

# FROM THE WILL THEORY TO THE PRINCIPLE OF PRIVATE AUTONOMY: LON FULLER'S "CONSIDERATION AND FORM"

*Duncan Kennedy\**

*Lon Fuller's "Consideration and Form" originated a scheme for the analysis of contract questions based on multiple formal and substantive considerations, with "the principle of private autonomy" first among equals. This Article places Fuller's scheme in the context of the critique of the nineteenth-century will theory of contracts and the rise of sociological jurisprudence and legal realism. Fuller built on European legal theory and on civilian contract law solutions that seemed more flexible than those provided by the objective theory of contract formation and consideration doctrine. Fuller's scheme came closer to modern policy analysis than anything in the prior literature. It nonetheless achieved only a partial synthesis, denying any place to what the writers of the time called the "social" dimension of the field and underplaying conflict among the factors he identified. These traits may be explained by the fact that he was breaking new ground and by the center-right ideological agenda he was pursuing within private law theory.*

## INTRODUCTION

In this Article, I read Lon Fuller's "Consideration and Form"<sup>1</sup> as an incident in the emergence of what I will call the "conflicting considerations" model of legal reasoning. I restrict myself to a single area within this large frame: the development of American contract theory from the publication of Holmes's *The Common Law* in 1880 up to the publication of Fuller's article in 1941. This will be a study of the writings of legal academics, rather than of case law, of what the Europeans call "doctrine." It will be a major theme that, during this period, American contract theory was continuously responsive to the challenges posed by European legal philosophy and by civilian contract theory, so that what I will be describing is a truly international development.

In brief, my thesis is that the current understanding of American legal academics is that each and every one of the valid legal norms that makes up our legal system (including private, public, and international law) *can be understood* as the product of what I will call "conflicting considerations." Every rule *can be understood* as representing a choice in the colloquial lawyers' sense of a "policy question." We resolve such questions by balancing conflicting considerations, and throughout this paper I will categorize these as formal, substantive, and institutional.

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\* Carter Professor of General Jurisprudence, Harvard Law School. Thanks to Marietta Auer, Andrea Barenghi, David Barron, Scott Brewer, Christine Desan, David Kennedy, Roy Kreitner, and Todd Rakoff. Errors are mine alone.

<sup>1</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

Formal considerations have to do with the choice between rules and standards of greater or less generality, arranged in rule/exception or rule/counter-rule configurations. Substantive considerations include conflicting utilitarian or welfarist considerations, conflicting moral principles, and conflicting rights implicated in the decision. Conflicting legal institutional considerations arise from the fact that we address the choice of a legal norm in the context of the separation of powers, federalism, the division of sovereign power among nation states and international organizations, and so forth.<sup>2</sup>

At present in the U.S., I think we all agree that the conflicting considerations that are invoked in public, private, and international law disputes are analogous. There is a single underlying model of policy conflict with which we can easily contrast a model of legal necessity, or deduction, or "law," or straight "doctrine." There is an equally clear contrast with what I will call a "reconstruction project," in which a legal theorist uses preferences, rights, moral philosophy, or democratic theory to develop right answers dictated from an outside normative system.<sup>3</sup>

I will refer to all of these modes of arguing—formal, substantive, and institutional—as involving conflicting considerations, rather than using the word "policy," for two reasons. First, the consciousness I want to describe is a particular development of the widespread sense of elite legal academics in the first half of the twentieth century that they should replace something they loosely called "deduction" with something they loosely called "policy analysis." The particular form of analysis that triumphed was the conflicting considerations type, rather than the initially far more popular type in which a (single) policy requires a rule, much as deduction can require a rule, except in the mode of social rather than logical necessity. Second, it seems a good idea to try to avoid confusion

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<sup>2</sup> I develop this typology at greater length in Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 78-80 (1991) [hereinafter Kennedy, *A Semiotics of Legal Argument*]. See also DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 393 n.6 (1997) [hereinafter KENNEDY, A CRITIQUE OF ADJUDICATION] (citing various typologies); J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 78-110 (1986) (offering a typology of legal arguments).

<sup>3</sup> The consensus appears when comparing the starting points of reconstruction of today's authors. For example, compare RONALD DWORKIN, *LAW'S EMPIRE* 151-64 (1986) (describing the "pragmatist"), and RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 71-100 (1990) (discussing "practical reason"), with ROBERTO M. UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 78-105 (1996) (describing "pessimistic progressive reformism"). For descriptions of the general consciousness I am describing, see MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 14-42 (1988) (describing moral norms and policy goals influencing common law); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 269-72 (1992) (summarizing and critiquing developments in legal thought since 1960); ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 41-48 (1982) (offering overview of "pragmatic instrumentalist" theories).

with the more restrictive use of the word “policy” to refer to the utilitarian subset of considerations.<sup>4</sup>

The genealogical question that interests me is how we got to what I am claiming is the nearly universal elite legal academic view that we *could* indeed resolve all situations where there is a choice of norm by balancing conflicting considerations of one kind or another. Of course, there is a lot of conflict about whether we *should* balance in cases where we clearly could if we wanted to, about how often we have a choice, and even more about how we should go about balancing and what we should balance when that procedure seems appropriate. As to the significance of balancing for the rule of law, adjudication, or liberal or radical political theory, there isn’t even agreement about how to conceptualize the disagreement.

For private law, I will argue, the most important respect in which the situation in 1900 differs from that in 2000 is that, in spite of their complete disagreement about the sources and ends of law, the rival schools of nineteenth century legal theory were in agreement that there was a single primary basis of legal liability. As Pound argued persuasively in 1917, the main schools of legal theory, including natural rights (Lockean in the U.S.), metaphysical moralism (Kant), idealism (Hegel), historicism in the mode of Henry Maine (status to contract), social Darwinism, and utilitarianism, were in agreement about the crucial characteristics of modern law. The state ought to and largely did in fact define the rules of law so as to guarantee the free exercise of individual will, subject to the constraint that willing actors respect the like rights of other willing actors.<sup>5</sup> This agreement existed whether or not one was a positivist in legal theory. In other words, even if you believed that the only coherent definition of law derived it from the will of the sovereign, you were overwhelmingly likely to believe that the end of the sovereign’s commands should be the liberation of the individual will, subject only to the constraints necessary for everyone to have equal freedom.

This Article is devoted to showing how this understanding of contract theory came apart, and was replaced by the conflicting considerations approach. I distinguish between external and internal critiques, and between critiques that used the analysis of formal considerations—considerations of administrability—in undermining the will theory, and critiques that demonstrated the presence of other substantive policies than will within the contract core. I will have practically nothing to say here about the emergence of conflicting institutional considerations as a recognized sub-category within private law theory.

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<sup>4</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22, 90 (1978).

<sup>5</sup> See Roscoe Pound, *The End of Law as Developed in Juristic Thought II: The Nineteenth Century*, 30 HARV. L. REV. 201, 202, 223-25 (1917); see also Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 554-58, 575-78 (1933) (describing will theory of contract); Max Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575, 575-77 (1943) (discussing centrality of will in nineteenth-century legal thought).

Fuller's contribution in "Consideration and Form" was to the long-term project of moving from the will theory of contractual liability to our conflicting considerations model, by arguing persuasively that, even after the demise of the will theory, a "principle of private autonomy" was and should be the key consideration in private law theory, to be harmonized with, and occasionally balanced against, a small number of counter-principles.<sup>6</sup> His article superseded in a decisive way two earlier approaches to the critique of the will theory, which were either to refute it absolutely, or to subordinate it as a mere means to a "higher" goal, for example, "the social," or the "relational," and then restrict its scope, say, by excluding labor law from its ambit. The first approach annihilated the will theory, while the second left it intact within its restricted domain. Fuller, by contrast, reduced it to the status of "first among equals," even within the private law core.

I don't want to claim that these were "firsts" in the sense that they had never occurred to anyone before. I do want to claim that the article is the first to manage to "stand for" these propositions. In the genealogy of the conflicting considerations model, this, rather than factual priority, is what makes an article important.

"Consideration and Form" was, however, no more than a kind of mid-point in the development of the conflicting considerations model. The reason for this is that Fuller achieved a coherent formulation of the new approach, as applied to private law, in part through the device of choosing conflicting considerations that were arguably non-ideological. In order to understand our situation at the end of the century, it would be necessary to take the story forward from Fuller's article, through the process by which the potentially threatening traces of the political that Fuller purged from his version of the core found their way back into it. In this process, the key actors after the Second World War were Friedrich Kessler, Stewart Macaulay, and Ian Macneil.

And then we would have to take up the stage that begins around 1970. At that point, contract theorists moved from setting up the conflicting considerations model to trying to supersede it, either with one or another new normatively cogent integrating model (*e.g.*, rights, law and economics, democracy, republicanism, equality, personhood), or with one kind or another of meta-theory of the conflicting considerations model itself (*e.g.*, critical legal studies). I don't think the common understanding of the role of policy in legal reasoning has changed much as legal theorists have pursued these projects.

Before I begin, I should indicate, although I will not pursue, the partisan orientation behind this work. One of the many themes of critical legal studies over the last 25 years has been the notion that there is such a thing as American legal consciousness, and that it has a history we can trace. Of course, if it exists it has many possible histories. The one that

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<sup>6</sup> Fuller, *supra* note 1, at 806.

I've worked to construct has been a Death of Reason narrative (a *grand recit* of *grands recits*), in which legal consciousness participates in an even more general or abstract history of American thought that in turn participates in a Western story of loss of faith. It is important that loss of faith is something that happens as an event along a rationalizing work path that transforms whatever discourse we are talking about, so that we lose faith (or don't) in reason in a world that has been transformed by reason, rationalized to the point of arbitrariness, so to speak. This is a familiar Western account; among its various bards perhaps my favorite is Horkheimer, who published his most notable version, "The End of Reason," in 1941, the year that Lon Fuller published "Consideration and Form" in this law review.

The era of reason is the title claimed by the enlightened world. The philosophy this world produced is essentially rationalistic, but time and again, in following out its own principles, it turns against itself and takes the form of skepticism. The dogmatic or the skeptical nuance, depending on which was given the emphasis, in each case determined the relation of philosophy to social forces, and in the shifting fortunes of the ensuing struggle, the changing significance of rationality itself became manifest. The concept of reason from the very beginning included the concept of critique. Rationalism itself had established the criteria of rigidity, clarity and distinctness as the criteria of rational cognition. Skeptical and empirical doctrines opposed rationalism with these selfsame standards. The left-wing Socratic opposition branded Plato's academy a breeding place of superstition, until the latter moved toward skepticism.

Skepticism purged the idea of reason of so much of its content that today scarcely anything is left of it. Reason, in destroying conceptual fetishes, eventually destroyed itself. . . . None of the categories of rationalism has survived. . . . Since this opinion has pervaded every stratum of our society, it does not suffice to propagate freedom, the dignity of man or even truth. Any attempts along this line only raise the suspicion that the true reasons behind them are either held back or are entirely lacking.<sup>7</sup>

This passage reflects the darkness of the year 1941, a darkness of which the reader will find no trace in "Consideration and Form." Horkheimer and Fuller seem to be characters from different worlds. For the one, the meaning of the moment, suffused in the pain and death inflicted on innocent real bodies in the camps and battlefields of Germany and Russia, is that the "progress of reason that leads to its self-destruction has come to an end; there is nothing left but barbarism or free-

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<sup>7</sup> MAX HORKHEIMER, *The End of Reason*, in THE ESSENTIAL FRANKFURT SCHOOL READER 26, 27-28 (Andrew Arato & Eike Gebhardt eds., 1978).

dom."<sup>8</sup> For the other, the point is that it "would... be unwise, and in a broad sense even impossible" to abolish the doctrine of consideration.<sup>9</sup>

And yet Fuller's resuscitation of the will theory of contracts, which he himself had helped slay a few years earlier, seems in retrospect hard to understand without the background represented by Horkheimer. I mean that Fuller's article is part of the reaction of the liberal intelligentsia against the rise of Nazi and Soviet totalitarianism. Moreover, its politics, I will argue, represent a strand within the reaction, that of the center-right.

There is a second connection. In my mind, the history of American contract theory presents a paradigmatic case of reason unraveling itself, with "[t]he dogmatic or the skeptical nuance, depending on which was given the emphasis, in each case determin[ing] the relation of philosophy to social forces."<sup>10</sup> Since around 1970, the question has been what to do with the yarn. But the question is too close to us to permit even an attempt at an answer in the "philosophy of history" mode in which this essay is written.<sup>11</sup>

Part I summarizes "Consideration and Form," introduces the conflicting considerations model, and briefly traces some elements of its history in general legal theory. Part II describes the external critique of the will theory—according to which we should subordinate it to higher values, then restrict it to the "sphere" in which it will operate to achieve those values. Part III takes up two different internal critiques of the will theory. One argues that contract law is more than will, because reasons of administrability constantly lead us to disregard will. The second argues that even if we restrict will to an appropriate sphere, according to higher motives of ethics and utility, there will be substantive considerations other than protecting will at play in deciding on contract rules. Here I explore the historical origins of Fuller's triad of private autonomy, reliance protection, and prevention of unjust enrichment, as the substantive bases of contract enforcement. In Part IV, I argue that Fuller's particular contribution came with a center-right ideological subtext, namely the expulsion of "the social" from the doctrinal core of contract law. The path of development of the conflicting considerations model in contract theory involved the reintegration of this element, understood as threateningly ideological, into that core. Throughout, I argue that "Consideration and Form" deserves its fame not because it contributes to our understanding of legal form or the doctrine of consideration, but because it moved several important incremental steps forward along the path to our present conflicting considerations consciousness, steps that had been very fully prepared by (acknowledged) previous steps.

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<sup>8</sup> *Id.* at 48.

<sup>9</sup> Fuller, *supra* note 1, at 824.

<sup>10</sup> Horkheimer, *supra* note 7, at 27.

<sup>11</sup> My model in this Article has been Catherine Colliot-Thélène, *LE DÉSENCHANTEMENT DE L'ÉTAT DE HEGEL À MAX WEBER* (1992) (discussing the disenchantment of the state from Hegel to Max Weber).

## I. CONFLICTING CONSIDERATIONS IN LEGAL THEORY

A. “*Consideration and Form*” as *Conflicting Considerations Analysis*

I first read Fuller’s article in 1972, at the suggestion of a senior colleague, John Dawson, while I was an assistant professor teaching contracts. It profoundly influenced my first law review article, called “Legal Formality,”<sup>12</sup> which I was writing at the time, and then, to a lesser degree, my second, “Form and Substance in Private Law Adjudication.”<sup>13</sup> I thought it made sense of consideration doctrine, with which neither my student experience, using the Fuller and Braucher casebook,<sup>14</sup> nor my first teaching effort, using Ian Macneil’s radically anti-formalist casebook,<sup>15</sup> had seemed to help. Much more important was that the article was a striking contribution to the general legal theoretical topic of the form of legal directives. It was particularly helpful to understanding the way formal considerations come into play when we are dealing with “formalities” rather than with just any old rule of law.

In order to understand the fascination of this, I think it is important to see just how consideration doctrine looked to a recent law school graduate back then. Consideration was a requirement for the enforcement of a promise, well established by precedent in all American jurisdictions. It had a precise definition: a legal detriment to the promisee, bargained for or given in exchange for that promise. The logical manipulation of the definition appeared to resolve a number of quite concrete, sometimes practically significant, and sometimes ethically controversial questions.

The most familiar of these were: 1. Should courts enforce promises in situations of half-completed exchange (unilateral or bilateral)?—yes, there was consideration. 2. Should courts enforce the promises in an executory bilateral contract situation?—yes, there was consideration, though it was possible to argue that finding it involved circular reasoning. 3. Should courts enforce promises to make gifts?—no, no consideration (except sometimes promissory estoppel would substitute). 4. Should courts enforce promises to compensate for previously conferred benefits (moral consideration)?—no, no consideration. 5. Should courts enforce modifications of contracts unilaterally beneficial to one party at the expense of the other (pre-existing duty rule)?—no, no consideration (except where there was novation). 6. Should courts enforce “firm offers” or offers in unilateral contract situations, as in the famous “flagpole” hypothetical?—no, no consideration (except possibly in case of reliance). 7. Should courts enforce a gratuitous promise of guarantee of another’s debt?—no, no consideration. 8. Should courts enforce gratuitous

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<sup>12</sup> Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

<sup>13</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (hereinafter Kennedy, *Form and Substance*).

<sup>14</sup> LON L. FULLER & ROBERT BRAUCHER, BASIC CONTRACT LAW (2d ed. 1964).

<sup>15</sup> IAN R. MACNEIL, CASES AND MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS (1971).

promises not to sue on acknowledged debts (*Foakes v. Beer*<sup>16</sup>)?—no, no consideration, unless it was possible to construe the release as an executed gift of personalty.<sup>17</sup>

No one was a “formalist” in 1972. Legal rules established through precedent and then worked out by deduction were (and still are) everywhere, but we were (and still are) more interested in whether they were good rules or bad rules. To reach an opinion on that, one needed to know what they were about—why one might have wanted to adopt them in the first place and then keep them in effect rather than overruling them or modifying them by statute. Since all the eight results listed in the last paragraph at least arguably followed deductively from the definition, it seemed at least possible that there was some general principle, objective, or function motivating the adoption of the definition. This would make the doctrine intelligible, even if it remained controversial. Working out the implications of the definition in one situation after another would be a way to put the principle into effect, to secure the objective, or to perform the function.

On the other hand, I was familiar with another kind of approach to legal rules, that is, a full fledged “policy analysis” (though I can’t at the moment remember what I would have proposed as a good example of this genre. Very possibly it would have been Fuller’s article with Perdue, “The Reliance Interest in Contract Damages”<sup>18</sup>). That was what Fuller’s article turned out to be, much to my delight. Rather than proposing a single “rationale of consideration,” Fuller disintegrated or dissolved the classic doctrinal category. Amazingly enough, he didn’t even trouble to state the classical definition, let alone address the question whether it is a rule that courts are obliged to follow, through its various deductive permutations, under stare decisis.

He therefore had no occasion to reflect on the question whether the eight sub-rules are logical implications of the doctrine—he takes for granted that they are presently in force. Each has distinct pros and cons from the point of view of his situationally fluctuating set of formal and substantive policies. Without even a nod to legal necessity, Fuller proceeds to figure out for each typical situation whether its sub-rule, viewed on its own according to its specific effects, achieves the congeries of policies that the definition has been pushing us toward all along.<sup>19</sup>

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<sup>16</sup> L.R 9 A.C. 605 (H.L. 1884).

<sup>17</sup> This way of looking at it is alive and well. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS*, ch.2 (West Group Black Letter Series, 3d ed. 1999).

<sup>18</sup> Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 *YALE L.J.* 52 (1936) [hereinafter Fuller & Perdue, *Reliance Interest I*]; Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 *YALE L.J.* 373 (1937) [hereinafter Fuller & Perdue, *Reliance Interest II*].

<sup>19</sup> See Fuller, *supra* note 1, at 814-22.

Fuller showed that the requirement of consideration was indeed “a form as much as a seal,”<sup>20</sup> as Holmes had written in *The Common Law*, but that, contrary to Holmes’s suggestion, it was more than that. To call it a form was to say that, within some limits, it imposed no substantive requirements on what promises parties could make legally enforceable. Rather, it required that to make any promise enforceable, it was necessary to use the form of recital and then actual handing over of some consideration to indicate that you really wanted to be bound.

If it was a “form,” it was because there was no requirement of “adequacy” of consideration—no requirement of equivalence in the purported exchange of something for the now enforceable promise. If there was no requirement of adequacy, then you could make a gift, or any other unilaterally onerous promise, binding simply by reciting, and then actually handing over some token item, such as a peppercorn, to clearly signal your intent to make the promise legally binding, and the court would oblige. But if it was a form, that also meant that if you failed to use it, you suffered the sanction of nullity, no matter how clear it might be what your intentions were.

The reasons for imposing this kind of formal requirement, according to Fuller, were three: (1) to provide good evidence of the parties’ agreement, (2) to make sure that they thought carefully before making the kind of promise in question, and (3) to make sure that they understood and could organize their behavior around a very clear distinction between legally enforceable and unenforceable promises. This last reason, the “channeling function,” turns out to be much more complicated in Fuller’s treatment, as we will see below, than this summary indicates.<sup>21</sup>

Holmes may have *wanted* consideration to be ‘a form as much as a seal,’ but this seemed a bizarre interpretation given that there was all kind of authority imputing a “substantive” objective, namely the exclusion of promises to make gifts, and other unilaterally onerous promises, from legal enforcement. The ground of non-enforcement was not inadequate formality, but rather that there were good reasons not to enforce them, no matter how carefully formalized and no matter how clear it was that the promisor intended them to be enforceable. Moreover, in spite of the ostensible lack of an “adequacy” requirement, there seemed to be many cases that manipulated or disregarded the definition in order to impose a *de facto* adequacy requirement, for example in the case of the widow whose promise to pay off her husband’s worthless note was held unenforceable.<sup>22</sup> Fuller argues that these substantive results should be defended or criticized not in terms of the functions of legal formalities, but in terms of the substantive objectives we pursue when we give remedies

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<sup>20</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 273 (Boston, Little, Brown, and Co. 1881).

<sup>21</sup> See Fuller, *supra* note 1, at 800-03.

<sup>22</sup> See *Newman & Snell’s State Bank v. Hunter*, 243 Mich. 331, 220 N.W. 665 (Mich. 1928).

for breach of promises. These are (1) to secure private autonomy, (2) to protect reliance, and (3) to prevent unjust enrichment.<sup>23</sup>

According to Fuller, consideration was a doctrine that served different purposes. It was indeed a form (like the seal, the requirement of an acceptance to make a contract, the parol evidence rule, or the statute of frauds) and could be assessed as a form in terms of the functions of formalities. But it was also a substantive restriction on freedom of contract, justified by the functional reasons for refusing to enforce particular kinds of promises. It was therefore possible and indeed urgent to assess the application of consideration doctrine in terms of all six considerations, three formal and three substantive, that were "bases of contractual liability," meaning that they underlay all contract rules, not just consideration doctrine.<sup>24</sup>

Overall, consideration doctrine served its formal and substantive purposes to different degrees in different situations to which it was applied. In some of these situations, it served its underlying purposes well, and in others ill. Occasional judicial resistance to applying the definition, which produced doctrinal inconsistency, was plausibly explained by the failure of the doctrine to adequately further the underlying formal and substantive "bases" of contract liability in the subset of cases in question.<sup>25</sup>

In light of this analysis, on the one hand, quite a bit of law reform seemed a good idea. On the other hand, even if we abolished the requirement of consideration, we would still have to find some functionally equivalent means to accomplish its formal and substantive objectives.<sup>26</sup>

Viewing consideration doctrine as a formality, we ask the extent to which, in any given situation, it promotes the evidentiary, cautionary, and channeling functions Fuller peremptorily assigns to formalities. Viewing the doctrine as a restriction on freedom of contract, we ask whether the restriction confines enforcement appropriately, given the goals of securing private autonomy, compensating reliance, and preventing unjust enrichment. A striking move in the article is to ask (with respect to consideration viewed as a formality) to what extent the "nature of the situation" allows accurate fact-finding *ex post*, cautions people *ex ante*, and clearly distinguishes the moment when we pass from merely moral to legally binding obligation.<sup>27</sup>

Fuller concludes that some of the sub-rules listed above invalidate promises for lack of consideration when the "nature of the situation" gives assurance of the adequate performance of cautionary, evidentiary, and channeling functions. In other words, we could enforce written promises of guaranty in business contexts, even if unilaterally favorable to one party. In these contexts, there is no apparent substantive or formal

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<sup>23</sup> See Fuller, *supra* note 1, at 806-14.

<sup>24</sup> See *id.* at 800.

<sup>25</sup> See *e.g., id.* at 821.

<sup>26</sup> See *id.* at 824.

<sup>27</sup> See *id.* at 805-06.

justification for refusing to let parties bind themselves unilaterally.<sup>28</sup> In short, each of the sub-rules that the black letter law made flow from the definition of consideration could be and should be treated as a separate rule in its own right, to be justified, modified, or rejected by a de novo application of a unified formal and substantive policy analysis applicable to all questions of contract law.

Reading the article in 1999, my then self seems, to my present self, to have misread it in several different ways. First, I attributed to Fuller insights that were not his but those of the lineage in which he was working (he very fully identifies these sources, but doesn't go to the trouble of separating out what part of the article is "original" and what part is representing and clarifying or obscuring their ideas).<sup>29</sup> Second, the article doesn't seem as powerful as an example of policy analysis as it seemed to me then. Indeed, I can see that I read quite a lot into it that wasn't there.

Third, it didn't occur to me that Fuller was doing something highly original in proposing a principle of private autonomy as one of the concurring/competing policies within the contract core. That seemed an obvious rather than an original move. My misreading was "no accident." As a typical member of the early 1970s legal academic elite, I was moving in the direction of the self-conscious formulation of what I am calling the conflicting consideration model.<sup>30</sup> I read Fuller's article as though it were a text of which this was the hidden meaning.

## B. *The Conflicting Considerations Model versus Classical Legal Thought*

### 1. *The Conflicting Considerations Model.* —

a. *The Analytics of Conflicting Considerations.* — There is more to the conflicting considerations model than the use of analogous policy arguments across legal issues. In highly schematic form,<sup>31</sup> I would define the model as follows:

- The considerations are not ideological, meaning that they are universal, or are considerations whose achievement or avoidance are of concern to all;
- The considerations conflict;

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<sup>28</sup> See *id.* at 818-19.

<sup>29</sup> Between 1972 and 1975, I read Rudolf von Jhering's *The Spirit of Roman Law* [references are to the French edition, *L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DÉVELOPPEMENT* (O. de Meulenaere, trans., 2d ed. 1880) (1877) (French translation of German original)] because Fuller had cited it. Jhering's seemed to me a much better—indeed an unutterably brilliant—take on the issues Fuller discussed, and this greatly reduced my admiration for Fuller. My article downgrades him for this reason. See Kennedy, *Form and Substance*, *supra* note 13.

<sup>30</sup> See KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at ch. 14 (discussing modernism and modern legal consciousness).

<sup>31</sup> This description will be brief because I have tried this several times before. For a short summary, see *id.* at chs. 7-8. For a more elaborate version, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Kennedy, *A Semiotics of Legal Argument*, *supra* note 2, at 75.

- They have different force in different situations;
- Along a continuum of closely related typical fact situations, different considerations will be marginally stronger or weaker, as we move from the strongest case for one party to the strongest case for the other by marginally adjusting the details of conduct and setting.
- Possible legal solutions to any given legal problem are also arrayed on a continuum, ranging from those that most to those that least favor particularly situated parties—for example, the tort rule covering a given situation can range from no duty through liability for malice only, to malice plus intent, then add gross negligence, then negligence, then switch the burden of proving negligence, then strict liability.

When choosing a legal norm to cover a case, rational decision making selects from the continuum of normative possibilities the one that best accommodates (balances, maximizes, mini-maxes, or whatever) the conflicting considerations as they play out more or less strongly in the fact situation of which the case is an instance. The solution does not fully realize any consideration, nor does it ignore any that has force under the circumstances. The solution is responsive to the case, but only to the case seen as a specimen of a species of case, or situation-type.

I would define conflicting considerations consciousness as that in which any norm can be looked at as the product of this kind of analysis, and assessed as such. Of course the actual reason why a norm was adopted may have nothing to do with an analysis of this kind. The norm could be the result of deduction from a more abstract norm, or it could be the result of an ideologically driven, that is socially partial, imposition by a power holder, or it could be an irrational or unprincipled compromise not reflecting the considerations that were really implicated.

The crucial point is that it is possible to analyze any norm in this way—that is, to go through the following steps. First, figure out the range of other norms that might be applied to the situation. Second, ask why this particular choice was made among the possibilities on the continuum. Third, identify this norm as a compromise between the ends of the spectrum reflecting the conflict among considerations pushing for more or less of this norm. Fourth, assess whether the compromise is sensible, or ask why it was made in the particular way it was.

Nothing requires that one look at any particular norm this way. No one may ever have set out to look at a particular norm this way. But the idea is that you can do it if you want to, to every single norm.

*b. The Instability of the Model: The Ad Hoc, the Post Hoc, the Ideological, and the Possibility of Reconstruction.* — The conflicting considerations model has a kind of shadow, which is just as much a defining element as the formal arrangement of elements in the field. This is what I will call “the shadow of ideology.” It is present because participants in the discourse know that there is always a possibility that a given policy analysis will seem to be ad hoc in its definition of the situation to be dealt with,

and merely post hoc in its deployment of conflicting considerations reduced to easily manipulable argument-bites. The possibility that the discourse will devolve into indeterminacy leads to the threat that it will turn out that a given argument will be understood as no more than a cover or mask for an ideological intention—ideological in the sense of partisan, or political, for example liberal or conservative.

Legal argument in general is premised on the distinction between legal, that is, adjudicative discourse, and legislative, that is, political discourse. Against the possibility of descent through indeterminacy into the merely ideological, private law theorists combine traditional legal authorities and “fancy” normative discourses, such as economic efficiency or rights or democratic theory, to develop reconstruction projects. These purport to show that there is something more to legal analysis than the conflicting considerations model. They are various, and correspond to the “schools” of late-twentieth-century legal thought.

The shadow of ideology is not a “fact.” It is the sense of unease, or of threat, or of “crisis,” or whatever, that motivates these reconstruction efforts. In characterizing the consciousness, the point is not that they fail so that the “truth” is the ineluctability of ideological contamination, nor is it to defend a particular reconstruction project or the possibility of such projects, nor some lower level idea like being merely “pragmatic.” The point is to convey the overall situation in which these are options and activities.

c. *Classical Legal Thought*. — For our purposes here, it isn’t necessary to give an elaborate description of classical legal thought, or to enter into the interesting and still lively controversies about what it was if it was anything at all. It is enough to say that the private law theorists who developed the conflicting considerations model had a strong consensus about what they were reacting against and trying to replace.<sup>32</sup> There were two components to the earlier approach, one concerning legal reasoning and the other concerning the categorization of legal rules. What follows is a minimalist definition in each area.

The classical equivalent of the conflicting considerations idea in modernist legal consciousness was the idea that, for any legal question, there was *the possibility* that, *properly analyzed*, the correct answer could be arrived at by applying basic principles that were both derived from and reflected in case law. It was not that all rules came from such an opera-

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<sup>32</sup> See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN L. & SOCIOLOGY 3, 4-5 (Steven Spitzer ed. 1980) (recounting the history of the Classical period); see also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-32 (1995) (referring to Classical legal thought as legal formalism); Horwitz, *supra* note 3, at chs. 1-2 (discussing the structures of classical legal thoughts); WILLIAM WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT (1998) (discussing history and ideology of legal classicism); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 32—39 (1983) (explaining the development of classical orthodoxy).

tion, or that one would think to try to analyze and assess all rules all the time that way. As with the conflicting considerations model, we can define classical legal thought by the possibility that an operation could be successfully performed.<sup>33</sup> "Theories of law," say the idea that law is a "science," or the idea that "all legal questions are policy questions" for the modern period, are both far too specific, coherent, explicit, and analytical, and, at the same time, too controversial, partial, partisan, and contested to characterize the consciousness of a period.<sup>34</sup>

Classical legal thought should be associated not just with precedent and principle, but also with a particular ordering of substantive principles around the public-private distinction, iterated and reiterated at every level of doctrine.<sup>35</sup> A large part of the apparent experience they had of generating a sense of the necessity or correctness of their solutions to

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<sup>33</sup> Whether that would be a good or bad idea, a waste of time, or likely to be impossibly difficult given the historically idiosyncratic origins of the rules in force, there was still the possibility of doing a precedent-and-principle number, just as now there is always the possibility of doing a policy analysis. Attitudes toward the model were as various as those in our period toward the possibility of applying the conflicting considerations model as a universal element in any situation.

The classics were as various in their actual practices as we are in ours. Sometimes they themselves operated according to the conflicting considerations model, as we will see in the particular case of the choice of legal form. *See infra* Part I. C. Sometimes they resolved questions by deduction—as we sometimes, though less often, do today. Sometimes they acknowledged gaps, conflicts, or ambiguities confronting a person asked to identify and apply the law, and decided that no principled resolution was possible. Sometimes they appealed to policy, equity, history, philosophy, or economics rather than to legal logic. But they "knew" that it might very well happen, and that it would be an event to be welcomed, that an inquiry into the principles underlying the rules or the precedents might show that an apparent conflict between norms could be settled once a single principle underlying the apparently conflicting norms had been identified.

In this system, it was common to acknowledge conflict among norms, conflict among jurisdictions (majority and minority rules), conflict about the "nature of law," and uncertainty about what the right answer was. This is most decidedly not Grey's "Langdellian Orthodoxy," *supra* note 32, at 1, or Horwitz's intrinsically conservatively-biased version of classical legal thought in *The Crisis of Legal Orthodoxy*, *supra* note 3, at ch. 1. I am trying to identify an experience of legal reasoning during that period that would have been common to people across the whole spectrum of competing jurisprudential theories and also the whole spectrum of conflicting ideological orientations.

In this version, what defined classicism was the possibility that difficulty might yield to precedent and principle, rather than anything like "formalism." I am *not* talking about the "legal theory"—anachronistic in any case because there was no such discipline back then— or, less anachronistically, the jurisprudence or the philosophy of law of the period. Similarly, the conflicting considerations model does not represent the legal theory or the philosophy of law of the modern period. The consciousness idea is rather to get at presuppositions, "unarticulated premises," or "assumptions" shared across the whole elite group.

<sup>34</sup> The classical consciousness of the possibility of principle lurking in every situation was associated with, and in some complex way both the cause and the effect of, the experience that the legal elite had of reorganizing and re-analyzing the vast mass of rules imported from England or developed indigenously during the pre-Civil War period.

<sup>35</sup> *See* Grey, *supra* note 32, at 48-49 (describing the classical public-private distinction and the literature's reliance on legal concepts to "dictate" judgments).

doctrinal problems may have derived from the fact that they were working out a new organization of rules that seemed to have many implications for the content of rules. For our purposes, what is most important about this ordering is this sequence:

- Public law is opposed to private law.
- Within private law, tort is opposed to contract, because tort is more public than contract—tort is based on the will of the sovereign about how private parties should treat each other in the absence of agreement, while contract is based on the private parties' own decisions about what rules should govern their interaction.
- Within contract law, quasi-contract, or restitution, is opposed to “true” contract because quasi-contract rules are imposed by the will of the sovereign concerning things like payments made by mistake, and are analogous to property rules (except that they deal with rights in personam rather than rights in rem), whereas “true contract” is about rules the parties make for themselves.
- Within “true” contract law, consideration doctrine is opposed to offer and acceptance, because the consideration requirement is imposed by the will of the sovereign on the parties, regardless of their wishes, say, to make an offer gratuitously irrevocable, whereas offer and acceptance is about finding the “meeting of the minds” of the parties.
- And so on indefinitely.

A second substantive aspect of this system is that it tended toward putting the judge in the position of identifying an actor, public or private, who was “in charge” within a “sphere,” and then doing the “will” of that actor. In private law, there was the “will of the parties,” but also the will of the state limiting, for example, the possible types of property (e.g., through the rule against perpetuities) or outlawing particular types of contract, or defining the obligations of parties in the absence of agreement. In contract law, a dramatic example of the “will of the sovereign” as opposed to the “will of the parties” was consideration doctrine, which denied parties the power to make their promises legally enforceable, no matter how crystal clear had been their intent to achieve this result. In public law, there were the spheres of the separate judicial, legislative, and executive powers, then the spheres of state and federal actors.<sup>36</sup>

### C. *Background of the Conflicting Considerations Model*

Some of the important predecessors of conflicting considerations thinking in law are, quite clearly, Jeremy Bentham,<sup>37</sup> Rudolf von Jhering<sup>38</sup>

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<sup>36</sup> See Kennedy, *supra* note 32, at 4-5 (describing these spheres and their legal relationships).

<sup>37</sup> See e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1789).

and Oliver Wendell Holmes.<sup>39</sup> The way they contributed will be for another time. For our purposes here, we need look at only one author in this genealogy, René Demogue, because his work was so important for the critique of the will theory, and for Fuller in particular, and is so little known today.

1. *René Demogue*. — René Demogue's<sup>40</sup> all but forgotten masterpiece, *Les Notions fondamentales du droit privé: essai critique*,<sup>41</sup> published in 1911 and partially translated into English soon thereafter as "Analysis of Fundamental Notions,"<sup>42</sup> initiated a particular type of legal theoretical project, which he describes in the first sentences of the preface:

This book is not a study of positive law. . . . I have adopted mainly a critical point of view, in order to show, without seeking to disguise anything, the conflicts and contradictions which will no doubt always agitate private law, and my object will be attained if I may suggest to students already through with elementary studies reflections which will help them to penetrate the basis of institutions.<sup>43</sup>

a. *Demogue's Unstructured List of Reasons for Rules*. — His title is in itself a claim: that there is a limited set of basic ideas that animate the design of private law rules. They are static and dynamic security, economy of time and activity, justice, equality, liberty, solidarity and the principle of the spreading of losses, the notion of the general welfare or public

<sup>38</sup> See, e.g., Jhering, *supra* note 29; RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., MacMillan 1924) (1877). Jhering was a German law professor, born 1818, died 1892, at once one of the greatest of legal historians, a philosopher of law, and a doctrinal writer who strongly influenced the development of German contract law and the drafting of the German Civil Code. He was widely read in France and in the United States, and is still recognized in Germany as one of the great figures of legal thought. Unfortunately, *The Spirit of Roman Law* has never been translated, while *Law as a Means to an End*, revolutionary in its time, is a good deal less interesting today. See Joseph Drake, *Editorial Preface to this Volume xv*, in JHERING, *LAW AS A MEANS TO AN END*, *supra*.

<sup>39</sup> See, e.g., Oliver Wendell Holmes, *Privilege, Malice, and Intent*, in *COLLECTED LEGAL PAPERS* 117 (1920); Oliver Wendell Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920); see also KENNEDY, *A CRITIQUE OF ADJUDICATION*, *supra* note 2, at 322; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 819-20 (1989).

<sup>40</sup> Demogue was a French law professor, born 1872, died 1938, who taught at Lille, then at Paris, and is known for the book discussed at note 41, *infra*, and for his unfinished treatise on contract law, a sort of French equivalent of *Corbin on Contracts*. Like the other French theorists of the turn of the century who participated in the international critique of classical legal thought, Demogue is at present largely forgotten in French legal culture. See Christophe Jamin, *Henri Capitant et René Demogue: Notation sur l'actualité d'un dialogue doctrinal (on file with the Columbia Law Review)*.

<sup>41</sup> See RENE DEMOGUE, *LES NOTIONS FONDAMENTALES DU DROIT PRIVE: ESSAI CRITIQUE* (1911) [hereinafter DEMOGUE, *NOTIONS*].

<sup>42</sup> See René Demogue, *Analysis of Fundamental Notions*, in *MODERN FRENCH LEGAL PHILOSOPHY* 345 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., Macmillan 1916) (1911).

<sup>43</sup> *Id.* at 349.

interest, protection of future as opposed to present interests, and protection of emotional as opposed to material interests.<sup>44</sup>

Along with these “bases,” Demogue presents a catalogue of what he calls technical applications, meaning basic legal concepts such as freedom of contract. His book has some of the qualities of a Borges list. It includes what we would call policies, which we can see as goals that legal decision makers have or ought to have. But it also includes in a relatively unstructured list what we might call legal concepts, institutional descriptions, abstract “values,” concepts like evolution, and what we might call images or stereotypes about social life. But in the conclusion of the first part of the book—the only part that was translated—he clearly states his position about what it all means. I will let him speak for himself:

*The Tendency to Oversimplification: Fictions of Unity and Opposition.*

This rapid examination of the principal ideas that come into play in the theory of private law makes it now possible to express conclusions with greater force.

The simplicity which our minds require does not appear to be the law of the exterior world. The simplist [sic] theories—such as those of a world steadily advancing, of a world of infinite perfectibility, of solidarity and fraternity unfolding themselves ever more and more—seem just as exaggerated as the dualistic [sic] theories, if I may be permitted to coin a word, which see everywhere in life a struggle between two opposite principles—individualism and socialism, authority and liberty, progress and reaction, State and individual. Correct as approximations, as methods of instruction, these duels, if closely examined, are really battles between masses, certain parts of which support or oppose just as well one as the other of the two combatants.<sup>45</sup>

A crucial point about Demogue is that at the time he wrote there had been a proliferation of French theorizing about how to conceptualize the coherence or not of the rules currently in force, about how to understand their history as in some sense the working out of “scientific” laws of social development, and about how to rationalize the reform of French law in the “social” direction. There was a well-established but still developing conception based on individual rights and the will theory, a theory of situational or variable natural law, associated with Génny (and Stammler), Duguit’s notion of social law, the theory of “solidarism,” and Hauriou’s institutionalism.<sup>46</sup> The striking accomplishment of Demogue is to present the “notions” simply as “there” in the legal consciousness of his time,

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<sup>44</sup> See *id.* at 345.

<sup>45</sup> *Id.* at 564-65 (footnotes omitted).

<sup>46</sup> See MODERN FRENCH LEGAL PHILOSOPHY, *supra* note 42, at xxix—xli (discussing these trends). On the general political theoretical context within which these legal developments occurred, see JACQUES DONZELOT, L’INVENTION DU SOCIAL: ESSAI SUR LE DÉCLIN DES PASSIONS POLITIQUES (1984).

as what people actually think is important, without forcing them into his own meta-theory.

After summarily critiquing the various modes of reconstruction of his time, and particularly the various metrics and evolutionisms, and pointing out that practice is contradictory when looked at in terms of any one value,<sup>47</sup> Demogue makes a characteristic conflicting considerations observation:

In the opposition which ideas cause to arise at a given moment, the law of simplicity of the mind discloses a conflict bound to end in the death of the vanquished. This is an error. Each one of the sentiments is rooted in the needs of human nature, and the conquered one has right to its revenge. As slaves, in the times of the Saturnalia, got their few days' compensation for the burden of a long obedience, so rejected ideas must retake, sooner or later, a part of the lost ground; whence comes that satisfaction, to a certain extent, of contradictory desires which is completed by illusion and hope.<sup>48</sup>

In other words, there are no killer arguments. Instead, he proposes:

*Compromise, Not Logical Synthesis, the Goal of Juridical Effort.* May we hope that the human brain will one day be strong enough to unite in one harmonious synthesis the elements on which law depends? I do not believe that it is possible. We can make fortunate reconciliations—an effort which is even facilitated by the shut-in character of every society; but we must be conscious of their imperfection...

...

... [L]aw can perfect its technic, that is to say its methods of perfectly attaining an end, or even several ends simultaneously. This is the only side on which it is certain that progress is possible.<sup>49</sup>

b. *Demogue on Static and Dynamic Security.* — Two of the many ways Demogue influenced the Americans who developed the conflicting considerations model were the following. He suggested a mere listing of notions or considerations as opposed to proposing a theory or undertaking a reconstruction project. Moreover, he developed a prototypical example of policy conflict in the area of the design of formalities—the very topic that Fuller addressed, among others, in “Consideration and Form.”

Demogue's contribution to the genealogy of formal considerations was the distinction between “static and dynamic security.” His position is that “security” is one of the most important of all the animating ideas of private law. He distinguishes between two types. Static security means that when you have rights, you know what they are, and expect to be able to defend them. Dynamic security, or security of transaction, means that

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<sup>47</sup> See Demogue, *supra* note 42, at 565-67.

<sup>48</sup> *Id.* at 567-68.

<sup>49</sup> *Id.* at 569-72 (footnotes omitted).

you know when you and your transactional partner will be bound, and to what.<sup>50</sup>

Dynamic security is the goal behind devices like negotiability and the formal promise before a notary (in our case, the equivalent is the sealed promise). These devices encourage a person to enter into transactions because they assure him that it will be hard to take away the advantage he has secured by transacting, and hard to impose on him any more liability than he has deliberately incurred. If his partner puts him in the position of having to enforce his rights in court, the court will severely limit the defenses his partner can oppose to his claim. The goal, according to Demogue, is to encourage people to act productively.<sup>51</sup>

Demogue posits a perennial and ineradicable conflict between the two types of security. Security of transaction is obtained by reducing the chance that a person will be able to defend himself against a claim by a person who has transacted for a right against him. The security of the holder in due course of a negotiable instrument is analytically as well as practically at the expense of the security of the maker, who loses the defense that he gave his note in a transaction in which it turned out that there was a failure of consideration. For stolen property, we must choose between the static security interest of the rightful owner and the dynamic security interest of the good-faith purchaser.<sup>52</sup>

Demogue provided a complex complement to Rudolf von Jhering's discussion in his masterpiece, *The Spirit of Roman Law*.<sup>53</sup> Jhering dealt with what we now see as the quintessential formal question of rules against standards, and clearly distinguished formalities, *i.e.*, rules about the manifestation of intent, from rules that do not have this function. His prototypical policy conflict was between the virtues and vices of rules (certainty for the parties, control of the judge but over- or under-inclusiveness), and the virtues and vices of standards (ethically exact, but uncertain and open to bias in judicial application).<sup>54</sup>

Demogue points out that the question of whether you permit defenses against claims supported by formalities goes far beyond the problem Jhering identifies of people being bound when they didn't "really" want to be. In modern terms, his contrast of security of transaction and static security is on the border between form and substance. The cutting off of defenses vs. the equitable expansion of defenses can be done in a regime of rules *or* in a regime of standards. In other words, the two questions: (a) rule or standard and (b) lots of defenses or very few defenses, are logically independent of each other.

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<sup>50</sup> See *id.* at 427-29. For a more complete discussion, see *id.* at 418-71.

<sup>51</sup> See *id.* at 427.

<sup>52</sup> See *id.* at 428-36.

<sup>53</sup> See *supra* note 29.

<sup>54</sup> See *id.* at 4, 50-60. For elaboration, see Kennedy, *Form and Substance*, *supra* note 13, at 1687-94.

What makes Demogue a founder of conflicting considerations analysis is that he, like Jhering, identified a trade-off that is built into the lawmaking process. When one thing goes up (security of transaction), something else must go down (static security). This means that it *never* makes sense, when justifying a rule, to say that it is good because it promotes security of transaction. To make sense, one must add: at an acceptable cost to static security. Likewise for Jhering, it *never* makes sense to justify a rule by appeal to its administrability—one must always add: and its acceptable cost in over- or under-inclusiveness. This is the basic difference between the conflicting considerations model and the rival approach to policy analysis that identifies one policy per rule.

2. *The State of Conflicting Considerations Thinking in 1941.*— Between 1900 and 1941, the notion that legal analysis had to be conflicting considerations analysis, or policy analysis, developed very rapidly. Historians of the legal thought of this period distinguish between the sociological jurisprudence of Roscoe Pound and legal realism. It is difficult to decide on the boundaries of these tendencies, and there are interesting conflicts in interpreting what the tenets of the schools were, and especially over what the realists really thought.<sup>55</sup> For our purposes, all of this is irrelevant. It is enough that by 1941, it was clear that a dramatic change had happened since 1900, and everyone seems to have agreed that the change was that policy was recognized as a crucial element in legal reasoning. Pound and Llewellyn had fought it out;<sup>56</sup> Felix Cohen had published "Transcendental Nonsense and the Functional Approach"<sup>57</sup>; his father, Morris Cohen,<sup>58</sup> and Fuller<sup>59</sup> himself had developed a modified natural law response to the realist response to Pound. Llewellyn had written and circulated *The Bramble Bush*.<sup>60</sup> Everyone and his brother had offered an overview or totalization of the situation, starting from the idea that law is a means to an end and rejecting the idea, imputed to the nineteenth century, that deductive reasoning was or could be all, worrying about the consequences for certainty and judicial restraint of letting judges do policy analysis, and hoping or despairing for the future.

It was not, however, clear just what form policy analysis would take. Because the technique was still new, no one had even tried to apply it across the full universe of legal questions. No one knew how it would

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<sup>55</sup> For a sampling, see Horwitz, *supra* note 3; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); William W. Fisher III et. al., *Introduction*, in *AMERICAN LEGAL REALISM* xi, xiii (1993); Brian Leiter, *Rethinking Legal Realism*, 76 *TEX. L. REV.* 267 (1997); Joseph W. Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465 (1988).

<sup>56</sup> See N. E. H. HULL, *ROSCOE POUND AND KARL LLEWELLYN* 173-222 (1997).

<sup>57</sup> 35 *COLUM. L. REV.* 809 (1935).

<sup>58</sup> See Morris Cohen, *On Absolutisms in Legal Thought*, 84 *U. PA. L. REV.* 681 (1936).

<sup>59</sup> See L. L. Fuller, *American Legal Realism*, 82 *U. PA. L. REV.* 429 (1934).

<sup>60</sup> K. N. LLEWELLYN, *THE BRAMBLE BUSH* (1951) (originally circulated in 1930 as materials for students).

look if it were extended or what consequences would flow from trying to extend it.

In his review of the second edition of *Williston on Contracts*, which he published in 1939, Fuller took a position on the question of policy that turned out to be highly influential in the years to come. He made the interesting move of lumping Williston with his realist archenemies in the camp of “positivistic” writers. They had in common the search for a way to state the law precisely, and thereby had to underplay or understudy what he called the policies that underlie the “fundamental conceptions” of legal reasoning.<sup>61</sup>

Williston’s error was that though he admitted that policy played a role in law, he saw it as forcing deviations from the strict logical application or extension of the principles of contract law. For example, policy might force us to let the promisee in the hypothetical flagpole case (“I will pay you \$100 if you climb to the top of the flagpole,” followed by “I revoke” just before you get to the top) recover something for his efforts, but only as a concession in the teeth of the logic of consideration doctrine (the offer was revocable because not supported by consideration). Fuller insisted that there was another way to do policy analysis, namely by asking about the policy bases of fundamental conceptions, something he claimed that Williston never did. “What may be called the bases of contract liability, notions like consideration, the necessity for offer and acceptance, and the like, are nowhere in his work critically examined in the light of the social interests they serve.”<sup>62</sup>

Fuller saw Williston’s attitude as a perfectly intelligible bias (“parallax”). He thought Williston

fears the intrusion of vague ethical and philosophical considerations, even in the interpretation of existing law, because their corruptive and dissolving influence threatens to make impossible the very task which the positivist sets for himself, that of stating what “the law” is. The force of this point is readily seen if one will imagine the task that would be involved in an attempt to state the existing law of consideration in terms of the social interests it serves.<sup>63</sup>

Of course, this is the very task Fuller undertook in “Consideration and Form”. That it was policy analysis did not make it legal realism, for Fuller, because according to him the realists were the mirror image of Williston. Rather than trying to find “what the law is” through the method of precedent and principle, tempered around the edges by policy, they had set out to identify it as fact through social science method. In the process, they rejected not just what they saw as the over-broad generalizations of their classical and Poundian predecessors, but the whole

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<sup>61</sup> Lon L. Fuller, *Williston on Contracts: Revised Edition*, 18 N.C. L. REV. 1, 9-13 (1939).

<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.* at 13.

apparatus of legal thinking through principle, policy, and ethical reflection. Fuller thought they would fail at this, and that it was high time to get back to the middle ground of conflicting considerations—to tackle the ethical/legal issues rather than denying or deferring them.<sup>64</sup>

## II. THE EXTERNAL CRITIQUE OF THE WILL THEORY

This section traces the genealogy of a particular way of criticizing the will theory, which I call external critique. I begin with a summary description of the will theory and of the contrasting modes of critique. Then I take up the development, in the years before World War I, of the argument that the will theory, in its form as the doctrine of freedom of contract, should be subordinated to the social interests that underlie all law. Such an approach, according to the critique, would lead us to segregate it into the limited sphere within which its individualistic normative premises and nineteenth-century assumptions about the working of social life were plausible. This meant getting rid of it in areas like labor law and landlord-tenant. Finally, I present the private-public flip performed by the inter War theorists, particularly Robert Hale, Morris Cohen, and Karl Llewellyn, who argued that we should understand contract law as a state-imposed regulatory regime, and tailor it accordingly, rather than seeing it as the protection of individual rights. Fuller in "Consideration and Form" adopts one version of this analysis as the basis for his revival of the will theory as a contract law policy.

### A. *The Will Theory of Contract Liability: Summary Definition*

The will theory of contract liability states that all the rules of law that compose the law of contracts can be developed from the single proposition that the law of contract protects the wills of the contracting parties. Thus we can define the law of capacity (duress and infancy, for example) to protect will, likewise the law of fraud, of damages, of offer and acceptance, of breach, of excuses, of contract interpretation, and so forth. Still at the descriptive level, we can say that a given legal regime does or does not adopt the will theory as its theory, and that it does or does not adopt the rules the will theory indicates in its regime of positive law. At the normative level, one can subscribe to the will theory in the sense of favoring the adoption of the theory as positive law, and of the rules that flow from it.

The will theory is first and foremost a proposition about the "inner logic" of the rules of contract law as developed from the seventeenth through the nineteenth century. One was still a believer in the will theory of contract liability if one believed that it described the basis of the rule system put in force during this period, favored it across the domain of contract liability, but also believed that the state should limit freedom of contract in particular cases, or according to some general principle,

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<sup>64</sup> See *id.* at 13—15.

such as that contracts that have deleterious effects on third parties should be prohibited. One favored *laissez faire* if one believed that there were very few situations in which this kind of restriction of freedom of contract was desirable.<sup>65</sup>

A historical peculiarity of great significance is that the schools of legal theory believed that the will theory of contract law had, as I've already suggested, enough coherence and normative bite so that once adopted it required the adoption of a very large number of specific legal rules. Many of these were targeted by late-nineteenth-century reformers, on the ground that they were rules that, by comparison with easily conceivable alternative rules, empowered strong economic parties at the expense of weak ones. The will theory thus acquired an unmistakable political meaning for the American legal academic elite, and, it turned out, a very similar one for the legal elite of France, though there it was a particular interpretation of the Code Napoleon rather than a body of case law that was politically implicated.

In a 1954 article that he wrote in his eighties,<sup>66</sup> Pound gave a useful summary of doctrinal consequences for private law that nineteenth-century legal theorists derived from the will theory, along with the changes that, as he saw it, changing conditions had brought about in the twentieth. The list of things that had to go included the privity requirement of *Winterbottom v. Wright*,<sup>67</sup> limitations on the duties of common carriers to passengers,<sup>68</sup> the general maxim "no liability without fault,"<sup>69</sup> legal permission for landowners to do whatever they wanted on their land regardless of the social consequences,<sup>70</sup> enforcement of contracts of adhesion in public utility and insurance contracts,<sup>71</sup> refusal to enforce collective bargaining agreements against non-consenting union members,<sup>72</sup> and fault based as opposed to enterprise liability for industrial accidents.<sup>73</sup> This list more or less corresponds to the agenda of twentieth-century reform in private and administrative law.

#### B. *The Critique of the Will Theory in Contract Law*

Starting around 1900, the will theory, whether of contractual liability or of private law in general—including property and torts—came under

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<sup>65</sup> See on the historical development, JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 161-213 (1991); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780—1860*, at 173-88 (1977). For England, see P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 405—19 (1979).

<sup>66</sup> Roscoe Pound, *The Role of the Will in Law*, 68 *HARV. L. REV.* 1 (1954).

<sup>67</sup> See *id.* at 6-7 (citing *Winterbottom v. Wright*, 152 *Eng. Rep.* 402, 404 (Ex. 1842), which limited manufacturers' liability to purchasers with whom they were in privity).

<sup>68</sup> See *id.* at 7.

<sup>69</sup> See *id.* at 7-8.

<sup>70</sup> See *id.* at 11.

<sup>71</sup> See *id.* at 15.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 18-19.

intense attack throughout the West. In the United States, the attack was partly a matter of the internal development of legal theory, and of influences on legal theory from the general culture, including American pragmatism, institutional economics, and sociology. But it was also an attack designed to show that the development of conservative judge-made private law rules, and judicial over-ruling of progressive reform legislation, could not be justified as straightforward judicial "law application." These judicial trends represented instead either an outdated and arbitrary "mechanical jurisprudence," or an ideological agenda, and could be rejected without offense to the ideals of the rule of law or judicial neutrality.

There were various ways to critique the will theory, which we can organize roughly into "external" and "internal" critiques. External critiques show that a theory has suspect motives or premises or values or factual assumptions, and/or suspect effects, without challenging its internal coherence. An internal critique shows that the theory fails to make sense of the body of legal rules that supposedly flow from it. There are two main ways to do this. One is to show that formulations that purport to explain the data (the rules) are incoherent or internally contradictory or vague. A second is to show that when formulated coherently, the theory requires results different than those adopted in fact.<sup>74</sup> In the case of contract theory, there were two stages, a pre-World War I and an inter-War stage, for each type of external and internal critique.

### C. *The External Critique of the Will Theory Before World War I: The Rise of "The Social"*

In the first phase, concurrently in France, Germany, and the United States,<sup>75</sup> critiques all had pretty much the same structure:

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<sup>74</sup> Cf. KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 92-95; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 580-83 (1982) (arguing that freedom of contract principles are not definitive).

<sup>75</sup> It is striking to what an extent the Americans read and were influenced by Continental developments, especially in France and Germany. See generally THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920 (Mathias Reimann ed., 1993) (surveying impact of German legal science on Classical Anglo-American legal thought). Key characters are René Demogue, as it turns out, and Emmanuel Gounot, whose untranslated doctoral thesis, *Le principe de l'autonomie de la volonté en droit privé: contribution à l'étude critique de l'individualisme juridique* (1912), came out a year after Demogue's *Notions*; *supra* note 39. On these two critiques, see VERONIQUE RANOUIL, L'AUTONOMIE DE LA VOLONTE: NAISSANCE ET EVOLUTION D'UN CONCEPT (1980).

Demogue's critique of the will theory is part of a general discussion of *autonomie de la volonté* as a sub-category of the fundamental notion of liberty. The conclusion reached is that it would be wrong to think that all of private law is deduced from the will theory, but that it is "the most important" of all the notions, a phrase mimicked by Fuller in "Consideration and Form," *supra* note 1. But the autonomy of the will comes up again as a part of "technique," that is of those fundamental notions that jurists have developed to put into effect their compromises of the "bases" of law. Here an important point is that it is

(1) A rudimentary internal critique set the stage by demonstrating that the will theory fails to account for some very important rules of our actual legal system. Will theory *tout court* cannot be the governing, valid, operative norm of our legal system, because of these important counter-instances, such as that freedom of contract does not apply to testamentary succession or to contracts to enslave oneself. This showed that freedom of contract was not “absolute,” and that there were considerations other than freedom of contract that the legal system as a matter of fact sometimes took into account in deciding what the rules of contract law should be. But there was no suggestion either that the will theory or freedom of contract were flawed in a way that made it difficult or impossible to apply them in practice, or that the counter-instances (slavery, succession) represented policies that should be applied ad hoc, rule by rule, to the myriad concrete rules that made up the contract law system.

(2) There was an external critique arguing for *subordinating* the will theory or freedom of contract to a higher principle or principles, so that we would decide to permit free contractual ordering or prohibit it according to how doing that would accomplish or block our higher order objectives. These might be summarized as simply “the public interest,” or referred to even more vaguely as “reasons of policy,” or they might take the more elaborated form of an argument that the individual interests realized through the will theory are no more than means to the achievement of higher social or moral goals. This form of critique challenges neither the internal coherence nor the workability of will theory in areas where we decide to employ it. The notion is that will theory or freedom of contract flows logically from a set of individualist normative premises, and that the specific subrules in turn flow logically from the concept once adopted.

(3) There was also an external critique arguing for *segregating* the will theory—restricting it to its appropriate sphere, namely where its underlying individualist normative premises and its nineteenth-century “yeoman society” factual assumptions were plausible. By contrast, it was inapplicable where, in our modern, interdependent, urban, industrial, organizational society, there was unequal bargaining power or no “real freedom,” etc. This form of argument takes it for granted or asserts that the will theory is both an internally coherent theory, and that it works well within its appropriate domain, without further interference once that domain is established. The “other considerations” apply within their appropriate domains as well, and not within the contractual one.<sup>76</sup>

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constantly necessary to supplement the notion of autonomy with other notions, because there are so many situations in which the idea of will gives us no clue as to what rule to enforce. *See* Demogue, NOTIONS, *supra* note 41, at 286.

<sup>76</sup> That a critic of the will theory was nonetheless a believer in what I am calling its “coherence” does not mean that the critic was a “formalist.” That is, the critic did not necessarily believe that if we adopt individualist premises then the will theory follows by a strong deduction, or that if we adopt the will theory then the subrules follow by a strong

These arguments were highly compatible with one another. Demogue and Gounot in France,<sup>77</sup> and Ely<sup>78</sup> and Pound<sup>79</sup> in the United States used all of them simultaneously.

Pound's alternative to the will theory was the "relational" theory.<sup>80</sup> This was the American version of what Europeans called "social law."<sup>81</sup> Social law was law created deliberately to reflect new conditions, and to be well-adapted to them, too. It was to replace the will theory, which he and his contemporary critics understood to be an emanation of, if not a logical entailment of, the individualist philosophies of the nineteenth century.

It is very important to understand that the social was neither left nor right, or rather it was both. Many of the most important theorists of the social were social Catholics,<sup>82</sup> while others were moderate socialists or what we would now call social democrats (in France, they were "republicans"). In the United States, "progressivism" drew from the "old conservatism"—sometimes represented by the Teddy Roosevelt brand of Republicanism—as well as from the leftist versions of "reform." The slogan of the social distinguished one from nineteenth-century liberalism, from individualism, from laissez-faire, from Manchesterism, from natural rights

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deduction. Both advocates and critics of the will theory usually seem to have had a much looser idea of how it worked. It was essential that adopting it had some real, concrete consequences for your positions about legal rules, but the methodological debate about how consequences followed from premises was primitive until the 1930s. You could adopt the will theory for a loose congeries of non-deductive individualist reasons, and then believe that you had to implement it not through deduction, but by some combination of loose "application" with concessions to practicality or even "policy." What made you a will theorist was that you saw will as the "governing principle," even if it was tricky and non-deductive to apply it and you sometimes had to compromise it with other factors. If you were a critic of the will theory, you could conceive it as a mere influence" on legal decision, or as fully "mechanical." Or you could start out believing that adopting the will theory required all kinds of results, good and/or bad. You could then change your mind, coming to believe that these results were not implicit in or required by the will theory, just adopted for whatever reasons—including errors of reasoning—by people who also believed in the will theory.

<sup>77</sup> See *supra* note 75.

<sup>78</sup> See 2 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 555-626 (1922).

<sup>79</sup> See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 264-71 (1922) [hereinafter POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW]; Pound, *supra* note 5, at 202-03; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457-58 (1909); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610-15 (1908); Pound, *supra* note 66, at 9-17.

<sup>80</sup> See Pound, *supra* note 5, at 212-16; Roscoe Pound, *The New Feudal System*, 35 COMMERCIAL L.J. 397, 401 (1930) [hereinafter Pound, *The New Feudal System*].

<sup>81</sup> See Georges Gurvitch, *L'idée du droit social: Notion et système du droit social* 272-279 (Scientia Verlag Aalen 1972) (1932). For a general background, see André-Jean Arnaud, *Les juristes face à la société du XIXe siècle à nos jours* (1975); Donzelot, *supra* note 46. For a sketch of the contemporary European version, see KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 2, at 93.

<sup>82</sup> See, e.g., Gounot, *supra* note 75.

theory. It did not involve a choice between organic social hierarchy in the conservative mode and egalitarian social reorganization in the radical mode. Moreover, before World War I, the choice for the social did not require one to come to terms either with communist or with fascist versions of collectivism, because neither yet existed, either as a *developed* theory or as a practice of state power.<sup>83</sup>

Pound advocated law-making by “social engineering” in order to protect “interests of substance” under conditions of new found post-nineteenth-century urban and industrial interdependence. A given interest predominates in a particular area and explains the rules. A basic hypothesis not just for Pound but also for Nathan Isaacs<sup>84</sup> and Morris Cohen<sup>85</sup> was that there was a long-run cyclical movement to and from relational versus individualist conceptions, according to prevailing social and economic conditions, rather than Maine’s simple status to contract progression. So the “relational” was not only the spirit of the common law against the more individualist civil law. It was also the return of feudal law, once again well adapted to the evolution of society.<sup>86</sup>

The conflicting considerations model crops up around the edges of this program, but only around the edges. The key to relational or social law or sociological jurisprudence or social engineering was the idea that the “is” of sociology would engender a legal “ought,” with the social scientist in the role of midwife. Expertise, data, training, and scientific method were crucial not just to provide a context for value judgments about desirable law reform, but to suggest and validate them. In practice, the social interests of sociological jurisprudence are very similar to the principles of classical legal thought, or similar at least in that the trick is to find a governing interest for a domain and then implement it.

For example, Pound was forever neatly fitting rules to situations through a straightforward identification of single purposes. For contract law, it turns out that we can replace the will theory with the social interest in performance, as this typically diffuse passage suggests:

Wealth, in a commercial age, is made up largely of promises. An important part of everyone’s substance consists of advantages which others have promised to provide for or to render to him; of demands to have the advantages promised which he may assert not against the world at large but against particular individuals. Thus the individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations created by promises and agreements. If this claim is not secured friction and waste obviously result, and unless some countervailing interest must come into account which

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<sup>83</sup> On the Marxist theory of this period, see CARL E. SCHORSKE, *GERMAN SOCIAL DEMOCRACY, 1903-1917: THE DEVELOPMENT OF THE GREAT SCHISM* 17–20 (1955).

<sup>84</sup> See Nathan Isaacs, *The Standardizing of Contracts*, 27 *YALE L. J.* 34, 40-41 (1917).

<sup>85</sup> See Cohen, *supra* note 5, at 587-88 (1933).

<sup>86</sup> See Pound, *The New Feudal System*, *supra* note 80, at 403.

would be sacrificed in the process, it would seem that the individual interest in promised advantages should be secured to the full extent of what has been assured to him by the deliberate promise of another.<sup>87</sup>

Once we have the correct interest and its domain in mind, Pound makes it follow, in a way that can only be described as "mechanical" (and polemical), that we should get rid of most of the applications of consideration doctrine to commercial contracts.<sup>88</sup> But then it turns out that the interest is clearly over-ridden in a series of situations where the will theory had seemed to dictate bad results, such as, for example, the privity requirement of *Winterbottom v. Wright*.<sup>89</sup> *MacPherson v. Buick Motor Co.*<sup>90</sup> is therefore clearly correct, given modern conditions of mass production and long, impersonal chains of distribution.<sup>91</sup>

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<sup>87</sup> POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, *supra* note 79, at 236-37.

<sup>88</sup> *See id.* at 275-82; Roscoe Pound, *Individual Interests of Substance-Promised Advantages*, 59 HARV. L. REV. 1, 29-42 (1945); Pound, *supra* note 66, at 3-7.

<sup>89</sup> 152 Eng. Rep. 402, 404 (Ex. 1842) (limiting manufacturer's liability to purchasers with whom they were in privity).

<sup>90</sup> 111 N.E. 1050, 1053 (N.Y. 1916) (imposing on manufacturers a duty of care to workers, consumers, and passersby, as well as to purchasers).

<sup>91</sup> Pound's generation of an "ought" from an "is" is that common to pragmatism and institutional economics in their early stages, as well as to sociological jurisprudence. It is important not to confuse it with the question of whether law is separate from morality. Pound thinks moral considerations should influence the choice of legal rules at the legislative level, but does not claim at all that immoral laws are not laws. At the level of adjudication, he thinks that there is so much inevitable discretion that, if you want to predict as a matter of fact how judges will choose legal norms, you have to take into account their moral sentiments. *See* Roscoe Pound, *THE THEORY OF JUDICIAL DECISION*, 36 HARV. L. REV. 641 (1923). In all this, his position is not that different from Fuller's in the Hart/Fuller debate. But the point is that Pound does not clearly distinguish *in sociology* between factual and value judgments, or at least he fudges in the same way the early pragmatists did. He wants the new social sciences to generate valid judgments about what norms are well or ill "adapted" to particular social situations. This is Morton White's point that the "revolt against formalism" was carried out before the 1920's fact/value revolution. MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 203-19 (1949) ("Is Ethics an Empirical Science?"). The revolution was the work of Max Weber in sociology, logical positivism in philosophy, and Lionel Robbins in economics (the notion that economics could be a science only if it purged all value judgments by avoiding interpersonal comparisons of utility). *See generally* Horwitz, *supra* note 3, at 169-92 (Legal Realism defined, in part, by skepticism about reason and morality); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 386-89 (1991) (describing how late-Progressive era social scientists "remade the contours of American social science"). For the field of economics, *see* the account of BEN SELIGMAN, *1 MAIN CURRENTS OF ECONOMIC THOUGHT: THE REVOLT AGAINST FORMALISM* (1962), and for law, *see* EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74-94 (1973) (discussing the relation between the Legal Realists and the social sciences). A major realist complaint against sociological jurisprudence was its blurring of the fact/value distinction. The European analogue, paradoxically, was Kelsen's version of legal positivism, which had the identical motive of rigidly segregating fact and value, but pursued it through legal neoformalism rather than through a move to empirically-based social science.

#### D. *Inter-War External Critique: Contract Law as a State Imposed "Regime"*

1. *The Social Comes to Appear Problematic Rather than Obvious.* The inter-War approach is different, though how different is often unclear. Karl Llewellyn's relationship with Pound illustrates this. In *A Realistic Jurisprudence—The Next Step*, he puts forward what today seems a devastating critique of the social:

Discussion of law, like discussions of "social control," tend a little lightly to assume "a society" and to assume the antecedent discovery of "social" objectives. Either is hard to find in any sense which corresponds with the facts of control. Where is the unity, the single coherent group? Where is the demonstrable objective which is "social," and not opposed by groups well nigh as important as those which support it? And law in particular presents, over most if not all of its bulk, the phenomenon of clashing interests, of antagonistic persons or groups, with officials stepping in to favor some as against some others.<sup>92</sup>

But then he takes a lot of it back:

There is, amid the welter of self-serving groups, clamoring and struggling over this machine that will give power over others, the recurrent emergence of some wholeness, some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good. To affirm this is to confess no Hegelian mysticism of the State. . . . It merely notes that, lacking such a self-sanation in terms of the whole, the whole would not indefinitely continue as a whole.<sup>93</sup>

2. *The Private / Public flip: Contract Law as a "Regime."* — Disillusionment with the social, whether complete or partial, went along with an interest in applying "value free" social science techniques to judicial or lay legal behavior, seen as social fact to be explained like any other social fact. But it led also to a more social theoretical rethinking of law in general and the will theory in particular. In "Consideration and Form," Fuller cites Llewellyn's "What Price Contract?" in presenting his theory of private autonomy as a principle of social order.<sup>94</sup> He might as well have used Morris Cohen's "The Basis of Contract," which he uses for other purposes.<sup>95</sup> Llewellyn cites Max Weber's as yet untranslated *Economy and Society*, and Robert Hale's article, classic but un-cited by Fuller, "Coercion

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<sup>92</sup> Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 3, 36 (1962).

<sup>93</sup> *Id.* at 37. There follows a fascinating footnote in which Llewellyn explicitly argues against too sharp a rejection of the father (clearly meaning Pound). *See id.* at 37 n. 33.

<sup>94</sup> *See* Fuller, *supra* note 1, at 809 n. 12 (citing Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704 (1931)).

<sup>95</sup> *See id.* at 806 n.9 (citing Cohen, *supra* note 5).

and Distribution in a Supposedly Non-Coercive State.”<sup>96</sup> Each of these canonical works presented a different version of the modernist maneuver of turning private into public law, thereby destabilizing the most basic underlying structure of classical legal thought.<sup>97</sup>

In this strand, what is rejected is the idea that freedom of contract is a natural right of individuals, and that the positive rules of contract law, which direct state force in the enforcement of contracts, merely protect this natural right. Likewise what is rejected is the idea that freedom of contract is the result of a natural evolutionary process, normatively validated as the institutional “survival of the fittest.” In place of these two ideas is the idea that freedom of contract, with its accompanying apparatus of positive legal norms, is a “principle of social order.” A principle of social order defines a “regime.” There are many possible socio-legal regimes, including feudalism, communism and fascism, and so forth. Each organizes the production and distribution of goods according to its own rules, understood as implicit in the general regime-defining principle.

The reconceptualization of freedom of contract as regime-defining reflects several characteristics of legal thought between the World Wars. There was the revolt against formalism, and also the revolt against evolutionism. There was the massive growth in historical and comparative cultural knowledge, which revealed a greater diversity of regimes, arranged in less neat sequences, than had been apparent to nineteenth-century historicists. But most important there was the emergence and rise to state power of left- and right-wing ideologies that defined themselves as antagonistic to liberalism in all its forms, and claimed to be based on different principles.

Conceiving freedom of contract as a regime-defining principle of social order was part of a political reform project, one situated between fundamentalist conservative natural rights theory and left or right collectivism. In the reform project, the idea was that a democratic society could choose, through the state, to operate the economy according to private property and freedom of contract for instrumental reasons. Not because the positive legal regime recognized and enforced natural rights, but because such a regime did or could deliver more of what the citizens wanted than the alternative feudal or collectivist regimes.

Instrumentalizing the contract principle in this way gave a new twist to the argument for “segregating” the will theory, or freedom of contract. The segregation argument was that law makers should depart from freedom of contract whenever they concluded that the instrumental benefits of adhering to it were outweighed by the drawbacks. There were two important reasons for choosing another regime than freedom of contract. First, parties within some specified sub-domain of the economy, such as

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<sup>96</sup> See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

<sup>97</sup> See discussion of classical legal thought at text accompanying notes 30-34, *supra*.

labor management relations, were not really “free.” That is, there was grossly unequal bargaining power, so that the benefits of the property/contract regime would be distributed in a manner not legitimated by “true consent.” Second, the practical or real world results of operating the regime were inconsistent with “the public interest,” defined either in terms of spill-over effects, for example labor unrest disrupting the economy, or in terms of a very loose conception of the common or national good.

The notion of freedom of contract as regime-defining served to emphasize that the question of the appropriate scope of the principle of private autonomy was a political question, a subset of the more general political issue of the choice between communism, socialism, social democracy, conservatism, Manchesterism, fascism, and so forth. In the American context, a major practical conclusion that was made to follow from this analysis by its originators was that the U.S. Supreme Court should not strike down progressive legislation on the grounds that it interfered with a right of free contract guaranteed by the 14th Amendment. The arguments against the massive displacement of freedom of contract in labor, securities, and banking law were not legal but political, and therefore legislative rather than adjudicative.<sup>98</sup>

3. *Fuller’s Place in the External Critique of Freedom of Contract.* — Fuller fully assimilated the private/public flip, and repeatedly cited its major proponents:

[I]f *A* contracts to buy a ton of coal from *B* for eight dollars, it seems absurd to conceive of this act as species of private lawmaking. This is only because we have come to view the distribution of goods through private contract as a part of the order of nature, and we forget that it is only one of several possible ways of accomplishing the same general objective. Coal does not have to be bought and sold; it can be distributed by the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and sold by private agreement, we are, within certain limits, allowing individuals to set their own legal relations with regard to coal.<sup>99</sup>

Fuller then had to choose, and did so apparently unselfconsciously, between two quite different next steps. The one he rejected is well-repre-

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<sup>98</sup> Soon after Fuller wrote “Consideration and Form,” *supra* note 1, the U.S. Supreme Court’s New Deal liberal majority decided *Shelley v. Kraemer*, 334 U.S. 1 (1948), applying the realist critique of the public-private distinction. At that point, the idea that private law was public law switched its significance. Before *Shelley*, it meant that it was within the domain of legislative change, and the Supreme Court shouldn’t strike down social legislation. After World War II, it meant that the state was responsible for the effects brought about by private law mechanisms, so that the Supreme Court should use the Equal Protection Clause to strike down common law or statutory private law rules that facilitated racial discrimination. See Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 347-60 (1977).

<sup>99</sup> Fuller, *supra* note 1, at 809 n. 12 (citing Llewellyn, *supra* note 94).

mented by Llewellyn's critique of the rule that courts will not review the adequacy of consideration:

But when the courts ... recognize in general language the adequacy of thoroughly formal consideration, they obscure the problem discussed above, as to government by contract; the same problem so clearly seen by the courts in usury and mortgage cases, and by the legislature in regulation of employment: that of discrepancy of bargaining power and semi-duress in fact. Though obscured, that problem recurs. It is therefore not surprising that the last quarter century has seen—in business cases—the incursion into the doctrine of consideration of a further doctrine of so-called “mutuality” whereby ... some equivalency in fact ... [is] insisted on, even when formally adequate consideration is present. ... [I]t is not unlikely that [this tendency] will develop, as in the past, peculiarly to relieve the weaker bargainer. ... [T]he result has been ... —natural enough in a business economy—a relief of smaller business men which finds little counterpart in the case of the laborer.<sup>100</sup>

The crucial point about this approach is that the issue of relative bargaining power poses itself across the whole range of contract-types, starting with the relations of businessmen among themselves.

The contrasting approach Fuller adopted was to affirm that there was a “proper sphere” for the principle of private autonomy: “[T]he most familiar field of regulation by private autonomy is that having to do with the exchange of goods and services,” and it extends beyond to partnerships and collective bargaining agreements.<sup>101</sup> The family was implicitly but firmly excluded.<sup>102</sup>

Even within the “proper sphere” of private autonomy, Fuller asserts that:

If we look at the matter realistically, we see that men not only make private laws for themselves, but also for their fellows. I do not refer here simply to the frequent existence of a gross inequality of bargaining power between contracting parties, nor to the phenomenon of the standardized contract established by one party for a series of routine transactions. Even without excursion into the social reality behind juristic conceptions, a principle of private heteronomy is visible in legal theory itself, as, for example, where it is laid down as a rule of law that the servant is bound to obey the reasonable commands of his master. Here the employer, within the framework of the agreement and subject to judicial veto, is making a part of “the law” of the relation between himself and his employee.<sup>103</sup>

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<sup>100</sup> Llewellyn, *supra* note 94, at 744.

<sup>101</sup> Fuller, *supra* note 1, at 809.

<sup>102</sup> See, e.g., *id.* at 819 (arguing that exchange is absent in an uncle's promise to his nephew).

<sup>103</sup> *Id.* at 808.

This said, the article simply moves on. “Consideration and Form” restricts itself to analyzing the domain that remains for contractual ordering after we have separated from it, first, non-economic relations, and, second, relations of private heteronomy. What Fuller wants to analyze is the internal structure of the contract regime, rather than the question of its “proper sphere.” He seems to think that once he has made his exclusions, he can do the internal analysis without bothering with issues of bargaining power. This was a momentous decision, as we will see. But before we analyze it, according to the tortuous scheme of converging genealogies we are following, we need to start all over again, so to speak, in order to trace the origins of the conflicting considerations that Fuller admitted into contract law once it had been restricted to its “proper sphere.” These consist of the formal considerations he summarized as evidentiary, cautionary and channeling functions, and the three substantive considerations of private autonomy, protecting reliance, and preventing unjust enrichment.

### III. THE INTERNAL CRITIQUE OF THE WILL THEORY

This Part is about the origins of the conflicting considerations that Fuller acknowledged within the contractual core that remained after appropriately restricting the principle of private autonomy. What is involved is internal critique of a quite pure kind. The private law theorists of the period up to 1940 argued that the will theory could not explain the rules, and also that in order to explain the rules, it was necessary to add other factors than the will theory. The outcome might have been to get rid of will altogether and replace it with another theory based on another governing principle. But that is not what happened. Instead, the will theory was demoted from governing legal principle to the status of a policy (the principle of private autonomy), and the other factors that had been revealed by internal critique were promoted from the shadows to policy status as well, though somewhat subordinated to private autonomy. The first section is about the origin of the formal policies—evidentiary, cautionary, and channeling—and the second is about the origins of the substantive ones—autonomy, reliance, and unjust enrichment.

#### *A. Consideration Doctrine and the Objective Theory of Contracts as Responsive to Formal Goals*

1. *Holmes.* — Holmes’s contribution to the discussion of form was his theory that the law evolves in the direction of “external standards.” The legal system starts with a moral standard like good faith or negligence, and the jury has the role of applying the standard in case after case, with little predictability. Eventually the judges identify the elements in the cases that cause the jury to go one way or the other consistently, and abstract these in the form of a list of factual elements that lead to liability regardless of the state of mind of the defendant. The point is not that the judges are interested in strict liability, for example, as opposed to

negligence. It is that once we have figured out that according to the moral sense of the community particular conduct is negligent, it is wasteful and unnecessary to let defendants off if they can show that although they engaged in the conduct they did not have a requisite mental element. It is more efficient and better for everyone in the long run to shoot a few hostages through proceeding "objectively."

Holmes is full of ambiguities. An important one is between a theory that is concerned with the form of norms because of the Jhering issue of "realizability," certainty for the parties and social control of the judiciary,<sup>104</sup> and what Holmes calls his "general object of showing that the tendency of the law everywhere is to transcend moral and reach external standards."<sup>105</sup> He presents this as a law like Maine's from status to contract.<sup>106</sup> The latter way of phrasing it has "big think" overtones, seeming to suggest both a law of change for law, and of change in a direction that would make law like other "sciences" in its preoccupation with "phenomena" rather than with inner "essences." Both the utilitarian and the moral dimensions of the choice between rules and standards get slighted in honor of this notion of objectivity:

Notwithstanding the fact that the grounds of legal liability are moral to the extent explained above, it must be borne in mind that the law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. ... In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. ...

Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of any body of men.<sup>107</sup>

Like Jhering, Holmes finds the issue of form equally in tort and contract law. In contract law, he applies his theory of externals as a strong support for the "objective" theory, as opposed to the theory of the subjective "meeting of the minds." But it is striking, it seems to me, that his defense of the objective theory pays almost no heed to considerations of administrability or certainty, of "formal realizability" in Jhering's phrase. All the emphasis is on the more "philosophical" notion of the "tendency to transcend moral and reach external standards." The recasting of the objective theory as about the relative certainty of rules as against standards was the work of Costigan, Corbin, and Whittier, not Holmes.

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<sup>104</sup> See *supra* text accompanying notes 50-51.

<sup>105</sup> Holmes, *supra* note 20, at 107-08.

<sup>106</sup> See HENRY MAINE, ANCIENT LAW 151 (1911).

<sup>107</sup> Holmes, *supra* note 20, at 88.

Another contribution is that Holmes in a famous passage generalizes the category of the “*formality*.” The category should include not only the familiar ritual requirements, such as the seal, but also thoroughly modern rules, so long as those rules function, like the rituals, to require something more of the parties than mere intent, proved in the normal way, if they want to change their legal relations:

Nowadays, it is sometimes thought more philosophical to say that a covenant is a formal contract, which survives alongside of the ordinary consensual contract, just as happened in the Roman law. But this is not a very instructive way of putting it either. *In one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor’s will. Consideration is a form as much as a seal.* The only difference is, that one form is of modern introduction, and has a foundation in good sense, or at least falls in with our common habits of thought, so that we do not notice it, whereas the other is a survival from an older condition of the law, and is less manifestly sensible, or less familiar.<sup>108</sup>

The two issues of whether or not we should have an objective theory of contracts and whether or not we should have a doctrine of consideration were the obsessional concern of American contract theory from then on. And it was common ground from then on that objectivism and consideration were both in some (let’s face it) obscure way questions that invoked the conflicting considerations that arise when we try to decide on the proper form of legal rules, particularly of legal formalities.

*2. The Objective Will Theory of Contract Critiqued as the Sacrifice of Will to Certainty.*

a. *The Internal Critique of Objectivism.* — In Holmes, the objective theory of contract derived first and foremost from the idea that it is the nature of law to cast its tests in external terms. One reason for this is the desire for certainty. But contract was still the law of will, and freedom of contract was, for Holmes when he wrote *The Common Law*, simply the generally accepted policy spirit of the time. What he advocated was an objective rather than a subjective will theory of contract.

There were two distinct tendencies in contract theory that worked to undermine and eventually to reverse this way of looking at it. The first was the general tendency of classical legal thinkers to divide and sub-divide and sub-sub-divide all legal fields into public and private nesting categories. They had transformed the pre-Civil War field of contracts by expelling tort rules, quasi-contract rules, and status rules on the ground that they derived from the will of the sovereign rather than the will of the parties. In 1907, George Costigan wrote an article arguing that contracts formed on the basis of the objective manifestations of intent of the parties, without a subjective meeting of the minds, were formed against rather than in accord with their intentions, and should be called “con-

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<sup>108</sup> *Id.* at 215 (emphasis added).

structive contracts" or contracts "by estoppel."<sup>109</sup> He did not appear to have any motive for this proposal beyond the desire for analytic rigor in legal classification.

Arthur Corbin took Costigan a long step further, in a famous article called "Offer and Acceptance, and Some of the Resulting Legal Relations," which was an early application of Hohfeld to contract law. He argued not only that forming a contract on the basis of objective manifestations had nothing to do with protecting the will of the parties, but also that the reason for disregarding will, by imposing full contract liability in its absence, was that "[i]n the law of contract as in the law of tort, men are expected to live up to the standard of the reasonably prudent man."<sup>110</sup> Contrary to the will theory, "[t]he legal relations consequent upon offer and acceptance are not wholly dependent, even upon the reasonable meanings of the words and acts of the parties."<sup>111</sup> They were based rather on "the notions of the court as to policy, welfare, justice, right and wrong."<sup>112</sup> In other words, Corbin treated basic contract offer and acceptance rules as imposing liability, or refusing to impose it, on the basis of a combination of will considerations and *non-will* policy considerations derived from the law of tort. The outcome could not be referred to will alone, and the core of contract law was a locus of compromise.

Williston's response, in 1919, was the kind of performance that led to Fuller's critique in the book review already discussed.<sup>113</sup> It was that

[t]o distinguish into two categories obligations imposed by law in accordance with the mental assent of the parties, and obligations imposed by law in accordance with the natural meaning of the acts of the parties but without mental assent, is undesirable unless the law attaches consequences to one category which it does not attach to the other. ...<sup>114</sup>

Williston thought that, although all contractual liability is imposed by the state for reasons of policy (he was a Holmesian positivist),<sup>115</sup> the objective and subjective theories were both genuine variants of the same will theory.

In one case, there was mental assent; in the other, the "natural meaning of the acts" of the parties (*i.e.*, what they actually said) was the same. "[A]n expression of mutual assent, and not the assent itself, is the essential element of contractual liability."<sup>116</sup> This was Holmes's version, but

<sup>109</sup> George P. Costigan, Jr., *Constructive Contracts*, 19 THE GREEN BAG 512, 513 (1907).

<sup>110</sup> Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169, 205 (1917).

<sup>111</sup> *Id.* at 206.

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* note 59.

<sup>114</sup> Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85, 95 (1919).

<sup>115</sup> See Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368, 371 (1921).

<sup>116</sup> *Id.* at 87.

Williston then argued not that it was the nature of law to go for the objective manifestation, but rather that the objective theory was simply the law of the land, apparent equitable backsliding being easily explained away and a very few anomalies acknowledged. Williston offered no policy rationale at all for objectivism.

Corbin's analysis was a quite pure example of internal critique. The will theory doesn't explain the rules. The Williston version is not coherent because it treats an outcome that a party definitely does not desire as though it were an outcome that same party wanted; on the other hand, if we adopt a consistent explanation in terms of intention, we need to add new factors to account for the rules.

Corbin's analysis was taken up by Pound<sup>117</sup> and Morris Cohen<sup>118</sup> as a way to refute a deductive version of the will theory. For them, the point had a political resonance that Corbin may or may not have intended. The U.S. Supreme Court was busily constitutionalizing common law freedom of contract, in order to strike down the Progressive legislative program. But Corbin's analysis opened up the line of argument that, as Horwitz puts it, "the goals of intervention and regulation were already deeply embedded in the existing law and that the individualistic world of autonomous wills had long since passed from the scene."<sup>119</sup> Common law judges had all along been restricting or compelling contracts, according to their views of policy. And if it was all right for the judges to do this, it was hard to see how the Constitution could forbid the legislature from doing it.

That the internal critique of the will theory in contract formation doctrine had a direct meaning for constitutional law gradually became a commonplace of progressive rhetoric. Max Radin, participating in a 1943 *Columbia Law Review* symposium on compulsory contracts, seemingly a response to critics of the New Deal, put it as follows:

If the "objective" theory is really as fundamental in our system as is so often said, it is hard to see why "compulsory" contracts should seem abhorrent to the common lawyer, who so frequently boasts of his contempt for mere verbalism. All obligatory transactions are compulsory by the fact of being obligatory. And if a man is compelled to carry out what he never meant or what he did not quite understand—and that is implied in the "objective" theory—merely because his words or acts might reasonably be assumed to carry certain implications, we have something not very different from contracts made for parties by statutes or regulations.<sup>120</sup>

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<sup>117</sup> See Pound, *An Introduction to the Philosophy of Law*, *supra* note 79, at 264-65, 270-71.

<sup>118</sup> See Cohen, *supra* note 5, at 576-78.

<sup>119</sup> Horwitz, *supra* note 3, at 36.

<sup>120</sup> Max Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575, 575 n.4 (1943).

b. *Fuller's Response: A first Defense of the Principle of Private Autonomy.*

— Fuller's contribution in "Consideration and Form" was to develop the principle of private autonomy as a concurring and competing consideration in the development of contract doctrine. To do this, he had to deal with the approach that claimed simply to refute the will theory through the critique of objectivism. The principle of private autonomy "simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations."<sup>121</sup> The nature of the principle has been

obfuscated through the introduction into the discussion of what is called 'the will theory of contract.' The obfuscation has come partly from the proponents of that theory, but mostly from those who have undertaken to refute it and who, in the process of refutation, have succeeded in throwing the baby out with the bath.<sup>122</sup>

In a footnote he identifies Pound and Duguit as "hav[ing] rejected too much in their repudiation of the will theory."<sup>123</sup>

Fuller's point is straightforward: the validity of a principle of private autonomy is not in any way put in question when courts use objective tests to decide what version of the parties' intentions to enforce. The counter-intuitive result of the objective approach "rests upon the need for promoting the security of transaction."

Yet security of transactions presupposes "transactions," in other words, acts of parties which have a law-making and right-altering function. When we get outside the field of acts having this kind of function as their *raison d'Être*, for example, in the field of tort law, any such uncompromisingly "objective" method of interpreting an act would be incomprehensible.<sup>124</sup>

Fuller's solution is to dethrone the will theory by making it coexist, under the name of the principle of private autonomy, with other considerations, including the formal ones of evidence, caution and channeling summarized for contract law as "security of transaction." By conceding that autonomy is not all, and indeed accepting the formal considerations revealed by internal critique to be at work in shaping the rules, Fuller

<sup>121</sup> Fuller, *supra* note 1, at 806.

<sup>122</sup> *Id.* at 807.

<sup>123</sup> *Id.* at 807 n.10. Fuller is quite unfair to Pound, whose main critique of the will theory was that it was inconsistent with the common law relational tradition and ill-adapted to modern conditions. Pound critiques, in his famous trashing of consideration doctrine, a "deductive" and "subjective" will theory, while constantly conceding that there are quite different historical and philosophical versions of it (utilitarian, historicist, etc.). See Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, *supra* note 79, at 263-69. In fact, Fuller adopts what I will claim later is a vulgarized, unsophisticated version of the argument for segregation," simply dismissing the will theory as irrelevant in areas of private heteronomy. In this respect, he casually adopts most of Pound's position, while ignoring sociological jurisprudence as a totalization, social law, the relational theory of contract, and the sociological theory of interdependence as the characteristic trait of modern societies.

<sup>124</sup> Fuller, *supra* note 1, at 808.

saves the baby rather than throwing it out with the bath. In the process, he establishes the particular kind of relationship between considerations that characterizes his work. They are plural rather than singular, and in principle they can conflict, but in practice they are seen to be harmonious and non-controversial, as here security of transaction supports and improves private autonomy rather than contradicting it.<sup>125</sup>

We are now in a position to look at:

3. *The Policy Analysis of Consideration Doctrine.* — The requirement of consideration was defined in a way that permitted deductive resolution of a large number of ethically delicate and potentially controversial questions of contract rule choice. If all these questions were settled once one adopted a definition of consideration that was itself a fair induction from prior cases, then there were a large number of rules that needn't be looked at in terms of conflicting considerations analysis.

Because consideration played such a prominent role in classical contract law, it was an early target of sustained attack by the sociological jurists and then by the realists. For example, Pound demonstrated in a striking article that many of the case law applications of the definition were a late development that disregarded earlier cases in equity that came out the other way.<sup>126</sup>

The consideration discussion was preoccupied from the beginning with the formal dimension of consideration, as illustrated by Holmes's mot about "a form as much as a seal."<sup>127</sup>

<sup>125</sup> See *id.* at 813-14.

<sup>126</sup> See Roscoe Pound, *Consideration in Equity*, 13 ILL. L. REV. 667, 687-92 (1919).

<sup>127</sup> Holmes, *supra* note 20, at 225. See also Morris Cohen's argument from his seminal article, which we will be discussing in greater detail in a moment:

Modern law therefore professes to abandon the effort of more primitive systems to enforce material fairness within the contract. ... Though ... the common-law doctrine of consideration did not originate in the law's insistence on equivalence in every contract, the latter idea cannot be eliminated altogether. It colors the prevailing language as to consideration, and especially the doctrine that in a bilateral contract each promise is consideration for the other ... . The real reason for the sanctioning of certain exchanges of promises is that thereby certain transactions can be legally protected [sic], and when we desire to achieve this result we try to construe the transaction as an exchange of promises. Consideration is in effect a formality, like an oath, the affixing of a seal, or a stipulation in court.

We are apt to dismiss the early Roman ceremonies of *mancipatio*, *nexum*, and *sponsio*, the Anglo-Saxon *wed and borh*, or the Frankish ceremonies of *arramitio*, *wadiatio*, and of the *festuca*, as peculiar to primitive society. But reflection shows that our modern practices of shaking hands to close a bargain, signing papers, and protesting a note are, like the taking of an oath on assuming office, not only designed to make evidence secure, but are in large part also expressions of the fundamental human need for formality and ceremony, to make sharp distinctions where otherwise lines of demarcation would not be so clearly apprehended.

Ceremonies are the channels that the stream of social life creates by its ceaseless flow through the sands of human circumstance.

Cohen, *supra* note 5, at 581-82.

The policy analysis of the doctrine by sociological jurists like Corbin<sup>128</sup> and realists like Llewellyn<sup>129</sup> was far more sophisticated than Holmes.<sup>130</sup> From the first, it made a sharp distinction between two types of applications of the classical definition of consideration. There was a policy against enforcing promises to make "true" gifts, that is, gifts outside any commercial setting (which meant in practice in the family and charitable contexts). And there was a quite distinct set of applications of the definition to promises in business contexts, as in the rule against irrevocable offers, the pre-existing duty rule, and the rule of *Foakes v. Beer*.<sup>131</sup> Promises in these contexts might be technically "gratuitous," but were understood as part of the "continuous adjustment of business relations" rather than as instances of private benevolence, or charity.

This policy analysis emphasized, as did some "progressive" case law, that the difficulty in the commercial context was with either duress or informality, and that the right way to deal with both was by addressing the "moral" problems directly. In other words, consideration doctrine, like objectivism, was inconsistent with the will theory, because it refused to enforce will. But, after subjecting it to internal critique, it could be rendered intelligible by looking at it as a misguided attempt to avoid overbearing of will—the duress side—and to achieve formal objectives just like those of the objective theory.<sup>132</sup>

In the commercial context there was no good reason aside from duress or informality not to let businessmen decide for themselves whether they wanted to be bound to offers, to contract adjustments that favored only one side, or to settlements of liquidated debts for less than their theoretical value. The same seemed to them true for charitable subscriptions. Consideration doctrine could be attacked as an unjustified impairment of parties' general freedom to contract on any terms they wanted, allying the critics, paradoxically, with the rhetoric of *laissez faire*.

As to the simple case of the intra-family unrelieved-on gratuitous promise, they were split, on policy grounds, just as the authorities are today, with some favoring some equivalent of the highly formal, sealed or nota-

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<sup>128</sup> See Arthur L. Corbin, Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions, 27 YALE L.J. 362, 372-74 (1918).

<sup>129</sup> See Llewellyn, *supra* note 94, at 718-22, 741 n.77, which is also discussed at length at *infra* notes 136-142 and accompanying text. See also Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919) (explaining that both common law consideration and civil law *causa* doctrines are inadequate measures of intent in particular cases).

<sup>130</sup> Note that Fuller does not even mention that Holmes line. In general, he was anti-Holmes because of Holmes's positivism, objectivism, and anti-natural law views. See Robert S. Summers, LON L. FULLER 58, 115-16, 147-48 (1984). But all of "Consideration and Form" is a critique of the idea that we can understand consideration as no more than a form.

<sup>131</sup> L.R. 9 A.C. 605 (H.L. 1884).

<sup>132</sup> See Corbin, *supra* note 128; Llewellyn, *supra* note 94.

rized enforceable gratuitous promise, and some opposing it.<sup>133</sup> Section 90 of the first Restatement of Contracts added the alternative of recovery on a gratuitous promise based on reasonable reliance. It was clearly designed as a “substitute for consideration” based on morality rather than formality.<sup>134</sup> It was only after World War II that there appeared the body of cases that treat promissory estoppel as an alternative to consideration seen as a form, and as an alternative to many other formalities as well.<sup>135</sup>

Llewellyn, in his 1931 article “What Price Contract?”, begins by pointing out that “[i]n all legal systems the effort is to find definite marks which shall at once include the promises which ought to be enforceable, exclude those which ought not to be, and signalize those which will be.”<sup>136</sup> He understands these marks to be “forms,”<sup>137</sup> and he endorses, in a footnote, Holmes’s “a form as much as a seal.” He says, “Consideration can be conceived as a form, in every instance, and is quite plainly such, in many.”<sup>138</sup> He then critiques consideration doctrine as a way to achieve formal objectives:

[A] business economy demands a means of quick, not one of “informal” contracting.

*Consideration*

But with us the machinery evolved fits both descriptions; the much discussed requirement, and sufficiency, of a consideration. In purpose consideration surely approximates closely the rough description given above of *causa*: any sufficient justification for court-enforcement. In broad effects, that purpose is accomplished. In detail, however, the machinery is embarrassed by a number of rules not too well designed to meet the purpose, yet sufficiently crystallized to make continuous trouble in such cases as involve them.<sup>139</sup>

<sup>133</sup> See the literature collected and summarized in Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 186-89 (1989).

<sup>134</sup> Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 909 (1937). See generally *id.* at 914, 943-44. The phrase, “substitute for consideration,” was articulated by Cardozo in *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 175 (1927).

<sup>135</sup> See Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 55-58, 77-79 (1981).

<sup>136</sup> Llewellyn, *supra* note 94, at 738.

<sup>137</sup> See *id.* at 741-42 n.77, where he defines a form as

(a) one particular necessary way of doing the thing, for legal effect, among several ways (all known to practice) of doing the same thing if law be not considered; or (b) a way of doing which must be *added* to what would be done anyhow. For otherwise form so fits into common habits as not to require attention from any but philosophers and ethnographers.

The definition is clear and useful, as a definition of a *formality*. His next sentence shows, however, that Llewellyn had not figured out the basic Jhering insight that we can do a general policy analysis of “form,” or as they said already in the 1920s, “administrability,” as an aspect of all legal rules, to be treated in parallel with substantive considerations. See discussion *infra* at Part III.A.4.

<sup>138</sup> Llewellyn, *supra* note 94, at 741-42 n.77.

<sup>139</sup> See *id.* at 741.

Llewellyn identifies four "troublesome classes of cases": the firm offer, withdrawal of an offer of a unilateral contract after part performance by the promisee, business modifications unilaterally beneficial to the promisee, and, in the family context, reliance on promises where the promisor did not intend to be bound.<sup>140</sup> He concludes that:

As a test of what promises *not* to enforce, [consideration doctrine] must be regarded as somewhat formalistic. The existence of a bargain equivalency does indeed commonly evidence positively that the promise was deliberate—considered—meant. Such equivalency gives also fair ground for believing that *some* promise was in fact made; and thereby much reduces the danger from possible perjury, and even from misunderstanding. The giving of a bargain equivalent, be it by promise or by action, is furthermore an excellent objective indication not only of the creation of expectation in the promisee, but of the reasonableness of there being expectation, and of its being related to the promise . . . . Yet it will be observed that the handing over of a signed promise in writing (which is *not* enough for enforcement) would go far in most circumstances to assure the same values; no lawyer, *e.g.*, can fail to be struck by the closeness with which exemptions from the requirement of a writing under the statute of frauds are related to the presence of unambiguous consideration which is *substantially equivalent in fact* to the promise claimed. Nor is it apparent why in many cases deliberateness, due assurance that the promise was made and relied on, and properly so, might not all be evidenced by circumstances apart from either writing or consideration. The problem is acute only within the family. Outside, a writing might well be made a condition to "reasonableness" of any reliance; though very possibly, as with the statute of frauds on sales an exception might be needed for petty transactions. All in all, then, as a test, for non-enforcement, our consideration requirement must be regarded as not yet wholly just to our needs.<sup>141</sup>

This discussion quite fully anticipates Fuller's approach to analyzing how formal policies should affect enforcement. And it is followed by a substantive discussion in which the question is whether the presence of consideration indicates that a given promise should be enforced. Here Llewellyn points out that having a doctrine of the adequacy of what he calls a "thoroughly formal consideration" means that the courts do not, at least overtly, police the substantive fairness of bargains, and that the formal rule leads them to do exactly that in a covert and biased way.<sup>142</sup>

4. *Fuller's Contribution.* — In this context, "Consideration and Form" was not by any means the first or even a particularly good critical take on consideration doctrine, seen as a formality. Fuller was unmistakably do-

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<sup>140</sup> See *id.* at 742.

<sup>141</sup> *Id.* at 743-44 (footnotes omitted).

<sup>142</sup> *Id.* at 744. For a discussion of this aspect of Llewellyn's position, see *supra* note 94 and accompanying text.

ing a second generation kind of work. He didn't have to establish that we can look at the doctrine through a policy analytic. What he wanted to do was to show how we should do the policy analysis, rather than that we can do it, or even that it should reach any particular set of results.

Fuller contributed mightily to this agenda by abstracting and generalizing the conflicting considerations that his predecessors had developed in their detailed critiques of the will theory as it manifested itself in particular sub-rules of objectivism and consideration doctrine. As opposed to a primary focus on a particular sub-rule, for example, the pre-existing duty rule, or the non-enforceability of irrevocable offers, that opportunistically invokes the relevant arguments, he proposed a grid of formal and substantive considerations that can be applied over and over again. Then he applied it to each of the sub-rules of consideration doctrine, and in a way that was strictly parallel to the way he and others had applied it to objectivism.

In order for there to be this strict parallelism between the treatment of the formal and substantive aspects of a given private law question, he had to disembed the formal considerations from the particular policy analyses in which contract writers had developed them.<sup>143</sup> But Fuller had to perform a second operation as well. He had to disembed the theory of form from the larger theories in which the general theorists of private law had developed them. Fuller contributes by *not having a theory of form* of the type proposed by writers like Jhering and Holmes, and by *not having a theory of consideration* of the type writers like Holmes and Pound were grasping for.

Each of the writers on formalities is preoccupied with form viewed in historical or sociological perspective, and only secondarily with form as an issue in policy making, although these writers are so important that they had massive influence on policy through their historical and sociological hypotheses. Thus Jhering contrasts formal to material realizability in order to set up sociological requirements of a functioning legal order, and then formulates his famous hypothesis that the rational, ethical, subjective, and therefore anti-formal evolution of Roman law was a symptom of decadence.<sup>144</sup> The insights that there is a built-in conflict about legal form, with the gains from formality always won at a significant ethical cost, and that rules for formalities function like a language to convey the parties' decision about whether or not to bind themselves, were buried in this much more grandiose agenda.

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<sup>143</sup> For example, Fuller cites articles by Mechem and Chafee that develop formal arguments in particular contexts without relating them to any general discussion of form. See Fuller, *supra* note 1, at 800 n.4 (citing Zechorian Chafee, Jr., *Acceleration Provisions in Time Paper*, 32 HARV. L. REV. 747 (1919); Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, (1926—27)).

<sup>144</sup> See Jhering, *supra* note 29, at 163.

Holmes's theory of the movement from subjective, internal standards to objective, external standards is based on his clear understanding that there are conflicting considerations that come into play in the choice of form, but his purpose is no less grandiose than Jhering's, since he wants to make a contribution both to the application of evolutionist ideas to law, and to the "scientific" turn legal theory took in reaction against the "vague ethicism" of the pre-Civil War generation.<sup>145</sup>

Just as Demogue's greatest contribution was to forego a theory that would integrate the contradictory or conflicting notions he specified for private law, the lesser but valuable contribution of Fuller was not to ask us to buy into a theory of form. He presents us with the functions of formalities for no other purpose than to help us decide how to design formalities.

With respect to consideration doctrine, Fuller begins, both in the article and in his case book, with quotations designed to show that some authorities have thought consideration was just a formality and others have thought consideration was about what promises deserve enforcement on the merits. He clearly thinks, and he seems to be right, that he is the first to present the doctrine as having two quite distinct functions, so that each sub-rule needs to be analyzed, as a tub on its own bottom, neither just as a formality nor just as a substantive restriction on freedom of contract, but as both.<sup>146</sup> In other words, just as he doesn't propose a theory of form, he doesn't propose either a formal or a substantive theory of consideration.

The formal presentation of the question of form is no different from the formal presentation of the substantive bases of liability. I think that this will turn out to be the first time that a legal scholar sets up conflicting considerations in this particular way. But let me emphasize that for many years legal scholars doing policy analysis of particular questions had used both formal and substantive and institutional policy arguments.<sup>147</sup> The

<sup>145</sup> See *supra* text accompanying note 88.

<sup>146</sup> Llewellyn does do everything that Fuller says needs to be done, but he fails to describe what he is doing in a way that makes it replicable, or paradigmatic.

<sup>147</sup> A good example is Zachariah Chafee, Jr., *Unfair Competition*, 53 Harv. L. Rev. 1289 (1940), published the year before "Consideration and Form" and destined to have as much influence in its field. This is an impressive early attempt to present arguments in an organized set that can be reused in many particular doctrinal contexts:

1. [Rules I should be capable of reasonably accurate definition. ... 2. There is a policy against monopolies. ... 3. There is a policy in favor of centralizing the protection of morality in the government,—in a prosecuting attorney or the Federal Trade Commission. ... 4. Some trade practices are better handled by administrative agencies. ... than by the courts.

*Id.* at 1317—2 1. But this article does not make anything of the distinction between formal, substantive, and institutional arguments. It merely deploys instances from each category in a way that shows a complete tacit understanding of the limited number of arguments, their infinite redeployability, and their non-conclusive character. In other words, Chafee is moving toward semioticization but without much interest in the typology of arguments. Fuller, in contrast, offers a typology that has endured and still organizes our thinking.

point is not that Fuller contributed a new argument or a new way of arguing. What he contributed was a new way of conceptualizing policy analysis: as involving the conscious deployment of two different types of considerations, without privileging one or the other type, each subdivided, and all considerations arguably relevant to any problem of legal choice.

5. *Critique of Fuller on Form.* — Fuller's presentation of the formal issues raised by consideration doctrine is open to many criticisms,<sup>148</sup> but when we look at it as a contribution to conflicting considerations thinking rather than as a contribution to the specific problems of form and consideration doctrine, the only criticism that is important is that having to do with his treatment of conflict. He fails to see the conflict of considerations as intrinsic to the choice of form, so he lists the functions of form without doing as Jhering and Demogue did, and also listing the disfunc-

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<sup>148</sup> The biggest weakness is that the channeling function is a mess. The clearest idea is that formalities like the seal are a device by which the businessman who wants to bind himself or another can accomplish his objective. But here it would seem that we are speaking of providing good evidence of his intention and making sure that he is cautious, so why a third function, and in what sense are we "channeling?" See Kennedy, *Form and Substance*, *supra* note 13, at 1691, n.14.

A second idea that runs through the discussion is that transaction types, identified for the judge by the use of formalities, involve default rules (the writers of the time called them "suppletive rules"). These "channel" in the real sense that, because varying them is costly, they influence the content of bargains in their direction. Formalities, arguably, should be designed so that the parties will find themselves channeled into legally binding obligations given content by court-made default rules when it seems likely that is best for them, and not otherwise. But is this what Fuller is talking about? If so, he does not offer a convincing test for when to bind when intent to be bound is unclear. See David Charny, *Non-legal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 455 n. 239-240 (1990).

A third idea comes directly from Demogue. It is the idea that a transaction, entry into which requires a formality, may have—to one degree or another—default rules that cut off the promisor's defenses, in order to achieve security of transaction. Fuller acknowledges, though only in passing, that this may involve both "advantages and dangers of form in the aspect we are now considering." See Fuller, *supra* note 1, at 802. There is something to be lost if we relax the rigors of such an arrangement, as in the case of the seal, because the "abstract" transaction is useful for people who are up to using it correctly. But he does not acknowledge, even in passing, Demogue's interest in static security.

The notion that formalities are a language through which the parties communicate with a judge is yet a fourth idea. The language analogy suggests another sense of channeling: Legal formal languages, like natural languages, constrain (obscurely) and are subject to similar vicissitudes.

None of these four ideas originated with Fuller. His only contribution was to present them, though he confused them in the process, in a way that has made the channeling function idea largely useless, however often hopefully deployed.

Because the channeling function is what distinguishes formalities from legal rules in general, and the channeling function is pretty confused, Fuller does not contribute much to our understanding of the different arguments that support formality and informality in the two contexts. Here it seemed to me, in 1976, that the big difference was the impact on transactor behavior of formalities as opposed to other kinds of rules. See Kennedy, *Form and Substance*, *supra* note 13, at 1690-94.

tions. The result is that it seems that we have a problem of combining, or harmonizing goals, but no problem of *inherent conflict*.

Fuller's mode is that the different formal desiderata usually point in the same direction. "Generally speaking, whatever tends to accomplish one of these purposes will also tend to accomplish the other two. He who is compelled to do something which will furnish a satisfactory memorial of his intention will be induced to deliberate."<sup>149</sup> Surprisingly, there are no cases of flat out conflict among formal purposes.<sup>150</sup> This problem of how to conceptualize the conflict of conflicting considerations will recur when we trace the substantive elements in the same way we have just traced the formal ones.

The Progressives seemed sometimes to think they could refute the will theory by showing that objectivism and consideration doctrine involved disregarding the will. Fuller, by contrast, thought he could rehabilitate, not the will theory, but the notion that a principle of private autonomy was a basis of contract liability. He did this by showing that objectivism and consideration could serve private intentions by providing forms for their expression. This involved fully accepting the internal critique that revealed the conflict between intention and security of transaction, just as he fully accepted the private/public flip that made contract a principle of social order rather than mere rights enforcement.

But Fuller took the project of internal critique a long step beyond this development of form as an independent consideration in legal rule making. What he did was to show that there was a multiplicity of substantive principles within the contractual core. It was not just that the substantive motive of private autonomy had to be adjusted for formal reasons. *There were several substantive ideas, rather than just one, from which we derive the particular sub-rules.* This is true even after we have segregated

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<sup>149</sup> Fuller, *supra* note 1, at 803.

<sup>150</sup> The closest Fuller gets is:

Despite the close interrelationship of the three functions of form, it is necessary to keep the distinctions between them in mind since the disposition of borderline cases of compliance may turn on our assumptions as to the end primarily sought by a particular formality. Much of the discussion about the parole evidence rule, for example, hinges on the question whether its primary objective is channeling or evidentiary.

*Id.* at 804. What this probably means is that if the function is merely evidentiary, then we might excuse the worker who signs the release on the basis of assurances from the insurance company's agent, by allowing him to explain what he was told. But if it is channeling, then the function of the rule is to permit people to insulate their bargain, and we should stick to it. This is not an analytically powerful way to look at it. The trouble is, as Jhering and Demogue saw, that there are always considerations against using form, and against providing security of transaction, because form deforms intent, and security of transaction comes at the expense of static security. It is really a two-layered conflict situation: There are different pro-form policies that may converge or conflict, and there are different anti-form policies that may do likewise. The outcome involves balancing all these in one big mush. Fuller's treatment is much less sophisticated than theirs, though he cites them admiringly.

contract from domains of heteronomy, such as employer/employee relations, and are all in agreement that we are dealing with a domain that should be governed by contract, and have made all kinds of adjustments to achieve evidentiary, cautionary, and channeling objectives. Even then, every choice of a norm within the domain of free contract, to be made rationally, must be made according to a calculus that includes factors other than free contract or autonomy. Moreover, these factors have a pedigree within private law that is every bit as respectable as that of freedom of contract or will itself. In short, contract law is the law of will, of tort, and of restitution, as well as the law of formalities.

*B. The Substantive Internal Critique of Will Theory: Tort and Prevention of Unjust Enrichment as Constitutive Principles of Contract*

In this section, I will trace the emergence of the substantive trio—the principles of private autonomy, of protecting reliance, and of preventing unjust enrichment—from earlier attempts, post-deduction-from-the-will-theory, to identify what is “really” at stake in choosing the specific sub-rules that make up the law of contracts. I will first argue that this structure owes a great deal to the peculiar circumstances of common law, as opposed to civilian, classical contract theorizing—pre-World War I but continued by the older generation into the inter-War period. Second, it owes an equal amount to American inter-War attempts to critique classical presuppositions in order to escape their apparently reactionary implications.

*1. Classical and Modernist Legal Thinkers Develop a Picture of Common Law Contract Theory Based on Tort and Restitution, as Well as Subjective Will.*

— Classical legal thought was a truly international phenomenon, characteristic of the last half of the nineteenth century at least in France, Germany, Britain, and the United States, and in the many independent countries and colonies under their strong influence or direct legal control.<sup>151</sup> Legal theorists developed different versions of the will theory in different countries, versions that fit to one degree or another their local law. Then, given their universalizing aspirations and their relatively high level of comparative law knowledge—much higher than is typical for American legal theorists today—they had to figure out why the results in their own countries resembled or did not those of their foreign correspondents. When the intellectual leaders of the legal academic elites started critiquing classical legal thought, they also did it (and do it) differently in different countries, raising an interesting question as to how the critiques relate to one another.

*a. Covenant, Debt, and Assumpsit as the Background of Expectation, Restitution, and Reliance.* — My argument in this sub-section is that one of the

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<sup>151</sup> See Marie Claire Belleau, “*Les Juristes Inquiets*”: *Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379; Jorge Esquirol, *The Fictions of Latin American Law*, 1997 UTAH L. REV. 425; Grey, *supra* note 32.

things that contributed to Fuller's choice of a model in which protection of reliance and restitution concur/compete with private autonomy was the history of common law, as opposed to civil law contract, as developed in American classical legal thought. Fuller built on the effort that classical writers, particularly Holmes, Ames, and Williston, had made to distinguish the common law version of the will theory from the continental version, on the basis of history. In the process of developing the distinction, they laid the groundwork for the inter-War development of a peculiarly American internal critique of contract law.<sup>152</sup>

Here, schematically, is the issue. In the civil law, as the Americans understood it, the basis of voluntary legal obligation was the subjective will of a party to bind himself for the future. Contractual obligation arose from the correspondence of wills or meeting of the minds, and there was a wide variety of situations in which a single party had the power to bind himself or herself to a unilaterally onerous future performance. The origin of this conception was the natural law thinking of the seventeenth and eighteenth centuries, combined with the various individualistic philosophies of the nineteenth.

Starting with Holmes, the Americans<sup>153</sup> developed a version of the history of the common law of contracts that was designed to explain, and then sometimes to justify and sometimes to critique, the somewhat different body of common law contract rules. They wanted to do this in such a way as to suggest that the common law mode of thinking (if not any particular result) was at least as good as, and maybe better than, the civilian.

The historical origin of the common law of contract was in the medieval action of debt and the renaissance tort action of *assumpsit*. The first point here is that it was *not* in the medieval action of covenant—that is, it was not in the action that enforced the promise of the defendant on the basis of formalities clearly showing an intent to be legally bound. The second point is that the classical historians linked debt to restitution and *assumpsit* to reliance.

Debt, according to Holmes, had its origin not in a bargain, or exchange of promises, but in an action to recover a sum certain that the medieval jurists thought of as property of the plaintiff wrongly withheld by the defendant. Given the earlier dealing between the parties, the sum was "owed." This, rather than the notion of promise, was the key to the action. The other origin of the modern action on the contract was the tort action of *assumpsit*. As *assumpsit* developed, this tort origin meant that the enforcement of a promise, in a case of promisor non-feasance

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<sup>152</sup> The question of what exactly, if anything, about Fuller's article is peculiarly American is discussed in Part III.C.2. *infra*.

<sup>153</sup> The British classical legal theorists, including Anson and Pollock, had started out to incorporate Continental subjective will theory, particularly Savigny, wholesale, but according to Mark Howe, Holmes got them to change their tune and become at least moderate objectivists. See 2 Mark DeWolfe Howe, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 223-32* (1963).

*without promisee reliance*, was historically the exceptional, and conceptually difficult case, rather than the most obvious application of a legal principle of respect for subjective individual will.<sup>154</sup>

The requirement of consideration made the enforcement of a promise depend not just on the formally expressed will of the promisor, but also on the presence of “benefit to the promisor or detriment to the promisee.” Although the modern action was unequivocally based on the will of the parties, this definition was a trace of the modern action’s origins. “Benefit to the promisor” derived from the debt root, and pointed to the unjust enrichment of the promisor if he retained the sum certain that he “owed” the promisee (the modern law of unjust enrichment is about restitution of “benefits conferred”). “Detriment to the promisee” derived from the tort root, pointing to the reliance damages that the plaintiff recovered in *assumpsit*, starting with the case of promisor misfeasance in the course of performance of a promise.<sup>155</sup>

In *What Price Contract?*, published in 1931, Llewellyn says that “[w]e do not know in any clarity the process by which the case-misfeasance-tort root and the *quid-pro-quo* root out of debt were built together.”<sup>156</sup> For our purposes, it is enough that it was a part of the general understanding that these were the non-promissory elements that the tradition of the time ascribed to the common law history.

b. *The Doctrinal Rigidity of the Common Law: Consideration and Objectivism.* — The modern common law of contract was different from the civil law not only in historical origin but also in two doctrinal particulars: first,

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<sup>154</sup> See Holmes, *supra* note 20, at 247-88. This is an excellent piece of analysis. As far as I can tell, Howe’s interpretation of it, *supra* note 153, at 228-29, is still the best.

<sup>155</sup> See James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 1-2, 17-18 (1888). This does not mean that the classical students of common law tort elements in contract were critiquing the coherence of a will theory of contract, understood in the large historicist, evolutionary, or utilitarian sense as a governing general principle. Nor does it mean that they thought they were taking a position about freedom of contract in its highly controversial, newly emerging, Fourteenth Amendment version. The turning of the common law particularities to the uses of the progressive critics of the “excesses of contractualism,” Cohen, *supra* note 5, at 568, did not happen until the 1930s, at least not in even a faintly overt way, and even then only barely, as we will see in a moment.

Holmes was defending the Teutonic Forest against the Roman Forum and science against mere metaphysics. For Holmes, Ames, Williston, and Whittier, the modern common law of contracts was just as fully based on the ideas of the will of the parties and freedom of contract as the civil law of contracts. They had various ideas about how to reform it to make it more rational and modern, and they were completely enemies of the idea that, just because common law contract had tort origins, it had to preserve doctrines that otherwise failed the test of good sense. And all were, in varying degrees, open to the control of contractual freedom through the will of the state in the pursuit of its various policy objectives. See Grey, *supra* note 32, at 34-35 (discussing the history of public policy limitations on freedom of contract); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373-80 (1921). Objectivism in contract formation and consideration doctrine seem pretty clearly to have been, initially, about Anglo-American identity rather than about more mundane kinds of politics.

<sup>156</sup> Llewellyn, *supra* note 94, at 742.

the use of the doctrine of consideration to deny enforcement to a wide range of intra-family and commercial promises that the parties arguably intended to be legally binding; and, second, the objective theory of contract formation.

(i) *Consideration*. — The civilians made it easy to create binding contractual obligations in situations in which the common law consideration doctrine made it hard. They policed the bargains that the common law disenforced by requiring formalities—such as notarization—and imposing some variant of the doctrine of good faith. They thereby reached different solutions with respect to gratuitous promises in the family context, the pre-existing duty rule, revocability of offers for unilateral contracts, and “incomplete contracts” in the commercial context where the price or quantity term was missing or there was a problem of indefiniteness. Of course, not all European solutions were the same, and it seems that the Germans were much more willing than the French and their legal satellites to adopt an “enforce but police” approach.<sup>157</sup>

An important implication of the common law approach was that if there was consideration for a promise then the promisee got expectation damages, but if there was no consideration, then the most the promisee could recover was restitution. This seemed harsh both in the family context—nephew’s trip to Europe—and the commercial context—“I’ll pay you the money if you finish the job” followed by “I revoke” when you’re almost done.

What was missing from the common law approach was recognition that there was at least a case for some kind of recovery, depending on the particular circumstances, in at least two kinds of situations: first, where you intended to bind yourself, and later tried to get out of it on the ground of a formal failure; and second, where you promised, but intended not to bind yourself legally, knowing that the other party would rely and wanting him to rely. It was arguable that, in each kind of situation, the promisee should recover *reliance damages*, the measure in tort actions for similar behavior, when the promisor’s conduct seemed morally reprehensible.

(ii) *Objectivism*. — While the civilians, by rejecting the common law consideration doctrine on unilaterally onerous agreements, made it easy to get enforcement of some promises, their subjectivism *should have* made it hard to get enforcement of others. And indeed, in cases of unilateral mistake—even negligent unilateral mistake—they refused their usual remedy of specific performance (no subjective meeting of the minds). But then they turned around and dealt with the situation through the doctrine of *culpa in contrahendo*, imposing a pre-contractual duty of good

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<sup>157</sup> See 2 Francois GénY, METHODE D’INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 158 n.3 (1899); Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1057-76 (1959); Barry Nicholas, CERTAINTY OF PRICE, IN COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN MERRYMAN 247 (David Clark ed., 1990).

faith. The plaintiff, suing on the contract, recovered only *reliance damages*. This solution was the work of Jhering, in the very years when Holmes was developing the contrasting objectivist approach.

It is important that the action was on the contract, though for an exceptional remedy, and understood to be incompatible with the will theory, rather than in tort. It thus turned out, perhaps surprisingly, that civilian theory was subjectivist in name only. In practice, it was conceptually mixed and was, at least arguably, though by no means clearly, far better than either a strict subjective or a strict objective system. Or so it seemed to several generations of American contract theorists.<sup>158</sup>

In the common law classical objective system,<sup>159</sup> by contrast, the idea was that the bargainer was bound by the “reasonable understanding” of his words, regardless of subjective intent, so no tort or good faith issues need arise in cases of non-corresponding understandings. The plaintiff, suing on the contract, recovered *expectation damages*. This was true whether or not the promisor, held objectively, had been negligent, and whether or not there had been reliance losses to the promise.<sup>160</sup> In revenge, there was no duty at all to behave in good faith during the negotiation stage, and no significant tort duties either. If the plaintiff could not establish objective contractual liability, the only recovery in Anglo-American classical theory was restitution in quasi-contract, based on unjust enrichment.<sup>161</sup>

*c. American Contract Thinkers Develop Reliance and Restitution Theories in their Struggle with the Problem of Common Law Rigidity.* — American contract theorists from 1900 through the 1930s struggled with the apparent inflexibility and even arbitrariness of the common law combination of objectivism and consideration doctrine, referring constantly to the German solutions. These seemed simply better than ours, and seemed to have the added advantage of rejecting the notion that contract was just the law of individual will. *Culpa in contrahendo*, or the duty of good faith in precontractual negotiations, was part of contract law rather than an external tort principle.

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<sup>158</sup> I have not tried to figure out what parts of the American version of continental contract law were accurate and what parts inaccurate. I will be dealing in what follows with their understanding of German and French law, rather than with my own. See Fuller & Perdue, *Reliance Interest I*, *supra* note 18, at 87 n. 54; Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 411 n. 208 (1937); Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract A Comparative Study*, 77 HARV. L. REV. 401, 401-02, 406 (1964); Edwin Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859, 889-90 (1928).

<sup>159</sup> See, e.g., Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919), which builds on Holmes, *supra* note 20, at 308-39.

<sup>160</sup> See the analysis by Clarke Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441 (1929), which has the major virtue of putting this as the central issue.

<sup>161</sup> At the time Fuller wrote, the universal citation for this proposition was *Boone v. Coe*, 153 Ky. 233 (1913).

The point of this subsection is that, in the course of this struggle, the Americans developed the non-promissory reliance and restitution roots of common law contract liability. Thus the development by Holmes and Ames of the common law origins of contract in debt (unjust enrichment) and assumpsit (reliance) were put to use in finding a way to reconceptualize and reform the modern common law adherence to objectivism and the consideration requirement. The ad hoc resort to restitution and reliance for this purpose was eventually turned into a full-fledged theory of multiple bases of liability in "The Reliance Interest" and "Consideration and Form."

(i) *The Reliance Route*. — Corbin's article on offer and acceptance, discussed above, reached the conclusion that the underlying motive for the objective theory was a tort concept of reasonableness. The article also included a canonical discussion of the flagpole case, and of the revocability of offers in general, in which, with approving references to German law, Corbin argued for enforcement of offers on the basis of offeree reliance. He then proposed adjusting the recovery to make it look more like reliance than like the expectancy.<sup>162</sup>

Clarke Whittier's excellent analysis of offer and acceptance ended up sharply rejecting the whole doctrine of objectivism. He argued that liability for the non-negligent mistaken promisor, especially in the absence of promisee reliance, violates the primordial classical principle of "no liability without fault." He argued for what he saw as the civil law solution: denying the expectancy remedy when there is no meeting of the minds, and then granting a reliance remedy in tort for promisor negligence, otherwise letting the losses lie where they fall.<sup>163</sup>

Another response was common law chauvinism. In 1928, in his much-cited "Equitable Relief for Unilateral Mistake," Edwin Patterson defended what he claimed was the American "legal" objectivist solution—no rescission for "impalpable" (that is, not obvious to the promisee) unilateral mistake—against what he saw as a misguided tradition in equity, ill-advised "alien" civilian ideas (Jhering's *culpa in contrahendo*), and some contemporary aberrant case law.<sup>164</sup> He did this in vintage realist fashion, beginning by trashing "the will theory,"<sup>165</sup> and then purporting to bring

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<sup>162</sup> See Corbin, *supra* note 110, at 189-96.

<sup>163</sup> See Whittier, *supra* note 160, at 442. Thirty years earlier, he had expressed his unequivocal adherence to "no liability without fault" in Clarke Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335, 335, 350-51 (1902).

<sup>164</sup> Patterson, *supra* note 158, at 889-91.

<sup>165</sup> His critique of the will theory is both external and internal. It is based on individualist premises; it is "hopelessly vague" so that it fails to tell us what to do in many important situations; it masks the ethical problem of what to do with conflicting wills in the suggestion that we are just trying to figure out what one party did or did not will; it is psychologically unrealistic; and it deals with imputed states of mind rather than with the external facts or internal "neural processes" that are intelligible to modern science. *Id.* at 863-66.

the insights of modern behaviorist psychology (especially Allport and Watson) to bear on the problem.

For Patterson, what counts is reliance by the promisee, and administrability, or Jhering's formal realizability. Jhering's solution, a contract but no more than reliance damages, "besides being somewhat vague for purposes of judicial administration, excludes from consideration important injuries to the promisee resulting from the promisor's repudiation. Then in a passage which may come as a shock to those who admire Fuller above all for his analysis of the reliance basis for expectation damages, Patterson offers the following justification for refusing rescission for unilateral mistake. Speaking of the alternatives of rescission and reliance, he says that as applied in practice, both give

inadequate recognition to the importance of security in commercial transactions. With this important factor in view, one is not surprised that the courts have been driven to the third alternative, namely, allowing the promisee to recover the standardized value of his bargain. This standardized value might conceivably, in some cases, be less than the promisee's psychological injuries; it has the advantage, even to the promisor, of fixing with considerable certainty the extent of the risk which the promisor takes when he makes the bargain.<sup>166</sup>

The protection of promisee reliance, achieved through sticking to the rule-like expectancy measure rather than a standard-like direct measure of reliance, trumps all other considerations.<sup>167</sup> Here reliance, after the demise of the will theory, defines a "conservative" common law position against the civil law.

Patterson was willing to take the consequences of the tough approach:

The harshest applications of this legal doctrine (denying rescission) are found in the cases of release of personal injury claims. Here there is frequently the grossest inequality between the negotiating individuals (the injured party and the claim-agent or

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<sup>166</sup> *Id.* at 888.

<sup>167</sup> His defense of the common law illustrates the important point that an emphasis on reliance is not necessarily progressive or altruistic in orientation. Patterson rejected out of hand the conflicting ethical considerations that had seemed important to the pre-Classical writers. In particular, he treated as merely "emotive" the following, from Redfield's edition of Story, EQUITY JURISPRUDENCE, written in 1866:

But where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress; and no intervening rights have accrued; and the parties may still be placed *in status quo*; equity will interfere, in its discretion, to prevent intolerable injustice.

*Id.* at 889 n. 108 (citing Redfield ed., STORY ON EQUITY JURISPRUDENCE § 1381 (9th ed. 1866)).

Patterson is not a conflicting considerations thinker. He thinks that this principle is wrong, and the reliance principle is right. As to the actual practice of equity, "[i]t represents a half-hearted compromise between conflicting policies. Either one is right, or the other is right, and the time has come to decide which one." *Id.* at 900.

other representative of the tort-feasor) in native intelligence, education and economic bargaining power.<sup>168</sup>

That the courts enforce these bargains in many cases, "even though it be accepted as a fact that the injured party did not understand the language of the writing," gives rise to the question, "[a]re the objective theory of contracts and the parole evidence rule merely the products of class selfishness or professional myopia?"<sup>169</sup> And to the answer:

The question cuts too deep to be settled here. It seems not unlikely that, in certain aspects, professional law has always exacted a higher level of educational achievement and native intelligence than was possessed by the mass of the population. However, before an adverse opinion is formed, it should be pointed out that the legal doctrines in question are adapted to secure a higher degree of efficiency in communication through language. ...

There was a third response: neither argue for changing the common law theory nor defend it on new terms, but instead show that case law has been much more sensible, all along, than the American classical theorists thought it was or ought to be. Here the claim was that, in practice, just as *culpa in contrahendo* liability mitigated the bad results that the civilian subjective will theory would have produced, the common law had a whole slew of devices to soften the rigors of objectivism and consideration doctrine.

For example, Ames protested the pre-existing duty rule as based on medieval technicalities, and argued for a reinterpretation that would make the common law an indirect, oblique version of the Continental approach, permitting the enforcement of unilaterally onerous promises in many contexts.<sup>171</sup> Corbin showed that there was lots of case law authority for enforcing promises in the pre-existing duty context and then policing them, à la the civil law.<sup>172</sup> Pound showed that in equity the courts had and still did enforce lots of consideration-less promises.<sup>173</sup> Williston and Corbin defended section 90 of the new Restatement of Contracts by arguing that the common law had long granted an expectancy recovery on promises that were not supported by consideration but which had been reasonably relied on by the promisee.<sup>174</sup> Havighurst showed that consideration-based or objectivist objections to enforcing in-

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<sup>168</sup> *Id.* at 893.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 894.

<sup>171</sup> See James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 527-31 (1899).

<sup>172</sup> See Corbin, *supra* note 128, at 362-74.

<sup>173</sup> See Pound, *supra* note 126, at 668.

<sup>174</sup> See James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 564-68 (1995), which convincingly discredits Gilmore's version, Grant Gilmore, *THE DEATH OF CONTRACT* 64 (1974) (§ 90 adopted in response to disagreement over § 70).

complete contracts typically failed because the courts interpolated a good faith requirement.<sup>175</sup>

By far the most striking work in this genre was George Costigan's brilliant article, "Implied-in-Fact Contracts and Mutual Assent," arguing for allowing reliance recoveries on "implied-in-fact contracts" imposed by the court as a default rule in the absence of express agreement to the contrary.<sup>176</sup> He proposed to "imply" such contracts to reimburse reliance in a variety of situations in which the standard approach was either to enforce, and grant the expectancy, or not to enforce, leaving the parties to restitutionary remedies.

Costigan seems to have been the first to see that there were parallels between: (1) reliance on a contract where there was no subjective meeting of the minds, but only correspondence of objective manifestations (for example, in cases of unilateral mistake); (2) reliance on promises where there was no bargained for consideration; (3) reliance on promises barred by the statute of frauds or by failure to comply with some other contract formality; and (4) reliance on promises rendered unenforceable because of mutual mistake, impossibility or frustration.<sup>177</sup> This article anticipates, within a completely different doctrinal frame, many of the solutions proposed by Fuller and Perdue in "The Reliance Interest" eighteen years later).<sup>178</sup> It also anticipates the doctrinal developments represented by the U.C.C. and the Second Restatement.

(ii) *The Restitution Route.* — The principle against unjust enrichment had played, up to that moment, and would play in the future, a much smaller part in internal critique than the tort principle of compensating reliance losses caused by arbitrary promise breaking. One reason for this was that the difference between the common and civil law systems concerned reliance, not restitution, and there are some interesting intra-doctrinal explanations as well.<sup>179</sup> But there was one noteworthy attempt to push the critique along this path rather than along that of protecting reliance. In 1934, James Bradley Thayer published an intricate, difficult essay on the law of mistake in the common and civil law.<sup>180</sup>

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<sup>175</sup> See Harold Havighurst & Sidney Berman, *Requirement and Output Contracts*, 27 U. ILL. L. REV. 1, 13 (1932).

<sup>176</sup> George P. Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 389-90 (1919).

<sup>177</sup> See *id.* at 383-94.

<sup>178</sup> See *supra* note 18.

<sup>179</sup> See Stanley D. Henderson, *Promises Grounded in the Past*, 57 VA. L. REV. 1115, 1177-83 (1971).

<sup>180</sup> See James Bradley Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, in HARVARD LEGAL ESSAYS 467 (1934). Thayer was son of Dean Ezra Ripley Thayer of Harvard Law School and grandson and namesake of the constitutional and evidence law scholar. This is his only published work that I know of, and he seems to have left the legal academy soon after he wrote it. The article seems to exist only within the slim genealogy of modernism in contract and is cited, for example, by Kessler and Fine, but otherwise ignored. See Kessler & Fine, *supra* note 158, at 430 n. 116.

The thesis of the article is that civilians deal with mistake at the stage of formation in the context of their subjective will theory, but avoid its full implications by making a set of distinctions, such as that between errors of motive and errors of expression, or, before that, distinctions between essence and accident, that make no sense at all.<sup>181</sup> The same is true of the basic common law distinction between unilateral and bilateral mistake.<sup>182</sup> The canonical distinctions often produce no clear outcome, and when they do it is often not an ethically attractive outcome.

According to Thayer, when not befuddled by the distinctions, "the common law regards all mistakes as depending upon the doctrine of unjust enrichment, wherein it possesses an immense advantage over its rival system."<sup>183</sup> In practice, this means that "[i]f it is true that one who has received an equally valuable equivalent for his own performance merits no relief [even though mistaken], the reverse proposition would seem to be open to little question that recovery or avoidance should be permitted where one has received absolutely nothing in return."<sup>184</sup> But in the vast intermediate area where the promisor would receive something in exchange for performing his mistaken promise, no clear rules are possible. We are up against "the impossibility of establishing categories."<sup>185</sup>

Thayer's conclusion is toward the opposite end of the spectrum from Patterson's, which rejected the "emotive" language of "unconscionability" and "intolerable injustice" as "alien ideas" from the civil law, and had not much problem with enforcing unrelieved written releases from workers who "as a fact" had no idea what they were signing. For Thayer,

the remedy of avoidance... should depend on the requirement of unjust impoverishment on the one hand and enrichment on the other. . . . There is no consideration where too much is given or done in the attempt to perform a contract, at least where the performance due is so definite as to give no room for the exercise of any option. If, however, the transaction involves an exchange of values, it necessarily involves the risk that one side will gain more than was expected by the other, and this is often the main purpose of each party. Here little can be said except that the unexpected impoverishment must be very great in order to warrant rescission.<sup>186</sup>

It is interesting to contrast Patterson's reliance-based with Thayer's unjust enrichment-based theory. I don't think one was intrinsically more progressive than the other. I incline more to the view that either result could be derived from either theory. The point is rather that the eventual triumph of reliance, as the vehicle of intervention in response to the on-off character of common law formation rules, was not at all inevitable:

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<sup>181</sup> See Thayer, *supra* note 180, at 469-73, 487.

<sup>182</sup> See *id.* at 468, 473.

<sup>183</sup> *Id.* at 476.

<sup>184</sup> *Id.* at 478.

<sup>185</sup> *Id.* at 479.

<sup>186</sup> *Id.* at 487-88.

Reliance, à la Patterson, might have gone the other way, and unjust enrichment could have done its work as well.<sup>187</sup>

In Fuller's model, all questions within the contract law core, from the most elementary to the most technical, require us to consider not just a principle of private autonomy, but also a principle of protecting reliance and a principle of preventing unjust enrichment. I am suggesting that this model owes a great deal to the historical and doctrinal work of Holmes, Ames, Whittier, Pound, Costigan, Corbin, Patterson and Thayer. The upshot of their work was: (1) that common law objectivism was not the will theory, because it enforced, for reasons of administrability, contracts against the will of one of the parties; (2) that civil law subjectivism was not the will theory because it turned out to enforce, in an action on the contract, a duty of reasonable care under the rubric of *culpa in contrahendo*; (3) that the systems were practically similar, in spite of their apparently radical subjective/objective disagreement, because both were arguably concerned in practice with protecting reliance and preventing unjust enrichment across a range of topics, including formalities and excuses as well as consideration and objectivism; and (4) that with the one exception of Costigan's article, there was no general framework for addressing these issues.

2. *From the Will Theory as One Wrong Theory Among Many to Autonomy Versus Reliance and Restitution.* — I feel at least some confidence that the history of common law contract, along with the development of reliance and restitution theories in the 1920s and 1930s, influenced Fuller's choice of an analytic scheme. But there was more to it than that. Fuller adopts a theory of "multiple bases" of promissory liability, an approach foreign to these writers about consideration doctrine and the objective theory. Their work provides the substance, but the form comes from elsewhere. He relies most directly on a distinct genealogy of internal critique, that initiated by Demogue. Here the question was: if not the will theory, then what were the reasons to enforce contracts? As we have seen already, Demogue answers not with a theory, but with a list.

a. *From Rival Theories to Multiple Principles.* — A step in Demogue's direction was Pound's summary, in 1922, of "the theories of enforcing promises that are current today" as "(1) the will theory, (2) the bargain theory, (3) the equivalent theory, (4) the injurious reliance theory."<sup>188</sup> But though he cites Demogue, Pound was definitely in an earlier mode: He was looking for one best theory, and concluded that none of those around were as good as his formulation, quoted above.<sup>189</sup>

Two articles published at the bottom point of the Depression and the beginning of the New Deal take the step of combining Demogue's multiple considerations approach with the specific history of American

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<sup>187</sup> See Gordley, *supra* note 174, at 564-68; Henderson, *supra* note 179, at 1177-83.

<sup>188</sup> Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, *supra* note 79, at 269.

<sup>189</sup> See *infra* note 87 and accompanying text.

classical and early modernist reflection on the role of tort in common law, as opposed to civilian contract theory. These articles are the direct predecessors of Fuller's work, because they do not propose a theory in the Poundian sense.

(1) *Morris Cohen*. — Morris Cohen published "The Basis of Contract" in 1933, citing Demogue's "stimulating reflections."<sup>190</sup> Cohen, as we've seen already, was centrally preoccupied with the critique of conservative judicial nullification of social legislation, and with the defense of the social law regulatory program embodied in institutions like the I.C.C. and state insurance commissions. He also wanted to argue that regulation in areas like labor law was justified because there was no "real freedom" under freedom of contract because of unequal bargaining power, and that regulation actually increased 'real freedom.' Contract law is public law, and more clearly so than in any previous reform statement.

But he also offered a survey of "justifications" of contract law. For each, he pointed out that the "theory" in question was quite glaringly inadequate if asked to explain the institution of contract as a whole. The six "theories" are the sanctity of promises, the will theory of contract, the injurious-reliance theory, the equivalent theory, formalism in contract, and contract and the distribution of risks. At the end he says:

It was said of Aristotle that whenever he set up a theory he began, like an Oriental despot, by killing off all possible rivals. And this seems to be the fashion in the peaceful world of scholarship. I trust that the foregoing discussion will not appear in that light. It has not been my object to refute the various theories discussed but rather to sift the valid from the invalid elements in them. Not one of these theories logically covers the whole field of contracts. But as they are not mutually exclusive, a more adequate account is possible by utilizing the valid elements of all of them.

This task of formulating a comprehensive theory of contract, that shall do justice to its many sources and various phases, is one that I shall not undertake here.<sup>191</sup>

One of the strikingly Demoguan aspects of Cohen's article is that the "justifications" includes disparate elements in a single, internally unstructured list. Cohen's approach is to see each element in the list as providing some helpful hints as to why we have enforceable contracts. Some of the items on the list are not "theories" at all—the discussion of "formalism in contracts" is about how formalities are a perennial part of legal culture. "Ceremonies are the channels that the stream of social life creates by its ceaseless flow through the sands of human circumstance."<sup>192</sup> And the like. Where he is dealing with "theories," he provides, as he freely admits, nothing at all in the way of a suggestion of how

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<sup>190</sup> Cohen, *supra* note 5, at 590 n. 27.

<sup>191</sup> Cohen, *supra* note 5, at 585.

<sup>192</sup> *Id.* at 582.

their disparate defects as such might be remedied, or, of how, if none of them can be made into “the” theory, we might combine them in choosing the particular sub-rules of the institution of enforceable contract. Cohen’s list is a list of theories, rather than of considerations, they are not internally structured so that they parallel each other and so could be reconciled or balanced, and there are far too many of them.

(ii) *George Gardner*. — In his 1932 article, “An Inquiry into the Principles of the Law of Contracts,” George Gardner makes a heroic effort to do exactly what Cohen says he will not try to do.<sup>193</sup> He doesn’t cite Demogue, but it’s hard not to see him as under his influence. Unlike Demogue and Cohen, he offers not a description of theories or influences or things that we should take into account or need to know about, but a coherent presentation of conflicting considerations.

Gardner’s reconstruction begins, after defining promise and consideration, with an original, analytical-jurist/legal-realist pair of typologies. There are three kinds of breach—basically intentional, unintentional, and altogether involuntary.<sup>194</sup> There are six different rules that define contract remedies: indemnity (reliance), specific performance, substituted performance (plaintiffs expectancy), accounting for performance (total benefit to the defendant), accounting for consideration (restitution damages), and specific restitution (return of the object).<sup>195</sup>

He then comes up with no fewer than twelve basic maxims that underlie contract rules. These are the tort principle, bargain principle, speciality principle, remedial principle, principle of limited responsibility for breaches, principle of economy in remedies, principle against forfeitures, principle of limited responsibility for apparent promise, quasi-contractual principle, trust principle, principle against violation of legal duty, and the principle against double compensation for performance of legal duty.<sup>196</sup>

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<sup>193</sup> George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932).

<sup>194</sup> *See id.* at 12-13.

<sup>195</sup> *See id.* at 15-18.

<sup>196</sup> *See id.* at 22-37. There is no mention at all of formal considerations, except that the speciality principle applies only to promises that comply with whatever formalities the legal system specifies for enforceability. However, at the end of the article, Gardner affirms the ad hoc character of his approach, and then argues that the alleged uncertainty of ad hocery is uncertain. He goes so far as to offer the quintessential conflicting consideration to the formal interest in the security of transactions:

There is no great advantage to the man of business, by whom the lawyer is supported, in knowing, either when he makes a promise or when he breaks it, precisely what the legal consequences of a breach will be. There would be a great advantage if he could know on both occasions that the law, so far as it lay within its power to do so, would always prevent a breach of promise from being profitable to either party, and would assure to the promisee, except in contingencies for which the promisor could not be understood to assume responsibility, the full value of the [promise].

*Id.* at 41. In other words, a standard will work better than detailed rules.

The final set-up requires the analyst to pick from the list of six damage measures, plus the option of no recovery, and apply them according to the three types of breach, by bringing to bear the twelve principles. The force of the principles goes in ascending order so, for example, the quasi-contractual principle trumps the bargain principle.<sup>197</sup> There are very few examples, and I think it fair to say that generations of hopeful earnest readers have been, simply, defeated when they tried to make use of this scheme. Nonetheless, after Holmes, he seems to me to rank along with Llewellyn, Fuller, and Macaulay, among the most important American innovators of the conflicting considerations model.

The first thing he says about his principles is that they:

are submitted not as laws, but as hypotheses, as a tentative formulation of the principles which should guide the administration of justice in controversies arising out of consensual relations between men.... From the standpoint of legal theory the consequences probably are not important; we have done no more than summarize the philosophy of a period which is already drawing to a close.<sup>198</sup>

One of the striking things about Gardner and Cohen is that they convey a strong sense that the moment (1932-33) is one of crisis, not just for the economy, but also for the whole society, including its self-understanding and the basic principles of its legal order. They are also strikingly similar in that they are critical of the legal theory of the day. Cohen seems an unreconstructed pre-World War I Progressive in his approach, as shown in his well-known critique of the realists.<sup>199</sup>

Gardner insists that "the ethical" is an indispensable stage of the judicial process, involving "the judgment as to what [the parties] ought to have done and ought now to do in view of their past actions."<sup>200</sup> This leads him to critique:

the assumption that there are but three ways of administering justice: to act on hunches ... ; to act on precedent ...; to act on studies of the law in action. ... There is another method of conducting government which has proved more or less effective on occasions—that of striving to erect standards of conduct by which men may judge others' acts and their own. ... In a society exposed to an unending stream of revolutionary inventions and subjected to constant changes in economic structure, it is useless to suppose that justice can be made effective by rigid adherence to traditional forms. ... But. ... [the] scientific method and [an] unlimited trust in private judgment [i.e., hunches] will not

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<sup>197</sup> See *id.* at 22.

<sup>198</sup> *Id.* at 39.

<sup>199</sup> See Morris R. Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681, 693-94 (1936).

<sup>200</sup> Gardner, *supra* note 193, at 39.

replace in a moment the fruit of centuries of connected thought.<sup>201</sup>

I think what is important here is that Fuller is far more like Gardner in his underlying political and social attitudes than he is like Cohen or Pound on the one hand, or Felix Cohen, Karl Llewellyn, or Jerome Frank on the other. As his well-known article on “American Legal Realism”<sup>202</sup> shows, he is in reaction against the realist turn in the critique of classicism, rather than a whole-hearted participant. Like Gardner, he sees the problems of norm choice as ethical rather than political, and as in the most basic sense free, rather than dictated by social or economic conditions. He is no more sympathetic with the aspirations to “scientificity” of the realists (wanting to treat judicial behavior as mere fact) than he is with the social law impulse to make the is of society generate the ought of good policy.

b. *The Reliance Interest in Contract Damages*. — It seems to me that the next important development was the publication of Fuller and Perdue’s “The Reliance Interest in Contract Damages.”<sup>203</sup> One way to read it is as the first full-scale attempt to put the multiple considerations approach of Demogue, Cohen, and Gardner to practical use. That practical use is to take on the whole complex of common law rigidities discussed in the last subsection. They do it by picking and choosing a new, much smaller set of considerations from the productions of their predecessors in the conflicting considerations genealogy.

First, Fuller and Perdue reduce Gardner’s six remedies to their famous three: expectation, reliance, and restitution. The other three are, of course, all in actual use in important or at least interesting contractual situations, and Fuller and Perdue mention them, though only in passing.

The second move is that two of the three damage measures link up with, indeed are stated in an indistinct amalgam with principles of liability, and this also involves picking and choosing from Gardner’s and Cohen’s lists. What Cohen calls the “injurious reliance theory” and what Gardner calls the “tort principle” becomes Fuller’s “reliance interest. Cohen’s “equivalent theory” and Gardner’s “quasi-contractual” principle become Fuller’s “restitutionary interest.”<sup>204</sup>

The situation of the expectancy is quite different. Fuller and Perdue undermine the idea that one can derive the expectancy as the measure of damages in contract cases from the propositions of the two main schools of the moment, the classical will theory and sociological jurisprudence. Neither the “nature” of contract as protection of the will of the parties nor the “social” along the lines of Pound’s “contract is wealth, therefore

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<sup>201</sup> *Id.* at 41-42.

<sup>202</sup> Fuller, *supra* note 59.

<sup>203</sup> See Fuller & Perdue, *Reliance Interest I*, *supra* note 18; Fuller & Perdue, *Reliance Interest II*, *supra* note 18.

<sup>204</sup> See Fuller & Purdue, *Reliance Interest I*, *supra* note 18, at 53-54.

we should protect it,"<sup>205</sup> has any persuasive force—both arguments are circular.<sup>206</sup>

It turns out that in deciding on contract damage rules, we are primarily interested in protecting reliance and restitutionary interests. The "expectancy interest," clearly associated with the will theory, turns out to provide a definition of the prevailing rule of damages, but the justification for the rule is not the will of the parties, but the social value of promoting the reliance interest.<sup>207</sup> Here Fuller owes a good bit to Patterson's "administrability" explanation of the recovery of expectation damages by the promisee in the case of a non-negligent, unrelieved-on unilateral mistake.<sup>208</sup>

I want to make three points about the solution of "The Reliance Interest": (i) It represented a kind of nadir of the will theory, even of Pound's diluted non-deductive version. In "Consideration and Form," Fuller will shift back in the other direction. (ii) By deposing the will theory in favor of the principle of protecting reliance, Fuller created a structure within which he could defend the whole set of intermediate solutions to problems of objectivism, consideration, formalities, and excuses developed during the prior twenty years of puzzling over the common law/civil law contrast. (iii) The article presented a muddled conflicting considerations analysis of the law of contract damages, in which rules and reasons for rules are confused rather than distinguished.

(i) *Nadir of the Will Theory*. — In classical legal thought, tort law represents the will of the sovereign, and tort damages are measured by reliance—what is necessary to put the plaintiff back in the status quo ante. Tort liability is based on the sovereign's complex decisions about the degree of fault that should be necessary for recovery, ranging from no fault at all to really, really bad intentional behavior. Contract liability is strict liability based on the will of the parties.

The law of unjust enrichment, like tort law, flows, in the scheme of classical legal thought, from the "will of the state" rather than the "will of the parties." It governs situations, such as the payment of money under the influence of a mistake, where the pre-Civil War claim to enforce the "implied intent" of the parties had been shown by the classics to be no more than a fiction. This reconceptualization was being set in doctrinal stone, at the time Fuller wrote, by the segregation of quasi-contract and constructive trust from contract law in a separate Restatement of Restitution.

In "The Reliance Interest," this means that at the point of application—"where the rubber meets the road," so to speak—contract damage law, the classical domain of private will, gets its content from the tort

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<sup>205</sup> See *supra* notes 84-88 and accompanying text.

<sup>206</sup> See Fuller & Purdue, *Reliance Interest I*, *supra* note 18, at 58-60.

<sup>207</sup> See *id.* at 60-63.

<sup>208</sup> See *supra* notes 156-162 and accompanying text.

(reliance) and quasi-Contract principles that were supposed to define the opposed sphere of private law rules imposed by the state. After “The Reliance Interest,” until the reconstruction projects of the 1970s and 1980s, the choice of contract rules was premised on the dissolution of any sharp boundary between contract, tort, and restitution.<sup>209</sup> But the solution of “The Reliance Interest” was extreme. In terms of classical private law theory, it worked a complete private/public flip, leaving nothing behind contract damage rules but the will of the state.

(ii) *Germanizing the Common Law*. — Replacing will with reliance, as the central concept of contract damage law, was part of Fuller’s strategy of intervention in the common law versus civil law debate I described at length in the last section. It responded *both* to the problem of reducing the multiple considerations approach to workable order, *and* to the ethical difficulties created by the combination of objectivism, consideration, the statute of frauds, and a general hostility to excuses. The second part of the article<sup>210</sup> showed that the common law courts were either already using, or should in the future use, the reliance measure as the vehicle for the creation of an intermediate category between the valid contract and the altogether inoperative contract.<sup>211</sup>

I agree with Todd Rakoff that the whole idea was to create a series of solutions—each motivated by a series of purposes and differentially applicable to a series of situations—calibrated in terms of promisee appeal and promisor nastiness. In short, Fuller was working toward a typical conflicting considerations solution. As Rakoff points out, Fuller claimed that the main axis for arraying the situations was their distance in the direction of the family from the competitive market, but this axis does not explain

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<sup>209</sup> The high point of the “tortification” of contract law was probably Grant Gilmore’s analysis in *The Death of Contract*, *supra* note 174. The reaction began with Charles Fried, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981), and continues to this day. See the excellent summary by Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 *HASTINGS L.J.* 1191, 1193-1203 (1998).

<sup>210</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18.

<sup>211</sup> That this was at least part of Fuller’s intention is confirmed by a letter to Llewellyn in 1938: “I consider the contribution made in my article ... to lie, not in calling attention to the reliance interest itself, but in an analysis which breaks down the Contract-No-Contract dichotomy and substitutes an ascending scale of enforceability.” Robert Summers, *LON FULLER* 133 (1984) (quoting Fuller’s letter to Llewellyn). Summers comments:

The importance of this contribution to contract theory cannot be overemphasized. Treatise writers, commentators, judges, lawyers, and others had previously tended to pose issues in this field in all-or-nothing fashion: either there is a contract, and hence liability—usually measured in terms of lost expectancy—or there is no contract, and hence no liability [sic]. Fuller’s analysis enabled us to see the crudity of this dichotomous approach.

*Id.* As the reader of the above discussion of the inter-war attempt to come to grips with the civil law intermediate solutions will appreciate, I disagree with Summers’s assessment of Fuller’s contribution.

what he was doing.<sup>212</sup> I think Rakoff is right that Fuller wanted his reliance cases situated in the business-law core of classical contract theory, rather than in the familial periphery.<sup>213</sup> But the outcome is intelligible only in light of the problems revealed by comparison with the civil law treatment.

For consideration cases, the new intermediate category had been created in section 90 of the first Restatement of Contracts on promissory estoppel, and through the Restatement's abolition of the flagpole rule in section 45 (reliance on an offer of a unilateral contract is equivalent to an acceptance).<sup>214</sup> But neither section corresponded to Fuller's program. Each treated reliance as a substitute for the element missing for formation of a "normal" contract, and seemed to indicate that damages were therefore to be measured by the expectancy. Fuller advocated a case-by-case approach, with reliance as the norm.<sup>215</sup>

For the statute of frauds, there was case law to support a second intermediate category, allowing a reliance recovery for the promisee whose action on the formal contract was barred by failure to comply.<sup>216</sup> In these cases, we are increasing the recoveries of vulnerable, incompetent, or misfortunate plaintiffs by allowing them to recover in reliance, when previously the judge might have thought there was no basis for anything but restitution.

But the beauty of it was that the intermediate category also involved reducing the liabilities of vulnerable, incompetent, or misfortunate defendants. These were, first, the mistaken promisors under the objective theory, whom we might let off on payment of mere reliance if we could get out of the Willistonian straightjacket. Fuller devoted little space to this category, but his position is easy to infer from his approving citations to Jhering's *culpa in contrahendo* theory, which he describes as "pioneering,"<sup>217</sup> and from his explicit endorsement of Whittier's critique of Williston's defense of objectivism.<sup>218</sup> Whittier is the one who argued for adoption of what he understood to be the civilian solution: refusing to enforce agreements in the absence of subjective meeting of the minds, but allowing a tort recovery against negligent promisors when there are reliance losses.<sup>219</sup>

Fuller devoted far more space to the fourth, less familiar category of the non-negligent but previously unexcused victims of impossibility and frustration, whom we had been forcing to pay the expectancy, because if

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<sup>212</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 373; Todd D. Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, 232-33.

<sup>213</sup> See *Id.* at 240-41.

<sup>214</sup> Restatement of Contracts §§ 45, 90 (1932).

<sup>215</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 405.

<sup>216</sup> See *Id.* at 386-94.

<sup>217</sup> See Fuller & Perdue, *Reliance Interest I*, *supra* note 18, at 86.

<sup>218</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 419 n. 225.

<sup>219</sup> See Whittier, *supra* note 160, at 442.

we excused them, they would be liable only for restitution.<sup>220</sup> In these two categories of objectivism and excuses, the intermediate category reduced the damages imposed on the misfortunate defendant by eliminating a plaintiff windfall: expectation damages in cases where there was neither defendant negligence nor plaintiff reliance. But for excuses, there was a further complexity. Creating an intermediate category might lead to increasing liability for promisors the judge might have felt forced to excuse, if the consequence of holding them to their frustrated bargains was making them pay expectation damages. In other words, this fourth intermediate category accommodated cases from both sides of the traditional dualistic structure.

*Fuller's Middle Ground*

Unbargained for reliance can give rise to an action in both the promissory estoppel and flagpole situations, with damages less than the expectancy when that is appropriate.

Reliance on a promise barred by the statute of frauds or otherwise invalid for informality can give rise to an action for reliance.

Objectivism is softened: the non-negligent but mistaken promisor is liable only for reliance.

In impossibility and frustration cases, we can excuse the defendant, yet still grant reliance damages, rather than mere restitution, to the disappointed promisee.

My view, for what it's worth, is that the lasting impact of this article is that it set contract theory on the path of reforming the common law to make it much more like the civil law in its treatment of cases. Its success, in this view, comes from its mustering of common law authorities for the subversion of common law theory, along with its oddly incoherent quality, which meant that there was "plenty left to do"—and a lot of it got done in the U.C.C. and the Second Restatement of Contracts. As in the case of "Consideration and Form," Fuller was working from the synthetic efforts of others, like Costigan<sup>221</sup> and Gardner<sup>222</sup> (both of whom he egregiously downplays or mis-cites), and developing the work of Corbin and Llewellyn (barely mentioned). But none of these authors seems to have grasped the possibilities of the German approach the way Fuller did.

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<sup>220</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 379-86. For Fuller's use of German sources, *see id.* at 380 (noting the German recognition of usefulness of reliance interest).

<sup>221</sup> *See id.* at 394 & nn. 150-51.

<sup>222</sup> See Fuller & Perdue, *Reliance Interest I*, *supra* note 18, at 64 n. 14, 75 n. 37, 90 n. 61; Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 405 n. 189, 419 n. 224.

In the first installment, which presented the general scheme, Fuller, as already mentioned, spoke of Jhering's "pioneering" approach, proposing a reliance recovery "in a series of situations which we may call 'not quite' contracts."<sup>223</sup> Fuller then described his plan for the second installment as showing how American courts have given reliance when the expectancy would be "going too far." But the reference to Jhering was oddly presented, as an aside in the discussion of reliance in the *Hadley v. Baxendale* situation.<sup>224</sup> Only a very informed reader would have been prepared by it for the wealth of references to Jhering's specific arguments and to the solutions laid out in the German Civil Code, that run through the presentation of the intermediate reliance categories in Part II.<sup>225</sup> Fuller seems to have seen himself not as imitating or just adopting the German approach, but as going beyond it. As the various criticisms of the American common lawyers indicate,<sup>226</sup> they did not see the Germans as having solved the basic theoretical problem, but rather as having found a highly promising possible path out of the common law thicket.

(iii) *Botched Conflicting Considerations Analysis*. — As Rakoff also points out, a major problem with "The Reliance Interest" is its peculiar mode of merging damage measures (rules) with policies (justifications for rules), a cardinal sin in developed conflicting considerations analysis.<sup>227</sup> To begin with, there is a restitution interest, with a corresponding restitution measure, and we use it to "prevent unjust enrichment," an intelligible, though vague, policy or goal. But this interest is also a lesser-included element in the reliance interest. Fuller gives no general reason for wanting to protect reliance, and doesn't state that we are interested only in "reasonable" reliance although he refers to "broken faith." He oddly merges the "reliance measure," understood as a rule of damages sometimes applied by courts, with the "reliance interest," understood as something it would be good to protect through a rule—which might be a rule of expectancy—without being more than episodically explicit on why and under what circumstances we would want to protect the interest.<sup>228</sup>

The result is that it is quite possible to read the article, as suggested again by Rakoff, as a response to Cohen's challenge to produce a coherent version of "the reliance theory of contract." In this reading, we have

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<sup>223</sup> Fuller & Perdue, *Reliance Interest I*, *supra* note 18, at 86.

<sup>224</sup> *See id.* at 87 (discussing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854)). On the German precedent, *see id.* at 399 n. 168.

<sup>225</sup> On Jhering, *see id.* at 87 & n. 55; Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 380 n. 101, 411 n. 208, 416 n. 219. On the German Civil Code, *see id.* at 380, 399 n. 168, 407-08 & n. 195 (discussing German recognition of reliance damages).

<sup>226</sup> *See, e.g.*, Patterson, *supra* note 158, at 886-88 (arguing German conception ignores "important injuries to the promisee"); Thayer, *supra* note 180, at 469-70 (criticizing the Code's arbitrary results); *see also* Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 411 & n. 208 (explaining Williston's rejection of Jhering's view).

<sup>227</sup> *See* Rakoff, *supra* note 212, at 233-34.

<sup>228</sup> *See id.* at 213-15.

not three conflicting considerations, but a struggle to explain everything in terms of one.<sup>229</sup>

The expectancy interest, unlike reliance and restitution, doesn't have any built-in reason behind it. We give expectation damages to encourage reliance, which is good for the economy and corresponds to what business expects, rather than for a reason on its own. "The Reliance Interest" slights the will theory, or, otherwise put, it doesn't give us the full gamut of reasons for protecting the expectancy.<sup>230</sup>

This is the big change between "The Reliance Interest" and "Consideration and Form." In "Consideration and Form" we have a new trio, one that fully obeys the implicit rules of the conflicting considerations model: The reliance interest is sharply distinguished from the reliance measure (though still only very "thinly" grounded); "the restitution interest" has been rephrased as preventing "unjust enrichment" and is no longer just a lesser-included element; and Fuller replaces "the expectancy interest" with the "principle of private autonomy." The principle of private autonomy, altogether absent from "The Reliance Interest," is *primus inter pares*: "Among the basic conceptions of contract law," it is "the most pervasive and indispensable."<sup>231</sup> What is implicated in this change?

### C. Fuller's Contribution in "Consideration and Form"

1. *From Will Theory as a Binding Legal Principle to the Principle of Private Autonomy as a Reason for a Legal Rule.* — Fuller sees Cohen's discussion of "freedom of contract" as a discussion of what he calls the principle of private autonomy, and he borrows heavily from Cohen's presentation of freedom of contract as delegated state law-making power, as we saw above. But Cohen's discussion is mainly about the "excesses of contractualism," seen as a product of wrong nineteenth-century philosophical ideas (from Kant to Bentham, etc.). What Fuller does with Cohen is to combine Cohen's categories of "freedom of contract," the discredited "will theory," and the "sanctity of promises" into the new super-category he calls the "principle of private autonomy."<sup>232</sup>

He performs an analogous operation on Gardner. Gardner has a bargain principle—if you get something in exchange for a promise, you have to pay if you breach<sup>233</sup>—and a speciality principle—if you make a promise according to the forms prescribed, it is binding<sup>234</sup>—which combine into Fuller's principle of private autonomy. As noted above, Gardner also has a tort principle, already converted by Fuller and Perdue into

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<sup>229</sup> See *id.* at 209-11. However, Rakoff eventually concludes, in line with his general reading of Fuller as a conflicting considerations analyst, that all three interests "survive." *Id.* at 232.

<sup>230</sup> See *id.* at 224.

<sup>231</sup> Fuller, *supra* note 1, at 806.

<sup>232</sup> See *id.* at 806 n. 9.

<sup>233</sup> See Gardner, *supra* note 193, at 23-25.

<sup>234</sup> See *id.* at 25-26.

the principle of protecting reliance, and a quasi-contractual principle, already converted into Fuller's unjust enrichment. In "Consideration and Form," Fuller cites to these passages of Gardner in introducing his principles.<sup>235</sup> Cohen's six theories and Gardner's twelve principles have been reduced to three.

I think this reduction to three is quite a big deal, before we even discuss the significance of the choice of three. Modernist policy analysis in the mode of long lists like Demogue's and Gardner's was, in hindsight, obviously unworkable. There had to be a dramatic, however Procrustean, reduction before it could be expected that people would actually use the policy analytic in day-to-day legal life. But a lot also depended on the choice of a reduction.

What happens in Fuller's "Consideration and Form" version is that, in sharp contrast to the Fuller and Perdue version, the underlying social value that will theorists pursued through their unconvincing deductive system survives the demise of that system, gets restated in the language of social theory as a principle of social order, and is renamed "private autonomy." Private autonomy, reconceived as a value rather than as a legally or constitutionally binding principle from which whole rule systems can be deduced, becomes a factor to be combined with other factors. In other words, will is demoted from the basis of a coherent substantive theory of private law to a mere public policy to be harmonized or traded off with others equally valid in the abstract and equally subject to being overridden in particular cases. Social law turns out to have been a "transitional object" on the road toward policy analysis, rather than a substitute for will.

The principle of private autonomy is neither the late-nineteenth-century "formalist" will theory that determines the appropriate subnorms of contract law nor the explosion and discarding of will altogether so that all that is left is social engineering in the context of "the social." By "Consideration and Form," it had become clear that no new theory like the will theory would emerge. Social law wasn't plausible as a large scale, coherent, determinate alternative, and it was anyway tainted by association with fascism and communism.<sup>236</sup> What was left was private autonomy as a tool for managing the economy and as something people valued in its own right; it was only one of a variety of means and only one of a variety of desiderata. Fuller denied the existence of any pure individualist domain

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<sup>235</sup> See Fuller, *supra* note 1, at 806 n. 9.

<sup>236</sup> Cf. Pound, THE NEW FEUDAL SYSTEM, *supra* note 80, for a sense of how the social can have vaguely collectivist overtones. For a collection of sources alleging a connection between the German Free Law movement and Nazism, see Stephen J. Lubben, *Chief Justice Traynor's Contract Jurisprudence and the Free Law Dilemma: Nazism, the Judiciary, and California's Contract Law*, 7 S. CAL. LNTERDISC. L. J. 81, 92 nn. 52-54, 93 nn. 54-60 (1998). On Pound's turn to the right, see Hull, *supra* note 56, at 278-338.

and created conflict within the core. Will theory was neither supreme within its domain nor subordinated within its domain.<sup>237</sup>

2. *Contrasting Fuller's Solution with the Social Law Approach.* — The particular conflicting considerations model that emerges in "Consideration and Form" holds that even within the domains of social life where private contract, rather than state ownership or administrative regulation, is the appropriate ordering idea, the principle of private autonomy must concur and possibly contend in every case of rule definition with tort and restitution principles. This was a highly original approach. In order to show just how original, it is useful to contrast it in some detail with the disillusioned version of the social or relational approach that survived in Europe long after it had been displaced in the United States. As we have seen already, the "social" was a trans-Atlantic creation. The disillusioned Continentals, well represented by Ripert's writings on "ordre économique"<sup>238</sup> and by Wieacker's *History of Private Law*,<sup>239</sup> dominated private law theory well into the post-World War II period.

During the nineteenth century, according to the post-World War II European version, the principle of ordering according to the will theory in general, and freedom of contract in particular, had governed labor law, landlord/tenant, urban land use, environmental law, insurance, transport, and on and on. The new "social" principle of regulation, in the interest of weak parties or third parties or the public interest, made "incursions into the classical territory of private law"<sup>240</sup> in one of two ways. Either wholesale, displacing free contract altogether, or ad hoc. In either case, the incursions led to the "disintegration of private law," and "not only destroyed the internal coherence of private law but also undermined the distinction between private and public law, which our legal system still took for granted at the end of last century."<sup>241</sup>

To make things even more problematic, the reformers failed (perhaps tragically, or miserably, or heroically), to state the social principle in a way that had "proper system and conceptual clarity" as a guide to adjudication or even to legislation.<sup>242</sup> The result was that where the social fully displaced contract, we either returned to status or to some half baked version of collectivism. In the areas where contract survived as

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<sup>237</sup> There are many ways in which this view is different from that of Pound. One is that it does not try to make the rules flow from the state of society; the legislative impulse is more ethical than sociological. The question is not what rules are required by the current state of society in contrast to an earlier state of society, but rather how to justify existing rules that are not problematic from the point of view of a particular reform agenda. There is both much less of an "is" to "ought" move and less of a reform agenda.

<sup>238</sup> Georges Ripert, *L'ordre économique et la liberté contractuelle*, in 2 RECUEIL D'ETUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANCOIS GENY 347 (1934).

<sup>239</sup> Franz Wieacker, *A HISTORY OF PRIVATE LAW IN EUROPE WITH SPECIAL REFERENCE TO GERMANY* (Tony Weir trans., Oxford Univ. Press 1995) (1967).

<sup>240</sup> *Id.* at 434.

<sup>241</sup> *Id.* at 438.

<sup>242</sup> *Id.* at 438-39.

remnants of its once coherent self, it was displaced by a hodge podge rather than by something that could guide elaboration and development. "[T]he disintegration of the coherent private law of the nineteenth century remains the crucial problem in the relationship between legal scholarship and the outside world."<sup>243</sup>

Fuller's approach differs from this one in two ways. First, it is different because it claims that there are conflicting considerations within, rather than impinging from outside, the domain of contractual ordering. The principle of private autonomy is not a "legal principle" in the sense of an abstract norm from which a coherent body of sub-norms can be derived, but a "policy" to be confronted in each case with other concurring or conflicting policies (*e.g.*, the formal ones).

Second, these internally concurring/conflicting principles are just as much principles of strictly private law as the private autonomy principle with which they contend. In other words, what opposes freedom of contract within contract law is not a left wing or right wing regulatory pro-grain operating against the liberal capitalist order, but rather the internal tort and restitution principles of the liberal capitalist order itself.

This is the fascinating "defanging" effect of Fuller's mode of appropriating the legal realist/institutionalist critique of classical legal thought. They showed that tort (reliance) and quasi-contract principles, associated with the will of the state within private law, were omnipresent within the contractual domain supposedly governed by the will of the parties. Fuller says, in effect, true, and because they are eminent and respectable, the principles of our familiar, liberal, property-based, and equity-based common law, there is no problem with balancing them against "will," even within the core.

Each of the sub-rules within the unquestioned domain of contract is subject to potentially conflicting considerations, but not because a formerly coherent system is now invaded from outside by counter-principles. Mere inclusion of a problem within the domain of contract never, ever permitted resolving it by mere deduction, even when there were no outside or "social" counter-principles threatening invasion. Rather, for each rule in the domain, it had always been necessary to decide how to proceed *ad hoc*, choosing among impeccably pedigreed private law principles, however much the legal reasoning style of the previous period may have tried to hide or deny this.

Fuller's general thesis—that there is plurality within the core, legitimately concurring/conflicting private law principles, with freedom of contract *primus inter pares*, is utterly hegemonic in post-World War II American contracts theory. It is second nature. But his more specific thesis—that the concurring and conflicting internal principles are protection of reliance and prevention of unjust enrichment—is today the

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<sup>243</sup> *Id.* at 441.

position of a mere current within the mainstream, a current which might be called the school of Fuller loyalists.<sup>244</sup>

It turns out that Fuller's model was itself a transitional one, destined to pave the way, during the 1950s and 1960s, for the full conflicting considerations approach, and for the revival of the anti-individualist strand—of the “social”—that his approach seemed to have suppressed. The revival of the social provoked, in turn, the efforts of the 1970s and 1980s to “reconstruct,” in the specific sense of showing that one or another single principle can be made regnant within contract, so that conflicting considerations analysis can be pushed to the margins or abolished altogether.

3. *Fuller's Scheme of “Bases of Liability” does not Deal in any Clear Way with the Problem of the Conflict among Considerations.* — Fuller's is not a conflicting considerations model because he doesn't deal systematically with conflict. To begin with, he acknowledges very little of it of any kind. One of the very few instances involves the reliance principle, which usually either re-enforces autonomy or provides a separate basis for enforcing promises. Nonetheless:

In another class of cases the principle of reimbursing reliance comes into conflict with the principle of private autonomy. These are the cases where a promisee has seriously and, according to ordinary standards of conduct, justifiably relied on a promise which the promisor expressly stipulated should impose no legal liability on him.<sup>245</sup>

In a footnote, we learn that in cases of employer promises of bonuses, the courts have allowed the reliance principle to “overrid[e]” private autonomy.<sup>246</sup> Disappointingly, when we get to the relationship of unjust enrichment to the other principles, Fuller mentions the principles re-enforcing each other, or providing alternative bases, but conflict has dropped out as a possibility.<sup>247</sup>

As I mentioned above, there are no cases of conflict among the formal objectives, and the formal objectives always seem to serve the substantive ones rather than conflicting with them. I also criticized Fuller for failing to see that there are always counter-arguments to form, and to channeling, if by that we mean cutting off defenses, and charged him with being less sophisticated than Jhering and Demogue, for whom conflict is structural. Fuller came closer to their approach for his substantive considerations, because he recognizes that there is always an available argument against imposing liability by enforcing promises. Enforcement is more expensive than inaction, and “there is a real need for a field of human intercourse freed from legal restraints, for a field where men may

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<sup>244</sup> See the summary of the schools, *infra* note 282.

<sup>245</sup> Fuller, *supra* note 1, at 811.

<sup>246</sup> *Id.* at 811 n. 16.

<sup>247</sup> See *id.* at 812-13.

without liability withdraw assurances they have once given."<sup>248</sup> But he failed to integrate this factor into his particular rule discussions.

It was not that the problem of conflict was untheorized in 1941. Holmes, Demogue, Llewellyn, Felix Cohen, and Gardner, just to name a few, while much less successful than Fuller at organizing and expounding a workable system of policy analysis, were much more up front about the problem of conflict among policies.

To get a sense of just how Fuller's suppression of conflict within the core was a choice, rather than a mere reflection of the time, contrast Gardner's *Inquiry*, written from a similar substantive position. Along with their common emphasis on the ethical and their aversion to hunches and studies, Fuller would have agreed, I think, with Gardner that the old fashioned lawyer tends to

become an uncompromising opponent or an uncompromising convert to all legal movements whereby freedom of contract is curtailed and government regulation or the trustification of industry substituted in its stead. The first attitude, under modern conditions, can hardly be otherwise than sterile. The second may easily result in the needless destruction of economic freedom in fields where it might advantageously prevail.<sup>249</sup>

Also like Fuller, Gardner takes as his starting point the half completed exchange, in which all the principles seem to concur on enforceability. But he is intensely conscious of the issue of conflicts within the core, and that these are inseparable from the larger ideological conflicts of the day. The clash between the bargain and speciality principles explains policy disagreement about wagers, forfeitures, and excuses for impossibility and frustration.<sup>250</sup> As he sees it, the urge to enforce comes from the speciality principle. The bargain principle sees it as outrageous to put state force behind the losing gambler's payment of something for nothing, or behind the promise of a pound of flesh in the event of breach, or behind payment for a room for a day to watch a canceled coronation.

He then generalizes the specialty principle as "aristocratic-individualistic" and the bargain principle as "democratic-collectivist."<sup>251</sup> It turns out that

the task of the law ceases to be the simple one of enforcing bargains and becomes the far more complex one of providing a means for conducting a cooperative commonwealth on a voluntary basis, of reconciling group industry and economic justice with individual freedom and individual responsibility for results. To achieve this it is necessary to enforce promises to such an extent that promisees may reasonably entrust their fortunes to

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<sup>248</sup> *Id.* at 813.

<sup>249</sup> Gardner, *supra* note 193, at 43.

<sup>250</sup> *See Id.* at 21.

<sup>251</sup> *Id.* at 21 n. 46.

them, but not to an extent which will permit them to be made instruments of exploitation, multiply the chances of accidental gains and losses, or needlessly restrict the future economic initiative of promisors.<sup>252</sup>

In Fuller's casebook, published in 1947, he includes excerpts from most of the sources on form and on the substantive bases of liability that he cited in "Consideration and Form," including some translations of the French and German sources. But he does not include anything from Gardner's article because he uses instead something called "Observations on the Course in Contracts, 1934," an unpublished fragment. It is the first pure example of a conflicting considerations model of substantive conflicting considerations that I know of:

The ethical problems involved in the law of contracts result as I see them from four elementary ideas:—

- (1) *The Tort Idea*, i.e., that one ought to pay for the injuries he does to another. As applied to promises this means that one ought to pay for losses which others suffer in reliance on his promises.
- (2) *The Bargain Idea*, i.e., that one who gets anything of value by promising to pay an agreed price for it ought to pay the seller the price he agreed.
- (3) *The Promissory Idea*, i.e., that promises are binding in their own nature and ought to be kept in all cases.
- (4) *The Quasi-Contractual Idea*, i.e., that one who receives anything of value from another ought to pay for it unless it came to him as a voluntary gift.

These ideas, which at first seem trite and wholly harmonious, are in fact profoundly in conflict. The first and fourth proceed from the premise that justice is to be known after the event, and that it is the business of the court to correct whatever consequences of voluntary intercourse between men may be found to have turned out unjustly. The second and third proceed from the premise that justice is to be known before the event in transactions voluntarily entered into, and that it is the parties' business to settle the justice and injustice of their voluntary transactions at the start. The conflict between these two standpoints is perennial; it can be traced throughout the history of the law of contracts and noted in nearly every debatable contracts question; there is no reason to think that it can ever be gotten rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.<sup>253</sup>

This is probably the first, and still one of the most interesting, deep but also obscure, formulations of a concise conflicting considerations scheme. By contrast, Fuller's treatment seems, to my jaundiced millen-

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<sup>252</sup> *Id.* at 21-22.

<sup>253</sup> George K. Gardner, OBSERVATIONS ON THE COURSE IN CONTRACTS (unpublished) (1934) (quoted in Lon L. Fuller, BASIC CONTRACT LAW 297-98 (1947)).

nial eye, not so much primitive as ostrich-like. He gets credit in this area mainly for saving Gardner's *Observations* for posterity.

Fuller's failure to see the pervasiveness of conflict does not leave the reader of "Consideration and Form" altogether adrift. After all, we know that the principle of private autonomy is "the most pervasive and indispensable" of the bases of liability.<sup>254</sup> Formal considerations are in its service. Moreover, contract is our chosen mechanism for organizing the sphere of economic exchange. At this point, it seems that there is a clear ideological message: Once we have restricted private autonomy to exchange and taken care of heteronomy, we can have an ethically coherent, though of course non-deductive, law of freedom of contract.

#### IV. THE IDEOLOGICAL SUBTEXT OF "CONSIDERATION AND FORM"

First, "Consideration and Form" is partial and political at the same time—its political message depends on its partiality. Second, Fuller's expulsion of Pound's "social" was no more than provisional. The strands of the social, augmented by an institutional competence analysis that owed a lot to Fuller, were eventually reintegrated in the characteristic conflicting considerations approach of our own time.

What [Fuller] constructs does not include everything; perhaps *The Reliance Interest* would have no strength if it did. Fuller wants to show that the reliance interest is an inherent part of contract law; wants to account for the usual measure of damages according to the expectancy; wants to illustrate that even apparently abstract doctrine is closely connected to an institutional context. For all of these purposes, he will be most persuasive if he tackles "contract" in its most "hard core" sense. As a result, *The Reliance Interest* treats promise or consent as a non-controversial element of its structure, and tends to have a view of society graded by its departure from the perfect market.

In its own time, this meant ignoring the body of literature that saw consent in much of contract law as highly problematic, and that connected that difficulty to social forces not easily described simply as deviations from the marketplace. It also meant sliding past the constitutional law battles about freedom of contract that provoked so much of that literature.<sup>255</sup>

In a footnote, Rakoff adds:

If pressed to speak in the terms of that conflict, *The Reliance Interest* would seem to encourage the conclusion that contract law is based on policy judgments, so that legislative revision would be appropriate, but also that the common law of contract exemplifies a deep moral ordering, so that legislative revision would often be unwise.<sup>256</sup>

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<sup>254</sup> Fuller, *supra* note 1, at 806.

<sup>255</sup> Rakoff, *supra* note 212, at 243-44 (citations omitted).

<sup>256</sup> *Id.* at 244 n. 171.

Rakoff also opines that those “who see modern society as increasingly dominated by structured relationships, by statuses, find it less useful” than those oriented to law and economics or to traditional doctrinalism. Also, “the transactional viewpoint taken by the article prevents its easy expansion to cover other assumptions, analytically similar but contextually different.”<sup>257</sup> Rakoff then suggests that in the 1980s, the doctrine of employment at will was a “battleground,” and that it is a limitation of Fuller’s article that his references to employment contracts in the preexisting duty context<sup>258</sup> assume a contract for a term.<sup>259</sup>

While Rakoff’s observations seem to me highly insightful, they also seem limited in a way characteristic of what one might call anti-ideology ideology or partisan centrism, in that they minimize, without altogether ignoring, the ideological implications of academic contracts scholarship.<sup>260</sup> In this section, I will try to analyze the political subtext of “Consideration and Form” in a way that brings ideological intentions, conscious and unconscious, much more to the fore. My conclusion is that the article (and I would say “The Reliance Interest” as well) is not political by omission, which is what Rakoff suggests above about “The Reliance Interest,” but aggressively ideological—an intervention in the legal politics of the time, and, as it turned out, an important influence on the politics of legal theory in the Cold War period.

A. *The Absence of Distributive Justice from Fuller’s Analysis of the Contract Core*

At the time Fuller wrote, there was no unconscionability doctrine in American law.<sup>261</sup> There were a variety of devices by which judges more or less overtly manipulated doctrine to achieve transactional fairness. There were extant fascist and communist critiques of the consequences for weak groups of a freedom of contract regime. There was also a well developed right wing position that freedom of contract was the legal manifestation of a natural right of individuals to do what they wanted so long as they didn’t interfere with the like rights of others.

Finally, there was the position of the advocates of the “socialization” of contract, some more or less right (often Catholic) and some more or less left, methodologically anti-individualist but also anti-collectivists, advocates neither of laissez-faire nor of socialism in the sense of nationaliza-

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<sup>257</sup> *Id.* at 244-45.

<sup>258</sup> See Fuller & Perdue, *Reliance Interest II*, *supra* note 18, at 383.

<sup>259</sup> See Rakoff, *supra* note 212, at 245.

<sup>260</sup> Boyle and Horwitz, it seems to me, also underestimate, for quite different reasons, the self-conscious anti-radicalism of Fuller’s contract law scholarship. See Horwitz, *supra* note 3, at 184 (suggesting that Fuller may have been unaware of the political significance of his anti-formalist critique of contract doctrine); James Boyle, *Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371 (1993) (arguing that Fuller’s approach to contract law was radical, in contrast to his public law scholarship).

<sup>261</sup> See *supra* Part II.

tion or planning. They wanted regulation, including judicially enforced compulsory terms, self-policing within trades, and the creation of administrative agencies armed with low level criminal rather than private law sanctions to police expert-generated standards of good practice.<sup>262</sup> Methodologically, this tendency fluctuated between what Karl Klare has usefully dubbed "social conceptualism" (unproblematic derivation of a particular rule from a particular policy) and "balancing." Fuller's work is mainly in dialogue with these people.<sup>263</sup>

A basic condition of the existence of this group's moderately regulatory legislative and administrative law program was that the courts, during the classical period, had very self-consciously given up the role of overtly policing bargains for substantive fairness. Horwitz has shown that consideration doctrine was understood by an important part of the pre-Civil War elite as a vehicle for assuring some minimum of substantive fairness in transactions, that is, as a guarantee that there wouldn't be too much of a difference between the values of the things exchanged. This approach faded with the century, in part at least because of the fading of just price notions in the face of the devastating critique of the economists, and in part because of the "subversive" implications of judicial or other governmental review of the fairness of the bargains between bosses and workers and between farmers and the various intermediaries between them and consumers.<sup>264</sup>

The representative of this notion in modern contract law is the idea that once there is consideration there is no doctrine of "inadequacy." That the courts will not look into the adequacy of the consideration means that the courts will not set out to police the distributive fairness of the exchange system.

Fuller takes this so much for granted that he never mentions this rule in his elaborate discussion of the various sub-rules of the system. This in spite of the fact that one of Pound's best articles, "Consideration in Equity," shows that even after the formalization of the doctrine as "legal detriment to the promisee" there were many situations in which it was put to work in the service of transactional fairness.<sup>265</sup> Cohen, in the passage quoted above,<sup>266</sup> sees it as close to definitive of the contract regime. And Llewellyn and others had begun the work of teasing out the various ways

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<sup>262</sup> See generally Alan R. Kamp, *Uptown Act A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 276-78 (1998) (describing the disagreements that preceded that adoption of the U.C.C.).

<sup>263</sup> See Karl E. Klare, *Contracts Jurisprudence and the First Year Casebook*, 54 N.Y.U. L. REV. 876, 880 (1979); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 280 (1978).

<sup>264</sup> See Horwitz, *supra* note 65, at 180-85. For England, see Atiyah, *supra* note 65, at 167-77, 414-16.

<sup>265</sup> Pound, *supra* note 126, at 685; Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, *supra* note 79, at 271-77.

<sup>266</sup> See *supra* note 253 and accompanying text.

in which there was in fact an unacknowledged adequacy requirement imposed through the various manipulative devices I mentioned above.<sup>267</sup>

Though he doesn't mention adequacy, Fuller is well aware that the principle of private autonomy implicates issues of distributive justice. He recognizes, first, that there are "limits" to the appropriate "sphere" of application of the principle of private autonomy, by which he means that it should be limited to the economy, as opposed, say to the family, where non-market norms do and should apply.

Second, within the economic sphere, there is no reason to honor contracts that reflect not private autonomy but private "heteronomy," meaning that they are imposed on one party by the other. But Fuller simply puts to one side the question of when and how to decide whether we are in the area of autonomy or that of heteronomy, as well as the question of how the legal system should respond when heteronomy is established. This means, as Rakoff pointed out about "The Reliance Interest,"<sup>268</sup> that "Consideration and Form" puts aside the principal ideological issues of the day, ideological issues that were understood by the legal elite as of consuming importance for the future of the legal system.

But it means much more than that, in both articles. When we are talking about the domain that is left for the principle of private autonomy once we have spun off labor law, insurance, etc., as heteronomous, the possibly conflicting considerations are protection of reliance and prevention of unjust enrichment. Reliance is understood to be a "tort concept." Unjust enrichment is the classical legal thought category of the retention by the promisor of a benefit conferred by the promisee. The criterion of injustice is whether the promisor has retained something of the promisee's, in spite of his own breach.

I pointed out above that this meant that the opposing principles had impeccable private law pedigrees, albeit from the side of private law theory associated with the will of the state rather than the will of the parties.<sup>269</sup> In the Aristotelian scheme, both reliance and restitution belong to the category of commutative justice. They restore the status quo ante, as that was defined by the pre-existing legal rights of the parties. There is no element of distributive justice involved. This meant that while Fuller made an extremely important contribution to the internal critique of the will theory, and to the rise of the notion that contract is in part a matter

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<sup>267</sup> See Karl N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 704 (1939) (reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937)). In his article in the Columbia Law Review Symposium in which Consideration and Form appeared, Llewellyn proposed that the policies behind consideration doctrine were three: two formal policies and "[a]voidance of undue unfairness." Karl N. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 865 (1941).

<sup>268</sup> See *supra* notes 255-259 and accompanying text.

<sup>269</sup> See *supra* text accompanying notes 243-244.

of public policing of private conduct through the tort principle, he gave his contribution a particular twist.

He comes across as representing the right wing of the socialization-of-contract tendency, since the core that remains after segregation of heteronomy is innocent of the inescapably ideological motives that drive segregation. By getting rid of labor law and acknowledging that protecting will was no more than a policy rather than a legally binding principle that could be a fountain of deductions, it was possible to save the baby—the apolitical, ethical, commutative, core of contract law.

The trick here is to acknowledge that in setting boundaries to the sphere of private autonomy we have to make complex judgments about whether the parties are acting freely or one is merely dictated to—that is, whether we are dealing with autonomy or heteronomy. And there is no question that the choice whether to include a domain within the private autonomy sphere is a question of public law, a choice of a “principle of social order” for the domain in question, rather than a simple choice to enforce natural rights, for instance.

Moreover, within the sphere of private autonomy, autonomy is not autonomous: The principle may occasionally have to yield to generally harmonious but also possibly conflicting formal or substantive considerations. But here’s the rub: The interests or principles or purposes or ends or functions that oppose private autonomy within its sphere are *non-ideological*. While it is pretty clear that defining the scope of the sphere involves public law—a political decision—it is equally clear that within the sphere the acknowledged conflicts are between ethical principles and practical objectives that no one could possibly object to. The occasional conflicts can be seen as dilemmas for moral reasoning rather than as threatening political confrontations.

#### B. *Traces of the Distributional Issue in Fuller’s Treatment of the Core*

But while it seems that the technique of segregating, first the family and then domains of private heteronomy, including all of labor law, has gotten rid of distributional questions in the core, this turns out to be not quite possible. The first sign is that in the discussion of the application of consideration doctrine to releases of claims, there is an aside to the effect that “[a]mong the counter-currents which pull [against enforcement is] ... the peculiar background surrounding the surrender of personal-injury claims.”<sup>270</sup> This is the issue Patterson and Thayer addressed head on in the articles discussed above.<sup>271</sup>

On the next page, the trace gets stronger in the discussion of the pre-existing duty rule, as applied to modifications of contracts that unilaterally favor one party. Here Fuller points out, following Ames, Corbin, and Llewellyn, that the refusal to enforce a modification may well reflect

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<sup>270</sup> Fuller, *supra* note 1, at 821.

<sup>271</sup> See *supra* notes 156-162, 171-177 and accompanying text.

a judicial reaction against the possibility of duress (e.g., the contractor threatens to abandon the job in midstream unless his compensation is increased). But rather than suggesting, as they did, a doctrinal solution to the duress problem that would allow enforcement in easy cases, Fuller ducks: "These cases involve factors extrinsic to the problems under discussion here. Among those factors are the effects of improper coercion. . . ." <sup>272</sup>

A page further on, Fuller surrenders, briefly. The dealer/jobber relationship "calls increasingly for some kind of judicial regulation to prevent hardship and oppression." <sup>273</sup> Behind this series of examples lurks the general question whether and how to control the principle of private autonomy in the politically important fields of the labor contract, landlord-tenant, agricultural tenure, consumer law, and so forth. But you have to look carefully.

On the formal side, there is a quite similar dance of avoidance and acknowledgment. Fuller uses, as the central example of how different formal requirements will be appropriate for different factual situations, the contrast between a contract between merchants on an exchange and a door-to-door sale. He suggests that the housewife buying from the door-to-door salesman may sign and be legally bound under the duty to read doctrine, although in fact she has no idea of what she is getting herself into. "Some 'channeling' here would be highly desirable, though whether a legal form is the most practicable means of bringing it about is, of course, another question." <sup>274</sup> Maybe he was thinking of the kind of right of revocation within a time certain that eventually was adopted by statute in many jurisdictions. So it is clear to him that the choice of form can have distributional consequences. But there is no more than that to indicate his thinking about how distributional considerations should be taken into account by the decision maker.

In all of this, we can regard him as a paradigmatic thinker. The oblique acknowledgment of what one might call the "distributional difficulty" by analogy to the "counter-majoritarian difficulty," followed by some gesture of denial, avoidance, marginalization, erasure, or whatever, is one of the salient traits of conflicting considerations thinking. It represents what I called in Part I the presence of ideology, but as a shadow.

### C. *Completing the Conflicting Considerations Model by the Return of the Social*

To my mind, the work that moves contract theory from Fuller's intermediate position to the fully developed modern conflicting considerations model has to do with deciding what beside private autonomy is at stake, given that neither protecting reliance nor preventing unjust enrichment comes close to summarizing the various considerations that in

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<sup>272</sup> Fuller, *supra* note 1, at 822.

<sup>273</sup> *Id.* at 823.

<sup>274</sup> *Id.* at 806.

fact come into play against autonomy. This involved reintroducing the social, with its ideological baggage. The traces of the social Fuller left in "Consideration and Form" expanded to a bridgehead, and then into a reorganization. I plan to continue the narrative through this phase, but for reasons of space, I will give no more than the briefest sketch of these developments here.

The main actors seem to have been Friedrich Kessler in his article on contracts of adhesion<sup>275</sup> and Kessler and Fine, in their article on *culpa in contrahendo*,<sup>276</sup> and then Stewart Macaulay in his articles on Justice Traynor<sup>277</sup> and on lost credit cards,<sup>278</sup> with Ian Macneil coming along to wrap it all up in the first edition of his radically anti-formalist contracts casebook.<sup>279</sup> Kessler, Macaulay, and Macneil represent the post-World War II integration of the Demogue/Gardner/Fuller strand in contract theory with no fewer than three others.

The first, associated with Robert Hale and John Dawson, emphasized that the distributive outcome of cooperative but also conflictual relations in the production and sale of goods depends on the ground rules of contract and tort that govern the conduct of the cooperators when they decide to conflict. The second strand developed the case for consumer protection in products liability, landlord-tenant, consumer credit, franchising, and generalized unconscionability, all areas still governed<sup>280</sup> by contract law after the Progressive and New Deal reformers spun public utilities, insurance, labor, banking, and securities law off into separate regulatory domains. The third strand worked at teasing out the ideological, rather than merely ethical issues involved in choosing standard contract rules to apply to parties with equal bargaining power.

Eventually contract doctrine was the site, not of the old "will theory versus social law" debate, but of an even more mildly ideologized debate between conservatives touting freedom of contract, on one side, and liberals advocating policing bargains in the interests of weak parties, on the other. They carried on the debate using the full repertoire of formal arguments, substantive arguments, including rights, morality, and efficiency, and institutional competence arguments about the appropriate roles of judges, administrators, and legislatures. And the criterion for decision was balancing. Conflicting considerations had won the day.

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<sup>275</sup> See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>276</sup> See Kessler & Fine, *supra* note 158.

<sup>277</sup> See Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

<sup>278</sup> See Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

<sup>279</sup> See *supra* note 15. For a quite similar account, see Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 567-68.

<sup>280</sup> The landlord-tenant relationship was not "still governed" because it had been property law; it became contractual in the 1960s.

We can see the contracts scholarship of the period up to 1970 as Cold War, as opposed to 1930s, theory, in two senses. First, everyone assumed that there were communist and fascist extremes, but that they had nothing to do with the debate, except that they were occasionally invoked as destinations on one's opponent's slippery slope to serfdom. Moreover, not even moderate socialism or Catholic right wing organicism could much risk raising their heads, for fear of compromising their moderate, respectable spokespeople within the "vital center." Second, the conflict within the center was between liberal regulatory reform, pursued often obliquely and always ad hoc, and conservative free market holding of the line, or foot dragging, pursued in the same fashion. There was no aggressive conservative deregulatory program—that impulse was directed at the New Deal statutes, as in the Taft-Hartley Act—and most prestigious judges had been appointed by liberal presidents and governors.

The integration of the field around the dichotomy "freedom of contract" versus "good faith and fair dealing," "regulation," "socialization," "planning," "intervention," or "policing," reflected this post-World War II change of focus. It was no longer the contrast between private autonomy and fascism or communism, but rather the intra-free world choice between liberal and conservative approaches to the mixed capitalist economy. Since World War II, law has mirrored the general political debate. After 1970, there emerged both a more radical left and a more radical right tendency in legal scholarship, patently tied to developments outside law. This is what creates the perennial sense of danger: that ad hoc, semioticized conflicting considerations analysis of legal problems will turn out to be no more than a vehicle for ideology—liberal or conservative, radical or hard right, not communist or fascist; and it is one of the things that motivates the reconstruction projects that characterize the period from 1970 to the present.

Of reconstruction, I will say no more here than that the proliferation of projects has ironically defeated the purpose of the projects.<sup>281</sup> Rather than helping us out of our sense of the ad hoc, post hoc, ideological character of conflicting considerations analysis, their proliferation leads us to array them on the very ideological spectrum they claim is irrelevant in good legal analysis.<sup>282</sup>

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<sup>281</sup> For a more fully developed analogous claim, see Kennedy, *A CRITIQUE OF ADJUDICATION*, *supra* note 2, at 91-92, 359-61.

<sup>282</sup> Just as a thought experiment, without benefit of citation, and obviously subject to grievous error and misunderstanding, not to speak of hurtful accidental omission, I would array the projects as follows: I would place Allan Farnsworth, *FARNSWORTH ON CONTRACTS* (1998), in the center-right position that Fuller himself occupied in 1941. To his right are the conservative projects based on morals, rights, or efficiency, including those of Richard Epstein, Charles Fried, Randy Barnett, Farber and Mathieson, Richard Posner, and Alan Schwartz. To his left, there are, first, the Fuller loyalists of the center, including Melvin Eisenberg, Robert Summers, Stanley Henderson, and Richard Hillman. Then come the more progressive modernists in the Fuller tradition, including Patrick Atiyah, Todd Rakoff, and Charles Knapp, and liberal law and economics types, such as Guido Calabresi, Michael

## CONCLUSION

Just twenty years ago, Karl Klare gave the following analysis of the larger development within which I have tried above to situate "Consideradon and Form":

Very shortly realism was superseded by a new mode of legal consciousness, elsewhere described by this reviewer as "social conceptualism." The project of social conceptualism was to restore the vitality of liberal legalism after its crisis in the 1930's by harmonizing—or at least by arranging an uneasy truce between—a series of dual but seemingly irreconcilable commitments of American law: a commitment to enormously expanded state regulation of private conduct and yet to private ownership and control of socially created wealth and means of production; a commitment to equality and yet to a mode of social organization that systematically generates inequality; a belief that judges do and should consider the social consequences of their decisions and yet that adjudication can and must be something more than imposition by' judges of social and political values choices; and most fundamentally, a commitment to the notion of rights and entitlements that are morally prior to any exercise of state power, and yet an acceptance of the notion that legal rights and entitlements have their source in state power and are tailored and balanced by the authoritative agencies of government.

The mutual assimilation of instrumentalism and formalism was to occur in part through an ad hoc process of treating central social policies as fundamental values, principles, or interests that were conceived to offer, when appropriately weighed, relatively determinate answers to legal questions.<sup>283</sup>

It is hard to see this as the death of reason in Horkheimer's apocalyptic sense of 1941. Indeed, reason seems alive, if not well, as does critique. Over and over, since he wrote, the choice for particular groups of humans has been "barbarism or freedom," but that has not been the choice for the great mass of humanity. It has been most of the time for most people something in between, and, in the in between, reason has continued to sew by day and unravel her work at night.

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Schill, Jon Hanson, and Christine Jolls. Further to the left are left reconstructionists, for example Roberto Unger and Margaret Radin. Also on the left are the critical legal studies contract scholars who pushed for bringing the ideological out of the shadows: myself, Karl Klare, Frances Olsen, Clare Dalton, Mary Joe Frug, Jay Feinman, Elizabeth Mensch, Peter Gabel, and James Mooney, among others.

<sup>283</sup> Klare, *supra* note 263, at 880-81 (citations omitted).