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A Critical Legal Studies Perspective on Contract Law and Practice

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A CRITICAL LEGAL STUDIES
PERSPECTIVE ON CONTRACT LAW
AND PRACTICE

GIRARDEAU A. SPANN*

The critical legal studies movement is often viewed as highly theoretical, characterized by impenetrable scholarship that makes frequent reference to the work of "famous dead Europeans." Indeed, the theoretical detachment of critical legal studies from real-world concerns has led some to speculate that the methodologies of the movement are so abstract and stylized that they could be used to deny the validity of distinctions that we commonly rely upon in everyday life—even something as basic as the distinction between up and down. Given the level of abstraction at which most critical legal studies analysis occurs, one might wonder why a critical legal studies perspective would be offered at a conference intended to focus on the ways in which theory can affect the practice of contract law. Despite its theoretical nature, I suspect that critical legal studies has both a mundane and a more significant message for the practical application of law.

The practical utility of critical legal studies can best be appreciated by focusing on the function that critical legal studies has served in the broader context of American jurisprudence. By doing to legal realism what realism did to nineteenth century formalism, the critical legal studies movement conveyed what I believe to be its central insight—that, in addition to whatever application an argument may have to its intended object, arguments can also be applied to themselves. Once recognized, this insight permitted the manipulation of doctrinal rules, through a process frequently referred to as "deconstruction," to produce virtually any result that the manipulator desired. It is through our efforts

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1. The phrase has been borrowed from readings prepared by Professor James Boyle for the Eighth National Conference on Critical Legal Studies at 7 (March 16-18, 1984).

to deal with the unsettling indeterminacy revealed by the phenomenon of deconstruction that the practical contributions of the critical legal studies movement are likely to emerge.

Part I of this essay traces the development of the critical legal studies movement in American jurisprudence, placing it on a continuum with formalism and legal realism. Part I then discusses the indeterminacy thesis of critical legal studies, which I believe to be its most significant contribution to legal scholarship. Part II applies the indeterminacy thesis to a variety of contract doctrines in order to impart both a technical understanding of the manner in which deconstruction works, and a sense of the doctrinal disillusionment that it often generates. Finally, Part III discusses the practical implications that theoretical indeterminacy may have for the lawyers and judges who must apply the doctrines of contract law. Although I am not myself a card-carrying member of the critical legal studies movement, I am sufficiently sympathetic to the indeterminacy thesis to present it with the requisite degree of enthusiasm.3

I

THE CRITICAL LEGAL STUDIES MOVEMENT

Like most intellectual movements, the critical legal studies movement was a response to that which preceded it.4 As the rigid

3. A substantial component of popular critical legal studies is its radical left political agenda. The movement's assaults on liberalism, the reproduction of hierarchy, and legal hegemony, in favor of communitarianism, egalitarianism, and freedom from the illusion of false necessity undoubtedly account for the appeal of critical legal studies to many of its adherents. Because I am not sufficiently sympathetic to the claim that these political objectives follow from the indeterminacy thesis to present that claim with the requisite degree of enthusiasm, I will limit my focus to the indeterminacy thesis itself. Moreover, I believe that it is radical indeterminacy, rather than radical politics, that gives critical legal studies its status as a legitimate intellectual movement.


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categorical analyses of nineteenth century formalism grew to appear artificial and intellectually unsatisfying, the legal realists began to challenge the legitimacy of categorical analysis itself. They suggested that more satisfying results would ensue from a process of policy analysis, which could be implemented through the technique of interests balancing. Policy analysis was better suited than formalism to the progressive resolution of social problems because it was pragmatic and instrumental rather than pristine and conceptual, the way that formalism had been.

As the legal realism of the 1920's and '30's grew to appear artificial and intellectually unsatisfying, the critical legal studies movement of the 1970's and '80's began to challenge the legitimacy of policy analysis itself. Critical legal studies adherents embraced the rule skepticism evolved by the realists in debunking the conceptual categories of formalism, but they directed that skepticism at both the social science principles that the realists had offered as a substitute for the formalist categories and the structural mechanisms that the realists had established to implement their progressive social program.

In the process of doing this, the critical legal studies movement appropriated the technique of deconstruction that was being used by continental philosophers and literary scholars to revolutionize textual analysis, and used it to develop a thesis of radical legal indeterminacy. This thesis asserts that all efforts to provide a principled account of judicial behavior (or anything else, for that matter) are vulnerable to the techniques of deconstruction, or "trash"ing as it has affectionately come to be know among its practitioners. A corollary of this thesis is that all judicial efforts at principled decision-making are necessarily doomed to failure. It is the nihilist implications of the indeterminacy thesis that has caused the critical legal studies movement to be such a controversial one.5

by The Federalist Society); cf. M. Horwitz, The Transformation of American Law, 1780-1860 (1977). The present historical account is derived from these sources.

5. I am not overlooking the fact that critical legal studies is frequently associated with contemporary versions of Marxism. Although this association has undoubtedly contributed to the controversy surrounding the movement, I suspect that it is the nihilist proclivities of certain adherents that has generated most of the alarmist opposition. My guess is that Dean Carrington, for example, would be relieved to learn that members of the critical legal studies movement were merely Marxists. See Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227 (1984)(suggesting that members of the critical legal studies movement should leave legal academics); see also Martin, "Of Law and the River," and Of
A. Development of the Movement

Nineteenth century American legal thought was characterized by what is now referred to as formalism. Legal formalism emerged during a period in which the American intellectual community was beginning to favor scientific over theological accounts of perceived phenomena. Consistent with this preference, legal formalism conceived of law as a science, and assumed that, like other sciences, law could be understood by discovering its governing principles through a process of logical induction. Just as physicists could induce the principles of gravity by generalizing from the behavior that proximate masses exhibited under particular circumstances, lawyers could inducing the principles of contract law by generalizing from the behavior that courts exhibited in particular cases. This view of law as a science manifested itself in legal education as the case method, which was introduced at the Harvard Law School in the 1870's by Dean Christopher Columbus Langdell.6

Inherent in the law-as-science perspective of formalism was an inclination toward the analytical techniques of the scientific method. Accordingly, the meaning of legal principles was discerned through a process of observing, organizing and classifying the data provided by individual cases. The outcome of a case was determined by how prior cases had been classified and by which of the competing conceptual categories the facts of a case brought it into. If an agreement fell into the "mutual assent" category, it constituted a contract; otherwise it did not. If the motive of the parties for entering into an otherwise acceptable contract fell into the "consideration" category, the contract was enforceable; otherwise it was not. In this sense, nineteenth century legal analysis was "formalistic." Relatively rigid conceptual categories, rather than flexible standards of reasonableness or fairness, determined case outcomes, and proper classification was all that mattered for proper resolution of legal disputes.7

In the twentieth century, the scientific conceptualism of the formalist approach began to lose much of its appeal. As case outcomes were perceived to change with changing social circumstances, belief in a transcendent set of legal principles became more difficult to maintain. Moreover, the enhanced role that ju-
ries were permitted to play in resolving cases made it more difficult to argue that principles of legal science were the operative forces behind legal decision-making. If such principles did exist, the courts seemed to be ignoring them in order to reach more equitable results. And to the extent that one approved of these results, one was tempted to relinquish the view of legal principles as scientific truths in favor of a view of legal principles as contingent, context-dependent assertions.\(^8\)

The legal realist movement of the 1920's and '30's crystallized growing dissatisfaction with the scientific view of legal principles. Legal realism grew out of an intellectual climate in which pragmatic instrumentalism had replaced formal conceptualism as the desired objective. American society was no longer conceived of as an aggregation of autonomous individuals, but rather as an amalgam of interdependent interest groups that had to find ways to coexist. Accordingly, the emphasis in law shifted from proper taxonomy to the development of promising strategies for dealing with social problems. Social sciences such as sociology, anthropology, psychology, economics, and political science were consulted in the formulation of such strategies, and process-based solutions to social problems were developed. American thinkers also began to gravitate toward moral relativism and context-dependent views of values in lieu of the moral universalism that had been offered by the formalists.\(^9\)

Legal realism was empirical and sociological where formalism had been theoretical and conceptual. As a result, the realists favored innovative legislative solutions to social problems and disfavored judicial invalidation of legislative initiatives in the name of abstractions such as "property rights" or "freedom of contract." Moreover, legal cases were regarded as *sui generis* rather than as mere members of one formalist category or another. Although knowledge of general trends might provide some assistance in resolving particular cases, at bottom case outcomes were a function of their individual facts. Accordingly, the interface between legal doctrine and real-world effects, rather than doctrinal integrity, was of paramount concern. Article Two of the Uniform Commercial Code, drafted by the prominent legal realist Karl Llewellyn, exemplifies this concern in its insistence that the law of sales should correspond to sound commercial practice, rather than forcing commercial practice to correspond

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\(^8\) See id. at 56-62.

\(^9\) See id. at 63-75.
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to law. To the legal realists, law was an instrument for the implementation of social policy. As a result, the principles that mattered to the realists were not legal principles, but rather were the social science principles that determined how legal doctrines actually played themselves out in society.10

The fall of formalism not only caused a shift in emphasis from legal to social science principles, it also introduced a new type of legal analysis—interest balancing. Under the formalist regime, outcomes had been determined by categorizing cases—either a case fell into one category or it fell into another; there was no middle ground. Once the realists abandoned formalist classifications, however, it was possible to blend and compromise divergent interests in a way that was impossible under the mutually exclusive formalist categories. Moreover, interest balancing responded to the new, sui generis conception of legal cases by permitting even subtle factual differences between cases to justify differential resolution of those cases. In a time of social volatility and sociological experimentation, balancing provided a convenient mechanism for granting legal doctrine the flexibility needed to keep pace with changing social developments. Balancing was also consistent with emerging notions of political pluralism and economic cost-benefit analysis—basic principles of two of the social sciences on which the realists had begun to rely. Balancing was not only the hope for the future, but it ultimately became so successful that even today it is difficult to analyze a legal problem without lapsing into a reflexive interest balancing mode.11

It was out of this context that the critical legal studies movement emerged in the late 1970's. Although the social programs developed by the legal realists were less than completely successful, one of the analytical techniques developed by the realists proved to be irresistibly seductive. The realists had prevailed in their assault on formalism because they had been willing to peer behind the facade of the formalist concepts, to question the unstated assumptions embedded in those concepts and to exploit the internal inconsistencies that they found. This so-called rule skepticism permitted the realists to nullify the appeal of the formalist categories. Disillusioned by the realists' failure to effectively implement their progressive political and social agendas, critical legal studies adherents sought to complete the work that

10. See id. at 69-75. For an example of this flexible approach to dispute resolution see U.C.C. § 1-102(2) & comment 1, and § 1-205 comment 1.
11. See Aleinikoff, supra note 4, at 955-63.
the realists had begun. They chose to do this, however, by applying the rule skepticism that the realists had developed to the foundations of the realist movement itself. Just as the realists had peered behind formalist concepts in order to discredit them, critical legal studies adherents peered behind the social and governmental structures that the realists had established during the New Deal, and behind the social science principles on which the realists had relied in formulating their social program. Just as the realists had done, the critical legal theorists questioned the unstated assumptions embedded in those structures and principles, and they exploited the internal inconsistencies that they found.\(^\text{12}\)

The political results were striking. Critical legal theorists argued forcefully that liberalism itself—belief in the primacy of individual liberty\(^\text{13}\)—was perpetuating economic inequality and social injustice. Moreover, the concept of “rule of law” was suspect because it conceded minor victories to powerless individuals while legitimating the basic economic and political assumptions of the social system that caused those individuals to remain powerless. The attainment of neutrality in principles of law or of social science was an impossibility, and the system was “tilted” so that outcomes would preserve existing power relationships and reproduce existing illegitimate hierarchies. However, because the “tilt” was not generally recognized, it could not effectively be opposed. The hegemony of the legal system had convinced those without economic and political power that their plight was both their own doing and a necessary consequence of fundamental principles that they themselves held dear. As a result, the powerless were being held down by the illusion of false necessity. Moreover, because the problems with both liberalism and the rule of law are inherent in any liberal social system, the only way to escape the inevitable repression of liberal legalism was through localized communitarianism, known as “left decentralization,” where shared values would preclude the need to use rhetorical principles as a technique for social control. Although the bulk of critical legal studies adherents are probably disgruntled liberal democrats who endorse only diluted versions of this account, some adherents are vocal neo-Marxists, for whom the present ac-

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12. See Boyle, supra note 4, at 687-708; Tushnet, supra note 4, at 1984-88.
13. Other definitions of liberalism are possible. For example, Dworkin has defined liberalism as giving primacy to a particular version of the principle of equality. See R. Dworkin, \textit{A Matter of Principle} 181-213 (1985). The concept of equality, however, has itself been characterized as vacuous. See Westin, \textit{The Empty Idea of Equality}, 95 Harv. L. Rev. 537 (1982).
count is undoubtedly too timid.\textsuperscript{14}

The intellectual implications of the critical legal studies movement were even more striking. Most critical legal studies adherents have been content to apply realist techniques to our basic social and political structures, in the hope of advancing their political agendas. However, the rule skepticism of the realists can theoretically be transferred to any principle of any sort. There is a wing of the critical legal studies movement, often referred to as the irrationalist or nihilist wing, that is comprised of scholars who are prepared to take the realist analytical insights as far as they will go. They have developed a thesis of radical indeterminacy that is both breathtaking in its scope and potentially unsettling in its implications.\textsuperscript{15}

B. Indeterminacy

The indeterminacy thesis of critical legal studies asserts that all principled accounts of perceived phenomena are demonstrably inadequate. In fact, the principles themselves lack logical coherence. Note that the thesis does not address the question of what sorts of accounts \textit{would} be sufficient to explain social phenomena; it simply highlights the inadequacies of accounts that are offered by others. As a result, the indeterminacy thesis cannot itself constitute an argument in favor of any political objective—not even the political objectives espoused by supporters of the critical legal studies movement. Indeterminacy is politically neutral.\textsuperscript{16} Nevertheless, the indeterminacy thesis may facilitate realization of alternate political visions to the extent that it proves to be successful in discrediting the political assumptions that underlie the status quo.\textsuperscript{17}

The demonstration of inadequacy on which the indeterminacy thesis depends is accomplished through a process of "deconstruction." Although there are both more and less techni-


\textsuperscript{15} Cf. Boyle, supra note 4, at 687-736.

\textsuperscript{16} I realize the difficulties inherent in this assertion.

\textsuperscript{17} In his comment on the present paper, Professor Feinman argues that an appreciation of doctrinal indeterminacy permits decision-makers to transcend the artificiality of doctrinal decision-making through explicit consideration of the political and cultural factors that doctrine tends to obscure, thereby providing affirmative guidance for the proper resolution of cases rather than merely a mechanism for criticizing them. Feinman, A Case Study in Critical Contract Law, 1988 Ann. Surv. Am. L. 273.
cal variants of the deconstruction technique, all variants incorporate some version of the same basic strategy. They all undermine an argument by turning the argument against itself in a way that exposes internal inconsistencies, and thereby neutralizes the argument's logical appeal. In this sense, deconstruction constitutes the maturation of realist rule skepticism. I should emphasize what deconstruction is and what it is not. Deconstruction is a comment on the operation of language, logic and rational analysis. It is not a comment on the nature of the universe. Nevertheless, because deconstructive techniques can be applied to any rational argument—including the arguments offered by deconstructionists themselves—many find deconstruction and radical indeterminacy to be unsettling, threatening and disturbingly nihilistic.

The critical legal studies movement borrowed the technique of deconstruction from continental philosophers and literary scholars. Although much of the writing about deconstruction has come from literature departments, especially at Yale, the principle architect of the technique is Jacques Derrida, a French philosopher whose work has concentrated on methods of textual analysis. Derrida's work is itself difficult to understand. However, Professor Balkin has provided an accessible description of those aspects of Derrida's theories that are most often discussed by legal commentators. Balkin identifies two deconstructive techniques that are of use in the legal context. They are the inversion of hierarchies and the establishment of textual free play. Rather than describe these techniques at the outset, I will first attempt to distill from them an administrable formula for doing deconstruction, and then elaborate on the techniques more fully as I illustrate their application.

The objective of deconstructing an argument is to demonstrate its lack of coherence—to establish that the principle on which the argument rests does not actually generate the outcome that the argument attributes to it, or any other outcome, because it is not logically capable of doing so. An argument or principle


19. See Balkin, supra note 18, at 746.
can be deconstructed by following a three-step process. First, specify an opposition or dichotomy that is inherent in the argument. This will be easy to do because the binary nature of logical analysis—i.e. something either is the case or it is not—causes us to incorporate dichotomous oppositions into our arguments. Second, identify the hierarchical relationship implicit in the opposition that has been specified, grounding the hierarchy in its policy justifications. The implicit hierarchy will generally be quite obvious, as will the policy reasons for establishing the hierarchical relationship. Third, invert the hierarchy by pairing its favored member with the disfavored justifications and the disfavored member with the favored justifications. This part may require some analytical dexterity, but the payoff will be big. Inversion of the hierarchy will establish that the argument or principle on which the argument rests is self-defeating, and for that reason, cannot account for the phenomenon that it is offered to explain. Where the argument at issue concerns proper interpretation of a legal text, deconstruction of the argument will demonstrate that the meaning of the text is indeterminate—equally susceptible to all interpretations.

The nihilist potential of deconstruction becomes apparent when one focuses on the claim that any argument offered to provide an account of any rational phenomenon is demonstrably inadequate. If true, there can be no principled explanations for judicial decisions, social behavior in general, or anything else—including the phenomenon of deconstruction itself. Nevertheless, that is precisely the claim that the indeterminacy thesis makes. Before confronting the nihilist implications of radical indeterminacy, however, it makes sense to ascertain whether the deconstruction technique is really all that it claims to be. The best way to formulate an opinion about the legitimacy and significance of indeterminacy—to become intimately acquainted with the phenomenon—is to generate some indeterminacy yourself, so that you can know what it feels like. Although deconstruction may be difficult to understand in the abstract, it is relatively easy to comprehend in operation.20

20. Professor Dalton has exhaustively deconstructed a variety of contract doctrines based upon the doctrinal difficulties initially illuminated by Kessler and Gilmore. See Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1004 (1985) (citing F. Kessler & G. Gilmore, Contracts: Cases and Materials (2d ed. 1970)(1st ed. 1953). Although the deconstruction formula that I offer differs in detail from the methods employed in those earlier works, there is no real difference in the substance of what is being done. This is true even
II
DECONSTRUCTING THE STORY OF CONTRACT LAW

In order to convey a feel for the manner in which deconstruction operates—and a concomitant appreciation for what it means to say that doctrine is indeterminate—I would like to tell what I believe to be the "story" of classical contract law, and then to deconstruct each chapter of that story. A contract is an agreement that manifests the intent of the contracting parties to deal with particular contingencies in particular ways. If the contract is freely entered into by the parties as a result of their own volition, the legal system will enforce the contract against a breaching party, typically by awarding a damage remedy calculated to preserve the contractual expectation of the non-breaching party. Legal enforcement, however, is limited to only those contracts that are supported by consideration. The emphasized terms are the chapter titles of this story, each of which embodies a principle that can be deconstructed. The classical story does not include chapters on promissory estoppel or restitution, but as will become apparent, those doctrines have very much become a part of the story.

A. Agreement

A contract is an agreement—something to which the parties mutually assent. The legal system requires mutual assent as a precondition to enforcement because contractual obligations are, by definition, consensual. While the legal system endeavors to facilitate private ordering among contracting parties, it has no interest in imposing its will on private actors, or in assisting one private actor to impose his or her will on another private actor in a unilateral manner. Accordingly, a contractual obligation is enforceable only to the extent that it results from a meeting of the minds of the contracting parties.21 This mutual assent principle can be deconstructed by: (1) specifying an opposition inherent in the principle; (2) identifying the hierarchy implicit in that opposition, with its policy justifications; and (3) inverting the hierarchy.

(1) The argument that mutual assent should be required for enforcement of a contract rests upon an opposition between agreement and non-agreement. (2) The hierarchical relationship between the two that is implicit in the mutual assent principle fa-

vors agreement. The reason that agreement occupies the privileged position in the hierarchy is that it corresponds to the consensual nature of contractual obligations. Non-agreement is disfavored because it embodies coercion and interference with private autonomy. If a court were to enforce an apparent contract that did not genuinely embody a meeting of the minds, it would be aligning itself with the coercive, disfavored member of the hierarchy.

(3) In reflecting upon the manner in which contractual obligations are actually enforced, it becomes apparent that the disfavored characteristics associated with non-agreement actually accompany what courts typically consider to be agreement, and the favored characteristics of agreement actually accompany what courts typically consider to be non-agreement. Contract disputes arise because parties disagree over the effect that a particular contingency is to be given under their contract. If the parties disagree, however, there is no mutual assent—no contract—with respect to that contingency. As a result, enforcement of the putative agreement constitutes coercive judicial interference with the autonomy of the promisor in derogation of the consensual nature of contractual obligation. Moreover, because apparent agreement simply masks what is in reality the absence of mutual assent, the proper way for a court to implement the consensual limitation on contractual obligation is to deny enforcement to putative contractual agreements. The original hierarchy has now been inverted, and the principle of mutual assent has been deconstructed.

The principle not only fails to account for the manner in which courts determine whether a contract exists, but it also fails to have any coherent content.

22. More fundamentally, all contract enforcement involves disfavored coercion because all contract enforcement entails judicial compulsion of an act that the compelled actor will not take voluntarily. As a result, freedom from the coercion associated with non-agreement could occur only in the absence of any state apparatus for contract enforcement. But the absence of such enforcement apparatus would in turn defeat the possibility of ever achieving the consensual objectives of contract law, because it would deprive the parties of the ability to bind themselves to any future action. This dilemma illustrates that the technique of deconstruction can be used to invert and re-invert a hierarchy ad nauseam, because a deconstructed argument is itself subject to deconstruction.

23. It is, of course, possible that the parties really did reach agreement with respect to the troublesome contingency and that one of the parties is simply pretending that no agreement was reached. If that is the case, however, the dispute is not a true contracts dispute. Rather it is a tort case, involving fraud on the part of one of the parties, with which classical contract law has no reason to concern itself.
Inversion of a hierarchy is accomplished by attributing the characteristics initially associated with one member of a hierarchy to the other member of that hierarchy. The successful inversion of a hierarchy implies a necessary connection between the favored and disfavored members themselves. Derrida refers to this connection as "dangerous supplementation." In order to fully understand the concept of agreement, for example, it is necessary to think about what that concept entails in relation to what it does not entail. Stated differently, it is not really possible to know what agreement means without comparing it to non-agreement. In this sense, non-agreement "supplements" the concept of agreement by enhancing its meaning; the concept of agreement is incomplete in the absence of linkage to the concept of non-agreement. However, non-agreement has negative connotations that caused it to be the disfavored member of the original hierarchy. As a result, non-agreement is a "dangerous" supplement to the concept of agreement. It threatens the concept with the very disfavored qualities that the concept was invoked in order to avoid. But because the concept of agreement is incomplete without the participation of its dangerous supplement, the desirable qualities of agreement cannot be attained without also being "enhanced" by the disfavored qualities of the supplement. It is because of this interdependence between a principle and its dangerous supplement that a hierarchical relationship between the two can be inverted, thereby permitting the principle to be deconstructed.

B. Intent

A contract embodies the intent of the parties concerning the effect that particular contingencies should have on their respective rights and duties. As a result, a court called upon to enforce a contract should interpret that contract in accordance with the intent of the parties. If a court were to enforce a contract in a manner that was not prescribed by the parties, it would again interfere with the autonomy of the parties and undermine the consensual basis of contractual obligation, just as if it had forced a party to act in the absence of mutual assent. However, because a court can never read the mind of a contracting party in order to discover his or her subjective intent, the intent of the parties must be ascertained by drawing inferences from the parties' behavior—

the outward manifestations of their intent. This approach to contract interpretation is known as the objective theory of contracts.\footnote{See E.A. Farnsworth, supra note 21, at 113-16.} Like the mutual assent principle, the intent principle can be deconstructed by inverting its implicit hierarchy.

The argument that a contract should be interpreted in a manner that is consistent with the intent of the parties rests on an opposition between intended and unintended contractual consequences. The hierarchy implicit in that opposition favors intended consequences because, once again, judicial enforcement of intended consequences is consistent with the consensual basis of contractual obligation, while judicial imposition of unintended consequences would entail coercive interference with private autonomy.

However, a court seeking to implement the intent of the parties can respond only to the outward manifestations of the parties' intent—typically, the language contained in a written document. And, by definition, a manifestation of intent is different from intent itself; it is a mere symbolic representation of the parties' actual intent. Indeed, the very reason that the law of contracts was forced to evolve the objective theory was to justify enforcement of manifestations rather than actual intent. As a result, when a court enforces a contract, it is enforcing something other than the intent of the parties—it is typically enforcing only the words on a piece of paper. Judicial enforcement of a contract, therefore, actually frustrates the intent principle and once again undermines the consensual basis of contractual obligation. It is by declining to enforce supposed contractual obligations that courts can best adhere to the intent principle and avoid coercive interference with individual autonomy. The hierarchy has again been inverted and the intent principle has been deconstructed.\footnote{This deconstruction is similar to the technique used by Derrida in his now-famous deconstruction of the opposition between language and speech, which is described in Balkin, supra note 18, at 755-58. The particular manipulation that Derrida employed has now become a staple of deconstruction technology. See, e.g., Dalton, supra note 20, at 1039-66.}

The technique used to deconstruct the intent principle in the contracts context is also useful in other legal contexts. A contract is a text to be interpreted in accordance with the intent of its authors. Similarly, statutes, constitutional provisions and common law precedents are also texts whose interpretations are typically to be determined by authorial intent. Just as a contract is necessarily distinct from the intent of the parties, however, other legal
texts are necessarily distinct from the intents of their drafters. This assertion acquires considerable intuitive appeal in the context of a constitutional provision like the equal protection clause or the due process clause. The meaning of those clauses has changed considerably over time, even though the intent of the authors has remained constant.

The deconstructive process of divorcing a text from the intent of its author is known as establishing the “free play” of the text. Because a text is qualitatively distinct from the intent of its author, it has the capacity to convey meanings that are different from the author’s intent. Derrida calls this capacity “iterability”—the text can be reiterated in many different contexts, all of which are likely to alter the way in which it is interpreted. The author may have an interpretation, but it is only one of many interpretations. Because the author’s interpretation cannot correspond to—achieve identity with—the author’s intent, it cannot claim to be a privileged interpretation.

The phenomenon of free play establishes that the proper interpretation of a text is indeterminate. The author’s interpretation does not control the meaning of a text, and there is no other basis to ascertain an authoritative meaning. Rather, the meanings of a text will be intersubjective. The author’s subjective intent will be transformed into a text that will itself be transformed into the reader’s subjective interpretation. Although intersubjective communication might be desirable in some areas, the legal system would not seem to be one of them. Because textual indeterminacy denies to legal texts the capacity to acquire the authoritative meanings that they need in order to achieve independence from mere interpretations of those texts, the free play of text is devastating to the concept of the rule of law.27

C. Volition

In order for a contract to be legally enforceable, it must have been freely entered into by the parties. If the contract did not result from the parties’ own volition, enforcement would again be inconsistent with the consensual basis of contractual obligation. Contract law has developed a variety of bargaining defect doctrines designed to implement the volition principle. Doctrines such as capacity, undue influence, duress and unconscionability

27. For a more thorough explication of textual free play and its relationship to indeterminacy and rule of law, see Balkin, supra note 18, at 772-85.
deny enforcement if the free will of a party has been overborne. 28 In addition, doctrines relating to mistake, impossibility, impracticability and frustration deny enforcement if the will of the parties, although freely exercised, has been motivated by an erroneous assumption concerning the circumstances surrounding the contract that is serious enough to preclude actual allocation of the pertinent risks. 29 Collectively, the bargaining defect doctrines effectuate the fundamental policy of freedom of contract by binding parties to only those agreements that result from a bargaining process reliable enough to ensure true volition.

The volition principle rests on an opposition between process-based and substantive justifications for judicial enforcement decisions. A court will decline to enforce a contract if the court disapproves of the bargaining process that produced the contract. If the bargaining process was a reliable one, however, the court will not refuse enforcement merely because it disapproves of the substantive bargain struck by the parties. The hierarchy implicit in this opposition favors process-based justifications and disfavors substantive justifications for non-enforcement. Process-based justifications advance the consensual objectives of contract law by ensuring meaningful mutual assent, but non-enforcement based on substantive disapproval of the contract terms would constitute judicial negation of the parties’ intent, in violation of the policy of freedom of contract.

The process/substance hierarchy can be inverted by focusing on the manner in which a court must determine whether a particular contract does or does not result from a defective bargaining process. Just as a court cannot read the minds of the parties in order to ascertain their actual intent, it cannot examine the will of a contracting party in order to determine whether that will was exercised freely in forming a particular bargain. The only way that a court can make the necessary volition determination is by drawing inferences from the bargaining context or from the terms of the bargain itself. If the court bases its volition determination on the terms of the bargain itself, it is substituting its judgment about the substantive wisdom of the contract for the judgment of the parties, in derogation of the policy of freedom of contract. However, even if a court bases its volition determination on the circumstances that surrounded the bargaining process, it will still be substituting its judgment for that of the parties. It will be as-

28. See E.A. Farnsworth, supra note 21, at 232-34.
29. See id. at 647-49.
assuming that the parties judged the wisdom of entering into a contract under those circumstances in the same way that the court would have made such a judgment. However, the whole point of relying on process rather than substantive justifications in making judicial enforcement decisions is to preclude judicial second guessing of the parties' judgments, because such second guessing undermines the volition principle and the fundamental policy of freedom of contract. Stated more succinctly, the volition principle—freedom of contract—is intended to ensure that parties have the freedom to insist on their own idiosyncracies. But process-based justifications for judicial nonenforcement deny them this freedom by subjecting them to the idiosyncracies of the court. Accordingly, process-based justifications subvert the volition principle and undermine freedom of contract.

Ironically, substantive justifications for non-enforcement are more likely than process-based justifications to advance the volition principle inherent in freedom of contract concerns. The volition principle enables parties to make whatever contractual arrangements they believe will best serve their own interests. Although a court cannot examine the will of a contracting party in order to ascertain the freedom with which that will is exercised, a court can evaluate the terms of the contract resulting from the exercise of that will in order to determine how the best interests of the parties are affected. Moreover, this best interest determination will be more effective if made through direct scrutiny of the substantive terms of the bargain than through the circuitous route of analyzing the process by which the bargain was struck. Indeed, it is for this very reason that the drafters of the Uniform Commercial Code chose to include an unconscionability provision permitting courts to police bargains directly rather than requiring them to go through the charade of a process-based analysis. Admittedly, direct substantive policing of a contractual bargain will cause some judicial interference with the volition of contracting parties. However, as a utilitarian matter—because most people have normal rather than idiosyncratic desires—substantive judicial enforcement decisions will maximize realization of the best interests of contracting parties in general.

Process-based justifications for judicial refusals to enforce contracts undermine the volition principle and frustrate freedom of contract. Substantive justifications for such refusals, however, maximize fidelity to the volition principle, by maximizing the

30. See U.C.C. § 2-302 comment 1.
best-interest objectives that underlie that principle. The process/substance hierarchy has now been inverted and the volition principle has been deconstructed.

Deconstruction of the volition principle provides an example of the manner in which critical legal theory can defeat a realist claim by applying the techniques of realism to the tenets of realism itself. The tension between freedom of contract and judicial intervention in the guise of contract interpretation was well recognized by the legal realists. In fact, it was the centerpiece of the realist challenge to formalism in contract law. One of the things that the realists did to escape formalist legal categories was to offer process-oriented approaches to legal analysis. But by reformulating realist skepticism about freedom of contract as a more generalized challenge to the distinction between process and substance, critical legal theory is able to do to legal realism what legal realism did to formalism.

The technique used to deconstruct the process/substance hierarchy could also be used to deconstruct the hierarchies implicit in other general oppositions, such as the oppositions between form and substance, subjectivity and objectivity, public and private, or the individual and society. In fact, deconstruction of these oppositions is common in the critical legal studies literature. Because they are basic components of most analytical distinctions, almost any argument or principle can be said to rest on one or another of these oppositions, and can then be deconstructed by inverting their implicit hierarchies. That is what enables critical legal studies to extrapolate from the relatively modest claims made by most legal realists to the more expansive claims made by the nihilist wing of the critical legal studies movement.

D. Expectation

The typical remedy for breach of contract is expectation damages—a monetary award measured by the cost of approximat-

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32. Cf. G. White, supra note 4, at 110-13 (discussing the process legacy of realists in the context of tort law).
33. The individual/society hierarchy is discussed more fully in Part III(A) below.
34. See, e.g., Dalton, supra note 20; Feinman, supra note 4; Frug, supra note 24; Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).
ing performance for the non-breaching party. Although sensible arguments can be made for measuring damages by the amount necessary to compensate for the non-breaching party's frustrated reliance, or to prevent unjust enrichment, modern contract law uses lost expectation as the typical measure of damages in the apparent belief that the essence of a contract is the expectation that it embodies. 35 Although it is difficult to account for precisely why contract law favors the protection of lost expectations, Fuller and Perdue have offered what has become the prevailing doctrinal view. The reliance interest includes opportunity costs—costs associated with all the other contracts that were not made as a consequence of the one contract that was made. However, because opportunity costs can be difficult to measure, the legal system can best protect the aspect of reliance to which they correspond by deferring to the parties' own estimate of their value. The contract expectation constitutes that estimate because it represents the value for which the parties were willing to exchange their opportunity costs. Accordingly, the reason that contract law protects the expectation interest is really to protect the reliance interest.

Fuller and Perdue have provided a basis for deconstructing the expectation principle. The principle rests on an opposition between expectation and reliance in which expectation is given the preferred hierarchical position because it corresponds to the essence of a contract right. However, because expectation is only valuable as a means of pursuing reliance, reliance actually occupies the preferred position in the hierarchy; expectation is disfavored because it constitutes a mere indirect approximation of the reliance interest that we could better protect directly. The realists had such insights available to them in developing their rule skepticism, and that skepticism caused them to seek refuge in process guarantees and policy analysis. The vulnerability of the realists' process approach to legal analysis has already been discussed. However, the substantive social science policies that the realists offered as a substitute for formal doctrinal analysis are also subject to deconstruction.

Perhaps the most popular social science enlisted for the purpose of engaging in contemporary policy analysis is economics. The law and economics movement has now offered analytical ac-

35. See E.A. Farnsworth, supra note 21, at 811-16.
counts for most of the legal doctrines that have present significance. The law and economics explanation for why contract law protects the expectation interest, rather than the reliance or restitution interest, is that the expectation principle of contract damages best promotes efficient breaches. If the value of a breach to the breaching party is high enough to benefit the breaching party even though he or she will have to compensate the non-breaching party for that party's lost expectation, the law should provide an incentive to breach. A breach will promote efficiency, because the non-breaching party will be no worse off than he or she would have been after performance and the breaching party will be better off. Moreover, the goods or services that constitute the subject matter of the contract will be directed to the user who values them most highly. Neither reliance nor restitution damages can ensure efficiency, because they provide incentives to breach even when the non-breaching party may not be fully compensated for the lost expectation.37

Note that this justification holds true only to the extent that contract doctrine is interested in regulating breach behavior. If contract law were instead interested in regulating reliance behavior, restitution damages would be the preferable measure, because they provide the best efficiency incentives to a party considering whether to make a particular reliance investment in a contract. Expectation and reliance damages reimburse reliance expenditures without regard to their efficiency. However, because restitution damages will not provide such reimbursement, a given reliance investment will be made only if it appears to be efficient—i.e. warranted in light of the probability of receiving the performance that was bargained for.38

Accordingly, to the extent that traditional contract doctrine deems efficient breaches to be more important than efficient reliance, the expectation damage rule best promotes efficiency because it is the only one of the three alternatives capable of ensuring that only efficient breaches are encouraged by the legal system. As a corollary, expectation damages are generally preferable to compelled or coerced performance, because such compulsion would provide a disincentive to breach even when a breach was efficient. For that reason, contract law generally makes the injunctive remedy of specific performance unavailable, and it re-


38. See A. Polinsky, supra note 37, at 32-36.
fuses to enforce penalty provisions that are included in a contract in order to punish nonperformance. 39

This efficiency principle can be deconstructed by focusing on precisely what it is that makes a breach efficient. In order for a breach to be efficient, the non-breaching party must be accurately compensated. Undercompensation will defeat efficiency by leaving the non-breaching party with less than what was bargained for, and overcompensation will defeat efficiency by deterring some efficient breaches that would have occurred at the proper level of compensation. Accordingly, the efficiency principle rests on an opposition between accurate and inaccurate compensation—or, more precisely, between remedies that provide accurate compensation and remedies that provide inaccurate compensation. The hierarchy implicit in this opposition favors accurate remedies because they promote efficiency, and it disfavors inaccurate remedies because they undermine efficiency. Expectation damages are favored because they constitute an accurate remedy. All other remedies are disfavored because they constitute inaccurate remedies. Reliance and restitution damages are inaccurate because they undercompensate the non-breaching party. Specific performance and punitive damages are inaccurate because they overcompensate the non-breaching party by enabling that party to extort from the breaching party the more costly remedy of actual performance when expectation damages alone would suffice to provide full compensation.

39. See R. Posner, supra note 37, at 93-94, 95-97. Things can get more complicated if the relative risk aversions of the parties are taken into account. See A. Polinsky, supra note 37, at 61-63.

Fairness to the law and economics movement requires recognition of more recent economic analyses of contract remedies that consider complexities not addressed by the stereotypical efficient-breach analysis. These more recent analyses do not endorse the view that expectation damages are necessarily the most efficient of the available remedies. See generally Clarkson, Miller & Muris, Liquidated Damages v. Penalties: Sense or Nonsense, 1978 Wis. L. Rev. 351 (1978); Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977); Katz, A Note on Optimal Contract Damages When Litigation is Costly (1987)(unpublished manuscript); Menell, Contract Formation and Damage Remedies for Breach of Contract (1987)(unpublished manuscript); Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979).

Although more sophisticated economic analyses are possible, to date, the stereotypical analysis is what has been assimilated into practical contract law. The more sophisticated economic analyses are also susceptible to deconstruction by those with a more sophisticated understanding of economics.
This hierarchy can be inverted by pairing favored expectation damages with disfavored inaccuracy, and by pairing the disfavored remedies with the accuracy objectives of the efficiency principle. Expectation damages are inaccurate, and therefore inefficient, because they constitute a less precise measure of the injury suffered by the non-breaching party than all of the other remedies. Damages provide an imperfect measure of compensation because they do not include the incidental costs of enforcement, such as attorneys’ fees, and because they do not include compensation for intangible injuries such as aggravation that are very real but very difficult to value. As a result, the most accurate monetary measure of the injury caused by a breach is whatever penalty provision the parties agreed upon when forming their contract.  

This is the amount it would take to fully compensate the non-breaching party—to make that party indifferent to the choice of receiving performance or receiving damages. Although one might argue that a penalty provision overstates the non-breaching party’s actual interest in receiving performance and permits that party to recover a windfall, that argument merely ignores the true nature of the bargain. Even assuming that the penalty provision does include a windfall component, the windfall is something for which the parties bargained, and for which the non-breaching party had to make bargaining concessions to obtain. Accordingly, a mutually agreed upon penalty provision constitutes the most accurate monetary measure of the non-breaching party’s injury, and it is the measure that would best promote efficiency.

Specific performance is also a more accurate remedy than an expectation damage award. Although specific performance is not quite as accurate as enforcement of a penalty provision because it does not permit compensation for the costs and aggravation of litigation, it is more accurate than expectation damages because it permits the non-breaching party to benefit from those non-quantifiable, intangible components of the bargain that cannot realistically be included in an ordinary damage award. Although one might again argue that specific performance amounts to a windfall if the non-breaching party does not at the time of breach desire actual performance, this again merely ignores one component of

40. The law can, of course, require parties to specify in their contracts the remedy for breach as a prerequisite to judicial enforcement.

41. For economic analyses suggesting that enforcement of penalty provisions may promote efficiency see Clarkson, Miller & Muris, supra note 39; Goetz & Scott, supra note 39.
the bargain. At least under a regime in which specific performance was the recognized remedy for breach, the right to compel performance would simply be one of the contract rights secured by the non-breaching party during the bargaining process. Moreover, if the non-breaching party does not truly desire actual performance, he or she will sell that contract right to the breaching party, thereby permitting the efficient outcome. The question of whether the breaching party or the non-breaching party is "entitled" to the proceeds of that sale is simply a distributional question with which efficiency analysis has no concern.42

Expectation damages are also a less accurate measure of compensation than reliance damages. If Fuller and Perdue are correct that expectation damages are attractive only because they approximate the complete reliance injury occasioned by a breach, including opportunity costs, a direct measure of reliance damages themselves will provide a better measure of this loss. The court can take direct testimony about market conditions and the likely alternative behavior of the parties in order to ascertain opportunity costs and include them in the measure of reliance damages that it awards. Although this may be both difficult and uncertain, it is no more difficult or uncertain than the quantification of pain and suffering or a lifetime of lost earnings, which courts engage in everyday. The argument for measuring the full reliance loss through reference to the contract expectation rests on the assumption that the parties are better able than the judicial system to quantify elusive intangibles. Assuming that this is true, however, it constitutes an argument for judicial enforcement of the penalty provisions that the parties provide in their contract, not for awarding expectation damages. Penalty provisions, not expectation damages, provide the best measure of the lost expectation—which, under this theory, is relevant because it provides the best measure of frustrated reliance. Either direct judicial determination of full reliance or deference to the parties in the form of enforced penalty provisions would constitute a sensible approach to measuring lost reliance. But, an expectation damage award seems like nothing more than some compromise middle ground.

Finally, expectation damages are even less accurate a measure of full compensation than restitution damages. Assuming that the ultimate objective of awarding expectation damages is to

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42. This is an application of the Coase Theorem. See Coase, The Problem of Social Costs, 3 J. L. & Econ. 1 (1960). For an economic analysis suggesting that specific performance can be efficient see Schwartz, supra note 39.
protect the reliance interest of the non-breaching party, restitution damages can accomplish this in the most efficient way possible—by preventing inefficient reliance before it occurs. Although expectation damages arguably promote efficient breach decisions, it is restitution damages that best promote efficient reliance decisions. Accordingly, to the extent that the legal system is interested in simultaneously promoting efficiency and protecting reliance, those dual objectives can best be secured by adopting a damage rule that encourages reliance only under circumstances in which reliance would be efficient—by awarding restitution damages rather than expectation damages for breach of contract.

The efficiency principle has now been deconstructed by inverting the accuracy hierarchy of contract remedies. For the purposes of promoting efficiency, expectation damages constitute the least, rather than the most, accurate remedy for breach of contract. As a result, expectation damages undermine rather than promote the goal of efficiency. An unstated assumption lying beneath every efficiency analysis is the assumption that the remedy used to compensate the non-breaching party will in fact provide adequate compensation. However, because legal remedies can never be fully compensatory, economic efficiency in fact entails a sacrifice of some portion of the non-breaching party's full expectation. Because that makes the outcome inefficient, the concept of efficiency becomes self-consuming. Moreover, because the interest of the non-breaching party is knowingly sacrificed in order to promote additional economic activity, efficiency analysis is neither neutral nor value free.

Efficiency economics is not the only type of substantive policy analysis that is subject to deconstruction by emphasizing the implications of its unstated assumptions. Like the legal system itself, social science systems operate through the application of logical rules to governing principles that are expressed in linguistic terms. Because of the ambiguities inherent in language and the limitations that logical analysis entails, the principles of any social science will be vulnerable to deconstruction by anyone who is sufficiently familiar with the discipline to recognize and manipulate the unstated assumptions on which the discipline is based.

E. Consideration

A contractual promise is legally enforceable only if it is supported by consideration. Under eighteenth century contract law, consideration consisted of a benefit to the promisor or a detriment to the promisee, and contracts were enforced in order to
avoid the unjust enrichment of the promisor or the reliance injury to the promisee that would result from non-enforcement. Since the nineteenth century, however, consideration has consisted of a bargained-for exchange—an exchange in which the component promises or performances of the contract induce each other. If they do not induce each other, but rather result from other motives such as donative intent or moral obligation, the contract is not enforceable, because it is not supported by consideration. Although restitution or promissory estoppel recoveries may still be available to prevent unjust enrichment or frustrated reliance, those doctrines do not compel enforcement of the contract itself, but merely provide whatever recovery is necessary to protect the respective interests with which they are concerned.43

Two types of justifications are typically offered for the contemporary consideration requirement. First, restricting legal enforcement to bargained-for exchanges promotes the allocation of limited societal enforcement resources to the types of promises that are most likely to increase social utility.44 Second, the act of bargaining itself serves as a legal formality that promotes the benefits generally associated with formalities. Like the early common law seal, it causes the parties to deliberate more carefully before they enter into a contract, and it increases the likelihood that they will provide evidence of their agreement in a form useful to a court that may be called upon to enforce it.45 The contemporary doctrine of consideration, therefore, advances both functional and formal objectives.

The consideration principle rests on an opposition between exchange and detriment. More specifically, it rests on an opposition between promises that are part of an exchange, which are enforced in order to complete the exchange, and promises that are not part of an exchange, whose only claim to enforcement lies in the desire to prevent some sort of detriment—either frustrated reliance or unjust enrichment. An example of an exchange promise is a standard bilateral contract to sell a widget for a specified sum of money. Examples of detriment promises include a promise to make a gift, a promise to satisfy a moral obligation, and a promise made in appreciation of some past consideration, where non-enforcement would frustrate reliance or restitution interests.

43. See E.A. Farnsworth, supra note 21, at 41-42; Feinman, supra note 4, at 678-96.
44. See E.A. Farnsworth, supra note 21, at 47-48.
45. See Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-04 (1941).
The hierarchy implicit in this opposition favors exchange promises because exchanges promote social utility and serve the objectives of legal formality. Detriment promises are disfavored because they divert societal resources to the enforcement of non-productive promises and they ignore the need for beneficial legal formalities. The exchange/detriment hierarchy can be inverted by focusing on the nature of the correlation that exists between the type of promise at issue and the consequences attributed to that type of promise. Exchange promises do not necessarily increase social utility because something as trifling as a "peppercorn" can suffice as bargained-for consideration.\(^4\) If this means that the doctrine of consideration is a purely formal doctrine, it has nothing whatsoever to do with substantive social utility. If it means that, for freedom of contract reasons, the court is unwilling to override the subjective valuations that the parties attach to their exchange, the doctrine still fails to assure substantive utility because the court is not empowered to ascertain whether a bargain in form also constitutes a bargain in substance. Moreover, the degree to which consideration serves the deliberative and evidentiary functions associated with it as a legal formality is minimal at best. A detriment promise made in a notarized writing is much more likely to serve the functions of legal formality than a precipitous oral exchange. Nevertheless, the oral exchange is enforceable under the consideration rule while the detriment promise is not. In Derrida's terms, the exchange/detriment hierarchy has now been "ungrounded."\(^4\)\(^7\) The members of the hierarchy have been shown not to correlate with the consequences attributed to them.

The hierarchy can be inverted by regrounding each member in the consequence initially attributed to the opposite member—by showing that the correlation between category and consequence is, in fact, inverse. Rather than promoting social utility, the allocation of societal resources to the enforcement of exchange promises undermines social utility by diverting societal enforcement to promises that cannot increase utility. Pure exchange promises, by hypothesis, entail no detrimental reliance or unjust enrichment. If they did, enforcement based upon promissory estoppel or restitution theories would preclude the need for consideration-based enforcement. Because neither reliance nor enrichment are implicated, refusal to enforce an exchange entails

\(^{46}\) See E.A. Farnsworth, supra note 21, at 66.
\(^{47}\) Cf. Balkin, supra note 18, at 755.
no loss of utility. If you are tempted to argue that loss of the expectation is itself a loss of utility, such an argument simply re-states the problem encountered in trying to justify an expectation damage rule for contract recoveries—a problem that could ultimately be solved only by reformulating the expectation interest as a device for the protection of detrimental reliance. Detriment promises, on the other hand, do entail a loss of utility if they are breached. Because reliance or enrichment interests are necessarily implicated in detriment promises, the breach thereof inflicts a harm upon those interests which correspond to a loss of social utility.

As a matter of legal formality, the act of investing reliance or enrichment in a contract is more likely to serve the deliberative and evidentiary functions of the legal system than the act of bargaining where no reliance or enrichment is involved. Because there is a potential for out-of-pocket loss in the context of a detriment contract, which does not exist with respect to an exchange contract, the incentive to take precautions is greater when entering into a detriment contract. The exchange/detriment hierarchy has now been inverted and the consideration principle has been deconstructed.

It is easy to deconstruct the consideration principle because no one has yet been able to fashion a persuasive justification for it. Economists have no use for the doctrine because it does nothing to promote efficiency.48 Those who believe in legal formalities are quick to admit that detrimental reliance would better serve the function of formality.49 And for those who believe that there is a moral obligation to honor promises, consideration is an irrelevant vestige of less enlightened reasoning.50 Nevertheless, we continue—at least nominally—to require the presence of consideration before we will enforce a contract. The significance of the doctrine lies in the fact that we submit to it, knowing it serves no useful purpose. Although it is completely non-instrumental, we comply with the consideration requirement simply because it is a rule with which we must comply. So characterized, the con-

48. For a suggestion that enforcement of gratuitous promises not supported by consideration can be efficient, and a discussion of exceptions and modifications that are necessary to make the doctrine of consideration efficient see Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Stud. 411 (1977).
49. Cf. Fuller, supra note 45, at 817.
sideration requirement appears Kafka-esque. Moreover, to the extent that deconstruction "works," it suggests that all legal doctrines, like the doctrine of consideration, are incapable of satisfactory justification. If principled accounts are unavailable, if things are radically indeterminate, troublesome questions arise concerning rule-of-law itself, leading one to recall Grant Gilmore's admonition:

The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.51

However, Gilmore's admonition may provide a way of dealing with the disturbing implications of radical indeterminacy, and even the nihilism that it portends.

III
PRactical IMPLICATIONS

The foregoing deconstructions demonstrate that critical legal studies operates at a fairly high level of abstraction. Nevertheless, I believe that the critical legal studies movement does have two concrete implications for the practice of law. The first is relatively uneventful: critical legal studies techniques are, in fact, what constitute the practice of law. As a result, one can become a better judge or practitioner by mastering those techniques. The second implication is more significant. By unmasking the fallacy of theoretical justification, critical legal insights permit the legal system to produce what are actually better results. In light of its practical utility, the critical legal studies movement has fittingly inverted the hierarchy between theory and practice.

A. Deconstruction as Practice

Under the doctrine of stare decisis, which characterizes our common law method of decision making, the practice of law consists of inducing general principles from precedents and deducing the outcome that those principles produce in specific fact situations. This process entails three analytical activities that correspond to the techniques used in deconstruction. First, intrinsic in both the inductive and deductive aspects of legal practice is the

type of functional analysis on which the deconstructive inversion of hierarchies relies. Second, stare decisis necessitates textual interpretation, which is accomplished by using the same inferential techniques that deconstruction uses to establish the indeterminacy of texts. Third, because most legal problems may ultimately be reduced to an opposition between the individual and society, most legal arguments may ultimately be reduced to an effort to manipulate that opposition, just as the critical legal studies movement has manipulated it in order to challenge the appeal of liberalism. If the practice of law and the practice of deconstruction coincide, mastering the techniques of deconstruction will improve one’s ability to practice law.

Both the process of evaluating a set of precedents in order to ascertain the governing principle, and the process of applying the governing principle to the facts of a specific case, involve functional analysis. This is especially true of contemporary legal analysis because of the realist substitution of functionalism for formalism. Induction of the governing principle constitutes an effort to ascertain what objective the legal system is trying to advance by the particular pattern of precedents that it has generated. Likewise, deducing the outcome of a specific case constitutes an effort to ascertain what result will best serve the objective that has been extracted from the precedents. As a result, legal analysis is acutely concerned with the relationship between legal principles and their functional justifications. Deconstruction is also acutely concerned with that relationship. Hierarchies are ungrounded and then inverted by tampering with the putative connections that exist between principles and purposes. By highlighting the significance of those connections to the acceptability of an argument, and by illustrating techniques for the severance and reversal of those connections, the process of deconstruction has pragmatic utility for the practice of law. Moreover, the suggestion that a “dangerous supplement” is in-

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52. Some disputes might not initially appear to involve conflicts between the individual and society, such as disputes between private individuals, disputes between an individual and a group, or disputes between groups. Consistent with the tenets of liberalism, however, these disputes can be recast as conflicts between the individual and society. Disputes between individuals necessarily entail the intervention or non-intervention of society on behalf of the individual disputants. In disputes between an individual and a group, the group is the relevant society for purposes of liberal analysis. Similarly, disputes between groups are of liberal interest only because of the effect that they will ultimately have on the welfare of individual group members; concern for the welfare of groups in and of themselves is a communitarian rather than a liberal endeavor.
herent in all statements of principle provides an incentive for practitioners to keep digging for favorable arguments no matter how superficially appealing an adverse argument might initially appear to be.

Textual analysis of common law precedents is an important aspect of legal practice because the doctrine of stare decisis requires adherence to precedent. The deconstructive techniques used to establish the "free play" of texts are also useful in formulating arguments that are the stuff of everyday textual interpretation. By exploiting the necessary distinction between authorial intent and mere manifestations of intent, lawyers can uncover ambiguities in seemingly precise precedents and can formulate functional arguments for resolving those ambiguities in favor of their clients' interests. In a contracts context, textual interpretation has added utility because, not only precedents, but contracts themselves must be interpreted. Moreover, it is frequently apparent that the parties have formulated no actual intent about how to deal with a particular contingency, and the contractual manifestation of their intent is of little assistance in determining how to resolve the case. Mastery of the techniques used to establish textual indeterminacy facilitates the formulation of strategies by which courts and lawyers can deal with such problems.

The third way in which the critical legal studies movement can improve one's ability to practice law is by providing one particular set of substantive arguments that can almost always be invoked, regardless of the particular legal issue in dispute. As part of its campaign against liberal legalism, the critical legal studies movement has focused attention on the hierarchical opposition between the individual and society on which our liberal philosophical tradition rests. The inconsistency embedded within that hierarchy is so basic that it is often referred to as the "fundamental contradiction." The fundamental contradiction is that individuals can attain their individuality only through membership in a society. This creates an interdependence between the two concepts that permits the individual/society opposition to be perpetually manipulated. It also permits derivative manipulation of the doctrines that the legal system generates in order to mediate.

53. The phrase was coined by Duncan Kennedy in Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 205, 211-13 (1979).
54. See id. at 211-13.
55. For example, although individual liberty occupies the favored position in the liberal hierarchy, individual liberty can be secured only by ceding to the society the power needed to override one individual's liberty in order to protect...
the fundamental contradiction. This is particularly true of contract doctrines, because the central problem of contract law is determining when judicial intervention is warranted in light of our liberal preference for contractual autonomy. This is simply a special case of the fundamental contradiction. As a result, contracts arguments can be developed for either side of an issue by linking the desired outcome to the basic opposition between the individual and society.65

One might argue that we knew all of these tricks before critical legal studies was ever invented. I suspect that for many of us that is correct. But I also suspect that for many of us the critical legal studies movement has systematized a technique for formulating legal arguments that we were not quite sure how to make before we learned about deconstruction. Moreover, I suspect that the critical legal studies movement has expanded our working conception of just how much doctrinal manipulation is realistically possible in the name of principled legal analysis. Nevertheless, I do not believe that the enhancement of practice techniques constitutes the major contribution that the critical legal studies movement has made to the practice of law. Rather, its major practical contribution lies in what I hope will constitute an improved method for making legal decisions.

B. Atheoretical Justification

The unmistakable message of the critical legal studies movement is that doctrine does not account for the way in which the legal system decides cases. This is true whether doctrine is construed narrowly to include only legal rules, or whether it is construed broadly to include principles of the social sciences, moral

65. For example, something as basic as a statute of frauds problem can be reconceived as a problem that reflects the tension between the individual and society, and the hierarchy that exists between the two can be manipulated in order to support either result. One arguing in favor of the enforcement of oral agreements would emphasize the evidence of actual agreement and argue in favor of flexible application of the statute, with expansive construction of its exceptions, because such an interpretation would best serve the liberal objectives of the legal system out of which the statute emerged. One arguing against enforcement would emphasize the need to provide incentives for parties to make written contracts in order to promote certainty and stability over the range of agreements, because such an interpretation would minimize judicial enforcement of non-agreements and best serve the liberal objectives of the legal system out of which the statute emerged.
philosophy or even astrology. Any principled explanation for a particular outcome can be deconstructed—it can be shown not to have actually generated the result attributed to it. Although such assertions often instill anxieties about nihilism, these anxieties are largely unwarranted. Nevertheless, the critical legal studies movement has demonstrated that the prevailing model of our legal decision making process is inadequate, and we are not justified in ignoring that demonstration. Rather, we should incorporate the central indeterminacy insight of critical legal studies into the way in which we make our legal decisions.

The scope of the radical indeterminacy claim made by the critical legal studies movement is vast. Radical indeterminacy denies the ability to give a principled explanation for the occurrence of any social phenomenon. As a result, critical legal studies has generated a fair amount of alarmist opposition based upon its allegedly nihilistic propensities. In my view, however, apprehensions about nihilism misconceive both the nature of the radical indeterminacy claim and the nature of the legal system to which it is directed. The critical legal studies movement grew out of dissatisfaction with a particular epistemological model that was thought to govern legal analysis, and the indeterminacy claim amounts to nothing more than an argument for why that should not be taken as the governing model. Radical indeterminacy would portend nihilism only if we were irrevocably committed to the current model because it would then threaten the validity of the only available means of understanding the world in which we live. But we are not irrevocably committed to the current model. There are alternatives, and the critical legal studies movement suggests that it is now time to start exploring them.

The prevailing model of legal analysis is heavily rational. It assumes that language effectively captures the concepts that it describes and that rules of logic govern the manner in which those concepts interact. Critical legal studies suggests that both assumptions of the current model are incorrect. Language does not reproduce concepts but merely approximates them, in the same way that manifestations merely approximate intent. As a result, the slippage that exists between an actual concept and its linguistic approximation can be exploited in the course of formulating an argument. In addition, the rules of logic do not adequately account for the ways in which concepts can interact. Logical analysis generates reliable conclusions only when the rules of logic are applied to premises having ascertainable truth values—premises that are either true or false. The premises that we are forced
to use in conducting our legal analyses, however, are indeterminate rather than true or false. Because every concept contains the trace of its "dangerous supplement" the operative truth value of a concept or premise depends upon the use to which it is to be put in a particular logical argument. This can cause logical arguments to be self-referential and subtly circular. And it can allow the formulation of arguments that seem counter-intuitive even though they have no apparent analytical defects.57

Deconstruction is accomplished by manipulating the ambiguities inherent in language and by performing logical operations on premises that are not suitable for incorporation into logical arguments. That is why deconstruction often seems artificial and counter-intuitive. However, exploitation of the inadequacies in language and logic characterizes all legal arguments, not just those used to deconstruct doctrine. The reason that more traditional arguments do not seem equally artificial is simply because they are more traditional. Because they have been around longer, we have learned to vest them with intuitive appeal. It is not because they are better arguments. Because they are not. Critical legal studies has demonstrated that whatever it is that distinguishes a good argument from a bad one operates through some process other than syllogistic reasoning. The epistemological model that actually accounts for how our legal decisions are made is a non-rational one. Critical legal studies does not nihilistically establish that there are no governing rules, but rather that the governing rules are likely to be inarticulable ones. The implication of critical legal studies for legal theorists is that it is time to start developing new models to account for the manner in which legal and other rational decisions are made. My guess is that the substitute model will turn out to be largely aesthetic. Nevertheless, the important implication of critical legal studies for legal practice is more concrete.

Even though we no longer have a serviceable explanatory model to account for the operation of our legal system, I think we do know where the operative rules reside. The operative legal rules, as opposed to the rules contained in the statutes and precedents, are comprised of a complex amalgam of conflicting cultural norms. Because they are so complex, we could not begin to write them down or even to understand their content. Nevertheless,

57. The analytical difficulties created by heavy reliance on language and logic are explored more fully in Spann, Secret Rights, 71 Minn. L. Rev. 669 (1987).
the rules are accessible to us, operating through their embodiment in our social decision makers. Individuals who are socialized in a particular culture embody the most accurate representation possible of that culture's operative rules. And when those individuals make social decisions, they make them in the way that the inarticulable rules of the culture require them to be made. This is not to say that individual decision makers will always agree about proper outcomes. In fact, controversial cases must generate disagreement among decision makers in order to reflect accurately the lack of societal consensus attendant to proper resolution of the case. The fact that we have very little cognitive understanding of what is going on is highly interesting, but it is of purely academic interest. As a matter of practical consequence, things are proceeding apace.

What then is the important message of critical legal studies for the practice of law? Grant Gilmore has suggested that there may be an inverse relationship between law and social justice.\textsuperscript{58} I believe that the reason for this is that legal doctrine can be very distracting. If we take it too seriously, we run the risk of letting it divert us from the path of correct decision making. The less law there is, however, the less likely doctrine is to constitute such a diversion. And the more likely we are to get things right. Speaking of the need for faithful application of the law, Judge Wyzanski once wrote, "the never-to-be-forgotten caution is that this Court is not free to render such decision as seems to it equitable, just and in accordance with public policy..."\textsuperscript{59} Judge Wyzanski did not understand the practical lesson of critical legal studies, and he allowed doctrine to stand in the way of his administration of justice.\textsuperscript{60}

CONCLUSION

The nineteenth century formalists suggested that law was a science that could be understood through the inductive methodologies of the scientific method. The early twentieth century realists suggested that law was a social science that could be understood through the pragmatic methodologies of the social scientific method. Now, the late twentieth century critical legal

\textsuperscript{58} See text accompanying note 51 supra.
\textsuperscript{60} For an example of how a case might be decided by a judge who does understand the practical message of critical legal studies see Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986).
studies movement has suggested that law is really nothing at all. Rather, it is a mere conglomeration of deconstructable doctrines that necessarily have no effect on the way that legal decisions are made. Legal decisions are guided by the invisible hand of our complex cultural values, operating through their embodiment in our social decision makers. Nevertheless, by paying undue attention to doctrine we risk interference with proper decision making through diversion of the invisible hand from its appointed course. As a result, the most significant thing about legal doctrine is its lack of significance.

If I am correct about the declining significance of doctrine, we might expect the future to hold fewer and fewer doctrinal rules. And the rules that do persist may show less and less concern for constraining the discretion of legal decision makers. In fact, such an evolution may already be occurring. Consider, for example, Article II of the Uniform Commercial Code and its infusion of reasonableness-type standards into nearly every sphere of traditional contract concern. This trend has been replicated in the Second Restatement of Contracts, and commentators have already begun to speculate about an expansion of the trend in some future Third Restatement.61

Nevertheless, you may sense an internal inconsistency in all of this. I have suggested both that doctrine is largely irrelevant to legal decision-making, and that undue attention to doctrine can undermine the soundness of legal decision making by interfering with the complex cultural norms that operate through their embodiment in our judges and other social decision-makers. If doctrine cannot control decision-making, how can a doctrinal diversion cause a decision-maker to reach an improper result? Either doctrine is relevant to legal decision-making or it is not, but it cannot be both. If you think that you have caught me in a contradiction, arguably you have. But it is not a contradiction that matters very much. At least not under a post-critical legal studies model of legal reasoning, where internal inconsistency is the humdrum of everyday deconstruction.