively devoted to vindicating the moral obligations generated by the promise principle.

³²Fried variously claims to be providing an explanation of particular contract doctrines (for example, Fried writes that contract as promise "generates the structure and accounts for the complexities of contract doctrine." *Id.*

Fried seems to advance the distinctiveness thesis out of sheer conviction, based on his reading of contracts case law, that the formidable array of his contemporaries were wrong to deny it. But it is clear that Fried's principal motivation for advancing the distinctiveness thesis is to support his normative claim that contract law is morally justified because it legally enforces the moral obligation to keep promises.³³ The legal enforcement of the moral obligation to keep promises, in Fried's view, is essential to vindicating the idea of rights central to liberal individualism.³⁴ Fried's strategy for justifying contract law is first to explicate and defend the moral promise principle,³⁵ and then to demonstrate that the obligations recognized and enforced by contract law are moral

at 6.), supplying a moral justification for contract law (for example, Fried claims the promise principle is "the moral basis of contract law." *Id.* at 1.), and offering solutions "to perennial conundrums" in contract law (*Id.* at 132). But his central claim is that contract as promise explains contract law's "essential unity" (*Id.* at 6), and "that contract offers a distinct and compelling ground of obligation." *Id.* See also Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* (Dennis Patterson ed., 1996) 24, at 37 ("Fried's central aim is to vindicate the distinctive character of contract and the primacy of the expectation interest").

³³Fried's thesis holds that contract law, *and only contract law*, enforces the moral obligation to keep promises. It is therefore properly a form of the distinctiveness thesis. But for the normative purpose that motivates Fried, he need advance only the claim that contract law enforces the moral obligation to keep promises. An adequate defense of the claim that contract law is justified by the promise principle does not necessarily require that no other bodies of law also enforce the promise principle. Fried nonetheless asserts the full distinctiveness thesis.

³⁴The first sentence in Fried's book states his intention to argue that the promise principle is "the moral basis of contract." *Id.* at 1. Fried claims that "[t]he regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism." *Id.* at 2.

³⁵Fried casts his argument as a defense of the will theory. According to Fried, the will theory "sees contractual obligations as essentially self-imposed." *Id.* at 2. His version of the will theory claims that "the promise principle" is "the moral basis of contract law." The promise principle is "the principle by which persons may impose on themselves obligations where none existed before." *Id.* at 1. Fried's defense of the will theory proceeds first by explaining how promising is possible. He argues that promising is made possible by the existence of a social convention that defines the practice of promising. According to Fried, such a practice enhances autonomy by allowing individuals to transform morally optional activity into morally mandatory activity. Fried explains the moral force of such a convention by arguing that breaking a promise constitutes a breach of trust: "There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it." *Id.* at 17.

obligations arising out of the moral promise principle. Fried therefore devotes the bulk of his second chapter to explicating and defending the moral promise principle before turning exclusively to his defense of the distinctiveness thesis in the remaining chapters. Thus, although the central preoccupation of Fried's book is to defend the distinctiveness thesis, that defense is in service of his overall normative project of justifying contract law on the basis of the moral promise principle that he believes underwrites liberal individualism.³⁶

Although Fried clearly accords priority to the normative task of contract theory, that commitment requires him to devote the vast bulk of his efforts to providing an explanatory contract theory. Yet unlike the explanations of economic contract theories, Fried's explanations do not attempt to explain case outcomes. In order to prove that contract law is justified by the promise principle, Fried must examine sources of contract law— contract cases, the Restatement (Second) of Contracts, and Article 2 of the Uniform Commercial Code— to demonstrate that they are best explained as efforts to enforce promises. Typically, Fried proceeds by considering a series of stylized vignettes of classic contract cases to determine whether they constitute counter-examples to his thesis. For each example he considers, Fried implicitly sorts it into one of three categories. The first category consists of cases he claims were properly decided on the basis of contract law. Those are cases in which the contract doctrine invoked is best understood as enforcing the moral obligation to keep promises. The second category consists of cases he claims were not properly decided on the basis of contract law. Those are cases in which the doctrine

³⁶For a lucid presentation of Fried's account of the moral obligation to keep promises, see Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, at 1098-1103. For his trenchant criticism that Fried's conception of autonomy is at bottom teleological, see *id.* 1103-1117.

invoked cannot be understood as enforcing the moral obligation to keep promises, but rather are best explained as based on normative principles underwriting other areas of law, such as tort law. The third category consists of cases Fried claims were decided on the basis of incoherent contract law. Those are cases in which the doctrine invoked cannot be understood as enforcing the moral obligation to keep promises and cannot be reinterpreted as cases decided under a defensible principle operating in non-contract law. In sum, Fried's claim is that all and only those cases decided on the basis of a doctrine supportable by the promise principle qualify as genuine contracts cases. If they can't be supported by the promise principle, they are either defensible as non-contract cases, or indefensible because incoherent.³⁷

Despite its normative priority, Fried's theory therefore offers an extensive explanation of contract law. Yet unlike economic contract theories, his theory offers no explanation of case outcomes. Two reasons explain why. First, Fried focuses exclusively on defending the distinctiveness thesis. His sole goal in examining contract doctrines is to defuse doctrines that constitute potential counter-examples to his claim that contract is based exclusively on promise. Once Fried has demonstrated that a given doctrine can be understood as giving effect to the

³⁷So described, Fried's defense of the distinctiveness claim is analytic: By virtue of his stipulative definition, any case that cannot be plausibly interpreted as enforcing the promise principle does not qualify as a genuine contracts case. Fried *a priori* rules out the possibility of a genuine counter-example by argumentative fiat. The only way for Fried to avoid vicious circularity in defending his distinctiveness claim would be to settle in advance on *theory-independent* criteria for determining whether a case, and the doctrine under which it was decided, are genuinely part of contract law. But Fried could avoid this problem by redescribing his project. Instead of following his contemporaries in debating the "true" nature of contract law, Fried could instead simply assert that the promise principle is available to explain and therefore justify a great deal of what is normally considered contract law. Little seems to be at stake in deciding whether those cases and doctrines that cannot be so explained and justified nonetheless constitute "genuine" contract law. Fried's fundamental claim, after all, is that liberal individualism, and its attendant promise principle, requires and therefore justifies much of modern contract law, even though it cannot similarly justify some of what is (rightly or wrongly) regarded as contract law. This redescription of Fried's explanatory project frees him from the burden of justifying uninteresting conceptual claims about the true nature of contract law.

promise principle, or can instead be relegated to another body of law, that doctrine no longer constitutes a potential counter-example to his contract-as-promise thesis: It is either a contract doctrine that satisfies the promise principle or it is not a contract doctrine at all. Thus, the potential counter-example doctrine is defused. Fried has no reason to proceed further to offer an explanation of how the doctrine applies to particular cases. Similarly, if the promise principle cannot explain a given contract doctrine, and that doctrine cannot readily be assimilated to another body of law, Fried's sole concern is to defuse the potential significance of that doctrine as a counter-example. In this case, he deems the doctrine indefensible because incoherent. If a contract doctrine is incoherent, no theory can explain it. It therefore does not constitute a counter-example to his theory. Again, because Fried's sole objective is to defend the distinctiveness claim, his job is done once the counter-example doctrine is explained or explained away. No reason remains for explaining the cases decided under that doctrine.

The second reason Fried's theory fails to explain case outcomes is that he is implicitly committed to views on the status and interpretation of doctrine that reject the realist and CLS critique of legal doctrine, and therefore reject case outcomes as stand-alone sources of law. Fried implicitly treats contract doctrines, rather than contract case outcomes, as the primary source of contract law, and likewise implicitly limits the permissible interpretations of doctrines to their plain meaning. These views explain the reasoning underlying Fried's conclusion that if contract doctrines cannot be explained by the promise principle or by non-contract law, they must be incoherent. According to the economic contract theorist, a contract doctrine is not necessarily incoherent simply because neither the promise principle nor principles explicit in non-contract law can explain it. The economic contract theorist would claim that some other principle, such as a

principle of efficiency, might explain the cases decided under that doctrine and thereby render the doctrine coherent. But if the primary source of contract law is contract doctrine, and the acceptable interpretations of contract doctrine must be based on their plain meaning, then theories that do not provide plausible interpretations of the plain meaning of a contract doctrine are ruled out. Even if an efficiency principle can make sense of the case outcomes reached under a particular contract doctrine, that principle would not qualify as an explanation of contract law because it does not provide a plausible interpretation of the doctrine under which those cases were decided. And if the doctrine is the primary source of contract law, a theory that focuses exclusively on case outcomes, and completely disregards the doctrine's plain meaning, cannot constitute an explanation of the contract law applied in those cases. On this view, simply rendering case outcomes coherent under a principle, by itself, does not qualify as an interpretation of the law applied in those cases. On Fried's implicit view, case outcomes are results, rather than sources, of law. The law itself is contained in the doctrines courts use to explain case outcomes. Case outcomes therefore cannot be used to explain away the plain meaning of doctrines. Thus, Fried's view rejects, and the economic analyst's view presupposes, the interpretive legacy of the realist and CLS critiques of doctrine.

B. *Illustrations: The Enforcement Doctrines*

These methodological commitments are illustrated in Fried's discussion of contract law enforcement doctrines. According to Fried's theory, virtually all promises not intended to be legally unenforceable, including gift promises, should be enforced by contract law.³⁸ Yet

³⁸Fried's position is that all promises, including gift promises, should be enforced, provided they are intended by the parties to be legally enforced, they are voluntary, rational and deliberate, and they do not create illegitimate third party effects: "Allowing people to *make* gifts (let us assume freely, deliberately, reasonably)

American contract law does not enforce all such promises. The doctrines of consideration, promissory estoppel, and past material benefit, for example, are routinely used to deny certain promises legal enforcement.³⁹ Each of these doctrines therefore represents a potential counter-example to Fried's distinctiveness claim that contract law enforces the moral obligation to keep promises. Under each of these doctrines, courts sometimes hold that although a promise was unequivocally made, it is nonetheless not legally enforceable. Fried addresses each of these doctrines separately. He first considers the standard doctrine of consideration. Ordinarily, contract law will not enforce promises that are not supported by consideration. Fried begins his analysis of this doctrine by paraphrasing the "bargain theory" of consideration as stated in two critical sections of the Restatement (Second) of Contracts that define and circumscribe the requirement of consideration.⁴⁰ He then argues that the bargain theory, interpreted in light of its

serves social utility by serving individual liberty. Given the preceding chapter's analysis of promise, there simply are no grounds for not extending that conclusion to *promises* to make gifts. . . . My conclusion is . . . that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it. . . . Along the way to this conclusion I have made or implied a number of qualifications to my thesis. The promise must be freely made and not unfair. . . . It must also have been made rationally, deliberately. The promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised. Finally certain promises, particularly those affecting the situation and expectations of various family members, may require substantive regulation because of the legitimate interests of third parties." *Contract as Promise, supra* note 25, at 37-38.

³⁹Fried concedes that his theory cannot explain the patterns of enforcement in American contract law: "I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it." *Id.* at 38.

⁴⁰Fried identifies the consideration doctrine with two propositions: "(A) The consideration that in law promotes a mere promise into a contractual obligation is something, or the promise of something, given in exchange for the promise. (B) The law is not at all interested in the adequacy of the consideration. The goodness of the exchange is for the parties alone to judge-- the law is concerned only that there *be* an exchange." *Id.* at 29. The first proposition paraphrases Restatement of Contracts (Second) §71(1) and (2): "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." The second proposition paraphrases Restatement of Contracts (Second) §79: "If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a

plain meaning, cannot provide a coherent explanation for the patterns of enforcement in ten representative cases decided under the consideration doctrine: “The bargain theory of consideration not only fails to explain why this pattern of decisions is just; it does not offer *any* consistent set of principles from which all of these decisions would flow. These cases particularly cannot be accounted for by the two guiding premises of the doctrine of consideration: (A) that only promises given as part of a bargain are enforceable; (B) that whether there is a bargain or not is a formal question only.”⁴¹ Fried ultimately concludes that “the standard doctrine of consideration . . . does not pose a challenge to my conception of contract law as rooted in promise, for the simple reason that that doctrine is too internally inconsistent to offer an alternative at all.”⁴²

Fried’s discussion of the consideration doctrine clearly illustrates the three methodological commitments discussed above. First, as his final conclusion reveals, Fried’s sole motivation for analyzing the doctrine of consideration is to disarm it as a threat to the distinctiveness thesis. Fried concedes that the promise principle cannot explain the bargain theory of consideration. But instead of acknowledging this failure as a limit to his explanatory theory, Fried argues that the consideration doctrine inexplicable in principle. Second, the argument Fried presents implicitly relies on the view that contract law consists in the plain meaning interpretation of contract doctrines rather than other principles that might provide a coherent account of contract case outcomes. For Fried, an explanation of the consideration doctrine requires an explanation of how

loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) ‘mutuality of obligation.’”

⁴¹*Contract as Promise*, *supra* note 25, at 33.

⁴²*Id.* at 35.

the bargain theory, interpreted in light of its plain meaning, explains the outcomes in the classic consideration cases. Fried thus begins by arguing that the doctrinal propositions A and B are inconsistent: “The matrix of inconsistency is just the conjunction of the propositions A and B. Proposition B affirms the liberal principle that the free arrangements of rational persons should be respected. Proposition A, by limiting the class of arrangements to bargains, holds that individual self-determination is not a sufficient ground of legal obligation”⁴³ Assuming Fried is right to conclude these two propositions are inconsistent, the plain meaning of the consideration doctrine cannot be given a coherent interpretation. In his view, the promise principle explains proposition B, presumably because proposition B asserts that the enforcement of promises turns solely on the parties’ intent and not on a third party’s judgment of the adequacy of the parties’ exchange. But like any principle that explains proposition B, it is necessarily contradicted by proposition A. Presumably, proposition A’s bargain requirement, in Fried’s view, implies that the enforcement of promises will turn on a third party’s substantive judgment of the adequacy of the parties’ exchange.⁴⁴ Thus, since the law consists in propositions A and B, and those propositions are inconsistent when interpreted according to their plain meaning, the law itself is incoherent. Once Fried takes himself to have demonstrated the incoherence of the bargain theory, his task of defending his theory is complete. The promise principle fails to explain the bargain theory of consideration because no principle can explain it. In Fried’s view, so much the worse for the consideration doctrine, not the promise principle. Given that his exclusive concern is to defend

⁴³*Id.*

⁴⁴For present purposes, the accuracy of Fried’s interpretation of propositions A and B (his paraphrased versions of Rest. §§ 71 and 79) is not relevant.

the distinctiveness thesis, there is no point in considering whether the consideration doctrine could be rendered coherent by a principle that explains many of the outcomes of the consideration cases but ignores the plain meaning of the bargain theory.⁴⁵

Fried's failure to consider alternative explanations of consideration case outcomes is explained in the first instance by his single-minded focus on defending the distinctiveness thesis.⁴⁶ But Fried's resistance to non-promissory alternative accounts of the consideration doctrine can be explained, in part, by his implicit methodological view of the status and interpretation of contract doctrine. Fried's inference from the incoherence of the plain meaning interpretation of the bargain theory to the incoherence of the consideration doctrine itself implicitly presupposes that contract law consists in the plain meaning of its doctrines, rather than in whatever principles render coherent the set of cases decided under particular doctrinal rubrics within contract. In Fried's view, if the plain meaning of the bargain theory cannot be given a coherent interpretation, the consideration doctrine and the cases decided under it are necessarily incoherent. For the economic contract theorist, like the realists and CLS theorists before them, the failure of the bargain theory to provide a coherent explanation of consideration case outcomes merely demonstrates that the bargain theory itself, construed according to its plain meaning, constitutes a

⁴⁵Significantly, Fried concludes that the “[*the bargain theory*] does not offer *any* consistent set of principles from which all of these decisions would flow.” *Id.* at 33 (first italics added). He does not claim that no theory offers a consistent set of principles to explain these cases.

⁴⁶Indeed, Fried sometimes appears to beg the question outright: “My conclusion is . . . that the doctrine of consideration offers no coherent alternative basis for the force of contracts, *while still treating promise as necessary to it.*” *Id.* at 38 (emphasis added). Of course, if Fried's contract-as-promise theory is not presumed to be true in the first instance, there is no reason to rule out the possibility that an alternative theory will provide a coherent basis for the force of contract without treating promise as necessary to it. As I discuss below, rather than relying on circular reasoning, Fried's preference for the promissory account of contract law can be explained, at least in part, by his methodological views about the status and interpretation of contract doctrine.

bad theory of the considerations cases. The bargain theory does not itself constitute the consideration doctrine. The true semantic content of the consideration doctrine, for the economic analyst, is provided by the principle that best explains the consideration case outcomes. Thus, for the economic contract theorists, the true semantic content of all contract doctrines is provided by the principles that explain contract case outcomes, whether or not they happen to correspond to the plain meaning of doctrinal formulations.

Thus, when Fried discusses the so-called moral consideration cases (decided under the material benefit rule (R2d. §86)),⁴⁷ the modification cases (R2d. §89), and the debt revival cases (decided under R2d. §§82 and 83),⁴⁸ he does not conclude that no principle can make sense of these cases. Rather, he claims that because these cases cannot be explained by the plain meaning of the bargain theory, the doctrine of consideration is incoherent. He does not allow for the possibility that the content of the consideration doctrine might be provided by some principle that makes sense of the consideration cases but rejects the plain meaning interpretation of the bargain theory. Consider Fried's discussion of two representative debt revival cases. In the first, a widow promises to repay the debt of her deceased husband. In the second, a contractor makes a written promise to repay a debt discharged in bankruptcy and barred by the statute of limitations. Under the consideration doctrine, the court refused to enforce the former promise because the bank gave

⁴⁷§86. Promise for Benefit Received

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1)

(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

(b) to the extent that its value is disproportionate to the benefit.

⁴⁸These are cases IV-X in *Contract as Promise*, *supra* note 25, at 31-33.

the widow nothing of value. In the latter, the court enforced the promise on the ground that the contractor's prior obligation supported his later promise. Fried regards these two cases as irreconcilable under the consideration doctrine: "Whatever the substantive merit of allowing recovery in such cases, the stated explanation is obviously gibberish. To be consistent the courts would have to find that in such cases there was no bargain, any more than in the case of the widow, since one does not bargain for what one already has: the repentant contractor has already got clear of all obligation the money that he subsequently promises to pay."⁴⁹ Because he believes the bargain theory of consideration is gibberish, Fried rejects the consideration doctrine itself as gibberish. For him, the courts' stated rationale *is* the doctrine of consideration. If it can't be explained, the *law* of the cases simply can't be explained.

Economic analysts would agree with Fried that the *stated* rationale under which consideration cases are decided is gibberish. But for them, the point of legal theory is to supply coherent rationales in place of the stated gibberish that makes up the plain meaning of contract doctrines invoked by courts to explain their decisions. For example, Charles Goetz and Robert Scott argue that most contract enforcement doctrine outcomes can be explained by viewing enforcement cases as occasions for maximizing net beneficial reliance.⁵⁰ For example, they would hold that the widow's promise should not be legally enforceable because doing so in this class of cases would be likely to decrease net beneficial reliance overall.⁵¹ In all probability, a widow's

⁴⁹*Id.* at 32.

⁵⁰*See* Goetz and Scott, *supra* note 17.

⁵¹This and other applications of Goetz and Scott's net beneficial reliance theory of contractual enforcement is based *Enforcing Promises*, *infra* note 17, and its further elaboration in, CONTRACT LAW AND THEORY (Third Edition), Robert E. Scott and Jody S. Kraus, eds. (forthcoming 2002).

promise to pay her husband's debt is motivated by moral or religious convictions. It is therefore likely to be very reliable. Little is to be gained by making it legally enforceable. In addition, making it legally enforceable would likely deter widows from making such promises in the future. Had her husband's creditor sought to compel her to make a legally enforceable promise, she would likely have refused. Because she is likely to view her promise as a morally supererogatory act, she would not view legal enforcement as appropriate. Enforcing her promise would likely deter similarly-situated parties from making similar promises in the future.⁵² Thus, legal enforcement of promises in this kind of context would lead to a relatively small increase in the reliability of such promises but a relatively large decrease in the quality and quantity of such promises in the future. Enforcement therefore would be likely to decrease overall expected net beneficial reliance. In contrast, the contractor's promise, while reliable, is not likely to be as reliable as the widow's promise. It is likely to be made solely out of self-interest. The contractor has a professional motivation to honor his discharged business debts. By doing so, he provides reassurance to potential future creditors on whom his future success depends. If he decides to abandon his business, or his self-interest otherwise conflicts with his promise, he is less likely to keep it. Thus, there is more to be gained by enforcing his promise than the widow's promise. And unlike legal enforcement of the widow's promise, legal enforcement of the contractor's promise is not likely to deter similarly situated parties from making the same quality and quantity of promises in the future. If his past creditor had insisted that he make a legally enforceable promise to repay his debt, it would have been in the contractor's self-interest to agree. His refusal

⁵²Or alternatively, require such parties to incur the costs of "opting out" of the default enforcement rule by expressly stating that she does not intend her promise to be given legal effect.

to agree to make his promise legally binding would substantially undermine the likely point of making his promise-- to reassure his future creditors of his bona fides. Thus, legal enforcement of the contractor's promise will increase the reliability of such promises without decreasing the quality and quantity of such promises in the future. Legal enforcement of promises in the contractor's context therefore maximizes overall expected net beneficial reliance.

In sum, the economic analyst agrees with Fried that the bargain theory fails to explain the consideration cases, but unlike Fried, treats the bargain theory as a failed theory of consideration that needs to be replaced by a better theory. Goetz and Scott's theory explains the consideration doctrine by interpreting it as just one device among others that courts use in contracts cases to maximize overall expected net beneficial reliance. Goetz and Scott's theory is just one of a number of economic theories that can allow the economic analyst to explain why courts enforce promises like the widow's but do not enforce promises like the contractor's. Thus, Fried uses cases to test the coherence of the plain meaning of the doctrines courts use to decide them. If the plain meaning of a doctrine fails this coherence test, Fried rejects that doctrine *and the cases decided under it*. Economic analysts also use cases to test the coherence of the plain meaning of doctrines. But if the plain meaning of a doctrine fails this coherence test, the economic analysts rejects only that interpretation of the doctrine but not necessarily the cases decided under it. In the economic analyst's view, when Fried rejects the cases along with the plain-meaning interpretation of the doctrine, he is throwing out the baby with the bath water.

Ultimately, then, the most fundamental disagreement between economic analysts and deontic theorists like Fried is about sources of law. Both agree that doctrinal formulations are useful as a theoretical point of departure for analyzing the law. For the economic analyst,

doctrinal formulations are useful because they provide salient and convenient categories for organizing case outcomes that presumptively can be explained by the same set of principles. In addition, the plain meaning interpretations of doctrinal formulations provide an initial theory of the law applied in the cases decided under them. But for the economic analyst, the plain-meaning interpretation of a doctrine is just a theory. Like any theory, it can be disconfirmed by the legal data it purports to explain. Since doctrines purport to explain case outcomes, those outcomes are the data of legal theory. Thus, for economic analysts, case outcomes, not the plain-meaning interpretations of doctrine, are sources of law in themselves.⁵³ In contrast, Fried regards doctrines as more than merely devices for categorizing case outcomes and prima facie theories of the law that decided them. For Fried, case outcomes are mere results of the application of law, not sources of law in themselves. The legal significance of a case outcomes is, for Fried, entirely derivative of the legal significance of the doctrinal reasoning the court used to justify it. If the doctrinal reasoning applied in a case is not coherent, then the case outcome standing alone, disembodied from the reasoning the court used to justify it, has no theoretical significance and no status as law.

Fried's discussion of promissory estoppel provides stark confirmation of his exclusive focus on defending the distinctiveness thesis and confirms the view that he assigns no legal significance to case outcomes in themselves.⁵⁴ Fried's explanation of promissory estoppel is

⁵³To be sure, no theory, including economic theories of contract law, explain all the data. Economic analysts will reject some case outcomes as inconsistent with their explanatory theory. But economic analysts will resist wholesale rejection of central doctrines on the ground that their ostensible rationale fails to explain them. Instead, they will seek to identify alternative principles that explain most, or the most important, case outcomes decided under that doctrine.

⁵⁴§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

limited to his claim that it constitutes a “belated attempt to plug a gap in the general regime of enforcement of promises, a gap left by the artificial and unfortunate doctrine of consideration.”⁵⁵ With almost no analysis of promissory estoppel case law, Fried asserts that promissory estoppel should be understood as a natural, if inadequate, institutional response to the problem of promissory under-enforcement created by the consideration doctrine. Fried considers promissory estoppel, therefore, only to buttress his claim that the consideration doctrine is anomalous.⁵⁶ His suggestion is that the emergence of promissory estoppel provides evidence that contract law itself has begun to reject the doctrine of consideration because it runs contrary to the requirements of the promise principle which otherwise animates contract law. Apart from the merits of his claim, Fried’s discussion of promissory estoppel illustrates his exclusive focus on defending the distinctiveness thesis and his lack of interest in explaining case outcomes.⁵⁷ He makes no effort to

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.

⁵⁵*Contract as Promise*, *supra* note 25, at 25.

⁵⁶“The anomalous character of the doctrine of consideration has been widely recognized. A variety of statutes abrogate some of its more annoying manifestations” *Id.* at 35.

⁵⁷As a general proposition, Fried is surely right that promissory estoppel evolved to “fill gaps” in enforcement created by the consideration doctrine. But his claim that it evolved to enforce the promises that would be enforced under the promise principle but are not enforced under the consideration doctrine is less plausible. If this claim were true, then promissory estoppel should provide recovery for any promisee that detrimentally relies on a promise. But under the reasonableness test of §90, recovery is routinely denied to promisees who have detrimentally relied. Thus, if he ignored the historic development of contract doctrine, Fried could just as well interpret the consideration doctrine as an institutional response to the under-enforcement problem created by promissory estoppel.

Fried also seems implicitly to be advancing the normative claim that promissory estoppel is justified as a corrective to the problem of under-enforcement created by the consideration doctrine. This claim appears to be circular. Fried’s direct critique rejects the consideration doctrine because it is incoherent, not because it leads to promissory under-enforcement. His claim that the consideration doctrine leads to under-enforcement of promises *presupposes* that contract law ought to conform to the promise principle. Unless the claim that contract law *ought* to conform to the promise principle has already been established, there is no force to the objection that the consideration doctrine fails to enforce all the promises the promise principle would enforce. His objection to the

explain, under the promise principle or any other principle, which promises are enforced under section 90.⁵⁸ Once he conceives of promissory estoppel as a counter-measure against the consideration doctrine, and thus a doctrine designed to bring contract law in alignment with the promise principle, it is no longer a threat to the distinctiveness thesis. An explanation of which promises are enforced under §90 is beside the point.⁵⁹

The only promissory estoppel case Fried discusses is *Hoffman v. Red Owl Stores*.⁶⁰ In *Hoffman*, the plaintiff, Hoffman, engages in preliminary negotiations with the defendant to obtain a supermarket franchise. In the course of extended negotiations, Hoffman relies on defendant's assurances that he will be granted a franchise if he meets their stated conditions. But when he meets them, defendants change the conditions and do not award the franchise. The court finds for Hoffman on a theory of promissory estoppel and awards reliance damages. Even at the time Fried was writing, there was a substantial body of scholarship discussing *Hoffman* and the application of promissory estoppel in preliminary negotiation cases.⁶¹ That scholarship attempted to explain

consideration doctrine therefore applies with equal force to promissory estoppel: Both doctrines prohibit enforcement of some promises the promise principle would enforce.

⁵⁸He does suggest that "principles of tort" can be used to impose liability in the absence of a promise when one party gives "vague assurances that cause foreseeable harm to others." *Contract as Promise*, *supra* note 25, at 24. Although he does not, Fried could conceivably rely on such tort principles to try to account for the cases decided under promissory estoppel. But the vague invocation of "tort principles" hardly provides a coherent account of promissory estoppel.

⁵⁹If Fried had acknowledged the numerous cases in which recovery is denied under §90 to promisees who detrimentally rely on promises, he might have felt compelled to examine these cases to explain either why the promise principle does not support recovery in those cases or why they are unsupportable.

⁶⁰133 N.W.2d 267 (1965).

⁶¹*See e.g., Recent Developments: Contracts - Expanded Application of Promissory Estoppel in Restatement of Contracts Section 90 - Hoffman v. Red Owl Stores, Inc.* 65 MICH L. REV. 351 (Dec. 1966); Bruce A. Coggeshall, *Note: Contracts: Reliance Losses: Promissory Estoppel as a Basis of Recovery for Breach of Agreement to Agree: Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), 51 CORNELL L. Q. 351 (1966); Charles L. Knapp, *Symposium on the Restatement (Second) of Contracts. Reliance in the Revised*

when courts do or should allow recovery for reliance on representations made during preliminary negotiations. Fried's discussion of *Hoffman*, however, is limited to the sole purpose of defending the distinctiveness thesis. Fried introduces the case only to refute the claim that it constitutes a counter-example to the distinctiveness thesis. Fried introduces *Hoffman* after he has taken the position that contract-as-promise requires an expectancy remedy for breach of contract. Since *Hoffman* awards reliance damages for defendant's failure to keep its promise,⁶² Fried's critics might argue it demonstrates that contract law is not based on the promise principle. Fried's response is that *Hoffman* should be understood not as a contracts case but as a torts case instead.⁶³ Fried thus defuses *Hoffman* as a threat to the distinctiveness thesis by reclassifying it as a tort law case, which is consistent with an award of reliance damages, rather than a contracts case, which requires, on Fried's view, an expectancy award. Once he has defused *Hoffman*, however, Fried makes no effort to explain when promissory estoppel will lie in a preliminary negotiation (or any other) case. His only point is that when it does lie, and reliance damages are awarded, it sounds in tort rather than contract.⁶⁴ The economic analysts, however, has no interest

Restatement: the Proliferation of Promissory Estoppel, 81 COLUM. L. REV. 52. (1981).

⁶²Because the court believes defendant's assurances fell short of a "definite" and detailed promise, it avoids describing defendant's conduct as "breach of contract" and concludes simply that "injustice would result here if plaintiffs were not granted some relief because of the failure of defendant to keep their promises which induced plaintiffs to act to their detriment." *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (1965).

⁶³"Promissory obligation is not the only basis for liability; principles of tort are sufficient to provide that people who give vague assurances that cause foreseeable harm to others should make compensation." *Contract as Promise*, *supra* note 25, at 24.

⁶⁴Fried's argument is not intended to presuppose that recovery in promissory estoppel cases is limited to reliance damages. As a matter of law, it is clear that this is not the case. Fried's point is simply that when reliance damages are awarded, liability cannot be based on contract. *Hoffman* is of interest to Fried solely because the court awarded reliance damages. Since contract as promise, in Fried's view, requires expectancy damages for breach of contract, Fried must argue that liability in *Hoffman* is not contractual.

in whether the case sounds in tort or contract, but is exclusively concerned with explaining when recovery will be allowed under promissory estoppel.⁶⁵

C. *The Ex Post Perspective in Adjudication*

In his highly influential critique of deontic contract theories, Richard Craswell argues deontic theories such as Fried's are seriously deficient because they fail to provide any guidance in understanding how courts do or should decide cases in which the relevant issue falls within a contractual gap.⁶⁶ For Craswell, contractual gaps exist whenever contractual parties either attempt but fail to resolve an issue unambiguously, or fail even to consider an issue.⁶⁷ He argues that "creative interpretation" is required to resolve any contractual disputes over issues falling within a contractual gap.⁶⁸ His central point is that deontic theories such as Fried's cannot explain or guide the interpretation necessary to fill contractual gaps. Fried's theory holds that courts in contract cases do and should hold the promisor to the content of his promise. But in gap cases the promise has no unambiguous content bearing on the relevant issue. As Craswell notes, the vast majority of contractual disputes require courts to settle issues not provided for by the express terms of a promise.⁶⁹ To name just a few, parties often fail to specify the proper remedy for

⁶⁵See e.g., Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996); *Enforcing Promises*, *supra* note 17, at 1317-19.

⁶⁶Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 395 (1989)[hereinafter *Default Rules*].

⁶⁷"While it is perhaps more common to speak of 'interpretation' in cases where parties attempt to resolve an issue but do so with insufficient clarity, and to speak of applying default rules in cases where the parties made no attempt to address an issue, the principle is much the same in either case." *Id.* at 505.

⁶⁸*Id.* at 504-5.

⁶⁹As Craswell puts the point, "some method must be found to *interpret* the parties' agreement, to provide rules governing any topic *not explicitly settled* by the parties." *Id.* at 504-5 (second emphasis added).

breach, the conditions under which performance is excused, the information, if any, each party must disclose to the other, which party should bear the risk of loss of goods in transit, and which warranties, if any, the promisor is providing to the promisee. In short, the express terms of an agreement always radically under-determine its content. An adequate descriptive and normative contract theory would provide a set of background rules for contract law to explain how courts do and should resolve such agreements. These background rules include both so-called “default rules,” which impute terms into all agreements in the absence of parties specifying otherwise, and “mandatory” rules, which impute terms that cannot be avoided into all agreements. Craswell argues that deontic theories such as Fried’s lack the resources necessary to identify and evaluate contract background rules because they are “content neutral. They give reasons why an individual who has promised to do ϕ thereby incurs some form of obligation to do ϕ , regardless of how ϕ is filled in.”⁷⁰ As a result, deontic contract theories must be supplemented with independent theories that “do virtually all of the work involved in fulfilling the needs of contract law.”⁷¹

Craswell’s critique provides a vivid context for examining the extent to which deontic theories are limited to the ex post perspective. If deontic contract theories hold that the sole ground for liability in contract is the parties’s past agreement, then deontic theories appear committed to an ex post perspective. Yet whenever an agreement fails to provide grounds for resolving a contract dispute, the ex post perspective runs out. Whether the problem is to recommend the content of legislated default rules, such as those found in Article 2 of the U.C.C., or to describe or assess common law default rules, the ex post perspective of deontic theories

⁷⁰*Id.* at 515-16.

⁷¹*Id.* at 508.

appears to disable them from providing answers. Fried would, in large measure, agree with this part of Craswell's critique, although he would not regard it as a criticism of his theory. As Craswell notes, Fried explicitly disavows the claim that the promise principle has implications for gap-filling. He readily admits that other principles, external to the parties and their agreement, must come into play to fill these gaps. Fried's sole objective is to demonstrate the absolute priority of the promise principle *within its domain*. Where that principle has no application, Fried has "no dog in the fight." As we have seen, Fried defines contract law as that body of law that can be explained and justified by the promise principle. In his view, contract law by definition runs out wherever contracts run out. For Fried, contract law and theory answer questions regarding matters addressed by contracts. Questions regarding matters not addressed by contracts can be addressed, of course, only by non-contract law and theory.

Thus, by conceptual *ipse dixit*, Fried removes the question of default rules from the arena of contract theory. This much is enough to demonstrate why economic analysts might find Fried's theory of limited interest. Fried is interested in defining and defending a version of contract law whose domain is circumscribed by the promise principle. Economic analysts of contract law are interested in explaining and justifying contract law. There can be no question that the problem of contractual default rules is fundamental and important to contract law. By apparently bowing out of the debate, Fried concedes the irrelevancy of his theory for much of interest to contract scholars. But to make matters worse (to the considerable distress of economic analysts like Craswell), Fried refuses to leave the stage after his swan song. Indeed, Craswell makes the point that Fried's theory is irrelevant to the default rule debate not by showing that Fried fails to endorse any default rules, but instead by demonstrating that Fried endorses a

host of default rules his theory cannot justify. For each default rule Fried supports, Craswell argues his theory's ex post perspective disables it from describing or evaluating default rules. Instead, Craswell argues that Fried helps himself to a jumble of arguments that appear to have no relationship to promise, autonomy, or each other. Craswell thus writes: "Sometimes Fried relies on people's existing expectations; sometimes he uses economic arguments; sometimes he rests on principles of 'fault' or 'altruism'; and sometimes . . . he advances no justification at all. Such a scattershot approach to the selection of default rules does little to advance our understanding of contract law."⁷²

Craswell's central claim is that the ex post perspective of deontic contract theories structurally disables them from identifying and evaluating contract background rules. Unfortunately, his illustrative critique of Fried proceeds on the basis of a conflation between two fundamentally different kind of default rules. Once this distinction is taken into account, Craswell's criticisms no longer appear to establish a generalized structural limitation of deontic theories. Instead, they reveal a simple disagreement over the sufficiency of different kinds of evidence for establishing whether contractual parties have formed subjective intentions on particular issues. Thus, even if Craswell's criticisms are sound, at most they establish that Fried's theory is currently irrelevant to determining the content of the particular default rules he discusses. But Fried's theory remains potentially relevant to all default rules, and may currently have direct implication for the content of default rules Craswell does not discuss. The relevancy of Fried's theory for default rules turns out to be a matter of contingent empirical fact, rather than a priori structural incapacity.

⁷²*Id.* at 523.

The key to understanding Fried's position is that his theory requires a strict distinction between interpreting the meaning of contract terms, and filling in gaps not governed by contract terms. Craswell lumps these problems together in his definition of default rules.⁷³ But for Fried, the constraints on a theory of contractual interpretation are quite different than those governing gap-filling. Fried reserves the term "interpretation" for the task of determining the subjectively intended meaning of a term. Thus, someone who has assigned a particular meaning to an agreement should regard herself as having *interpreted* the agreement only if she believes the parties to the agreement subjectively intended their agreement to have that meaning. By proposing an interpretation of a term, the interpreter implicitly asserts that the meaning ascribed to the term by the interpretation represents the subjectively intended meaning of the parties. Fried contrasts interpretation with "interpolation." An interpolation describes the task of adding semantic content to terms, or imputing entirely new terms in agreements, that the parties did not subjectively intend when they entered into their agreement.⁷⁴ Thus, someone who has assigned a particular meaning to an agreement should regard herself as having *interpolated* (from) the agreement only if she believes the parties to the agreement did not subjectively intend the assigned meaning. The distinction between interpreting and interpolating agreements is crucial to Fried's theory because it marks the boundary between contract and non-contract law. The task of interpreting a term falls squarely within contract law and theory, as they are conceived by

⁷³"While it is perhaps more common to speak of 'interpretation' in cases where parties attempt to resolve an issue but do so with insufficient clarity, and to speak of applying default rules in cases where the parties made no attempt to address an issue, the principle is much the same in either case." *Id.* at 505.

⁷⁴"In contract law, there is a vaguely marked boundary between interpreting what was agreed to and interpolating terms to which the parties in all probability would have agreed but did not." *Contract as Promise*, *supra* note 25, at 60.

contract-as-promise. Contract-as-promise requires fidelity to the content of promises and interpretations describe that content. The task of interpolating a term or agreement arises only if an interpretation is impossible because the parties formed no subjective intent relevant to resolving the issue in question. Interpolation is required only if a determination is made that the disputed issue falls within a genuine gap in the parties' subjective intentions. Thus, interpolations necessarily will be guided by non-contract law and theory.

Craswell's conflation of the distinction between interpretation and interpolation helps to explain why he is puzzled by Fried's insistence that the promise principle must explain some default rules, while it need not-- indeed cannot-- explain other default rules. For example, Craswell cannot understand why Fried asserts that the expectancy damage remedy for breach is a default rule compelled by the promise principle, but the default rules governing impracticability and mistake are not.⁷⁵ The short answer is that Fried believes that parties who form contracts that do not provide an explicit remedy term subjectively intend the expectancy remedy.⁷⁶ But he believes that parties who form contracts that do not provide an explicit term governing excuse

⁷⁵*Default Rules*, *supra* note 43, at 523.

⁷⁶Admittedly, Fried's justification of the expectancy damage rule is far from clear on this point. Fried simply asserts that "If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this proposition appears as the expectation measure of damages for breach. The expectation standard gives the victim of a breach no more or less than he would have had had there been no breach-- in other words, he gets the benefit of his bargain." *Contract as Promise*, *supra* note 25, at 17. My claim is that this justification presupposes that the parties subjectively intended their agreement to include the expectancy damage option for the promisee. Thus, Fried's claim that the expectancy rule follows from the principle that "the promisor should do as [he] promised," and that "he gets the benefit of his bargain" makes sense if we presume that the parties subjectively intended to provide the expectancy damage remedy as an option for the non-breacher. Others have argued that if specific performance is not available, expectancy damages are the logically or conceptually entailed remedy for breach of promise. See *e.g.*, Thomas Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW* (Peter Benson ed. 2001), and Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 *Osgoode Hall L. J.* 273 (1995). See *infra* Part IV.B. for my argument that this view is non-responsive to the Craswell's questions because it makes expectancy damages analytic, and simply raises the question of the appropriate remedy at one level removed.

and mistake failed to consider those issues and so had no relevant subjective intentions at all. In the former case, the promise principle requires courts to interpret the agreement in order to respect their autonomy and enforce their moral obligations. In the latter case, courts must interpolate by using non-promissory principles.⁷⁷ The promise principle (and thus contract law) has no bearing on matters on which parties failed to come to an agreement. Of course, the plausibility of Fried's specific conclusions about these particular default rules turns entirely on his basis for deciding that all parties not expressly stating otherwise subjectively intend their agreements to be governed by expectancy damages, while parties not expressly stating otherwise have formed no subjective intention concerning excuse and mistake.⁷⁸

⁷⁷“As we have seen in the discussion of mistake and impossibility, interpretation may fail to locate a core of agreement, and so at some point we must admit that the contract gives out. In such a case we have nothing to do but to reach for other principles of resolution than promise.” *Contract as Promise, supra* note 25, at 89.

⁷⁸A similar analysis applies for the other default rules Craswell considers. For example, Fried argues that, absent the parties specifying otherwise, all promisees should have the right to rescind the contract: “Parties bind themselves reciprocally. If one party treats himself as not bound, the other may also treat himself as not bound. By breaking his contract, a contractual partner not only opens himself up to claims for damages but releases his opposite number.” *Id.* at 117. Craswell views the question of rescission as just another default rule. As he sees it, we need some basis for choosing whether to interpret contracts as granting the right of rescission unless otherwise specified, or not granting that right unless otherwise specified. In Craswell's view, Fried's promise principle has no bearing on this question: “While a system of promising with that default rule would certainly expand a promisor's freedom, so too would an institution of promising with any other rule as its default rule. The quoted passage merely asserts that our system of promising contains rescission as one of its default remedies, without doing anything to justify that rule.” *Default Rules, supra* note 43, at 520. Craswell is thus mystified to find that Fried not only endorses the rescission default rule, but does so on the ground that it is a “corollary of the binding force of promising.” *Id.* at 520. Craswell is further confused when he discovers Fried acknowledging that, with respect to rescission, “[t]here is no obvious a priori reason for one or the other response.” *Id.* at 521 (quoting Fried).

But Fried's position is perfectly coherent. His justification for the rescission default rule is that “[a]ny other outcome would disturb the expectations on which contractual terms are usually established.” *Contract as Promise, supra* note 25, 118. Fried's claim is that most people subjectively intend their agreements to be governed by the rescission remedy option, and that this fact provides sufficient grounds for inferring such a mutual subjective intention in any case in which the parties fail to specify otherwise. *On the assumption that these premises are correct*, it follows that contract-as-promise requires contracts to be held to include the rescission remedy option. Given the truth of these premises, Fried's theory must treat the question of whether a contract is governed by the rescission remedy option as a matter of *interpretation*, not *interpolation*. In his view, there is no contractual gap to fill in agreements that fail to specify whether promisees are entitled to the rescission remedy. Rather, contract law must respect the actual subjective intent of the parties on this question, which requires interpreting agreements as providing the rescission remedy option. This analysis is consistent with Fried's claim that there is no a priori

Unfortunately, Fried does not explain his basis for making these determinations. Nor does he offer a general theory about how such determinations should be made. Nevertheless, Fried's argument refutes Craswell's claim that his theory has no *potential* relevance for any default rules. Fried's theory is directly relevant to determining the content of default rules for *interpreting* contracts. When there is persuasive evidence that the parties formed the relevant subjective intent, Fried's theory requires courts to interpret contracts in accordance with that intent, provided there is also persuasive evidence of its content. Craswell is surely justified in demanding that Fried justify his factual inferences about parties' subjective intent on various issues, such as contract remedies and excuses. But a demonstration that Fried fails to provide such a justification provides absolutely no support for the claim that Fried's theory is *necessarily* irrelevant to explaining or justifying the content of any default rules. It merely undermines Fried's case for the

reason for one rule or the other. Fried's argument instead rests on an a posteriori reason for favoring the rescission default rule: most parties in fact subjectively intend their agreements to include the rescission remedy option.

Thus, in the end, Craswell's objection is not that Fried's theory cannot possibly be relevant to justifying the contract default rule governing rescission. If Fried's factual premises are correct, his theory does provide a justification for choosing a rescission default rule (though Fried would claim it is an interpretive default rule rather than a gap-filling default rule). Craswell's real objection is that Fried's argument does not yet convincingly demonstrate that Fried's theory is *in fact* relevant to this default rule. Craswell's complaint is that Fried hasn't demonstrated the truth of his factual premises. He has two objections to Fried's grounds for inferring an actual subjective intention to include the rescission remedy in any given contract: "Fried cites no sociological data to support this claim," *Default Rules*, *supra* note 43, at 521, note 77; and "Fried says nothing to explain why the expectations of most people in the community should necessarily be dispositive in any individual case," *Id.* at 521. Both of these complaints constitute objections to the truth of the premises in Fried's argument, not the validity of his argument. None of these criticisms demonstrate that Fried's theory has no potential implications for the rescission default rule. The first objection rightly demands that Fried support a factual assertion, which may or may not be true. If the assertion is false, then Fried's theory in fact has no relevance for this particular default rule. But this fact in no way undermines the potential relevancy of Fried's theory for any other default rule. Its relevancy for any particular default rule will be purely contingent on people's subjective expectations. The second objection can easily be met by arguing that subjective intentions in particular cases can be reasonably inferred from true generalizations about the frequency of such subjective intentions in the general population (absent particularized evidence to the contrary). Finally, Craswell alleges Fried's argument contradicts other positions Fried has taken because "at other points in his analysis Fried seems to view the enforcement of community expectations as the realm of tort." *Id.* at 521. Fried would argue, consistently, that community expectations provide the *standards of conduct* governing tort law, while community expectations are relevant to contract law only insofar as they provide a *basis for inferring subjective contractual intent*.

relevancy of his theory to the particular default rules he discusses. The relevancy of Fried's theory for determining the content of any particular default rule will turn on whether or not the issue in question is one governed by the actual subjective intent of the parties. That determination may be difficult to make, but Fried's theory requires it to be made. Craswell's critique points out the need for Fried to develop a systematic and defensible theory for how this determination should be made without begging the question. But this is a problem necessarily faced by *any* contract theory. The very idea of background rules presupposes a metaphysically firm, if evidentially soft, distinction between matters within and outside the scope of an agreement. Indeed, at the outset of his article, Craswell makes precisely this distinction when he defines the domain of background rules as those rules required to settle disputes about topics not "explicitly settled" by the parties. Thus, before we can decide whether any background rule is required to settle a dispute, we must first determine whether the parties' agreement explicitly settled the issue in question. Like Fried, Craswell offers no theory for how this determination should be made.

Thus, Craswell's arguments do not, in fact, support his contention that Fried's theory is necessarily irrelevant for identifying and evaluating default rules. Both Craswell and Fried agree that, in Fried's terms, Fried's theory is relevant for interpreting contracts but irrelevant to interpolating them. Since Craswell includes both exercises under the rubric of "default rules," we can say that Fried's theory is relevant to determining the content of interpretive default rules but irrelevant to determining the content of interpolative default rules. Craswell's criticism is that Fried employs an unarticulated and undefended theory for deciding whether parties shared the relevant subjective intent in any given dispute. Craswell's claim is that we need a default rule to tell us what to do when we don't know whether deciding a case requires us, in Fried's terms, to

interpret or interpolate. For Craswell, the gap case is one in which either we know the parties did not form the relevant mutual intent or we don't know what mutual intent they formed. In either case, the court has to decide without advertent to the parties' intent. Fried would treat such cases as true gap cases that require the court to interpolate. As a practical matter, it would be impossible for the court to justify its decision on the basis of the promise principle because, by hypothesis, it has insufficient evidence of the relevant content of the promise.

But I suspect Craswell's real complaint here is that Fried's principal source for evidence of subjective intent is "background conventions and understandings" that create expectations,⁷⁹ as well as "inchoate meanings."⁸⁰ When "plain meaning" runs out, Craswell sees indeterminacy of subjective intent and the concomitant need for a true gap-filler. Although it is possible to fill the resulting gaps by advertent to background conventions, we need a theory of gap-filling default rules to tell us whether we should. For Fried, however, the subjectively intended meaning of terms is necessarily informed by background conventions. So when the surface meaning of a term does not resolve an issue, Fried adverts to background conventions to determine whether subjective intent is likely to extend beyond the surface meaning to resolve the issue.⁸¹ If in his

⁷⁹*Contract as Promise*, *supra* note 25, at 84-5.

⁸⁰"It is a truism in the philosophy of language that in interpreting a person's words we are not guessing at the hidden but determined content of some list in the speaker's head. Rather, our concerns particularize, render concrete, inchoate meanings. (So when a person refers to all the even numbers between 10 and 1000, he intends to refer also to the number 946, though that number may not figure explicitly on some list in his head)." *Id.* at 60.

⁸¹Here Fried forays into a brief discussion of the relationship between philosophy of language, semantics, and contractual interpretation. His view, informed by Lon Fuller's discussion of Wittgenstein, is that all meaning is necessarily contextually determined by a system of background expectations. Thus, "[p]romises, like every human expression, are made against an unexpressed background of shared purposes, experiences, and even a shared theory of the world. Without such a common background communication would be impossible." *Id.* at 88. He claims that the system of background conventions is not "susceptible to a factual, cognitively identifiable specification" in advance of all possible circumstances, but is nonetheless knowable: "It is possible to call something a matter of understanding, even though its actual results cannot have been specified beforehand in terms

judgment it does, then there is no need for a true gap-filler-- standard contract interpretation does the job on its own and the case is therefore governed by contract law.⁸² A true gap-filling default rule is required only if Fried believes the background conventions do not provide persuasive evidence of subjective agreement. Then courts must go beyond the agreement, and therefore beyond contract law, to resolve the dispute.⁸³ Thus, the true disagreement between Craswell and Fried is over the status of background conventions as evidence of subjectively intended meaning, not the potential relevance of contract-as-promise for interpretive gap-filling default rules. Their disagreement is over the familiar, albeit complex, question of the relationship between semantic theory, conventions, and interpretation, rather than the deep structure of deontic theory and its potential relevance for default rules.⁸⁴

Craswell's failure to take into account Fried's views on meaning and contractual

of necessary and sufficient conditions. . . . The fact that we cannot, for example, be said to know beforehand all instances of what counts as cruel behavior does not mean that our designation of a novel instance as true cruelty is an arbitrary decision. There is an element of understanding, and the concept of cruelty itself determines our decision, though we cannot fully know that determination beforehand." *Id.* at 87-8. Thus, on Fried's view, a court ex post can make a determination that the parties' subjectively intended a given meaning for a term in their agreement even though, at the time of their agreement, the parties could not have known this precise meaning was part of their intention.

⁸²Fried takes the standard good faith interpretation of contracts to provide a clear example of judicial interpretation, rather than interpolation: "In each case a reasonable interpretation of the parties' agreement, of their original intentions, against the background of normal practices and understandings in that kind of transaction, would be quite sufficient to provide a satisfactory resolution." *Id.* at 86.

⁸³Fried claims that in cases in which parties think they have agreed but actually have not, "[t]he one basis on which these cases cannot be resolved is on the basis of the agreement-- that is, of contract as promise. The court cannot enforce the will of the parties because there are no concordant wills. Judgment must therefore be based on principles external to the will of the parties." *Id.* at 60. Thus, he claims "[t]he further courts are from the boundary between interpretation and interpolation, the further they are from the moral basis of the promise principle and the more palpably are they imposing an agreement." *Id.* at 61.

⁸⁴Craswell has since written on the subject at length. See Richard Craswell, *Do Trade Customs Exist?*, in *THE JURISPRUDENCE OF CORPORATE AND COMMERCIAL LAW*, Jody S. Kraus and Steven D. Walt, eds., (2000). For my response, see Jody S. Kraus and Steven D. Walt, *In Defense of the Incorporation Strategy*, *id.* at 193.

interpretation is typical of the literature discussing Fried's theory. For example, a failure to appreciate Fried's interpretive views also leads Randy Barnett to the misleading conclusion that Fried's account of the objective theory of liability conflicts with his theory's claim that contractual liability cannot be imposed on unwilling parties.⁸⁵ The objective theory of contract treats parties as legally bound solely on the basis of their manifestations of intention, irrespective of their subjective intentions. Fried's theory clearly requires that contractual obligation be based on shared subjective intentions, and therefore rejects the objective theory of contract because it imposes contractual liability in the absence of such intentions. Fried argues that the objective theory of contract originated in a misguided attempt by classical contract law proponents to disguise the truly non-contractual nature of liability imposed in the absence of subjective

⁸⁵Barnett claims that "[s]ome will theorists uneasily resolve [the conflict when subjective understanding and objectively manifested behavior] by acknowledging that other 'interests'-- for example, reliance-- may take priority over the will (citing *Contract as Promise*, *supra* note 25, at 58-63). By permitting individuals to be bound by promises never intended by them to be enforceable, such a concession deprives a will theory of much of its force. Requiring the promisor's subjective will to yield always, or almost always, to the promisee's reliance on the promisor's objective manifestation of asset undermines the claim that contractual obligation is grounded in the individual's will and bolsters the view that contractual obligations may be imposed rightfully on unwilling parties." Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986)[hereinafter *Consent*], at 273-4. But Fried's view does not "bolster the view that contractual obligations may be imposed rightfully on unwilling parties." Quite the opposite. It takes the view that *non-contractual* obligations may be imposed rightfully on unwilling parties. Nor is Fried's theory embarrassed by "acknowledging that other 'interests' . . . may take priority over the will." When an individual objectively promises and causes another to justifiably rely, Fried holds that the state may be justified in protecting the objective promisee's reliance, even though the promisor did not subjectively intend to promise. This view is perfectly consistent with Fried's contract as promise. Such liability is justified by non-promissory, contractual principles. The will theory asserts only that promissory liability may be imposed if and only if the promisor subjectively intended to promise. Nothing about contract as promise prevents Fried or any other will theorist from holding that there are circumstances under which state coercion can justifiably be brought to bear against the will of individuals. For example, will theorists are not, and need not be, opposed to imposing criminal liability even though the source of the justification of such liability is not the will of the criminal. *See also, Consent* at 300-1 ("[A] theory that bases contractual obligation on the existence of a 'will to be bound' is hard pressed to justify contractual obligation in the absence of an actual exercise of will. It is difficult to see how one is legally or morally committed to perform an agreement that one did not actually intend to commit oneself to and still hew to a theory that based the commitment on its willful quality"). Again, Barnett misinterprets Fried's theory as being committed to the proposition that liability *of any sort* can be imposed on individuals in the absence of their will. The promise principle is intended to explain and justify contractual liability, not all liability.

agreement yet under the rubric of contract law.⁸⁶ But Fried does not reject the objective theory of liability generally. His claim is that when liability is imposed on the basis of what an ordinary person would have intended, the resulting liability can be characterized as genuinely contractual only if the hypothetical intentions of the ordinary person provide sufficient grounds for inferring the actual subjective intentions of the parties. In that case, the objective manifestations of intent serve merely as persuasive evidence of the presence of the subjective intent necessary for genuinely contractual liability (i.e., liability justified by the promise principle), rather than as alternative, non-promissory grounds for imposing liability. Thus, if the hypothetical intentions of the ordinary person do not provide adequate evidence of the parties' subjective intent, the imposition of liability based on objective (and decidedly not subjective) intent is non-promissory and therefore non-contractual.⁸⁷ Yet Fried has no objection to deciding such cases on this basis. Indeed, Fried readily admits that there are good reasons why courts should not allow individuals to escape liability on the ground that they did not subjectively intend what they objectively manifested. First, such claims might justifiably be disbelieved. But even if believed, a court

⁸⁶“Another of classical law’s evasions of the inevitability of using noncontractual principles to resolve failures of agreement is recourse to the so-called objective standard of interpretation. In the face of a claim of divergent intentions, the court imagines that it is respecting the will of the parties by asking what somebody else, say the ordinary person, would have intended by such words of agreement. This may be a reasonable resolution in some situations, but it palpably involves imposing an external standard on the parties.” *Contract as Promise*, *supra* note 25, at 61.

⁸⁷Fried could have made this point far clearer than he did. Recall Fried’s claim that “[i]n the face of a claim of divergent intentions, the court imagines that it is respecting the will of the parties by asking what somebody else, say the ordinary person, would have intended by such words of agreement. This . . . palpably involves imposing an external standard on the parties.” *Id.* at 61. Put this way, it is puzzling why Fried automatically rejects the court’s claim that it is respecting the will of the parties. It is possible that the parties did subjectively intend what the ordinary person would have intended even though there is a *claim* of divergent intentions. Parties make false, self-serving claims all the time. The argument makes sense, however, if we modify Fried’s sentence to read, “in the face of a *credible* claim of divergent intentions.” If a court believes that both parties did *not* subjectively agree on the relevant issue, but nonetheless resolves that issue, then the decision is not properly a matter of genuine contract law, as Fried conceives it. It would be false to assert that the decision is based on the will of the parties.

should impose liability anyway in order to protect the reasonable expectations of the promisee for which the promisor is responsible, or to safeguard the efficacy of contract law by insuring that parties will be able effectively to communicate subjective intent accurately in the future. The first ground for liability is based on the deontic value of preventing or compensating wrongful or negligent harm. The second ground is based on the consequentialist value of enhancing opportunities to incur contractual liability for future individuals. In Fried's view, both of these justifications for liability are justified, but neither of them ground *contractual* liability. Therefore, Fried supports liability based on the objective theory of intent as justified instances of non-contractual obligation. However, if a court believes that neither party subjectively intended what they objectively manifested, it should not impose liability unless this would undermine confidence in objective meaning. By undermining confidence in objective meaning, the decision would jeopardize the institution of contract law and the conception of autonomy and liberty it advances. Again, the question of whether to impose liability in this case depends on a balance of competing concerns external to the parties' (subjective) agreement. Fried's only point is that imposition of liability in this case would not be contractual, even though it might or might not be justified.⁸⁸

Thus, Fried's only concern here is to defend his conception of contract as promise against the

⁸⁸“Perhaps a promisor should not be allowed to claim that she did not mean by a term what is generally implied by that term. But if she is not allowed to excuse herself by showing this private, special intention, it is not because we doubt that sometimes people truly have such special intentions. Rather we may bar such a claim as a matter of fairness to the other party or as a matter of practical convenience. We rather suspect either (1) that the claimant did mean what is usually meant, took her chances, and is now trying to get out of what has turned into a bad deal; or (2) that though *she* didn't mean it, her opposite number did, and reasonably assumed that *she* did mean it, so that it would be unfair to disappoint the opposite party's expectations now by urging some surprising, unexpected, secret intention. . . . These are perfectly reasonable, practical grounds for administering a system that in general seeks to effectuate the true intentions of the parties. Where we really can be confident that neither party intended to cover this particular case, and where we can reach that conclusion without fearing a spreading disintegration of confidence in contractual obligations generally, no reason remains for enforcing this contract.” *Id.* at 66-7. To be perfectly clear, the last sentence should have read, “. . . no reason remains for enforcing this *agreement*,” because, of Fried's view, the only ground for enforcing that case is based on non-contract law.

claim that the objective theory proves contractual liability is non-contractual. As we have seen, Fried's standard response relies on conceptual stipulation: All contractual liability is based on promise, therefore any liability not based on promise is non-contractual. In a nutshell, Fried just wants it to be clear that decisions imposing liability for so-called "objective agreements" do not demonstrate that contract is not based on promise, but rather demonstrate that such decisions are not based on contract. Fried endorses the objective theory of liability, but rejects the objective theory of contract.

Craswell's critique therefore does not undermine the relevancy of contract-as-promise for interpretive default rules. But Craswell's other complaints stand. First, as Fried concedes, contract as promise has no bearing on default rules for interpolating agreements (true gap-filling). That this concession is no embarrassment to Fried demonstrates a fundamental difference between his objectives for contract theory and those of the economic analyst. His project is to explain and defend the distinctiveness of contract law, not to explain all "non-contract" law that may be relevant to enforcing agreements. Economic analysts of contract have no interest in the distinctiveness thesis. Their exclusive goal is to explain all legal doctrines relevant to enforcing agreements, whether or not those agreements qualify as "contracts" according to Fried's theory. This alone surely explains the why economic analysts find Fried's theory of little use. Second, Fried nonetheless opines on how such gaps should be filled by suggesting a variety of considerations for filling different kinds of gaps. For example, Fried invokes considerations of fairness to justify a gap-filling default rule requiring sharing in cases of impracticability and mistake,⁸⁹ but relies on considerations of "convenience" to justify the "mailbox" default rule

⁸⁹*Id.* at 57-73.

governing offer and acceptance.⁹⁰ As Craswell points out, Fried appears to offer no reason why fairness is not invoked to govern offer and acceptance, or why convenience is not relevant to the rules governing mistake and impracticability.⁹¹ Clearly, Fried cannot generate these conclusions by drawing on contract as promise because the rules are, by hypothesis, non-promissory cases. What is the basis for Fried's justification of these rules, and how in particular can Fried reconcile his use of consequentialist principles, such as future convenience for prospective contracting parties, with the deontic foundations of his theory?

The answer to both of these questions lies in Fried's broader jurisprudential views about the nature of law and adjudication.⁹² Fried subscribes to Dworkin's theory of law and adjudication, as Dworkin had developed it at the time Fried was writing. Fried believes that judges have no discretion in deciding hard cases because there is a right answer for every possible legal question. As Fried understands Dworkin's view, law provides a uniquely right answer in every case because it necessarily incorporates morality. The law consists in a "reasoned elaboration of principles, including moral principles,"⁹³ which together are, in principle, sufficient to generate a uniquely correct result in every case. Thus, the parties in adjudication have pre-existing legal rights which courts are bound to vindicate. In this respect, Fried sees a parallel between his general jurisprudential views and his theory of contract. The adjudication of contract disputes must be based exclusively on the prior subjective intentions of the parties. On this view,

⁹⁰*Id.* at 52.

⁹¹*Default Rules*, *supra* note 43, at 522-3.

⁹²For his discussion of jurisprudence and its relevance for his contract theory, see *Contract as Promise*, *supra* note 25, at 67-9.

⁹³*Id.* at 68.

the parties' prior subjective agreement creates moral rights and obligations the court is bound to enforce. Thus, the adjudication of contract disputes requires judges to take an exclusively ex post perspective. Similarly, on the Dworkinian view to which Fried subscribes, even in non-contractual disputes, decisions must be based on the litigants' pre-existing legal rights. All disputes require judges to identify and vindicate the pre-existing legal rights of the litigants. Thus, the adjudication of all disputes requires judges to take an exclusively ex post perspective. So while Fried views contract law as enforcing moral rights, he shares Dworkin's view that law itself incorporates morality. When judges decide cases, they are necessarily called on to enforce morality. In this respect, the deontic character of Fried's theory of contract is embedded in the deontic foundation of Dworkin's rights-based jurisprudential theory.

But Fried is at pains to emphasize that contract law, and the promise principle that justifies it, provides no constraints whatsoever on decisions that cannot be based on the litigants' subjective intentions. The constraints that apply to gap-filling default rules (for interpolation), therefore, are generated by the deontic character of adjudication. Gaps are to be filled, according to Fried, by "residual principles of law," which include moral principles.⁹⁴ On this Dworkinian view, all adjudication is constrained by the obligation of judges to respect the pre-existing legal rights of the litigants. Fried argues that the very idea that individuals have rights entails that individuals cannot be sacrificed to collective goals such as efficiency, redistribution, or altruism. Rights derive from the inherent value of autonomy— they enable individuals to plan, consider, and

⁹⁴ "[W]e know perfectly well how to fill the gaps in a contract. There is no bare flesh showing, as it were, when relations between persons are not covered by contractual clothing. These relations take place under the general mantle of the law. Indeed, the very absence of gaps in the law makes it easy to admit that there may be gaps in contract. For when relations between parties are not governed by the actual promises they have made, they are governed by residual general principles of law." *Id.* at 69.

pursue their own ends. Because individuals make these plans against society's background conventions, respect for individual rights prohibits courts from undermining these expectations without providing fair notice. Such a right is basic for securing individual autonomy. Without it, individuals would be unable to plan and pursue their ends. Any change in the content of the law must therefore be made prospectively only, either through legislation or judicial rulings with a purely prospective effect.⁹⁵ Thus, although Fried's theory does not prohibit change in gap-filling default rules, it constrains the rate of change and provides no direct guidance for the direction of change. Fried's underlying jurisprudential commitments therefore build in a normative bias in favor of the status quo for gap-filling default rules.

The litigants in gap cases have the right to have their legitimate expectations respected, and those expectations are based on society's background conventions.⁹⁶ These are the same background conventions that sometimes provide sufficient evidence of parties' actual subjective intent. But in gap cases these conventions both guide and constrain adjudication, not because they provide evidence of the parties' subjective intent, but because they form the basis of the parties' legitimate and therefore legally protected expectations. Thus, the deontic constraints of

⁹⁵"Conventions . . . define expectations, permit planning, and constrain the court's pursuit of either efficiency or altruism in the particular case. For if efficiency or altruism were our sole concern, there would be no a priori reason why they might not be better served if courts sometimes took it upon themselves to decide particular cases on an ad hoc basis, free of the constraints of preexisting convention. But courts generally do not operate on such an ad hoc basis, and the rarely admit it if they do. . . . Efficiency, redistribution, and altruism are certainly among the law's many goals. By pursuing those goals according, by only according, to established conventions—including conventions established prospectively or gradually by courts—the collectivity acknowledges that individuals have rights and cannot just be sacrificed to collective goals. The recourse to prior conventions permits individuals to plan, to consider and pursue their own ends. And once they have made and embarked on plans against this background it would be unjust to change the rules in midcourse Changes should be prospective only." *Id.* at 85.

⁹⁶Presumably, for Fried an expectation would not be legitimate if not grounded in good reason. Background conventions constitute one source of good reasons for forming expectations.

adjudication prohibit courts from taking an ex ante perspective by ignoring the parties' legitimate expectations. To do so would be contrary to the individual rights of litigants. Courts cannot simply pursue efficiency or any other value without regard to the rights of the parties, but must instead respect expectations based on background understandings.⁹⁷ However, because the rights of litigants are determined, in part, by their legitimate expectations, which in turn are determined by background conventions, if the background conventions *themselves* allow an ex ante perspective, then courts can *to that extent* take an ex ante perspective as well. Indeed, in such cases, the litigants not only lack grounds for complaint, but are affirmatively entitled the court taking that perspective by virtue of their legal right not to have their legitimate expectations undermined. Here, their legitimate expectation is that in adjudicating their dispute courts will take into account certain prospective effects of its decision on others. Thus, background social conventions that permit consequentialist considerations to be brought to bear in resolving certain kinds of issues permit, indeed require, courts to take such considerations into account when adjudicating disputes. In sum, Fried's deontic contract and jurisprudential views commit him to the ex post perspective in adjudication. But that perspective simply requires judges to vindicate the parties' preexisting rights. Parties in adjudication have the right not to have their legitimate expectations upset. But if their legitimate expectations are based on background conventions that permit prospective effects to be taken into account in resolving the issue they are litigating, then respect for their rights is consistent with resolving their dispute using an ex ante perspective.

⁹⁷"A court . . . must inquire into the background understandings (including those established by prior decisions) of a particular case. For those who have not patience with anything but forward-looking policies of social betterment, this inquiry will seem a vain, even foolish exercise— as would scrupulous adherence to one's promises." *Id.* at 85.

Fried thus provides a deontic justification for the possibility of the ex ante perspective in adjudication by demonstrating how the ex post perspective itself might require a shift to the ex ante perspective.

In the end, then, Fried's theory contemplates that both interpretation and interpolation will be informed by background conventions. When background conventions provide the basis for interpreting an agreement being adjudicated, the state coercion used to enforce the judgment is justified because it enforces a parties' moral obligation to keep a promise. The conception of autonomy foundational to Fried's liberal theory requires that individuals have the power to incur this obligation. When background conventions provide the basis for interpolating an agreement being adjudicated, the state coercion used to enforce the judgment is justified because it respects the individuals' rights not to have their legitimate expectations upset. Coercion is justified because the prevailing party has a pre-existing legal right to have his legitimate expectations protected. That right in turn is a corollary of the individual right to form, revise, and pursue a system of ends that is part of the conception of autonomy at the foundation of Fried's liberal theory. Thus, although the use of background conventions in both interpretation and interpolation is ultimately justified by the foundational value of autonomy, autonomy is mediated by the idea of voluntary obligation in the former, and the ideas of fair notice and planning in latter. In both interpretation and interpolation, background conventions are relevant only if they are consistent with the parties' subjective intentions. In interpretation, the various background conventions will be either displaced or implicitly invoked by the parties' subjective intentions. In interpolation, the background conventions will govern disputes between the parties not otherwise governed by their subjective intentions. Thus, Craswell's charge that, on this interpretation of

Fried's theory, "sociology is doing all the work involved in fulfilling the needs of contract law"⁹⁸ rings hollow. Given the necessary relevance of context to any interpretive enterprise, all contract theories must ultimately rely on a combination of sociology, other allied disciplines, and ordinary intuition. Craswell's charge instead must be that Fried's theory is somehow objectionably over-reliant on background conventions for interpretation. But in the absence of an argument for why and how a theory of contract interpretation should avoid or minimize its reliance on expectations, there is no basis for this claim. And in any event, it is clear that in Fried's theory, whatever work sociology is doing, it is hardly doing *all* the work. In fact, sociology does *none* of the normative work. Sociology is relevant to contract law only because, on Fried's jurisprudential view, the individual rights that liberal individualism requires courts to respect in contract cases are sometimes informed by society's background conventions.

Fried's view, so understood, still faces Craswell's practical question of how these background conventions are to be determined, especially by courts, and the normative question of how such a theory provides a basis for criticizing and recommending prospective changes in current default rules.⁹⁹ But our concern is not with the practical viability and theoretical breadth of Fried's approach to default rules, but the question of whether and how his theory has any implications for default rules. Fried has coherent arguments for his claim that both interpretive and interpolative default rules informed by background conventions are justified. Craswell claimed to demonstrate that Fried's theory necessarily is irrelevant because it necessarily takes an ex post perspective in adjudication. Craswell is right that Fried's *contract* theory has no

⁹⁸*Default Rules*, *supra* note 43, at 508.

⁹⁹*Id.* at 505-8.

implications for true gap-filling default rules and, in a sense, he is right that Fried's theory necessarily takes an ex post perspective in adjudication. But he is wrong that Fried's contract theory has no implications for interpretive default rules, and that Fried has no coherent *non-contract-theory* defense of the gap-filling default rules he supports. In both cases, Fried has a coherent argument for using background conventions as default rules. Fried's contract theory supports his claim for interpretive default rules, and his jurisprudential views support his claim for interpolative default rules. In addition, Fried has a coherent account of how both theories might allow a court to take both an ex post and an ante perspective in adjudicating agreements. And that account explains why Fried believes courts are sometimes justified in settling disputes over agreements by taking into account various consequentialist considerations. In the final analysis, Craswell's claim fails to reveal a fundamental feature of deontic theories that puts default rules and ex ante considerations beyond their reach. Instead, it reveals that contract interpretation implicates serious philosophical and pragmatic issues that transcend the differences in methodologies between deontic and economic contract theories.

D. *Summary*

The methodological commitments of Fried's deontic theory of contract explain why economic analysts of contract generally ignore or reject it. Fried accords theoretical priority to the twin objectives of justifying contract law and demonstrating its conceptual distinctiveness from other bodies of law. These lead him to dismiss or ignore, rather than explain, important contract doctrines that cannot be explained and therefore justified by the promise principle. His conceptualism also fuels his view that the law consists in the plain meaning of its doctrinal formulations and that case outcomes have no theoretical significance divorced from the reasoning

offered in their support. Economic analysts of contract law, however, are principally interested in explaining case outcomes, not the doctrinal formulations that purport to justify them. And they have no interest in preserving the distinctiveness of contract law from other areas of law. Indeed, given that their objective is to explain case outcomes, the theory with greatest explanatory power, in their view, will be one that provides an explanation of case outcomes across apparently distinct areas of law, thereby demonstrating the underlying unity, rather than distinctiveness, of apparently diverse areas of law such as contract and tort. Rather than seeking to explain the distinctiveness of contract law, economic analysts want to explain its distinctiveness away.

Finally, Fried's distinctiveness thesis, his subtle view about the relationship between contract theory and jurisprudence, and his insufficiently articulated views about semantics and interpretation invite misinterpretation and misunderstanding. Fried's concession that his contract theory does not speak to gap-filling default rules appears to confirm the economic analysts' view that deontic theories are irrelevant to this important debate. But as we have seen, Fried's contract theory has direct implications for interpretive default rules, and his general jurisprudential views about law and individual rights have equally direct implications for interpolative default rules. Misunderstandings of Fried's views about semantics and interpretation lead economic analysts and others to conclude his explanations of doctrines are inconsistent, arbitrary, or question-begging. In fact, his accounts reflect a consistent application of his interpretive methodology and jurisprudential views. In each kind of case, he first determines whether the context is sufficient to indicate the parties to a dispute are likely to have had a subjective intent relevant to resolving the question at issue. Then, he determines which background expectations are relevant either to interpreting the meaning of their agreement or filling in the gaps left open by their agreement.

The diverse and apparently inconsistent results reflect the underlying diversity of the background expectations that, on Fried's jurisprudential view, necessarily inform individual rights and thus constrain and guide adjudication.

E. *Conclusion*

To be sure, Fried's theory rests on many controversial premises and its presentation is unquestionably obscure. It is constructed on the shaky ground of several deep and complex debates of Fried's time: the classic death-of-contract debate in contract law, the CLS and emerging communitarian attacks on liberal individualism, opposing theories of semantics in the philosophy of language, and the jurisprudential debate between Dworkinian rights-theorists and Hartian legal positivists. Inevitably, Fried sometimes misjudges the plate tectonics of these shifting continents and his theory falls through the cracks. But it is the first sustained effort to align contemporary contract law with a normative theory that enjoys both wide intuitive appeal and deep philosophical credentials. Indeed, the most common objections to Fried's normative argument are based not on difficulties with its underlying Kantian conception of autonomy, but with its unreflective embrace of naive legal moralism: the inference that the state is justified in coercively enforcing all moral obligations.¹⁰⁰ Deontic contract theorists in Fried's tradition, therefore, often find little of interest in economic contract theory. Those theories are grounded on consequentialist principles which are widely regarded as counter-intuitive and philosophically

¹⁰⁰Peter Benson is the only critic who argues that Fried's conception of autonomy itself is seriously defective. But Benson's ground for objecting to Fried's theory— that it is ultimately a teleological rather than deontological conception— leads him also to reject every contemporary contract theory but his own. Moreover, rather than questioning the viability of autonomy justifications of contract law, however, Benson's claim is that contemporary autonomy contract theories must be rejecting because they do not remain sufficiently true to the deep philosophical arguments that explain the normative significance of autonomy. Benson therefore endorses a Hegelian theory of contract the rests on a thoroughly deontological conception of autonomy.

objectionable. Although no one denies the relevance of consequentialist reasoning for moral, political, and legal theory, only recently have serious academics begun to revive the claim that consequentialism can provide an adequate normative foundation for any of these enterprises. In addition, because deontic theorists accord priority to the normative project of legal theory, they take seriously the question of whether the law as it is written provides an adequate justification for the decisions reached under the law. Especially in light of recent theory emphasizing the importance that political justification be available for public inspection and debate, deontic theorists are dubious of theories that purport to explain judicial decisions on the basis of hidden reasons that dismiss the plain meaning of the justifications offered in the decisions themselves.¹⁰¹ Explanations of case outcomes divorced from their ostensible justifications may be useful for practicing attorneys, law professors organizing cases in casebooks, and even judges trying to take account of otherwise irreconcilable precedents that bind them. But they may have no inherent interest for deontic theorists seeking genuine normative justifications for the political coercion exercised through the rule of law. In the end, the most fundamental methodological difference between deontic and economic contract theorists is not only their differing respective priorities in the normative and explanatory projects of legal theory, but their differing conceptions of the objectives of legal explanation itself.

III. PETER BENSON

In Peter Benson's first major contribution to contract theory, he accords primacy to the

¹⁰¹For example, in *Political Liberalism*, Rawls argues that state coercion can be justified only by making available public justifications that draw on shared ideas in the public political culture. Peter Benson applies this idea to the justification of contract law. See *Public Basis*, *supra* note 49.

normative project of justifying contract law and grounds that justification on the idea of consent as a transfer of entitlement.¹⁰² Benson claims that the major doctrines of contract law conform to this conception of contract. Benson also argues that the entitlement theory of contract rests on a purely Hegelian conception of autonomy, and that only such a conception can provide an adequate normative justification of contract law. Benson's central thesis is that all contemporary contract theories except his, including ostensibly autonomy-based theories such as Fried's, provide a teleological justification of contract law. As such, their justifications do not derive from a genuinely deontic conception of autonomy in which individuals have free will. Each of these justifications, therefore, at most explains how contract generates a morally conditional obligation. Only a Hegelian justification of contract can explain how and why contractual obligation is morally unconditional. Moreover, Benson argues that the central doctrines and animating principles of contract law can be explained and justified only by this deontic conception of autonomy. Thus, even if the teleological arguments of contemporary contract theory could provide an adequate normative foundation for some legal institutions, they cannot justify the institution of contemporary contract law.¹⁰³

¹⁰²See Peter Benson, *Abstract Right*, *supra* note 27.

¹⁰³Benson rejects in their entirety every contemporary contract theory other than Randy Barnett's, including ostensibly autonomy-based theories such as Fried's and Kronman's, on the ground that they ultimately rest on teleological principles inconsistent with respect for the free will of autonomous persons and are therefore unable to explain or justify contract law. Benson rejects the contemporary autonomy-based theories of Charles Fried (*see Abstract Right*, *supra* note 27, at 1092-1117; *Contract*, *supra* note 26, at 37-40; *Public Basis*, *supra* note 49, at 288-93) and Joseph Raz (*see Contract* at 33-7), the welfare-based theories of Anthony Kronman (*see Abstract Right* at 1119-1145; *Public Basis* at 302-5; *Contract* at 45-8) and Charles Goetz and Robert Scott (*see Public Justification* at 299-302; *Contract* at 50-4), the corrective justice theory of James Gordley (*see Contract* at 43-5), the mixed autonomy-and-welfare theories of Michael Sandel (*see Abstract Right* at 1092, 1117-19) and Michael Trebilcock (*see Public Basis* at 312-15), and the reductivist theories of Lon Fuller (*see Contract* at 25-9) and Patrick Atiyah (*see Contract* at 29-33), which subsume contract law under general tort principles. Benson presents and criticizes Barnett's theory in *Public Basis* at 293-9 and *Contract* at 40-3.

However, Benson's more recent scholarship suggests he no longer views the Hegelian conception of autonomy as justifying contract law in its own right. Instead, Benson argues that the justification of contract law should proceed analogously to the justification of Rawlsian political liberalism. Rawls argues that a political conception of justice can be justified only by constructing principles of justice out of the fundamental ideas in the public political culture. The resulting justification does not presuppose the truth of any particular comprehensive moral view, but instead accommodates all reasonable comprehensive views, each of which, by definition, indorses political liberalism from its own point of view.¹⁰⁴ Similarly, Benson argues that the justification of contract law must be constructed from what he calls the basic normative ideas present in our public *legal* culture in general, and from the principles and doctrines of contract law in particular.¹⁰⁵ The possibility of such a "public juridical justification" presupposes that "there is present in the common law— in judicial decisions— a set of normative ideas that implicitly contain a whole theory of contract and, furthermore, that this theory is able to settle the very questions which the law must answer to adjudicate contract disputes."¹⁰⁶ Benson's claim, therefore, is that this set of ideas provides the normative foundation for the justification of contract law. Although Hegelian autonomy may indeed provide a true moral justification for contract law, its truth is irrelevant for purposes of providing the public justification that is "essential to making the coercive operation of the law legitimate" on a liberal conception of

¹⁰⁴See *Political Liberalism*, *supra* note 10. For an explanation of the idea of political justification and the criticism that it need not and cannot remain neutral on its own truth, see Jody S. Kraus, *Political Liberalism and Truth*, 5 *LEGAL THEORY* 45 (1999).

¹⁰⁵Benson, *Public Basis*, *supra* note 49, at 305.

¹⁰⁶*Id.* at 306.

justice.¹⁰⁷ Instead, the Hegelian concept of contract simply provides a heuristic conceptual framework for unifying the otherwise diverse set of basic normative ideas implicit in the common law of contracts.¹⁰⁸ Hegelian moral and political theory, then, plays no foundationally normative role in the public justification of contract law, except insofar as it is derived from, or provides a fair representation of, the normatively fundamental ideas in the public legal culture of contract law.

By adopting a Rawlsian approach to the justification of contract law, Benson in effect converts the justificatory project of contract theory into an explanatory project. Benson's initial project is to justify contract law by defending the Hegelian concept of autonomy and demonstrating how that concept explains and therefore justifies contract law.¹⁰⁹ But his current approach no longer requires him to defend the Hegelian concept of autonomy. Instead, he must

¹⁰⁷*Id.* at 306.

¹⁰⁸Benson argues that the conception of contract underlying and unifying the common law of contract "has been developed with great rigour and completeness in the long tradition of legal philosophy that stretches from Aristotle to Hegel. . . . While the work of Kant and Hegel, where this idea is most fully elaborated, supposes a philosophically deep conception of practical reason, their arguments can be presented and understood on the basis of widely-shared everyday notions of legal accountability and obligation. . . . In other words, the leading ideas and claims in their accounts of contract can be presented in a way that stands apart from their deeper philosophical elaboration. Moreover, while the philosophical tradition elucidates the form and content of this conception of contract at a high level of abstraction, it can provide guidance in the endeavour to exhibit the coherence and the unity of conception in the well-established doctrines of contract law, because after all, philosophy too begins— and can only begin— with ordinary moral experience." *Id.* at 321.

¹⁰⁹Rather, the burden on Benson's theory would be to defend the Hegelian conception of autonomy and contract, as well as establish that it explains and justifies contract law. All of Benson's writings on contract theory, however, simply presuppose the truth of Hegel's views. Indeed, in the principal article in which he presents his Hegelian theory of contract law, Benson repeatedly prefaces his conclusions with the phrase, "If Hegel is right," as he does in the final paragraph of the article. Benson, *Abstract Right*, *supra* note 27, at 1198. Instead of defending Hegel's views directly, Benson defends the claim that all autonomy-based contract theorists purport to ground their theories on an ideal of autonomy that can be vindicated only by Hegel's (and perhaps Kant's) conception of autonomy, and not the conceptions they indorse in their own theories. Thus, his argument is directed at those who already acknowledge the normative force of the Hegelian ideal of autonomy, but do not realize that their non-Hegelian conceptions of autonomy ultimately fail to ground that ideal adequately.

independently identify the normatively fundamental ideas implicit in the public legal culture of contract law, and then construct from these ideas a coherent theory of contract law to serve as the basis for arbitrating all contractual disputes. Unsurprisingly, Benson claims the Hegelian concept of contract is the best theory of contract that can be constructed out of the fundamental ideas in the public legal culture of contract law. But on this Rawlsian approach to justification, the normative force of the Hegelian concept of contract law derives entirely from its claim to be embedded in the normatively fundamental ideas of the common law of contract. The claim that the Hegelian theory of contract derives from the Hegelian concept of autonomy, and thereby vindicates a metaphysically deep conception of free will, has no bearing on its justificatory force.

Benson begins his sketch of a public justification of contract law by identifying three normative ideas fundamental to the private law, and one provisionally fixed point of contract law. The three normative ideas are found in the principle that there can be liability for misfeasance, but no liability for mere nonfeasance,¹¹⁰ the “juridical conception” of persons, defined independently of their abilities to pursue the good and as having a capacity to have, acquire and exercise rightful possession for and by themselves as free and equal,¹¹¹ and the idea of private transactions between two persons: that through their interactions, one party either acquires rightful possession of something from the other or, alternatively, suffers an interference with his or her rightful

¹¹⁰Benson makes this claim throughout his scholarship: “At common law there is one fundamental principles that provides a basic point of view from which the rights and duties that can arise between parties in private transactions are construed and elaborated. I am referring to . . . the principle that there can be no liability for nonfeasance, with the severely limited idea of responsibility which this entails. This principle pervades, and is often explicitly recognized as regulative, in all areas of private law. Indeed, it is taken as an essential and distinctive feature of private law. Offhand, it therefore appears well-suited to serve as an organizing principle for a public basis of justification of contract.” *Public Basis*, *supra* note 49, at 315.

¹¹¹*Id.* at 316.

possession by the other.¹¹² The provisionally fixed point of contract law is that the law should, in principle, protect the plaintiff's expectation interest.¹¹³ Benson does not purport to justify these normative ideas or the provisionally fixed point of contract law. Instead, his claim is that they constitute widely shared, natural, and appropriate starting points from which to build a theory of contract law. Thus, they are presented as facts about the public legal culture of contract law, rather than as defensible ideas or features of contract law. Any theory of contract law must begin by trying to take account of them. Presumably, the theory of contract is built, just as Rawls' builds the principles of justice, by using the process of reflective equilibrium. The justificatory task requires the contract theorist to attempt to comprehend the normatively fundamental ideas and fixed points of contract law within one coherent theory. Each normatively fundamental idea and provisionally fixed point of contract law can be rejected only if it cannot be rendered consistent with the maximally consistent theory available. Benson's claim is that Hegelian theory provides the best available theory to explain the coherence and unity of these fundamental normative ideas and the provisionally fixed point of contract law.

Thus, Benson's original theory of contract rests on the plausibility of Hegel's theory of autonomy and contract, and the success of Benson's efforts to demonstrate a substantial alignment between Hegel's conception of contract and the central principles and doctrines of contemporary contract law. Benson's new approach, however, constitutes a creative and original synthesis of Rawlsian political theory and Hegelian autonomy and contract theory. Its ultimate defensibility will turn, in large measure, on the defensibility of applying Rawlsian political

¹¹²*Id.* at 317.

¹¹³*Id.* at 317-18.

justification to a specific legal institution and its “public legal culture,” as well as the success of Benson’s effort to demonstrate a substantial alignment of contract principles and doctrine with the Hegelian contract ideal. The present purpose of examining Benson’s theory, however, is not to assess its merits, but rather to identify the extent to which it evidences the methodological commitments I have argued are associated with deontic theories of contract.

A. *Normative Primacy, Distinctiveness, and Doctrine as Data*

Benson’s project is devoted, first and foremost, to establishing the moral and political justification of contract law. Like Barnett, Benson rejects Fried’s equation of moral and legal obligation, and grounds legal obligation in consent rather than promise. But unlike Barnett’s theory, Benson’s initial theory justifies contract law as morally necessary to vindicate the Hegelian conception of autonomy and free will. Benson argues that a mere promise, without offer and acceptance, generates what Kant calls a “duty of virtue.” Duties of virtue are genuine moral obligations, but they are not owed to anyone in particular. Such moral obligations cannot explain or justify the use of state coercion to require compensation to a disappointed promisee because they fail to confer on the promisee a correlative moral right to the promisor’s performance. But when an offeror makes an offer that is accepted, the acceptance gives rise both to the promisor’s moral obligation to perform and to the promisee’s correlative moral right to the promised performance. Kant calls moral obligations which generate correlative rights “juridical.”¹¹⁴ For

¹¹⁴For the distinction between “duties of virtue” and “juridical” obligation, see Benson, *Contract*, *supra* note 26, at 40. For further elaboration and defense of the distinction, see Benson, *Grotius’ Contribution to the Natural Law of Contract*, 1 CAN. J. NETH. STUD. 1 (1985). See also *Public Basis*, *supra* note 49, at 293 (“[Contract doctrines] suppose a distinction between promises that create correlative rights and duties which are coercible, and promises that may only give rise to an ethical duty of fidelity;” *Id.* at 297 (criticizing Barnett’s theory because promises made with an intent to be bound may not create “a relation of correlative rights and duties which can be coercively enforced).”

Kant and Hegel, promises made as part of an offer effectively transfer to the promisee the moral right to the promised performance upon acceptance. Benson argues that this right constitutes ownership in whatever is promised. State coercion to enforce juridical obligations is therefore justified to protect individual ownership. Failure to perform a promise made as part of an accepted offer constitutes a refusal to respect a transfer of ownership (of the promised performance) that was effective upon acceptance. On Benson's Hegelian theory, the moral right of ownership is entailed by the Hegelian conception of autonomy and free will, and as such, is inalienable.¹¹⁵ Therefore, state coercion to enforce juridical obligations created by accepted offers is morally justified (indeed morally required) in order to protect the inalienable moral rights possessed by individuals conceived as having genuinely (metaphysically undetermined) free will.¹¹⁶ And as we have seen, even on the Rawlsian version of Benson's theory, this Hegelian framework for understanding autonomy plays a crucial role in the justification of contract law. It provides the unifying theory that explains how the normatively fundamental ideas of contract law cohere with one another and the expectancy remedy, the provisionally fixed point of contract law. In other words, Benson's view is that the most basic normative ideas and elements of contract law are best viewed as entailments of Hegelian autonomy theory.

Benson's explanatory agenda, then, is entirely in service of his claim that the common law

¹¹⁵According to Benson, Hegel claims that "[t]he essential first condition of the possibility of free will is that its activity be conceived as independent from determination by inclination or, more generally, by anything given to it." *Abstract Right*, *supra* note 27, at 1157. Further, "the first way in which self-determination is actualized must be as a person having a capacity to own external things." *Id.* at 1157. Thus, Hegel claims the moral capacity to own is "inalienable." *Id.* at 1165.

¹¹⁶"What abstract right entails is an account of the intelligibility of contractual obligation that can be realized by a positive legal order consistently with the Idea of freedom. Moreover, it implies that a person's individual capacity to own and therefore to acquire or to alienate by contract can never be denied outright, whether by the state or by another individual." *Id.* at 1188.

of contracts embeds the Hegelian concept of contract law. The Hegelian concept of contract law rests on clear distinctions between public law and the private law, and within the private law, between property, tort, and contract. Thus, like Fried's project, Benson's Hegelian project leads him to defend the distinctiveness thesis.¹¹⁷ Benson argues that contract law is distinct from other bodies of law because of its unique place in the private law. The private law itself, Benson argues, is founded on the principle of no liability for mere nonfeasance.¹¹⁸ That principle marks the private law as the exclusive domain of autonomy. In the private law, the sole basis for legal liability is respect for autonomy. The law of property respects autonomy by vindicating the moral right of ownership through initial acquisition entailed by autonomy. The law of torts respects autonomy by requiring compensation for wrongful harm to others' property (which includes their bodies). And the law of contract respects autonomy by facilitating and enforcing the voluntary transfer of property ownership. All legal liability in the private law is imposed in order to vindicate and protect individual autonomy by vindicating and protecting the individual right to

¹¹⁷Benson explicitly indorses the distinctiveness thesis throughout his work. See e.g., Benson, *Contract*, *supra* note 26, at 29 (rejecting Fuller's theory on the ground that it "does not attempt to justify the normal rule of contract damages on a basis that is consistent with the distinctive character of private law"); *Id.* at 36 (rejecting Raz's theory of contract on the ground that it does not "seem to account for the central and distinctive feature of contract").

¹¹⁸"[C]ontract law reflects a basic principle of private law that there can be no liability for mere nonfeasance." *Abstract Right*, *supra* note 27, at 1083; "By 'nonfeasance,' I mean the failure to confer an advantage upon another, in contrast to misfeasance, which is the failure to respect what *already* rightfully belongs to another." *Id.* at note 8; "At common law there is one fundamental principle that provides a basic point of view from which the rights and duties that can arise between parties in private transactions are construed and elaborated. I am referring to the . . . principle that there can be no liability for nonfeasance, with the severely limited idea of responsibility which this entails. This principle pervades, and is often explicitly recognized as regulative, in all areas of private law. Indeed, it is taken as an essential and distinctive feature of private law, in contrast to public law. . . . According to the principle of no liability for nonfeasance, a right always has the form of being a claim against someone else who is under a corresponding or correlative duty, and the content of the right always has to do with rightful possession of something that can be owned. . . . *Unless* and *until* one has rightful possession of something, others cannot be under a corresponding duty. Duties are thus obligations owed to persons with respect to something that is their own." *Public Basis*, *supra* note 49, at 315.

own and transfer property. Outside of the private law, justice may require that individuals come to the aid of others and otherwise take into account the interests, desires, and needs of others. But inside the private law, “[n]o one is accountable for failing to minister to another’s needs, wishes, or purposes. One need not assist others to acquire or preserve rightful possession of anything. What a person must not do is to interfere with, injure, or adversely affect another’s rightful possession, whether innate or acquired. The principle of no liability for nonfeasance stipulates only prohibitions.”¹¹⁹ This principle of limited liability, which Benson characterizes as the “moral point of view” of the private law,¹²⁰ constitutes the first of the three normatively fundamental ideas of the private law.

The second normatively fundamental idea of the private law is “the juridical concept of the person.” Benson claims the private law presupposes that “individuals are to be viewed as, and *only* as, subjects with a capacity to have, acquire, and exercise rightful possession for and by themselves. Their personal characteristics and activities are normatively significant only insofar as they can be construed in terms of this central and defining feature.”¹²¹ Further, individuals are conceived as free and equal, in the sense that every individual is entitled equally to the ownership rights safeguarded by the private law.¹²² The third normatively fundamental idea of the private law is the idea of a private transaction between two persons. In the private law, liability is assigned solely on the ground “that through their interaction, one party either acquires rightful

¹¹⁹*Id.* at 315.

¹²⁰*Id.* at 317.

¹²¹*Id.* at 316.

¹²²*Id.*

possession of something from the other or, alternatively, suffers an interference with his or her rightful possession by the other. Only insofar as interaction has this feature does it count as a transaction.”¹²³ Thus, Benson claims the principle of no liability for nonfeasance, the juridical concept of the person, and the idea of a transaction together form a unified and coherent theory of moral responsibility that underwrites liability in the private law, and distinguishes the private law from all other areas of law.

Contract law, in turn, is distinguished from property and tort by virtue of the kind of liability it imposes. Whereas property law simply assigns rights of exclusive possession, and tort law protects those rights from wrongful injury, contract law assigns liability for expectation damages to protect individuals’ ownership rights. While tort liability is for wrongful injury to property, contract liability requires no wrongful injury. Indeed, an expectancy award can be given even in the absence of any reliance by the promisee. The expectancy award, unique in the private law, demonstrates that liability in contract is premised on the view that the promisor transfers rightful ownership at the time his offer is accepted, rather than at the time he actually performs. On this view, performance does not itself effect a transfer of ownership. Rather, performance is required in order to respect the ownership rights *previously* transferred to the promisee at the time the promisor’s offer was accepted. Thus, a showing of detrimental reliance on a promise is no more relevant to contractual liability than a showing of injury would be relevant in an conversion action for theft. In both cases, the plaintiff’s recovery requires that he receive the value of what was already his. Just as the thief wrongfully interferes with the owner’s right of exclusive use of his personal property, the breaching offeror wrongfully interferes with the

¹²³*Id.* at 317.

promisee's right to the promised performance.¹²⁴

Benson thus vindicates the distinctiveness thesis by engaging in abstract analysis of general principles, and demonstrating the conceptual coherence between the expectation remedy and the Hegelian concept of contract. His explanation of offer and acceptance doctrine is abstract as well, never descending to the level of doctrinal detail (for example, he never attempts to explain or justify the details of offer and acceptance, such as the mailbox rule). Moreover, Benson's theory virtually never purports to explain how doctrines apply to generate particular outcomes in cases. Benson's theory is premised on the idea that an explanation of contract law must explain the language and concepts of contract law, not merely the outcomes of contract cases. Both his initial Hegelian theory, and his subsequent Rawlsian-Hegelian theory, take the plain meaning of doctrine at face value and seek a theory that unifies and justifies those doctrines in their own terms. In particular, Benson's view is that an area of law, such as contract law, must be explained from the point of view of the law itself as evidenced in the plain meaning of doctrinal language.¹²⁵

¹²⁴“[A]t the moment of formation, and therefore prior to and independent of performance, the plaintiff must be represented in legal contemplation as having acquired from the defendant actual rightful possession of something that is interfered with by breach and restored by an award of expectation damages at the remedy stage. In protecting the expectation interest, the law supposes that the plaintiff ought to have received the defendant's promised performance. We may infer from this that what, in legal contemplation, the plaintiff must be deemed to have acquired at formation is, therefore, rightful or juridical possession of this performance. Only if contract can be construed in this way will a breach constitute the kind of wrong that comes under misfeasance.” *Id.* at 319.

¹²⁵Benson writes that “theories of contract law must] preserve the essential character of contract *from a legal point of view.*” *Contract, supra* note 26, at 37 (emphasis added); he describes autonomy theories as trying “to account for *the legal point of view*” *Id.* at 33 (emphasis added); he argues that Goetz and Scott's and Kronman's theories fail to take “the retrospective orientation of *the legal point of view* in settling the rights and duties of parties.” *Id.* at 52 (emphasis added); he claims that “*contract law presents itself as a point of view* constituted by a set of principles and categories that articulate certain basic normative ideas” *Id.* at 54 (emphasis added); he argues that contemporary contract theories presuppose a distributive theory of fairness that “the positive law does *not* frame in distributive terms and *which appear on their face* to embody the values of individual autonomy and liberty” *Abstract Right, supra* note 27, at 1081-2 (emphasis added); he claims that “*on their face*, these legal doctrines suppose a distinction between promises that create correlative rights and duties which are coercible, and promises that may only give rise to an ethical duty of fidelity” *Public Basis, supra* note 49, at 293 (emphasis added); he claims a public justification of contract “would mean that there *is present in the common law— in*

Indeed, Benson quite explicitly rejects as a non-theory of contract any theory that purports merely to explain outcomes of contract cases, divorced from the plain meaning of the doctrines used by courts to decide them. This is, in fact, one of Benson's central criticisms of economic theories of contract law:

At no point does economic analysis make the legal point of view with its normative ideas the immediate object of its analysis. . . . Instead, it begins with interests and preferences and its sole normative principle is welfare-maximization. At most, economic analysis applies this framework directly *to the bare conclusions of contract doctrine detached from the normative ideas which give them life and meaning from a legal point of view*. It hopes to show that these conclusions coincide with what economics requires *from its own standpoint*. Even if economic analysis were to become complete in its own terms, it is doubtful that it could legitimately claim to be a theory of contract law as opposed to an economics of transactions.¹²⁶

Benson's failure to consider case outcomes reflects his methodological commitment to taking doctrinal language and concepts seriously as sources of law. On this view, outcomes are simply results whose explanation consists in elaborating the plain meaning of doctrine. Benson evidences no aspiration to explain how the doctrines he discusses apply to generate definite outcomes in specific factual settings. This is seen in his accounts of offer and acceptance, consideration, and the objective theory of intent.¹²⁷ In each case, his sole concern is to explain how the plain

judicial decisions— a set of normative ideas that implicitly contain a whole theory of contract.” *Id.* at 306 (emphasis added).

¹²⁶*Contract, supra* note 26, at 54 (first emphasis added). Benson also writes that “[i]n general, discussions of wealth-maximization, either as an explanation of the law or as a normative goal for the law, focus on whether the *conclusions* of legal doctrine and judicial decisions are, in fact, explicable on the basis of wealth-maximization.” *Public Basis, supra* note 49, at 307.

¹²⁷*See e.g., Public Basis, supra* note 49, at 307, 326. *See also* Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* (Peter Benson ed.) 118 (2001). (This Article was not available in time to be incorporated in the present analysis of Benson's work. However, its treatment of the doctrines of offer and acceptance, consideration, and unconscionability illustrate Benson's interest in explaining how the structural features of these doctrines conform to his conception of contract, rather than how doctrinal formulations determine particular outcomes in individual cases).

meaning of these doctrines coheres with the Hegelian concept of contract. No effort is made to explain, for example, why courts have found consideration in certain cases but not others. In general, Benson's view appears to be that once the plain meaning of contract doctrines has been unified under a Hegelian rubric, the heavy lifting of contract theory is done. There is the suggestion that a theory which provides a complete public justification of contract law would contain within it all the resources necessary to adjudicate any contract dispute.¹²⁸ But Benson's extensive theoretical efforts so far have yet to yield explanations of contracts case outcomes.

Benson's concern to vindicate the distinctiveness thesis derives from his view that contract law consists in the plain meaning of doctrine. For Benson, the task of both an explanatory and normative theory of contract law is to provide a normative principle that *inherently limits* liability to voluntary transfers. Thus, one of Benson's primary criticisms of economic theories of contract law is that the normative principle they endorse is "inherently expansionary:" It alone cannot explain the doctrinal limits of liability essential to contract law.¹²⁹ For example, the principle of welfare maximization cannot on its own explain why it would be impermissible to force involuntary transfers that maximized expected welfare. Economic analysts typically explain the voluntariness requirement of contract law as the best available institutional mechanism for

¹²⁸A public justification attempts to show that the public legal culture contains, even implicitly, a coherent and definite conception of contract informed by principles that can settle most, if not all, issues of justice that arise in contractual relations." *Public Basis*, *supra* note 49, at 321. But Benson continues, "Such a justification, if successful, will undoubtedly guide the application of these principles to particular facts, but it will not be determinative. Inevitably, judgment must be brought to bear to decide the significance, weight, and appropriate application of the favoured principles in particular, always individual, circumstances, thus making inescapable a range of different possible assessments, all reasonable." *Id.* Although he does not mention it, perhaps the most persistent cause of epistemic, if not metaphysical, indeterminacy in contracts stems from the problem of interpreting the content of agreements, rather than the difficulties of balancing various normative principles.

¹²⁹This is also the central, systematic criticism advanced against economic theories of tort and contract in ERNEST WEINRIB, *THE IDEA OF THE PRIVATE LAW* (1995).

insuring that property transfers maximize expected welfare given the contingent, empirical difficulties of identifying welfare-enhancing transfers absent consent. But the welfare principle itself carries with it no inherent prohibition against forced transfers. In contrast, the deontological Hegelian conception of autonomy which Benson endorses explains why the voluntariness requirement is a morally necessary, rather than empirically contingent, feature of contract law.¹³⁰

Benson's rejection of the economic explanation and justification of the voluntariness requirement reflects two methodological commitments. The first is that only a deontological conception of autonomy can provide an adequate justification of state coercion. Thus, demonstrating how contract law is just one institutional variant among others for advancing the goal of maximizing expected welfare provides, in his view, no justification at all. The goal of maximizing expected welfare is not normatively defensible as a foundation principle for justifying state coercion.¹³¹ Second, an adequacy condition on any explanation of contract law is that the explanatory principle demonstrate why the essential features of contract law are essential to contract law. Economic theories explain why the essential features of contract law are contingently justified, while genuinely deontological explanations, such as Benson's, explain why those essential features are necessarily justified. Benson's view is that only this sort of explanation and justification of contract law explains the concept of contractual liability that is both implicit and explicit in the plain meaning interpretation of contract doctrines. An adequate explanation and justification of contract law, therefore, must explain why contract liability is

¹³⁰Or on the Rawlsian version of Benson's theory, the Hegelian concept of autonomy constitutes the deepest moral conception embedded in the public legal culture of contract law.

¹³¹Or on the Rawlsian version of Benson's theory, Benson's criticisms would be that the principle of welfare maximization is inconsistent with the deep moral conception of the person embedded in the public legal culture of contract law.

essentially, not merely contingently, different than tort liability, and why liability in the private law generally is essentially, not merely contingently, different than liability outside of the private law. The principle of welfare maximization provides precisely the opposite kind of explanation and justification. It explains how conceptually distinct areas of law can be explained and justified as institutional variants devoted to the maximization of expected welfare. For economic analysts, the “inherently expansionary” nature of the principle of welfare maximization is a virtue that affirms its explanatory power. For Benson, the economic view of the boundaries of conceptually distinct areas of law as contingently, rather than necessarily, justified demonstrates its manifest failure to provide an adequate explanation of the body of law it purports to explain. In short, deontic theories explain, and economic theories explain away, the apparent distinctiveness of contract law.

Benson’s criticism of economic contract theories that rely on the notions of Pareto and Kaldor-Hicks efficiency also illustrate how disagreements between deontic and economic contract theorists often stem from the different priorities each assigns to the normative and explanatory goals of contract theory. Benson argues that the concepts of Pareto and Kaldor-Hicks efficiency are inherently inadequate explanatory tools because both can be applied to assess the efficiency of a transaction *ex ante* or *ex post*.¹³² For example, a transaction that is Pareto efficient *ex ante*, because each party prefers the exchange at the time he agrees to it, may not be *ex post* Pareto efficient, at the time of performance. Pareto efficiency itself cannot explain why the *ex ante* Pareto result that argues for enforcing the agreement should be privileged over the *ex post* Pareto

¹³²Benson’s criticism is based on similar criticism made by Jules Coleman and Michael Trebilcock. *See Public Basis, supra* note 49, at 284-88.

result that argues against enforcing the agreement. Some normatively prior principle is necessary to justify indexing the Pareto inquiry to the ex ante or ex post perspective. Efficiency theories that rely on the Pareto criterion are therefore normatively incomplete. Yet efficiency theorists typically privilege the ex ante Pareto result without defense, and proceed to demonstrate how various legal doctrines can be explained by viewing them as advancing ex ante Pareto efficient transactions. Such economic analysts are content to stipulate the primacy of the ex ante Pareto result simply because by doing so they are able to explain case outcomes. They have little interest in defending the Pareto criterion itself, let alone the normative primacy of the ex ante Pareto result. Deontic theorists such as Benson reject the Pareto criterion as normatively inadequate from the start, and so evidence no interest in testing its explanatory powers. For them, there is no point in such an exercise because it will not advance understanding of the normative justification of contract law. For economic theorists concerned to explain contract outcomes, the proof is in the pudding (or perhaps, any port in a storm will do). The Pareto criterion is attractive if and only if it can explain and predict case outcomes. A demonstration of how the (ex ante) Pareto principle can unify a set of outcomes that otherwise appear arbitrary is useful for lawyers. Further, it potentially contributes to the justification of contract law because it demonstrates that contract case outcomes can be rendered coherent and mutually consistent. Presumably, this much will be required of any minimally adequate justification of contract law.

Benson's theory is far more philosophically sophisticated than Fried's and Barnett's. His chief objective is to demonstrate how all contemporary contract theories, even those ostensibly based on autonomy, are ultimately teleological in character, and therefore cannot vindicate the concept of autonomy as the exercise of free will. He rejects Fried's theory as teleological because

it ultimately grounds the moral obligation to keep a promise on the contingent desire to maximize individual freedom.¹³³ He rejects Barnett's theory because it premises contractual liability solely on a manifested intention to be bound irrespective of the offeree's acceptance, and thereby fails to explain and justify the promisee's legal right of enforcement. And he effectively demonstrates how every other contemporary contract theory ultimately rests contractual liability on teleological grounds.¹³⁴ In their stead, he presents Hegel's theory as a truly deontological theory of contract. Hegel's theory provides an express argument for the moral necessity of contract law as the embodiment of autonomy and the vindication of truly undetermined, free will. Although Benson's grasp of the normative foundations of contemporary contract theory is firm, and his Hegelian critique quite effective, it is simply not his ambition to explain how contract doctrine yields particular outcomes in particular cases. Just as it is equally and manifestly not the ambition of economic theories to provide a genuinely deontic explanation and justification of the plain meaning of contract doctrine.

B. *The Ex Post Perspective*

¹³³Benson, *Abstract Right*, *supra* note 27, at 1103-17.

¹³⁴Benson's demonstrates both the teleological character of contemporary contract theories, and how they fail to cohere with the normatively fundamental ideas underlying the private law and the distinctive features of contract law, such as expectancy damages. Although his demonstration of their ultimately teleological character is convincing, his characterization of some economic theories of contract are not always equally convincing. For example, Benson subscribes to Trebilcock's claim that Goetz & Scott's net beneficial reliance theory supports imposition of contractual liability in the absence of the parties' consent to be legally bound. He therefore rejects their theory as inconsistent with the normatively fundamental principle of no liability for nonfeasance. *Public Basis*, *supra* note 49, at 300-303. But Goetz & Scott's theory does not countenance the imposition of liability in the absence of consent to be bound, and indeed rejects liability in such circumstances. Rather, their theory in effect provides an interpretive rule for implying such consent. They argue for enforcement in bargain contexts, in which an intent to be legally bound is more likely than not, and against enforcement in non-bargain contexts, in which an intent to be legally bound is less likely than not, absent special circumstances. Their theory simply provides an "interpretive" default rule for deciding whether to enforce promises absent clear evidence of the parties' intent to be bound.

Benson argues that the private law in general, and contract law in particular, evidences the “retrospective orientation of the legal point of view in settling the rights and duties of parties to a particular past transaction now before a court.”¹³⁵ As we have seen, Craswell claims this retrospective orientation disables autonomy theories from resolving disputes concerning contractual gaps.¹³⁶ Recall that Fried allows gap-filling to take prospective effects into account because gap-filling falls outside the domain of contract law and is governed by general principles of non-contract law. Thus, Fried argues that the goal of facilitating future contracting qualifies as an acceptable rationale for adopting a particular gap-filling rule. Similarly, Barnett allows gap-filling to take prospective effects into account, even though it falls within the domain of contract on his view, because his functionalist justification requires contract law to minimize the expected disagreement between subjective and objective consent. Benson, however, appears categorically to reject any teleological reasoning in contract law, and so rejects all justifications of judicial decisions in contract cases based on its prospective effects. Thus, Benson rejects Fried’s and Barnett’s argument that contractual gaps should be filled according to rules that will decrease the expected costs contracting by decreasing the expected frequency gaps in future contracts. Such reasoning is teleological in character and therefore inconsistent with Benson’s account of contractual obligation. Benson therefore must either deny the existence of contractual gaps, or explain how courts should fill them based solely on ex post considerations of autonomy.

¹³⁵*Contract, supra* note 26, at 52.

¹³⁶Trebilcock also raises Craswell objection against autonomy theories. Benson puts Trebilcock’s claim as follows: “We should not forget that the rules are elaborated in the context of adjudication. Thus, the rules will be imposed on at least one set of litigants as the proper resolution of their dispute, even though they will have had no opportunity to contract around them. This, however, violates their autonomy, making the tension between welfare and autonomy values inescapable.” *Public Basis, supra* note 49, at 283.

Benson's first strategy is to argue, like Fried and Barnett, that the cases Craswell believes constitute contractual gaps are not in fact true gap cases. Benson claims that Craswell generates gap cases only by invoking a widely discredited theory that limits interpretation to express meaning and does not consider meaning implied from context.¹³⁷ For example, Benson argues that once implied contextual meaning is taken into account, the doctrines of non-disclosure, mistake, and frustration can be justified on grounds of actual consent, and therefore do not, as Craswell claims, constitute gap-filling background rules.¹³⁸ Benson claims that each of these doctrines applies when "one party seeks to be released from her duty to perform on the basis that she would not have made the agreement had she known at that time what she now knows."¹³⁹ Whether they should be released depends, in Benson's view, on whether their contract explicitly or implicitly excuses performance under the relevant circumstances. In the absence of express language addressing a particular excusing condition, Benson argues the parties should be regarded as having implicitly consented to the general principles underlying contractual obligation. In particular, the parties should be regarded to have implicitly (but nonetheless actually) consented to the principle of no liability for nonfeasance. Because the parties tacitly agree to the background principles of contract law when they intentionally undertake contractual liability, and

¹³⁷ "[T]he public justification does not limit the kind of act of will that can generate a contractual obligation to the express words of the parties. Conduct or words of any kind may provide a basis for inferring manifestations of will that can reasonably be construed as mutually-related voluntary acts Moreover, like any meaningful act or utterance, such conduct and words must be viewed and interpreted in a given particular context." *Id.* at 323.

¹³⁸ "[T]he public justification roots the allocation of risks in the parties' actual consent. . . . Actual consent can be express or implied. The central idea is that the analysis turns entirely on what the parties did. In this way, it is thoroughly retrospective and indifferent to dynamic considerations." *Id.* at 328-9.

¹³⁹ *Id.* at 329. Benson continues: "In the cases of non-disclosure, the complaint is that the party with the information should have disclosed it to the party now asking release. Where there has been mistake or frustration, typically neither party possessed the information at the time of entering the agreement." *Id.*

the principle of no liability for nonfeasance is one of those background principles, all contractual parties should, prima facie, be interpreted as having “assumed the risk of such losses.”¹⁴⁰ This prima facie interpretation can be defeated by evidence that one of the parties expressly or implicitly made the other’s contractual rights and duties “in effect conditional upon the absence of certain information imperfections.”¹⁴¹

How should courts determine whether the parties implicitly agreed that a particular non-disclosure, mistake, or frustration of purpose would constitute an excuse for performance?

Benson argues that a court must determine

the parties’ common intention retrospectively on the basis of their manifested acts or will, reasonably construed in accordance with an objective standard. The test is: looking at the terms and subject matter of a contract in light of its surrounding circumstances, can we infer that the parties considered, or ought to have considered, as reasonable people, the duty to perform as so obviously dependent on the non-occurrence of a contingency that, had the contingency been brought to their attention, they would have thought it unnecessary to provide for it explicitly in their agreement? If yes, a court is justified in finding an implicit condition that makes that duty to perform dependent on the absence of the contingency.¹⁴²

Benson’s analysis in effect treats the principle of no liability for nonfeasance as an “interpretive” background rule against which parties’ intentions will be construed absent evidence to the contrary. His claim is that this principle is publicly known and therefore constitutes an objective source for interpreting the meaning of contracts. The failure of contractual parties to manifest an

¹⁴⁰*Id.*

¹⁴¹*Id.* at 330. Benson continues: “The parties’ common intention to make performance conditional may be inferred, not only from the parties’ express words, but also from the ‘substance, words, and circumstances’ of their transaction. In short, this common intention may also be found to be implicit in their agreement as interpreted in its particular context. In both instances— express and implicit— it should be emphasized that this determination is arrived at by inferring from what the parties have actually done.” *Id.* at 330-331.

¹⁴²*Id.* at 332-3.

intention to the contrary justifies the inference that they intended the background understanding to govern. Unless contextual evidence establishes a contrary intent, all parties actually, though implicitly, consent to being legally bound to perform irrespective of any nondisclosure, mistake, or frustration of purpose. Thus, Benson theory, like Fried's and Barnett's, relies on the distinction between interpretive ambiguity and genuine contractual gaps, the difference between Fried's interpretation and interpolation. Benson claims that every case of excuse for non-disclosure, mistake, and frustration can be resolved by mere interpretation, rather than interpolation, because parties always implicitly intend to be bound to perform unless express terms or context indicates otherwise, in which case they implicitly intend performance to be conditioned. Either way, the question is one of determining contractual intent, not filling in a gap where no contractual intent exists. Benson's contract theory can therefore resolve questions of non-disclosure, mistake, and frustration without taking an ex ante perspective that takes prospective effects into account. These cases all turn, instead, exclusively on an ex post inquiry into the parties' contractual intent, albeit implied or tacit. Thus, these doctrines do not require Benson's theory to sacrifice its exclusively teleological character.

Now economic analysts like Craswell would likely find this response unsatisfactory for two reasons. First, although this view of these doctrines does demonstrate how these disputes can be resolved using the ex post perspective, Benson provides no guidance for determining the circumstances under which courts will or will not allow these excuses. On Benson's view, it depends on the court's determination of the parties' actual intent, which in turn is discovered by answering the hypothetical question of whether the parties would have agreed to the excuse had it been brought to their attention. Benson provides no account of the circumstances under which

courts will answer this hypothetical in the negative or affirmative. In contrast, economic analyses of these doctrines purport to identify structural features of the parties' circumstances that will lead a court to excuse or require performance. Because some of these economic accounts begin by asking precisely the same hypothetical Benson asks, it might be possible to combine Benson's view with the more detailed explanations economic analysis provides. The economic analyses often hold that courts find excuses in the particular circumstances they identify because those are the circumstances under the parties would have agreed to those excuses had they considered them. But economic analysis does not make the further claim that this hypothetical agreement provides compelling evidence that the parties in fact actually, although implicitly, agreed to such an excuse. It justifies the practice of excusing performance in those circumstances on the ground that doing so is likely to allow parties to maximize the expected joint value of contracts in the future. But Benson would claim these are the circumstances under which the parties in the dispute actually did agree that performance would be excused. For economic analysts, this inference is unnecessary, so Benson's analysis adds nothing of value to the explanatory enterprise. For Benson, however, the inference to actual intent is critical to maintaining the impermissibility of ex ante considerations in contract adjudication.

The second reason economic analysts are likely to find Benson's account unsatisfactory is that it stipulates, rather than demonstrates, that all parties actually intend their contracts to contain no excuses, absent express or contextual evidence to the contrary. Craswell's intuition is that, at least in some cases, parties simply do not consider, tacitly or otherwise, the question of whether performance should be excused by a particular condition. Benson asserts that the principle of no liability for nonfeasance is basic to contract law and that therefore, all else equal, all parties tacitly

consent to it. But Benson's inference from the principle of no liability for nonfeasance to a presumption against excuse begs the question. The distinction between nonfeasance and misfeasance presupposes a logically prior determination of a party's obligations. Whether a party's conduct constitutes misfeasance or nonfeasance depends entirely on what that party is obligated to do. If a contract contains an excuse, then failure to perform constitutes nonfeasance, not misfeasance. By definition, if a party's performance is excused, he has no obligation to perform. Excusing performance is therefore perfectly consistent with the principle of no liability for nonfeasance. Indeed, the imposition of liability in the face of a valid excuse would itself violate the principle of no liability for nonfeasance. However, if a contract does not contain an excuse, then, by definition, failure to perform constitutes misfeasance, rather than nonfeasance. The imposition of liability in the case of unexcused performance is therefore also consistent with the principle of no liability for nonfeasance. The principle of no liability for nonfeasance, therefore, makes the imposition of liability turn on a logically prior and independent determination of the parties' obligations. The principle itself can be applied only if the parties' obligations have already been determined. It is therefore logically irrelevant to making that determination in the first instance. Thus, Benson's assertion that parties tacitly intend their contracts to contain no excuses for performance relies on a question-begging argument. Given that the principle of no liability for nonfeasance provides no grounds for inferring actual intent on questions of excuse, Benson's claim boils down to a mere assertion based at most on an intuition Craswell does not share.

Unsurprisingly, Benson's argument fails to demonstrate the logical impossibility of a contractual gap. Even if there were some reason to believe most parties tacitly agree that

performance will not be excused, it is still possible that under some circumstances, parties might not agree either way (as a matter of subjective or objective intent). Both Fried and Barnett emphasize that actual consent, even merely tacit or implied consent, can only go so far. In their view, contractual gaps will always be possible in principle. Benson avoids putting his deontic commitment to the test by denying the possibility of contractual gaps. But his argument for that claim does not succeed. Benson could claim that there are other basic principles in the public legal culture of contract law to which parties tacitly consent and thereby avoid contractual gaps. This approach is reminiscent of Fried's strategy of falling back on general principles of law to fill contractual gaps. But because Fried acknowledges contractual gaps, he claims these principles are not part of contract law and so avoids the need to claim that parties tacitly consent to them. Because Benson is committed to finding such principles within contract law, and unlike Barnett he rejects teleological justifications within contract law, he is forced to argue that everyone necessarily gives their tacit consent to all the principles underlying contract law. But both Fried and Barnett resist the claim that consent can be stretched that far. By asserting that claim, Benson risks diluting the normative significance of consent.

Benson's discussion of expectancy damages illustrates the same tendency to dodge the question of contractual gaps by defining them away. Craswell argues that the question of what remedy a party is entitled to for breach is often unaddressed in contracts and therefore constitutes a gap that must be filled. Benson claims that expectancy damages, like the principle of no liability for nonfeasance, is simply a constituent part of contract law. But unlike his analysis of mistake, disclosure, and frustration doctrines, Benson does not suggest that the expectancy rule therefore constitutes an "interpretive" background rule that creates a prima facie case for expectancy

damages absent the parties' contrary manifestation of intent. Instead, he appears to argue that the best public justification for contract law will necessarily include expectancy damages in all contracts because it is the only remedy consistent with the normatively fundamental ideas underlying contract law. On this view, expectancy damages are indispensable for maintaining and explaining the distinctive structure of contract law because any other remedy would be inconsistent with the uniquely contractual idea that a transfer of ownership takes place at formation, rather than at performance.¹⁴³ Benson's defense of the expectancy measure of damages amounts to the claim that the promisee who accepted an offer is necessarily entitled to the promised performance or its equivalent. Benson's claim, therefore, is that Craswell misconstrues the question of contractual remedy as a contractual gap, not because parties implicitly agree to the expectancy remedy, but because the right to expectancy damages is analytic: the very idea of a contract entails it. But rather than avoiding Craswell's question, by construing the expectancy remedy as analytic, Benson just raises it again at one level removed.

Benson's claim is that when *A* promises *B* "to do X," that promise entails *B*'s right to *A*'s performance of X or its equivalent. Any other remedy would be inconsistent with the idea that contract transfers from *A* to *B* at the time of formation the entitlement to *A*'s performance of X. But Craswell's question can be recast in Benson's analytic framework. Craswell's question is

¹⁴³“The idea that the formation of a contract entails a transfer of non-physical possession at the moment of agreement implies, in turn, a general entitlement in principle to expectation damages for breach of contract. Expectation damages, I have suggested, fit with and are implied by this conception of contract, consistent with the principle of no liability for nonfeasance. . . . If the plaintiff were limited to reliance damages, a contract could not be viewed as conferring any possession different from or in addition to what the plaintiff already had *prior* to the transaction. Contract could not be conceived as a mode of acquisition, and the defendant's duty to perform would apply to something that the plaintiff possessed prior to and independent of the defendant's promise. The action for breach would be indistinguishable from a claim in tort against a defendant for failing to use due care in the making and the performance of a voluntary undertaking. But then there would be no need for the further legal requirements of offer and acceptance or consideration. We could not account for the legal point of view.” *Id.* at 324-5.

how to interpret *A*'s promise to *B*. It is possible that *A*'s promise is "to do X," subject to the implicit qualification that in the event he fails to do X, his sole obligation will be to reimburse *B* for any harm suffered because of *B*'s detrimental reliance on *A*'s promise. Alternatively, it is also possible that *A* made his promise without considering whether *B* should be entitled to expectancy or to reliance damages for his failure to do X. In both of these cases, Benson's claim that expectancy damages are analytic provides no purchase on what amount *A* must pay *B* in the event of breach. If a court determines that *A*'s promise was "to do X or pay reliance damages," then, in Benson's terms, a court awards expectancy damages by requiring *A* to pay *B*'s reliance damages, not *B*'s expectancy (i.e., the value *B* would have received if *A* had done X). If a court determines that *A* simply did not consider, tacitly or otherwise, the proper remedy for his failure to do X, then requiring *A* to pay *B*'s expectancy cannot be justified on the ground that expectancy is analytic to contract. So defined, expectancy merely requires that the promisor give the promisee his expectancy. But the promisee's expectancy turns on what was promised. In a true gap case, the promise is silent on what remedy was promised, so the expectancy remedy, as Benson conceives it, can provide no guidance as to what *A* should be required to pay *B*. Expectancy simply requires *A* to pay *B* the value of his promise, but it provides no assistance in determining the content of *A*'s promise. Thus, the problem with Benson's expectancy analysis is precisely the same as the problem with his analysis of non-disclosure, mistake, and frustration. In both cases, the principles he invokes presuppose the answer to the question he uses them to answer. Just as the principle of no liability for nonfeasance presupposes, and therefore cannot determine, a prior determination of the parties' obligations, the analytic conception of expectancy on which Benson relies presupposes, and so cannot determine, a prior determination of the content of the promise.

Because promises can contain a term governing the obligation of the promisor upon failure to perform, the award of an expectancy remedy, as Benson conceives it, requires a prior determination of the promised remedy to which the promisee is entitled. In short, Benson's analytic conception of expectancy is content free. It directs a court to enforce the parties' agreement, but it provides no guidance for interpreting the content of that agreement. And it is precisely that determination that leads Craswell to search for an interpretive default rule. Benson avoids that search only by stipulating a vacuous, analytic definition of expectancy that assumes away the problem of a genuine contractual gap.

Thus, Benson's response to Craswell's critique insists on maintaining the ex post perspective, but does so by failing to explain case outcomes and neglecting to explain how courts do or should resolve genuine contractual gaps. Unlike Fried and Barnett, however, Benson is unable to avail himself of the various teleological justifications for adopting gap-filling rules. Presumably, Benson feels compelled to reject Fried's rationale's for gap-filling, such as maximizing individual freedom, and Barnett's analogous goal of minimizing the gap between subjective and objective intent for future parties, as both impermissibly teleological. Once it is conceded that genuine contractual gaps are possible, and cannot be defined out of existence through analytic techniques, Benson faces the same cross roads that Barnett and Fried faced by ceding ground to teleological arguments. But once he concedes the possibility of genuine contractual gaps, it is difficult to see how he take the position that gap-filling must take place within contract law (unlike Fried's view), and that no teleological arguments can be used to justify gap-filling rules (unlike Fried's and Barnett's view). If consent runs out, something else must replace it. Yet it is not readily apparent what other facts about the parties and their transaction

would be relevant to fill a gap from an ex post perspective in adjudication.

Unless Benson ultimately agrees with Fried that genuine gaps fall outside the domain of the private law, his theory's commitment to the ex post perspective appears to disable it from addressing the problem of contractual gaps.

IV. CONCLUSION

Contemporary contract theories share the ambition of discovering an internal coherence and consistency in the law of contracts. Such a discovery advances both the pragmatic goals of lawyering, legal design, and adjudication, and the normative goal of justifying the coercion exercised through contract law. Despite this shared ambition, economic and deontic contract theories appear to disagree at every turn. Many of the apparently first-order disagreements between economic and deontic contract theories in fact reflect implicit second-order disagreements over the status as law of doctrinal statements and pure case outcomes, the relative priorities of the normative and explanatory enterprises of contract theory, and the importance and nature of explanations of the conceptual boundaries between contract law, the other areas of the private law, and public law. I have suggested that deontic contract theories tend to treat the doctrinal statements, rather than case outcomes, as the essence of contract law, accord primacy to the normative project of contract theory, and relatedly, regard the necessary distinctiveness of contract law from other bodies of law to be an essential feature of contract law that any adequate contract theory must explain. In contrast, economic theories of contract tend to treat bare case outcomes as the essence of contract law, accord primacy to the explanatory project of contract theory, and attempt affirmatively to explain away, rather than to explain, the apparently necessary

conceptual distinctiveness of contract law.

I have not argued, however, that any of these methodological tendencies are themselves necessary commitments of either deontic or economic contract theories. My claim is that the best developed theories of each kind evidence these tendencies, and that attending to them helps to understand why deontic and economic theorists are often at cross purposes, rather than at logger heads. Surprisingly, the one methodological issue that appears most likely to entail logically opposing commitments in deontic and economic contract theories turns out not to account for any systematic differences between these approaches. Thus, the strong association between deontic theories and the *ex post* perspective, and economic theories and the *ex ante* perspective, does not account for the different normative and explanatory positions these theories advance. While Benson professes a deontological commitment against gap-filling, because he relies on unsuccessful arguments to deny the possibility of contractual gaps, it is unclear he has a sustainable *ex post* position on contractual gaps. He may eventually be forced to allow teleological considerations to enter by, for example, following Fried and relegating gaps to noncontract law. But it is clear that for Fried and Barnett, what appear to be deep second-order disagreements over which of these perspectives is most appropriate to adjudication turn out, in most instances, to be good faith first-order disagreements over how particular contracts should be interpreted. Deontic theorists tend to be content to leave interpretation to the vagaries of context and “shared background understandings,” while economists tend to demand firmer, more operational, criteria for contract interpretation. In this respect, both enterprises would be well-served by efforts to clarify the meaning of express terms as well as the particular background understandings in various common business contexts. The difference between deontic and

economic theorists on this count is probably best explained by the historical aspiration of economic analysis of law to be a quasi-empirical science, and the historical development of deontic theories of law as straightforward applications of purely philosophical theory. It is therefore easy to understand why economic analysts would strive to replace vague interpretive inquiries with predictively valid operational tests, while deontic theorists, familiar and comfortable with the perennial questions of philosophy of language, would see no reason or way to avoid conclusions that leave the law subject to the deep complexity and ultimate indeterminacy of meaning.

The methodological commitments underlying the analyses of contemporary contract theory may not be logically compelled, but they are systematically in evidence, to various degrees, in the major theories I have considered. By attending to these differences, contract theorists can replace pointless debates with more fruitful inquiries over the genuine points of disagreement, and begin to evaluate each other's theories on the criteria most appropriate to them. Ultimately, the hope is that by exposing these methodological differences, a more complete contract theory can be developed that clearly articulates and defends its methodological commitments and provides a more comprehensive explanation and justification for the law of contract.