

1-1-2002

The Moral Foundations of Private Law

James Gordley

Follow this and additional works at: <http://scholarship.law.nd.edu/ajj>



Part of the [Contracts Commons](#), [Ethics and Political Philosophy Commons](#), [Jurisprudence Commons](#), [Legal History, Theory and Process Commons](#), and the [Natural Law Commons](#)

Recommended Citation

Gordley, James (2002) "The Moral Foundations of Private Law," *American Journal of Jurisprudence*: Vol. 47: Iss. 1, Article 1.
Available at: <http://scholarship.law.nd.edu/ajj/vol47/iss1/1>

This Forum is brought to you for free and open access by the The American Journal of Jurisprudence at NDLScholarship. It has been accepted for inclusion in American Journal of Jurisprudence by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE MORAL FOUNDATIONS OF PRIVATE LAW

JAMES GORDLEY*

My topic is the moral foundations of private law—unjust enrichment, property, tort, and contract—and not legal history. But I will be drawing on the work of a school of jurists who wrote in the sixteenth and seventeenth centuries called by historians the “Late Scholastics.” I will begin by saying a bit about them.

Few people today are familiar even with the names of the leaders of this group: for example, Domingo de Soto (1494-1560), Luis de Molina (1535-1600), and Leonard Lessius (1554-1623). Yet, as I have described elsewhere, they were the first to give private law a theory and a systematic doctrinal structure.¹ Before they wrote, the Roman law in force in much of Europe had neither. For all their subtlety, neither the Romans nor the medieval professors of Roman law were theorists. In contrast, the Late Scholastics tried to explain Roman law by philosophical principles drawn from their intellectual heroes, Thomas Aquinas and Aristotle. Their work deeply influenced the seventeenth-century founders of the northern natural law school, Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-94), who adopted many of their conclusions and disseminated them through northern Europe, paradoxically, at the very time that Aristotelian and Thomistic philosophy was falling out of fashion.

The Late Scholastics took an Aristotelian and Thomistic view of man. For them, as for Aristotle and Aquinas, human happiness consists in living a distinctively human life, a life which realizes, so far as possible, one’s potential as a human being. It is a life unlike that of other animals because a human being can act, not only by appetite, but by reason and will. He can understand that an action contributes to the distinctively human life he should live, and he can choose it for that reason. Living such a life is the ultimate end to which all well chosen actions are a means, either instrumentally or as constituent parts of such a life. To identify the actions that contribute to such

* An earlier version of this paper was given as the Natural Law Lecture at the Notre Dame Law School on 11 April 2002. I would like to thank Melvin Eisenberg and Kim Scheppele for their comments.

1. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), 69-111; James Gordley, “Tort Law in the Aristotelian Tradition,” in David Owen, ed., *Philosophical Foundations of Tort Law: A Collection of Essays* (Oxford: Clarendon Press, 1995), 131; James Gordley, “The Principle Against Unjustified Enrichment,” in Klaus Luig, Haimo Schack & Herbert Wiedemann, eds., *Gedächtnisschrift für Alexander Lüderitz* (Munich: C.H. Beck, 2000), 213.

a life, a person exercises an acquired ability—a virtue—which these writers called “prudence.” In following the dictates of prudence, he may need other virtues as well, such as the courage to face pain and danger or the temperance to forego pleasure. Because man is a social animal, part of living such a life is helping others to live it as well. To live it, we need not only virtues but some external things. A person should try to acquire what he needs and to help others to do so. The object of distributive justice is to ensure that each person has the wealth he needs to acquire them. The object of commutative justice is to enable him to obtain them without unfairly diminishing other people’s share of wealth.

My question today is: What concepts are necessary to make sense of private law? I believe that we need the ones I have just described: the idea that there is a distinctively human life to be lived, and that there are virtues, and particularly virtues of prudence and distributive and commutative justice, that enable people to live it. I believe that a better explanation can be built on these concepts than on the modern ones that have displaced them. I cannot, of course, discuss modern theories in any detail here, but I will illustrate my point by contrasting the approach of writers in the Aristotelian tradition with the approach that seems to be most in vogue today in American law schools: the economic analysis of law. I will try to show that private law is better explained by the concepts central to the older tradition than by concepts such as preference satisfaction and economic efficiency as the economists understand them.

I should say more about distributive and commutative justice before I begin speaking about private law. My understanding of these terms, is, I believe, within the mainstream of the Aristotelian tradition. I will not try to put them in historical context, however, but to say the minimum required to link them, later on, to private law.

Although the aim of distributive justice is that each person should be able to acquire the external things that he needs to live the life he should, as Grotius pointed out, we cannot simply allocate each person the external things that we think or he thinks that he needs. That, he said, can only be done in a society like a family or a monastery where there are few people and they are on good terms.² Writers in the Aristotelian tradition conceive of distributive justice as ensuring that each person has a fair share of wealth. By wealth, they meant roughly what we would call purchasing power.³ A fair share, they

2. Hugo Grotius, *De iure belli ac pacis libri tres* (Amsterdam: Iohannes Blaeu, 1646), II.ii.2.

3. Not quite, because people acquire things that are worth more to them than the amount of purchasing power they represent. A person who loses such a thing, and cannot buy another like it, will have lost more than that amount. Consequently, if someone takes or destroys it, he

acknowledged, will be understood differently in differently constituted societies. In a society ruled by the virtuous—an aristocracy—it will be taken to mean that wealth should be divided in proportion to virtue; in a democracy, that each person should ideally have the same share.⁴ Writers in this tradition made it clear that such principles are ideals. A democracy should not confiscate the wealth of rich people, virtuous or otherwise, and divide it up.⁵ We can see one reason why it should not if we consider Aristotle's objections—which Aquinas shared—to Plato's proposal to abolish private property. Do so, Aristotle said, and there will be endless quarrels, and people will have no incentive to work or to take care of property.⁶ If these evils are to be prevented, an ideal distribution of wealth can only be approximated.

While the aim of distributive justice is to provide each citizen with a fair share of purchasing power, that of commutative justice is to preserve each person's share. Here again, we are speaking of an ideal which can only be approximated. All sorts of accidents can change a person's share. As the Late Scholastics knew, prices fluctuate, and must do so to reflect what they called the need, the scarcity, and the cost of goods.⁷ A change in price necessarily changes the purchasing power that each person's goods represent. Moreover, goods may physically perish. The Late Scholastics accepted the Roman rule *res pereat domino*: the loss falls on the owner. Perhaps they could not see how a system of private property would work otherwise. There would be no incentive to take care of property, and the distribution of wealth would shift in favor of people who acquire property that is more subject to risk. There were, then, changes in the distribution of purchasing power that could not be prevented. For them, that was not a reason to tolerate those which we can

should pay its value to the owner even if that is more than the amount for which the owner could have sold it. If something identical is not available on the market and someone offers to buy it, the owner can sell it for a price that reflects its value to him. See James Gordley, "Contract Law in the Aristotelian Tradition," in Peter Benson, ed., *The Theory of Contract Law: New Essays* (Cambridge: Cambridge University Press, 2001), 265, 313.

4. Aristotle, *Nicomachean Ethics* in *Basic Works of Aristotle* (R. McKeon, ed., New York: Random House, 1941), V.iv 1131b-1132b; Thomas Aquinas, *Summa theologiae* (3rd ed., Taurini: Matriti, 1963), II-II, Q. 61, a. 2.

5. Aristotle, *Politics* in *Basic Works of Aristotle* V.5 1304b; V.9 1310a; VI.3 1318a 25-26; VI.5 1319b - 1320a.

6. Aristotle, *Politics*, II.v; Thomas Aquinas, *Summa theologiae*, II-II, Q. 66, a. 2.

7. Gordley, *Philosophical Origins*, 94-102; Domenicus de Soto, *De iustitia et iure libri decem* (Salamanca: Andreas à Portonariis, 1553), lib. 6 q. 2 a. 3; Ludovicus Molina, *De iustitia et iure tractatus* (Venice: Sessas, 1614), II, disp. 348; All of these factors had been mentioned, albeit cryptically, by Thomas Aquinas. In *decem libros ethicorum expositio* (Angeli Pirota, ed., Taurini: Matriti, 1934), lib. 5, lec 9; *Summa theologiae*, II-II, Q. 77 a. 3 ad 4. They were discussed by medieval commentators on Aristotle. Odd Langholm, *Price and Value in the Aristotelian Tradition* (Bergen: Universitetsforlaget, 1979), 61-143.

prevent. If Peter is enriched at Paul's expense, they thought that the law should ask why. To analogize, death is an evil that we often can't prevent. But if Peter kills Paul, the law will ask why.

These ideas intertwine. Commutative justice matters because distributive justice matters. To put it another way, we should try to preserve each person's share of wealth because we want each person to have what he needs to live as he should. We can speak meaningfully about how each person should live because there is a distinctively human life to be lived and a distinctively human capacity to understand and to choose what contributes to such a life.

We can now turn to private law. From an Aristotelian and Thomistic standpoint, it is fairly easy to explain the law of unjust enrichment. Peter is enriched at Paul's expense, and the law does ask why.⁸ Thus the Late Scholastics explained unjust enrichment in terms of commutative justice.⁹ Roman law gave relief for specific instances of unjust enrichment: for example, when A paid B a debt he really didn't owe.¹⁰ The *Digest* of Justinian contained the maxim that no one should be enriched at another's expense.¹¹ But unlike the Late Scholastics, the Romans never explained the maxim or tried to draw out its consequences systematically. Indeed, as Robert Feenstra has pointed out, the Late Scholastics were the first jurists to identify unjust enrichment as a distinct branch of private law like tort and contract.¹² The northern natural lawyers borrowed this idea¹³ and passed it on to us, although, in time, its origins and the philosophical concept that had inspired it were forgotten.

8. I deal with the objection that the law does not always give relief when one person's enrichment causes another person a loss in Gordley, "The Principle Against Unjustified Enrichment." I discuss how commutative justice can explain the defense of change of position and the remedies a court will give, respectively, in "Restitution Without Enrichment? Change of Position and *Wegfall der Bereicherung*," forthcoming in David Johnston & Reinhard Zimmermann, eds., *The Law of Unjustified Enrichment* (Cambridge: Cambridge University Press), and "The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib," *Theoretical Inquiries in Law* 1(2000) 39.

9. Molina, *De iustitia et iure*, II, disp. 718, no. 2; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libra quatuor* (Lyon: Philippus Borde, Laurentius Arnaud & Claudius Rigaud, 1628), lib. 2, cap. 14, dub. 1, no. 3.

10. Inst. 3.27.6. See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of The Civilian Tradition* (Capetown: Juta, 1990), 837-57.

11. Dig. 12.6.14; Dig. 50.17.206.

12. Robert Feenstra, "Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence on Roman-Dutch Law," in E. J. H. Schrage, ed., *Unjust Enrichment* (Berlin: Duncker & Humblot, 1995), 197.

13. Grotius, *De iure bellis ac pacis*, II.x.5; Samuel Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam: Andreas van Hoogenhuysen, 1688), IV.xiii.9.

Modern legal systems also give relief when one person has been enriched at another's expense, as when a person pays a debt he does not owe. It is hard to explain why they do so unless one objective of the law is to preserve each person's share of resources. But then we are talking about commutative justice whether or not we use that term.

Those who try to explain law in terms of economics do not concern themselves with justice but with efficiency. Efficiency presupposes a distribution of purchasing power and then asks how people can satisfy more of their preferences, given that distribution. By one definition, ascribed to Pareto, a change is efficient if at least one person's preferences can be better satisfied without diminishing the ability of others to satisfy their own. By a looser definition, a change is efficient even if some people lose out provided that the winners—those whose preferences are better satisfied—would have been willing to compensate the losers. This is so-called Kaldor-Hicks efficiency. According to Richard Posner, it is formally identical to what he calls wealth maximization.¹⁴ In any event, from the economist's standpoint, a distribution of purchasing power is not efficient or inefficient or just or unjust. Consequently, in and of itself, nothing bad can have happened if the distribution of purchasing power between two individuals changes. That cannot be the evil the law seeks to remedy.

For an economist, the evil must be that unless relief is given, someone will incur some unnecessary cost. For example, if people who pay money they do not owe could not get it back, according to Saul Levmore, they "would protect themselves with more paperwork, and disbursing agents would demand more proof before paying claims. It does not require great faith in the usefulness of economic analysis in law to believe that the flat denial of restitution in these cases would lead to an inefficiently high level of care."¹⁵

It seems odd to imagine that if a bank accidentally deposits a million dollars in my account, the reason I cannot keep it is to prevent extra paper work. In any event, if avoiding such costs is supposed to be the only reason for giving

14. Richard A. Posner, "The Value of Wealth: A Comment on Dworkin and Kronman," *Journal of Legal Studies* 9 (1980) 243, 244.

15. Saul Levmore, "Explaining Restitution," *Virginia Law Review* 71 (1985) 65, 69. See Hanoch Dagan, "Symposium: Restitution and Unjust Enrichment: Mistakes," *Texas Law Review* 79 (2001) 1795. He analyzes how to save the costs that unjust enrichment might incur. He does not go so far as to say that, in and of itself, unjust enrichment does not matter. Quite the contrary, he thinks that because it is an instance of "involuntariness" it runs contrary to the "autonomy" prized by "the liberal tradition." *Ibid.*, 1796. Perhaps. But from the economic standpoint he takes in his article, it is hard to see why it matters whether someone involuntarily loses purchasing power he once had when it does not matter if he involuntarily never had it in the first place.

relief—as it must be by the economic approach—then the goal of doing so does not explain the law of unjust enrichment. Suppose the defendant who is enriched can prove that the plaintiff could not have prevented what happened by incurring extra costs. No legal system will allow him to escape liability.

Even if the law gave relief only when it is economically efficient to do so, I still do not see how principles of efficiency can explain why the law is as we find it unless these principles actually shaped the law. They can have done so only if the jurists who shaped the law glimpsed these principles, however indistinctly. Otherwise, the jurists hit on the efficient result by accident much as the United States, when it annexed the Philippines, accidentally happened to acquire good bases for military aircraft. The jurists might as well have been rolling dice. If so, why does efficiency explain the law, any more than the need for aircraft bases explains American annexation of the Philippines? Why do those who take an economic approach care whether, by chance, the jurists happened upon results that correspond to their own conclusions? Indeed, they should be embarrassed if the jurists did so often, and we should be suspicious that they are tailoring their conclusions to fit results that make sense for other reasons. Yet they say that such coincidences permeate the legal system.

So they would do well to consider whether it is plausible that the jurists who shaped the law of unjust enrichment really glimpsed a principle of cost avoidance rather than one of justice, and built the law on that principle. I don't think so. These jurists said that their concern was justice. They said that it is unjust for one person to be enriched at another's expense. They put textbook cases which seem to have nothing to do with avoiding costs. In contrast, people have had insights about the effect of restitutionary relief on paperwork only recently, and then because their economic approach requires them to look for a cost to be avoided. Some of their insights are novel and clever enough to earn a person tenure for thinking of them. Moreover, even if it had occurred to jurists such as the ancient Romans, the medieval civilians, the natural lawyers, and the nineteenth-century conceptualists that the law could be used to promote efficient cost avoidance, I doubt if they would have cared very much. They cared about other things.

So far, I have been speaking about unjust enrichment. Let's turn to property law. Nineteenth-century jurists tried to explain property law by a "will theory" that left no room for considerations of commutative or distributive justice. The task of property law is simply to protect the owner's exclusive right to do as he wills with his own.¹⁶ The problem is that by this

16. E.g., Christopher Columbus Langdell, "Classification of Rights and Wrongs" (part 1), *Harvard Law Review* 13 (1900) 537, 537-38; Frederick Pollock, *A First Book of Jurisprudence*

approach, one cannot explain any limitation which the law places on the owner's rights.¹⁷ And the law did limit the owner's rights even in their own time.

One limitation is the doctrine of necessity. When a person's need is great enough, he can use another's property without the owner's permission and even against his will. Although German will theorists disparaged that doctrine, it was adopted by the German Civil Code of 1900¹⁸ because otherwise, the drafters said, it would be "against the law for a drowning man to pull himself onto another's boat to rescue himself."¹⁹ The law of other civil law countries is similar,²⁰ as is American law. In 1908, in *Ploof v. Putnam*, a pier owner was held liable when his employee cut loose the plaintiff's ship which the plaintiff had tied to the pier to save it in a storm.²¹

While the German drafters and the American courts saw intuitively that the owner's rights should be limited, writers in the Aristotelian tradition explained why the limitation is just. The ultimate goal is that people should have what they need to live as they should. Property rights are instituted to further this goal, not to thwart it. For these reasons, Aquinas endorsed a conclusion that had already been reached by the medieval canon lawyers:²² when a person's need is great enough, he can use another's property against the owner's will.²³

for *Students of the Common Law* (London, Macmillan & Co.: 1896), 160; Charles Aubry & Charles Rau, *Cours de droit civil français d'après la méthode de Zachariae* (4th ed., Paris: Marchal et Billard, 1869-71), 2: § 190; François Laurent, *Principes de droit civil français* (Paris: A. Durand & Pedone Lauriel; 1869-78), 6: § 101; Charles Demolombe, *Cours de Code Napoléon* (Paris: Imprimerie générale, 1854-82), 9: § 543; Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (7th ed., Düsseldorf: J. Buddeus, 1891), 1: § 167.

17. For further discussion, see James Gordley, "Contract, Property and the Will—The Civil Law and Common Law Traditions," in Harry Scheiber, ed., *The State and Freedom of Contract* (Palo Alto: Stanford University Press, 1998), 66.

18. German Civil Code (*Bürgerliches Gesetzbuch*) § 904.

19. *Protokolle der Kommission für die Zweite Lesung des Bürgerlichen Gesetzbuchs*, § 419, p. 214 (Berlin: J. Guttentag, 1899).

20. In French law, according to some commentators, necessity excuses the defendant although the French Civil Code does not mention necessity. François Terré, Philippe Simler & Yves Lequette, *Droit civil Les obligations* (7th ed., Paris: Dalloz, 1999), no 704. According to the Italian Civil Code, the defendant must still pay whatever compensation the court deems to be equitable. Italian Civil Code (*Codice civile*) § 2045.

21. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908). But he can recover if his pier is damaged. *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).

22. *Glossa ordinaria* to *Decretum Gratiani* (Venice: Iuntas, 1595), D. 47 c. 8 to *commune*. Similarly, *id.* to D. 1 c. 7, to *communis omnium*; *Glossa ordinaria* to *Decretales Gregorii IX* (Venice: Iuntas, 1595), 5.18.3 to *poenitiae*.

23. *Summa Theologiae*, II-II Q. 66, a. 7.

He was followed by the Late Scholastics and the early northern natural lawyers.²⁴

It is harder to explain this doctrine in terms of economic efficiency. Richard Posner notes that, in *Ploof v. Putnam*, it was the pier owner's employee who cut loose the plaintiff's ship. The pier owner wasn't there and so "negotiations were, in the circumstances, infeasible."²⁵ The negotiations would have led to an efficient result. Suppose, however, that the owner had cut the ship loose himself. In *Ploof*, the court rested its decision not on the defendant's absence, but on the plaintiff's "necessity."²⁶ If it meant what it said, then, as in Germany and other civil law countries, it would have held the pier owner liable. Suppose that the pier owner cut the ship loose out of sheer cussedness after the plaintiff offered him a fortune to refrain. Would that result be efficient? I think an economist would have to say so. He defines efficiency in terms of preference satisfaction, whatever the preference may be, and cussedness is as much a preference as any other. Suppose, after negotiating, the owner accepted plaintiff's promise of a fortune for permission to tie up. Would that also be efficient? In an article on rescue at sea, Posner found a reason why it would not. Under admiralty law, a ship that rescues the property of a ship in distress can charge only a reasonable amount for doing so. According to Posner, this rule is efficient because otherwise shipowners will overinvest in safety equipment to avoid the need for a rescue.²⁷ Presumably he would find some similar reason why the drowning man, in the German drafters' example, is allowed to pull himself onto another's boat. As before, this is not a good explanation of the law. The defendant cannot escape liability by proving that no investment in safety equipment could have prevented the emergency. Moreover, it is another instance of claiming to explain the law by principles that could not have shaped it. If the jurists responsible for the rules of admiralty law and the doctrine of necessity hit upon an efficient result, it was by accident, and not because they were not concerned about optimizing investment in safety equipment.

24. Soto, *De iustitia et iure*, lib. 5, q. 3, a. 4; Molina, *De iustitia et iure*, II, disp. 20; Lessius, *De iustitia et iure*, lib. 2, cap. 12, dub. 12; Hugo Grotius, *De iure belli ac pacis libri tres*, II.ii.6-7; Pufendorf, *De iure naturae et gentium* II.vi.5.

25. Richard Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen, 1998), 190.

26. 71 A. at 189 ("necessity ... will justify entries upon land and interferences with personal property that would otherwise be trespasses.").

27. William M. Landes & Richard A. Posner, "Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism," *Journal of Legal Studies* 7 (1978) 83. The same explanation is given by F. H. Buckley "Three Theories of Substantive Fairness," 19 *Hofstra Law Review* 19 (1990) 33, 40-48.

Posner also presumes that the ship in trouble can pay a reasonable price for the rescue. Suppose it cannot. Or suppose the drowning man is broke and can't afford to pay the boat owner anything for saving his life. Or suppose someone is starving through no fault of his own because he has no money to buy food. In the Aristotelian tradition, where the ultimate goal is to enable people to obtain what they need, when the need is severe, the normal rules of commutative justice should not apply. In an emergency, the starving man can take what he needs to survive. If people are starving, not because of an emergency, but because of how wealth is distributed in society, then the problem is one of distributive justice. Posner himself points out, however, that if the goal of the legal system is wealth maximization, anyone whose "net social product is negative" may have to starve. "[H]e would have no right to the means of support though there was nothing blameworthy in his inability to support himself." That conclusion "grates on modern sensibilities," Posner admits, and yet he "see[s] no escape from it that is consistent with any major modern ethical theory."²⁸ That sounds like a point that someone like me would want to make about modern ethical theory. And without wishing to be overly inquisitive, I wonder why a person would adopt an ethical theory that grates on his own ethical sensibilities. I thought the point of an ethical theory would be to shed light on them.

Another limitation on the owner's rights was described by the nineteenth-century German jurist Rudolph von Ihering. He pointed out that it is contradictory to say that the owner has the unlimited right to do as he wishes with his own property. If A could do anything he wishes, he could produce such noise or stench on his own land as to make B's neighboring land worthless. If B could insist that A do nothing to disturb his own use of his land, he could insist that A never make the least noise or never build a fire.²⁹ Ihering's solution, based on common sense rather than theory, has passed into the German Civil Code: A is not liable if his interference with B is normal given the use of land typical in the area; if it is abnormal and grave, either A must stop, or, if his activity is sufficiently valuable, he may continue but he must compensate B.³⁰ American law and that of many civil law countries is similar.³¹

28. Richard Posner, "Utilitarianism, Economics and Legal Theory," *Journal of Legal Studies* 9 (1979) 103, 128.

29. Rudolph von Ihering, "Zur Lehre von den Beschränkungen des Grundeigentümers im Interesse der Nachbarn," *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 6 (1863), 81, 94-96.

30. German Civil Code (*Bürgerlichesgesetzbuch*) § 906.

31. Restatement (Second) of Torts § 831 (1965). The rule that one can sometimes continue but pay compensation was not traditional but has been adopted in some jurisdictions. E.g.,

But how does one theoretically explain this limitation on the owner's rights? The Late Scholastics did not discuss the problem. In one of my articles, I did so in terms of commutative justice.³² The law is preventing one person from gaining at another's expense. Here, I can only sketch my reasons for thinking so. Imagine a community in which everyone is doing the same thing: for example, a rural community in which every farmer raises animals. The smell of each farmer's animals bothers his neighbors, and in this sense, imposes a cost on them. Nevertheless, because each is deriving the same benefit for himself by imposing the same cost on others, no one is a net gainer or loser. Now suppose a cement factory moves in and produces far more stench than the animals do. The company now derives a benefit from producing and selling cement which its neighbors don't share, and it does so by interfering with them in a way that they do not interfere with it. In this sense, it has gained at their expense. As a matter of commutative justice, it should not be allowed to do so.

That example may seem artificially easy because, if none of the farmers buys the company's cement, its activity does not benefit any of them. But suppose it did. The argument still holds as long as everyone is not benefitted and harmed in the same proportion. Suppose a railroad spur is built into the rural locality with a station and large livestock pens, and the noise of the trains and livestock awaiting shipment bothers the farmers who live near the tracks. The railroad gains, as do all the farmers who can now ship their produce, but the gain is secured at a disproportionate expense to those who live nearby. Thus some people gain at the expense of others. As a matter of commutative justice, the railroad should pay compensation. It will then adjust its fares to recover the amount it has paid. In the end, all the farmers will pay for the disturbance in proportion to the use they make of the railroad.

Economists would explain the matter differently. They once said that if the cement plant does not pay for the harm to the farmers, there will be an overproduction of cement and an underproduction of farm produce. Then, in 1960, Ronald Coase published his famous article "The Problem of Social Cost."³³ This article showed that if transactions costs are zero, meaning that the farmers can negotiate with the cement company costlessly, speaking with one voice, the outcome will be efficient whether or not the company is held liable. Either way, the cement plant will prevent the stench if and only if the

Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). Swiss Civil Code (*Zivilgesetzbuch*) § 684; Italian Civil Code (*Codice civile*) § 844. On French law, see François Terré & Philippe Simler, *Droit civil Les Biens* (5th ed., Paris: Dalloz, 1998), § 309.

32. James Gordley, "Immissionsschutz, Nuisance and Troubles de Voisinage in Comparative and Historical Perspective," *Zeitschrift für Europäisches Privatrecht* 2 (1998) 13.

33. *Journal of Law and Economics* 3 (1960) 1.

cost of doing so is less than the harm done to the farmers, and that is the efficient result. Even if the company is held liable for the harm, it will not prevent the stench if the cost of doing so is more than it will pay in damages. Even if the company is not held liable, the farmers will pay it to stop if the cost of doing so is less than the harm they will otherwise suffer. One consequence, however, is that if the stench is unendurable but the cost of preventing it exceeds what the farmers can pay, then the efficient result is that the farmers will be wiped out. But if all that matters is efficiency, it is not wrong, in principle, for the cement company to wipe out the farmers even if it does not compensate them for their loss.

That consequence offends most people's sense of justice. One way to avoid it is to point out, as Guido Calabresi has done, that the transaction costs are not zero. The company may be able to know the costs of prevention more cheaply than the farmers.³⁴ But is that all one can say? I cannot believe that Guido Calabresi would think it is all right if the farmers are wiped out even if the transactions costs were zero and there were no possible way to prevent the stench. And if his concern is really about justice, he should talk about justice rather than about the evils of over- or under-producing something like cement.

While I have been speaking about the law of unjust enrichment and property, when Aristotle wrote about commutative justice, he discussed what we call tort and contract. He said that in involuntary transactions, when one person has deprived another of resources, commutative justice requires that the victim recover the amount of his loss. In voluntary transactions, in which people exchange resources, commutative justice requires that they exchange resources of equivalent value so that neither gains at the other's expense.³⁵ These two types of commutative justice not only resemble our categories of tort and contract but are probably their lineal ancestor. Our categories derive ultimately from the Roman jurist Gaius. Earlier Roman jurists had discussed what we would call particular torts and contracts. Gaius was the first to use the general terms *contractus* and *delictus*.³⁶ Since he drew elsewhere on Aristotle, many scholars believe that he did so here as well.³⁷

34. Calabresi's arguments were addressed to the analogous problem of strict liability for accidents. See Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970), 135-403; Guido Calabresi, "Transactions Costs, Resource Allocation and Liability Rules: A Comment," *Journal of Law and Economics* 11 (1968) 67, 71-73.

35. Aristotle, *Nicomachean Ethics* V.ii 1130b-1131a; V.i 1131b-1132b.

36. *G. Inst.* 3.88.

37. Zimmermann, *The Law of Obligations*, 10-11; Max Kaser, *Das Römische Privatrecht* (2nd ed., Munich, C.H. Beck, 1971), 522; Anthony Honoré, *Gaius* 100 (Oxford: Clarendon

Be that as it may, writers in the Aristotelian tradition gave an explanation of tort and contract which I believe is better than any modern one. In tort, in Roman law, and in modern legal systems, the defendant who is held liable must restore the plaintiff to the position he was in before the tort was committed. Writers in the Aristotelian tradition had a reason: as a matter of commutative justice, the law should preserve the share of resources that belongs to each person.

One puzzle for these writers was that, according to Aristotle, commutative justice rectifies a situation in which one party gained at the other's expense.³⁸ He admitted that it seems odd to speak of a "gain" when one person has wounded another.³⁹ Why is it a gain? Aquinas answered: a "person striking or killing has more of what is considered as good, insofar, that is, as he fulfills his will, and so is seen to receive a sort of gain."⁴⁰ "To gain," then, means to fulfill one's will. He who harms another for his own ends "gains" by doing or getting something he wants, or by trying to do so. Therefore, he must pay compensation.

For Aquinas, this conclusion followed not only from Aristotle's theory of commutative justice but also from his theory of voluntary action. An action is voluntary if it is due to an internal principle. As mentioned, the internal principle by which a human being acts, and which makes his action that of a human being, is reason and will. An action is therefore involuntary if he does not know what he is doing or cannot choose, as when his body is moved by force.⁴¹ Aristotle concluded that he could not be praised or blamed for such actions.⁴² Aquinas concluded that he could not be liable for them.

Another puzzle concerned liability for negligence. As my late colleague David Daube showed, and as Aquinas himself noted, Aristotle was speaking only of intentionally inflicted harm.⁴³ But in the Roman law in force in much of medieval Europe, the plaintiff was also liable for negligence. Is negligence

Press, 1962); Helmut Coing, "Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts," *Zeitschrift Der Savigny-stiftung für Rechtsgeschichte, Rom. Abt.* 69 (1952) 24, 37-8.

38. In involuntary transactions, Aristotle said that "the judge tries to equalize things by means of the penalty," taking away the "gain" of one party and restoring the "loss" of the other. *Nicomachean Ethics* V.iv 1132a.

39. *Ibid.*

40. Thomas Aquinas, *In decem libros ethicorum Aristoteles expositio* lib. V, lectio vi, no. 952.

41. Aristotle, *Nicomachean Ethics* III.i; Aquinas, *Summa Theologiae* I-II, Q. 6, aa. 1, 5, 8.

42. Aristotle, *Nicomachean Ethics* III.i.

43. David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh: Edinburgh University Press, 1969), 131-56; Aquinas, *In decem libros ethicorum Aristoteles expositio* lib. V, lectio xiii, no. 1043.

voluntary? Aquinas answered that it is.⁴⁴ If an action is in no way voluntary it cannot be attributed to a person. But a negligent person fails to exercise prudence.⁴⁵ Prudence, like all virtues, is acquired by voluntary action, by taking the consequences of one's actions into account, and by doing so over and over until it becomes habitual. Of course, not all people are equally prudent even if they try equally hard to be. The Late Scholastics concluded that a person should be liable for failing to exercise the degree of prudence that he could be expected to possess.⁴⁶

There are three features of this account which I find, not only attractive, but necessary to a sound theory of tort law. First, it explains why the plaintiff should recover, and recover from the defendant. The defendant has profited—in the sense of getting what he wants, or seeking to do so—at the plaintiff's expense. Modern economic theories have difficulty with this point. Supposedly, the reason the defendant must pay is not to compensate the plaintiff but to give people an incentive to take an efficient level of precautions in the future.⁴⁷ Many features of tort law then become mysterious: for example, that when someone is killed, and is no longer around to be compensated, either no one recovers or the victim's family recovers a lower amount; that the incentives are provided by civil litigation, which is expensive precisely because it is concerned with reaching the proper result in an individual case rather than simply on average; and that people are allowed to buy liability insurance even though it changes their incentives. Moreover, as before, it seems strange to explain an ancient and now widely accepted rule by a recent insight about efficiency.

Second, according to this earlier approach, in principle, a person is liable in tort because he acted voluntarily. That is so both for reasons of commutative justice, and because only a voluntary act is attributable to a human being. In my view, this approach better explains fault-based liability than so-called "objective" theories of negligence. Oliver Wendell Holmes championed such a theory. He said that "if a man is born hasty and awkward"

44. Aquinas, *Summa Theologiae* II-I, Q. 68 a. 8.

45. More technically, negligence (*negligentia*) is a lack of solicitude (*sollicitudo*) or diligence (*diligentia*). Solicitude or diligence is the virtue that enables the alert, adroit performance of the "chief act" of prudence, *praecipere*, which could be translated as "to command" or "to execute." Prudence requires three "acts": to take counsel or to consider what should be done (*consiliari*); to judge or decide what should be done (*iudicare*); and to execute this decision (*praecipere*). See Aquinas, *Summa Theologiae* II-II, Q. 47, aa. 8-9; Q. 54, aa. 1-2; Q. 64, a. 8.

46. Ioannes de Lugo, *Disputationum de iustitia et iure* I, disp. 8, sec. 3 (Lyon: Laurentius Arnaud & Petrus Borde, 1670); Lessius, *De iustitia et iure*, lib. 2, cap. 7, dubs. 2 & 6; Molina *De iustitia et iure*, II, disp. 698.

47. Posner, *Economic Analysis of Law*, 179-83.

he should be liable for negligence because "his slips are no less troublesome to his neighbors than if they sprang from guilty neglect."⁴⁸ He correctly pointed out that a defendant cannot escape liability by claiming to have been born hasty and awkward. The standard in common and civil law is objective: the defendant must have acted as carefully as a "reasonable person."⁴⁹ But that is not surprising. A court has no way of telling whether the man was really born hasty and awkward, and if so, whether he could have brought himself up to the standard of others by forming better habits and taking extra care. But as soon as the defendant can point to a verifiable physical disability which prevented him acting as safely as a normal person—for example, he is blind—he is not held liable.⁵⁰ If Holmes were right, all that would matter is how dangerous he is. A person who transmits a contagious disease is dangerous, as is one who has fallen off a roof and is about to land on someone else. But he is not liable if he was not at fault.

In the third place, the earlier approach provides a better account of negligence. In one way, it is like our own. In law school, we explain negligence by the "Learned Hand formula." A person is negligent if he fails to take a precaution that was worth taking, given the burden of doing so, the risk of causing harm if the precaution is neglected, and the magnitude of the harm that might ensue.⁵¹ Writers in the Aristotelian tradition agreed that there

48. Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), 108.

49. E.g., Dan B. Dobbs, *The Law of Torts* (St. Paul: West, 2000), § 118 (American law); Peter Hanau in Kurt Rebmann & Franz-Jürgen Säcker, eds., *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (3rd ed., Munich: C. H. Beck, 1994), § 276, no. 78 (German law); Boris Starck, Henri Roland & Laurent Boyer, *Obligations*, vol. 1, *Responsabilité délictuelle* (4th ed., Paris: Litec, 1991), no. 307 (French law); Augusto Baldassari in Paolo Cendon, ed., *Codice civile annotato con la giurisprudenza* (Torino: Utet, 1996-97), no. 3 to § 2043 (Italian law).

50. See Restatement (Second) of Torts, § 283C (1965); Dobbs, *Torts* § 119 (American law); Hanau, *Münchener Kommentar* § 276, no. 85 (German law); Starck, Roland & Boyer, *Responsabilité délictuelle* no. 307 (French law); Lina Bigliazzi Geri, Umberto Breccia, Francesco Busnelli & Ugo Natoli, *Diritto Civile* (Torino: Utet, 1989), 3: 702 (Italian law). It is true that in some jurisdictions, children and insane people are held liable for behavior they could not help. But that is thin support for an objective theory of fault. The German and Italian Civil Codes say that such people are not at fault but will be held liable if it is equitable under the circumstances. German Civil Code (*Bürgerlichesgesetzbuch*) §§ 827-28; Italian Civil Code (*Codice civile*) § 2046-47. In the United States, children are not liable if they are engaged in an activity appropriate to their age. Restatement (Second) of Torts § 283A (1965). The insane are liable in all but two states. Dobbs, *Torts* § 120. Yet, unlike those at fault in the ordinary sense, in many states, they are not held to be contributorily negligent. *Ibid.* In France, children and the insane are held liable without qualification but they were not traditionally. Law of 3 Jan. 1968, now French Civil Code (*Code civil*) arts. 489-92 (insane are liable); *Cour de cassation, Assemblée plénière*, Decision of 9 May 1984, *Recueil Dalloz Sirey* 1984 Jur. 525 (children are liable).

51. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

needs to be a balancing. A prudent person weighs the magnitude of the good result he seeks against that of the evil one he avoids. As Aquinas said, "any prudent person will accept a small evil in order not to obstruct a great good."⁵² A prudent person must concern himself with probabilities, with "what happens in the greater number of cases."⁵³ Suppose a nurse put a baby in her own bed at night to stop it from crying, and, when they had fallen asleep, she rolled over and smothered the child. Was the nurse negligent? According to Cajetan, commenting on Aquinas, it depends:

[If] the bed is large and there is nothing else near it, the nurse is always accustomed to find herself in the same place and position in which she put herself to begin sleeping, and the implacability of the infant required it, she seems to be excused, because it is not reasonable when these things concur to fear the risk.⁵⁴

Modern economists agree that there must be a balancing. The difference concerns what is to be balanced. For them, it is not the magnitude of good and evil consequences but the magnitude of costs and benefits. Costs and benefits are determined by the amount that a person would be willing to pay, given the purchasing power he commands, to obtain or avoid what he likes or dislikes. Thus, according to Posner, if one person walks fast and smashes another's oranges, the court must judge how much the oranges were worth to the plaintiff, and how much walking fast was worth to the defendant, meaning, how much each would be willing to pay for what he wants.⁵⁵

The implications of that approach are at odds with most people's sense of justice. At the beginning of Dickens's novel *A Tale of Two Cities*, an aristocrat races his horses through the streets of Paris, injures a poor child, and inquires whether his horses have been hurt. Was that efficient? It would be if he could have compensated his potential victims in advance for their willingness to run this risk. What matters, to paraphrase Posner, is how much racing through the public streets was worth to the aristocrat, and how much safety was worth to those he endangers. If they are sufficiently poor, like the workers who ran huge risks before modern factory-safety legislation, and are willing to risk their safety for a small sum, the result would be efficient. I wonder if it even matters that the victim was a child. In the Aristotelian tradition, one would

52. Thomas Aquinas, *De Veritate* Q. 5, a. 4, ad 4, in *Opera omnia. Secundum impressionem Petri Fiaccadori Parmae 1852-1873, photolithographice reimpressa* (New York: Musurgia Publishers, 1948-1950), 9:5

53. Aquinas, *Summa Theologiae* II-II, Q. 49, a. 1; a. 8 ad 3.

54. Cajetan (Tomasso De Vio), *Commentaria* to Thomas Aquinas, *Summa Theologica* post Q. 64 a. 8 (Padua: Typografia seminarii, 1698).

55. Posner, "Utilitarianism, Economics and Legal Theory," 120.

say that the child might not yet have the prudence to make a proper choice. But if we do not speak about prudence, but only about preference satisfaction, and the child is willing to risk his life for a gumball, why not? Moreover, by the Kaldor-Hicks definition of efficiency, or Posner's definition of wealth maximization, the aristocrat need not actually compensate the victim. What matters is whether he would have been willing to do so if necessary. Running the child down without compensation would therefore be efficient if the aristocrat is sufficiently rich, sufficiently fond of racing, and sufficiently indifferent to human life. There is much to be said for the earlier approach.

Roman law and modern law sometimes impose strict liability—liability without fault. The Late Scholastics never found a good reason why, and that seems to be a difficulty with their approach. Nevertheless, as I have described elsewhere, I think that strict liability can be explained in terms of commutative justice, and indeed, in the same way as the liability of the cement plant for the stench it makes.⁵⁶ In American law, as a general rule, one is liable without fault for carrying on an abnormally dangerous activity.⁵⁷ Examples are blasting, and transporting or storing gas or explosives. The law of many civil law systems is similar in result.⁵⁸ In such cases, the defendant, to gain an advantage that is not shared by everyone, has imposed a risk on others that they do not impose on him. In this sense, he has gained at their expense. If he had not gained, then he would not be liable even if he endangered others: for example, if he were blind or carried a contagious disease. It may be, of course, that his activity also benefits his potential victims. For example, he is blasting to build a new tunnel for a highway, and everyone will benefit from the tunnel. But he should still be liable if each person's benefit is not proportional to each person's risk. Those who benefit the most from the tunnel are those who will use it most. Those who bear the greatest risk are those who live nearby. Thus some benefit at the expense of others. This explanation is like one advanced by George Fletcher who believes that those who create "non-reciprocal risks" should be liable.⁵⁹ The Aristotelian concept of commutative justice provides a reason why they should be.

We come, then, to contract. Here, as with property law, nineteenth-century jurists espoused a "will theory."⁶⁰ Jurists had known for centuries that

56. Gordley, "Tort Law in the Aristotelian Tradition," 151-57.

57. Restatement (Second) of Torts § 519 (1976)

58. See James Gordley, "Contract and Delict: Toward a Unified Law of Obligations," *Edinburgh Law Review* 1 (1997) 345, 350-51.

59. George P. Fletcher, "Fairness and Utility in Tort Theory," *Harvard Law Review* 85 (1972) 537, 542. Fletcher, however, tries to explain fault-based liability by the same principle.

60. A.W. B. Simpson, "Innovation in Nineteenth Century Contract Law," *Law Quarterly Review* 91 (1975) 247, 266; Gordley, *Philosophical Origins*, 161-229.

contracts are only binding on parties who consent to them. The nineteenth-century innovation was to define contract in terms of will or consent as though that were all that matters.⁶¹ The will of the parties was supposed to be the source of all of their obligations. There were two problems with this approach which still plague modern theories. First, modern legal systems, like medieval Roman law, do not enforce any terms the parties agree upon. They do not enforce terms that are sufficiently unfair. Second, they do not enforce only the terms that the parties agree upon. Most of the law of sales, leases, partnerships, and so forth, consists of rules by which the parties will be bound unless they say otherwise. If contracts are merely the product of the parties' will, why are they bound by those terms? This problem led Holmes and Williston to propose a so-called "objective" theory of contract. Contractual obligations are consequences that the law attaches to a contract whether the parties willed them or not.⁶² But then one needs to explain why the law attaches some consequences rather than others. And the question remains: Why, because the parties expressed their assent to certain terms, are they bound by others about which they never spoke?

In the Aristotelian tradition, it is not hard to see why a court will not enforce unfair terms: the concept of fairness belongs to the definition of contract. A contract of exchange is an act of commutative justice in which the value of what each party gives should equal that of what he receives, thereby preserving each party's share of purchasing power. This idea—that the parties should exchange at a just price—has been misunderstood so often that we must be clear on what it did not mean to writers in this tradition. They did not mean that each party personally placed the same value on the goods he gave as on those he received. If they had, the parties would not exchange. As Aristotle said, the shoemaker does not exchange with the shoemaker but with the house builder.⁶³ Nor did they believe that the just price of goods was an intrinsic or stable property of them like their color. The identified the just

61. E.g., Christopher C. Langdell, *A Summary of the Law of Contracts*, 2d ed. (Boston: Little, Brown, 1880), 1-21; Stephen Leake, *Elements of the Law of Contracts* (London: Stevens & Sons, 1867), 7-8; Frederick Pollock, *Principles of Contract* (London: Stevens & Sons, 1885), 1-9; Demolombe, *Cours de Code Napoléon*, 24: § 12; Léon Larombière, *Théorie et pratique des obligations* (Paris: A. Durand, 1857), 1: § 41; Laurent, *Principes de droit civil français*, 15: §§ 424-27; Georg Friedrich Puchta, *Pandekten* (Leipzig: Johann Ambrosius Barth, 1844), §§ 49, 54; Friedrich Karl von Savigny, *System des heutigen römischen Rechts* (Berlin: Veit, 1840), 3: § 134; Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (Frankfort-on-Main: Rütten & Loening, 1891), 1: § 69. See generally, Gordley, *Philosophical Origins*, 161-213.

62. Samuel Williston, *The Law of Contracts* (New York: Baker, Voorhis & Co., 1920), 2: § 615.

63. Aristotle, *Nicomachean Ethics* V.v 1133a.

price with the price on a competitive market⁶⁴ which, they knew, fluctuates from day to day and place to place in response to need, scarcity, and cost.⁶⁵ Thus, although they believed that neither party became richer or poorer at the moment of the transaction, they knew that either might find himself richer or poorer the next day.

As it happens, if markets work as economists say they do, the Late Scholastics were right. According to economists, market prices are as likely to go up tomorrow as to go down. If it were not so, the market price would have been bid up or down today. Consequently, an exchange at the market price does not change the value of either party's resources as of that moment, or, as an economist would say, it does not change their expected value.⁶⁶ It is therefore fair to each party in the same way as a bet at fair odds. That is the only kind of fairness one can achieve if prices are allowed to fluctuate, as the Late Scholastics knew they must. They knew that prices must reflect need, scarcity, and cost. One does not have to be a modern economist to see that if a price is fixed below cost, goods will not be produced, and that if it is fixed when goods are scarce, the power to purchase them will be redistributed to those who are quickest to queue up.

One can make a similar point about the terms that the law reads into a contract absent agreement by the parties. A term may impose a risk on one of the parties which, if it eventuates, will make him poorer. And yet if he is compensated for bearing this risk, he is no poorer at the time of transaction, and the other party no richer, in the way that a person who bets at fair odds is at that moment no poorer or richer. An example is the seller's liability to the buyer if he unintentionally sold defective goods. Aquinas said he should be liable.⁶⁷ Otherwise, commutative justice is violated because the buyer paid the price of sound goods and received defective ones. The Late Scholastic Luis de Molina said that the seller might disclaim liability provided he reduces his price.⁶⁸ The buyer would then lose if the goods prove to be defective because

64. As noted by John Noonan, *The Scholastic Analysis of Usury* (Cambridge, Mass.: Harvard University Press, 1957), 82-88; Raymond de Roover, "The Concept of the Just Price and Economic Policy," *Journal of Economic History* 18 (1958) 418.

65. See note 7, *supra*.

66. Indeed, in other contexts, the Late Scholastics described the concept much as we do: value is gain or loss discounted by the probability that it will occur. See James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore: Johns Hopkins University Press, 2001), 286-88; James Gordley, "The Rule Against Recovery in Negligence for Pure Economic Loss: An Historical Accident," forthcoming in Vernon Palmer & Mauro Bussani, eds., *Recovery for Pure Economic Loss in European Tort Law* (Cambridge: Cambridge University Press).

67. Aquinas, *Summa theologiae* II-II, Q. 77, a. 2;

68. Molina, *De iustitia et iure*, II, disp. 353.

the reduction in price would only reflect the probability of that event. But as of the moment of the transaction, the contract would be fair in the same way as a bet at fair odds. The price reduction would fairly reflect the risk that the buyer was assuming.⁶⁹

If the parties always contracted with their eyes open, understanding the risks that a contract placed on them, I think that every contract would be fair in the sense just described. It would place risks on the party who could bear them most easily and compensate him for the risk he bears. A party might be able to bear a risk more easily because he is less likely to suffer a loss, or because the loss is likely to be smaller, or because he can insure or self-insure against it better than the other party. If \$50 would compensate one party for bearing a certain risk, and it would take \$500 to compensate the other, the first party will agree to bear the risk in return for \$50. He would rather do so than pay the second party \$500, which is what the second party must be paid for bearing the risk if he has his eyes open.⁷⁰

We can draw two conclusions. First, the fair terms are not only the terms that parties with their eyes open would write for themselves. They are also the terms which fair minded parties would want the law to read into their contract absent express agreement. We can therefore see a link that eluded the nineteenth-century will theorists between the will of the parties and the terms that a court will read into their contract. In the vocabulary of the Scholastics, such terms are willed by the parties "implicitly." In their vocabulary, if you "explicitly" want something—for example, a car—you "implicitly" want whatever is necessary to make the car go—for example, a cam shaft—even if you have never heard of a cam shaft. You would want it if you understood its relationship to what you explicitly want. If you enter into a contract, you explicitly want what you expressly agree upon, but if you are fair-minded, you implicitly want whatever terms will make the deal a fair one. While you have not thought of these terms, you would accept them if you did and saw that they are fair. Of course, a party may not be fair-minded. He may want to enrich

69. I think Molina would have explained the matter just that way because the concept of expected value was one the Late Scholastics understood. See note 66, *supra*.

70. Posner believes that competition will produce terms like these, although he would not describe them as fair. "If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offer more attractive ones. The process will continue until the terms are optimal." Posner, *Economic Analysis of Law*, 126. I don't see why it is necessary to assume a competitive market. A monopolist will charge more but, if the other party has his eyes open, he gains nothing by throwing a risk on that party which he could more easily bear himself. I would expect the monopolist to bear the risk as long as he can charge more than his cost for doing so, and for roughly the same reason that he would put leather upholstery in the cars he is selling if customers are willing to pay more than his costs.

himself at the other party's expense. But that is an intention the law should thwart.

The second conclusion is that if a court can see that a contract in fact places a risk on the party who is less able to bear it, then it cannot be that this party was fairly compensated for running that risk. The other party would have preferred to run the risk himself rather than pay fair compensation. Elsewhere, I have argued that it is precisely in such cases that the law gives relief, in the United States, because the contract is "unconscionable," in Germany, because it violates *Treu und Glauben* or good faith, and in the European Union, because an EU directive protects consumers against terms which give a seller a disproportionate advantage.⁷¹

Thus, the Aristotelian tradition can explain straightforwardly why the law should read terms into contracts which do not enrich one party at the other's expense, and why it should refuse to enforce terms which do so. Once again, it is harder for a modern economist to find an explanation. He would agree that the terms to be read into a contract are those the parties would have chosen for themselves, and that these are the terms that place risks on the party who can most easily bear them. But his reason is not fairness. His reason is that somehow a cost is avoided. Posner points out that it might be expensive for the parties to think of all of these terms in advance, and cheaper for them to let the courts read them in afterwards.⁷² The reason courts give relief when terms are unfair, I suppose, is that otherwise one of the parties would have been put to extra expense acquainting himself with the risks and burdens the contract imposes on him, and then objecting.

If this explanation is correct, then it does not matter what terms a court reads into or strikes out of a contract unless the parties would otherwise have incurred extra expenses reading or drafting it. But often they would not have done so. It is almost a cliché that most people who contract do not expect to end up in court. The problem that lawyers call the "battle of the forms" arises because parties have a habit of signing each other's contracts even if the terms conflict. Moreover, even if it occurred to a court that its decision would not affect the costs of reading and drafting a contract, it would hardly be uncertain what to do. It would behave no differently. And finally, once again, I do not think one can explain what courts have done for centuries by recent insights about efficiency supplied by those who are committed to finding economic explanations of anything that needs to be explained.

Thus far I have spoken about fairness, which is easier to explain in the Aristotelian tradition than by either nineteenth-century will theory or modern

71. Gordley, "Contract Law in the Aristotelian Tradition," 318-23.

72. Posner, *Economic Analysis of Law*, 104-05.

economics. But suppose we ask the larger question, why do we enforce contracts at all? The will theorists, curiously enough, did not have an answer. The contract was enforceable because it was the will of the parties. They gave no reason why the will of the parties should be respected. As Véronique Ranouil has said, the contract was enforceable because it was the contract.⁷³

Those who take an economic approach would say that the contract is enforceable because the result is efficient, and they define efficiency in terms of preferences. Once, they thought one could measure the intensity of preferences in units called *utils*. As Paul Samuelson noted fifty years ago, however, many economists "have ceased to believe in the existence of any introspective magnitude or quantity of a cardinal, numerical kind."⁷⁴ They merely assume that a person can rank order his preferences: he prefers A to B, and B to C. As Samuelson explains, they define a "preference" as that which a person actually chooses. "Thus," he observed, "the consumer's market behavior is explained in terms of preferences, which are in turn defined only by behavior."⁷⁵

The question then arises, why is the satisfaction of preferences supposed to be a good thing? Is it because, most of the time, people are the best judges of what genuinely makes them the better off? What, then, do we mean by genuinely better off? If we say to be better off is to live a more fulfilled human life, and that people have an ability to judge what contributes to one, we are back to the Aristotelian tradition.

Many economists, however, seem to think that preference satisfaction is good just because a preference is satisfied. It doesn't matter what the preferences are. That is an odd claim. Just how odd is illustrated by a story which I admit I have told more than once. A man's yacht was sinking. He radioed his position to the coast guard and was told that for various reasons, they could not reach him for six days. He got into a lifeboat with a six pack of beer, which was all he had to drink, and he knew (never mind how) that if he drank only one can a day he would live, but if he drank the beer any faster he would die. As it happened, he drank four cans the first day, two the

73. Véronique Ranouil, *L'Autonomie de la volonté: naissance et évolution d'un concept* (Paris: Presses universitaires de France, 1980), 72, quoting Eduard Gounot, *Le principe de l'autonomie de la volonté en droit privé: contribution à l'étude critique de l'individualisme juridique* (thesis, Paris, 1912), 129.

74. Paul Anthony Samuelson, *Foundations of Economic Analysis* (New York: Atheneum, 1976), 91.

75. Samuelson, *Foundations of Economic Analysis*, 91. Similarly, Leff objects that it is "definitionally circular" to say "what people do is good, and its goodness can be determined by what they do." Arthur Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," *Virginia Law Review* 60 (1974) 451, 458.

second, and was picked up dead on the sixth. I have asked six leading economists, including a Nobel prize winner, whether this result is efficient. Five answered yes. The sixth, the Nobel prize winner, said that it couldn't happen.

This story indicates the distance that separates these economists' concept of efficiency or welfare from any normal idea of what makes people better off. Like the man in the lifeboat, a person who gets what he chooses may not be better off in the normal sense. But these economists conceive of efficiency or welfare in such a way that, by definition, it is enhanced by whatever a person chooses. Why, however, should we suppose that it is good to enhance efficiency or welfare so defined?

In his seminal work *On Ethics and Economics*, Sen claimed that "the distancing of economics from ethics has impoverished welfare economics, and also weakened the basis of a good deal of descriptive and predictive economics."⁷⁶ As part of his program for a rapprochement, Sen distinguishes a person's "well-being" from what makes a person feel happy or what he desires or happens to value. "Well-being" is truly valuable. We need not suppose that "whatever a person happens to value [is] valuable (i) unconditionally, and (ii) as intensely as it is valued by the person."⁷⁷

Well-being is ultimately a matter of valuation, and while happiness and the fulfilment of desire may well be valuable for the person's well-being, they cannot—on their own or even together—adequately reflect the value of well-being. 'Being happy' is not even a valuational activity, and 'desiring' is at best a consequence of valuation. The need for valuation in assessing well-being demands a more direct recognition.⁷⁸

There is, then, a life to be lived which is truly of value, and an ability to see what that life entails, although we can be mistaken. It is not an accident that Sen began his book by quoting Aristotle to the effect that there is an "end of man" which politics must serve, and that it serves that end by making use of "the rest of the sciences, including economics."⁷⁹ He is closer to the Aristotelian tradition than the small circle of modern ideas which he wishes to escape.

If Sen is right, we must escape that circle to understand economics. If I am right, we must do so to understand law. Fortunately, to escape, we have the help of thinkers who, over the centuries, understood the moral foundations of

76. Amartya Sen, *On Ethics and Economics* (Oxford: Basil Blackwell, 1987), 78.

77. *Ibid.*, 42.

78. *Ibid.*, 46.

79. *Ibid.*, 3.

economy and law more deeply than our contemporaries but in ways that have become unfamiliar.

