

‘TWIXT DOCTRINE AND DOING,
Preliminary Notes Toward a Tentative Fragment
(a working title)

Peter A. Alces
Rollins Professor of Law
The College of William and Mary School of Law

I. Contract doctrine describes overlapping exchange objectives (and covers a multitude of sins)

A. Bargain as a constituent of Contract: RESTATEMENT (SECOND) § 3 defines “bargain” as “an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.” And “agreement,” in turn, is defined in the same section as “a manifestation of mutual assent on the part of two or more persons.” For a treatment of their interrelation *see* Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 46-51 (2001).

B. Intent as a constituent of bargain, a “will theory” of Contract: There has persisted a tension in the contract law between objective (status-based) and subjective (“will” or “promise” or “consent” based) theories of liability. Clearly something short of actual agreement will do to support the imposition of liability, though we have not been able to fix the limits of imposed, rather than actually assumed, liability with any certainty.

C. Doctrine constrains analysis in much the same way as rules, per Raz, provide exclusionary reasons; doctrine removes from the calculus that which we have decided would distract from the object of the analysis. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1009 (1985):

[M]y account suggests that doctrine is redolent with meaning, that it incorporates debates about commitments and concerns central to our society. However, the usefulness of those debates is unfortunately limited by their stylized distance from the core issues they represent. Debate on these core issues is further limited by doctrine’s pretense that it can resolve these issues rather than simply articulate them in a fashion that would allow a decisionmaker to make a considered choice in the case before her.

II. Commercial Law at the Crossroads

A. New forms of property, new transactional patterns invoke new conceptions of Contract: Ease of contracting and evolving means to assume contract liability may strain the fabric of the bargain constituent of Contract. *See* Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 724, 743 (1939)(distinguishing sale of merchant’s “wares” from sale of a horse).

B. History matters: *See* GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

1. “gravitational force” of history, like the “gravitational force” of precedent (*see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 100-113 (rev. ed. 1978)): “The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.” That puts a premium on discerning “alikehood.”

2. history explains and constrains doctrine: We are tempted to explain the application of doctrine as determined by historical context. Contemporary transactional forms are accommodated and even determined by *intellectual property* developments: computer contracting. *See generally* Robert A. Hillman, *On-line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, Cornell Law School Legal Studies Research Paper Series, paper No. 05-003 (2005); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002) (focusing on cognitive constituents of contracting to conclude that “new technologies” have not fundamentally changed the way consumers contract).

C. Doctrine as vessel(s) which may assume “new” forms and “gravitational force” of doctrine: another source of tension

1. “gravitational force” of doctrine dependent on history: *See* Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 880 (1939): “If then our law and its understanding are not to be set in empty cloud, we must struggle ourselves to see what sort of thing was there for courts to see, and what sort of reaction a judge or lawyer of the time and place might have to it.”

2. “gravitational force” of doctrine independent of history:

a. we cast distinctions in terms of doctrine: Our application of doctrine, though, may remain detached from the historical bases of doctrine; indeed, courts may go to some lengths to confirm the timelessness of doctrine: *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2nd Cir. 2004), while the internet presents many new situations to courts, “it has not fundamentally changed the principles of contract.”

b. conceptions of contract in terms of some fundamental, animating imperative, such as “promise,” (*see* CHARLES FRIED, *CONTRACT AS*

PROMISE (1981)) or “consent” (see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986)) so far have failed. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). So too have efforts to rely on welfare economics for either reliable positive or normative accounts. See Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L. J. 829 (2003).

3. malleability of doctrine: We may appreciate doctrine as a(n) (relatively) empty vessel that can determine the shape assumed by the *stuff* poured into it but cannot (at least does not) change the nature of that stuff, which is what both accommodates pouring new wine into old bottles and does nothing, necessarily, to improve the flavor of the wine therefor. Doctrine, tragically, is largely accidental: frames perceptions and context to determine a range of *possible* results. See Peter A. Alces, *On Discovering Doctrine: “Justice” in Contract Agreement*, 83 WASH. U.L.Q. ____ (forthcoming 2005). Compare *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) with *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

D. At the turn of the next century, how will we describe the doctrinal tensions in Contract law at the beginning of the 21st Century?

1. form contracts and rational ignorance: Original and Revised UCC § 2-207 and RESTATEMENT (SECOND) § 211 – a “form” is something it is irrational to read; to what extent might *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (NJ 1960) be read as a case of the type that determines agreement by reference to justice? Alces, *supra* II. C. 3.

2. proliferation of contract; sheer volume of “contracts” we enter, even unwittingly.

3. new “physics” of contracting: e.g., “clickwrap.” See Hillman and Hillman & Rachlinski *supra* II. B. 2.

4. our “underground” Contract law: arbitration and the disintegration of precedent. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002).

5. disclosure generally: Credit Card “1.9 % until transferred balance is paid off!” offer (so long as you extend promotional rate by making minimum purchases).

E. If we were “inventing” Contract today, what would matter? What would be its doctrine? Herein of the reliance basis of Contract: “certainty and predictability”

1. status, per Gilmore: Has contract become, in the main, sufficiently “tortified”

to render nugatory any reference to conceptions of “will,” either objective or subjective?

2. *would* we invent Contract today? Or would we differentiate among “consensual” undertakings? Or just categorize non-nonconsensual undertakings in order to retain a province for tort?

III. So, then, why “certainty and predictability”: Could we understand “certainty and predictability” as, at least to an extent, chimerical? And if that is true, can we also understand “certainty and predictability” as nothing more than values to be weighed in the calculus rather than as imperatives that necessarily overcome competing (normative) concerns? Consider LON L. FULLER, *THE MORALITY OF LAW* 33-44 (1964); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958).

A. Arbitration and reduced concern for “certainty and predictability”: Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L. REV. 183 (2000).

B. The *relative* moral force of “certainty and predictability”:

1. to be balanced against “justice,” perhaps; or against a consequentialist object.
2. parol evidence, plain meaning, promise vs. condition, etc. and “certainty and predictability” – have we already given up on “certainty and predictability”?
3. need “certainty and predictability” have anymore than an “actuarial” sense?

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