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What Might Contract Theory Be

Gregory Klass*

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Forthcoming in Understanding Private Law: Essays in Honour of Stephen A. Smith (E. Fox-Decent, J. Goldberg & L. Smith eds., Hart)

The first question any legal theorist should ask is: ‘What the hell am I doing here?’ What is the point of doing legal theory? What counts as success in the project?

Among the many virtues of Stephen Smith’s 2004 *Contract Theory* is its first chapter, which explains what Smith seeks to do with his theory of contract. Smith informs the reader that he will provide an interpretive theory.

Interpretive theories aim to enhance understanding of the law by highlighting its significance or meaning. . . . [T]his is achieved by explaining why certain features of the law are important or unimportant and by identifying connections between those features – in other words, by revealing an *intelligible order* in the law, so far as such an order exists.¹

More specifically, Smith will seek an interpretation of contract law that satisfies four criteria: fit with the existing law, internal coherence, moral attractiveness, and transparency to legal actors. Chapter One discusses these four criteria, distinguishes several versions of each, identifies the versions Smith will employ, and explains why. Few contract theories begin with so comprehensive a discussion of method.

This chapter examines Smith’s approach to contract theory through a close reading of his explanation of these four goals. Part One argues that Smith’s account of them is shaped in part by a picture of the theorist as spectator. For Smith, the legal theorist observes the drama of the law without having a role in it. Though the picture of theorist as spectator influences Smith’s account, I suggest it also fails to fully support it. In fact, the picture generates some tensions amongst Smith’s four criteria and leaves some gaps in the argument.

Part Two suggests an alternative picture, one that emphasizes a possible continuity between legal practice and legal theory. Such an approach can, like Smith’s, be interpretive. And its guiding principles can

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¹ Stephen A. Smith, *Contract Theory* (OUP 2004) 5.

include the criteria Smith identifies. But the reasons for and implementations of those criteria differ from what one finds in Smith.

1. The Legal Theorist as Spectator and the Goals of Interpretive Theory

The English word ‘theory’ comes from the Greek ‘θεᾶσθαι,’ to behold, contemplate or examine. Theory, one might say, takes a step back from its object to observe it from a distance. ‘θεᾶσθαι’ is also the root of ‘theater.’ If all the world is a stage, one might think of the theorist as a spectator working to make sense of the drama.

This picture of theorist as spectator is a familiar one. Consider Copernicus’s explanation of the paths of the planets through the night sky. People had been watching the planets for millennia, but without a theory it was difficult to make sense of their trajectories. (‘Planet’ derives from ‘πλάνης,’ meaning wanderer.) Copernicus’s suggestion that the Earth and other planets followed elliptical paths around the Sun made new sense of those observed facts—better sense, it turned out, than Ptolemy’s system of deferents, epicycles, and equant points.² In constructing his theory, Copernicus did not interact with the planets. Nor did his theory change their courses. He observed them from a distance, saw patterns in their movements, and proposed an explanation that rendered those movements intelligible.

There are important differences between explanations of the planets and explanations of a social institution like the law. A mechanistic explanation can render the movement of the planets fully intelligible. Additional explanations, like a deeper purpose or intention to their movements, are not only superfluous but suspect. Like the planets, people and social institutions are natural phenomena subject to the laws of physics. But mechanistic explanations of them are incomplete. Humans also act for reasons, with purpose, in accordance with rules. Their behavior and the institutions they create can be rendered intelligible in a way the planets cannot be.

Anglo-American legal theorists often make a related point by saying that reductive causal and incentive-based theories of law are unable to account for the *internal point of view* of participants in legal practice. The phrase is from H.L.A. Hart’s 1961 *The Concept of Law*. It refers, roughly speaking, to the perspective of participants in the law who accept and use legal rules to guide their behavior.³ Smith emphasizes the importance of the

² See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed., Chicago 1970) 68-69.

³ ‘[F]or it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the “external” and the “internal points of view.”’ H.L.A. Hart, *The Concept of Law* (2d ed., OUP 1994) 89.

internal point of view in his interpretive theory of contract law. 'To understand a human practice—to make it intelligible—it is necessary to understand what the participants in the practice think they are doing. In other words, it is necessary to understand how the practice is regarded internally.'⁴

What is the internal point of view on a social practice or institution? One finds subtle shifts and some ambiguities in Hart's use of the term, and scholars have since assigned various meanings to it depending for example on whose point of view counts as internal and what practical commitments the point of view entails.⁵ Smith does not fully explain what he means by the internal point of view. I will say more about his conception of it below. For the moment I limit myself to two observations.

First, the internal point of view for Smith, like for Hart, is the perspective not of all legal subjects, but of legal officials acting and importantly speaking in their official capacity. For example:

Because it is the public institution of the law, and not the inner minds of legal actors, that a legal theory seeks to interpret, the theorist is interested in how legal actors explain what they are doing when they are acting as legal actors. The relevant evidence of this understanding is found in judicial reports, parliamentary debates, and lawyers' arguments in courts.⁶

Second, a theory that seeks to explain the internal point of view need not itself adopt the internal perspective. A theorist can describe the point of view of participants in a practice without becoming a participant. Although Hart maintained that a complete explanation of the law must account for the internal point of view, Hart's theory is not guided by those rules and does not assume their legitimacy. Hart the theorist stands outside the practice and looks in.

Smith and Hart are doing very different projects. Whereas Hart seeks to construct a general theory of law, Smith aims to provide a theory of an existing area of law: the common law of contract. Nonetheless, Smith adopts an outsider perspective akin to Hart's. That perspective can be seen in Smith's explanation of his four criteria for assessing interpretive theories. It also, I will argue, generates in some gaps and tensions in his account of them.

⁴ Smith (n 1) 13-14.

⁵ See, e.g., Scott J. Shapiro, 'What is the Internal Point of View?' (2006) 75 Ford L Rev 1157; Charles L. Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 Va L Rev 1203.

⁶ Smith (n 1) 14.

A. Morality

Smith's picture of theorist as spectator appears most clearly in his account of the morality criterion. Smith argues that an interpretive legal theory is to be preferred if it shows the law to be morally justified. Why seek out interpretations of the law as morally justified? Because, Smith argues, moral justification accounts for a key aspect of the internal point of view: that 'the law is understood internally as a *legitimate* authority.'

One of the fundamental features of law's self-understanding is that it presumes a close link between law and morality. More specifically, laws are understood, from the inside, as providing morally good or justified reasons to do what the law requires. From the internal perspective, it is considered *wrong*, and not merely foolish, irrational, or contrary to self-interest to disobey the law.⁷

To make sense of the law's self-understanding as a legitimate authority, a theory of law must be able to explain how legal actors could believe laws to be morally justified.

Given this reason for the morality criterion, an interpretive theory need not show that the law *in fact is* morally justified. Legal actors might be wrong in their belief. This leads Smith to reject a strong version of the morality criterion, which 'holds that a theory of law is better if it portrays the law in a morally appealing light, that is, if it portrays the law as morally justified.'⁸ Smith's argument suggests that participants who accept the law's claim to authority adhere to something like the strong morality criterion, for they understand it to be a legitimate authority. But the theorist is not a participant, and so need not take the law to be morally justified. '[A] good legal theory should explain the law in a way that shows how the law *might be thought to be* justified even if it is not justified.'⁹ Smith's moderate morality criterion is of a piece with his picture the theorist as standing outside legal practice.

Despite this understanding of the theorist as spectator, Smith rejects a weaker morality criterion according to which 'it is enough that a theory explain why legal actors might claim, *sincerely or not*, that the law is morally justified.'¹⁰ Smith rejects systematic insincerity. 'It is just not plausible to suppose that legal actors are involved in a mass conspiracy.'¹¹ I will call this the 'sincerity postulate.' The sincerity postulate does not follow from other elements of Smith's theory. It is an empirical claim used to rule

⁷ Smith (n 1) 15.

⁸ Smith (n 1) 13.

⁹ Smith (n 1) 28.

¹⁰ Smith (n 1) 13 (emphasis added).

¹¹ Smith (n 1) 16.

out a hypothesis otherwise consistent with the picture of theorist as spectator.

Smith's reliance on the sincerity postulate tells us something about his conception of the internal point of view. The postulate is a claim about the plausible attitudes of actual judges, legislators, and other legal officials in Anglo-American legal systems. This empirical conception of the internal point of view of a piece with Smith's aim: to provide a theory not of contract law generally, but of the contract law we theorists in common law jurisdictions find in our legal systems. It also marks a difference between Smith's and Hart's projects. Whereas Hart is interested in the range of theoretically possible attitudes that might be associated with law's claim to authority (which might include systematic insincerity), Smith's concern is the attitudes of the actual legal officials who have created and apply the common law of contract.

One final point about Smith's morality criterion: Even granting Smith the sincerity postulate, his argument for the morality criterion relies on a non sequitur. Sincerity requires that legal officials attribute law moral authority. They must believe that a valid law imposing a legal duty to *A* gives persons subject to it a new moral reason to *A*. But a belief that the law has moral authority need not be accompanied by a belief that the substance of any given law, or even of an entire domain of law, is morally justified. Consider absolutist theories of the divine right of kings.¹² If one believes the law's moral authority derives from the sovereign's divine authority, the fact that the sovereign has issued a law suffices render it morally authoritative. No further justification, moral or otherwise, is required. Smith needs a theory of the law's claim to moral authority to get from his premises that the law claims moral authority and that legal actors sincerely believe it to be authoritative to his conclusion that those actors must believe that the rules of contract law are in substance morally justified. Smith does not provide such a theory. This is a gap in his argument for the morality criterion.

B. Transparency

Like his argument for the morality criterion, Smith's argument for transparency is premised a claim that belongs to the internal point of view. Despite that similarity, however, the two arguments are in tension with one another.

The law is transparent, in Smith's usage, 'to the extent that the reasons legal actors give for doing what they do are their real reasons.'¹³ Just as the law claims moral authority, Smith argues, the law claims transparency.

¹² See Glenn Burgess, 'The Divine Right of Kings Reconsidered' (1992) 107 Eng Hist Rev 837.

¹³ Smith (n 1) 24.

That law is understood, *from the inside*, as transparent is clear: law-makers, and in particular judges, give reasons for acting as they do and those reasons are presented as their real reasons. The report of a legal decision is not presented as mere window dressing; it is meant to explain why the plaintiff did or not win.¹⁴

The law's claim to transparency imposes an additional constraint on legal theory: 'to *account for* law's claim to be transparent a legal theory of the common law must, *inter alia*, take account (in a way yet to be specified) of the reasons that judges give for their decisions.'¹⁵

Smith identifies three ways a theory might take account of the reasons judges give for their decisions. A theory satisfies a strong transparency criterion if its explanation 'of the law will support the explanation that legal officials give.'¹⁶ A theory satisfies a moderate transparency criterion if it 'explain[s] the law in a way that shows how legal officials could sincerely, even if erroneously, believe the law is transparent.'¹⁷ A theory satisfies a weak transparency criterion if it 'explain[s] why legal actors might claim, sincerely or not, that the law is transparent.' As with his morality criterion, Smith deploys a Goldilocks argument for moderate transparency. The strong transparency criterion is too demanding. The 'linking of intelligibility and truth seems unwarranted. A false statement or belief may be perfectly intelligible so long as a plausible explanation is given for holding that statement or belief.'¹⁸ The weak criterion is not demanding enough. It allows for the theories that legal officials systematically hide the real reasons for their actions, violating the sincerity postulate. Having eliminated the alternatives, we are left with a moderate transparency criterion.¹⁹

There is, however, a difference between Smith's arguments for his morality and for his transparency criteria. The strong morality criterion is rejected because legal actors might be mistaken about the requirements of morality. They might believe the law to be morally justified, though in fact it is not. Smith rejects the strong transparency requirement because 'the link of intelligibility and truth is unwarranted.' But in the case of transparency, the possible mistake is to believe that the law is transparent when in fact it is not. It is for legal officials to believe that the reasons they give for a legal decision are the real reasons for it, when in fact they are not. The moderate transparency criterion rests on the idea that legal officials might be mistake about the actual reasons for the decisions they reach.

¹⁴ Smith (n 1) 25.

¹⁵ Smith (n 1) 25.

¹⁶ Smith (n 1) 25.

¹⁷ Smith (n 1) 25.

¹⁸ Smith (n 1) 27.

¹⁹ For a critical account of this form of argument, see Richard H. Gaskins, *Burdens of Proof in Modern Discourse* (Yale 1992) 205-39.

The twentieth century is replete with theories that people often do not understand the real reasons for their actions. Paul Ricoeur, in his book on Freud, Marx, and Nietzsche, labels a familiar category the ‘hermeneutics of suspicion.’²⁰ (Smith, somewhat confusingly, calls these ‘functionalist explanations.’²¹ I will use Ricoeur’s term.) The hermeneutics of suspicion does not take the meaning of the object of interpretation at face value but looks behind it for hidden causes or meanings. If the object of interpretation is a literary text, the interpreter finds a meaning other than the one its author or even contemporary audience intended or understood. If it is a social practice, the interpreter looks for causes, functions, or other explanations that participants in that practice might not recognize, accept, or even comprehend—such as the collective unconscious, the material conditions of society, or the will to power. The hermeneutics of suspicion seeks to unmask or demystify. The goal is to ‘clear the horizon for a more authentic word, for a new reign of Truth, not only by means of a “destructive” critique, but by the invention of an art of *interpreting*.’²²

Although his moderate transparency criterion makes room for a legal hermeneutics of suspicion, Smith wants nothing to do with such explanations. He deploys two arguments against them. First, ‘it seems implausible, in light of their training and sophistication, that all or even many judges are in the grips of a collective false consciousness.’²³ Like the sincerity postulate, this argument makes on an empirical claim. Call it the ‘self-awareness postulate’: Legal officials know the real reasons for which they act. Smith’s second argument is a version of a classic riposte to philosophical skepticism: if false consciousness is pervasive, it also infects the theorist who attributes it to legal actors, rendering the theorist’s own claims suspect.²⁴

Both arguments strike me as ad hoc, and neither as especially convincing. (Query how the self-awareness hypothesis squares with Smith’s rejection of strong transparency.) In addition to these arguments, Smith

²⁰ Paul Ricoeur, *Freud and Philosophy. An Essay on Interpretation* (Yale 1970) 32-36.

²¹ Smith (n 1) 29 (‘[A] “functionalist” explanation . . . supposes that legal actors are controlled by external forces that are typically unacknowledged and unknown.’)

²² Ricoeur (n 20) 33.

²³ Smith (n 1) 28. See also *ibid* 20 (‘Given the number, variety, and sophistication of the actors involved in making law’s claims to authority, the suggestion that these actors have all wildly misunderstood the reasons with which they explain the law is *prima facie* implausible.’)

²⁴ Smith (n 1) 20 (‘If the hidden forces that drive the development of the law work as successfully and covertly as the explanation suggests, the obvious question is why are those defending the explanation—and everyone else for that matter—not subject to the same or similar types of unconscious forces. Functionalism, at least in its stronger versions, is self-defeating.’), 28 (‘[I]f it were plausible, then it seems likely that legal theorists would be in the grip of similar forces.’)

suggests that the hermeneutics of suspicion fail to render the law intelligible.

Insofar as a theorist's explanation of the law reveals the law to be based on concepts that are external to legal reasoning—on concepts, in other words, that are not just different from those that the judge did use but from those that the judge *might* have used—then the law's belief that its reasons were real reasons is not just mistaken, but conceptually confused (and hence not intelligible).²⁵

This, I believe, is the root of Smith's objection. It relies, however, on a narrow understanding of what it means to render a practice intelligible. If a toddler has a meltdown in a supermarket and the parent says to a passerby, 'She missed her nap this afternoon,' the parent has rendered the toddler's behavior intelligible—whether the toddler would accept the explanation or not.²⁶ Legal officials are not toddlers. Among other things, they have a greater capacity to reflect on the reasons for their actions. It does not follow, however, that they always know the full explanation of their decisions. Historical examples like coverture, colonialism, slavery, and apartheid suggest it would be Panglossian to rule out the possibility of shared false consciousness amongst sincere legal officials. The hermeneutics of suspicion might not be the whole story in legal theory. But it is unduly optimistic to exclude it tout court.

Regardless of whether Smith's argument against the hermeneutics of suspicion is convincing, his decision to rule it out transforms his moderate transparency criterion into something stronger. Whereas originally the criterion required 'explain[ing] law in a way that shows how legal officials could sincerely, even if erroneously, believe the law is transparent,'²⁷ the goal is now to 'explain the law using concepts that are recognizably "legal" . . . even if those concepts are not the same legal concepts that were employed by judges.'²⁸ I will call this the 'moderately strong transparency criterion.' Smith calls explanations that satisfy the moderately strong transparency criterion 'internal' or 'legal' explanations. Although the theorist remains a spectator who stands outside and looks in on legal practice, the theorist's explanations must be in a vernacular of the practice. The best theory of contract law will provide an explanation that legal actors could accept, even if it is not the explanation they would give.

To construct such a theory, Smith needs to be able to identify what does and does not count as a legally acceptable explanation, what distinguishes 'internal' legal arguments, which are on the table, from

²⁵ Smith (n 1) 29.

²⁶ See 'Big brother tells sister she needs nap' (Jan 7, 2015) <https://youtu.be/A-Vn_fmKcuc> accessed 18 July 2023.

²⁷ Smith (n 1) 25.

²⁸ Smith (n 1) 29.

'external' legal arguments, which are off it. Here Smith recurs to the judgments of actual legal officials. '[A]n explanation is legal if it is recognized as such by the consensus of those familiar with the law.'²⁹ This rests on another empirical claim, the 'vernacular postulate': There exists a consensus among those familiar with the law regarding what counts as a legal argument and what does not, a consensus within the legal community regarding the legal vernacular. Like the other postulates I have identified, the vernacular postulate is an empirical claim that might be true or false depending on the legal system.

One final comment on Smith's moderately strong transparency criterion. Smith's moderate morality criterion holds that an interpretive theory should look for the actual reasons of actual legal officials, even if they are based on a moral mistake. Smith's argument for his moderately strong transparency criterion, in distinction, holds that an interpretive theory should not limit itself to the actual reasons of actual legal officials—the reasons sincere legal officials give for their decision. Moderately strong transparency permits the theorist to seek reasons that are better than those given by officials. Unlike Smith's moderate morality criterion, Smith's moderately strong transparency criterion allows for a gap between the explanations sincere legal officials give for the law and the explanations the best interpretive legal theory gives for it.

C. Coherence

Smith's argument that a theory should render the law coherent does not rest on the law's claims and a desire to explain the internal point of view. A minimal coherence requirement follows directly from the goal of interpretive theory: to render the law intelligible. 'Consistency in the sense of non-contradictoriness is a basic requirement of intelligibility.'³⁰

Smith considers whether legal theory should seek a stronger form of coherence. Maximally a theory might seek to show that 'all [contract law's] constituent parts flow from a *single* master idea or principle.'³¹ He rejects maximal coherence as being unnecessary to render contract law intelligible. 'Unless one assumes (as few people do) that all reasons for acting can, in the end, be reduced to a single master principle, it is accepted as perfectly intelligible, indeed appropriate, that people act for different reasons in different situations.'³²

Smith does not, however, recur to minimal of coherence, or non-contradiction. Instead, he again aims for a middle way. If perfect unity is too much to ask for, 'a good theory must show that *most* of the core elements of contract law can be traced to, or are closely related to, a single

²⁹ Smith (n 1) 30.

³⁰ Smith (n 1) 11.

³¹ Smith (n 1) 11-12.

³² Smith (n 1) 12.

principle.³³ This coherence is not maximal. Other principles might work around the edges. But it is relatively strong: an interpretive theory should seek out a single principle that explains as much of contract law as possible.

Smith does not explain why this relatively strong form of coherence is preferable to the minimal requirement of non-contradiction. He does not suggest, for instance, that contract law claims to flow from a single principle. Nor does he identify reasons to expect such unity in a body of law built by many hands through the resolution of individual disputes over the course of many centuries. And given Smith's outsider perspective, it is not obvious why he would want to rule out *ab initio* the possibility that the common law of contract law has more than one aim or is justified by multiple, non-contradictory principles. This is another gap in Smith's account: Smith does not explain the reasons for his relatively strong coherence criterion.

D. Fit

The fit requirement follows directly from Smith's picture of the theorist as spectator. According to that picture, the job of a theorist is to explain the observed data. Copernicus's theory of the movement of the planets ultimately beat out Ptolemy's not because it was more elegant, but because sixty years later Galileo pointed his telescope at the sky and provided additional data that fit Copernicus's theory and not Ptolemy's.³⁴ 'A theory "fits" if it is consistent with, and supported by, the relevant facts.'³⁵ To qualify as an interpretation of the law, a theory must to some degree fit the legal data. The better the fit, the better the theory.

This fit requirement generates a new question for Smith: Fit with what? Which legal facts should a theory of contract law should aim to interpret and explain? The spectator theorist needs to know which play to watch.

A theory of contract fails the fit criterion if it rejects as an exception or as misclassified so much of contract law that those familiar with the law would not recognize what remains as 'contract' law (though such an account might qualify as a good theory of *something else . . .*).³⁶

Smith's answer is that an interpretive theory of contract law should fit with what legal sophisticates understand the core elements of contract law to be.

³³ Smith (n 1) 13.

³⁴ Thomas S. Kuhn, *The Copernican Revolution: Planetary Astronomy in the Development of Western Thought* (Harvard 1957) 219-28.

³⁵ Smith (n 1) 7.

³⁶ Smith (n 1) 10.

Contract law—pre-interpretation—is rightly regarded as that which people familiar with the law (lawyers, judges, legal scholars) take to be contract law. The parameters of contract law, and also the identification of what is central and what is peripheral to contract law, are determined by the consensus of those familiar with the law.³⁷

Again Smith's approach relies on an empirical claim: that there is a consensus amongst legal sophisticates regarding the core of contract law. Call this the 'doctrinal core postulate.'

The doctrinal core postulate is of a piece with Smith's attachment to a strong coherence criterion. A commitment to seeking a single principle to explain contract law's core assumes that 'contract law' is not just a convenient label for a loosely related family of rules but a unified whole. The assumption of unity suggests that a good theory of contract should not be expected to fit the rules of tort, property, unjust enrichment, or other areas of law. Fit must be fit with that which counts as contract law.

2. The Legal Theorist as Participant

I have taken a deep dive into Chapter One of *Contract Theory* because Smith's answer to the question, 'What is contract theory?' is so thoughtful, thorough, and forthright. Whether one agrees with him or not, one cannot help but learn from Smith's careful explanations of what he means by 'interpretive theory,' his criteria for assessing interpretations of contract law, and his reasons for choosing them.

Although I have doubts about several of the moves in Chapter One, I am sympathetic to Smith's idea of interpretive legal theory. This Part suggests modifications based on a different understanding of the role of the legal theorist. Whereas Smith views the legal theorist as spectator, a contract theorist might instead understand themselves to be in conversation with legal officials and, in this way, to be a participant in legal practice. This alternative picture of contract theory, I argue, avoids some of the gaps and tensions in Smith's account and suggests some revisions to his four criteria.

Contemporary contract law poses any number of difficult doctrinal questions. When if ever should the parties' intent to contract be a condition of contractual liability? Is the proper test for good faith a subjective or an object one? What precontractual duties do parties owe one another and what consequences should the law attach to their violation? When if ever should parties' contractual obligations turn on a writing's plain meaning? How should courts take account of unread terms in standard consumer

³⁷ Smith (n 1) 9.

contracts? When should a court grant injunctive relief? Do some breaches call for exemplary damages? What is up with promissory estoppel?

Different common law jurisdictions, including different US states, provide different answers to these and other doctrinal questions. The existence of difficult doctrinal questions suggests two things. First, the fact of doctrinal divergence amongst common law courts is part of the data for an interpretive theory of the common law of contract. It too requires explanation. I return to this point below. Second, answering such questions often requires recurring to the level of theory. To decide whether or when liability should turn on parties' intent to contract, we would want to know whether contract law is best understood as a power-conferring or a duty-imposing rule. Decisions regarding the enforcement of standard terms in consumer contracts turn in part on the scope and meaning of freedom of contract, on the scope of parties' responsibility for their decisions, and on their responsibilities to one another. To decide whether specific performance should be more readily available, we might want to know whether contract law is guided by the principle *pacta sunt servanda*, by considerations of efficiency or party preference, or by something else. Theoretical questions are intrinsic to legal practice.

Viewing contract theory as continuous with the practice of courts and other legal officials provides theorists a new reason to take an interpretive approach, especially in legal domains shaped in significant part by judicial decisions. The law's commitment to *stare decisis* entails that every judicial decision is answerable in part to the best interpretation of decisions that went before. To use a well-worn metaphor, common law judges are like the sailors on Neurath's ship: responsible for replacing individual planks as conditions require, but always in a way that fits with the current design of the whole and that keeps the ship afloat.³⁸ Interpretive theories of the common law look for basic design principles that judges and even legislatures should use to maintain, repair, and extend the common law.

This picture of the contract theorist as participant in the shared project of using available materials to achieve the best possible law of contract suggests rethinking of Smith's four criteria for assessing interpretive theories of contract.

The morality criterion receives a new argument and new content. If contract theory is continuous with the practice of legal officials, we have a new reason to prefer morally attractive explanations of contract law: to

³⁸ 'We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom. Where a beam is taken away a new one must at once be put there, and for this the rest of the ship is used as support. In this way, by using the old beams and driftwood the ship can be shaped entirely anew, but only by gradual reconstruction.' Otto Neurath, 'Protocol Statements' in *Philosophical Papers 1913-1946* (R.S. Cohen & M Neurath eds, Reidel 1983) 91, 96.

arrive at the best contract law possible. When courts consider doctrinal change—whether because the question is open, because existing authorities are in conflict, or because a rule seems ripe for change—they look to contract law’s *raisons d’être*, to considerations of justice, to whether a possible rule will benefit or harm future parties, to what the rule might signal, and so forth. The more morally compelling a theory’s explanation of contract law, the better its answers to such doctrinal questions. The practical theorist need not take a (possibly misguided) detour through law’s claim to authority to explain the morality criterion.

This practical argument entails replacing Smith’s moderate version of the morality criterion with a stronger one. From the perspective of practice, the goal of contract theory is not merely to ‘explain the law in a way that shows how legal actors could sincerely, even if erroneously, believe the law is morally justified.’³⁹ The goal is an explanation that shows that the law is or might be morally justified. The goal is to provide the most morally attractive account of contract law possible.

The strong morality criterion means that the theorist is no longer exclusively interested in the reasons legal officials give for their decisions. This shift aligns the morality criterion with Smith’s moderately strong transparency criterion, which seeks explanations that ‘use concepts that are recognizably “legal” . . . even if those concepts are not the same legal concepts that were employed by judges.’⁴⁰ The theorist who is a participant in the legal practice aims *inter alia* to address to legal officials arguments of the form: ‘You think the best grounds for your decision is *R*, but I want to convince you it is *S*.’ Like morality, the argument for transparency does not require a detour through the law’s claims. The transparency criterion follows directly from the theorist’s interest in providing reasons legal officials will respond to, which means speaking in a legal vernacular.

A practical contract theory might, however, employ a more open-ended conception of the legal vernacular than Smith’s. A theorist outside the practice looking in must rely on practitioners’ understanding of what counts as a legal reason and what does not. Hence Smith’s vernacular postulate, which assumes a consensus amongst legal sophisticates regarding what does and does not count as a legal argument. I have doubts about whether any such consensus exists, and if it does, whether the legal vernacular is as narrow as Smith believes. Be that as it may, a practical theory of contract does not require prior guidance regarding which explanations are internal to the law and which are not. It is open to anyone participating in a conversation on a hard doctrinal question to say, ‘Yes, but until now you have not considered *S*,’ where *S* is an explanation, reason, or justification that has not yet been part of the conversation.

From this practical perspective, even the hermeneutics of suspicion is on the table. Consider Mary Keyes and Kylie Burns argument that the

³⁹ Smith (n 1) 13.

⁴⁰ Smith (n 1) 29.

intent-to-contract requirement has served in English law to create ‘a highly effective default principle which impedes enforcement of family agreements, and performs a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, privileging the former over the latter.’⁴¹ Or the overwhelming evidence that during the Jim Crow era in the United States, Southern courts used facially neutral contract doctrines to effectively bind formerly enslaved Blacks to their former owners.⁴² Smith is correct to note that these interpretive explanations of contract law differ from other types of legal argument. But I find it easy to imagine them entering a contemporary judicial discussion about what contract law should be.⁴³ It would be a mistake for the theorist who wants to participate in those conversations to exclude this form of argument *ab initio*.

My advocacy of a more capacious conception of the legal vernacular is of a piece with my doubts about Smith’s claim that ‘a good theory must show that *most* of the core elements of contract law can be traced to, or are closely related to, a single principle.’⁴⁴ There is a familiar practical argument for the moderately strong coherence criterion Smith proposes. Theories that ascribe independent, non-ordered justifications to contract law cannot provide determine answers to hard doctrinal questions when those justifications conflict. If one believes the job of legal theory, practically speaking, is to provide such answers, this argues for a unitary theory. Smith does not make such an argument. But if he were to take a practical turn, it would be available to him.

My own view is that the unitary theories of contract tend to paper over real conflicts between competing principles, as evidenced by jurisdictional splits on hard doctrinal questions, which belong to an interpretive theory’s data. From this perspective, the job of contract theory is not merely to answer hard doctrinal questions. It is to identify conflicts, explain why they exist, and elucidate the values different doctrinal choices implicate. I hope Smith would grant that such a theory can render contract law intelligible, even if he might consider it second-best.

This practical approach I am sketching can also do without Smith’s assumption that contract law has a doctrinal core. Smith’s doctrinal core postulate serves to ensure that the spectator theorist is not observing or explaining the wrong social practice. That is not a risk for a contract theory

⁴¹ Mary Keyes & Kylie Burns, ‘Contract and the Family: Whither Intention?’ (2002) 26 *Melb U L Rev* 577, 585–87.

⁴² See, e.g., Jennifer Roback, ‘Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?’ (1984) 51 *U. Chi. L. Rev.* 1161.

⁴³ For an example and analysis of a critical historical argument entering judicial reasoning, see Charles Barzun’s discussion of the opinions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Barzun (n 5) at 1266-70.

⁴⁴ Smith (n 1) 13.

that starts from the hard doctrinal questions practice presents and which is not committed to a unified interpretation.

This is not to say that fit is irrelevant to such a theory. For Smith, the fit criterion follows from the very nature of interpretive theory. For an interpretation to be about the interpretandum, it must in some sense fit it. Practical contract theories have other reasons to aim for fit. One has already been mentioned: *stare decisis*. Fit with the existing caselaw belongs to the vernacular of common law courts. As or more importantly, I would argue, theorists can learn from caselaw. This point was central to Arthur Linton Corbin's empiricism:

A study of the appellate court decisions can never decrease in value or interest, for the reason that they constitute the living evidence of the continuing evolutionary process of our judicial system, both in the statement of its 'working rules,' and as to its success or failure in the administration of 'justice.'⁴⁵

Corbin's attitude here is of a piece with his skepticism toward 'the quest for absolutes,' his embrace of contingency in the law, as well as his basic optimism.⁴⁶ Contract theory should take caselaw seriously—should seek to fit with it—because, despite many errors along the way, there is wisdom to be found there.

Conclusion

In his *Lectures on Pragmatism*, William James emphasizes the role of temperament in the production of theory.

Of whatever temperament a professional philosopher is, he tries when philosophizing to sink the fact of his temperament. Temperament is no conventionally recognized reason, so he urges impersonal reasons only for his conclusions. Yet his temperament really gives him a stronger bias than any of his more strictly objective premises. It loads the evidence for him one way or the other, making for a more sentimental or a more hard-hearted view of the universe, just as this fact or that principle would. He trusts his temperament.⁴⁷

⁴⁵ AL Corbin, 'Sixty-Eight Years at Law' (1964) 13 U Kansas L Rev 183, 188.

⁴⁶ AL Corbin, 'Farewell of Arthur Corbin to the Yale Law School Faculty' in G Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale 2016) 173, 174-75. For more on Corbin's approach to contract theory, see Gregory Klass, 'Arthur Linton Corbin (1874-1967)' (2022) in *Scholars of Contract Law* (J Goudkamp & D Nolan eds, Hart) 201.

⁴⁷ William James, *Pragmatism, A New Word for Some Old Ways of Thinking* (Longmans, Green & Co 1907) 7.

James's observation is not intended as an indictment. It is a description of how actual philosophers, James included, work. Theory is not handed down from on high. It is crafted. Any serious theory reflects the concerns, values, habits of mind, and, broadly speaking, temperament of the living person who created it.

My sense is that the postulates and occasional gaps I identified in Part One reflect Steve Smith's philosophical temperament. Smith is inclined to believe that legal officials are basically trustworthy; that the common law is the product of judicial attempts to do justice between parties; that the law is not only coherent, but principled. At the same time, Smith's analysis in Chapter One suggests an openness to complexity. Fit, coherence, morality, and transparency are multiple, potentially competing goals that Smith nowhere attempts to reduce to a single principle. Smith's account of interpretive theory is complex. Although I disagree with him on the substance of what contract theory can and should be, I admire and will miss Steve's way of theorizing.