

Doing Deals with Aristotle—Today

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INTRODUCTION

In 1997, Seventh Circuit Court of Appeals Judge Frank Easterbrook authored a now-iconic opinion in *Hill v. Gateway 2000*.¹ He wrote:

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?²

Shipping boxes often arrive with terms-in-the-box, terms that bind the purchaser to all sorts of things she really had no reason to anticipate or care about. Routinely, these terms include mandatory arbitration, dubbed by the court in *Hill* as "legal-ware."³ Unfortunately, this court's framing of the problem presents a false dichotomy: there are many potential solutions other than the two Judge Easterbrook identified. So how should contract law deal with terms-in-a-box?

This Article makes a surprising proposal. The key to solving the terms-in-a-box problem, and many similar problems of modern contract law, is to analyze them from the perspective of an Aristotelian just exchange using conceptual reasoning. Though counter-intuitive—*what could Aristotelian thought possibly have to do with online ordering followed by legal-ware-terms-in-a-box?*—this Article will show that the approach is actually quite promising. In short, modern contractors already behave in ways that meet the requirements of an Aristotelian just exchange. For an exchange to be just, the exchange must be one in which,

1. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

2. *Id.* at 1148.

3. *Id.* at 1150.

loosely, each party benefits but neither at the expense of the other.⁴ Just exchanges and terms are enforceable. Unjust exchanges and terms are not.

Developing empirical studies now prove that modern contractors in certain situations do behave in ways in which each benefits, but neither at the expense of the other. For example, when asked about mutual expectations of cooperative behavior in certain business-to-business transactions, contractors tell researchers they expect each other to demonstrate flexibility, to share information proactively, and to reciprocate professional courtesies.⁵ They do this not only because they believe it will make for a better deal for both parties (which I call mutualism) but also, in many cases, even at the partial expense of profit—when they think it is the fair thing and the right thing (which I call dualism). Moreover, studies of individual economic actors' motives (i.e., individuals representing their own interests, not a company's) also show that desires for social norms of equity and fairness can drive economic decision-making.

The problem is contract law is not built to account for—to process or analyze—either the mutualism or the dualism of modern economic behavior. Instead, contract law and contract theory are good at handling one thing at a time, but not two. Contract law asks, “What is the parties' intent?”, as if there is one single, shared intent expressed in a contract. Contract theory asks, “Will this rule promote efficiency?”, or “Does this remedy respect full promise-keeping?”, or “Does the application of this rule to these facts respect autonomy?” In other words, contract law and theory seem to ask one half of the Aristotelian formula for a just exchange: either about the goal of the contract (which is usually assumed to be wealth maximization), or how the goal is to be achieved (which varies by theory). But contractors are doing all of these things. The law is not keeping up.

An Aristotelian approach to contract law, by contrast, could keep up quite well. One reason is that, as I have explained in previous work, Aristotelian reasoning directs a legal analyst to consider both the means and ends of the thing being analyzed.⁶ Means-ends analysis is familiar in constitutional law, but not in contract. Yet I maintain that means-ends reasoning would be very helpful to contract analysis. Another reason is that, also explained in prior work, empirical evidence shows that modern,

4. See, e.g., JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 12 (2007) [hereinafter PRIVATE LAW] (according to principles of Aristotelian justice in private exchange, “[c]ommutative justice required that [each contractor set] a price that enriched neither party at the other's expense”).

5. See Chapin Cimino, *The Relational Economics of Commercial Contract*, 3 TEX. A&M L. REV. 91 (2015) [hereinafter *Relational Economics*].

6. See Chapin Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703 (2009) [hereinafter *Virtue and Contract Law*].

business-to-business contractors do care about both the means and ends of exchange relationships—they expect each other to voluntarily share information even when it is not required by the contract, for example, or to be flexible when flexibility is not required by the contract.⁷ This Article ties together and extends these ideas. Here, I connect the Aristotelian means-ends reasoning about contracts with the means-ends expectations of individual economic actors. This final step shows that Aristotelian reasoning about contracts would be downright sensible. In sum, the thesis of this Article is that an Aristotelian contract jurisprudence can make good sense of what modern commercial contractors tell academic researchers they expect of each other, and of the fact that individual economic actors make unexpected choices not predicted by standard rational action models.⁸ Because of this possibility, we ought not give up on law's ability to make sense of contracts.

This analysis proceeds in six steps. In Part I, this Article sets the stage by describing the problem: while contracting behavior is increasingly complex, contract law and theory remain stubbornly uni-faceted. That is, while contracting and contractors are ever more modern, contract law and theory are ever more traditional. The greater the divide, the less useful contract theory is to contract law, and the less useful contract law is to contractors. This trend does not bode well for the future of contract law or theory. The question is how much of a crisis contract law will have to endure before the law evolves to keep up.

Then in Parts II and III, I move to research not widely discussed in contract law literature showing that contractors can, and often do, pursue more than economic gain in a transaction. There are two different bodies of this research. First, I show in Part II that under certain conditions, contractors in business-to-business transactions hold shared expectations that each will adopt certain relational contracting behaviors, such as flexibility and reciprocity, over the course of their contracting relationship.⁹ These shared expectations become the expectation of the contracting unit—of both parties. This Article names this expectation

7. See *Relational Economics*, *supra* note 5.

8. In many ways, I am taking up an invitation made by Professor Paul J. Gudel, who wrote:

In developing Relational Contract Theory, one of the most important things lawyers and law professors can do, ill-suited as they are to do it, is to return to philosophical questions of the motivation of human action, its natural ends and goals and its distinctive virtue and characteristic excellence, as the Greeks would have said. Without this understanding, we cannot construct theoretical models that will adequately reflect humans' interests and commitments in contracting behavior.

Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 *BUFF. L. REV.* 763, 791–92 (1998). I am grateful for this invitation.

9. *Relational Economics*, *supra* note 5, at 110–11.

mutualism, and explains a little bit of why it is that business economists, but not legal economists, have integrated relational contract norms into their economic modeling.

Part III discusses the second body of relevant research, which is being done by behavioral and experimental economists. This work demonstrates that individual contracting actors also respond to different motives while contracting, which I call *dualism*. In this Part, I explain that this research not only confirms that individual economic actors are motivated by goals beyond efficiency, but it shows that contractors make predictable choices based on these motivations.

Part IV illustrates more precisely why the mutualism and dualism of modern relational contract behaviors have Aristotelian underpinnings. At its core, it has to do with reciprocity: the reciprocity that is integral to relational contracting behaviors is also a fundamental characteristic of Aristotelian just exchange.¹⁰ Once these pieces are in place, a coherent contracting picture emerges. It is one that makes total sense once we transcend the normative boxes of existing legal theory.

Finally, Part V takes up the question of what modern contract law analysis might look like if courts interpreted contract law as facilitating an exchange that meets the requirement of Aristotelian commutative justice of each benefits, but neither at the expense of the other. To flesh this out, I offer an example of a paradigmatic problem in contract law, the mandatory arbitration term-in-a-box. I analyze that problem from the perspective of an Aristotelian conceptual analysis of the contract law issues that the problem presents, drawing on a new classic of contract law, *Hill v. Gateway 2000*,¹¹ and comparing it to a very recent decision from the Ninth Circuit.¹²

I. THE PROBLEM: NEITHER CONTRACT LAW NOR THEORY IS BUILT FOR MODERN CONTRACTS

When law is indeterminate, theory has a role to play. To be useful, however, theory ought to be informed by the realities of the institution the theory is explaining. Legal philosopher William Lucy calls this concept “the methodological injunction,” which is that “any adequate theoretical account . . . of any social action, practice or institution, must, in the first instance, capture the way in which that action, practice or institution, is understood by those whose patterns of behavior and thought constitute that

10. See RICARDO F. CRESPO, *PHILOSOPHY OF THE ECONOMY: AN ARISTOTELIAN APPROACH* 112 (2013).

11. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1147–51 (7th Cir. 1997).

12. *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279 (9th Cir. 2017).

action, practice or institution.”¹³ The problem for contract, as this Part will show, is that neither contract theory nor contract law today score very high on that metric.

A. *The Pressures*

Contract law seems to be quickly approaching a fundamental paradigm shift. For many years, scholars and courts were surprisingly unconcerned about the fact that the common law of contract we inherited from England was built for much simpler times. Starting with the legal realists in the 1930s, however, contract law scholars have voiced more concern. In recent years, they have increasingly questioned the usefulness of a doctrinal paradigm that was built to handle discrete, one-off exchange relationships, while contracts today are, as everyone concedes, relational.¹⁴ Today, even law-and-economics scholars accept the truth of the relational paradigm, but they continue to resist that law can or should do anything about it.¹⁵ That matters because many key contract doctrines, like the rule of blanket assent, are predicated on the outdated model. One of that model’s most public failures is, as will be shown later,¹⁶ the question of assent to legal-ware in online contracting.

When doctrine breaks down, theory can be helpful. Legal theory can be useful to explain or organize existing law, and it can be useful to help courts determine what to do in close or novel cases. But contract theory is in trouble too. Mostly contract theorists are what philosophers call “monists”: theorists who attempt to explain or organize contract law according to the primacy of a single value. Each different theory points courts in a different direction according to that theory’s principal value. For example, as law-and-economics theory (“L&E”) points courts toward efficiency,¹⁷ contract-as-promise theory points toward full enforcement of

13. WILLIAM LUCY, *THE PHILOSOPHY OF PRIVATE LAW* 272 (2007) (noting that subscribers to the methodological injunction include Hart, Dworkin, Weinrib, and Coleman).

14. See, e.g., Robert E. Scott, *The Promise and Peril of Relational Contract Theory*, reprinted in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL* 105, 105–06 (Jean Braucher et al. eds., 2013) (noting and explaining “definitional difficulties” in the term “relational contract theory” resulting from the different approaches of law and economics “relational theory” and law and society “relational theory”).

15. See Ethan J. Leib, *Contracts and Friendships*, 59 *EMORY L.J.* 649, 654–55 (2010) (using the term “strangeness” and noting that “[t]o the extent that one hears that ‘we are all relationists now,’ all this statement means is that most people have embraced the relationists’ empirical observation”).

16. See *infra* Part V.

17. See Mark Cooney, *Why Is Economic Analysis So Appealing to Law Professors?*, 45 *STAN. L. REV.* 2211 (1993) (reviewing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)).

obligations, and contract-as-consent theory points toward the objective manifestation of autonomy.¹⁸

Supporters of each of these theories have been arguing with each other for years. Each camp believes it, and only it, has the key to unlock the mysteries of contract law. While reconciliation between the competing theories is not impossible,¹⁹ it does not seem to be in the offing any time soon. One possible solution was thought to be a theory of contract known as pluralism. Pluralism, unlike most of the other theories of contract law, argues for bringing multiple values under the contract law tent. For now, however, there are multiple visions of pluralism, including what the term actually means, as well as various visions of how the approach might impact contract law.²⁰ It remains at the question-raising stage.

In the meantime, with ever-increasing globalization and ever-expanding possibilities of technology, among other change-drivers, real-world exchanges grow more complex each day. The complexity is not limited to the exchanges, either. We are learning more each day about the complex motivations of the human beings responsible for these exchanges.

Much of this learning is happening outside of the legal academy. It is happening in economics departments and in business schools (as well as in psychology and neuropsychology departments, though I do not discuss that work here). In business schools, economists are learning a good deal about what contractors actually do. By incorporating relational expectations²¹ into economic modeling, transaction cost economics (“TCE”) scholars have discovered the presence of mutually-held expectations of cooperation, or relational behaviors in modern commercial business-to-business transactions. This work, which I explain a bit more in Part II, is one source of pressure on neoclassical contract law and its baseline assumption of individualism in contract. Moreover, behavioral and experimental economists use the tools of game theory to run lab experiments to predict what steps an individual economic actor might take under varied conditions. This work, which I explain more in Part III, shows that economic actors often make the choices unpredicted by the rational

18. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Randy E. Barnett, *Contract is Not Promise: Contract is Consent*, 45 *SUFFOLK U. L. REV.* 647 (2012).

19. See Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 *WISC. L. REV.* 389 (1997).

20. See Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 *SUFFOLK L. REV.* 915, 917 (2012) (discussing ROBERT HILLMAN, *THE RICHNESS OF CONTRACT: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997) (offering a typology, or “mapping,” of the various different kinds of theories considered to fall under the umbrella of pluralism)); see also Nathan Oman, *Unity and Pluralism in Contract Law*, 103 *MICH. L. REV.* 1483, 1499 (2005).

21. See, e.g., Ian R. Macneil, *Values in Contract: Internal and External*, 78 *NW. U. L. REV.* 340, 341–43 (1983).

action paradigm. This work puts pressure on contract law's exclusive underlying assumption of self-interest.

B. *The Possibilities*

Despite the growing body of empirical and experimental evidence showing the predictive failure of the rational action model, influential contract law scholarship maintains that contract law is better off unchanged. Dismissing the new evidence, these scholars argue that the best one can hope for is that contract law be both minimal and consistent,²² and besides, they say, contractors often do not pay any attention to the law anyway.²³ So, the theory goes, just keep it simple and contractors will adapt. Despite good reasons for these arguments, I believe this is a missed opportunity. There is an opportunity here for contract theory to help reshape contract law to better reflect what is actually happening in contracts. Indeed, the Uniform Commercial Code was a step toward modernization of commercial law. Now is a good time for contract law scholars to start reconceptualizing contract law based on what we now know contractors actually do.

Specifically, the new empirical work by TCE scholars, and experimental work by behaviorists and game theorists, suggests two modern contract phenomena that are not well accounted for currently. These are what I call *mutualism* and *dualism*. Mutualism means the capacity of a contracting unit to jointly pursue goals beyond wealth maximization, such as flexibility or fairness. Dualism, by contrast, means the capacity of a single contracting actor to act from multiple motivations—such as selfishness and other-regardingness—at the same time. The remainder of this section will explain each of these phenomena in more detail.

First, the contracting relationship itself can undertake dual-faceted commitments to further the success of the relationship. By that I mean the actors in the relationship can share joint expectations of non-contractually required, pro-social behaviors to promote the relationship itself. This is

22. See, e.g., Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990) (“[Exchange parties] behave under two sets of rules: a strict set of rules for legal enforcement and a more flexible set of rules for social enforcement. It may be that the great lesson for the courts is that any effort to judicialize these social rules will destroy the very informality that makes them so effective in the first instance.”); cf. John E. Murray Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 891–907 (2002) (describing and rebutting neo-formalist critiques of the Uniform Commercial Code’s attempt to incorporate the norms of a contracting relationship into the definition of legal contract).

23. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1820 (1996).

mutualism: one relationship furthering the success of both parties.²⁴ Second, relational contract norms show that any single contracting actor is capable of acting from a place of dual intentionality. In other words, any single contractor can be motivated by both self-regarding and other-regarding concerns at one time.²⁵ This is dualism: one actor proceeding from simultaneously-held dual motivations.²⁶ Thus, the complexity of human nature can manifest in a single actor involved in a contracting relationship (dualism), and across the relationship itself (mutualism).

Reciprocity and solidarity, two contracting norms put to the test by TCE scholars, behaviorists, and game theorists, most directly manifest these complexities. Early proponents of relational contract theory understood this. Ian Macneil, the father of modern relational contract theory,²⁷ argued that reciprocity and solidarity deserve special attention.²⁸ Macneil observed: “As students of man in society, we are faced with an illogicality. Man is both an entirely selfish creature and an entirely social creature, in that man puts the interest of his fellows ahead of his own interests at the same time that he puts his own interests first.”²⁹

In a frequently-quoted and memorable passage, Macneil explained:

24. *Relational Economics*, *supra* note 5. Although I did not use this term then, the mutualism of a contracting unit is the subject of this piece.

25. By using the term “other-regarding,” I consciously mean to avoid the term “selfless.” I used the term selfless in prior work but it is not quite right. While awkward, other-regarding does a better job of capturing what I mean. The meaning I intend to capture is that contractors can, and do, act simultaneously from opposing states. One of those is selfishness; the other is not so much selfless or even “social” (Macneil’s term). Rather, the opposite of selfish is other-regarding. The words selfless, unselfish, and even “altruistic” are not right because ultimately, the goal is to always make the relationship the most productive it can be. Further, the word social is not quite right because, in my view, social detracts from the economic nature of the transaction. I find that other-regarding works best because these words capture an intentionality to be interested in the “other,” without implying that the interest is either altruistic/selfless or otherwise purely non-economic/social.

26. See Jan B. Heide & Kenneth H. Wathne, *Friends, Businesspeople, and Relationship Roles: A Conceptual Framework and a Research Agenda*, 70 J. MKTNG. 90, 90 (2006) (“Our framework explicitly accounts for the possibility that different orientations (calculative and heuristic) and the associated roles (businessperson and friend) can coexist and that switching among them is both possible and likely.”); *id.* at 93 (challenging the assumption that the two “prototypical roles” (friend or businessperson) “either follow rules [i.e., friend] or maximize utility [i.e., businessperson], or more generally, that they play a single role (friend *or* businessperson) over time”).

27. Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2009 n.9 (joking that while Macneil told his own students that he (Macneil) had invented relational contract theory, Macneil’s colleague, Stewart Macaulay, told *his own* students that *Macaulay* had invented it, and Scott told *his* students that Scott and his collaborator Charles Goetz together invented relational contract theory).

28. Macneil, *supra* note 21, at 347.

29. *Id.* at 348.

Such a creature is schizophrenic, and will, to the extent that it does anything except vibrate in utter frustration, constantly alternating between inconsistent behaviors—selfish one second and self-sacrificing the next. Man is, in the most fundamental sense of the word, irrational Two principles of behavior are essential to the survival of such a creature: solidarity and reciprocity. Man, being a choosing creature, is entirely capable of paralysis of decision when two conflicting desires are in equipoise. The two principles of solidarity and reciprocity, neither of which can operate through time without the other, solve this problem. Getting something back for something given neatly releases, or least reduces, the tension in the creature desiring to be both selfish and social at the same time, and solidarity—a belief in being able to depend on another—permits the projection of reciprocity through time.³⁰

The research being done outside the legal academy suggests Macneil was right. To that research I now turn.

II. MUTUALISM IS ALIVE AND WELL IN NEW INSTITUTIONAL ECONOMICS LITERATURE, BUT NOT IN LAW-AND-ECONOMICS LITERATURE. HOW DID THAT HAPPEN?

In prior work, I wrote about TCE work that shows under certain conditions, commercial contractors intentionally hold and jointly rely upon expectations of relational behaviors, such as flexibility and voluntary information sharing.³¹ As I wrote in that piece, this work is largely unknown to legal scholars. This Part first names this phenomenon “mutualism,” after the mutual expectations these behaviors represent. Second, this Part provides a needed explanation of how and why it is that transaction cost economists have brought relational contract norms into their economic modeling, but legal economists have not.

The economics that we in law are most familiar with—i.e., the dominant law-and-economics tradition—is traditional neoclassical economics. Neoclassical economic analysis studies exchange on the market. Under that approach, a firm is only interesting for its production

30. *Id.* at 348–49. Others have commented upon this passage as well. *See, e.g.*, Melvin A. Eisenberg, *Why There Is No Law of Relational Contract*, 94 NW. U. L. REV. 805, 813 (2000) (quoting Macneil, *supra* note 21, at 348); Sarah Maxwell, *The Social Norms of Discrete Consumer Exchange: Classification and Quantification*, 58 AM. J. ECON. & SOC. 999, 1002 (1999); Catherine Mitchell, *Contracts and Contract Law: Challenging the Distinction Between the “Real” and the “Paper” Deal*, 29 OXFORD J. LEGAL STUD. 675, 687 (2009) (noting that in writing this passage, “Macneil regards this dualism as a reflection of human nature”).

31. *Relational Economics*, *supra* note 5, at 110.

function: a firm produces things to be traded on markets and its sole function is to maximize profits by market trade.³² In that view, a firm's transactions are unimportant and irrelevant because they are assumed to be costless. Thus, it has been said that in orthodox economic analysis, the firm—and its motivations—are a “black box” into which one need not “peer.”³³

But, lurking deep in that black box is an important question: why have a firm at all?³⁴ This is an inherently institutional question, and as such, it is not one that traditional neoclassical economics asks. That question was taken up by the new institutional economics (NIE). In a 1937 paper, *The Nature of the Firm*, economist Ronald Coase hypothesized that firms exist to organize trade more efficiently.³⁵ According to Coase, the boundary of the firm is an important economic variable—one that can be manipulated to minimize the overall costs of operating a firm and to enhance its profitability.³⁶ In this vision of economics, unlike in the traditional vision, the costs of transactions cannot be assumed to be zero; instead, they are the name of the game.³⁷ Until the transaction costs on the

32. Oliver E. Williamson, *The Evolving Science of Organization*, 149 J. INSTITUTIONAL THEORETICAL ECON. 36, 38–39 (1993) (describing the evolution of economics toward the study of the firm as an institution and away from the traditional conception of the firm as production function, and noting that it took some time for the shift to take root: “[b]e that as it may, the New Institutional Economics has crossed a viability threshold.”).

33. Gary Slater & David A. Spencer, *The Uncertain Foundations of Transaction Cost Economics*, 34 J. ECON. ISSUES 61, 62 (2000) (observing that “[f]or many years, the dominant neoclassical approach suggested that nothing would be gained from peering into the ‘black box’ called the firm; it was enough to know that it operated to maximize profits) (“The firm has been shunned in mainstream economics by an overriding emphasis on the efficient coordinating mechanism of the market.”).

34. *Id.*

35. *Id.* at 62–63 (discussing and citing Ronald Coase, *The Nature of the Firm*, 4 ECONOMETRICA 386 (1937)).

36. *Id.* at 63.

37. Although Coase—a Nobel Prize winner—is best remembered for his later work, *The Problem of Social Cost*, in which he said that *in absence of* transaction costs, the rules of market exchange and initial property distribution would be irrelevant because the parties would always bargain to the most efficient outcome, he never actually endorsed the core assumption upon which this premise is based: the absence of transaction costs. See David Campbell, *The End of Posnerian Law and Economics*, 73 MODERN L. REV. 305 (2010) [hereinafter *Posnerian Law*]. See also David Campbell, *The Incompleteness of Our Understanding of the Law and Economics of Relational Contract*, 2004 WISC. L. REV. 645, 649 (2004) (quoting Ronald H. Coase, *The Problem of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW* 95, 114 (1988)) (“Markets are institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transactions. In an economic theory that assumes that transaction costs are nonexistent, markets have no function to perform, and it seems perfectly reasonable to develop the theory of exchange by an elaborate analysis of individuals exchanging nuts for apples on the edge of the forest or some other similar fanciful example. This analysis certainly shows why there is a gain from trade, but it fails to deal with the factors that determine how much trade there is or what goods are traded.”). Instead, Coase never

market are high enough to justify the cost of hierarchical organization as a firm, a firm will not arise. Instead, economic actors will continue to contract with each other on the market. Only when the transaction costs of contracting become too high will they decide to combine, forming a firm. Thus, determining different institutional boundaries to maximize profitability requires accounting for the impact of transaction costs on exchange.³⁸

This shift in emphasis led eventually to a different and more realistic treatment of transaction costs in what is now known as NIE. With the development of NIE, the groundwork for including the variable of relational contract behaviors in economic modeling was thus in place.

TCE did not always embrace relational contract norms as variables in its modeling. This changed as TCE increasingly challenged both the discrete model of classical microeconomics and its parsimonious assumptions. Indeed, Oliver Williamson cautioned his fellow institutional economists, quoting Ian Macneil: “[T]he discrete transaction—‘sharp in by clear agreement; sharp out by clear performance’ is very rare in both law and economics, and we deceive ourselves by treating it otherwise.”³⁹ Williamson argued that economics needed to be “more self-conscious . . . [of] ‘human nature as we know it.’”⁴⁰ Thus, Williamson introduced two behavioral assumptions into TCE, each of which is particularly relevant to this project.

First, Williamson distinguished between the purely rational actor, “economic man,” who exists only in theory, and “organizational man,” who operates in the real world and who is “boundedly rational” (though not irrational).⁴¹ Second, he distinguished the morality of organizational man from an idealized economic actor. Noting that organizational man is “motivationally . . . complex,” Williamson explained he is unlike the hyper-rational economic man, who always plays by the rules.⁴² Thus, the TCE approach requires the analyst to consider the costs arising out of the need to observe and control for opportunism, including the costs of

abandoned the core principle of his earlier work—work that eventually formed the basis of the new institutional economics.

38. EIRIK FURUBOTN & RUDOLPH RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTIONS OF NEW INSTITUTIONAL ECONOMICS 47 (2d ed. 2005).

39. Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 550–52 (1981) (internal citations omitted).

40. *Id.* at 553.

41. *Id.* at 553–54.

42. *Id.* at 554 n.9 (quoting Peter Diamond, *Political and Economic Evaluation of Social Effects and Externalities*, in FRONTIERS OF QUANTITATIVE ECONOMICS 31, 31 (M.D. Intriligator ed., 1971)) (“[S]tandard economic models . . . [treat] individuals as playing a game with fixed rules which they obey. They do not buy more than they can pay for, they do not embezzle funds, and they do not rob banks.”).

negotiating, monitoring, and enforcing contracts.⁴³ Eventually, recognizing that sociological variables could affect these costs, TCE scholars began to model relational norms.⁴⁴ Orthodox neoclassical economics made none of these changes, and modern law-and-economics still excludes these variables from its modeling.

In sum, TCE “explicitly incorporate[s] a number of Macneil’s notions and also acknowledge[s] the possible existence of bilateral relations.”⁴⁵ Thus, unlike L&E scholars, NIE scholars treat relational contract norms as both true and useful.⁴⁶ Relational principles have become integrated into how inter-firm transactions are studied. As these studies all examine the existence of relational norms of contracting behavior as bilateral expectations, the studies that confirm the presence of these norms are quite clear evidence of what I have called the mutualism of the modern economic transaction.

As noted earlier, the second of human nature’s complexities that pervades real world contracts is the concept of dualism. Dualism means that individual economic actors themselves can, and often do, make single contracting decisions for multiple reasons, not just one (i.e., not simply to maximize utility). In the next Part, I argue that, as the TCE work shows mutualism in action, the behavioral and experimental economics work shows dualism in action.

43. Ranjay Gulati, *Does Familiarity Breed Trust? The Implications for Repeated Ties for Contractual Choice in Alliances*, 38 THE ACAD. OF MGMT. J. 85, 86 (1995) (internal citation omitted).

44. See, e.g., Charles W. L. Hill, *Cooperation, Opportunism, and the Invisible Hand: Implications for Transaction Cost Theory*, 15 ACAD. OF MGMT. REV. 500, 511 (1990) (“If the wider context within which economic transactions are embedded is considered, it can be concluded that over time the invisible hand of the market favors actors whose behavioral repertoires are biased toward cooperation, rather than opportunism The error of conventional transaction cost theory comes not so much in the construction of the theory but from the failure of researchers to consider the implication of the wider context for the distribution of *behavioral repertoires* among a population of economic actors.”) (emphasis added); Akbar Zaheer & N. Venkatraman, *Relational Governance as an Interorganizational Strategy: An Empirical Test of the Role of Trust in Economic Exchange*, 16 STRATEGIC MGMT. J. 373, 379 (1995) (“The rationale for the key role of trust is straightforward: in the extreme case, it does away with formal contracts, which are costly to write, monitor and enforce. Thus, trust acts to reduce transaction costs by reducing or eliminating both *ex ante* and *ex post* opportunism.”) (internal citations omitted).

45. Jan B. Heide, *Interorganizational Governance in Marketing Channels*, 58 J. MARKETING 71, 74 (1994).

46. A notable exception is Robert E. Scott, who finds relational contract norms useful for purposes of contract design, though not contract law. See, e.g., Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

III. DUALISM IS ALIVE AND WELL IN BEHAVIORAL AND EXPERIMENTAL ECONOMICS STUDIES

The notion of an individual economic actor who makes decisions from multiple motivations is dualism. While dualism might be a more familiar concept in law than mutualism,⁴⁷ many legal scholars remain unconvinced that dualism can be successfully operationalized.⁴⁸ That said, like with mutualism, there is now substantial scholarship outside of law successfully operationalizing dualism.⁴⁹ Indeed, as the literature discussed here shows, economists engaged in conceptual and experimental work, from strategic management to behavioral economics and game theory, have concluded that although it is complicated, the dual-action model of human behavior has a place in econometric modeling.⁵⁰ It seems that one key to those scholars' success has been to extend, but not replace, the rational action model by relaxing some of its less realistic assumptions about human behavior.⁵¹ This work has received some attention from

47. See, e.g., Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 711 (1990) (noting the possibility of a moral dimension of utility—that is, “that people are motivated by pleasure and by morality”) (emphasis in original); *id.* at 733 (making the assumption that people want more than just wealth maximization, even when they contract). See also William C. Whitford, *Ian Macneil’s Contribution to Contracts Scholarship*, 1985 WISC. L. REV. 545, 550 (1985) (noting that the second of Macneil’s two great contributions to contract law scholarship—the first being the empirical point that most exchange is, indeed, not discrete—is the idea that “parties in relational contracts frequently temper wealth maximization with other objectives”).

48. Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1638 (2000) [hereinafter *Limits of Behavioral Theories*] (noting that while sociology and psychology have successfully improved our understanding of the human experience, that understanding has not produced a generalized, tractable model capable of successfully predicting the effect of law on that experience). See also Richard Zeckhauser, *Comments: Behavioral Versus Rational Economics: What You See Is What You Conquer*, 59 J. BUS. S435, S438 (1986) (noting a lack of optimism that the conflict between rational choice and behaviorist economic theorists will be resolved any time soon, and noting that one reason why is that “[e]legant abstract formulations will be developed by both sides, frequently addressing the same points, but because there are sufficient degrees of freedom when creating a model, they will come to quite different conclusions”).

49. See Teck-Hua Ho & Xuanming Su, *Peer-Induced Fairness in Games*, 99 AM. ECON. REV. 2022, 2022 (2009) (citing recent literature and comprehensively reviewing literature from the following sources: Matthew Rabin, *Psychology and Economics*, 83 AM. ECON. REV. 1281 (1998); COLIN F. CAMERER ET AL., *ADVANCES IN BEHAVIORAL ECONOMICS* (2004); Teck-Hua Ho et al., *Designing Pricing Contracts for Boundedly Rational Customers: Does the Framing of the Fixed Fee Matter?*, 54 MGMT. SCI. 686 (2006); and Teck-Hua Ho et al., *How “Psychological” Should Economic and Marketing Models Be?*, 43 J. MARKETING RES. 307 (2006)).

50. For a similar conclusion in contract law, see Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1672 (2003) [hereinafter *Self-Enforcing Indefinite Agreements*] (concluding that “the experimental evidence strongly suggests that the effect of reciprocal fairness, an effect that has thus far been neglected in contract theory, is an important element in optimal contract design”).

51. See, e.g., Matthew Rabin, *An Approach to Incorporating Psychology into Economics*, 103 AM. ECON. REV. 617, 617 (2013) (arguing generally that psychological realism can improve our understanding of economic phenomena if operationalized properly, as “when done with the

contract law scholars generally,⁵² but has received only minimal attention with regard to relational contract theory specifically.⁵³

This Part highlights some of what we can learn from economists who have studied dualism, who propose that fairness can serve as a motivating factor in economic behavior and that concerns for fairness take different forms, from inequity aversion to reciprocity. This work also shows that the different social roles played simultaneously by a contractor (a business person, a friend) can impact a contractor's behavior. These conclusions are explored below.

A. Fairness as Inequity Aversion

While economists agree that “[b]y now we have substantial evidence suggesting that fairness motives affect the behavior of many people[,]” they do not agree on what that evidence means for the future of economic modeling.⁵⁴ Part of the reason for a lack of consensus is that, for a long time, economic analysis produced conflicting results as to both the presence and potency of non-efficiency motivations underlying economic action.⁵⁵ In an attempt to order this somewhat chaotic body of literature, Ernst Fehr and Klaus Schmidt hypothesized that the divergent results might be explained simply—by adding to the standard model an additional cohort of actors who cared about fairness in addition to material payoffs.⁵⁶

This move, while small, turned out to be important for the long-term viability of modeling dualism. It allowed the authors to retain the assumption that people generally optimize and seek to make choices rationally. To this they simply added one additional assumption: some

mathematical and statistical rigor required by mainstream economic questions and methods”); Matthew Rabin, *Incorporating Limited Rationality into Economics*, 51 J. ECON. LIT. 528 (2013) (expressing support for modeling bounded rationality within the traditional, neoclassical framework because 1) doing so properly adjusts the utility model to include preferences other than wealth-maximization, but at the same time is consistent with rationality, and 2) optimization models can help reveal limits to rationality).

52. See, e.g., *Limits of Behavioral Theories*, *supra* note 48, at 1638. Richard Posner has also been rather critical of behavioralism's implications for law-and-economics. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1557–58 (1998).

53. See, e.g., *Self-Enforcing Indefinite Agreements*, *supra* note 50, at 1661–75 (2003) (discussing experimental economic research confirming “reciprocal fairness” as a motivation in economic behavior, and arguing that this literature holds valuable lessons with respect to designing incentive structures in contracts).

54. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 QRTLY J. ECON. 817, 817–18 (1999) (concluding that there is a “bewildering variety of evidence” of conflicting conclusions regarding fairness and self-interest motivations).

55. *Id.* at 818 (noting conflicting evidence in fairness and cooperation studies, observing that “[s]ome pieces of evidence suggest that many people are driven by fairness considerations, other pieces indicate that virtually all people behave as if completely selfish, and still other types of evidence suggest that cooperation motives are crucial”).

56. *Id.*

actors also (not instead) care about fairness.⁵⁷ Extending the model to include the variable of “fair types” largely maintained the core of econometric analysis but allowed the analyst to determine if, in certain conditions, a fair type might make a different choice than a purely rational actor.⁵⁸ The results showed that in certain economic environments, fair types did make choices other than selfishness, and in certain environments, fair types influenced selfish types. These results meant that, at least under certain economic conditions, the predictive power of the purely rational actor model—assuming no fair types—was weaker than in models that did assume some fair types.⁵⁹

Notably, in this study the authors modeled fairness as “self-centered inequity aversion,” which they defined as the state in which people “do not care per se about inequity that exists among other people but are only interested in the fairness of their own material payoff relative to the payoff of others.”⁶⁰ This kept the idea of fairness close to the rational action tradition in that fair types were less motivated by fairness concerns generally than they were with fairness concerns via-a-vis their own payoff relative to others. Similarly, in a later paper, authors Fehr, Klein, and Schmidt characterized inequity aversion as “a simple extension of the standard self-interest model that takes into account the fact that some people are not only interested in their own material payoff, but also dislike inequity.”⁶¹ Thus, fairness as inequity aversion allowed the analyst to account for non-efficiency motivations within the broader framework of utility maximization.⁶²

In the later paper, the authors hypothesized that fairness concerns, unexplained by self-interest, could impact the kind of contract parties choose to enter.⁶³ The authors conducted a series of experiments where principals could choose either a bonus contract or an incentive contract to offer to an agent.⁶⁴ The standard self-interest model predicted that subjects in the experiment would favor the incentive contract over the bonus contract.⁶⁵ However, the results showed the opposite: once the model

57. *Id.*

58. *Id.* at 819 (“We show, in particular, that the economic environment determines the preference type that is decisive for the prevailing behavior in equilibrium.”).

59. *Id.* at 819, 855–56.

60. *Id.* at 819.

61. Ernest Fehr et al., *Fairness and Contract Design*, 75 *ECONOMETRICA* 121, 123 (2007) [hereinafter *Fairness and Contract Design*].

62. *Id.*

63. *Id.* at 121.

64. *Id.* at 121–22.

65. *Id.* (explaining that the authors based their prediction that subjects would choose the incentive contract over the bonus contract on the assumption that all subjects are rational actors; this, however, proved to be untrue, as many of the subjects opted for fairness over rational action).

included the presence of some fair subjects, the contracts predicted to be found optimal under standard contract theory turned out to be far less efficient, and contracts predicted to be inefficient turned out to be superior.⁶⁶

Importantly, these effects were not predicted by the standard self-interest model.⁶⁷ The model showed that concerns for fairness explained the deviation from the standard prediction, and the authors concluded that fairness could affect the incentive effects of contracts.⁶⁸ The study implies that different contract enforcement mechanisms will work differently given the characteristics of different agents: “[i]ncentive contracts that are optimal when there are only selfish actors perform less well when some agents are concerned about fairness”; however, “implicit bonus contracts that cannot work when all actors are selfish provide powerful incentives and become superior when there are fair-minded players.”⁶⁹

These two studies alone could have profound effects for contract law. Importantly, these studies show that it is possible to know when—under what economic conditions—individual economic actors will likely choose fair rather than efficiency-maximizing actions. Understanding that variable could answer one of the chief L&E criticisms of the behavioral/relational contract project, which is that the economic models have yet to be replicated showing the predictive effect of law on the human experience.⁷⁰ If it is possible to model the effect of economic conditions on the human experience, it ought to be possible to model the combined effect of legal and economic conditions on the human experience. As will be explored later in Part V, such a combined model might shed light on what seems to be the intractable problem of how to think about meaningful consent to legal-ware when consumers lack bargaining power over legal-ware provisions.

B. Fairness as Reciprocity

A second set of experimental studies explored a slightly different concept of fairness: fairness-as-reciprocity. The fairness-as-reciprocity model was originally developed in 1993 by Matthew Rabin.⁷¹ Rabin challenged the idea that the only real exception to self-interested economic

66. *Id.* at 121.

67. *Id.* at 122.

68. *Id.* at 151.

69. *Id.* at 150–51.

70. *See, e.g., Limits of Behavioral Theories, supra* note 48.

71. *See, e.g., Fehr, supra* note 54, at 852 (situating Rabin’s 1993 paper as developing a theory of reciprocity: one which “rests on the idea that people are willing to reward fair intentions and to punish unfair intentions”).

behavior was altruism, meaning pure generosity.⁷² Rabin observed that psychology research showed that altruistic behavior was more complex than that.⁷³ For example, it showed that people could be altruistic—with conditions.

Specifically, Rabin noted that existing psychology research showed that rather than consistently seeking to help others, people tended to mete out helpfulness according to how helpful or generous others were to them.⁷⁴ For example, Rabin cited studies showing that in ultimatum games, people routinely forwent the self-interested action—i.e., they self-sacrificed, instead of wealth-maximized—if they perceived that doing so would rightly punish an unfair actor.⁷⁵ This research suggested that rather than responding to a pure generosity principle, these self-sacrificers seemed to be responding to a reciprocity principle: if someone is kind to me, I'll reciprocate; if someone is mean to me, I'll reciprocate that too.⁷⁶ Assuming that such tit-for-tat behavior had economic consequences, in his paper *Incorporating Fairness Into Game Theory and Economics*, Rabin developed a game-theoretic framework for incorporating what he called similar emotions into “a broad range of economic models.”⁷⁷

Rabin applied his model to two economic problems implicating fairness: monopoly pricing and labor economics. In both situations, behavioral economists had previously studied fairness, though not by using the tools of game theory.⁷⁸ Only the monopoly pricing problem will be discussed here. That problem was why consumers who, in the face of monopoly pricing, refused to buy a product even if they considered the product worth the price being charged.⁷⁹ Standard economic theory predicted that a rational actor should buy the product because having a product worth the price—even if the product is being sold by a monopolist—is better than not having it. But behavioral experiments showed that consumers would refuse to buy in that situation.⁸⁰ The theory was that these consumers were willing to self-sacrifice to punish an unfair

72. Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1281 (1993).

73. *Id.*

74. *Id.*

75. *Id.* at 1283–84 (reviewing research, including Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERS. 195 (1988); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986); and Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285 (1986)).

76. *Id.* at 1281.

77. *Id.* at 1282.

78. *Id.* at 1292–94.

79. *Id.*

80. *Id.* at 1293.

actor.⁸¹ Rabin hypothesized that his model would offer proof of this hypothesis, and it did; Rabin found that reciprocal fairness explained the consumers' behavior.⁸²

In a second foundational reciprocity study, Steven Hackett investigated the conventional wisdom regarding the conditions necessary to sustain relational exchange. Hackett defined relational exchange as an exchange where the parties' observable *ex ante* investments were implicitly linked to *ex post* surplus sharing rules—where the “implicit link” took the form of some sort of proportionality principle.⁸³ Hackett hypothesized that the proportionality rule of relational contract might hold even in the absence of two hallmarks of relational exchange: the presence of reputational concerns and the opportunity for repeat play.⁸⁴ Building on earlier work,⁸⁵ Hackett tested this hypothesis in the context of a problem particular to relational contract: nested bargaining.⁸⁶

Competing theories predicted different sharing rules. Hackett noted that traditional game theory predicted that surplus sharing rules would develop as they would in any bargaining situation, according to bargaining power.⁸⁷ By contrast, equity theory predicted that as long as the parties were aware of each other's initial investments, the parties would develop proportional surplus sharing rules, even in absence of the other two conditions.⁸⁸ Hackett hypothesized that the standard game theory prediction was wrong.⁸⁹

Hackett found that when the parties' original investments were observable to each other, the proportionality rule held even when there was no opportunity in the game for players to form individual reputations and no opportunity for repeat play between players.⁹⁰ This was an

81. *Id.* at 1292.

82. *Id.*

83. Steven C. Hackett, *Is Relational Exchange Possible in the Absence of Reputations and Repeated Contact?*, 10 J.L. ECON. ORG. 360, 362 (1994).

84. *Id.*

85. *Id.* at 361 (quoting Victor Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAVIORAL SCIENTIST 337 (1982)) (“Of special relevance here is Goldberg's discussion in describing relational exchange, where he points out that parties ‘will be reluctant to incur the high initial costs [of specific investment] without some assurance of subsequent rewards.’”).

86. *Id.* at 360–61 (considering two central problems of incomplete contracts: 1) the “nested bargaining problem,” meaning the need to renegotiate new terms over time (i.e., *ex post* bargaining), and 2) the disincentives that come from potentially “redistributive effects of [ex-post] bargaining [which] may considerably undermine parties' [ex-ante] investment incentives”).

87. *Id.* at 362.

88. *Id.*

89. *Id.* at 375 (finding “that the subgame-perfect equilibrium point prediction [*i.e.*, traditional game theory] organize[d] little of the data”).

90. *Id.* at 362 (observing that implicit links formed even though the “setting . . . lacks both the capacity for forming individualistic reputations and for sustaining frequently repeated exchange—the two structures argued to support relational exchange”).

important finding because prior to this study, the proportionality principle observed in relational exchange was routinely explained not as a manifestation of fairness concerns but rather by the structure of relational contract itself: when players are concerned about reputations and repeat play, as they typically are in relational contracts, they will find it in their self-interest to act fairly toward each other. According to this standard explanation, any observed fairness would be explained by self-interest,⁹¹ yet Hackett's study demonstrated that even when these two strategic conditions were removed, the players still respected the proportionality principle. Thus, Hackett concluded that while reputation and repeated contact are undoubtedly important to relational exchange, "relational exchange may also be supported by social norms of equity."⁹² The results "support[] Macneil's claim that social norms of equity are central to relational exchange."⁹³

Hackett's conclusion negates the idea that all economic action, even fair economic action, is exclusively strategic; instead, it supports the dualism thesis. This finding warrants further attention from contract theorists in law. At the broadest level, this data offers further support for Macneil's conception of the economic actor as dualistic. Moreover, the data supports Rabin's argument that relaxing this assumption under the right conditions can improve our understanding of the dualistic economic phenomenon.⁹⁴ Finally, on a more granular level, data showing fairness as a reciprocity norm could add to ongoing conversations about the challenges and complexities of incomplete contracts, and even, as will be discussed in Part V, the viability of certain rules of the common law in the face of particular economic conditions.

C. *The Impact of Social Roles on Economic Behavior*

While the studies examined so far considered different ways that fairness motivates economic behavior, a third set examined a different influence: social roles.⁹⁵ To examine the effect of social roles, authors Heide and Wathne generated a new conceptual framework. Their framework considered how a single actor could, in one relationship, follow multiple behavioral roles and respond to two different internal logics: on one hand, the role of a business person (which follows the logic of consequences and rules) and on the other, the role of a friend (which

91. One sees this explanation often in economic accounts of relational contract. *See, e.g.*, Posner, *supra* note 52, at 1557–58.

92. Hackett, *supra* note 83, at 362.

93. *Id.* at 360.

94. *See* Rabin, *supra* note 72, at 1282.

95. Heide, *supra* note 26, at 90.

follows the logic of appropriateness and norms).⁹⁶ Prior to this work, analysts typically assumed that an economic actor followed one role or the other.⁹⁷ The authors hypothesized that the either/or nature of each side's assumptions were too narrow and limiting.

The authors observed that each of these two differing perspectives derives from a unitary value: either self-interest or social construction, but not both.⁹⁸ The authors—echoing Macneil—hypothesized that a model that could account for an actor's capacity to respond sometimes to economic self-interest and sometimes to social heuristics should hold more predictive power than one that could not.⁹⁹ To create this capacity, Heide and Wathne's framework thus depicted the processes by which relationship roles are created, maintained, diluted, or changed, and concurrently predicted whether a relationship would succeed given a particular combination of role, expected behavior, and actual behavior.¹⁰⁰ They suggested that the newly developed framework should allow future researchers (and perhaps even managers) to take even more nuanced approaches to matching governance structures with relationship roles.¹⁰¹ The ability to model behavioral nuance could be critical to convincing traditional L&E scholars to be more receptive to this work.

Finally, in another and relatively recent study considering the influence of social norms on behavior choices, Fershtman, Gneezy, and List hypothesized that different manifestations of fairness might be explained by an actor's selection of a particular social identity from competing identities.¹⁰² Specifically, the authors hypothesized that when an acceptable social norm justifies a selfish action, a person who would not act selfishly in the absence of that justification may indeed choose to act selfishly.¹⁰³ This theory not only raises important questions about the

96. *Id.*

97. *Id.* at 98.

98. *Id.*

99. *Id.* (noting that “[o]ur central argument is that such categorical distinctions may be too simplistic”).

100. *Id.* at 96 tbl. 1. For example, the flow chart illustrates that to the extent that an actor chooses a contracting partner, that selection is likely to lead to the role of friend. Once that occurs, a series of behaviors consistent with that role are likely to follow, including voluntary cooperation (which reinforces the role of friend), or, if cooperation fails, the role of friend may be “diluted” or even “switched” to another role. Similarly, to the extent that a partner is attracted to another on the basis of incentives, their relationship is likely to take on the role of “businessperson.” Further, the chart demonstrates how particular incentive or monitoring structures as applied to a particular relationship at a particular stage might affect the success or failure of that relationship. All of this has economic consequences.

101. *Id.* at 99.

102. Chaim Fershtman et al., *Equity Aversion: Social Norms and the Desire to be Ahead*, 4 AM. ECON. J.: MICROECONOMICS 131, 132 (2012).

103. *Id.* at 132–33, 141.

interrelationship between law and social norms, but it also supports the idea that single actors can select among alternative models of behavior given differing environmental conditions.¹⁰⁴

One interesting problem that studies like this might inform is the legal problem of opportunism. Opportunism is notoriously difficult to define legally. Williamson defines it as “self-interest seeking with guile.”¹⁰⁵ Posner defines it as when, in a bilateral monopoly situation featuring sequential performances, the latter-actor takes advantage of the former’s performance by simply not performing.¹⁰⁶ Timothy Muris describes it by illustration.¹⁰⁷ Although these studies do not solve the definitional problem, they illuminate a reason why defining opportunism is so hard: what seems opportunistic in one situation might not actually be, depending on the background social norms of that situation.¹⁰⁸ As the authors of this recent study emphasized, “future research should focus on how the properties of the situation influence behavior.”¹⁰⁹ Perhaps that future research could help contract law to better distinguish anti-social opportunism from pro-social competition in any particular case or in any recurrent transactional structure.

In sum, while the standard assumption in orthodox economics and law-and-economics has been that rational actors will care only about economic interest, not social interest, the frameworks and results developed in the studies canvassed here suggest they are driven by multiple motives and varied economic conditions and that self-interest will not always dominate the social motivation. The challenge is to relax or even build on this assumption in a way that does not destroy the predictive power of the traditional framework and adhere to rigorous methodology in the process. As this research shows, this can be done.

It is now time to revisit the question of whether these insights can or should have any impact on contract law and theory. I answer those questions with an unequivocal “yes.” As I will discuss in the next section, the behavior that modern contractors expect of themselves and each other

104. A similar though different study is Ho, *supra* note 49, at 2022. There, the authors noted that in addition to being driven by general equity or distributive justice fairness concerns, “in many real-life situations, people are also driven by social comparison.” *Id.* at 2023 (internal citations omitted). They hypothesized that “peer-induced fairness concerns can be more salient than distributional fairness concerns when agents engage in social comparison.” *Id.*

105. Williamson, *supra* note 39, at 554.

106. If the latter simply absconds with the benefit of the first party’s earlier performance, then the latter has acted opportunistically. Richard Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INSTITUTIONAL THEORETICAL ECON. 73, 81 (1993).

107. Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 522–24 (1980–1981).

108. Fershtman, *supra* note 102, at 143.

109. *Id.*

lines up remarkably well with what contract law should expect if contract law were interpreted more consistently with its philosophical foundation. That foundation, as legal historian James Gordley argued, is derived from Aristotelian philosophy.¹¹⁰

IV. THE ARISTOTELIAN UNDERPINNINGS OF MUTUALISM AND DUALISM

As this Part will explain, the way modern economic actors contract—demonstrating both mutualism and dualism—is consistent with the Aristotelian concept of justice in private exchange. The research set out in the prior Parts show that there are contractors for whom Aristotle’s conception of a just private exchange would likely ring true. Real world contractors tell researchers, and experimental behavioral economic studies also suggest, that while efficiency is of course a core goal of an economic transaction, how the contracting partners treat each other can also be surprisingly important to both commercial contractors and individual economic actors. Indeed, the work shows that how the partners engage with each other—in Aristotelian terms, the contract’s means—can direct transactional behaviors, choices, and expectations in surprising ways. That this is so shows common ground between the ancient Aristotelian concept of just private exchange and what modern contractors do and expect each other to do.

Notably, I am *not* claiming that goals other than economic gain, such as fairness or reciprocity, displace the goal of economic benefit. Indeed, such an either/or way of thinking about contract is a trap set by the monist paradigm itself. Instead, this Article’s thesis is that because Aristotelian thinking and reasoning processes both means and ends symbiotically—such that the choice of how one pursues one’s goal (means) is as important to the analysis as the choice of what goal should be pursued in the first place (ends)—and because modern contractors report that how they pursue economic gain matters in ways that can drive contracting choices—analyzing modern contracting from an Aristotelian perspective seems quite promising.¹¹¹

A. Mutualism’s Virtue: Commutative Justice

At first, it may seem that no two theories could have less in common than a twentieth century law-and-sociology anti-theory of contract and the ancient Greek theory of virtue ethics attributable to Aristotle. And yet it turns out that they have a lot in common. Both Aristotle and Macneil were

110. See, e.g., PRIVATE LAW, *supra* note 4.

111. See *Virtue and Contract Law*, *supra* note 6, at 703.

realists and were concerned with actual behaviors. As described in Part I, the point of relational contract theory was to illustrate what contractors do more realistically than traditional neoclassical contract theory. Similarly, while it is still not well appreciated in law, Aristotle's *Ethics* was fundamentally practical: he was concerned with how well equipped citizens were to make choices that would best preserve self-rule in a true democracy.¹¹² Aristotelian virtue ethics is an ethics for imperfect people.¹¹³ No person is perfect, nor can we be, otherwise we would be gods, said Aristotle in *Politics*.¹¹⁴ Aristotle did not assume away man's imperfections; instead, in *Ethics*, we learn how to live our best lives in our state of imperfection. Aristotle's advice is the same when it comes to exercising the virtue of justice.

Broadly speaking, in Aristotelian terms, "[j]ustice is a kind of equality; therefore injustice is a kind of inequality"¹¹⁵ Aristotle conceived of two different types of justice.¹¹⁶ The first concerns distribution of common goods, or what we call distributive justice.¹¹⁷ Aristotelian distributive justice is based on merit, or "desert."¹¹⁸ The second concerns a kind of proportional equality in voluntary interpersonal engagements.¹¹⁹ This is the concept of commutative (or corrective) justice.¹²⁰ David Bostock offers this account of Aristotelian commutative justice:

112. See, e.g., MICHAEL D. CHAN, *ARISTOTLE AND HAMILTON ON COMMERCE AND STATESMANSHIP* 12 (2006) (recognizing that the perfect government does not exist and Aristotle's advice in the *Politics* is realistic, not perfectionist).

113. See, e.g., JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 19 (1993) [hereinafter *PHILOSOPHICAL ORIGINS*] (explaining that "[w]hen [Aristotle] discussed virtues such as promise-keeping, commutative justice, and liberality, he was applying this method to the study of human beings").

114. See, e.g., MICHAEL DAVIS, *THE POLITICS OF PHILOSOPHY: A COMMENTARY ON ARISTOTLE'S POLITICS* 7–8 (1996).

115. *THE CAMBRIDGE COMPANION TO ARISTOTLE* 222 (Jonathan Barnes ed., 1995) [hereinafter *CAMBRIDGE COMPANION*].

116. *Id.*

117. *Id.* at 222–23 (explaining further that "[o]n the assumption that we were on an equal footing before, the fair exchange preserves the equality between us").

118. IZAHK ENGLARD, *CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES* 6 (2009).

119. *CAMBRIDGE COMPANION*, *supra* note 115, at 222.

120. The two concepts of justice are interrelated, though sometimes discussed as discrete:

[T]hat concern for justice in private transactions—largely a matter of commutative justice—cannot be divorced from concern for distributive justice. The relation was explained by Thomas Aquinas. Distributive justice governs 'the order of the whole toward the parts, which concerns the order of that which belongs to the community in relation to each single person.' Commutative justice governs 'the order of one part to another, to which corresponds the order of one private individual to another.'

PRIVATE LAW, *supra* note 4, at 12.

In each case one party (the victim) has suffered a loss, and the other (the offender) has made a corresponding gain. So the fair way of rectifying the situation is to restore the status quo; the offender should be made to give up his ill-gotten gain, which should then be restored to the victim, so that the result is ‘equality’ once more.¹²¹

Disproportionality results when “[o]ne person has too much and another too little. He has too much . . . in voluntary transactions because things of unequal value have been exchanged. Justice is done by taking the amount necessary to restore equality from one party and giving it to the other.”¹²² Gordley suggests that a just contract should not introduce any new inequalities into the position each party was in before the exchange:

The point of contracts of exchange is to allow the parties to exchange resources so that neither party enriches himself at the other’s expense. . . . fairness, in the sense of commutative justice, is not a sort of limitation on these bodies of law but belongs to their definition.¹²³

The point is that from an Aristotelian perspective, to be a just contractor, a party must be at least somewhat other-regarding. A contractor who lacks any concept of other-regardingness would presumably not hesitate to seek all advantage that she could possibly get, irrespective of her action’s impact on the other side. That sounds like the purely rational economic actor,¹²⁴ but it does not sound like the contractors who have been studied in the TCE and behavioral and experimental work. Those contractors respond to nuances in ways that are not accounted for in the purely-rational action models.

121. DAVID BOSTOCK, *ARISTOTLE’S ETHICS* 61 (2000). Commutative justice is sometimes also called corrective justice because the idea is to correct the disproportionality caused by an unjust interaction. ENGLARD, *supra* note 118, at 7–8 (“Corrective justice’s aim is to restore the original positions of both the person who suffered the loss and the person who gained the profit at the other’s expense. Aristotle describes the ‘correctively just’ as the arithmetic mean between the part of the earner and the part of the loser.”).

122. PHILOSOPHICAL ORIGINS, *supra* note 113, at 13. Moreover, as to modern contract law, Gordley has written that “one cannot define the rules of contract . . . without regard to commutative justice, or in other words, without regard to the effect of these rules on the distribution of resources between parties.” PRIVATE LAW, *supra* note 4, at 12.

123. *Id.*; *see also* PHILOSOPHICAL ORIGINS, *supra* note 113, at 55 (“Commutative justice does not simply mean that parties exchange, but that they exchange so that neither party is enriched at the expense of the other.”).

124. A truly rational economic actor would seek all the advantage she could, but she would not take advantage of the other side. Instead, as noted in Part III, she would “play by the rules,” because a truly parsimonious model of economic behavior does not and could not account for the costs imposed by deviance from this neutral baseline. But of course, the rational actor would, subject to this theoretical limit, seek all the gain she could.

B. *Commutative Justice in Modern Contracting*

As described in Part II, we know from the TCE work incorporating Macneil's relational contract norms in typical contracts in various industries that contractors do in fact find value—even economic value—in other-regarding behaviors. The trick is that they must have mutually-held expectations. It was the discovery of jointly held, mutual expectations of other-regarding behaviors that eventually persuaded TCE scholars to change the way they think about, and model, modern contractors. To appreciate this, one must understand what came before it.

Prior to robust testing for relational norms in this literature, the prevailing wisdom among transaction cost economists who studied industrial buyer–seller transactions was that when one prospective contracting party came to the bargaining table in a more powerful position than the other, the stronger party would always benefit most (and should) from seeking to maintain or improve upon that position. But, after scholars began to test for relational norms, they learned that this is not in fact what such parties did. Specifically, in a foundational TCE study—one of the first to test for and confirm the bilateral expectation of relational norms—the authors observed that the more powerful party in industrial buyer–seller relationships would often *cede* that control to the other partner. To explain this unexpected observation, the authors hypothesized that the parties' joint expectations of relational behaviors made that structure of the deal possible in the first place.¹²⁵

In a passage that sounds downright Aristotelian (i.e., doing the right thing at the right time for the right reason), the authors concluded:

Contrary to the notion that control is desirable *per se*, firms should structure relationships in a discriminating way, based on the characteristics of the situation in question. Firms should not pursue control as a goal in its own right, but only attempt to acquire control when specific assets are at risk. From the other side, it is not always wrong to cede control. The key is to be protected against abuse of control, and relational norms can serve that purpose. Hence supportive norms have significant economic value when specific assets need to be safeguarded.¹²⁶

Importantly, I am not claiming that these contractors were consciously “being” Aristotelian. I am, however, claiming that when studies like this demonstrate the presence of bilateral relational contract norms in real world contracts, those real world economic behaviors are consistent with behaviors that an Aristotelian account of commutative

125. *Relational Economics*, *supra* note 5, at 108–11 (discussing Heide, *supra* note 45, at 32).

126. Heide, *supra* note 45, at 41–42.

justice would expect. In sum, mutualism—the shared expectations of cooperative behavior that contractors consciously hold—and dualism—the capacity of any individual contracting actor to be motivated by non-efficiency concerns (i.e., fairness, inequity aversion, reciprocity), even in situations where one might expect purely selfish motivations—are remarkably consistent with the Aristotelian philosophy of just private exchange.

To Aristotle, a just private exchange is one where each contractor benefits, but neither at the expense of the other. What the research described in Parts II and III demonstrates is that in certain conditions, both in commercial and individual economic transactions, we should expect contractors to intend an exchange where each benefits (a mutual expectation of the contract's goal), but neither at the expense of the other (a mutual expectation of the contract's means). And these are the findings of a discipline wedded to mathematical methodology.¹²⁷

Now the critical question becomes: so what? What can or should contract law or contract law theory do about it? My final argument is that legal analysis of contracts would be more coherent if both contract law and theory better accounted for the possibility of relational goals in contract. What that might look like is the subject of the final part of this Article.

V. ACCOUNTING FOR MUTUALISM AND DUALISM IN MODERN CONTRACT LAW AND THEORY

A system of contract law that could account for a contract's complexities—specifically, the complexities of mutualism and dualism inherent in relational contract behaviors—is one that would better capture the internal practices and values of the participants than do traditional contract law theories. Such a system would be remarkably consistent with the Aristotelian ideal of just exchange. In this Part, I describe a fundamental reconceptualization that would need to happen to make that system possible: thinking about contract law as not in service of a single normative value, but instead as facilitating commutative justice. Finally, I offer an example of what that reconceptualized analysis might look like in the context of a paradigmatic modern contract problem: enforceability of the mandatory arbitration term-in-a-box.

127. Though the question is beyond the scope of this Article, it bears noting: what might they find if economists were to expand their research methods beyond the mathematical model? There have been multiple calls for economists to expand their methodology, and since the Recession of 2008, those calls have increased. See, e.g., *Relational Economics*, *supra* note 5, at 121–22; *Posnerian Law*, *supra* note 37; *CRESPO*, *supra* note 10, at 81–99.

A. A Modern Aristotelian Conceptual Method

Single value theories attempt to explain or organize law, and ultimately influence courts, around single normative values. The idea is that a particular value already is or should be inherent in the common law of contract (i.e., efficiency, promise-keeping, consent), and for that reason courts ought to apply the common law to the particular legal issue in front of them consistently with that value. The point of this subsection is that, as to contracts, this method of theorizing law puts the cart before the horse.

Sometimes the most simple, elegant truths are hidden in plain sight. Such is the case with contract. Contracts are rules—private law—that parties set for themselves. Unlike statutory law, like criminal law, designed to incentivize an entire community to do X or not do Y, a contract is designed to facilitate a particular relationship—a relationship entered into in order to accomplish some particular exchange goal in some particular way. From that perspective, it seems odd to say that the common law of contract ought to be interpreted as being about a single value—a value that the parties ought to learn so that they can make their contract conform *to it*.¹²⁸ Instead, it seems that the common law of contract ought to facilitate the relationship achieving its goals consistent with what we know about the practice of the institution of contract itself.

What we know about contract is that it is both a selfish and an other-regarding endeavor, chosen by parties to bring about some result that will benefit both parties. We know that individual parties can be both selfish and magnanimous. We know that parties will set goals and expectations for themselves and the other, sometimes living up to them and sometimes not. These things we know because they are inherent both in human nature and in the nature of contract. Finally, by quantifying these behaviors, the studies in Parts II and III show that they can be modeled economically.

Is it remotely realistic to think that contract law—the common law and the Uniform Commercial Code as they exist today, not some new law or law of relational contract¹²⁹—could be applied, in the hands of individual judges in particular disputes, in a way that fundamentally prioritizes what we know about the institution of contract? In a way that takes the dualistic nature of the practice of contract as a given and asks, with regard to the particular dispute, how does the dispute fit within what

128. See, e.g., Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663 (2004).

129. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (1999) (arguing that there can be no “law of relational contract” because all contracts are relational; thus, contract law must be relational or not, but there cannot be some separate “law of” relational contract).

we know about contract? If that were possible, it would resemble the Aristotelian analytic method.

James Gordley has written that if Aristotle could analyze a twenty-first century contract, he would probably approach the analysis as he approached any other: by first determining the end or purpose of the thing at issue (i.e., the contract), and then asking what means would best effectuate those ends:

He wanted to analyze almost everything the way one would a couch, discovering its purpose or what it does, and the contribution that each of its parts makes to this purpose. In the 13th century, Aquinas began his commentary on Aristotle's *Nicomachean Ethics* by noting that there are two basic types of order: the order of part to whole, and the order of means to ends. The second, he said, is based on the first. The parts of the couch such as the back, arms or legs each have a purpose which itself is a means to the ultimate end of the couch. That is why they count as parts. Each part has the structure it does so that, working in harmony with the other parts, it can serve this ultimate end. One can discover the purpose of each part and of the couch as a whole by examining how it is built. The purposes are implicit in the structure.¹³⁰

From our twenty-first century point of view, this may seem a bit odd. Approaching the analysis of a contract like the conceptual analysis of a couch sounds strange. And yet, if we zoom out a little bit, we might stop and question whether we have lost sight of the forest for the trees. Philosophers and historians of both law and economics have begun reminding us in recent years that our current analytic methods are relatively recent intellectual inventions. For example, they remind us (with increasing urgency after the crash of 2008) that economics was not, for most of its intellectual history, a value-neutral practice.¹³¹ They also remind us that the current preoccupation with parsimonious modeling is a by-product of a particular approach to social science generally; it is not intrinsically required by economics.¹³² They also remind us that like all

130. James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 FLA. L. REV. 441, 450 (1997) (internal citations omitted).

131. See, e.g., CRESPO, *supra* note 10, at 59 (“Economics has gradually drifted away from its original moral science character.”); *id.* at 59–62 (describing how economics first turned away from its normative and ethical foundation, which had characterized what we today call “economics” for 2200 years, when John Stuart Mill in 1843 suggested that rationality was limited to reasoning about means and doubting whether it was possible to be rational about ultimate ends); *id.* at 81–82 (noting that the economics positivist turn entrenched itself in the mid-twentieth century under the leadership of Milton Friedman).

132. See, e.g., *id.* at 81–83 (observing that economics’ turn away from ends and toward only means led to a practice of modeling that valued abstraction over realism, to the point where Milton

good things, one can have too much: at some point, parsimony stops facilitating something bigger (i.e., knowledge) and starts becoming the focus of the modeling project itself. At that point, Crespo observes, the parsimony assumption itself must be revisited.¹³³

This “difficult balance between realism and simplification” has been with economics for a long time and is not likely going away soon:

It is easy enough to make models on stated assumptions. The difficulty is to find the assumptions that are relevant to reality. The art is to set up a scheme that simplifies the problem as to make it manageable without eliminating the essential character of the actual situation on which it is intended to throw light.¹³⁴

Gordley reminds us that the same is true of law, and particularly, of contract law. Gordley’s meticulous work tracing the history of private law generally, and contract specifically, reveals that Aristotelian philosophy was, until relatively recently, inherent in Western law. Its influence waned over time as Aristotelianism became less and less understood.

Gordley writes that Aristotelian philosophy was interwoven with Western law in the late seventeenth and eighteenth centuries when scholars attempted—for the first time—to organize and explain legal decisions. Prior to that point, cases existed, but no one had attempted to organize or explain them. This first systematicization of law was undertaken by a group Gordley calls the late scholastics, and it was they who synthesized “Roman law with Greek philosophy, and in particular, the philosophy of Aristotle.”¹³⁵ Gordley argues, in sum, that the first “systematic doctrinal structure” of the law of obligation, which we now know as contract law, resulted from this synthesis.¹³⁶ The chief Aristotelian philosophical principle around which the legal principles of

Friedman’s contemporary successors believe that the more abstract and unrealistic the model, the more predictive it will likely be). See also *Posnerian Law*, *supra* note 37, at 326–27 (2010) (reviewing RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION* (2009)); Richard A. Posner, *How I Became a Keynesian*, *NEW REPUBLIC* (Sept. 23, 2009), <http://www.newrepublic.com/article/how-i-became-keynesian>.

133. CRESPO, *supra* note 10, at 84 (“All scientific theories are abstractions; there is no science without simplification; hypotheses are sketches of reality and undoubtedly differ from reality. Friedman got all that right, but he overemphasized simplification: it one thing to say that hypotheses are simplified models of reality that are corroborated by testing its consequences, and it is quite another to say that hypotheses should be ‘descriptively false.’ If false assumptions are a prerequisite of science, then its role is reduced to prediction, and science fails to be explicative. However, I think that all economists, including Friedman, would intuitively agree that they not only attempt to predict facts but also try to explain why they got it right (when they do get it right).”).

134. *Id.* at 68 (quoting JOAN ROBINSON, *ECONOMIC HERESIES* 41 (1971)).

135. *PRIVATE LAW*, *supra* note 4, at 4.

136. *Id.*

voluntarily-assumed obligations were first synthesized is commutative justice.¹³⁷

So what happened to the Aristotelian philosophical principles—to commutative justice? Gordley writes that, in the end, the doctrinal organizational structures produced at that time survived, but the philosophical principles and their inherent analytic method did not. Those principles (for example, each benefits, but neither at the expense of the other) were victims of the Enlightenment, “rejected, not because they contradicted common sense, but rather because common sense was no longer accepted as a proper standard.”¹³⁸ In its place, post-Descartes philosophical method morphed from the conceptual, dialogical method to the deductive reasoning method we have today.¹³⁹ Moreover, the Enlightenment philosophers saw Aristotelianism as inconsistent with the ideals of rationality and free will.¹⁴⁰ Hence, will theories began to be used in explaining and justifying existing legal doctrine—doctrine that had been built on the older standards and methods. This mismatch produced modern doctrine that superficially prioritizes deductive reasoning and free will, and yet is internally incoherent, tossing about for meaningful philosophical explanation.¹⁴¹

No single value theory of contract has put the pieces back together again. For some, the idea of pluralism holds some promise, but right now, legal scholars do not even agree as to what pluralism means.¹⁴² Against this backdrop, perhaps it does not seem so bizarre after all to think about a contract the way one might think about a couch. The next section will illustrate just such a problem in contract law—a doctrine casting about with no coherent theoretical explanation or direction—and then consider how that same doctrine might be made coherent by reconnecting it to its Aristotelian roots.

137. *Id.* at 14–15.

138. *Id.* at 5.

139. *Id.* at 16–17.

140. *See id.* at 14.

141. *Id.* at 364–65 (observing that modern law today has multiple theories that will deny enforcement of a promise to pay an extremely unjust price, yet modern law lacks a “theory of how prices can be unjust”).

142. Kreitner, *supra* note 20, at 917 (discussing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997) and offering a typology, or “mapping,” of the various different kinds of theories considered to fall under the umbrella of pluralism).

*B. The Method Applied to a Paradigmatic Contract Problem:
Mandatory Arbitration Term-in-a-Box*

This story is a recurring problem for contract law. A customer orders, for example, a Bluetooth speaker from Amazon, and the product is shipped. Inside the shipping container is not only the speaker, but a set of legal terms and conditions, or “legal-ware” as Judge Easterbrook dubbed them in the new contracts classic, *Hill v. Gateway 2000*.¹⁴³ One of the terms is a mandatory arbitration provision. Another is a term that tells buyers if they do not agree to all terms and conditions, they should return the product within a set amount of time for a full refund. The customer likes the speaker and has no intention of returning it. She happily enjoys her speaker and just as happily ignores the legal-ware. And why should she bother with the legal-ware? The deal is done; she has her speaker, and there is nothing she could do about the terms in the box anyway.

Inevitably, something goes wrong with the speaker, which the consumer determines, after a bit of googling, is systemic. The speaker has been designed to require an expensive replacement component far too early in the lifetime of the speaker, and then require further replacements more frequently than it should. The customer and others similarly situated suspect fraud. They contact a class action lawyer and file a suit. Rather than defend in court on the merits, the speaker manufacturer asks the court to dismiss the case based on the mandatory arbitration provision every purchaser received in her shipping container. Should the court enforce this provision?

The law is indeterminate, to say the least. The threshold problem is which law to apply: the common law or the Uniform Commercial Code (“U.C.C.”)? The sale is for a speaker, which is a movable good, so you might say the U.C.C. should apply.¹⁴⁴ If so, then the problem is likely governed by the U.C.C.’s provision on imperfect acceptance, Section 2-207.¹⁴⁵ But the problematic term binds the customer to arbitration as an alternative dispute resolution (“ADR”), which is not covered by the U.C.C. Even as to what body of law to apply, the law is indeterminate. For illustration purposes, because the Seventh Circuit analyzed it under the common law, let’s assume the common law should apply.

Next, what provision of the common law should apply? Is it the rule of blanket assent, the basic objective manifestation of acceptance rule? If so, then because the customer kept the product beyond thirty days, the customer accepted both the speaker and the terms in the box.¹⁴⁶ Or is it the

143. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

144. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339–41 (D. Kan. 2000).

145. U.C.C. § 2-207 (2014).

146. *Hill*, 105 F.3d at 1147–50.

rule of acceptance by silence or inaction, because the customer did not do anything affirmative at all with respect to the terms in the box? She simply left it there. If she had no real notice that there would be additional terms in the box, then she is not on constructive notice to look, and the rule for acceptance by silence or inaction would apply.¹⁴⁷ Or should we back up another step: should the law consider the offer to purchase the speaker a different offer, with a different acceptance, than the offer to participate in ADR (generously characterizing the unilateral imposition of the mandatory arbitration term in this example as an offer)?

The Seventh Circuit encountered this issue in 1997, and chose to analyze it under the common law, after summarily rejecting the argument that the U.C.C. ought to apply.¹⁴⁸ Under the common law, the court applied the rule of blanket assent and thus easily determined that terms-in-the-box were enforceable. The court reasoned that the customer's failing to return the computer after being given the opportunity was sufficient as a manifestation of assent to the terms in the box.¹⁴⁹ As noted, this is not the only possible analysis, and other courts have refused to follow the reasoning, finding it flawed for various reasons.

So the law is indeterminate. Theorizing, however, is not advancing the ball much. The Seventh Circuit in *Hill v. Gateway* was taken with economic theory. On the basis of commercial efficiency, the Seventh Circuit reasoned that in mass manufacturer-to-consumer transactions, the rule should be that the “vendor is the master of the offer”:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations like Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for

147. *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1287–90 (9th Cir. 2017).

148. Citing only its own prior decision as authority, the court rejected Hill's argument that the later-coming form in the sale of a movable good triggered the U.C.C.'s rule on imperfect acceptance, stating “[t]his argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, ‘sec. 2–207 is irrelevant.’” *Hill*, 105 F.3d at 1150 (quoting *ProCD, Inc., v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

149. *Id.* at 1148. Moreover, somewhat between the lines, it seemed important to the court that the customer knew there was warranty information that she did not yet have when she originally agreed to buy the computer, so the customer was on constructive notice that terms, including the warranty, were coming in the box. *See id.* at 1149–50.

both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.¹⁵⁰

Yet, twenty years later, the Ninth Circuit was not as impressed with economic theory. When Samsung asked the Ninth Circuit to accept this same argument, the court declined:

In the absence of support from California courts, Samsung urges us to conclude, as the Seventh Circuit did in *Hill*, that the practicalities of consumer transactions require the enforcement of in-the-box contracts and that consumers expect that products will come with additional terms. We decline this request. Even if we were persuaded by Samsung's argument, "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state." If the California Legislature believes that its current commercial code fails to strike an appropriate balance between consumer expectations and the burden on commerce, it can amend the law.¹⁵¹

The point is that when courts cannot agree on what rule should apply, and when they disagree as to which theory should influence the law, the law is under-performing our expectations. We want law to be determinate and predictable. We want to at least know that a particular set of facts will trigger the application of a particular doctrine. When this does not happen, and when each court's different doctrinal choice is justifiable by different precedent or different theory, we can safely conclude that something is not working.

What to do? I have suggested an Aristotelian conceptual analysis. Such an analysis would start with the thing to be analyzed, and work from there. Let's return to one of Gordley's go-to examples, the couch. Can a contract be analyzed like a couch?

Like a couch, a contract has multiple parts to it. Each of the contract's parts relates to—serves—the whole. A couch cushion alone does not function as a couch; the cushion is useful in service *of* the couch. It is easy to see how. However, is a mandatory arbitration term similarly in service of the purchased product (a speaker, a computer)? This is less clear. The term serves the product's seller, but does it serve the product being sold? It matters because if the ADR term is as integral to the product sold as the cushion is to the couch, then the blanket assent rule applied in *Hill* might make sense: those terms probably should stand or fall together. But of

150. *Id.* at 1149 (internal citation omitted).

151. *Norcia*, 845 F.3d at 1290.

course, the ADR term does not serve the speaker or the computer as the cushion serves the couch.

To see why not, consider that a purchaser shopping for a couch can, and likely will, shop for cushions of different comfort levels. The price she is willing to pay will reflect her comfort with the cushions on the couch. But a purchaser shopping for a computer, or in our example, a speaker, cannot shop for ADR terms that are more or less suitable for her needs. She cannot agree to a price that corresponds to her comfort with that term. Indeed, as Judge Easterbrook recognized in *Hill*, we modern consumers are busy people, and we simply do not read or appreciate every boilerplate term (whether set out online or in a shipping container) that comes with purchasing a product. Moreover, as to ADR specifically, a consumer is likely only to discover such a term if, at some later point, the product turns out to be defective in some sense, *and* if this defect is serious enough to justify her seeking a remedy in court. Only then will an ADR term become salient to the consumer. The seller knows this.

Seen from this perspective, an ADR term is more like the adhesive used to fasten couch material to the underside of the frame than it is like the cushion used to make the couch comfortable. An ADR term is not a core aspect of the thing purchased; neither is the adhesive, but the cushion is, and both are (arguably) necessary. The consumer will discover the properties of the cushion which are important to her prior to formation, but the same is not true with respect to either an ADR term or the adhesive.

Another angle on this problem is one suggested by the inequity aversion studies in Part III, and that is whether the consumer has any economic power over the term at issue.¹⁵² As noted, she does have a say

152. Given the possibilities of research outlined in Part III, it would be fascinating to study whether, if consumers subject to mandatory ADR terms could in fact punish sellers for unfair ADR terms, the consumers' desire for fairness (inequity aversion) could influence sellers to voluntarily offer better ADR terms. As Fehr, Klein, and Schmidt determined, fair types have more or less success influencing selfish types to be more equitable across differing economic environments. *Fairness and Contract Design*, *supra* note 61, at 855–56. For example, fair types are likely to have more influence over selfish types in bilateral negotiations than in competitive markets. *Id.* Importantly, according to the authors, standard rational action models are more predictive in environments where fair types are *less* able to exert any influence over their counterparts; where fair types have more power, the standard rational action models begin to fail. *Id.* at 856. Yet the standard rational action models are the models that lawyer–economists like Judge Easterbrook are presumably thinking of when they write economically-minded opinions like the opinion in *Hill*.

Take the example in *Hill*—the binding arbitration term in the box. According to the inequity aversion modeling surveyed in Part III of this Article, even if we assumed a competitive market for the underlying product (a computer, a speaker), if a single purchaser has no opportunity to impact the “material relative payoff” of the ADR term, then the selfish actor will continue to advantage herself and behave selfishly. *See id.* However, if the consumer has the ability to influence that payoff (as in a bilateral negotiation, or even a competitive market for ADR terms), these models suggest the fair types could more successfully influence the selfish types to design contracts with more equitable ADR provisions. Yet the blanket assent rule of the common law of contract—at least as interpreted and

in the comfort of her couch cushions because she can shop for comfort before purchasing. As noted, and unlike a couch cushion, neither an ADR term nor a particular adhesive is likely to warrant any attention from the consumer when shopping. As such, these terms are perfect sites for a seller or manufacturer to cut corners. Buyers have no power as to these terms and sellers know it. As cases like *Hill* (and the inequity aversion studies, and our collective common experiences as consumers!) readily show some companies do try to benefit at the consumers' expense in situations like this. The question is: Should contract law support those efforts?

Per Aristotelian commutative justice, the goal of contract law would be to enforce terms that serve the normative goal of each benefits, but neither at the expense of the other. What is at issue here is one of the means of the Aristotelian equation, so we should focus our analysis there. Does the mandatory arbitration term-in-the-box pass the test for the means of a just exchange, which neither party benefits at the expense of the other? (Does the adhesive?) Is the company thereby benefitting at the consumer's expense? It might be; it might not be. Like everything in law, it depends on the facts.

The facts we need to consider include the following: assuming that there is a functioning market for arbitration terms (which there probably is not, but could be if they were priced separately and could be shopped for, similar to long-term warranties), is the arbitration term competitive? Is the arbitration provider well-regarded by consumer interest groups? Do they have enough locations such that no consumer has to travel more than, say 100 miles, to get to an arbitration provider? Or can arbitration be done virtually at no cost to the consumer? Is the process fair to the consumer, *really*? These questions show that it is certainly possible to imagine an arbitration term that would be competitive and consumers could choose to accept, just as it is possible to an adhesive that work well and consumers could choose to accept. If the ADR term works well at a price one is willing to pay in a competitive market, then there is no reason to assume the term necessarily enriches one at the expense of the other.

Against proposals like this one, lawyer-economists tend to make three arguments. First, they argue that ADR terms, and especially mandatory arbitration terms, are critical to mass manufacturer-consumer deals because of cost. Providing extra notice is expensive, as is litigation,

applied by economically-minded judges like Judge Easterbrook—*removes* that ability. The blanket assent rule, as the opinion in *Hill* so eloquently shows, precludes any single consumer from any ability to impact the “material relative payoff” of a binding arbitration term in a box, which in turn removes any incentive for an unfair seller to offer better terms.

Thus, the inequity aversion economic modeling suggests that the blanket assent rule malfunctions *in these economic conditions*—a problem economists have discovered, but economically-minded lawyers have not. Yet.

and the costs of consumer protection would simply be passed on to consumers, driving up prices. Judge Easterbrook suggested as much in *Hill*.¹⁵³ But this is a red herring. Even if some ADR provision is necessary to keep consumer products affordable, just as a couch needs some adhesive to hold the material to the frame, the particular term selected does not have to be non-negotiable, hidden, and favoring sellers; it does not have to be one that effectively enriches sellers at consumers' expense. In short, while mass market sales contracts might need some ADR term to keep consumer products affordable, just as a couch needs some adhesive to hold the material to the frame, the law could require terms that do not enrich sellers at consumers' expense.

Lawyer–economists also argue that the solution is not more disclosure because more disclosure just does not work. They argue that consumers would still ignore boilerplate terms that they could not change.¹⁵⁴ This argument is answerable by reference to the same core principle, which is that if the law held manufacturers and sellers to a standard requiring that companies not enrich themselves at the consumer's expense, then manufacturers and sellers would write contracts to meet that standard. In other words, our hypothetical speaker company would figure it out, perhaps charging a bit more for a contract offering a dispute resolution term a bit more favorable to consumers.

A third argument lawyer–economists make is a formalist one, based on certainty and predictability: how will any speaker manufacturer know when its mandatory arbitration term in the box is sufficiently other-regarding so that a court will enforce it? How will the company know if a particular ADR provider is sufficiently well-regarded or has enough physical locations to pass the test? These are not easy questions, but we have the same uncertainties today. The truth is that no one really knows how marginal legal issues will come out until they are litigated enough times that patterns emerge, and even then we do not know for sure. No one knew for sure that the Ninth Circuit would reject both doctrinal and theoretical arguments that impressed the Seventh Circuit. No one knew for sure that the District of Kansas would say the U.C.C. applies to sales of computers, even though the Seventh Circuit dismissed that argument out of hand.¹⁵⁵

153. See *Hill*, 105 F.3d at 1149 (“Consumers as a group are better off when vendors skip costly . . . steps such as telephonic recitation . . .”).

154. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

155. Again citing itself as authority, the court rejected the plaintiff's argument that the later-coming form in the sale of a movable good triggered the U.C.C.'s rule on imperfect acceptance, stating “[t]his argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, ‘sec. 2–207 is irrelevant.’ 86 F.3d at 1452.” *Hill*, 105 F.3d at 1150.

In sum, the Aristotelian approach to contract law analysis treats the role of contract law as facilitating a relationship between parties who have various goals. It does not treat contract law as ultimately in service of one social value or other.¹⁵⁶ Indeed, the reconceptualization of common law that I am proposing here follows in the tradition of the legal realists' overhaul of commercial law via the U.C.C. The U.C.C. was intended to modernize commercial law to better account for the practices of real world commercial actors. Hence, commercial reasonableness plays a large role in Article 2 provisions. My proposal that the common law of contract be interpreted and applied as to facilitate the normative goal of each benefits, but neither at the expense of the other, is not unlike making commercial reasonableness a touchstone of commercial law.¹⁵⁷

CONCLUSION

This Article has argued that the key to solving the terms-in-a-box problem, and likely similar problems of modern contract law, is to analyze them from the perspective of an Aristotelian just exchange, using conceptual reasoning. Though surprising, upon reflection, this approach is not unlike the proposal to reform commercial law to better serve the internal practices of commercial actors. The argument here is motivated by the same concerns that motivated the early legal realists: the law is not keeping up with modern contracting practices, and forcing contractors to tailor their practices to particular legal rules— just because those are the rules— gets the project backward.

156. From the single value debate, other debates follow—for example, the debate over whether informal terms ought to be “formalized” or legalized. *See, e.g.*, Mitchell, *supra* note 30. Another example is the debate on default rules and how they should be determined. *See generally* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523 (2016).

157. Of course, the entire “incorporation strategy” of Article 2, by which courts hearing commercial cases are instructed to incorporate the informal norms of the relationship into the enforceable rules of that relationship, has its detractors. They are the same scholars who, after much careful and thoughtful deliberation, have concluded that because all prior common law modernization projects have failed, the best solution is the neo-formalist minimalist approach. *See, e.g.*, Robert E. Scott, *Is Article 2 the Best We Can Do?* 52 HASTINGS L. J. 677, 685 n.25 (2001) (“The norm of commercial reasonableness is variously expressed in Article 2, sometimes just with the injunction ‘reasonable,’ but always directed to or qualified (usually explicitly) by a broader reference to commercial practice. *See, e.g.*, §§ 2-103(1)(b), 2-204, 2-205, 2-206, 2-208, 2-305, 2-308, 2-309, 2-211, 2-402, 2-503, 2-510, 2-513, 2-603, 2-604, 2-605, 2-607, 2-608, 2-609, 2-610, 2-614, 2-706, 2-709, 2-710, 2-712, and 2-714.”); *see also id.* at 685 n.26 (“As I have suggested on previous occasions, the elimination of the merchant jury from Article 2 while retaining the pervasive notion of commercial reasonableness was, in consequence, a drafting disaster.”) (citation omitted). *See also* Bernstein, *supra* note 23, at 1765 (describing the Article 2 philosophy as “the idea that courts should seek to discover ‘immanent business norms’ and use them to decide cases,” which is known as the Code’s “incorporation” strategy).

The truth is that when they can and when it makes sense, modern contractors already do behave, and expect the same from their contracting partners, in ways that would meet the requirements of an Aristotelian just exchange. As this Article has spelled out, those requirements are that, for an exchange to be just, the exchange must be one in which each benefits, but neither at the expense of the other. Emerging empirical and experimental research proves to us that contractors are complex, but that economics does have the tools to model those complexities. One aspect of that complexity is shared commitments to mutualism of the contracting unit. Another is the choice to intentionally sacrifice profit in favor of another value. Another is whether the contracting conditions give the fair-minded types any real power to influence the selfish types. The real question now is whether contract law ought to account for these complexities. My answer to that question has been a resounding yes.

In sum, this Article has argued that an Aristotelian contract jurisprudence could make good sense of what modern contractors tell academic researchers they, in fact, mutually expect of each other, and that with more advanced modeling, we too could predict. Because of this possibility, we ought not give up on law's ability to make sense of contract as it is actually practiced.