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The Political Stakes in "Merely Technical" Issues of Contract Law

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1. Introduction

The topic I address in this paper, namely whether there are political stakes in "merely technical" issues of contract law, and if there are stakes what they are, seems such an obvious object of inquiry that legal scholars should long since have exhausted it. But I have found it difficult even to frame the question, let alone to answer it. This is a very tentative effort, one I expect to elaborate and develop, perhaps to revise altogether, over the next few years.

2. Defining "merely technical" issues and political stakes

By a "merely technical" issue I mean things like how to treat the mistaken offeror in a simple contract situation, or the contract promisee who interrupts his own performance in retaliation for breach by his partner. I don't think the resolution of questions like these - I will give more examples later on- has any importance at all for the shape of the economy. Nor indeed that choices about such rules have effects on any aspect of public or private, political, cultural or economic existence that are significant enough so that people can be expected to care about the choices in the normal manner of political concern. If we care about these rules it is not because of their practical or distributive consequences or because the issues are obviously morally gripping.

The politics of contract technicality, as I see it, is an ideological and rhetorical, rather than a directly distributive politics. In discussing technical issues, legal scholars make arguments, and these arguments "resonate" with, or are homologous with, or are mutually re-enforcing vis-à-vis arguments in domains conventionally thought to be political rather than "merely technical." The rules that emerge from the technical discussion can in turn be analyzed as analogous or homologous or resonant with rules of public or regulatory law that are very much the object of political concern.

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Because my idea of the primary political stakes in the merely technical is so simple, I will state it here at the beginning of my presentation, in order to avoid anticlimax at the end. If contract law requires businessmen of equal bargaining power to look out for one another, then it is more plausible that public law should require strong groups to look out for weak ones. I think there are secondary political stakes that are much more obscure: the very understanding of these issues as "merely technical" has its own effect (regardless of how the issues are resolved), re-enforcing the public/private distinction in mainstream political thought, and thereby indirectly re-enforcing political centrism against radicalism (whether of the left or right).

In other words, what is at stake, politically, in technical discussions is a set of quite indirect effects on the persuasiveness of positions in other, non-technical, domains, domains where there is a long running conflict between political points of view, or philosophies, or Habermasian universalization projects. The stake, if it exists, is an indirect effect on the discursive conflict, and an even less direct effect on the electoral or legislative or organizational conflict, between and among the whole array of "lefts" and "rights" very broadly conceived.

These conflicts concern, among many, many issues, the question of how much to tax, how progressively, and how to allocate government spending, say between welfare/redistributive programs and "neutral" or efficiency based programs (e.g. infrastructure). They include the question of how to respond to inequalities, whether associated with social class, race, gender, sexual orientation or national origin, along with the issue of how to define discrimination and how to respond to it. And they include, significantly for the discussion that follows, the issue of government regulation of relations between presumptively strong and weak parties. Technical contract issues are at once obviously distinct from and obscurely related to the design of the whole set of regimes of "special laws" that in Europe have usually, though by no means always (cf. the Netherlands), been split off conceptually from the civil codes. Throughout the West these have led to publicly administered, usually legislatively created, legal regimes limiting freedom of contract in matters of health, credit, employment, housing, land use, environmental law, product safety, and so forth indefinitely.

3. Analytics of merely technical issues

A merely technical issue of contract law, defined negatively, is one that will have to be resolved in order to give the institution of contract a concrete meaning in practice, but that does not involve any of the dimensions of the institution that have been politically controversial within the long running conflicts of lefts and rights. Cases of mistake in offer and acceptance and cases of interrupted performance present such issues. In order to keep them "merely technical" we will discuss them as they arise between businessmen of equal bargaining power operating in competitive markets. We will assume that no one is suggesting that we should limit freedom of contract with respect to mistakes or interrupted performance, so that the parties are free to modify whatever rules the "technicians" come up with.

I will proceed by offering a common analytic structure for the choice of solutions for mistake and interruption, and then suggest that the same analysis applies to numerous similar issues.

3.1. The liability of a mistaken party

One of the parties to an otherwise formally perfect contract is mistaken in one of the typical ways, ranging from slips of tongue or pen to mistakes as to the "identity" of objects to be exchanged. As soon as he discovers the mistake, the mistaken party asks the other party for a revision of the contract, and halts performance when the other party refuses. The mistake is "unilateral" in the sense that the other party does not make a mistake. It is detrimental to the mistaken party in the sense that if the contract is "enforced as made" (in any of a number of possible senses of that term) the mistaken party will be worse off than if it were to be enforced as the mistaken party thought it was.

For our purposes, it is useful to distinguish four alternative solutions. I chose these because they are alternatives that have at various times figured in the common law discussion of mistake.[1] One possibility is "no relief for unilateral mistake." In the common law system, "no relief" does not mean that the other party gets specific performance, because that is an equitable remedy only available in exceptional circumstances. It means expectation damages, which means that the other party gets the benefit of the mistaken bargain, say, the goods for half the price the seller thought he was charging. But the other party must be ignorant of the mistake. This means that there will be no recovery if there is knowledge of the mistake even though the other party has not committed fraud, i.e. has not intentionally misled the mistaken party in any way. If these conditions are met, the doctrine allows the recovery of expectation damages even though the other party (say the buyer) has not relied on the mistaken promise and even though the mistake was non-negligent.

An alternative would be to agree in rejecting specific performance and requiring other party ignorance of the mistake, but to say that the other party can recover only if there was both other party reliance and mistaken party negligence. This would be no liability without fault for the mistaken party, and the measure of damages where there was fault would be to make the other party whole with respect to the injury done by the fault. Mistaken party fault and other party reliance become the factors determining the outcome rather than being irrelevant to the outcome. In this solution, there are no "windfalls" for other parties, but we have to determine tricky factual issues avoided in the other solution.

A third solution would make the mistaken party always liable for reliance, but only reliance, without regard to fault (strict liability for unilateral mistake). A fourth

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[1] E.A. FARNSWORTH, *Contracts* §§ 9.2-9.4 (2nd ed. 1998); D. KENNEDY, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form"', 100 *Colum. L. Rev.* 94, 140-150 (2000). Cf. art. 4:104 Principles of European Contract Law with Notes.

would be to tailor liability, choosing the expectancy or reliance or restitution, with or without fault on either side, in order to prevent "unjust enrichment", a judgment based on "all the relevant circumstances." For example, where the reliance measure yields more damages than the expectancy (losing contract, wasteful preparatory expenses) we might see reliance as too much, and want to limit it by the expectancy... unless the mistaken party was grievously at fault, in which case we might say that as between the two the loss should fall on the mistaken party ... unless the other party although ignorant of the mistake "should have" discovered it ... unless …

One basic and very technical idea is that there should be different solutions for different types of mistake: slips of the tongue treated differently from the belief that the cow was pregnant, and so forth. A second basic idea is that a solution, within a sub-category or across the board, can be made to follow: from the nature of contract; from a general reliance principle; from the choice between objective and subjective theories; from the distinction between contract and tort; between promise and consent; between rights and utility; between commutative and distributive justice; from an investigation of the "implied intent" of the parties; from the notion that the parties would choose, in the original position, welfare maximizing default rules; or from specific or general clauses in a civil code. All of these modes of approach are resolutely non-political. They can be seen as the flight from the merely technical into the merely philosophical.

A major lesson of comparative law, particularly of the work of Rodolfo Sacco, is that similar code provisions sometimes produce different case law solutions, and that dissimilar code provisions sometimes produce similar case law solutions.[2] The same is true of the attempts at theoretical reconstruction listed above, whether modest ("implied intent") or grandiose ("the nature of contract"). It is clear that there is a surprising diversity of approaches and solutions within both the common law and the civil law. And that there is no tendency to convergence on a single correct approach, either at the abstract level of what theory is supposed to govern or on the question of what given theories require. Nonetheless, it is uncontroversial that there is a short list of things that count for a lot in the choice of a rule.

There is the dimension of fault of the mistaken party in making the mistake, and the dimension of fault of the other party, either through involvement in the mistake or through conduct aggravating the amount of the losses. We will see in a moment that corresponding to the other party's fault in running up the damage, there will be an issue about the mistaken party's conduct on discovering the mistake, ranging from dutifully performing, trusting to the other party and/or the courts to work it out afterwards, to interrupting performance in a way that opportunistically multiplies the other party's losses in order to maximize his own advantage.

A second dimension is quantitative. If there are no reliance losses or very small ones, and the mistaken party's degree of fault is small, the expectancy seems like a

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[2] R. SACCO, 'Legal Formants: A Dynamic Approach to Comparative Law', (pts. 1 & 2), 39 *Am. J. Comp. L* 1, 343 (1991).

windfall if it shifts a large amount of money from the mistaken party to the other party. On the other hand, if the innocently mistaken party acted in a way that led the unsuspecting other party into large and wholly reasonable reliance outlays that are lost, then "no liability without fault" comes up against the maxim "as between two innocents, he who caused the damage should pay." And so forth.

Note that in this discussion we have maintained the assumption that there are no significant differences of wealth, size, bargaining power, market power, status, race, gender, or anything else between the parties, that the subject matter of the contract is without any special social significance, and that there are no discernible third party effects of choosing one solution or another.

3.2. The right to interrupt performance (conditions, anticipatory breach)

The right to interrupt performance involves situations in which a party to a binding contract has to decide what action to take in response to breach, or to a high probability of breach, by the other party. The classic Case of the Young Traders[3] will suffice to orient us: the young traders want to go into business; they secure the promise of a loan and in return promise to obtain a guarantee; they fail in this; the prospective lender refuses to go ahead; the young traders reasonably abandon the project, suffering the loss of reasonable expenses in preparation for the new business.

I will present the analysis so as to highlight the similarities to the problem of the mistaken promise. The breaching party is analogous to the mistaken party. Again we can distinguish sharply different solutions. One of these is to say that from the moment that the breaching party is in breach in any way, the other party no longer has any obligation to continue performance ("perfect tender rule"). In this solution, the interrupting party can sue for either restitution or the expectancy. The breaching party is entitled to the restoration of benefits conferred on the other party, but absorbs all other losses caused by the interruption. This is a traditional solution for sales contracts.[4]

At the other extreme, we can require continued performance no matter what the breaching party does or does not do, and leave the other party to his legal remedies for breach ("independent covenants"). In this solution, if the other party interrupts performance, he is liable to the breaching party for the loss of the breaching party's expectancy, minus whatever damages the other party has himself sustained as a result of the initial breach. This is a traditional solution for commercial leases.[5]

There are two intermediate approaches worth mentioning. First, we could ask whether the breach is "substantial" from the point of view of the other party, within a perspective that says that the other party should not be expected to continue to perform

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[3] K*ingston* v. *Preston,* 99 Eng. Rep. 437 (KB. 1773).
[4] Farnsworth, supra, footnote 1, § 8.12.
[5] Ibid.. § 8.9.

when he "will get nothing in return." Second, we can adopt an "all the circumstances approach." It often seems that courts that claim to have a substantial performance test in a given domain use its obviously indeterminate character to interpolate the factors that would be openly considered if we moved to "all the circumstances." These correspond roughly to the factors that come into play in the mistake discussion.

Some of them are: The conduct of the breaching party may involve an intentional opportunistic breach (better bargain elsewhere), an involuntary breach that reflects negligence or miscalculation, or a faultless and unanticipated problem that falls short of the excuse of changed circumstances (impossibility or frustration). The other party may be motivated to interrupt performance for reasons unrelated to the breach (better bargain elsewhere), and may even attempt to provoke the breach (short of violating the duty of cooperation in performance). At the other extreme, the other party may interrupt only after diligent efforts to help out in any way possible, with no other motive than to minimize unavoidable losses.

Then there are the quantitative factors. First, suppose that the interruption of performance will cause large losses to the breaching party, losses that the other party could prevent by keeping on and then suing for damages at the end. In this situation, the case for permitting interruption is weaker than where the loss to the breaching party will be the same with or without interruption. Second, the greater the risk that the breaching party will turn out to be judgment proof, or the damages otherwise unrecoverable (e.g. for indefiniteness or problems of proof), and the larger the cost to the other party of completing his performance, the stronger the case for permitting interruption.

The law on anticipatory breach fixes the point within the time frame of the contractual relationship at which the other party can exercise whatever rights to interruption the system has accorded him within the grid of possible solutions above. We could ask the other party to wait until the time for performance is past, or, at the other extreme, we could permit interruption when a reasonable other party would think it more likely than not that breach was eventually going to occur. The law of anticipatory breach is plainly subject to the same calculus described above.

Just as with mistake, the most technical of all exercises is to distinguish between different types of contract and different types of actual or threatened breach, allocating rules to circumstances. And as with mistake, there are a multitude of (somewhat less exalted) theoretical bases for solutions, including implied intent, failure of consideration, the nature of the contract, *causa,* synallagma, good faith, and so forth.

As with mistake, solutions vary between and within countries and between and within systems in ways that seem not very satisfactory. This is the case even though we are still abstracting from politicizing or destabilizing factors like sensitive contractual subject matter (residential leases) and unequal bargaining power (residential leases in slums).

4. Misfortune, foolishness and vulnerability versus sacrifice and sharing

4.1. The individualism/altruism continuum for categorizing rules of law

4.1.1. The continuum conception

Looking at the four mistake rules I described above, or the four rules about interrupted performance, it seems uncontroversial that the "no relief for unilateral mistake" rule and the "perfect tender" rule have in common that they favour (but only in most circumstances, not always) the other party. But we can say somewhat more.

First, they favour the other party because they impose on him a lower level of duty to the breaching party than the alternatives. It is not a question of *no* duty. In mistake, the other party cannot induce the mistake or know of it. In interrupted performance, the interrupting party cannot induce the breach by violating the duty to cooperate in performance. But *within these limits,* the other party does not have to sacrifice his interests to prevent harm to the breaching party or share in any way in the bad consequences of the breaching party's mistake. Indeed, the other party can "take advantage" of the situation, by insisting on his rights, for example, because interrupting his performance in response to a trivial breach will allow him to make a better new deal elsewhere.

Second, they favour the other party by making no distinctions between foolish or negligent or incompetent mistaken or breaching parties, and parties whose mistake or breach was wholly innocent or even laudable. Of course, here too there are limits: the rules change, for example, if the breach can be excused on grounds of changed circumstances (impossibility or frustration).

Third, these rules, at least as formally stated, are not responsive either to the degree of vulnerability of the mistaken or breaching party, or, on the other hand, to the relative exposure of the other party. They ignore the quantitative dimension of the situation: it does not matter whether expectation damages will amount to a large windfall for the addressee of a mistaken promise, or whether large losses to the breaching plaintiff could have been avoided by a virtually risk free extension of performance by the other party.

Here is a big generalization: we can categorize the different rule-solutions for mistake and interrupted performance along a spectrum according to whether they impose more or less intense duties of sacrifice vis-à-vis vulnerable parties and more or less intense duties of sharing vis-à-vis misfortunate parties. And we can categorize them according to how much they make the duty a function of the fault of the mistaken or breaching party, i.e. at one extreme high duty regardless of foolishness, at the other extreme no duty regardless of innocence. In this very limited sense, it seems appropriate to characterize these rules as more or less "altruist" or "individualist."

A complexity arises because these rules have many sub-components. The mistake rule has to include both a sub-rule about what happens when the other party did not know in fact, but definitely should have known, about the mistake, and also a position on whether there will be liability for reliance losses caused by an innocent error. Each sub-component can be placed on the spectrum, so our view of the rule

as a whole, in comparison with another solution, is a comparison between two hodge-podges. Two rules can be quite different in their components but seem "tied" or similarly placed on the continuum.

A second complexity: duties of sacrifice and sharing vis-à-vis vulnerability and misfortune, and of forbearance vis-à-vis fault, run in both directions within contractual relationships. In the simplest situations, we can characterize a rule as imposing more or less duty on a party, because the rule is insensitive to the conduct of the other. But, in some circumstances, a rule that lets the other party escape obligation to the mistaken or breaching party reflects the decision to impose a high level of altruistic duty on the mistaken or breaching party, enforced by reducing the other party's obligation. Thus a standard that requires good faith in deciding whether or not to interrupt performance may allow the interrupting party to interrupt opportunistically when the breaching party breaches opportunistically.

Caveat: this is a mode of categorizing rule-solutions, and most definitely not a categorization of motives for rules. As explained below, the solutions do not follow either from a conception of individualism or from one of altruism, but represent points on a continuum between non-existent extreme points. The motives for moving along the spectrum from one rule-solution to another are as various as the motives for choosing between possible rules in any other situation. An important example: when the rule maker is regulating a conflict between strong and weak parties, one way to favour the strong is to impose high levels of altruistic duty on the weak.[6]

4.1.2. The continuum conception contrasted with the notion of a coherent individualist core surrounded by an arational altruist periphery

In this usage, no rule is ever individualist in the sense of following from individualist, as contrasted with altruist premises. To characterize a rule as individualist is always and only to contrast it with some other, more altruist rule, which rule is in turn individualist rather than altruist with regard to the next point along the spectrum. This point is crucial to the argument that follows. It represents a position in legal theory, rather than a conventional observation.[7] The reason for this is that as I have noted already, the tradition of private law theory has been committed since the late middle ages to the notion of a "logic" of contract rules within which the notion of an "individual will" plays a crucial role.

The classic attempts to produce "logics" start from individual will, and purport to derive the merely technical doctrines therefrom. A deep-rooted European idea has been that by the end of the 19th century private law theory had accomplished this task, generating a coherent body of technical doctrine all of which could be referred back to this foundational notion. In this still strong, though today much weaker

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[6] D. KENNEDY, Paternalist and Distributive Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power'. 41 *Maryland L. Rev.* 563, 584-86 (1982).
[7] D. KENNEDY, 'Form and Substance in Private Law Adjudication', 89 *Harv. L. Rev.* 1685. 1713-24 (1976).

conception, economic, social and finally political developments have forced the piecemeal abandonment of the individualist system.[8]

Change, in this view, has until recently reflected the sacrifice of individualist logic to an unstructured, diffuse, but insistent "social" (or sometimes "collectivist") tendency. The "fragmentation" or "dismantling" of the late 19th century synthesis in the face of the demands of "the social" is also the politicization of contract law, reflected in legislative creation of the public law systems in credit, health, employment, housing, urban planning, etc., that I referred to above. In this understanding, the "merely technical" issues are those that remain subject to elaboration in terms of the logic of individual will. They are technical rather than political precisely because there are no social stakes in play.

The presentation of technical issues in terms of a continuum, with positions being individualist or altruist (not "social") only in a relative sense, represents a sharp and conscious rejection, rooted in the tradition of legal realist and post-realist private law theorizing, of this way of understanding the field.[9]

4.1.3. Generalizing the analysis from mistake and interrupted performance to other "merely technical "issues

It seems to me that what we conventionally view as the "merely technical" issues of contract law are all well-suited to this kind of analysis and categorization. In short, this analytic does not solve any problem of rule choice, but it does allow us to place choices justified variously under "objectivism," or consideration doctrine, or good faith, or whatever, on a single grid for comparison. I would include as examples, but by no means intending an exhaustive list:

a. doctrines about excuse for hardship of the contract—impossibility, frustration;
b. doctrines about the consequences of failure to comply with formalities (requirements of notarization, writing, official registration; common law consideration; requirements of definiteness, of acceptance, of "integration" excluding parol evidence):
    i. intending to be bound—then trying to get out of it;
    ii. not intending to be bound but expecting reliance;
c. incomplete contracts:
    i. open price or quantity terms;
    ii. output and requirements contracts;
    iii. implied duties of good faith—exclusive dealerships, etc.

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[8] F. WIEACKER, *A History of Private Law in Europe with Special Reference to Germany* (Tony Weir trans., Oxford Univ. Press 1995) (1967); *see also* KENNEDY, *supra* note 1, at 160-67; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press 1991).

[9] D. KENNEDY, *From the Will Theory, supra* note 1, at 160-67; D. KENNEDY, *Form and Substance, supra* note 1.

4.2. Justifying the choice of a rule along the altruist/individualist spectrum: the conflicting considerations model

In choosing a place along the spectrum of rule-outcomes, the parties muster arguments in favour of intensifying or moderating the duty of the defendant to sacrifice or share for the plaintiff, and for intensifying or moderating the plaintiff's duty to look out for himself. These arguments come in familiar pairs:

1. *Moral arguments:*
   a. individualism (self-reliance) as an ethic (rather than individualism as an imagined pole of a continuum of rule-solutions, that is, individualist morality as a reason for adopting a particular spot on the continuum);
   b. altruism (sacrifice & sharing) as an ethic (rather than as an imagined pole of a continuum of rule-solutions, that is, altruism as a reason for adopting a particular spot on the continuum).

2. *Consequentialist arguments about social welfare, e.g.:*
   a. deterring plaintiff carelessness or opportunism;
   b. deterring defendant carelessness or opportunism.

3. *Rights in their two guises:*[10]
   a. the plaintiff's dynamic security — right to the deal he got fair and square;
   b. the defendant's static security—right not to be stripped of his assets contrary to his expectations and without fault on his part.

4. *Administrability arguments:*
   a. virtues of rules, certainty for the parties and control of judicial discretion, etc;
   b. virtues of open ended standards: equitable flexibility, etc.

5. *Institutional competence arguments:*
   a. virtue of judicial subordination, etc;
   b. virtue of judicial creativity, etc.

6. *Expectations arguments:*
   a. law should track custom;
   b. law should lead custom.

As with the discussion above of the contrast between continuumization and the rational core/arational periphery conception, this list represents a particular, controverted

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[10] R. DEMOGUE, 'Analysis of Fundamental Notions', in A. FOUILLÉE et al.. *Modern French Legal Philosophy* 345 (Mrs. Franklin W. Scott & Joseph P Chamberlin trans., 1916).

position within modern common and civil law private law theory. (It represents the contract theory genealogy of Stewart Macaulay,[11] and is rejected, for example, by Alan Farnsworth in his treatise.)[12] It asserts that modern private law justificatory discourse is "semioticized" - it has gone through a long term, historic process of reduction to a force field model of "conflicting considerations" as opposed to a model of pyramidal deductive order.[13] I won't elaborate that position here, except to note that it is, like the notion of continuumization, basic to the argument that follows. I will refer to the model as a whole as a "continuum-plus-conflicting-considerations" conception.

4.3. A "system" of technical contract rules

A system of technical contract rules, the ensemble that deals with the list of issues set out above, from mistake to requirements contracts, represents, in this perspective, a set of discrete choices, rather than the working out of the logic of a single chosen conception. But even if the choices don't represent the logic of a core conception, they can represent a tendency or bias or preference toward one end or another of the individualism/altruism spectrum as it is reflected in the discrete technical doctrines.

Consistent with the conception of individualism and altruism as descriptive of the relative positions of rules, rather than of the "nature" of a rule in isolation, the meaning of a bias or preference or tendency toward an end of the spectrum is very limited. It means that solutions within a system cluster, when we compare this system to another one, toward one end or another of the continuum. But there are an infinite number of other patterns that might characterize a system when we look at it through this lens.

A system might be "centrist", vis-à-vis other systems, but centrism is not a position transcending the quarrels of polarized individualists and altruists. It means "difference splitting", that is, choosing the middle of the road as defined by the extremists, or "bi-polarity" — achieving an equilibrium by combining apparently contradictory approaches rather than forcing all into the middle of the road. Another possibility is that a system might defy analysis in these terms, so that the set of choices across the list of technical doctrines seemed erratic, inconsistent, arbitrary or "clueless."[14]

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[11] S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', 28 *Am. Soc. Rev* 55 (1963); 'Justice Traynor and the Law of Contracts', 13 *Stan. L. Rev* 812 (1961); 'Private Legislation and the Duty To Read — Business Run by IBM Machine, the Law of Contracts and Credit Cards', 19 *Vand. L. Rev.* 1051 (1966).

[12] FARNSWORTH, *supra* note 2, s. 1.8, p 30 & n. 24.

[13] D. KENNEDY, 'A Semiotics of Legal Argument', 42 *Svracuse L. Rev. 75* (1991) reprinted with a 'European introduction: Four Objections', in *Collected Courses of the Academy of European Law* vol. 3, bk 2, pp. 309-365 (Amsterdam: Kluwer Academic Publishers, 1994).

[14] D. KENNEDY, 'A Critique of Adjudication (*fin de siècle*)', 180-212 (1997).

In all of these cases, the analytical point of view is "external." We compare rules of positive law, using our metric of the intensity of the duty to share the breaching party's misfortune, or to sacrifice to prevent him from being harmed in his moment of vulnerability, having more or less regard to his degree of fault. In this branch of study, we don't have to know the motives for the adoption of a position on the continuum, or even whether the legal actors in the system have a conception of a continuum. (Although, of course, this kind of information *might* make all the difference in the world to the accuracy of the legal interpretations that underlie any positive law comparison.)

While such an inquiry is possible and might be very valuable, it is not what we are about here. The question here concerns the political, in the specific sense of ideological, stakes in the choice of technical solutions to these contract questions. The political stakes derive not from the impact of the positive rules chosen on social, economic or political life, but from the indirect impact of the discourse within which they are chosen.

5. Against the idea that the politics of the merely technical is about "The Flight into the General Clauses"

In the next section, I will present the two theories already mentioned, one probably overly simple and the other perhaps overly complex, of the ideological stakes in merely technical contract issues. The simple theory is that if you make businessmen be nice to other businessmen who are foolish or unfortunate, that puts pressure on you to make the structurally strong be nice to the structurally weak. The complex theory is that the technicality of technical issues is an important component re-enforcing the public/private distinction, and the politics that distinction re-enforces in its turn.

Before taking up these topics, it seems important to offer a critique of what seems to be, in the civil law system and to some extent in common law countries, the most intuitively plausible account of how there could be a politics of technicality. In this account, the politics resides in the push for expansive readings of general clauses, particularly good faith clauses, and for expansive interpretations of implied duties, particularly of good faith. The politics of expansive versus restrictive readings of general clauses derives from the idea that general clauses are a threat to the separation of powers and to the distinction between law and morals. I think the preoccupation of private law theorists with this formulation distorts and distracts from the more plausible political stakes I will describe below.

5.1. The politics of expansive readings of general clauses: the mainstream account

Many systems operate with a variety of rules — relatively clearly defined, formally realizable, general directives — that force an actor to take the interests of another into account up to a certain point, but beyond that point authorize the defendant to act in disregard of those interests. But these systems also include a general clause requiring

that the defendant act "in good faith" (sometimes *abus de droit, ordre publique* and good morals also figure here). *A party always invokes the good faith clause to require the other party to act more altruistically than he would have to under the background rules. When the invoking party loses, it is because the court takes the position that the level of duty or forgiveness demanded are inappropriate under the circumstances, as a matter of law, i.e. as a matter of what the rule should be.*

This means that the good faith clause plays a part in defining the limit of altruism, vis-à-vis self reliance, rather than that the clause reconstitutes an individualist system is altruist. To say that a legal system requires good faith means not that it requires altruism in the abstract, or that it *is* altruist, but that it may, in a set of circumstances not fully specified in advance, require an actor to take the interests of the other into account beyond the degree specified in the general background rules of contract law. The words of the clause are the site or locus where the decision-makers argue about how far to take judicial support for the demands of altruism, beyond the preliminary compromise represented by the general background rules.

Because the outcome of the dispute is simply drawing a line across some limited class of cases between the two positions, the phrase good faith has no content at all, just as one faction of private law theorists have been saying for several generations, and as Martijn Hesselink recently argued with particular force.[15] The result achieved under the clause is a second compromise, on top of the original compromise represented by the choice of a general rule, rather than the application of a concept with a meaning.

There are two aspects of this situation that have been the focus of attention for generations. First, it is obvious that it is the judge rather than the legislator who is deciding what the limits of altruism will be. While the clause remains in force, case law reduces it to particular rules for sub-sets of cases, and this appears to be an instance of judicial legislation, presenting at least a danger for the separation of powers. Second, the general clause that raises the separation of powers issue is invoked by a party demanding a higher level of duty and forgiveness than the other party has demonstrated. This means that the clause can easily (though mistakenly, I will argue below) be seen as demanding that "law" be made "moral."

This interpretation gets power from the idea that the relatively clearly defined general rules permitting the other party to "behave badly" follow more or less logically or deductively from individualist premises that characterize the "classical" private law that began to emerge in the late Middle Ages and reached full flower in he late 19th century. In this reading, the general clause represents morality, vagueness, subjectivity and impossibly high ethical aspirations against the rule, which represents "law," legal tradition, individualism, coherence, deduction, legal science, and, above all, certainty. Certainty guarantees the subordination of the judge to the letter (supplemented by the individualist logic) of a code. To put it slightly differently, the

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[15] M. HESSELINK, 'Good Faith', *Towards a European Civil Code* 285 (Arthur Hartkamp et al. eds, and rev. ed. 1998). *See also* M. AUER, *Good Faith: A Structuralist Analysis,* on file with ARSP (2000).

issue with respect to merely technical issues is whether they will remain merely technical, or succumb to the anti-technical ethos of general clauses.

This produces an interpretation of the politics of the merely technical as follows: in this area, there is a major debate between those who favour an intrinsically vague or even undefinable legal altruism, and those who favour a well defined and easily administered legal individualism. The "expansionists" tend toward abolishing the distinction between law and morals by enforcing a demanding morality of aspiration rather than a more limited morality of obligation. The "restrictivists" favour legal individualism, either because they believe that it defines correctly the limits of moral duty to the other, or because they fear that more expansive but less defined ethical conceptions will lead to bad consequences.

In this debate, the expansionists find themselves often deprecating the claims of legal certainty of the other side, and singing the praises of judicial creativity. Their restrictivist opponents argue that going beyond an individualist legal ethic to a general duty of good faith is a threat to the ideal of individual autonomy. It authorizes the state to determine ethical issues for individuals concerning the appropriate demands of conscience, as opposed to law. They may concede that individualism is less morally attractive than altruism, but claim that it has at least a definite logic, however limited and ethically obtuse that logic may appear in the light, for example, of what Jesus, or Levinas, might say about duty to the other.

In the mainstream view, you either have a reconstruction project of the type listed above (nature of contract, commutative justice, efficiency, etc.), or you accept that this is a "tragic choice" or deep dilemma, open to continuing controversy. Whether they are reconstructers or tragic choosers, only fanatics take either the individualist or the altruist position to an extreme; for the mainstream, where you come out in the large middle ground probably depends on your general orientation to positions in moral and political philosophy, as well as on your temperament and life experience.

5.2. A critique of the idea that the politics of technicality is about the "Flight into the General Clauses"

5.2.1. Form versus Substance

A first objection to the general clause analysis is that it confuses the substantive issue — of the degree of sacrifice and sharing that should be required by a system of contract norms — with the formal issue of the extent to which the norms should be formulated as rules rather than as standards.

It is a commonplace observation that legal norms can be formulated as rules or as standards (or along a spectrum between these two poles). The choice between casting a norm as a rule or as a standard is distinct from the choice whether to impose greater or lesser altruistic duty. Moreover, we can embody substantively individualist norms in a standard, and substantively altruist ones in a rule.[16]

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[16] D. KENNEDY, *Form and Substance, supra* note 310, *passim.*

We could say, for example, that each person is absolutely obliged to respect the interests of his contractual partner, and that it follows that one can never interrupt performance, *except* in situations in which that would be an "intolerable affront to the interrupting party's individuality and undermine the self-reliance of breaching parties". Nonetheless, once we make the form/substance distinction clearly, we can establish a relationship (I would say of homology or structural analogy) between the two kinds of choice. This point will be important later in the argument.

The requirement of good faith is a paradigmatic example of a standard, while a norm treating obligations to continue performance as independent (so that it is never permissible to interrupt performance) is a paradigmatic example of a rule. As we saw above, there are reasons (conflicting considerations) for choosing the good faith standard or the independent covenants rule — reasons other than one's views about the level of altruistic duty that is appropriate. (For example, rules supposedly provide security of transaction and control judicial discretion, though they are over- and under-inclusive from the point of view of their underlying purposes, and may in practice end up less certain than apparently vaguer standards.) In this example both the rule and the standard impose a (relatively) high level of duty, so duty will not be the primary basis for choosing between them, at least until we begin to discuss more particular contexts in which they may turn out to work quite differently in this dimension.

The choice between a norm of independent conditions and a perfect tender rule is a paradigmatic example of the choice between norms imposing more or less altruistic duty on the other party. At least prima facie, this choice does not turn on the issue of administrability (although in particular sub-classes of cases these are likely to be important). Even if administrability figures, it will not be the only consideration, since the two rules obviously differ from the point of view of morality, rights, efficiency, correspondence to expectations, and so forth.

5.2.2. Since the merely technical mainly involves choice between rules, rather than between rules and standards, its politics is not that of the separation of powers

At a minimum, it seems to me, the conventional distinction between formal and substantive issues means that the politics of technicality cannot be reduced to the politics of rules versus standards. A much stronger claim: the merely technical not just sometimes, but rather most of the time, involves a choice between norms cast as rules, rather than the choice between a rule and a standard. Further, when we focus clearly on the prevalence of rule choice rather than rule/standard choice, it is clear that the separation of powers is a minor theme, perhaps even a red herring (a device that functions to distract us from a more political politics of technicality), rather than the "real issue."

First, the issue of the degree of sacrifice and sharing arises in many doctrinal areas. In all systems, some areas are governed not by good faith but by other technical formulations, such as implied intent, consideration doctrine or abuse of right, or by rules adapted to a particular set of circumstances without integration into a more general conception. For example, in the common law world, the two technical issues we discussed above — mistake and the right to interrupt performance — could

be but are not dealt with under the good faith rubric. The law of mistake is governed by rules rather than by a general clause, and interrupted performance is dealt with through formulae that vary from ultra-rule (either perfect tender or full independence of obligations) to ultra-standard (substantial performance understood to permit reference to all the circumstances).

Second, even when dealing with the issue through a good faith general clause, the judges typically make *rules* about how much altruism to require, and these rules represent different compromises — allowing us to describe the system's treatment of a given issue by comparison with its treatment of other issues, and to compare one system with another. In other words, the judges in all the systems are constantly concretizing (or as they often say in Europe, materializing) the general clause requiring good faith, along with other technical concepts like implied intent and consideration. They are reducing the abstract concepts to a system of sub-rules governing particular typical situations.

They do this first, because, as European and American comparativists have recognized for several generations, both the common law and the civil law are to a significant degree based on precedent — the judge deciding on an application of the clause looks to how earlier judges have dealt with similar situations.[17] But we are speaking of more than the general tendency of Western systems to operate through the development of settled case law. Within the spectrum of possible case law attitudes toward the clause, all the systems often choose to make the outcome of the tension between individualism and altruism predictable by reducing good faith (or implied intent or consideration) to a rule. When they do this, they reject the alternative strategy of making sure that one case has the minimum possible significance for the next, so that good faith (or whatever) can retain its pure "standard," or 'judgment on all the facts" character.

In this context of rule-choice, it is not plausible that more altruism means more judicial activism, in the sense of legislative choice by contrast with mere rule application. A judicial decision in favour of a rule imposing high duties of sacrifice and sharing is no more (and no less) legislative than a judicial decision in favour of a rule imposing a lower level of duty. Once the choice has been made for one rule or the other, the application process will be more or less discretionary not according to how altruist the solution chosen, but according to the choices made in the design of the rule in question. The politics of technicality in contract law, therefore, is not primarily, although it may be secondarily, the politics of the separation of powers.

5.2.3. Choice along the individualism/altruism spectrum does not threaten "the distinction between law and morals"

The claim I want to critique is that the politics of legal technicality concerns primarily the relationship between two distinct categories. On the one hand, there is the *legally*

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[17] R. DAVID, *Traité Elémentaire de Droit Civil Compare: Introduction à L'étude des Droits Étrangers et à la Méthode Comparative,* 30-31 (1950).

desirable, or the morally compulsory *for law* (this is *droit, Recht).* We can contrast it with the morally desirable per se or in the abstract. The idea is that there are two orders of morality. For example, the right and the good. Or the order of obligation and the order of aspiration. Or the order of rights and the order of the ethical. Or the order of justice and the order of virtue. In this conception, the moral mode that law should track, the appropriate morality for law, is less demanding of altruism than the higher order called simply morality. The "legal" (droit, recht) can be understood as a "lesser included" morality, in some sense within, but not at the level of, the full demands of morality per se. Most commonly the legal mode is understood to be individualist, by contrast with the more exacting mode of conscience or the ethical, understood as altruist.[18]

This is not the distinction between positive law (enacted, or valid because representing settled case law jurisprudence) and the legal rule that we would like to see enacted. In other words, the claim that the politics of technicality involves how we feel about "collapsing the distinction between law and morals" is not about a fear that one side will make it hard to distinguish between judgments about the validity of a rule and judgments about its desirability. I assume that we can tell the difference. The question is whether the politics of technicality opposes those who would "collapse the right and the good" (or justice and virtue) by enacting the good, to those who would preserve the distinction, by enacting only the right.

Choice between rules along the individualism/altruism spectrum is not a choice between law and morals, because all the rules along the spectrum are compromises between two different moral attitudes, and because the rules at the altruist end of the spectrum are no less "law" than those at the individualist end. This follows directly from the analysis in the last part above, which wholly rejects the idea that there is or could be an individualist logic of contract rules corresponding to the legal, and contrasting with a more demanding, extra-legal altruist ethic.

The idea that there is a viable distinction between the right and the good (justice and virtue, etc.) has, nonetheless, been a very powerful one in legal theory, and still has power for writers in several different traditions (in both the Aristotle/Aquinas and the Kantian natural law lineages, for example). This is one of the respects in which the conception based on an individualism/altruism continuum is, as I have already mentioned, controversial. I will not pursue this topic except to say, first, that a successful reconstruction of private law theory based in one of these traditions would allow us to go beyond the continuum-plus-conflicting-considerations model. And, second, that because none of the many extant reconstructions (that I know of) seems to me successful, we seem to me to be stuck with, and some of us are happy with, the very restricted mode of legal rationality that I have been describing.

There is a second point to the "law and morals" argument that needs more extensive treatment. This is the idea that for a system to be "truly" altruist, it has to subject all rules to constant derogation through the ad hoc application of an ethically

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[18] Cf. R. UNGER, *Law in Modern Society* 203-16 (New York: Free Press, 1976).

oriented general clause (good faith). The reason is that it is the nature of altruism to want intervention when rules fail to achieve their altruist purposes.

Once we adopt an altruist orientation, according to this argument, we will be pushed quickly or slowly down the slippery slope to the complete deformalization of private law. For example, the person pushing for more altruism might find the doctrine of the independence of conditions preferable to a perfect tender rule. But a rule of substantial performance, permitting consideration of all the circumstances, will look better still, because it permits the decision maker to take into account the duties on both sides.

There is a lot to this argument: a person very committed to altruism as a moral position or orientation is likely to demand that we have a general clause at the ready. As I mentioned above, it is plausible that the same impulse, or orientation that pushes a jurist toward high levels of altruistic duty also pushes toward standards as opposed to rules.[19] Moreover, there is undoubtedly a complex politics of legal deformalization that works itself out across many legal fields. (As with the substantive issues, it is wrong to see the choice as one between the poles. A norm is more or less formally realisable vis-à-vis another norm, not "in itself," and there is a perceptible danger neither of complete deformalization nor of its opposite, the complete abolition of the power to make exceptions.)

What is important for our purposes is that this is a different politics from the politics of the choice between rules within the domain of the merely technical. Suppose a system that managed somehow to ban general clauses (or standards) altogether. There would still be altruist/individualist choices in profusion — because, for example, people make mistakes and try to interrupt performance in response to breach, and we would have to have rules (not standards) to deal with these situations.

My conclusion is that in order to figure out the political stakes in merely technical issues of contract doctrine, we need to carry the inquiry beyond the virtues and vices of general clauses, and ask about the stakes in choosing between two highly definite rules, one of which requires more sacrifice and sharing, and is more forgiving of foolishness, than the other. There is a politics of the merely technical in its own right, distinct from the politics that opposes the technical to good faith.

6. The political stakes in merely technical issues of contract law

We are now in a position to take up the two kinds of stakes I mentioned at the beginning of this talk. First, there is the simplistic claim, and second the overly complex one. The point in each case is that both argument and choice along the individualist/altruist continuum have their own right/left political undertones, with left and right understood as positions within the broadly Liberal centre.[20] These are distinct from (though not unrelated to) those in the "flight into the general clauses" issue.

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[19] D. KENNEDY, *Form and Substance, supra* note 310.
[20] Cf. N. BOBBIO, *Destra e Sinistra: Ragioni e significati di una distinzione politica* (Rome: Donzelli, 1994).

6.1. Duties of businessmen to one another = Duties of social groups to one another

My argument is that the duties of buyers and sellers are analogous to the duties that social groups generally owe one another. If you favour high duties of sacrifice and sharing for the misfortunate and vulnerable, and a forgiving attitude toward their foolishness when we are dealing with business men, then you have to explain why you don't favour similar duties when dealing with capitalists and workers, large sellers and atomized consumers, rich and poor generally, white and black, men and women, gay and straight, natives and immigrants, northerners and southerners.

There are two levels at which the analogy works. First, the debate about the duties of social groups to one another proceeds through arguments that are closely analogous to those I have already reviewed in the discussion of the "conflicting considerations" dimension of rule choice along the individualism/altruism spectrum. In this area, the opposed sides in the conflicts of the various lefts and rights engage in a long term practice of developing the arguments that favour their side. The arguments in analogous domains re-enforce each other, so if the private law arguments for duty are coherent and powerful, there will be an "effect" in public law debate.

Second, particular choices of rules, or outcomes, have analogous force. In other words, the more altruist the private law rules governing the relations of businessmen look, the stronger the case for the adoption of analogous public law rules. There is no logical necessity about this connection. One can favour high levels of duty in private law and strongly oppose all the progressive protective and redistributive measures that are designed to respond to the relations of strong and weak groups. Conservative advocates of the "social" sometimes fall into this category. And one can advocate strictly individualist private law and elaborate welfare state intervention at the same time — some social democrats take this position.

One's views about general clauses are likely to influence one's position in this regard: Jacobin traditionalists want to avoid judicial discretion at all costs and may think individualism is the price of constraint in private law. Natural lawyers may see the application of general clauses as the inevitable and also desirable locus of "practical reason." Likewise one's views about efficiency: if efficient private law rules are individualist, then the best solution for progressives is tax and spend.

The relationship between the debates is one of what one might call transposition or structural analogy (like the relationship between the rules/standards and the altruism/individualism positions). Private law scholars have a half-conscious sense that there is an issue of the relationship between their technical positions and their public law politics, leading to explanations like those I gave above. When debate on the technical issues becomes passionate, it is often clear that the reason is the sense that some participants on each side are asserting the relevance of public law divisions, while others are just as vigorously denying that relevance.

It seems to me that no one doubts that the intuitively obvious initial alignment, though by no means one's ultimate position, associates altruism with progressivism (or social democracy) and individualism with right wing liberalism. The very fact that this is what advocates find it necessary to deny so vigorously shows the intertwining of the technical and the political.

6.2. That the technical is not political is an important support for the viability of the political centre's public/private distinction

The more obscure stake in technical issues of contract law involves the coherence of the public/private distinction. This coherence is important for left and right within the centre, and an object of attack from outside the centre. On the right, organic hierarchy absorbs public back into private law. On the left, egalitarians (myself included) redefine private property rights as public law regulations. What makes this so complex is that the stake in the merely technical is not in whether the rules adopted are more or less individualist or altruist, but rather in the maintenance of the perception that these issues are in fact merely technical. In other words, it is important to the public/private distinction not that contract law should come out one way or another, but that choices within contract law should appear to be based on considerations and procedures fundamentally different from those that operate in public law.

6.2.1. Merely technical issues of contract law as the core of the contract law core of private law

Undermining the "distinction between law and morals" in private law undermines a particular understanding of the structure of law as a whole, the understanding that opposes public and private law along a set of mutually re-enforcing dimensions. According to this conception, private law as a whole aspires to resemble its classical contract core, which is quintessentially legal, rational, scientific, and individualist, while the contrasting domain of public law is political, arational, arbitrary, and altruist.

Suppose that even the "merely technical" issues that constitute the core of contract, which is in turn the core of private law, require decision-making that is no more logical, or rationally structured, than the choices we associate with the ideologized domain of public law, including both constitutional law and the social law domains mentioned above (labour, land, housing, credit, discrimination, etc.).

Even in the absence of party inequality or third party effects there are alternative solutions, none of which is required by the premises of private property and free contract, or by the concept of the rule of law. None of these can be explained by the supposed "individualist character of private law", since the systems, internally and comparatively, adopt widely different, more or less altruist, solutions: good faith is not a threat to the coherence of private law because it was never coherent to start with. Then the supposedly technical core is the site of moral as well as scientific conflict.

If there is moral conflict within the core of the domain of law, then it is not plausible that legal solutions can be sharply distinguished from political solutions on the ground that they are (more) scientific. Choice among the alternatives seems to require judicial assessing (weighing, balancing) of contradictory or at least conflicting moral, economic, rights, administrability and institutional competence arguments. This weighing process seems no more rationally constrained than the overtly political choices that mainstream political theory allocates to the legislature, such as the decision to override freedom of contract, confiscate or tax property rights, or choose flexible administrative discretion over judicial method.

In this scenario, mainstream centrist claims about the factual prevalence of the rule of law, and about its desirability even if as an only partially attainable ideal, are highly suspect, because the separation of powers associated with the rational character of private law appears to be invalid, even in its most apparently unproblematic technical core — *if adjudication cannot be apolitical here it cannot be apolitical anywhere.*

6.2.2. If the public law/private law distinction is threatened, there is a "domino effect" threatening other crucial centrist distinctions as well

The distinction between private and public law serves to anchor the separation of powers (technical private law adjudication is the paradigm of the judicial by contrast with the legislative). It also serves to strengthen the distinctions between free market and regulatory regimes, and between professional and political systems for allocating positions of social power.

Thus it is common to represent regulatory regimes as rejecting the logic of freedom of contract in favour of an ad hoc adjustment of conflicting social interests. In the analysis pursued above, the supposedly individualist private law system has much the same character, rather than exactly the opposite character as a regulatory regime. The notion of the merely technical plays an important role, moreover, in permitting us to distinguish between domains where it is proper to allocate power according to criteria of professional expertise, and areas where political factors are inevitable and even desirable, given the absence of determinate rational and meritocratic criteria.

The critique of the merely technical suggests that technicians cannot "solve" technical private law problems, but only indicate a range of choices requiring balancing and "value judgments." In legal academia, this means that "schools" and the politics of the professor are inevitable aspects of professional life, rather than symptoms of corruption. A hermeneutic of suspicion is therefore always appropriate with respect to the supposedly meritocratic allocation of academic jobs and honours.

7. Implications of this analysis for the project of unifying the merely technical contract law rules of the European (or Western) legal systems

There is a political dimension to the unification project, as well as scientific and cultural dimensions (if there is in fact a cultural dimension). In deciding on a position about unification, it therefore seems appropriate to do the same kind of calculus one does when deciding on one's position with respect to unification of public law fields, such as, for example, the provision of social assistance. In such cases, it seems desirable to look at one's own system by comparison with the one's with which unification will occur, anticipating that differences will be split within the existing power context, rather than scientifically superior solutions arrived at. And then it seems important to ask, given one's own "political" views about the merits of one's own and the other systems, whether on balance the compromises will be beneficial overall.

For merely technical issues of private law, this involves figuring out what one thinks good altruist/individualist compromises are and asking how they will be promoted or impeded by unification. It also involves deciding whether the process of unification, if it is presented by its authors as "merely technical," will have the effect of obscuring the political element and thereby collaborating in the long term project of mystifying private law.