

CONTRACT *IS* CONTEXT

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INTRODUCTION

Actually, Contract *is* context. We can only understand the normative object of Contract by reference to the context in which the doctrine operates. That is a challenge for unitary normative theory—a challenge that more than a few theorists have been willing to confront on their way to positing unitary normative theories of Contract.¹ Such efforts are largely empty. Contract is, in an important sense, the product of a series of historical accidents because history is context in retrospect.² But there is a method to the madness: while Contract represents diverse (and often divergent) normative conclusions, those conclusions do proceed from the conjunction of a limited store of normative alternatives. My thesis is that context reveals the normative dynamic that determines the incidents of the law of consensual relations—Contract—and doctrine accommodates that revelation. That statement will support more specific consideration of the normative challenge that the *Principles of the Law of Software Contracts* (“*Software Principles*”), recently promulgated by the American Law Institute (“ALI”), present to Contract law and to Contract theory

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1. See generally P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

2. See Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 875 (2007) (observing that if no unifying theory of contract law exists, or the unifying theory is undiscoverable, then “contract doctrine represents little more than the random final product of a long chain of historical accidents”).

more generally.³

Part I of this Article offers general observations concerning the function and operation of theory in law generally, and Contract specifically. I argue that we may be skeptical of unitary normative theory in Contract without being indifferent to the proliferation of rules that treat normatively consistent contexts inconsistently. The presumption should be that like contexts support like results; there must be good reason for divergent results in normatively indistinguishable contexts. That is not to say that we need a *single unitary* normative foundation of Contract, but rather that resolution of recurring controversies should draw consistently from the same normative sources. Contract may be *neither* wholly deontological *nor* wholly consequentialist, but we should expect that similar issues in normatively similar contexts should be resolved by reference to the same or a similar amalgamation of normative premises. Indeed, I am sure that this is all Contract doctrine promises, and, indeed, this is all Contract doctrine can promise.

Part II of the Article considers very specifically the contract formation rules of the new *Software Principles*. When we try to come to terms with them from the perspective developed in Part I of the Article, what conclusion can we reach, or should we reach, about the contribution the *Software Principles* make to the Contract law generally? I fear that one of the Reporters, Professor Hillman—also a contributor to this Symposium—may too modestly present what he and the ALI have accomplished.⁴ This Part reacts to Professor Hillman's understanding of the fit between the *Software Principles* and normative theory of Contract. He and I generally agree, but we disagree around the edges. There is, though, significance in our disagreement to the law of Contract as it will inevitably continue to evolve.

Before proceeding further, it is worthwhile to establish some premises.

The stock (and correct) response to recurring Contract questions is “it depends.” If *A* and *B* agree that they will do *X*, does *A* have a cause of action if *B* does not perform *as agreed*? It depends. Not only would we need to know the subject matter of the parties' undertaking but we would need to know what the *agreement* entails. Further, we would need to know something about *A* and *B*. And we would also need to know what *X* is. The doctrine may be sensitive to those variables; there are rules and exceptions and exceptions to exceptions that account for the circumstances in which *A* does have a cause of action and the circumstances in which *A* does not have a cause of action. Just as often (indeed, likely, more often), however, doctrine is not *expressly* sensitive to context. It is the nature of the

3. See PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS *intro.* (2010).

4. See generally Robert A. Hillman, *Contract Law in Context: The Case of Software Contracts*, 45 WAKE FOREST L. REV. 669 (2010).

relationship between the transactional context and the operation of the apposite doctrine that will be determinative.⁵

5. Relatedly, resolving the question of whether common law Contract informed the development of transactional categories (context) may be difficult. An example of this question is whether we understood sales contracts as significantly distinct from marriage contracts before we realized they were both creatures of “contract.” Professor Grant Gilmore asserted that the categories preceded the generalized theory: “[W]e have tended to assume that ‘Contract’ came first, and then, in time, the various specialties—negotiable instruments, sales, insurance and so on—split off from the main trunk. The truth seems to be the other way around.” GRANT GILMORE, *THE DEATH OF CONTRACT* 12 (1974).

Professor James Gordley was not convinced that the categories preceded the theory. See James R. Gordley, Book Review, 89 *HARV. L. REV.* 452, 453 (1975) (reviewing GILMORE, *supra*). The resolution of that historical question, though, is of only historical interest. What matters for present purposes is the substance of the category-theory relationship. That is, even if the categories *did* precede the theory, as Gilmore maintained, does that tell us anything important about the category-theory relationship? Conversely, if the theory preceded the categories does that have normative significance? History can explain why we might reach an erroneous normative conclusion, but it cannot confirm that some other normative conclusion is correct. Homicide is punishable as a crime today, and should be, whether or not we could understand its rudiments as springing from evolutionary patterns developed when homo sapiens were not grouped in the social units that now determine human interaction. The best that history can do for us is trace the source of our normative conclusions—which might have been mistaken. History cannot justify a normative conclusion; it can neither establish nor, alone, undermine the normative significance of categories.

So Gilmore’s arguments matter even if his history is less than certain: “Once the theory had been announced it did operate, by a sort of backlash effect, to influence further development in some of the specialties . . .” GILMORE, *supra*, at 13. “Backlash effect” or not, there is something intuitive about appreciating symbiosis between theory and category, perhaps akin to a “reflective equilibrium.” See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971):

In searching for the most favored description of this situation we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a significant set of principles. If not, we look for further premises equally reasonable. But if so, and these principles match our considered convictions of justice, then so far well and good. But presumably there will be discrepancies. In this case we have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.

Even if the categories did evolve before the theory that would reconcile them, theory would have already been at work to fill the interstices between the doctrine within each category. So, although we may appreciate *A*, *B*, and *C* as separate (and distinguishable) transactional categories, rules *A1*, *A2*, and *A3*

Although Contract doctrine will not support a unified theory of promise enforcement in the familiar deontological and consequentialist categories, it may support a comprehensive theory of the *interrelation* of normative values that operate in Contract contexts.⁶ Succinctly, the structure may be described in generic terms: if results *A* and *B* are not consistent at one level of theoretical inquiry, that alone will not preclude their consistency at another, more fundamental level. What is determinative is our perspective, our level of acuity. A structure too coarsely grained to be intelligible from one perspective may be completely intelligible from another, after we, say, pull back the camera just enough.⁷ If we consider normative theories *A* and *B* as potentially apposite in a context and find a result consistent with *A* but not *B*, that does not mean that *A* but not *B* is *the* unified theory. It may be the case that *C*, a nonnormative theory, operates and, in so doing, vindicates a principle more fundamental than either *A* or *B*, which principle we could appreciate, after all, as mere means rather than object. *C* may explain why, in the particular context, the normative conclusion of *A* takes precedence over *B* (and why in the next context the order of *A* and *B* might be reversed, or their combination modified). To elaborate: consequentialism needs to serve some instrumental object and even deontology needs some reason (perhaps found within us) to vindicate duty; Kant, after all, had his reasons. So if we can discover the dynamic that explains the *relationship* among the extant theoretical perspectives and the objects of Contract (the goal(s) of those normative perspectives), then we may have discovered all that theoretical inquiry can make available to us. It is context that reveals that relationship.

The foregoing suggests the centrality of context in Contract, so far as normative theory is concerned. In order to reach reliable conclusions about the normative bases of Contract, it is necessary to understand what distinguishes the characterization of one transactional context from the next.⁸ Then the challenge is to

would only be coherent if we could understand them as consistent elaborations of some fundamental normative object at the base of *A*; there would be an effort, self-conscious or not, to identify the normative basis of *A*. Because the available normative alternatives are not that numerous—writ large they are deontology and consequentialism—it should not surprise us to find that, ultimately, even the most disparate normative constructions share fundamental affinities. It *would* be surprising if a category as large as Contract did not reveal some coincidence among its transactional constituents.

6. This raises the question, “what are Contract (as opposed to Tort, Property, or other legal) contexts?” That important inquiry is beyond the scope of this Article.

7. See MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR: ADVENTURES IN THE SIMPLE AND THE COMPLEX* 29 (1994) (“[W]hen defining complexity it is always necessary to specify a level of detail up to which the system is described, with finer details being ignored. Physicists call that ‘coarse graining.’”).

8. It should come as no surprise that some aspects of transactions have

determine the significance of that characterization in terms of the *relationship* between context and the normative inquiry.

I. THE OBJECT OF THEORY

The expansive field of Contract neither easily lends itself to rationalization based on a single positive, normative, or interpretive theoretical perspective, nor is such a system obviously desirable. At the same time, it is not obvious that it would be undesirable that all consensual relations subject to legal regulation proceed from a unitary theoretical foundation. But the test of a theory is its ability to explain and predict, so we should not be surprised (or alarmed) to find that theory (like the best tool) needs to conform to the task.

The first challenge, then, must be to discern the nature and roles of theory. That project is metatheoretical: what is it we understand the theoretical inquiry to be, and does it reduce to a single object? From there, we may reach some conclusion about the fit of a particular theory—positive, normative, or interpretive—with the law we have. But whether that conclusion would hold up when compared with the substance of Contract, the doctrine, is an important question, the answer to which we must not assume. An adjunct of my thesis is that a key to understanding Contract is understanding why it cannot be contained by any one of the aforementioned theories as commentators have thus far constructed them. But by that I do not mean to suggest that Contract is atheoretical; it most certainly is theoretical.

All theorizing, Contract theorizing not excepted, proceeds from a conception of morality and assumes a junction between theory and morality and then between that morality and the object of inquiry. Though I shall argue that it is unnecessary to do so, all extant theories of Contract in fact assume a moral foundation and discover that foundation in either consequentialist or nonconsequentialist (or deontological) premises. “Consequentialism” here denotes a moral theory that judges actions and decisions by analysis of their consequences and nothing else.⁹ Deontology, on the other hand, judges the morality of decision-making with no reference to its consequences. As explained by Immanuel Kant, certain normative imperatives, such as the categorical “act only according to those maxims that can be consistently willed as a universal law,”¹⁰ exist outside of consequentialism. The autonomy facilitated by such imperatives is indispensable to nonconsequentialist conceptions of

more in common, in normative terms, with Tort (nonconsensual liability) than with other aspects of Contract. See generally Andrew Robertson, *On the Distinction Between Contract and Tort*, in *THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES* 87 (Andrew Robertson ed., 2004).

9. BRIAN BIX, *A DICTIONARY OF LEGAL THEORY* 40 (2004).

10. Karl Ameriks, *Kant, Immanuel (1724–1804)*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 460, 465 (Robert Audi ed., 2d ed. 1999).

promising and, by extension, Contract.¹¹ It should be noted that while the nonconsequentialist category here certainly includes deontological theories, the two terms are not synonymous.

The search for a single Contract theory, though, need not necessarily be limited to normative conclusions. Indeed, in the case of Contract, a nonnormative or mechanical theory may well be able to do a better job of what we want or need theory to do if we abandon the quest for a unitary normative explanation and justification. When normativity, as constructed from a consequentialist or deontological perspective, does not exist, such a mechanical theory would be the only workable option. Once we do a better job of coming to terms with the morality of human agents, we may find somewhat less than at first meets the eye.

The success of normative theory as a tool for Contract and other human institutions requires a link between the human agent and normative theorizing. Philosophy has endeavored to discover the normative dimensions of human agency. Rational choice theory is an attractive assumption for consequentialists, providing a clear connection between actions and their desired consequences. It also allows leeway for judgmental errors, assuming that markets will correct mistakes in the long-term by absorbing new information on which to base decisions. This theory, and its assumption of markets' ultimate infallibility or trustworthiness, has met recent criticism in the form of research that supports the opposing behavioral decision theory.¹² Deontology has also struggled with the human agency issue. While Kantian theory, for example, may possess comfortingly consistent logic, it ultimately does not adequately explain either the normativity of typical human agents or the doctrine itself.

Theory certainly provides obvious advantages in the realm of decision-making and problem-solving. Human actors generally base their reactions to stimuli on heuristic devices. Experience-based cues allow actors to recognize acquaintances from afar, or decide whether to carry an umbrella. The ability to act relatively quickly using heuristics with a high probability of reaching the desired outcome is preferable to waiting for complete information; though more information might reduce the margin of error, the cost in loss of action, or paralysis, would be prohibitively high.

The use of theory follows this heuristic reasoning; the more accurately a theory predicts outcomes, the more human agents will deem its margin of error acceptably small.¹³ Indeed we have no

11. *Id.*

12. See generally Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000) (discussing behavioral decision theory and the law).

13. See HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT § 2.3 (1987) ("[G]iven the inherent imperfection of any physical device, we know that it will not perform perfectly."); Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 83–84 (2001); Peter A. Alces, *On Discovering*

choice but to rely upon heuristics, and no less theories, that work well enough often enough.

There is a necessary attraction to heuristics in their provision of intellectual leverage. They enable us to do things we could not do without them. Not least of which, they support learning, teaching, and argument. We rely upon particular heuristics, including our own theories that work best for us, that provide the greatest leverage. And we guard them and promote them zealously. If they work for us they must work for others, or perhaps we have deluded ourselves into believing that they do work as well as we think they do. Whatever explains our commitment to our theories, it is clear that we develop such commitments and enlist them to support argument.

There is danger in losing sight of that propensity to theorize and the necessary limitations of heuristics. So long as our heuristics do not obscure the reality with which we would have them deal, so long as they do, in fact, provide reliable leverage, they are useful. But the danger remains that we will be captivated by the leverage, by the very idea of such leverage. The intellectual power of heuristics is alluring; we could not do without it. We can too, though, be misled by the siren song and make mistakes. We will err if we settle on the wrong heuristic or, as bad, assume that we can rely on a heuristic when there is not one available. Plausible stories that can be made to fit the evidence do not provide real leverage, even though they might seem to. They facilitate error. So, in our search for parsimony, we must remain true to Einstein's admonition: theory should be as simple as possible, but no simpler.¹⁴

Contract theory, specifically a unitary normative theory, has so far failed because it has so far failed to provide a useful heuristic. The theories may make a normative argument (what Contract *should* be); they just fail to account for (interpret convincingly) the stuff of Contract, the doctrine. You might wish that your heuristics did not fail you and that the red Ferrari in the parking lot were yours; but if all you hold is title to a red Civic, all you hold is title to a red Civic, and your heuristics have failed you, even if both cars are red and have four tires. You will appreciate the danger of relying on faulty heuristics when you are arrested for grand theft.

The problem with developing and then relying on faulty heuristics (unitary normative theory) in Contract law may be less dramatic but is no less problematic. If you assert that Contract means *X* and then it turns out to mean *Y*, you will have erred not just in your understanding of what Contract has done but also in your projection of what Contract can and should do. Theory

Doctrine: "Justice" in Contract Agreement, 83 WASH. U. L.Q. 471, 505–07, 512 (2005).

14. See Albert Einstein, *On the Method of Theoretical Physics*, 1 PHIL. SCI. 163, 165 (1934).

provides (or good theory would provide) both an explanation and a justification.¹⁵ Professor Jody Kraus understands the difference between consequentialist and what he terms “deontic” theories to lie in their different shadings between explanation and justification:

The fundamental difference between deontic and economic contract theories is not that one is exclusively normative and the other exclusively explanatory. . . . [T]he crucial second-order disagreement between deontic and economic theories is over the relative priority between explanation and justification, as well as the contest between stated doctrine and case outcomes as sources of law. . . . The primary goal of deontic theories is to demonstrate that contract law is a morally and politically legitimate institution, rather than to explain how contract law determines outcomes in particular cases. In contrast, economic theories are principally concerned to explain how contract law determines outcomes in particular cases. Both kinds of theorists acknowledge the importance of both justification and explanation. But deontic theorists are methodologically committed to understanding the justificatory task first, and explaining particular cases later, while economic theorists are methodologically committed to undertaking the explanatory task first, and justifying the existence of contract later.¹⁶

Whether or not Kraus’s dichotomy is convincing, insofar as he fixes the tension between consequentialist and nonconsequentialist theory in terms of their respective explanatory and justificatory aspirations, he appreciates the nature of the heuristic leverage that theory endeavors to provide.

A certain theory, whether it be consequentialist or not, that illuminates a systemic pattern in Contract beyond what has been discoverable by the doctrine, would provide intellectual leverage both in its predictive (positive) and determinative (normative) abilities as applied to the doctrine. By incorrectly attributing such qualities to a theory, we run the risk of reaching ineffective conclusions by emphasizing the possibilities of Contract over Contract in fact. If, for example, a consequentialist theory supports the conclusion that Contract formulae result in efficient breach, but the actual doctrine does not, the conclusion loses its interpretive credibility and becomes a mere normative judgment. Theoretical constructions may fail in several ways, and a critique that could demonstrate the particular failures of one construction or another would make a valuable, though limited, contribution. The critic, though, could (and usually does) offer an alternative theory—

15. See Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 694 (Jules Coleman & Scott Shapiro eds., 2002).

16. *Id.* at 696.

one that both reveals the limitations of what preceded and develops an edifice that supports the weight prior efforts failed to support. But, after some time, cynicism becomes attractive. That is, when theoretical constructions built upon a strict consequentialist/nonconsequentialist dichotomy fail—on both explanatory and justificatory bases—you begin to suspect that they are making a common mistake. What both consequentialist and nonconsequentialist theories share is a focus on the human agent and a human artifact: Contract doctrine and its elaboration in litigated controversies. So in deciding which approach can claim the most intellectual leverage, it is necessary to fix the metric. While the human agent may be idealized at least at the outset, at some point if that idealization undermines the ability of theory to explain or justify, the terms of that idealization must be relaxed.

An important argument here is that the disjunction between theories' conception of human agency and the human agent in fact undermines any claim that extant theories may make to intellectual leverage. A more authentic conception of the human actor and the human actor's engagement with Contract doctrine demonstrates *how* unitary theory fails. We are, in an important way, contracting animals, and our Contract law, the doctrine, its application, and operation, may well be, to a significant extent, the product of that Contract sense. While it should not surprise us that Contract doctrine, a human artifact, would reflect the unique way in which human agents confront bargaining contexts, there may not be a basis to assume substantial coincidence between the agent and the artifact. At the same time, though, it would not be surprising were there more coincidence than has been appreciated by consequentialist and nonconsequentialist theories that are insufficiently considerate of the characteristics of human agents.

Human agents are neither consistently consequentialist nor consistently deontological.¹⁷ The pull of both predispositions results in a "fairness" calculus that relies more on emotional reaction than rational deliberation, or deductive or inductive inference from immutable principles. While space limitations preclude elaboration on that observation, the analysis of doctrine that follows assumes that premise. So if you do not accept the premise, you may not accept my conclusions about the *Software Principles'* efficacy as Contract doctrine. But for now, for the sake of argument, assume that normatively we are the product of a persistent tension between the consequential and the deontological and doctrine modulates that tension.

17. See JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 39–51 (2002) (concluding that Stanley Milgram's shock and obedience experiments reveal subjects' situational morality).

II. THEORY AND THE *SOFTWARE PRINCIPLES*

It is on a conception of human agents' normativity that I support my conclusions regarding when the *Software Principles*' succeed as Contract doctrine and when they do not. The *Software Principles*, as part of Contract, work best when they fit with our most authentic conception of the human agent best. And they fit best when they accommodate and modulate the consequentialist-deontological tension.

Professor Hillman recognizes that the *Software Principles* are not isolated from Contract writ large. If the *Software Principles* are to matter most, indeed, if they *do* matter (and I think they do), then they must be part of Contract and change our way of thinking about what Contract does and can do. They make a normative statement in their particular accommodation (combination) of consequentialist and deontological premises. While we may be able to distinguish the context in which the *Software Principles* would operate from other contexts in which Contract principles also operate, that fact does not necessarily diminish the *Software Principles*' impact on Contract. And once the ALI approved the *Software Principles*, the ALI was making a normative statement about the law of Contract and not just the law governing software transactions. That must be the case, unless there are good reasons to conclude otherwise.

To make this part of the argument more concrete, I focus on two aspects of the *Software Principles*' treatment of the agreement rules, a response to Contract law as the *Software Principles* found it. In the first example, the *Software Principles*' extrinsic evidence rule, I conclude the *Software Principles* better facilitate the normative calculus Contract doctrine vindicates than they do in the second example, the provision concerning so-called "form contracts."

A. *The "New" Doctrine*

Consider first the section of the *Software Principles* that would provide a parol evidence rule to govern software contracts irrespective of the relative sophistication of the contracting parties:

(e) Unambiguous terms set forth in a fully integrated record may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained by evidence of a course of performance, course of dealing, or usage of trade.

(f) Unambiguous terms set forth in a partially integrated record may not be contradicted by evidence of prior or contemporaneous oral conflicting terms, but may be explained by evidence of course of performance, course of dealing, usage of trade, or consistent additional terms.¹⁸

18. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 3.08(e)–(f) (2010).

The apposite comment explains that the *Software Principles'* parol evidence rule is based "in part" on *Uniform Commercial Code* ("U.C.C.") section 2-202 and *Restatement (Second) of Contracts* sections 209, 213, and 214.¹⁹ Note particularly the *Software Principles'* use of the terms "unambiguous," "integrated," "contradicted," and "explained." They resonate with human agents' efforts to resolve the consequentialist-deontological tension.

The parol evidence rule can serve, as well as frustrate, transactor expectations and contracting objectives.²⁰ To oversimplify, if the parties to a transaction reduce their understanding to an integrated writing,²¹ that writing²² may not be contradicted by extrinsic evidence²³ prior to or contemporaneous with the writing. The rule enables the parties to preserve the terms of their agreement: neither can go behind the writing to adjust the allocation of risks fixed by the writing. That works well enough to reduce transaction costs and thereby promote efficiency so long as neither party's justified expectations are undermined by the rule. But it could be the case that one party understood that something said to her by the other prior to execution of the writing would be enforceable. For example, during negotiations, Seller tells Buyer that Seller will repair or replace any component of the primary good

19. U.C.C. § 2-202 (2005); RESTATEMENT (SECOND) OF CONTRACTS §§ 209, 213–214 (1981).

20. The common law, the *Uniform Commercial Code*, and the *Restatement (Second) of Contracts* contain differing but essentially similar renditions of the parol evidence rule. See, e.g., *Shultz v. Delta-Rail Corp.*, 508 N.E.2d 1143, 1150 (Ill. App. Ct. 1987) ("An agreement reduced to writing must be presumed to speak the intention of the parties who signed it. The intention with which it was executed must be determined from the language used, and such an agreement is not to be changed by extrinsic evidence."); *67 Wall St. Co. v. Franklin Nat'l Bank*, 333 N.E.2d 184, 186 (N.Y. 1975) (recognizing that the parol evidence rule in New York "requires the exclusion of evidence of conversations, negotiations and agreements made prior to or contemporaneous with the execution of a written lease which may tend to vary or contradict its terms"); U.C.C. § 2-202 (2005); RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

21. An integrated contract is defined as "[o]ne or more writings constituting a final expression of one or more terms of an agreement." BLACK'S LAW DICTIONARY 880 (9th ed. 2009). Note that the *Restatement (Second) of Contracts* expressly refers to an integrated agreement, RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981), while the U.C.C. implicitly refers to it, using the following language: "a record intended by the parties as a final expression of their agreement with respect to such terms as are included therein." U.C.C. § 2-202 (2005).

22. "Writing" is defined in U.C.C. § 1-201(b)(43) (2005) as including "printing, typewriting or any other intentional reduction to tangible form." Article 1 also defines "Record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." U.C.C. § 1-201(b)(31) (2005).

23. Because the rule extends to all extrinsic evidence, oral or written, it is strictly speaking not just a rule about "parol" evidence.

that fails within thirty days of buyer's receipt of the good. Seller then presents Buyer with a writing to be signed that contains an integration clause and the writing says nothing about repair or replacement of defective parts. When a crucial part fails, Buyer requests repair or replacement and the seller refuses, citing the "as is" language in the writing.²⁴

Some courts have not been favorably disposed toward ignoring extrinsic evidence that would reveal the parties' intent more accurately than would the purportedly integrated writing.²⁵ At the same time, though, the good sense of the rule would be compromised were a sophisticated buyer, who understood that the writing took away what the oral representation seemed to give her, able to undermine the parties' written agreement by introducing evidence she knew she had surrendered (for a price, certainly) the right to introduce. Similarly, the equities would rarely seem to lie on the side of the party who gives with one hand (orally) and then tries to rely on what may be fine print to take that away with the other. Indeed, that might explain both impatience with the rule's operation and with the structure of the rule in its statutory and *Restatement (Second)* iterations. The exceptions to the rule are significant.²⁶

Next, consider the *Software Principles'* provision on form agreements. Section 2.02 of the *Software Principles* is captioned "Standard-Form Transfers of Generally Available Software; Enforcement of the Standard Form" and bears reproduction at length here:

- (a) This Section applies to standard-form transfers of generally available software
- (b) A transferee adopts a standard form as a contract when a reasonable transferor would believe the transferee intends to be bound to the form.
- (c) A transferee will be deemed to have adopted a standard form as a contract if

24. On the sufficiency of an "as is" provision as a disclaimer of implied warranties, see U.C.C. § 2-316(3)(a) (2005).

25. See, e.g., *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 646 (Cal. 1968) (holding that the lower "court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property" when defendant's performance of contract with plaintiff to replace the upper metal cover of a steam engine resulted in damage to plaintiff's property); *Masterson v. Sine*, 436 P.2d 561, 567 (Cal. 1968) (holding that the trial court erroneously excluded evidence in a bankruptcy proceeding that a nonassignable option to repurchase a home was intended to keep the home in the possession of the family).

26. See E. ALLAN FARNSWORTH, 2 FARNSWORTH ON CONTRACTS § 7.4 (3d ed. 2004).

(1) the standard form is reasonably accessible electronically prior to initiation of the transfer at issue;

(2) upon initiating the transfer, the transferee has reasonable notice of and access to the standard form before payment or, if there is no payment, before completion of the transfer;

(3) in the case of an electronic transfer of software, the transferee signifies agreement at the end of or adjacent to the electronic standard form, or in the case of a standard form printed on or attached to packaged software or separately wrapped from the software, the transferee does not exercise the opportunity to return the software unopened within a reasonable time after the transfer; and

(4) the transferee can store and reproduce a standard form if presented electronically.

(d) Subject to § 1.10 (public policy), § 1.11 (unconscionability), and other invalidating defenses supplied by these Principles or outside law, a standard term is enforceable if reasonably comprehensible.

(e) If the transferee asserts that it did not adopt a standard form as a contract under subsection (b) or asserts a failure of the transferor to comply with subsection (c) or (d), the transferor has the burden of production and persuasion on the issue of compliance with the subsections.²⁷

The section provides an alternative “fall back,” of sorts: “failure to comply does not absolutely bar a transferor from otherwise proving transferee assent.”²⁸ The apposite comments explain that the provision would apply to all transferees whether business (large or small) or consumer: “[D]rawing lines between what constitutes a large or small business or between businesses in the same position as consumers and businesses with a better bargaining position would be difficult and largely arbitrary.”²⁹

The drafters of the *Software Principles* seem to suggest that the object is deontological: “Increasing the opportunity to read supports autonomy reasons for enforcing software standard forms”³⁰ It is not, though, so clear that the provision relies on deontological rather than consequentialist premises. The focus is not on the particular transferee, but is instead on whether the standard term is reasonably comprehensible. Such a term will apparently bind the transferee even in the absence of actual agreement. The form

27. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (2010).

28. *Id.* § 2.02 cmt. c.

29. *Id.*

30. *Id.* ch. 2, topic 2, summary overview.

agreement provision does not modulate the consequentialist-deontological tension; it represents a clash of the two normative perspectives and so fails where the *Software Principles*' parol evidence rule succeeds.

B. Software Principles' Agreement Doctrine in Theoretical Context

A challenge that should remain for the ALI will be to offer convincing arguments to distinguish the software contracting setting from other transactional contexts.³¹ In his contribution to this Symposium, Professor Hillman presents his appreciation of the larger jurisprudential issue the *Software Principles* reveal.³² He argues that specialization, deference to context, is important because generalization, de-emphasis of context, comes at a cost.³³ That is not to say that *all* Contract rules should be particularized; there is a tension between the costs and benefits of generalization and specialization that must be resolved by reference to values that inform the role of Law more generally. Hillman takes stock of those costs and benefits.

1. Costs of Generalization

First, focus on two of the costs of generalization with regard to aspects of the agreement calculus.

a. *"Abstract Principles Cannot Predict Outcomes Coherently."*³⁴ Hillman argues that vague principles of the general Contract law would leave undetermined important questions that relate to software.³⁵ So the *Software Principles* need to fix clear rules that determine those important questions. As examples, he offers the consideration issue in open source software,³⁶ automated disablement,³⁷ the implied warranty of no hidden material defects of which the transferor is aware,³⁸ and, of particular interest here,

31. See Memorandum from Micalyn S. Harris to Reporters, Director, Advisors, Consultative Group Members, and Members of the Institute (May 16, 2008) (on file with author) (arguing, in response to the Comments on Discussion Draft of March 24, 2008, that the ALI has not demonstrated "why general contract principles are or should be inapplicable to contracts involving software"); Memorandum from Bob Hillman & Maureen O'Rourke to Director, Advisors, Consultative Group Members, and interested members of the ALI (Sept. 2, 2008) (on file with author) (responding to Harris's memorandum, *supra*).

32. See generally Hillman, *supra* note 4.

33. See *id.* at 678–86.

34. See *id.* at 678.

35. See *id.*

36. *Id.* at 678–79.

37. *Id.* at 679–80.

38. *Id.* at 680–81. See generally Peter A. Alces, *W(h)ither Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design*, 87 CAL. L. REV. 269 (1999) (discussing the inefficacy of software warranties).

contract interpretation.³⁹ We must first put the issue in theoretical context.

Professors Alan Schwartz and Robert Scott proceed from consequentialist premises and minimize the importance of the parol evidence rule by identifying firms as the prototypical parties in Contract and then evaluating firms' priorities.⁴⁰ Because a dichotomy exists between individuals and firms as contracting parties in terms of their respective concerns and interests, according to Schwartz and Scott, there should be a parallel dichotomy in the doctrine that addresses parties' contextual interests. Schwartz and Scott assert that, as a repeat player holding a portfolio of contractual agreements, a firm has a somewhat different attitude towards risk than does the typical individual. Their argument is that this difference is reflected in different transactional contexts and justifies divergent applications of the parol evidence rule.⁴¹ On this view, firms would find their interests served by "courts get[ting] things right on average"⁴² with minimum evidentiary input. For these repeat players, the cost of minimizing the margin of error would be greater than the losses accrued when the courts get it wrong. This conclusion depends on the assumption that firms, by allocating risk over an array of investments, are able to achieve risk neutrality, minimizing their concern for losses over any one contract in their portfolio.⁴³ So firms, according to Schwartz and Scott, would prefer strict limitations on the introduction of extrinsic evidence.

Whether or not Schwartz and Scott present an accurate characterization of firms' attitudes towards risk, distinguishing between firms and individuals makes a significant point about context within the doctrine. Discrepancies in courts' application of the parol evidence rule could be a response to the nature of a certain type of party and its relation to risk; apparently inconsistent constructions of the rule by reference to transactors' interests could in fact vindicate consistent normative objectives. Schwartz and Scott have thus produced a plausible explanation for apparent inconsistent applications of doctrine.⁴⁴

Professor Daniel Markovits responds that Schwartz and Scott are missing something central to Contract, such as autonomy, bilateralism, and collaboration between the parties, and so do not appreciate why the parol evidence rule ought to be construed in a

39. Hillman, *supra* note 4, at 682–83.

40. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 590–91 (2003).

41. *Id.* at 556 (asserting that because business entities are "artificial persons," the state need not enforce their commercial contracts based on principles of autonomy and morality).

42. *Id.* at 577.

43. See *id.* at 576.

44. See Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647, 1666–70 (2007).

way that would accommodate the introduction of more extrinsic evidence. Such contracts among firms, Markovits contends, are “not in the end agreements *at all*,”⁴⁵ and are therefore irrelevant to the doctrine. While Schwartz and Scott focus on economic efficiency, Markovits uses concepts of collaboration⁴⁶ and agreement to build a deontological framework.

Schwartz and Scott differ fundamentally from Markovits in their choice of the type of transaction that is most in need of doctrinal attention. Since individual transactors doing business with organizations are generally guided and protected by statutory law, such as consumer protection law,⁴⁷ Schwartz and Scott designate transactions between organizations, or firms, as most relevant to Contract law.⁴⁸ The alternative perspective proposed by Markovits, is that “contracts among individual, natural persons . . . represent the *core* of contract.”⁴⁹ Ultimately, both perspectives are fatally incomplete. A unifying theory of contract by definition needs to address the totality of Contract.⁵⁰

The colloquy, while considerate of the respective transactional contexts confronted by firms on the one hand and individuals on the other, does not offer a bridge between the contexts that would support more fundamental unifying theory. Of particular concern here, we may have learned nothing that would certainly inform a parol evidence rule in the software contracting context.

We may, though, discover something more fundamental in the way human agents makes normative judgments. The *Software Principles* get this right. The *Software Principles*' parol evidence rules draws on U.C.C. and *Restatement (Second)* antecedents to develop a formulation that can respond to the concerns of both Schwartz and Scott and Markovits.⁵¹ A court applying the *Software Principles*' rule would not have to do violence to the rule's formulation in order to accommodate the inevitable normative calculus, which depends on the consequentialist-deontological tension. By *not* fixing the inquiry in either consequentialist or deontological terms, the analysis is not constrained in a way that would undermine human agents' normative perspective. So the provision fits well with existing Contract doctrine and works, according to the argument of this Article.

45. Daniel Markovits, *Making and Keeping Contracts*, 92 VA. L. REV. 1325, 1350 (2006) (citation omitted).

46. Daniel Markovits, *Contracts and Collaboration*, 113 YALE L.J. 1417, 1420 (2004).

47. Schwartz & Scott, *supra* note 40, at 544.

48. *Id.*

49. Markovits, *supra* note 46, at 1421.

50. See Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1, 9 (2005).

51. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS ch. 3, topic 2, summary overview (2010).

b. “*Undesirable Outcomes of General Law.*”⁵² Hillman argues that specialized doctrine, doctrine that is context specific, can respond to deficiencies in the general Contract doctrine.⁵³ It is in this section that he makes the case for the *Software Principles’* treatment of standard form contracts.⁵⁴ The *Software Principles* rely largely on disclosure. The *Software Principles’* form agreement provision,⁵⁵ represents a departure from the traditional agreement conception and seems to defer to the type of market forces consequentialists trust, while affording somewhat less attention to the concerns raised by deontologists.

The *Software Principles’* form contract formation rules come along at just the right (or at least at a particularly interesting) time. The operation of form contracts has received considerable attention over the last few years.⁵⁶

A challenge for courts confronted with the contract formation questions is to determine how to construe the “agreement” requirement.⁵⁷ Is it necessary that the parties actually be *aware of and understand* the legal consequences of their communications (and even such awareness may be a matter of degree), or may the law infer *sufficient* agreement to support the imposition of liability? Courts that take seriously awareness and understanding can better explain their conclusions by reference to deontological precepts: for example, we vindicate individual autonomy by respecting the actor’s choice to assume a legal duty. Courts concerned with finding only sufficient agreement may be more concerned with the utility of imposing the legal duty than with any particular transactor’s appreciation of the legal obligation that follows therefrom. Three cases that reach opposing conclusions illustrate that divide—two going one way, one the other—on essentially similar facts. The two cases decided by Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit—*ProCD, Inc. v. Zeidenberg*⁵⁸ and *Hill v. Gateway 2000, Inc.*⁵⁹—and a decision by Judge Kathryn Vratil of the United States District Court for the District of Kansas—*Klocek v. Gateway, Inc.*⁶⁰—each construe

52. Hillman, *supra* note 4 at 684–86.

53. *See id.*

54. *See id.*

55. *See* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 (2010).

56. *See generally, e.g.*, Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879 (2008) (examining the effects of form contracts on bank customer agreements and the role contract doctrine does or should play in policing those terms); Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511 (2007) (discussing the importance of Contract doctrine and the implications of twenty-first century contract law on present and future Contract law).

57. PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.01(a) (2010).

58. 86 F.3d 1447 (7th Cir. 1996).

59. 105 F.3d 1147 (7th Cir. 1997).

60. 104 F. Supp. 2d 1332 (D. Kan. 2000).

agreement in the same important contemporary context: so-called “form contracting.”⁶¹ The courts’ divergent conclusions may be manifestations of divergent understandings of the normative claims made by the apposite Contract doctrine.

i. *The Decisions in Doctrinal and Transactional Context.* The *Restatement (Second) of Contracts* provides that “[a]n agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”⁶² The U.C.C.’s conception is essentially the same. “Agreement” is first defined in Article 1 of the U.C.C.: “Agreement” . . . means the *bargain* of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade”⁶³ The pertinent official comment makes clear that “[w]hether an agreement has legal consequences is determined by applicable provisions of the U.C.C. and, to the extent provided in section 1-103, by the law of contracts.”⁶⁴ There is nothing in the U.C.C. concept of “agreement” that is substantially distinct from general common law contract conceptions of agreement. “Bargain” works as well in the common law as it does in the Code.⁶⁵ But “bargain” seems ambiguous: is a “bargain” the product of bargaining? Or is “bargain” a term of art that describes the legal conclusion that an exchange of communications has legal consequences? While “bargain” in the legal conclusion sense would be circular, that may not be disqualifying; indeed, that may actually better describe our understanding of the legal significance of the term “bargain.” We often (perhaps too often) seem to be able to find sufficient bargain even without real bargaining to support the imposition of significant contract liability.⁶⁶

There are two provisions of Part 2 of Article 2 of the U.C.C. that are particularly relevant to our discussion of agreement as it relates to the three cases considered here: sections 2-204, “Formation in General,”⁶⁷ and 2-207, “Additional Terms in Acceptance or Confirmation,”⁶⁸ the so-called “battle of the forms” provision. The stated purpose of both sections is to facilitate contract formation and to effectuate the parties’ intent.⁶⁹

Although it is questionable whether *ProCD* is actually an

61. See *Hill*, 105 F.3d at 1148–49; *ProCD*, 86 F.3d at 1450–51; *Klocek*, 104 F. Supp. 2d at 1338–39, 1341.

62. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

63. U.C.C. § 1-201(b)(3) (2005) (emphasis added).

64. *Id.* § 1-102 cmt. 3.

65. See RESTATEMENT (SECOND) OF CONTRACTS § 3 cmts. a, c (1981).

66. See generally Alces, *Guerilla Terms*, *supra* note 56.

67. See U.C.C. § 2-204.

68. See *id.* § 2-207.

69. See *id.* §§ 2-204 cmts. 1 & 3, 2-207 cmt. 3.

Article 2 case,⁷⁰ Judge Easterbrook used Article 2 provisions to support his conclusions.⁷¹ The issue was whether buyers of consumer software are bound by the terms of shrinkwrap licenses.⁷² Zeidenberg had acquired ProCD's software and used it in a manner inconsistent with the license terms.⁷³ ProCD sought to limit Zeidenberg's uses of the software to those allowed in the terms of the license agreement, but Zeidenberg argued that he was not so constrained because those terms were only presented to him after he had paid for the software and left the store.⁷⁴

Judge Easterbrook had no trouble finding a consequentialist reason for incorporating into the contract the terms of the license provision limiting Zeidenberg's use of the software: the provision prevented Zeidenberg from licensing the software at a consumer price, but exploiting the product for commercial purposes.⁷⁵ ProCD had to rely on a limitation of use provision included within the box containing the software in order to effect the desired price discrimination.⁷⁶ Further, Judge Easterbrook observed that "[t]ransactions in which the exchange of money precedes the communication of detailed terms are common,"⁷⁷ and he gave several examples of recurring transactions in which that practice is followed.⁷⁸

Judge Easterbrook relied mainly on Section 2-204(1). He then concluded (erroneously) that section 2-207 was irrelevant because there was only one form in issue and he construed 2-207 to be solely a battle of the forms provision.⁷⁹

Hill v. Gateway 2000, Inc. was another Judge Easterbrook opinion. The Hills called the Gateway phone sales department and ordered a Gateway computer, agreeing to such things as computer model, time of delivery, and price.⁸⁰ When the computer arrived at the Hills' residence, the box contained terms in addition to those

70. The applicability of Article 2 to computer software has attracted a good deal of attention. See generally PETER A. ALCES & HAROLD F. SEE, *THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY* 251-64 (1994) (surveying the cases and commentary).

71. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452-53 (7th Cir. 1996).

72. *Id.* at 1448.

73. *Id.* at 1450.

74. The terms appeared both in the box and on the monitor screen when the software opened, requiring acceptance before the user proceed with the program. *Id.* at 1452.

75. See *id.* at 1450.

76. *Id.*

77. *Id.* at 1451.

78. See *id.* at 1451-52 (including the purchase of insurance, an airline ticket, a concert ticket, a product packaged with its warranty, and software over the phone or on the Internet).

79. *Id.*

80. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

discussed on the phone.⁸¹ Among those additional terms was a requirement that the Hills submit any dispute with Gateway to arbitration as well as a requirement that the Hills return the computer to Gateway within 30 days if they did not agree to any of the additional terms.⁸² Judge Easterbrook did not rely on the U.C.C., though the case was obviously within the scope of Article 2: the sale of the computer to the Hills was the sale of a good.

Judge Easterbrook concluded that the Hills were bound to the later supplied terms by assuming that later supplied terms could become part of an agreement after the fact. While there is a way for that to happen under Article 2, as a section 2-209 modification, Easterbrook made no such argument, and probably could not have identified the agreement necessary to support a modification in any event. Judge Easterbrook concluded that as “master of the offer,” Gateway could impose its terms on the Hills.

In *Klocek v. Gateway, Inc.*,⁸³ district court Judge Vratil had to decide a case with essentially the same facts as those in *Hill*: sale of a computer over the phone with terms that follow. Judge Vratil took issue with Judge Easterbrook’s conclusion that the vendor, here Gateway, was “master of the offer”: “The Seventh Circuit provided no explanation for its conclusion that ‘the vendor is the master of the offer.’ In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.”⁸⁴ Even if the Hills were calling in response to a Gateway advertisement, it is generally accepted that advertisements are not offers, but rather solicitations of offers.⁸⁵ As a matter of basic contract formation doctrine, Judge Vratil probably has it right. Under subsection 2-207(1) Gateway’s “expression of acceptance,” in response to the Klocek offer, could not constitute a counter offer (thereby making Gateway the offeror) because Gateway had not “made its acceptance conditional on plaintiff’s assent to the additional or different terms. . . . [T]he mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff’s agreement to the Standard Terms.”⁸⁶ Gateway was unable to demonstrate that Klocek had actually agreed to their arbitration provision, and Vratil found that plaintiff’s retention of the computer for five days after receiving it could not constitute

81. *Id.*

82. *Id.*

83. 104 F. Supp. 2d 1332, 1334 (D. Kan. 2000).

84. *Id.* at 1340.

85. Advertisements prevalently are characterized as solicitations of offers rather than offers. See FARNSWORTH, *supra* note 26, § 3.10. But see generally Jay M. Feinman & Stephen R. Brill, *Is an Advertisement an Offer? Why It Is and Why It Matters*, 58 HASTINGS L.J. 61 (2006) (arguing that advertisements are offers).

86. *Klocek*, 104 F. Supp. 2d at 1340–41 (citations omitted).

such agreement.⁸⁷

ProCD, *Hill*, and *Klocek* challenge us to understand the divergent normative bases of agreement that inform the different conclusions of Judges Easterbrook and Vratil. For Judge Easterbrook, the question of agreement is to be decided almost completely based on a consequentialist perspective: form contracts help reduce transactions costs, therefore any conception of agreement that would undermine such use of standard forms would be inefficient. “Agreement,” then, means no more than it can mean in order to reduce transactions costs, and any conception of “agreement” that would increase transactions costs is disfavored.

For Judge Vratil, on the other hand, the question of agreement operates independent of consequentialist considerations; agreement must be more like real understanding. Judge Vratil’s focus on the buyer as the “master of the offer” is reminiscent of autonomy considerations based on deontological values. Gateway could not impose terms on *Klocek* that were not part of his offer because that would violate the buyer’s autonomy by undermining the object of his promise.

Although Judge Vratil’s analysis seems more correct as a matter of law, Judge Easterbrook implicitly asks a question to which neither Judge Vratil nor doctrine responds: Why should we care about contracting formalities if attending to them would cost more than ignoring or relaxing them would benefit transactors?

ii. *The Instrumentalism of Agreement.* Recently, scholars have attempted to explain the consumer form contracting context, especially with regard to credit card “agreements.”⁸⁸ Consequentialist commentators who consider agreement issues in the credit card context are in fact furthering Easterbrook’s *ProCD* and *Hill* analysis. Easterbrook’s decisions raise a question as to whether we can be assured that a formal agreement conception consistently increases welfare compared to a substantial agreement conception.

Professors Oren Bar-Gill and Richard Epstein have debated the efficacy of deferring to formal agreement.⁹⁰ Bar-Gill, relying on behavioral economics, argues that we need to do more research before we can have any confidence that formal agreement results in

87. *Id.* at 1341.

88. See generally BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar ed., 2007).

89. See, e.g., Alces, *Guerilla Terms*, *supra* note 56, at 1512; Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 48–50 (2006); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1380–1411 (2004).

90. See Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 749–50; Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 808 (2008).

welfare gains.⁹¹ Epstein concludes that we can rely on what is essentially an agency theory to overcome Bar-Gill's reservations.⁹² It is worthwhile to consider each of their arguments.

Bar-Gill is concerned that credit card issuers exploit less-sophisticated consumers: "sellers might prefer not to correct consumer mistakes and might even invest in creating misperception."⁹³ Bar-Gill does not trust the market to overcome these "individual irrationalities,"⁹⁴ and he is certainly correct not to.

Epstein responds to Bar-Gill's examples of ostensible card issuer overreaching by suggesting an alternative construction that identifies a market justification for the result.⁹⁵ Epstein goes on to plot the average number of mistakes people make on a curve against their age,⁹⁶ confirming, he argues, that people really do learn from experience. He stretches this data to conclude that "education on how loans work is often the best protection against various kinds of dangerous credit practices."⁹⁷ Epstein makes a very large logical leap from the assertion that people learn over time to the conclusion that card issuer's exploitation of consumers is efficient. This logical leap seems to leave room for precisely the type of empirical evidence Bar-Gill seeks. Education is obviously some protection against sharp practices (which might explain why credit card issuers would change the rules in order to frustrate education),⁹⁸ but how can we be sure that it is the *most efficient* protection?

2. *The Normative Significance of Not Knowing What Is Good for You*

Professor Eyal Zamir has argued that paternalism and efficiency may be compatible.⁹⁹ Zamir's analysis supports Bar-Gill's desire for careful empirical inquiry, the results of which may or may

91. See Bar-Gill, *supra* note 90, at 749–52.

92. See Epstein, *supra* note 90, at 832–35.

93. Bar-Gill, *supra* note 90, at 761. Bar-Gill also asserts that, "[s]ince sellers will only alter the design of their products and prices in response to robust, systematic mistakes, observing such product and price adjustments is powerful evidence of persistent consumer mistakes." *Id.* at 766.

94. *Id.* at 755 n.27.

95. See Epstein, *supra* note 90, at 821–28.

96. *Id.* at 812 ("controlling for income, education, creditworthiness, and other observable variables").

97. *Id.*

98. See Alces, *Guerilla Terms*, *supra* note 56, at 1527 ("Form drafters can use a kind of 'three card Monty' game to assure maintenance of the pool of naïve: Each time consumers discover a particularly egregious term, hide the risk-shifting card by reshuffling the deck or by sleight of hand."); see also RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 132 (2006) ("It is typical for major issuers to amend their agreements in important respects with remarkable frequency.")

99. Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998).

not support arguments such as those offered by Epstein:

Arguably, economic analysis does not rest on the *normative* claim that rational preferences are a superior criterion for human well-being than actual ones. It merely rests on the *empirical* claim that people's actual preferences are rational. However, to the extent that standard economic analysis is built on the assumption that people are rational maximizers, its normative implications are the same as those of a rational preferences theory of well-being.

... Once the prevalence of systematic deviations from the rational-maximizer model is acknowledged, principled anti-paternalism is no longer a tenable position of economic analysis.

....

... Paternalism can certainly be efficient once it is realized that normative economics is in fact much closer to an ideal (rational) preferences theory.¹⁰⁰

The analysis that Zamir suggests to determine the efficacy of paternalism¹⁰¹ would respond to Bar-Gill's difference with Epstein: "a market-by-market analysis of the costs and benefits [of regulation]."¹⁰² We do not necessarily need to conclude that Bar-Gill and Zamir are right and Epstein wrong in order to establish the incompleteness of a pure consequentialist theory of Contract doctrine. We simply need to acknowledge that central doctrinal contract topics such as agreement lend themselves to the type of inquiry that Bar-Gill and Zamir suggest.

In the course of his defense of the *Software Principles'* form agreement provision, Hillman acknowledges that disclosure has its critics, but opines that "other solutions to the problem seem even more problematic."¹⁰³ But for present purposes, focus on the fact that the *Software Principles* deviate from the agreement calculus in the general common law of Contract. Chris Byrne and I have noted this elsewhere and Hillman cites our concern as marginal support for his observation that "[s]ome writers seem bothered by the fact that the *ALI Principles'* solutions to problems may have resonance in other forums."¹⁰⁴

It is important here to be very clear. Byrne and I are not so much bothered by the fact that the "*ALI Principles'*

100. *Id.* at 251–54.

101. *Id.* at 242–46, 251–54 (examining second order preferences, norm theory, and bounded rationality against ideal (rational) preferences theory).

102. Bar-Gill, *supra* note 90, at 753–54.

103. See Hillman, *supra* note 90, at 685.

104. *Id.* (citing Peter A. Alces & Chris Byrne, *Is It Time for the Restatement of Contracts*, Fourth?, 11 DUQ. BUS. L.J. 195 (2009)).

solutions . . . may have resonance in other forums.”¹⁰⁵ On the contrary, we are encouraged, even enthusiastic that the good sense of the *Software Principles* may resonate beyond their explicit scope. We see no more reason for form contracts to be any more enforceable outside of the software context than they are within the software context; indeed, we would not be troubled were they generally even less enforceable than they would be within the software context. The crucial point, though, is that there must be good *reason* for the discontinuity. It is not enough that the context is distinguishable; it must be normatively distinct. If the context is normatively indistinguishable, then efforts to draw lines will undermine the normative integrity of Contract. It is one thing to say that no single normative perspective explains all of Contract; it is quite another to say that Contract is normatively incoherent, and that is precisely what we say when we draw lines on the basis of political expediency.

It is curious that the law would draw a distinction between software contracts and other types of sales contracts so far as agreement and autonomy are concerned. It would seem that we would be as interested in transactor autonomy when someone purchases a computer as we are when that same person purchases or licenses the software that would be loaded on that computer.¹⁰⁶ The comments suggest an answer: “Technology may have rendered *ProCD*’s approval of terms after payment obsolete because the decision was based in part on the difficulty of providing notice of and access to a standard form. Today pre-transaction disclosure on the Internet is not difficult or expensive.”¹⁰⁷ Though it is not at all clear how important the “difficulty of providing notice of and access to a standard form” was to the decision in *ProCD*, it would seem entirely conjectural that pre-transaction posting of terms on the Internet could do much more for individual autonomy than the “terms in the box” practice approved in *ProCD*.

Indeed, and this is the crucial point, if posting on the Internet could so dramatically affect the autonomy calculus in software contracting, there is no obvious reason it should not have the same effect on all commercial contracting. What is normatively distinctive about the software contracting context? If the answer is “nothing” (and I suspect it is), then the *Software Principles* are much more significant than even the Reporter and the ALI may acknowledge.¹⁰⁸ The *Software Principles* are an attempt to vitalize disclosures as a response to autonomy concerns in the formation of agreements. But there may be no more reason to believe they will prove efficacious in the software setting than they have in other on

105. *See id.*

106. *See* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.06 (2010).

107. *Id.* § 2.02 reporters’ notes, cmt. b.

108. *See* Hillman, *supra* note 4, at 673–74.

settings.¹⁰⁹

The ALI should be able to answer the question that the *Software Principles* pose: *why* are software form contracts different from form contracts in other Contract contexts? Hillman seems to offer an answer—they are not:

[L]awmakers could apply the disclosure approaches adopted by the *ALI Principles* to any subject matter of exchange, not just software. In fact, nothing should stop courts or legislatures from applying helpful sections of the *ALI Principles* to other subject matters and even from including them in a future *Restatement (Third) of Contracts*.¹¹⁰

In the meantime, though, the ALI is the sponsor of conflicting statements on the Contract law, and that is good for neither the ALI nor for Contract.

3. *Benefits of Generalization*

Finally, following his review of the costs of generalization, Hillman appreciates too the “benefits of general contract law.”¹¹¹ These would be arguments the *Software Principles* would need to overcome in order to support their disparate treatment of fundamental Contract conceptions. Two of the benefits merit consideration here.

a. *Insulation from Interest Groups*.¹¹² Hillman acknowledges that it would be difficult for special interest groups to capture specialized reform initiatives because if the revision of doctrine were more general, the special interest arguing for one resolution of an issue would be opposed by a constituency that would endorse and lobby perhaps strenuously for the opposite resolution.¹¹³ Such capture was avoided, according to Hillman, for two apparently opposite reasons: first, there was broad representation of diverse interests in the drafting process; and second, the groups affected were aware that the *ALI Principles* were, well, only “principles,” and, as such, would not have the force of law that would a model statute or perhaps even the cachet that a new *Restatement of Contracts* would have.¹¹⁴

It would seem that interest groups did not capture the *Software Principles*, or at least there is no obvious evidence that the most powerful did. But in a very real way, to the extent that we are

109. See PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 2.02 cmt. h (2010).

110. See Hillman, *supra* note 4, at 685.

111. See *id.* at 686–92.

112. See *id.* at 686–87.

113. See *id.*

114. See *id.*

convinced by the argument that software is different and so requires different rules, the project does reflect the perspective of a particular interest group—those concerned with software contracts—and may not have taken sufficient account of the forces that operate in other Contract settings to balance the deontic and consequentialist constituents of Contract doctrine. A particular perspective may “capture” a project even if that capture is not reflected in one group’s overreaching. The product may suffer if the perspective of those interested in the transactional context is myopic, if the drafters do not sufficiently take into account the normative premises (plural) that inform consensual relations generally. While drafters might find it liberating to draft from whole cloth, there is a cost: normative concerns that seem inconsequential given the current state of the transactional setting may emerge when the context has more closely approximated repose. The *Software Principles* could be better if they could anticipate the directions in which the law might develop, and the history of the Contract law’s development offers an important guide to its likely future development. This is related to the second benefit of general Contract law that Hillman acknowledges.

b. “*Laboratories of Democracy*” Facilitate Resolution of Collective Problems.¹¹⁵ When new transactional forms are subjected to a more narrow body of principles, they may not evolve as robustly as they might were they subject to more broadly based doctrine. To the extent that Contract stakes out comprehensively the normative tensions and resolution of those tensions in consensual relations generally, principles that respond to discrete problems may not encourage transactors and courts to take account of all of the normative implications of their choices. All doctrine constrains but the more particular the doctrinal focus the more likely it is that important considerations will be ignored, or at least obscured.

Hillman responds to this concern by pointing out that the *ALI Principles* are, for the most part, default rules, and so transactors are free to draft around them. He recognizes, though, that the *ALI Principles* more specifically regulate software transactions than would general Contract law.¹¹⁶ The question, he acknowledges, is at least in part one of timing. And he cites an article I wrote more than a decade ago which argued that software contracting had not yet attained the type of repose that would be necessary for comprehensive legislation.¹¹⁷ A good deal has happened to software contracting (indeed, to all of Contract) in the last decade and it may be that we have achieved something close to repose; unfortunately we cannot know that until some time in the future.

115. *Id.* at 687–88.

116. *Id.* at 687.

117. *Id.* at 688 n.88 (citing Alces, *supra* note 38, at 271–72).

What we can know right now, though, is that the *Principles* diverge from general Contract doctrine in important ways, and that the *Principles* do not come to terms with that divergence. There is just no good reason for there to be different formation rules in software and nonsoftware contexts: “agreement” is “agreement” and it is no less crucial when the subject matter of the contract is or is not computer software. The *Principles* make new (and, on the whole, I believe better) Contract law. Professor Hillman is to be applauded not faulted for the important jurisprudential statement that the *Software Principles* make. The ALI should, though, acknowledge what he and the Associate Reporter¹¹⁸ and the Advisors¹¹⁹ have wrought.

CONCLUSION

This Article has considered the nature of normative theory in Contract and its dependence on context, including the human agent as an element of context. I have recognized the intellectual and rhetorical leverage theory provides, and then took notice too of the dangers of normative theory, either consequentialist or deontological, that is inconsiderate of context or human agency.

To make more concrete the observations offered here, I have considered two specific provisions of the recently promulgated *Software Principles*. I have placed both provisions in their theoretical as well as transactional context. My conclusion is that the parol evidence provision works better because it fits with the general Contract doctrine and so facilitates sensitivity to context. The form agreement provision is less successful because it is not consistent with extant Contract doctrine and does not sufficiently accommodate context. Both provisions, though, are important steps in the development of the Contract law and we should recognize their significance and the significance of the Reporter’s work. Professor Hillman has, nonetheless, improved Contract law, and set the bar quite high for future development.

118. The Associate Reporter is Maureen O’ Rourke, Dean and Michaels Faculty Research Scholar, Boston University School of Law. *PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS V* (2010).

119. A full list of the project’s advisors can be found in the publication. *Id.*