

Pre-Classical Private Law: The Transformation of Contract

This chapter describes the breakup of the pre-Classical vision of all of legal obligation as essentially contractual, and the emergence of the Classical vision of law as concerned with establishing spheres of autonomy for the wills of legal actors. It seems worth repeating that we are still concerned with the horizontal dimension of legal consciousness, with describing the ways in which an existing mass of legal rules were integrated into subsystems. In the next chapter, the addition of the vertical dimension, within which rules and principles are linked hierarchically, will make it possible to address Classical legal thought as a whole.

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Beside the ideal of liberality, the second important mediating concept within pre-Classical legal thought was “implied intent.” When pre-Classical thinkers had to justify a rule, or explain an area of doctrine, they often appealed to the “justice and policy” of the situation. They also referred constantly to the intent of the parties, meaning the actual desires and goals and understandings of the particular legal actors involved. Implied intent was a cate-

164 gory situated at about an equal distance from these three justifying ideas of morality, policy and actual intent.

Like liberality, implied intent was a child of 18th century enlightenment, and specifically of the law reforming enthusiasm of Lord Mansfield. As with liberality, the idea had a powerful appeal to Chancellor Kent. His discussion of the revocation of wills contained a typical use of the concept:

A will may be revoked by implication or inference of law; and these revocations are not within the purview of the statute [requiring wills to be executed formally]; and they have given rise to some of the most difficult and interesting discussions existing on the subject of wills. They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. [IV-572-73]

In the context of wills, the concept blurred the distinction between what people actually intend and what they ought to intend. Another problem for which implied intent provided a solution was that of making people intend what convenience or policy would like to have as the rule. For example, in rationalizing a particular pattern of easements, Kent said:

Sergeant Williams is of opinion, that the right of way when claimed by necessity, is founded entirely upon grant, and derives its force and origin from it. It is either created by express words, or it is created by operation of law, as incident to the grant; so that, in both cases, the grant is the foundation to the title. If this be a sound construction of the rule, then it follows, that, in the cases I have mentioned, the right of the grantor to a way over the land he has sold, to his remaining land, must be founded upon an implied restriction, incident to the grant, and that it cannot be supposed the grantor meant to deprive himself of all use of his remaining land. This would be placing the right upon a reasonable foundation, and one consistent with the general principles of law. [III -424]

Lord Mansfield attempted to use implied intent to reconstruct the law of contracts on an overtly ethical basis unencumbered by

technical concepts of formation and consideration. His famous opinion in the case of *Moses v. Macpherlan* contained the following language:

If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action [indebitatus assumpsit], founded in the equity of the plaintiff's case, as it were upon a contract (quasi ex contractu, as the Roman Law expresses it).

Contract students sometimes get the impression that this was the first case recognizing the existence of a distinction between a cause of action on the contract for expectation damages and a cause of action in quasi-contract for restitution of benefits conferred. This is incorrect. What Mansfield did was to suggest not a new cause of action for restitution, but a new general theory of the basis of contractual liability. This theory fused individual intention with community morality and commercial policy. In this respect, it differed sharply from the Classical and modern theories, with their insistence on carefully discriminating these elements. It differed no less from the approach of the traditional common lawyers, who offered lists of the requirements of success in the actions of debt and/or assumpsit rather than justifications of the phenomenon of liability.

The particular rules Mansfield proposed to instantiate his theory were, in many cases, rejected, and the common law forms of action endured in America another 70 years. But Mansfield's approach to intent was the basis of the emergence of contract in place of property as the main organizing concept of mid-nineteenth century law. We have already referred to *Parsons on Contracts* as representative of this vision. Here are the opening paragraphs of the work:

The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole

procedure of human life implies, or, rather, is, the continual fulfilment of contracts...

It would be easy to go farther, and show that, in all the relations of social life, its good order and prosperity depend upon the due fulfilment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of all the parties. Far more frequently they are not expressed at all; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, contract is coordinate and commensurate with duty; and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide though not a universal application, that whatsoever it is certain a man ought to do, that the law supposes him to have promised to do. "Implied contracts," says Blackstone (Vol. ii, p. 443,) "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." These contracts form the web and woof of actual life. If they were wholly disregarded, the movement of society would be arrested. And in so far as they are disregarded, that movement is impeded or disordered. [I - 3-4]

The most striking of the uses of implied intent to contract was in the treatment as contractual of family law subjects previously classified under the "Law of Persons." Parsons was aware that this posed difficulties.

Even those duties, or those acts of kindness and affection which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection, that the idea of a contract would in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still

such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes the performance of these duties the condition of the preservation of human life; and by the implied obligation on the part of the unconscious objects of this care, that when, by its means, they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces this obligation to a certain degree, on both sides, as will be shown hereafter. [I - 3-4]

The chapter on infants illustrates the use of implied intent as a mediator of the conflict of morality and policy. The question was the liability of parents to pay debts contracted for necessities by their children.

The obligation of the father to maintain the child is and always has been recognized in some way and in some degree, in all civilized countries. The infant cannot support himself. Others must therefore supply him with the means of subsistence; and the only question is, whether the public (that is, the State), shall do this, or shall his parent. And justice, equally with the best affections of our nature, answer that it is the duty of the parent. But it is a very difficult question how far this duty is made a legal obligation, by the common law.

In England, after much questioning, and perhaps a tendency to hold the father liable for necessities supplied to the child, on the ground of moral obligation and duty, it seems to be, on the whole, settled that this moral obligation is not a legal one; and indeed it has been recently peremptorily decided that no such legal obligation exists in the case of contracts made by the child for necessities. The father's liability is nevertheless admitted in many English cases, but is now put on the ground of agency; and the authority of the infant to bind the father by contracts for necessities is inferred, both in England and in this country, from very slight evidence. [I - 247-50]

American law exhibited the same movement from direct appeal to moral obligation toward the agency idea. The plasticity of the

168 concept of agency as Parsons was using it was very great. It was designed to do justice, and Parsons was unwilling to accept it as a constraint. This became clear when he considered the situations in which there would be no liability if we took agency seriously:

If we take the case of necessities supplied to an infant actually incapacitated by want of age, or by disease of mind or body, from making any contract, or acting in any way as the agent of any person, the father cannot be made liable excepting on the ground of his parental obligation; and some of the cases cited in the two last notes indicate, perhaps, that the question would be decided in England in favor of this liability on his part. It will be noticed, that where it is most distinctly denied that this moral obligation of the parent constitutes a legal obligation the denial is confined to a liability for the contracts of the child. The reason is said to be, the danger of permitting a father to be bound in this way, and it is variously illustrated in the cases; but this reason fails where the infant can make no contracts, and must be supplied or suffer. [I - 250-251]

What this meant was that the implied agency idea was a means of justifying a compromise between the moral obligation to support and the policy against encouraging false or frivolous claims against parents. When this policy became irrelevant, the court ought to discard the mediating concept.

Parsons treated the case where the father clearly had no intention of authorizing his child as agent as follows:

So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it, and will be regarded as performing it for him; and, on general principles, the law will raise a promise on the part of the parent, to compensate the party who thus did for him what he was bound by law to do. [I - 254]

Where the father went so far as to formalize his intention not to be responsible, Parsons had at last to abandon his obfuscatory language:

It is very common in this country to see in the newspapers an advertisement signed by a father, stating that he has given to his minor son "his time" and that he will make no future claim on his services or for his wages, and will pay no debts of his contracting. But if a stranger supplied a son, at a distance from his home, with suitable necessities, in ignorance of such arrangement, there is no sufficient reason for holding that it would bar his claim against the father. And we think that he might recover from the father for strict necessities, even if he knew this arrangement. On what ground could the father discharge himself from his liability by such a contract? Even if the father had paid the son a consideration for the release of all further obligation, it would be a contract with an infant, and void or voidable, because certainly not for necessities. And the whole policy and reason of the law of infancy would seem to be opposed to permitting a father to cast his son in this way upon the public, and relieve himself from the obligation of maintenance. [1 - 258]

The net effect of the use of the implication idea was that except in the case of express disclaimer, the discussion of the obligation of the parent to support the infant never directly confronted the conflict of morality and policy. The infant's claim might have compelling moral force. But the recognition of it would embroil the legal system in the regulation of fragile relationships to the detriment of both courts and families. But so long as we speak only of agency and the "raising" of promises, this problem can be kept on the periphery.

The use of a mediating concept like implied intent does *not* imply unconsciousness or ignorance of the conflicts mediated. It affects our perception of their importance, their pressingness, their pervasiveness, without concealing or resolving them. It makes it possible to admit, in a *few* cases, what we could not admit everywhere. So at the end of a discussion of the husband's duty to support his wife that paralleled that of parent and child, Parsons could openly acknowledge the limits of implied intent. The particular question was the husband's liability for the wife's necessities purchased against his express prohibition:

It seems, however, absurd to say that a man who has driven his wife from his house and his presence and manifested by extreme cruelty his utter hatred of her, was all the time constituting her his agent, and investing her with authority to bind him and his property. And if we suppose the case, where a wife perfectly incapacitated by infirmity of body or mind from making any contract at all, is supplied with necessities by one who finds her driven from home and ready to perish, and who now comes to her husband for indemnity, we cannot doubt that he would recover. But the proposition would seem too absurd even to take its place among the fictions of law, that the wife, when she received this aid, promised in the husband's name that he would pay for it, and that he had given her a sufficient authority to make this promise for him. For these and other reasons, courts now show a tendency to rest the responsibility of the husband for necessities supplied to the wife, on the duty which grows out of the marital relation. He is her husband; he is the stronger, she the weaker; all that she has is his; the act of marriage destroys her capacity to pay for a loaf with her own money; and all she then possesses, and all she may afterwards acquire, are his during life and marriage; upon him must rest, with equal fulness, if the law would not be the absolute opposite of justice, the duty of maintaining her and supplying all her wants according to his ability. And we think this plain rule of common sense and common morality is becoming a rule of the common law. [I - 290-291]

The notion of implied intent played just as great a role in commercial as in family law. There, too, there was a constant perception of a conflict between morality and policy, and a constant search for formulae that would reduce the acuteness of that conflict. For example, Parsons acknowledged that the institution of negotiability had been seen as involving concessions granted by morality to policy: the cutting off of equitable defenses had to be justified. Here is how he did it:

It is generally said that the law of bills and notes is exceptional; that they are choses in action, which, by the policy of the law merchant, and to satisfy the necessities of trade and business, are

permitted to be assigned as other choses in action cannot be. But the law of negotiable paper may be considered as resting on other grounds. If A. owes B. one hundred dollars, and gives him a promissory note wherein he promises to pay that sum to him, (without any words extending the promise to another,) this note is not negotiable; and if it be assigned it is so under the general rule of law, and is subject in the hands of the assignee to all equitable defenses. But if A. in his note promises to pay B. or his order, then the original promise is in the alternative, and it is this which makes the note negotiable. The promise is to pay either B. or some one else to whom B. shall direct the payment to be made. And when B. orders the payment to be made to C., then C. may demand it under the original promise. He may say that the promise was made to B., but it was a promise to pay C. as soon as he should come within the condition that is, as soon as he should become the payee by order of B. [I - 202-03]

The doctrine of respondeat superior provides a somewhat more complicated example. The problem was to explain why the law held the master when the master had neither been negligent nor given instructions to be negligent. Parsons' solution was as follows:

The responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant. It is true that the policy of holding a master to a reasonable care and discretion in the choice of a servant may cause a liberal construction of the rule in respect to an injured party, and may therefore be satisfied in some instances with a slight degree of actual control; but, of the soundness and general applicability of the principle itself, we do not doubt; nor do we see any greater difficulty in the application of the principle than may always be apprehended from the variety and complexity of the facts to which this and other legal principles may be applied. The master is responsible for what is done by one who is in his constant control, and may direct him from time to time as he sees fit; and therefore the acts of the servant are the acts of the master because the servant is at all times only an instrument; and one is not liable for a person who is a servant only by

construction, excepting so far as this essential element of control and direction exists between them. [I - 87-88]

A few pages later, Parsons began to substitute "power of directing" for actual control [I - 90-91] and finally pointed that the matter of control was for the jury. [I - 92] The master's control was inherently fictional. It was a basis for imputing responsibility that obscured the difficulty involved in imposing liability without fault.

By far the longest section of Parsons' discussion of consideration doctrine concerned the "many nice questions" that arise when a claim is made that plaintiff has benefited defendant without any contemporaneous promise of reimbursement. The general rule was that "a past or executed consideration is not sufficient to sustain a [subsequent] promise founded upon it, unless there was a request for the consideration previous to its being done or made." But the reader who stopped with the general rule risked serious misconception since:

This previous request need not always be expressed, or proved, because it is often implied. As, ... where one accepts or retains the beneficial result of such voluntary service. Here, the law generally implies both a previous request and a subsequent promise of repayment.

Language of this kind occurs in modern treatises and judicial opinions but it has lost all persuasive effect. Implied intent is meaningless. We have substituted (a) tort liability based on fault or the policy calculus of liability without fault, (b) the objective theory of contracts based on the "reasonable man" standard, and (c) quasi-contracts or estoppel arguments appealing directly to the judges responsibility for distributive justice between the parties. It is hard for us to believe that the addition of fudging categories and language such as "he makes it his own" add anything. The explanation of our attitude lies in the devastating assault Classical legal thinkers leveled at the approach Parsons typified.

That assault was aimed at more than the ambiguities of the concept of implication. The fudging of the distinctions between the actual intentions of the party and the intentions of the judge

based on morality or policy had been part of a larger vision of the legal order. As Pound pointed out in 1918, the key to that attitude was the idea of relationship.

Parsons' book was organized on the premise that there were four requirements for the creation of a contract: parties, consideration, mutual assent, and a subject matter. The sections on consideration and assent comprise about 60 pages; those on parties, 350; and those on subject matter, about 300. The initial 350 pages on parties contains the following divisions:

Agents	Parties by Novation
Factors & Brokers	Parties by Assignment
Servants	Parties to Negotiable Instruments
Attorneys	Infants
Trustees	Married Women
Executors & Administrators	Bankrupts & Insolvents
Guardians	Lunatics
Corporations	Aliens
Joint Stock Co.'s	Slaves
Partnerships	Outlaws

The subject matters were the following:

Sale of Real Estate	Hiring of Persons
Hiring of Real Estate	Service Contracts Generally
Sale of Goods	Marriage
Warranty	Bailment
Hiring of Goods	

Each of these categories represented for Parsons a social entity with its own positive body of expectations of the parties and its own set of moral obligations tempered by policy. This is *not* to say that there was no general theory of contract. The general theory of contract was the body of principles that governed the interaction of morality, policy, actual intent and implied intent in the different relationships that define social life. These are ideas like

pacta sunt servanda, estoppel against denying things after others have relied on one, the presumption that people intend to perform their moral duty, the desirability of encouraging transactions. The development or rationalization of a body of contract rules meant showing that within the context of a particular relationship the rules comported with these principles.

The importance of context dominated the organization of the book. For example, the discussion of infants includes both the question of the parent's obligation to support and a discussion of the validity of the infant's contracts on his own behalf. It also raises the question of the infant's duty to support his parent and the parent's responsibility for the infant's contracts for necessities. In the discussion of partnership, Parsons found it "convenient" to deal with the organization and internal arrangement of the institution as an adjunct of the discussion of the special character of partners as parties in contracts with third persons.

The chapter on Bailment began by referring to "systematic arrangement" and "profound and accurate investigation into its principles," and defined the subject in terms of the delivery of property by one to another for a special purpose. It included the "rights and duties of the parties in relation to the property and to each other." [I - 569] But of the 150 pages he devoted to this subject, no fewer than 90 in fact concerned the law of common carriers. Parsons described their liabilities for the carriage of passengers with no reference at all to property bailed and included a detailed review of duty of care under different circumstances, and even some paragraphs on the law of railroad injuries to pure strangers. Bailment, the legal category, was a pretext for a discussion of all the legal aspects of the social and economic category.

The idea of relationship was important if not essential to the plausibility of the idea of implication because it provided a source for the intentions and duties the judge imposed on the parties. Parsons spoke constantly of reasonable expectations in the situation of agent, or broker, or guardian, or innkeeper. These standards he never clearly imputed to actual intent, to morality, or to policy. They were "there" in the relationship without a sharp need to identify their source.

In light of this, it would be more accurate to identify as the mediating concept an amalgam: the process of implication of intent based on reasonableness within the context of one of the basic social-legal relationships. The judge working within such a conceptual frame of reference could feel that he was carrying out an objective judicial task that did not require him to confront directly the problem of conflict between morality and policy that pervaded private law as he experienced it. Implied intent without a belief in the background of conventionally defined relationships might have seemed open to arbitrary manipulation. Relationship without the imputation of assent and assumption of responsibility might have seemed pure judicial imposition.

The two taken together bear an interesting relationship to the notion of implied limitations in constitutional law. The implied limitations concept allowed the judge to draw on the elaborate context of natural rights philosophy and political theory without abandoning the claim that he was a positivist carrying out the will of the constitutional sovereign. Implied limitations therefore could mediate the contradiction of sovereignty and natural right without pretending to resolve it. Implied intent permitted the same kind of reference to ideals and usages without abandonment of the claim that the obligations imposed had been voluntarily assumed.

Implied intent was also a part of the program of liberality, rather than an altogether separate concept. The liberal notion that law could abandon the "rigorous, artificial, strict, and technical" forms of the feudal common law was implausible, unless one could point to alternative sources, both of content for rules, and of objectively determinable facts on which to found judicial action. Implied intent provided a solution wherever the quarreling parties were linked by a socially defined relationship. The liberal program called for flexible interpretation of words and acts, for the recognition of intent, and for flexible judicial remedial response to abuses. All of these were achieved in an apparently certain and non-arbitrary way when the judge appealed to implied intent for standards of reasonable expectations and behavior. The concept gave him access to morals, policy and actual intent, but required no discussion of any of them.

Parsons thought of his work as part of a trend. In his Introduction, he pointed out that Blackstone had devoted only a single chapter, called "Of title by gift, grant - and contract" to his subject matter. He remarked that of the many treatises since published, "the latest are the largest." "But", he went on, "I have thought that a work of still wider extent, that is, embracing some topics not usually presented in these treatises, and exhibiting the principles of law upon many subjects more fully, would be useful to the student and practitioner." [I-vii] Treatises continued to grow larger, but the theory Parsons used to annex all of substantive law except real property to contracts was superseded by the quite different organizational scheme of the Classics. The rest of this chapter deals with the impact of will theory, absoluteness and objectivism on the elements that constituted contracts in 1850. This section describes the implications of will theory for the organization of legal rules into distinct doctrinal fields.

Parsons almost never referred to the "will" of the parties or even of the state; nor did Kent or Story. For them, the crucial category had been "intention." The change in the dominant word after 1870 was more than formal. It signified a new preoccupation with locating a legal actor whose wishes would control the judge. "Will" suggested that controlling actor's dominance; it suggested that he was empowered by the legal order to determine the outcome, and acted with that power in mind. The category of intention, by contrast, suggested the whole pre-Classical apparatus based on the process of judicial implication, stereotyped social relationships, and the norm of reasonable behavior.

The pre-Classical approach blurred the distinctions between parties and judge, actual intent and moral duty, privately desired outcomes and socially desired outcomes. The essence of will was that it was an uncompromisingly *positive* concept. It represented a self-conscious decision to avoid fuzzing policy, morality and actual intention, and to avoid ambiguity about *whose* will was involved in any particular situation. Will was also *positivist*, in the sense that those who used it were insisting that the judge was always at

the beck of some lawmaker, the sovereign or the holder of a legal right derived from the Constitution. The judge's task was to do that actor's bidding, not to twist or interpret his bidding into something compatible with the judge's view of policy or morality.

The adoption of the will theory was manifested in (a) the dismantling of contracts by the spinning off of Quasi-Contract and Tort; (b) the rise in jurisprudence of an ordering of private law based on two distinctions: rights against the world versus rights against individuals; and rights arising from private agreement vs. those created by the state; (c) the emergence of the concept of status to deal with legal relationships organized in a way inconsistent with this scheme; (d) the reordering of the residuum of pure contract in terms of the will of the parties and the will of the sovereign; and (e) the organization of the brand new field of tort law into intentional tort, negligence and absolute liability.

The Emergence of Quasi-Contract

Parsons assumed that his readers were familiar with two forms of action, both loosely called contractual: an action "on the contract" or in "special assumpsit," and an action of "general assumpsit" based not on the express terms of the parties agreement but on the duties arising out of their relationship. This pleading distinction was *not* the basis of a distinction between contract and quasi-contract as we understand them. The category of general assumpsit included both what we would call contracts "implied in fact," or based on an inference of actual intent from conduct, and obligations imposed by law regardless of intent. Parsons treated recoveries in general assumpsit, where an express contract was void, as "contractual," even where we see them as not consensual at all. [I-57-58]

Take the case of the infant who receives goods, and then repudiates his promise to pay for them. Everyone agreed that an executory contract between an infant and an adult was void, but could the infant retain the goods while refusing to pay? There was a strong argument, based on the simple proposition that general

178 assumpsit was a contract action, that the infant could do exactly that. It was even possibly the case that an infant who rescinded his own contract ipso facto cut off his own restitutionary remedy for his uncompensated part performance. The opposition to these results rested on the "equity" of allowing general assumpsit in the particular circumstances, rather than on appeal to a recognized cause of action for unjust enrichment. [I-265-268]. Somewhat similar problems arose with breaching plaintiffs in employment contracts. [I-522-526]

The lumping of implied-in-fact with implied-in-law contracts has struck classical and modern legal thinkers as supremely irrational. The tendency has been to attribute it either simply to "confusion" or to archaic thinking controlled by the forms of action. But what we have said already about the concept of implied intent should make it clear that the category is typically pre-Classical. The suppression of the sharp distinction between the will of the state and that of the individual was a general principle rather than an aberration.

The emergence of the modern notion began with the Pennsylvania case of *Hertzog v. Hertzog*, decided in 1856. The court drew the distinction as follows:

There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place, 3 Comm. 159-66, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country,

and therefore the common law or statute law imposed upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. . . . The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other it is ascertained and enforced. [K&G - 122]

As far as I am able to determine, this is the first American case to make the distinction. In *all* previous cases, the protection of the restitutionary interest through the general assumpsit form of action is carried out without allusion to any distinction between private and public will. *Hertzog* is conventionally the earliest case cited in opinions of the 1870-1910 period.

In the early 1860's a second, much enlarged edition of Austin's *Jurisprudence* was published, and quickly acquired a readership far larger than Austin had been able to command when he wrote and lectured in the 1830's. This book and Maine's *Ancient Law* (1861) created a whole new area of learning for American legal thinkers. They began to study not the masses of Roman and medieval *rules* that had been the mark of erudition for the older generation, but rather pure Roman law *theory*. The distinction between the will of the parties and the will of the state played an important part in that theory, and Austin (in lectures only included in the later edition) and Maine discussed it. The second American reference to quasi-contract was by Justice Field in *Pacific-Steamship Co. v. Joliff*, decided in 1864, citing Maine and a California case not in point. *Leake on Contracts* referred prominently to the concept in 1867. The third American allusion appears to have been a sentence by Holmes in his first legal article in the *American Law Review* in 1871. In the next year, he brought out his 12th edition of *Kent's Commentaries*. No earlier edition of the work mentioned the distinction. All Holmes did was to append the following footnote to the initial definition of a contract:

The student should take notice that the phrase implied contract means two things, which have no connection with each other. It is

applied in the first place to those contracts, properly express, where the promise is signified by other means than by words, as when a man orders goods at a shop, and says nothing further. Austin on Jurisp. 3d. ed. 325. Secondly, to a class of cases which are not contracts at all, but which the law by a fiction treats as contracts, implying, as it is said, the request, consideration, or promise in order to render the common law forms of action *ex contractu* available. This fiction has always been a source of confusion, and is not needed where forms of action are abolished, and a recovery may be had on a simple statement of facts. See *Hertzog v. Hertzog*, 29 Penn. St. 465; [Holmes in] 5 Am. Law Rev. 11, 12. [II-608]

After 1870, the progress of the idea was rapid. The question of whether or not to distinguish arose whenever statutes prescribed particular procedures for actions "sounding in contract" as opposed to others. It arose also in the case of the supply of necessities to legal incompetents who refused to pay for them and then pleaded the invalidity of the contract of sale. In New Hampshire in 1872 and New York in 1879 these situations led to rather elaborate disquisitions on the importance of keeping the will of the sovereign clear of the will of the parties. In Bishop and Page, the leading treatises after Parsons and before Williston, much introductory space was devoted to the distinction in order to set up very clearly that the theme of contracts proper was utterly distinct from that of quasi-contract. In 1893, Keener completed the development by publishing a *Treatise on the Law of Quasi-Contracts*, summarizing and systematizing what had happened since *Hertzog v. Hertzog*. Keener began by stating the division of contracts into Express, Implied in Fact and Implied in Law, thereby showing that, by 1893, the essential distinction did not need preliminary explanations. He continued as follows:

This treatment of Quasi-Contracts is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice.

It needs no argument to establish the proposition that it is not

scientific to treat as one and the same thing, an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent. And yet with this wide difference between simple contracts and quasi-contracts, the latter are generally treated to-day as a species of simple contract. [K-3]

He then constructed the first comprehensive list of subjects that belonged to quasi-contract and not to contract. The list included the following items treated by Parsons as contractual: obligations of common carriers and innkeepers; obligations of incapacitated persons to pay for benefits; obligations of parents to children and of husbands to wives; liability for benefits received under voided express contracts; liability for money paid by mistake. [K-16-25] This subtraction from the domain of contract was justified on the basis of a general principle against unjust enrichment. Keener was clear that he was dealing with a separate cause of action with its own rules rather than with a pleading category. This view is universally accepted today. For example, the A.L.I. Restatements placed quasi contracts with the constructive trust in a separate volume on Restitution, restricting contracts to the class of obligations supposedly essentially voluntary.

The Emergence of Torts

In Parsons, what we would now call torts figured as an important aspect of every subject considered. I have already mentioned that his discussion of bailment involved the issue of the duty of care of a railroad company to trespassers on its tracks. In each relationship he took up, Parsons dealt with the standards of behavior the law imposed on the participants. A trustee "is held not only to careful management of the trust property, so that it shall not be wasted or diminished, but he is bound to secure its reasonable productiveness and increase." [I-103] Details followed. Parsons took up the liability of an agent for deliberately or negligently misleading as to the scope of his authority, respondeat superior, and the responsibility of husbands and fathers for the

182 tortious acts of wives and children. The torts of fraud and breach of warranty were the subjects of separate chapters.

One of the functions of the implied intent concept was to blur the question whether these duties of care were properly contractual or properly imposed by the sovereign. (The treatment of a father's attempt to disclaim liability for a son's debts is one of the very few cases in the whole treatise in which Parsons squarely considered the problem of contractual modification of legal liabilities.) The Classical reaction against what had come to seem his obfuscation was naturally concerned with rectifying this state of affairs. One of the consequences was the initial attempt to define a field of torts.

It is a familiar "startling" fact that the first treatise on Torts, by Hilliard, an American, appeared only in 1859. Prior to that time, the learning of torts was contained only in works on evidence, on "nisi prius," and on pleading and practice. Hilliard's objection to this treatment was based on the proposition that "Contracts, Torts and Crimes, [make] up, in their broadest interpretation, an entire corpus juris civilis." [i] The fragmentary treatment of Torts was "not the mode demanded by the nature and importance of the general subject." [ii] In the earlier treatments, "remedies have been substituted for wrongs." [vi]

Hilliard's program seemed to mark a departure: "in first looking at the wrong itself, its nature, its subject, its author, its recipient or victim, and subordinately its remedy; I have, at least to my own partial satisfaction, evolved a series of principles, far less fragmentary and disconnected, than they have always appeared to me when stated in connection with mere forms of action." [vii] The ultimate goal was to "consolidate private wrongs into one great subject, the unity of whose nature both admits and demands unity of treatment." [ix]

Neither this book, nor Addison's, published in England a year later, came close to fulfilling this promise. They began with a broad distinction, derived from the Roman law, between obligations *ex contractu* and obligations *ex delictu*. They had as well the conventional division of all the forms of action into contract writs and tort writs. Their books proceeded to enumerate different

kinds of rights (personal security, possession, property, reputation, etc.) and then to describe the remedies the tort writs gave for violation of those rights. The limits of the subject were defined without reference to any general principle, and the only internal ordering produced, albeit an advance, was the list of rights, each of which was treated according to the same taxonomic scheme of content, types of injury, etc.

It is striking that Hilliard's first two chapters are called "Torts as Connected With Contracts," and "Torts and Crimes." But the first of these does not distinguish contract and tort at all. It is a description of the situations in which actions undertaken in a contractual situation can give rise to liability in forms of action classified as tortious, such as fraud and breach of warranty. Likewise with torts and crimes. The definitions of a tort in the early books were of no more help. Addison's was "every invasion of a legal right...every neglect of a legal duty, every injury to the person, character or reputation of another." [iv]

Markby (1871), the first of the analytical jurists after Austin, was also the first to see this procedure as problematical. He began by defining contract as a legal obligation whose content the sovereign defined according to the intentions of the parties. The problem arose in defining torts:

I know nothing more difficult to grasp than the distinction on which this classification [of actions as tort or contract] is founded. Indeed, if we accept some accounts of that distinction, it is difficult to believe that it exists at all.

If, for instance, we turn to the description of torts by a very modern writer, what we are there told is, that a tort or a wrong, independent of contract, involves the idea of the infringement of a legal right or the violation of a legal duty. But is not a breach of contract both an infringement of a legal right and a violation of a legal duty? Further on we are told that one class of actions of tort are founded on infractions of some private compact, or of some private duty or obligation, productive of damage. But are not actions for breach of contract founded on that, which is at once the infraction of a private duty or obligation, and also of a com-

pact? Again, though we are reminded that tort differs essentially from contract, yet I have in vain endeavoured to discern what the essential difference is. On the contrary, I find it stated, that the same transaction may give rise to an action of tort and an action of contract. True, it is said that an action of tort cannot be maintained for a breach of contract, but only where the tort complained of flows from a contract. But what sort of special connection is expressed by the word "flowing" I am unable to conceive. [Id. 179-80, p. 87-88.]

Beside the problem of apparent over-inclusiveness, there was the problem that no one called violation of a civil duty to pay taxes, or of quasi-contractual obligation, a tort.

Markby proceeded to an extraordinary discussion of tort liability, one that we will take up in a later chapter. But he had nothing further to say about the classificatory dilemma he had posed. The Classical answer was propounded by Holmes two years later in his anonymous article on the "Theory of Torts" (1873):

Torts have been thought to be infractions of rights availing against all the world. This may prove too narrow a definition, although the title includes all such rights. It contains in the first place duties of all the world; that is, duties of subjects generally to subjects generally, irrespective of any more special circumstances on either side than such as make it possible to incur a legal liability. For instance, the duty not to commit an assault and battery is imposed on all persons not excepted from ordinary rules in favor of all persons upon whom a battery is possible. The fact of possibility is merely a condition precedent, not a defined state of facts to which a peculiar rule of law attaches. A second class of duties, equally general as regards the persons on whom they are imposed, are owed, not to every member of the community, but only to persons in particular situations of fact; that is, to persons distinguished from the rest of the community by certain definite marks. Such, for example, are the duties of all the world to a possessor, a patentee, or a master. The rights corresponding to both of these enumerated classes are, of course, rights availing against all the world, but there are other cases which are harder to deal with.

There are some instances, undoubtedly, in which the duty seems to arise out of a special relation between the parties. Take the case of a vendor of an article known to have a secret tendency to do damage if applied to the contemplated use. It would seem, at first sight, that the duty was a consequence attached by the law to the special relation of vendor and purchaser. But the same duty would arise out of the relation of bailor and bailee, and we think reflection would show that, although the relation of the parties afforded the occasion, the duty in question was capable of being generalized into a form irrespective of the particular relation. . . . Take again fraud in the making a contract. The breach of duty is only complete when the contract is made, but the duty not to defraud is logically anterior to the contract, and seems to be recognized as being so by the option given the defrauded party to sue in tort for the fraud. . . . There are, however, some truly special liabilities arising out of special relations of fact other than contract, which, as they are not enforced by actions *ex contractu*, are included in books on torts; for instance, the duties of a tenant for life to the remainder-man. But although such duties cannot be resolved into contracts, it is believed that together with contracts they fall under a distinct generalization: viz., duties of persons in a particular situation of fact to persons in a particular situation of fact; or, perhaps, more concisely, duties of the parties to a particular relation of fact to each other.

This arrangement is a particularly detailed and innovative example of the general classificatory pattern of the late nineteenth century, as we will see in a moment. It also immediately influenced the field it described. In 1875, Melville Bigelow of the Boston University Law School brought out a casebook on Torts, in the Langdellian manner, and in 1878 he published the first *short* book on Torts. He organized both as Holmes had suggested, acknowledging his debt [T-V]. The text opened as follows:

The substantive law of torts treats of the civil aspect of duties, and, by consequence, of the breach of duties, which govern the relations of individuals to each other (1) as mere members of the State; or (2) as occupying some special situation towards each

186 other not produced by agreement inter sese; or (3) as occupying some special situation of agreement inter sese which affords occasion for breaches of duty between them that need not be treated as breaches of contract.

Bigelow was attempting to carry out the basic program of the group of young legal scholars who published the *American Law Review*, particularly Holmes, Gray and Thayer. Their constantly repeated demand was for a "philosophical" arrangement of the law, rather than one based on purely utilitarian or accidental properties (the Law of Telegraphs being a favorite example). It is to the larger program that we now turn.

The New Classification of Legal Doctrines

The Parsonian vision of a relationally organized corpus juris within which implied intent would be the crucial integrating concept does not seem to have had any theoretical exponents. In 1870, the problem of arrangement was to take the pieces that writers like Parsons had fitted together and distribute them in a scheme that would overcome what seemed the manifest inconvenience and irrationality of Blackstone and Kent. Beginning with the posthumous publication of the extended version of Austin's *Lectures*, and with Maine, there seems to have been a general consensus both on the criticism of the old system and that the new should take the *in rem* vs. *in personam* distinction as its starting point. Markby was representative:

Laws which concern, or which chiefly concern the rights, duties, and obligations of persons in respect of persons, have been sometimes classed together and called the law of persons; and laws which concern, or which chiefly concern, the rights, duties, and obligations of persons in respect of things, have been likewise classed together and called the law of things.

I cannot discover that this classification of law has been turned to much purpose, and it would have been scarcely worth while to mention it, had it not been that by slightly changing the terms in which this classification is expressed, Blackstone has introduced

an egregious error. He speaks not of the law of persons and of the law of things, but of rights of persons and of rights of things. Rights of persons there are undoubtedly; for all rights are such. There may be also rights over things, and rights over persons; but rights of, that is, belonging to, things, as opposed to rights of, that is, belonging to, persons, there cannot be.

In English law, at any rate, the law of persons and the law of things is so mixed up, that no use can be made of this classification so long as our law retains its present form. [Markby 133-34, pp. 63-64]

He then offered the following instead:

Sometimes a right exists only as against one or more individuals, capable of being named and ascertained; sometimes it exists generally against all persons, members of the same political society as the person to whom the right belongs; or, as is commonly said, somewhat arrogantly, it exists against the world at large. Thus in the case of a contract between A and B, the right of A exists against B only; whereas in the case of ownership, the right to hold and enjoy the property exists against persons generally. This distinction between rights is marked by the use of terms derived from the Latin: the former are called rights in rem; the latter are called rights in personam. [Id. 136, pp. 63-64]

In two unsigned articles appearing in the *American Law Review* in 1872 and 73, Holmes significantly elaborated this scheme. He distinguished six categories:

1. Duties of all to the sovereign (e.g. not to be guilty of contempt of court);
2. Duties of all to all (e.g., to respect personal security and reputation);
3. Duties of all to those in particular positions (e.g., to respect the property and contract rights of others);
4. Duties of those in particular situations to the sovereign (e.g. Markby's case of the duty to pay one's taxes);
5. Duties of those in particular situations to all (e.g., duty of master to compensate for torts of his servant; liability for inherently dangerous instrumentalities);

6. Duties of those in particular situations to others likewise particularly situated (e.g., duty to perform one's contracts; familial duties). [7-46; 7-652]

Some variant of these distinctions was the primary basis of every arrangement of private law that I know of for the late nineteenth century period. [e.g. Holland, Amos, Terry, Salmond] Yet there was little if any discussion in the books of the reason why this distinction was expected to be so useful and accepted as eminently "natural." It seems likely that it is best understood as a further manifestation of the will theory. So long as the crucial fact about the legal system was that it was made up of legal actors each of those wills had a sphere of power, one of the crucial descriptive tasks was to identify, for each right, those against whom it could be exerted, and to distinguish them from those not bound. A passage from Holland at least suggests this conclusion:

A right which is at rest requires to be studied with reference to its 'orbit' and its 'infringement.' By its 'orbit,' we mean the sum, or extent, of the advantages which are conferred by its enjoyment. By its 'infringement,' we mean an act, in the strict sense of the term, which interferes with the enjoyment of those advantages.... It is obvious that to know the whole extent of the advantage conferred by the enjoyment of a right is the same thing as to know what acts are infringements of it. Thus the right may be such as to exact from the world an abstention only from any deliberate interference with it, or it may be such as to exact an abstention even from such an infraction of it as may result from want of care. [Holland 2nd p. 112]

The notion of a right "at rest," by contrast with a "right in motion" was Holland's way of stating the contrast between what we would call the content of a right and the means of origination, transfer or extinction of it. A second major dimension of classification during the Classical period was according to whether these changes took place by the will of the parties or by the will of the sovereign. Holland, for example, began his discussion of rights in personam as follows:

[R]ights 'in personam' are divisible, according to the investigative fact to which they owe their origin, into two great classes. Such rights either arise or do not arise out of a contract. In the latter case, since they arise from facts of various kinds to which it pleases the Law to affix similar results, we shall describe them as rights 'ex lege;' and it will be convenient to consider the rights which arise thus variously before treating of those which arise solely from contract. [id. pp. 182-83; see also Holmes 77 and Terry 480]

We have already seen the very powerful solvent effect that attention to the question: Will of the parties or will of the Sovereign? had on the pre-Classical classificatory schemes. The combination of this distinction with that between rights *in rem* and rights *in personam* gave Classical legal thinkers the sense that they had reordered the whole in a way that was more rational, and more responsive to the ends of law, than what had gone before. But it took a surprisingly long time for the two distinctions to be combined as a matter of course. For example, Wigmore, in an 1894 article on torts, had no directly relevant authority to cite for the following taxonomy:

Private law, then, deals with the relations between members of the community regarded as being ultimately enforceable by the political power. Such a single relation may be termed a Nexus; . . . For the first and broadest division it seems best to distinguish according as the Duty has inhered in the Obligor (1) without reference to his wish or assent, or (2) in consequence of some volition or intention of his to be clothed with it. The former we may term Irrecusable, —having reference to the immateriality of the attitude of the obligor in respect to consent or refusal; the latter, Recusable, —for the same reason. The latter sort includes Contracts (in the narrow sense), and some few varieties not here important. The former includes Torts (so called), Enrichment (a part of Quasi-Contracts as now treated), and a few minor ones. The permanent justification for this division, it may be said, will be found in the deep-rooted instinct of the Anglo-American legal spirit, which is strikingly backward in imposing or enlarging an

irrecusable nexus, but gives the freest scope for the voluntary assumption (Recusable) of nexus of any content. Dividing further the former sort, we find (a) many imposed universally, i.e., on all other members of the community in favor of myself; and (b) a few imposed on particular classes of persons by reason of special circumstances. Of the latter sort the duty of a child to support a parent, as recognized in Continental and other law, is an example; but the most important group is found in parts at least of the subject known. . . as Quasi-Contract. . . The subject of Tort, then, deals with the large group of relations here termed Universal Irrecusable Nexus. [8 Harv. L. Rev. 200-201]

The isolation of tort and quasi-contract in the categories of irrecusable rights in rem and irrecusable rights in personam was a manifestations of the will theory. It was an assertion that the crucial question in these areas was to determine the will of the sovereign; the will of the parties was irrelevant by definition, at least as a source of obligation. But this alone does not tell us very much. First, as we will see, the will theory had significance in the internal working out both of torts and of quasi-contract. Second, once we know we are dealing with obligations imposed by the sovereign, we must go on to find out how the actual rules dealt with the dilemmas of autonomy vs. community and formality vs. informality. These inquiries seem best deferred, however, until we have said something of the contractual core that survived the amputations just described.

3

In the last chapter, I suggested that Classical Legal thought dealt with the contradictions of private law theory by the creation of a mediating structure. There was a core of fully legal, highly salient relationships ruled by the ideals of Will Theory, autonomy and objectivism. There was also a periphery of relationships ruled by regulatory, paternalist, communitarian and informal ideals. The extrusion of quasi-contract and tort from the body of contract doctrine was an incident in the creation of this structure. But, as I said at the end of the last section, the mere fact of

regrouping did not imply the victory of any set of ideals within the new subject matters.

Nor was there any logical necessity that the remaining core of contract should be organized to reflect facilitation, self-determination, autonomy and formality. This did, however, occur. And in order for it to occur, it was necessary for the Classical theorists to deal with the fact that even after the expulsions I have mentioned there were a large number of contract rules that appeared to be direct reflections of regulation, paternalism, community and informality. There were two doctrinal developments that together solved this problem:

1. The undermining and eventual rejection of the ideas of "status," "relation," and "condition" as the operative sources of the great mass of contract rules.
2. The emergence of a specialized law of persons, and of a new category of status, that grouped together and explained the peculiar character of rules incompatible with the new vision of the nature of "real" contracts.

Status as an Operative Legal Category

In the discussion of Blackstone in the last chapter, I mentioned his dichotomy of the law of persons and the law of things, and illustrated the former with subjects like master and servant, husband and wife, corporations, aliens, and so forth. That listing understated the centrality of the idea of a social role as the operative, organizing concept in Blackstone, because it was restricted to private law subjects. In fact, Blackstone included, in an indiscriminate mixture with the categories I mentioned, clergymen, soldiers, sailors, attorneys, justices of the peace and members of Parliament.

Under each category, Blackstone included some or all of the following kinds of rules:

- (a) special formalities governing entry into the status (e.g. official solemnization of marriage);
- (b) limitations of legal capacity "flowing" from the status (wife cannot make binding contract);

- (c) special duties to others within relationships (as of husband to wife) whether subject to contractual modification or not;
- (d) special duties to or rights against strangers flowing from the status (husband must pay debts of wife for necessities; husband can bring action against stranger for alienation of affection);
- (e) limitations on withdrawal from the status (divorce, etc.).

Now one of the striking facts about both Blackstone and Kent (who followed his arrangement) is that they included no general discussion of the private law legal rights and powers of persons who occupied no status at all. They did include important sections on the rights of subjects—e.g. property, personal security—but these were oriented to the question of the legitimacy of state interference with vested rights. They assumed, without ever explicitly discussing, some set of private law rules somehow corresponding to the public law rights.

In Blackstone, one finds out about the law of contract and tort as they apply to persons occupying no special status by consulting the *Law of Wrongs*. Here one learns substantive private law by studying the forms of action. In Kent, there was no tort law, but all the various commercial law specialties were grouped under *Title to Personal Property*.

There was no direct movement from this toward the Classical and modern categorization. Instead, the contractualist theoreticians, Metcalf, W.W. Story and Parsons, created the system we examined at the beginning of this chapter. The statuses of clergyman, soldier, justice of the peace, and member of Parliament disappeared, along with the form of social life that produced them as political/legal/economic institutions. But the contractualists put together the remnants of the ancient law of status and the new commercial relationships not dependent on any legal peculiarity of the actor. The result was a new version of the law of persons as the master category, contrasting with that of real property.

The internal organization of the legal discussion in these books resembled that of Blackstone and Kent. Starting from the “nature” of the status, condition or relation, the author developed

a set of rules governing capacity, duties to strangers, termination, and so forth. There were still only very minimal "general parts" dealing explicitly with the rights and powers of an individual seen as existing outside of any one of those situations listed in the massive sections on "Parties" and "Subject Matter of Contract."

No one suggested that the judge could *deduce* the various legal aspects of a status from its nature. The categories were not experienced as operative in the very powerfully controlling manner of the Classical legal concepts like property or police power. Yet it is equally clear that there was a felt connection among the elements assembled under husband and wife, and that that connection had to do with what seemed plain and undisputable characteristics of the relationship as it existed in social life. The wife's inability to contract was a function of the "nature" of marriage, and so was the husband's duty of support.

Likewise in partnership, it was a consequence of the nature of the relationship that partners were held to the highest duties of good faith, *both* inter se and in respect to their collective obligations. In short, the different categories of relationship gave rise to legal concepts of an intermediate operative power, somewhere between that of mere conventional pigeonholes and that of logical implication.

The Concept of Status as Role Loses its Operativeness

The first striking manifestation of the declining operativeness of this conception of status was Austin's treatment of the subject in lectures delivered in the 1830's but not published until the 1860's. He was describing the distinction between the law of persons and the law of things. He seems to have taken it for granted that if such a division was desirable, the law of persons, or of status should include all the different indicia I have mentioned, including both the peculiarities involved in entering and leaving the status, the rights and duties toward others within or with respect to a relationship like marriage or wardship, and the special capacities and incapacities of occupants of the status.

Austin devoted a whole lecture, one that nicely illustrates the argumentative style of the early utilitarians, to the question

194 whether the various elements lumped together as a status could be said to be implicit in its nature:

According to a definition of status, which now (I think) is exploded, but which was formerly current with modern civilians, "Status est qualitas, cujus ratione homines diverso jure utuntur." "Exempli gratia," (adds Heineccius,) "alio jure utitur liber homo; alio, servus; alio, civis; alio, peregrinus."

Now a given person bears a given condition, (or, in other words, belongs to a given class,) by virtue of the rights or duties, the capacities or incapacities, which are peculiar to persons of that given kind or sort. Those rights or duties, capacities or incapacities, are the condition or status with which the person is clothed. They are considered as forming a complex whole: And, as forming a complex whole, they are said to constitute a status which the person occupies, or a condition, character, or person, which the person bears.

But, according to the definition which I now am considering, the rights or duties, capacities or incapacities, are not themselves the status: but the status is a quality which lies or inheres in the given person, and of which the rights or duties, capacities or incapacities, are merely products or consequences.

The definition (it is manifest) is merely a case of the once current jargon about occult qualities. Wherever phenomena were connected in the way of cause and effect, (or of customary antecedence and sequence, or customary coexistence,) it was usual to impute the so-called effect, (not to the customary antecedent, or to the customary coexistent,) but to an occult quality, or occult property, which was supposed to intervene in the business of causation. [Jur.II-720]

. . . The supposition that a status is a quality inhering in the party who bears it, has every fault which can possibly belong to a figment. The supposed quality is merely fictitious. And, admitting the fiction, it will not serve to characterise the object, for the purpose of distinguishing which, the fictitious quality was devised.

It is remarkable that Bentham (who has cleared the moral sciences from loads of the like rubbish) adopts this occult quality under a different name. In the chapter in the *Traite de Legislation*,

which treats of Etats (or of status or conditions), he defines a status thus: "Un etat domestique ou civil n'est qu'une base ideale, autour de laquelle se rangent des droits et des devoirs, et quelquefois des incapacities."

Now this base ideale (which is distinct from the rights or duties constituting the condition, and also from the fact or event by which the condition is engendered) is clearly the fictitious quality (expressed in another shape), which, according to the scholastic jurists, forms the status. [Id. 722]

Austin's conclusion about the logical status of the word status as it was used in legal thought in his time was unequivocal:

The sets of rights and duties called condition or status have no common generic character which determines what a status or condition is. Certain sets of rights and duties are detached for convenience from the body of the legal system, and these sets of rights and duties are styled status or conditions. [Id.-710]

The justification for the use of the concept for *purposes of arrangement* was that it made it possible to highlight what writers like Blackstone and Parsons had suppressed: the existence, at the core of the legal order, of the private law of persons having no peculiarities of status at all:

The main advantages of this division seem to me to be these.

First: in the Law of Things, or the Law of Things Incorporeal, or the Law of Rights and Duties, or The Law generally, all which can be affirmed of rights and duties considered generally, or as abstracted from status or condition, is stated once for all. One advantage, therefore, of the division is that it is productive of brevity: again, the general rules and principles with which the Law of Things is properly or directly concerned, are preserved detached and abstracted from everything peculiarly relating to particular classes or persons; they are, therefore, presented more clearly than if they were interspersed with that more special matter. Each rule or principle is apprehended more easily and distinctly than if the modifications which it receives from that more special matter, were appended or annexed to it. Being brought

together more closely, their mutual relation and dependency is more easily perceived. The brevity, therefore, which this division of the corpus juris produces, tends also to its clearness.[713-14]

Austin's approach became the premise of the way law was organized, written about, taught, practiced and understood during the Classical period, and it is hardly less influential today. The division between the abstract core and the "exceptional" periphery is almost never discussed. When it is, it seems enough to justify it on the basis of "convenience." Yet it has the most profound consequence for the substantive content of legal rules.

The reason for this is that the particular rules that characterize the relationships that constitute the law of status are those that most clearly embody the ideals of regulation, paternalism, community and informality. In the arrangement of Blackstone and Parsons, these rules were at the center of attention. Everything from the table of contents to the footnotes emphasized that the Law in General is constantly concerned with the ideals that motivate them. The exceptional category was that of relations so "abstracted" from any well defined social context that the equitable ideal was irrelevant. Indeed, this category was so exceptional that it was not even formally recognized as worthy of separate analysis.

The Austinian arrangement was then much more than an affair of convenience. It was part of a refocussing that made it possible to shift *analytic* effort from the development of one general vision to the development of another. But the change was by no means complete with Austin. He still, for example, found it so obvious as not to merit discussion that the legal category of a status ought to include *both* peculiarities of capacity and special rights and duties arising out of social role. He thus recognized, though only on unstated grounds of convenience, that there was something viable in the notion of relationship.

Holland (1880) went a step further:

The 'Ius quod ad personas pertinet' aptly enough expresses the law as to those variations in rights which arise from varieties in

the Persons who are connected with them. But it is unfortunately also used by the Roman jurists to express what the Germans call 'Familienrecht;' i.e. to express, not only the variation in rights which is caused by certain special variations in personality, but also the special rights which belong to certain personal relationships. Not merely, for instance, the legal exemptions and disabilities of infants and *femes covert*, but also the rights of a father over his son, a husband over his wife, and a guardian over his ward.

Such questions, however, as how far a woman's capacity for contracting is affected by coverture, and what are the mutual rights of husband and wife, are radically different in character. [2nd ed. 99]

On this ground, Holland classified all the special duties involved in relationships like marriage and parenthood under quasi-contract. The various rules of vicarious liability for the torts of children and servants found a place in the category "rights in rem created by the will of the sovereign" rather than of individuals. Status he restricted to variations in capacity. Since nothing was left of the Law of Persons, but the rules about the legal disabilities of married women, children, lunatics, drunkards and spendthrifts, he proposed a change in terminology: the law of persons became the law of "abnormal" persons. [id. 101-03] It was to be treated in a strictly segregated part of the rationally organized corpus juris, where it could have no contaminating effect on contracts "proper." [See Terry 614-619]

Thus the old concept of status underwent two vicissitudes. First, it came to exist in opposition to rights in the abstract, rather than as the medium for the organization and exposition of rights in particular. Second, the elements composing particular statuses were fragmented and dispersed, rather than treated as the elements of operative wholes. Both of these developments were influenced by, and also appeared to confirm Maine's famous generalization that "the movement of the progressive societies has hitherto been a movement from status to contract." [100]

Yet having said this much, an ambiguity arises, and one with a good deal of significance for Classical legal thought. The catego-

198 ry of status did not disappear from legal consciousness. Quite the contrary. As the particular relations lost their ability to explain existing rules and generate new ones, the general category gained in importance.

Status as a Relationship Controlled by the State

Maine's generalization is the culmination of his description of the process of transition from ancient to modern society. Ancient law

is full, in all its provinces, of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual. [Maine 74]

Maine defined status "agreeably with the usage of the best writers," to signify "personal conditions" connected with the "powers and privileges anciently residing in the Family," and contrasted it with "such conditions as are the immediate or remote result of agreement." [100] His argument concerned the disappearance of the Roman *patria potestas*, the expanding legal capacity of sons and women, the abolition of slavery, and the reduction of guardianship to a purely protective, rather than a proprietary institution. In short, it had to do with the decline of the power of heads of households to dictate to their dependents.

Ancient law is scanty, because it is supplemented by the despotic commands of the heads of households. It is ceremonious, because the transactions to which it pays regard resemble international concerns much more than the quick play of intercourse between individuals. Above all it has a peculiarity of which the full importance cannot be shown at present. It takes a view of life wholly unlike any which appears in developed jurisprudence.... The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and

offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members; the crime is a corporate act, and extends in its consequences to many more persons than have shared in its actual perpetration. If, on the other hand, the individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens, who suffer with him, and sometimes for him. [*Id.* 74-75]

When Austin, and the analytical jurists who followed him, argued for the relegation of the law of persons to the peripheral categories of "abnormal persons," quasi-contract, and special instances of tort liability, they reflected the conviction that the family relations were no longer either conceptually or practically central to law. The "scanty" law of the "international relations" between heads of households had become the more and more fully developed law of contractual dealings between autonomous individuals.

The ambiguity arose as follows. What interested Maine was the decline of despotic paternal power. The categories the analytical jurists purged from the legal core had to do with the relationships once governed by that despotic power. But at the time of the purging, the actual rules involved embodied not the idea of arbitrary power but that of communal solidarity. The specific provisions concerning parental obligations of support or the master's liability for the torts of servants were state *limitations* on arbitrariness. "Such conditions as are the immediate or remote result of agreement" came to be contrasted, through the indiscriminating use of the word status, with relations within which the state imposed a particularly demanding rather than a particularly lax moral standard of conduct.

Thus wrenched from its content, Maine's law of progress became a slogan of laissez-faire. The important thing was not the opposition of the law of persons to abstract contract law, but that of legal relations whose terms the parties controlled to legal relations the state treated in a regulatory, paternalist, communal and informal manner. Once the situation was described and understood in these terms, it followed as a matter of course, unless one

200 was a socialist, that the category of pure contract, ruled by ideals of facilitation, self-determination, autonomy and formality, was the norm, and the end of historical development.

Both the earlier and the later uses are oddly juxtaposed in Holland (1882). I have already referred to his extended discussion of the distinction between the law of abnormal persons and the abstract core of legal rights. He there reduced the concept of status to variation in legal capacity. As far as one can tell from the index, he never used the word in any other fashion.

Nonetheless, there is an unindexed reference that gives the word an altogether different meaning:

It may appear questionable whether the rights of husband and wife can be reckoned among those which arise by operation of law rather than out of contract. It is however submitted that this is the true view. The matrimonial status is indeed entered upon, in modern times, in pursuance of an agreement between the parties, accompanied by certain religious or civil formalities; but its personal incidents are wholly attached to it by uniform rules of law, in no sense depending on the agreement of the parties, either at the time of the marriage or subsequently. The effect of the contract, coupled with the other acts required by law, in producing a status, to which rights of definite kinds are incident, closely resembles that of a sale of property. In the one case, as in the other, the contractual act is complete, so far as its direct effects are concerned, when the status has been produced or the ownership changed. The necessarily resulting rights of the person newly invested with the status, or newly become owner of the property respectively, are the creatures not of the will of the parties but of fixed rules of law. [2nd 184]

The question whether marriage was a contract or a status had little significance in England, except for rare problems of the conflicts of laws. In America, it was or became crucial. Thirty years before Holland wrote it was already an issue, and provided an early occasion for the emergence of the will theory as a mode of dealing with the contradictions of private law theory.

In his discussion of divorce, Chancellor Kent said:

The first inquiry, is, how far has the legislature of a state the right under the Constitution of the United States, to interfere with the marriage contract and allow of divorces between its own citizens, and within its own jurisdiction? The question has never been judicially raised and it has generally been considered that the state governments have complete control and discretion in the case. In the case of *Dartmouth College v. Woodward*, the point was incidentally alluded to; and the chief justice observed, that the Constitution of the United States had never been understood to restrict the general right of the legislatures of the states to legislate on the subject of divorces; and the object of state laws of divorce was to enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it had been broken by the other. It would be in time to inquire into the constitutionality of their acts, when the state legislatures should undertake to annul all marriage contracts, or to allow either party to annul it at the pleasure of the other. Another of the judges of the Supreme Court, [Story] spoke to the same effect. He said that a general law regulating divorces was not necessarily a law impairing the obligation of such a contract. A law punishing a breach of contract by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, was not a law impairing the obligation of contracts. But he was not prepared to admit a power in the state legislatures to dissolve a marriage contract without any cause of default, and against the wish of the parties, and without a judicial inquiry to ascertain the breach of the contract. [II-128-29]

Up to 1850, most of those who argued that the Contracts Clause did *not* apply to marriage did so on the basis of a vision of marriage as profoundly contractual, as Story's argument that divorce is rescission for breach vividly suggests. It was also argued that the mere fact of the long history of legislative divorces showed that the Convention could not have intended to treat them

202 as impairment of contracts. When marriage was distinguished from contracts in general, it was often on the ground that it was in a class wholly by itself, sometimes on the ground of its "non pecuniary" character. There were, however, at least three cases that stated very clearly that it was because marriage was a "relation," like master and servant or guardian and ward, that the clause did not apply. These cases deduced from this categorization that the legislature had unusually broad powers to modify the terms and even the existence of marriage contracts. [16 Me. 481; 7 Dana 181; 5 Barb.474]

This minority view received a great boost with the introduction of the contract/status dichotomy, beginning with the publication of Bishop's treatise on *Marriage and Divorce* in 1852. His definitions were as follows:

The word marriage is used to signify either the act of entering into the marital condition, or the condition itself. In the latter and more frequent legal sense, it is a civil status, existing in one man and one woman, legally united for life, for those civil and social purposes which are founded in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations.... While the contract remains executory, that is, an agreement to marry, it differs in no essential particulars from other civil contracts, and an action for damages may be maintained on a violation of it. But when it becomes executed in what the law recognizes as a valid marriage, its nature as a contract is merged in the higher nature of the status. And, though the new relation may retain some similitudes to remind us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife.

Various definitions have been given of marriage; and the foregoing is not in the language of any former one. It is believed to be free from some of the objections which may well be urged against all former definitions, whatever defects it may have of its own. [B 1st, p. 25-26]

He summarized the objections to the old definition as follows:

In England and continental Europe, little inconvenience can result from making use of the word contract, rather than status, as applied to an executed marriage; for the jurists of those countries are not troubled with many of the peculiar questions of constitutional law, and the conflict of laws relating to divorce, which, arising under the constitutions of the United States and of the several States of this Union, have proved more embarrassing than almost any others to our courts, and have led to irreconcilable diversities of decision. No one can read the conflicting decisions of American tribunals on this subject, without perceiving, that the chief embarrassment has arisen from the tendency to apply the rules governing contracts to the status of marriage, owing to the fact of marriage having been so commonly defined by courts and jurists as a contract. . . . Thus to say, that marriage is a contract, when speaking of the marital condition, and not of the agreement to assume it, is, as we have seen, according to the general current of authorities, inaccurate; since they further declare, that it differs in many particulars from other contracts. And when the differences are pointed out, we perceive that they have covered every quality of the marriage, and left nothing of the contract. To term it, therefore, a contract, is as great a practical inconvenience as to call a certain well-known engine for propelling railroad cars "horse," adding, "but it differs from other horses in several important particulars," and then to explain the particulars. It would be more convenient to use at once the word locomotive. [Id. S.41, p. 34-35]

Bishop felt that his definition alone was enough to preclude application of the Contracts Clause to legislative divorces, and his views were immediately influential. Nonetheless, some courts preferred to concede contract and then deny impairment. A Pennsylvania case from 1867 illustrated the typical analytic mode of pre-Classical legal thought when it argued as follows: in normal contracts, the parties can dissolve their relationship by mutual agreement; this comports with the natural justice of the situation; for reasons of policy, the legislature abolishes this power in the case of marriage, a contract the parties cannot dissolve at will;

204 when the legislature relents in a particular case by granting a divorce, it is *restoring* rather than impairing the normal operation of the law of contracts; the Contracts Clause is therefore inapplicable.

The trend was the other way. It was reflected in the note Holmes appended in 1872 to the passage from Kent quoted above:

Constitutional Law. Marriage, although beginning in contract, is a legal status which may be modified from time to time by law. Hence, a legislative divorce has been held constitutional; or a law authorizing divorces for causes which accrued before the passage of the act. *Carson v. Carson*, 40 Miss. 349; contra, *Clark v. Clark*, 10 N.H. 380.

By 1888, when the Supreme Court finally took up the question of whether legislative divorce violated the Contracts Clause, the issue was close to moot because most states had instituted strictly judicial systems based on fault. Yet Justice Field's review of the authorities is interesting. It emphasized the historical argument for legislative power, then quoted at length from the cases defining marriage as a status. There was no mention at all of the various arguments to the effect that, though marriage is a contract, the constitutional clause is inapplicable, because divorce does not impair it. The status/contract distinction had won the day.

Bishop brought out a fully revised edition of his treatise in 1891, and took the occasion to crow:

Bishop on Marriage and Divorce—was published in 1852. In it the author, it is believed for the first time in any legal treatise or judicial opinion, broke away from the old shackles, and defined marriage as a status. The result has been already stated, citing many subsequent cases, the forms of expression from the bench have been gradually modified, until now those earlier ones above quoted would seem quite antiquated. [1B 2nd p. 13-14]

I remarked earlier that the point of the will theory was the suppression of intermediate terms, and this applied within the law of marriage. The married state lost its contractual character and came to be defined as within the sphere of official definition and regulation. Individuals lost their claims to have rights against state modification of the relationship. But, at the same time, an opposite evolution occurred in the law governing the act of marrying. This is illustrated by the fate of the doctrine of marriage *per verba de futuro cum copula*, or of marriage executed by the making of mutual promises of future marriage followed by intercourse.

The notes to Reeve's treatise on domestic relations, published in 1846, state the doctrine "adopted by most if not all of the United States" as follows:

The consent of parties, without any peculiar forms or ceremonies, is all that is required to its valid celebration. The Roman lawyers, (says Ch. J. Kent, 2K C. 89,) strongly inculcated the doctrine, that the very foundation and essence of the contract, consisted in consent, freely given, by parties competent to contract; *Nihil prodent signasse tabulas, si mentem matrimonii non fuisse constabit. Nuptias, non concubitas sed consensus facit.* The common law requires no ecclesiastical sanction, to render it valid, and considers it merely in the light of a civil contract; if it be made *per verba de praesenti*, and is not followed by cohabitation or *per verba de futuro*, and followed by consummation, it amounts to a marriage, which the parties cannot dissolve, if they are competent as to age and consent, and is just as binding as though made *in facie ecclesiae*.

This passage asserts both that consent is required and that the mere act of intercourse executes a marriage if there was a previous promise of future marriage. The doctrine was a typical pre-Classical case of implied intent, with the typical ambiguity concerning the primacy of the will of the sovereign or the will of the parties. Bishop, who was the first to insist that the married state

was a status, was also one of the first to insist on the purely voluntary character of the act of marriage. This required him to enter somewhat more carefully than had been habitual with pre-Classical writers into the effect of the *copula* on the prior promises:

When there is a contract of future marriage, we shall see a little further on, and the parties have sexual intercourse, the law usually presumes the intercourse to have been lawful, the parties having changed their future into a present consent. Hence it is said, that marriage may be contracted *per verba de praesenti*, merely, or *per verba de futuro cum copula*.

The *copula*, however, is no part of the marriage; it only serves, to some extent, as evidence of marriage. It was a maxim of the civil law, and it has become equally so of the ecclesiastical, of the common, and indeed of all law, that "*Consensus, non concubitus, facit matrimonium*." [B 1st p. 53-54]

In the 1850's, New York and Ohio cases rejected the doctrine altogether, refusing even to admit the *copula* as evidence of intent. Other courts, at least in dicta, accepted it in the form of a "conclusive presumption" not rebuttable by showing of contrary intent. The first case to put the matter clearly was *Robertson v. State*, 42 Ala. 509 (1868):

There are many authorities that sustain the proposition, that in the absence of statutory restraints, a marriage may be had *per verba de futuro cum copula*, but this doctrine is only reasonable upon the idea, that the *copula* was *prima facie* evidence of an acceleration of the espousals. Where this idea is negatived, . . . to regard the marriage as consummate . . . would substitute the *copula* for the consent as the constituent of the marriage. . . . [T]o infer the consent would be in contravention of an established fact. [42 Ala. 509 (1868)]

This position gained support through the 1870's and 1880's. Nonetheless, in 1891, Bishop's second edition had to admit that "doubt more or less prevails" on the question whether the presumption of intent from *copula* was conclusive or might be rebutted. He did claim that all but three states accepted his "true view:"

The True View—is believed to be, that the copula after promise establishes marriage *prima facie*, yet no further; that this *prima facie* case may be rebutted by evidence, for which purpose circumstantial evidence is as good as any other; that thus a question of fact is raised, to be decided on presumption and testimony combined, and this question is, under instructions from the court, for the jury. All the circumstances of the case may be looked into, including the conduct of the parties both before and after the relied-on copula. And if they did not regard themselves after it as married, the marriage presumption is weakened. [1B 2nd p. 149]

By 1922, commentators had begun to deny that the doctrine had ever existed in America outside of dicta [Koegel].

The distribution of rules about marriage into a formation category and a status category was a typical instance of the classical strategy of resolving contradictions through a kind of conceptual segregation. For this reason, it is wrong to view the new concept of status as no more than a tool in the attack on regulation. It could be used, as in this example, to strengthen state power in areas where pre-Classical contractualism had weakened it. The classification of marriage as a status simply eliminated a whole set of problems that would have arisen if the courts had attempted to subject it to Fourteenth Amendment freedom of contract theories.

The point is a more difficult one. The effect of segregation was to make it appear a datum of legal logic that contract law was the domain of the ideals of *laissez-faire*. Analogies from the laws of marriage were not available for the development of contract rules because marriage was not a contract. The ideals that marriage rules embodied could find their way into contracts only *sub rosa*, and subject always to suspicion as non-legal.

The completion of the separation affected both sides to it. In other words, the categories status and contract took on a whole new kind of operative power. Placement of a subject within the *corpus juris* came to affect dramatically the rules applicable to it. Enlistment contracts will serve as an illustration.

Throughout the 19th century there was litigation on the question whether minors' enlistments were valid. The question typically arose when a soldier charged with a crime before a military tribunal denied the court's jurisdiction on the ground his induction had been void or voidable. The federal statute set a minimum age of 16, with a requirement of parental consent up to the age of 18. The most frequent claim was that the recruiter had neglected to get this consent. The question was whether Congress could authorize minors over 18 to make enlistments which would be valid (a) without parental assent, and (b) in spite of the infant's subsequent repudiation. Justice Story decided the question on circuit in 1816, with an opinion that brings together many of the strands of pre-Classical legal thought.

He began by characterizing the common law powers of parents to control their children as "rights depending upon the mere municipal rules of the state [which] may be enlarged, restrained and limited as the wisdom or policy of the times may dictate." [24 Fed. Cas. 949] He then adduced elaborate policy arguments in favor of making minors available for naval service. "And if this exercise [of the power to enlist] should sometimes trench upon supposed private rights [of parents] or private convenience, it is to be enumerated among the sacrifices, which the very order of society exacts from its members in furtherance of the public welfare." [950] This is a good example of the positivist manner of treating rights against the state that constituted half of the pre-Classical repertoire.

It remained to consider whether the infant could take advantage of his common law disability to void the contract once entered. Story declared the law to be that the infant's power of avoidance did not exist in cases where the contract was beneficial to him, as in contracts for necessities. The argument from that point was as follows:

And whenever any disability, enacted by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute, is as com-

plete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which from its nature or objects, is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit, and for the public benefit; so that when bona fide made, it is neither void nor voidable, but is strictly obligatory upon them. [U.S. v. Bainbridge, 1 Mason 71, 24 Fed. Cas. 946 (1816)].

This opinion did not settle the issue. For the next 75 years, both state and federal courts held on many occasions that because enlistments were contracts like any others, they could be voided by minors. There was a good deal of confusion, which need not concern us here. The important thing is that the first person who seems to have thought to apply the status notion was Horace Gray, serving his first term on the Massachusetts Supreme Judicial Court, in 1864, the year after the publication of *Ancient Law*. He pointed out, in a dispute about the moment at which a recruit became bound, that:

The question before us is no ordinary one of the force, construction or validity of a contract—whether the plaintiff has made an agreement and broken it, and is liable in damage for the breach; but of a change of *status*—whether by signing a particular paper or by any other act, the plaintiff has changed his condition, given up some of the rights of a private citizen, and become amenable to military discipline. [Tyler v. Pomeroy, 90 Mass. (8 Allen) 480, 485-86 (1864)]

By the time the Supreme Court considered its first enlistment contract cases in 1890, the status-contract distinction had become a tool of analysis customary to the point it needed no citations. Justice Brewer first addressed the case of a man who wanted to escape the jurisdiction of a court martial on the ground he had been over the maximum age when he signed up. The Court rejected the argument:

But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts

which changes the status: and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrongdoer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligation of citizenship, of itself, destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. [137 U.S.151-52]

In the next case, Brewer dealt with a minor who had enlisted without parental consent, in violation of the statute, and then deserted. The distinction between status and contract was now enough to explain what Story had put on grounds of a presumption "in point of law" that the contract was beneficial:

An enlistment is not a contract only, but effects a change of status. *Grimley's Case*, ante, 147. It is not, therefore, like an ordinary contract, voidable by the infant. [137 U.S. 159]

Status in Classical Contracts Books

Given such a dichotomy, it made no sense to attempt to integrate statuses into the core of pure contract doctrine. In most of the Classical treatises, this is too obvious to merit discussion. But

in one of the first of these, Anson's *Principles*, published in 1879, the author took the trouble to make his assumptions explicit. He began with a broad definition of obligation, which he then narrowed by excluding transactions that were "not such as we ordinarily term Contracts." Among these were "[a]greements which affect a change of status immediately upon the expression of the consent of the parties, such as marriage, which, when consent is expressed before a competent authority, alters at once the legal relations of the parties in many ways." [1st ed. 3]

This was enough to explain why a contracts book should not include subjects like the infant's right to support, or even the mutual obligations of partners, which had figured so prominently in the pre-Classical treatises. But Anson was also interested in the question of which variations in contractual capacity should figure as part of the subject matter. This brought him up against the problem of defining the proper scope of the law of persons. He remarked in a footnote on the need to "help the student out of the difficulties which Austin's discussion of the subject of status tends to increase rather than diminish." His solution typifies the shift from status as a derivative of paternal arbitrariness to status as a derivative of sovereign rather than individual will:

In dealing with parties to contracts it seems right to limit that branch of the subject to the Capacity of Parties as affected by *Status*, and not to introduce limitations or modifications of contracting power, which, as in the case of Agency, spring from contract.

For Agency is not a *Status*. The essential feature of a *Status* is that the rights and liabilities affecting the class which constitutes each particular status are such as no member of the class can vary by contract while he remains a member of the class. An infant, for instance, can by no possibility contract himself out of the Infant's Relief Act, nor can a soldier contract himself out of the Mutiny Act. [1st ed. 328-29]

By far the most delicate issue of status and contract was that concerning the relation of "master and servant," or employer and employee. The very sharp distinction between two types of legal

212 relationship had obvious political implications when applied to industrial relations. If the employment relation was a status, there could be no objection to extensive public regulation of its terms. The whole point about statuses was that because of their public importance, it was not open to the parties to redesign them at will. But if employment was a status, it was also, according to the dichotomy that dominated Classical legal thought, "feudal, regressive, paternalistic," and so demeaning to the laborer. To say that "laborer" was a special status was to say that workers lacked full legal capacity; they were, like women, lunatics and aliens, presumed unable to look after their own affairs.

We will discuss the war of words that grew up around this position in a later chapter. For the moment, it is enough to note that the basic modernist strategy was to break down the sharp classical dichotomies so that the regulatory, paternalist, communal and informal ideals of the law of persons would be made relevant to the situations of employees and small businessmen. Anson's *Principles* happens to provide an example.

The first American edition of this book appeared in 1930, edited by Arthur Corbin, the first modern American contract theorist. He appended a note to Anson's paragraph banishing status relations from contract law. By that time, the text I quoted above had gone through several transformations, but it still used marriage as an example of an agreement that "effects a change of status" and "creates legal relations between the parties . . . which they themselves do not contemplate." Corbin's comment was that:

The ceremony creates a multitude of legal relations between the parties. . . many of which they did not foresee or intend. The same is true of many business contracts, the difference being one of degree. [1st Amer. ed. 6]



The remainder of this chapter describes the impact of Classicism — meaning will theory, objectivism and autonomy —

on contract, quasi-contract, and tort law. The Classical version of each will be the subject of considerable discussion in later chapters. Here my purpose is to illustrate the process of transition from one consciousness to another as it played itself out within the contours of concrete doctrinal subject matters.

In 1867, there was no Anglo-American literature on the theory of contract. Between 1867 and 1880 there appeared books by Leake, Langdell, Pollock, and Anson, along with Holmes' three lectures in the *Common law*, and important discussions by Markby and Holland in books on jurisprudence. These works created the Classical field, which the moderns have disintegrated but have not restructured.

The Classics created, as we have seen, by subtraction. It was these authors of the 1870's who purged quasi-contract, status and tort from the subject. In place of the imperialistic claims of Parsons, they began with elaborate descriptions of all the things that "contract" was *not*. They created also by abstraction, by asserting and then trying to show that there had been an essence hidden at the core of the pre-Classical hodgepodge. Martin Leake stated this program in the preface to the first of the new books (1867):

The present work professes to treat of the elementary rules and principles of the law of contracts, exclusively of the detailed application of that law to specific matters; such applications of the law being referred to only occasionally, as subsidiary to the main object of the work, for the purposes of proof, argument, and illustration.

It is in this respect essentially different from all those treatises on the law of contracts which treat exclusively or primarily, and either collectively or separately, of the applications of the law to the various specific matters of contract; such as the treatises on the law of vendors and purchasers of land, the sale of goods, landlord and tenant, carriers, insurance, bills of exchange and the like; and though all such works occasionally, in connection with their immediate practical object, deal in some degree with the general rules and principles of the law, the writer of the present treatise is

not aware of any English work undertaken with the exclusive object of treating the law of contracts in its general and abstract form, apart from its specific practical application. [Leake K-i]

Will Theory Within Contract

What was left after subtraction and abstraction was the idea of an agreement of the parties, an agreement that they intended to create an executory legal obligation. There followed immediately an extended discussion of the elements of agreement, namely offer and acceptance. Gone were the interminable listing of all the different kinds of parties and kinds of subject matters of contract. What had been half of the total law of the subject either disappeared altogether or was sliced up and distributed in small pieces in chapters on subjects like "Capacity" appearing toward the end of the story.

The essential question in the new books was never what type of relationship the parties had entered. For pre-Classical legal thought this had been important because the judges would impute different standards of reasonableness, appeal to different moralities, according to whether they were dealing with sale, partnership, a trust or marriage. The Classical focus was on the total autonomy of the will of the parties, their power to shape the relationship they created in any way they wanted. It followed that the essential question was *whether* there was a contract, rather than what type.

Offer and acceptance became a larger and much more difficult at the same time that it became a more fundamental subject. The judges had, as we will see, renounced much of their power to control conduct by regulating the terms of relationships once entered. There was a corresponding temptation to avoid having to do the will of the parties by denying the existence of a contract. The Classical answer to the problem of judicial discretion in this area was objectivism, which created its own host of technical difficulties. The result was that almost as many pages came to be devoted to the apparently trivial question of offer and acceptance as had once been sacrificed to the equally anomalous subject of Parties.

The other great gainer from the rise of the will theory was the consideration doctrine. It represented the will of the sovereign on the subject of what promises should be enforced. In pre-Classical legal thought it had figured as a pleading requirement that functioned in aid of a policy against enforcing promises to make gifts. But the doctrine was not sharply defined as a pervasive test of legal enforceability. As Pound showed in a famous article, it was treated in radically different ways at law and in equity and according to the social character of the relationship between the parties. Concepts like "moral consideration" allowed pre-Classical judges flexibility in adjusting its impact to particularized ideas of the just outcome.

Classical consideration was a different matter altogether. It was formalized in a series of definitions, which the Classics applied systematically to all promises enforceable at common law. Where there appeared no way to square the common law practice with the definition, there was pressure to change the older rules to make them consistent with "principle." For example, the Classics developed the view that past and moral consideration were not worthy of the name, so that the pre-classical doctrines were anomalies and exceptions, held up as examples of the inferiority of earlier styles of judicial reasoning. Needless to say, the same increase in extent and difficulty as had occurred in offer and acceptance doctrine occurred likewise for consideration.

This parallel growth in doctrines supposed to reflect the will of the parties and the will of the sovereign should serve as a reminder that in itself the will theory was neither "individualist" nor associated with *laissez-faire*. It represented the judges' commitment to finding a determinate legal actor to obey, a refusal to interject himself or to arbitrate. The adoption of that approach did not itself settle the question which it put at the center of inquiry. For example, the rise of will theory meant an increase in the number of situations in which the doctrine of duress was at least theoretically available to a defendant. The older rules requiring a showing of one or another specific type of unacceptable conduct gave way to abstract statements about "free will" being "overborn."

The Classical version of the history of objectivism in contract law was laid out by Williston in a famous 1920 article:

The point of dispute is whether actual mental assent of the parties is a legal prerequisite, or merely such an expression by them as would normally indicate assent, whatever may have been in the minds of the parties. Is the test objective or subjective?

... [N]ear the end of the eighteenth century, and for the ensuing half century, the prevalent theory of contract evidently involved as a necessary element actual mental assent. External acts were merely necessary evidence to prove or disprove the requisite state of mind.

This is shown most clearly in the assumption that an offer to sell specific property was necessarily revoked by the sale of the property to a third person, though the offeree had no knowledge of the sale and accepted the offer within the limit of time fixed by it.... The terms coming into use at this time of "meeting of minds," and "notice" of acceptance and of revocation contain the same implication that the attitude of mind of the parties is the ultimate fact to be proved, and that their acts are merely evidence of it.

At the present time courts of law at least—more clearly perhaps in America than in England—have generally turned from this theory of contracts which was emphasized during the half century or more following the year 1790, and have expressed or by implication asserted that the words and acts of the parties are themselves the basis of contractual liability, and not merely evidence of a mental attitude required by the law. In other words, that an expression of mutual assent, and not the assent itself, is the essential element of contractual liability. [14 Ill.L.Rev. 525-27 (1920)]

There are two distinct aspects to the objectivist position:

- (a) In deciding what meaning to attribute to the behavior of a party, the judge inquires not into his actual mental state as it is suggested by all the evidence available at the time

of judgment, but rather into the meaning which a reasonable man in the other party's position would have imputed to his partner's behavior at the time.

(b) The rules of formation and interpretation of contract are then applied to this imputed meaning, and neither party is allowed to bring in his deviant actual intentions, or deviant actual understanding of the other party's behavior, even if the deviation was:

- (i) altogether without fault on his part and
- (ii) caused the other party no injury.

The result of the application of the objective theory is that the deviations of actual intent or understanding from what the judge finds to be the objective meaning of actions leads from time to time to arbitrary redistributions of contractual gains and losses. For example, parties who thought they had entered — who fully intended to enter — contracts that afterwards turn out badly, discover that their lawyers can get them out of their losses by showing that the objective manifestations did not meet the requirements of the rules of contract formation.

Both the partisans and the foes of objectivism agree that the main alternative is a "subjective" theory, looking to real rather than manifested intent, combined with the application of tort doctrine to compensate the victims of those who negligently misrepresent their own intent, and to equitably adjust the losses where no one is at fault. It is also common ground that this was the pre-Classical approach. Whittier set out the modernist position to this effect in a strong article published in 1929:

It will probably be admitted by everybody that in the making of most contracts there is actual assent communicated by each party to the other. Professor Williston himself says: "An outward manifestation of assent to the express terms of a contract almost invariably connotes mental assent." It is only in the very exceptional case, therefore, that any doctrine other than that of mutual assent communicated is made necessary by the decisions.

As Professor Williston pointed out in his strong article on Mutual Assent in the Formation of Contracts, no new doctrine for

exceptional cases appeared until about 1850 and then chiefly as a misapplication of the principal of estoppel. The substance of the new doctrine which was adopted seems to have been that one who did not actually assent to the contract may be held to it if he carelessly led the other party to reasonably think that there was assent.

As an original proposition the wisdom of the innovation may well be doubted. It would have simplified our law of contracts if actual meeting of the minds mutually communicated had remained essential. The liability for carelessly misleading the other party into the reasonable belief that there was assent might well have been held to be in tort. With such a liability in tort the danger that one could falsely claim that he did not assent and so escape the contract would be rendered insubstantial. In most cases the triers of the fact would not be misled by his false evidence of non-assent. If they concluded that he truly did not assent then there would be liability in tort unless his mistake was also found to have been non-negligent or to have resulted in no damage. Under the present law the non-consenting party is liable on the contract itself if careless. The chief unfortunate result of this state of the law is that he is bound to the contract though the other party is notified of the mistake before the latter has changed his position or suffered any damages. [17 Cal.L.Rev. 441-42 (1929)]

Today, the problem of choosing between Whittier and Williston presents itself as follows: Objectivism justifies its arbitrariness on the ground of certainty of judicial administration. The predictability of rules based on the application of a reasonable man standard to the outward manifestations of intent should be great. By contrast, subjectivism requires the judge to combine a hopelessly obscure inquiry into actual intent with the uncertain value judgments about fault and equity that are inevitable in tort law. Tort law is fine when dealing with accidents, because accidents are unplanned. To introduce its uncertainties into contract would deter transaction.

The familiar responses both deny that subjective intent and tort standards of fairness are less certain than an intrinsically illusory objectivism, and assert that it is simply wrong to shoot hostages to preserve a hollow appearance of judicial impersonality. The problem of objectivism in contracts is a paradigm of the

emergence of the modern contradiction of formality vs. informality.

Nothing like this contradiction existed until the birth of modernism after 1900:

- (a) Under the general term objectivism, we now refer to a congeries of problems that were treated, before the Civil War, under different rubrics: there was no pre-Classical perception of a pervading issue.
- (b) The process of integration by which the elements of the modern problem were brought together proceeded piecemeal over a thirty year period between 1850 and 1880: the integrated Classical treatment of the issue emerged not at mid-century, but between 1870 and 1880.
- (c) The Classical treatment put much emphasis on the "logical necessity" of objectivism given overt premises about the "nature" of contract and covert ones about the nature of the judicial role; the "policy" conflict between formality and informality was a subsidiary, though not insignificant theme (except in Holmes).

In modern legal thought, the category of objectivism is relevant to at least the following array of contract issues:

1. *Formation*

(a) *Meeting of the Minds*

- (i) do the offer and acceptance have that degree of correspondence necessary for the existence of a contract?
- (ii) is the agreement sufficiently definite to be legally binding?
- (iii) did each party promise to the other something sufficiently substantial to constitute consideration?

(b) *Contract by Correspondence*

- (i) is an acceptance by mail legally effective on deposit in the mailbox, or on receipt?
- (ii) is the revocation of an offer effective on mailing, or on receipt by the offeree?
- (iii) what is the effect of the uncommunicated death of the offeror on a subsequent acceptance by an unwitting offeree?

- (c) Does *unilateral mistake* void a contract? If negligent? If without fault?
2. *Interpretation*: Is the judge attempting to determine the subjective intent of the parties, or is he trying to determine objectively the meaning of their verbal or non-verbal communications?

In spite of the modern pervasiveness of the problem, Williston, in the article already quoted, could not cite a single pre-Civil War discussion of the *general issue*. He inferred the existence of a subjectivist approach from the treatment in judicial opinions of a small number of the issues just listed, particularly the contract by correspondence. These cases state it as an axiom that contract depends on a "meeting of the minds," but so do virtually all Classical and modern opinions. The most important single piece of evidence of subjectivism was that the early writers seemed to feel that proof positive that the offeror had changed his mind before the unwitting offeree accepted destroyed the contract. The evidence is sparse to say the least.

The reason for this is that formation in general played only a minuscule part in the theoretical literature. As we have seen, doctrinal writing was dominated by the concepts of relationship and implied intent. It was only after the emergence of the will theory, with its insistence on a sharp distinction between judge and litigant, implied in fact and implied in law, that writers began their treatises with long chapters on offer and acceptance. Problems of definiteness, contract by correspondence, and unilateral mistake were discussed, but often separately, and never in the context of a few powerful generalizations, whether subjectivist, objectivist, both, or neither. Interpretation of existing contracts was an altogether distinct subject, and it was possible to treat it according to principles bearing little or no relation to those of formation.

Parsons may serve once more as an example, perhaps most appropriately here, since Langdell was his research assistant, Holmes his student and Williston the editor of the last edition of his treatise. Moreover, his second volume (1854) contained what seems to have been the first attempt at a somewhat general state-

ment of the problem of form. As was often the case with the prescient insights of the 1850's, what was new was encased and obscured in a mass of typically pre-Classical analysis.

Pound chose the following from Parsons' chapter on Construction as the archtypical statement of the ideal of "security" in law:

If any one contract is properly construed, justice is done to the parties directly interested therein. But the rectitude, consistency, and uniformity of all construction enables all parties to do justice to themselves. For then all parties, before they enter into contracts, or make or accept instruments, may know the force and effect of the words they employ, of the precautions they use, and of the provisions which they make in their own behalf, or permit to be made by other parties.

It is obvious that this consistency and uniformity of construction can exist only so far as construction is governed by fixed principles, or, in other words, is matter of law. [IIP2d 4]

After asserting that the rule of construction was the same in law and in equity, Parsons stated his alternative to the orthodox position (e.g., II Kent 760; IV Kent 107-08) that the actual intent of the parties will control contrary contractual language:

The first point is, to ascertain what the parties themselves meant and understood. But however important this inquiry may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean that which the parties to it meant; but rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit. In other words, courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language, or to the rules of law. [Id. 6]

What made Parsons' accomplishment extraordinary was that he abstracted the analysis of the interpretation of existing contracts to cover the distinct situation in which the interpretation

222 process determines the prior question of formation. Parsons was certainly the first to go this far:

This desire of the law to effectuate rather than defeat a contract, is wise, just, and beneficial. But it may be too strong. And in some instance language is used in reference to this subject which itself needs construction, and a construction which shall greatly qualify its meaning. Thus, Lord C. J. Hobart said: —"I do exceedingly commend the judges that are curious and almost subtle, astute, (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end,) to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." Lord Hale quotes and approves these words, and Willes, C. J., quoting Hale's approbation, adds his own. And yet this cannot be sound doctrine; it cannot be the duty of a court that sits to administer the law, and for no other purpose, to be curious and subtle, or astute, or to invent reasons and make acts, in order to escape from rigid rules. All that can be true or wise in this doctrine is, that courts should effectuate a contract or an instrument wherever this can be done by a perfectly fair and entirely rational construction of the language actually used. To do more than this would be to sacrifice to the apparent right of one party in one case, that steadfast adherence to law and principle, which constitutes the only protection and defence of all rights, and all parties.

Yet even this statement is far from the degree of abstraction of Classical objectivism. It did not embrace all of contract law, not to speak of the generalization of the position to tort and to public law. Parsons saw his model of interpretation within the pre-Classical frame of reference as a conflict between morality and policy, as one of the endless series of particular illustrations of the most general of pre-Classical legal categories:

It may be true ethically, that a party is bound by the meaning which he knew the other party to intend, or to believe that he himself intended; but certainly this is not always legally true. Thus, in the cases already supposed, he who was to give might know that

the party who was to receive, (a foreigner perhaps, unacquainted with our language,) believed that the promise was for "oxen," when the word "horses" was used; but nevertheless an action on this contract could not be sustained for "oxen." So if he who was to pay money knew that the payee expected compound interest, this would not make him liable for compound interest as such, although the specific sums payable were made less, because they were to bear compound interest. In all these cases, it is one question whether an action may be maintained on the contract so explained, and another very different question, whether the contract may not be entirely set aside, because it fails to express the meaning of the parties, or is tainted with fraud; and being so avoided, the parties are left to fall back upon the rights and remedies that may belong to their mutual relations and responsibilities. [Id. 9-10]

And on this general issue, Parsons was, exactly like Kent, unwilling to commit himself *either* to the virtues of "technicality" represented here by objectivism, *or* to an unbuttoned liberality. Exactly like Kent, he acknowledged not just that the law must sometimes appeal directly to subjective intent and to morality, but that there was at least sometimes a necessity for standards that flatly contradicted the whole idea of objectivity. I quoted at the beginning of the last chapter from his description of the law of fraud as a compromise of morality and policy. Here is what he said about the framing of the concrete legal doctrines implementing that compromise:

It follows that a certain amount of selfish cunning passes unrecognized by the law; that any man may procure to himself, in his dealings with other men, some advantages to which he has no moral right, and yet succeed perfectly in establishing his legal right to them. But it follows also, that if any one carries this too far; if by craft and selfish contrivance he inflicts injury upon his neighbor and acquires a benefit to himself, beyond a certain point, the law steps in, and annuls all that he has done, as a violation of law. The practical question, then, is, where is this point; and to this question the law gives no specific answer. And it is somewhat

noticeable, that the common law not only gives no definition of fraud, but perhaps asserts as a principle, that there shall be no definition of it. It is of the very nature and essence of fraud to elude all laws, and violate them in fact, without appearing to break them in form; and if there were a technical definition of fraud, and everything must come within the scope of its words before the law could deal with it as fraud, the very definition would give to the crafty just what they wanted, for it would tell them precisely how to avoid the grasp of the law. Whenever, therefore, any court has before it a case in which one has injured another, directly or indirectly, by falsehood or artifice, it is for the court to determine in that case whether what was done amounts to cognizable fraud. Still, this important question is not left to the arbitrary, or, as it might be, accidental decision of each court in each case; for all courts are governed, or at least directed, by certain rules and precedents, which we will now consider. [Id. 263-64]

The discussions in Parsons' second volume of construction and fraud were more elaborate and more serious than anything in the first. They suggest a dawning consciousness of a terrible problem. Classical objectivism was a response to this change in awareness. For example, in the first volume, Parsons' brief chapter on "Assent of the Parties" is wholly innocent of the existence of an issue of objectivity in the law of offer and acceptance. For example on the issue of the length of time an offer remains open for acceptance, Parsons adopted his typical framework of "implied intent." He first enunciated the usual rule that unless the offeror fixes its duration, the offer may be accepted within a "reasonable" time. He then fudged the issue of voluntariness:

It may be said, that in either case, *the intention or understanding of the parties is to govern*. If the proposer fixes a time, he expresses his intention, and the other party knows precisely what it is. If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the *law will decide this to be that time which as rational men they ought to have understood each other to have in mind*. [Id. 405, my emphasis]

Proceeding to the "analogous and closely connected question" of when the revocation of an offer becomes effective, Parsons again obscured the issue objectivism brought to the fore. The problem in this situation is as follows: The rule then and now is that the revocation is effective only on receipt. The offeree can therefore bind the offeror by putting an acceptance in the mail after the offeror has changed his mind, but before he has gotten his message through. Parsons handled the issue of the reality of the offeror's intent to be bound as follows:

We consider that an offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, during which the party to whom it is addressed may accept the offer. We hold also that this offer may be withdrawn by the maker at any moment; and that it is withdrawn as soon as a notice of such withdrawal reaches the party to whom the offer is made, and not before. If, therefore, that party accepts the offer before such withdrawal, the bargain is completed; there is then a contract *founded upon mutual assent*. [Id., 406-07, my emphasis]

Parsons does not discuss at all the issue of unilateral mistake, which was the key to the whole question of objectivism for both Williston and Whittier. In the area of agency, he used the estoppel concept to justify the liability of the principal when an agent acts within his apparent but in violation of his actual authority. [Id. 38-39; 43; 44-46]

It seems as clear as such things ever are that the first volume of Parsons is much more representative than the second. Leake, whose treatise of 1867 was the first to state the contract/quasi-contract distinction as an important organizing principle, and who, in a passage already quoted, claimed concern with general theory, was probably the first to focus the issue.

Agreement consists in two persons being of the same mind concerning the matter agreed upon. The state of mind or intention of a person, being impalpable to the senses, can be ascertained only by means of outward expressions, as words and acts. Accordingly, the law judges of the state of mind or intention of a person by out-

ward expressions only, and thus excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and actions; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that intention is established in law as a fact, whatever may be the real but unexpressed state of his mind on the matter. [Leake 8]

The first attempt to bring Leake's principles to bear systematically on the problem of the contract by correspondence was Langdell's (1871), although he had nothing to say about mistake or construction. At the end of a discussion that blends the issues in a way that is almost unintelligible today, he concluded that an acceptance must be received and read before a contract by correspondence can be formed. In other words, he thought that the mailbox rule was wrong because it was based on the faulty conception that the law was concerned with the meeting of the minds in itself rather than with its communication. In considering the arguments in favor of the mailbox rule, he said the following:

4. It has been claimed that the purposes of substantial justice, and the interests of contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but absurd results. The true answer to this argument is, that it is irrelevant; but, assuming it to be relevant, it may be turned against those who use it without losing any of its strength. [L. 20-21]

Compare the following discussion of the revocation of offers, which is perhaps the clearest of all the early objectivist arguments:

An opinion has prevailed, to some extent, that an offer is only evidence of the offerer's state of mind, and hence that it will be destroyed by any satisfactory evidence that the offerer has changed his mind since he made the offer; and this has been supposed to be a necessary consequence of the rule that, in order to make a contract, the minds of the contracting parties must concur

at the time of making it. But an offer is much more than evidence of the offerer's state of mind; otherwise, communication to the offeree would not be of its essence. It is, indeed, evidence of the offerer's state of mind, but it is not evidence which can be rebutted, except by showing that the offer has expired, or has been revoked. If an offer could be destroyed by evidence that the offerer has changed his mind, it could also be rehabilitated after it has expired by evidence that the offerer continued of the same mind. As to the rule that the wills of the contracting parties must concur, it only means that they must concur in legal contemplation, and this they do whenever an existing offer is accepted, no matter how much the offerer has changed his mind since he made the offer. In truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the required physical act has been done, only a physical act can undo it. An offer is a physical and a mental act combined, the mental act being in legal intentment embodied in, and represented by, and inseparable from, the physical act. [Id 243-44]

After Langdell, the discussions of offer and acceptance identified the issue of objectivism quite unambiguously, but the mode of formulation still varied widely. Pollock and Anson stated that parties were held from time to time against their will, but chose to put this in terms of a requirement of real assent modified by a "rule of evidence" under which "when men present all the phenomena of agreement they are not allowed to say they were not agreed." [Anson 3d p.9n.] The formula that won the day was rather that of Holland (1880). His mode of statement shows at how late a date the whole problem of objectivism in contract was unresolved:

Is it the case that a contract is not entered into unless the wills of the parties are really at one? Must there be, as Savigny puts it, "a union of several wills to a single, whole and undivided will?" Or should we not rather say that here, as elsewhere, the law looks, not at the will itself, but at the will as voluntarily manifested? When the law enforces contracts, it does so to prevent disappoint-

ment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise.

If one of the parties to a contract enters into it, and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless. Not only will the dishonest contractor be unable to set up his original dishonest intent as an excuse for non-performance, but should he, from any change of circumstances, become desirous of enforcing the agreement against the other party, the latter will never be heard to establish, even were he in a position to do so by irrefragable proof, that at the time when the agreement was made the parties to it were not really of one mind.

This view is put forward with some diffidence, opposed as it is to the current of authority from Javolenus to Mr. F. Pollock and Sir W. Anson, but when the question is once raised it is hard to see how it can be supposed that the true consensus of the parties is within the province of law, which must needs regard not the will itself but the will as expressed, taking care only that the expression of will exhibits all those characteristics of a true act which have already been enumerated. [Holland 2nd pp. 194-95]

Objectivism and the "Nature" of Contract

There remains the point that objectivism was not then, as it is today, conceived as posing no more than a series of issues of policy. In the passage from Parsons' discussion of construction quoted on page 221, *supra*, we find him claiming that the judge must disregard the subjective intent and act on the "real" meaning of the words used. There is a policy argument for this, but there is also a strong suggestion that it would be wrong and irrational rather than merely impolitic for the judge to proceed otherwise.

A similar contrast existed in the offer and acceptance discussions. On the one hand, there was the idea that in order to do substantial justice and achieve a measure of certainty, the court would disregard evidence of actual subjective intent and bind or discharge the parties objectively. The purpose was clearly to punish

fraud or negligence and to enhance predictability. On the other hand, writers like Holland at least suggested that there was some sense in which objectivism was the result of the "logic" of law. Leake derived his objectivism, at least apparently, as a deduction from the fact that the inner state of mind is unknowable. The reports are full of statements with an axiomatic, *a priori* ring, as for example:

All the plaintiff did was merely to determine in his own mind that he would accept the offer—for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so; and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract. [69N.H. 305 (1898); K&G 174]

The distinction between the two kinds of justification for objectivism was discussed in modern terms for the first time in an article by George Costigan published in 1907. He was commenting on one of Walter Wheeler Cook's early polemical excursions, which contained the following remark about the mailbox rule:

"As yet no one has arisen to argue that, inasmuch as real assent on the part of A is lacking there has been no meeting of minds, and so that no contract has been made; that, therefore, the true explanation of A's liability is to be sought in estoppel—he has represented to B that the offer is still open, B has changed his legal position in reliance on this representation, and A is therefore estopped to deny that a contract has been made."

May be nobody has arisen to call such contracts ones by estoppel; may be nobody will arise to do so. But certain it is that they are not, from the point of view of legal philosophy, contracts based on genuine mutual assent, though of course they are enforced as such contracts every day in the year. And why are they enforced as mutual assent contracts? Only because no name has been coined for them. It is only a short time since quasi-contracts were insisted upon as genuine implied contracts because *assumpsit* was the remedy on them; yet they never were genuine

contracts and to-day bear the distinctive name quasi-contracts. In the same way, though we teachers in the law of contracts are, for the present, obliged to tell our students that the "meeting of minds" talked of in the contract cases is often a misnomer, —that a meeting of the expressions of the parties in an offer of contract and a communicated acceptance is enough to make a mutual assent contract despite the fact that in an accurate sense of the words the minds of the parties never meet at one and the same moment of time; —we do this because the poverty of legal phraseology so compels. [19 Green Bag 512, 513]

After proposing the name "constructive contract" for situations where objectivism prevails over the intent of parties, he added that it was "only fair to notice" that constructive contracts were "doubtless once regarded as literally what above are called consensual contracts." Objectivism was "born of practical necessity, or if one prefers, a fair rule of the game of making contracts." [Id. 516] "Yet in applauding [it] we must not go so far as to say that the absence of a consensus of minds is the same thing as its presence." [Id. 515] "[I]t is only confusing to treat the obligations of such an unwilling party as if they rested on the same kind of consent that obligations actually intended by all parties at the time they arise rest upon." [Id. 516]

If the Costigan analysis is accepted, it becomes reasonable to ask, as Whittier did in 1927, why we should use the inflexible and inherently deceptive technique of full contractual liability to achieve tort objectives. And the question of objectivism ceases to be a unified one, becoming an ad hoc investigation of pros and cons of policy in particular situations. This modern attitude is at a great distance both from the unintegrated pre-Classical treatment and from the Classical belief that objectivism was part of the science of law. Here is a sample from a judicial opinion of 1947:

It is true that there is much room for interpretation once the parties are inside the framework of a contract, but it seems that there is less in the field of offer and acceptance. Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract. If a

court should undertake to resolve ambiguities in the negotiations between parties, disregard clerical errors, and rearrange words, leaving out some and putting in others, it is hard to see where the line of demarcation could be drawn and the general effect would inevitably be a condition of chaos and uncertainty. [75 F. Supp. 137; K&G 187-88]

Autonomy

The issue of autonomy vs. community is at least as pervasive within contract law as that of formality vs. informality, but it is less visible. Indeed, there exists, to my knowledge, no general discussion of it at all in the legal literature. The closest thing to it is contained in Prof. Gilmore's book on what he calls the "classical" contract theory of Langdell, Holmes and Williston.

The book contains fragmentary references to a theory of "absolute liability," meaning the constriction to extreme cases of doctrines nullifying contracts in case of impossibility, frustration or mistake. Gilmore associated this position with the ideas that third party beneficiaries have no rights, that there can be no suit for breach until performance has become impossible, and that plaintiffs in default can never recover. He added the idea that there should be the widest possible scope for pre-contractual maneuver and puffing, with no liability for ensuing damages if the contract falls through, and the idea that the law of fraud should impose only the most minimal duties on sellers.

What links these doctrines is that they all deal with parties within or just outside of contractual relationships who suffer losses or reap benefits that are neither clearly attributable to negligence nor bargained over in advance. The judge must devise rules allocating the gains and losses, ranging from letting them lie where they fall, to imposing them on someone, to splitting them equitably. I call "autonomist" solutions to this dilemma that insist that one party to the relationship has no obligation to share the other's losses or his own gains. Autonomism also means a preference for sets of rules that leave each party free to *increase* the other's losses in pursuit of his own gain.

Autonomy in contract is thus closely analogous to autonomy in

232 property law. The cutting off of the easements that forced an owner to look after his neighbor's interests corresponds to the doctrines that reduced the interdependence of contractual parties when unexpected losses occur. Since there is no theoretical literature on the issue as it arises in contract, and to trace the dilemma through each doctrinal area would take too much space, I will restrict the discussion to the crucial instances of the theory of conditions, and the problem of extra-contractual reliance.

The issue of autonomy arises in the area of conditions as follows: Suppose two parties, A and B, each of whom has promised a performance to the other. Further suppose that A is scheduled to perform before B, but is unable to do so. B then must decide whether to go ahead and do his part, seeking some compensation for A's breach, or to drop the whole contract. If the law says that he must go ahead, and sue A for whatever damages his breach may have caused, then we call the promises of A and B "independent covenants." If, on the other hand, A's default allows B to drop the whole deal, then performance by A is a "condition precedent" to B's duty.

The testing case for autonomy arises where A's breach is minor, but the losses to A if B drops the deal will be major. If the law is willing to say to B that he must look to A's large loss, compared to his risk of a small one if A refuses to compensate for his breach, and go through with his part, then it is communitarian. If the tendency is to avoid any situation in which we compare the respective losses, and if instead we give B the power to drop A for a slight default even if A will be ruined, then we are after autonomy.

Kent's treatment of this issue as it arose in deeds gives the flavor of the "liberal" strand in the pre-Classical approach:

If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; for a covenant is far preferable to the tenant. If a condition be broken, the landlord may indulge his caprice, and even malice, against the tenant, without any certain relief; but equity will not enforce a covenant embracing a hard bargain; and, at law, there can be no damages without an injury.... The intention of the party to the

instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case. [IV, 136-37]

In *Norrington v. Wright* (1885), the U.S. Supreme Court held that a seller of goods must make a "perfect tender," complying with *all* the terms of the contract, or the buyer can reject the goods, even if the breach is utterly trivial and the buyer's motive is to get out of what has turned up as a losing bargain. The court was unwilling to initiate a calculus of the degree of breach and the degree of loss to the seller, preferring to give the buyer an absolute power which he could exercise in his own interests without regard to those of his partner. In an historical note to this case, Kessler and Gilmore pointed out that:

The first American treatise on sales law suggests that, half a century earlier, the tender rule had been quite different: except for serious defects in the goods, the buyer had to accept the tender and sue in damages for breach; he did not have the privilege of rejection. See Story on Sales S.448 (1847). Thus, aspects of the sales contract which had been "independent covenants" in the first half of the century had become true "conditions precedent" by 1890. [Kessler & Gilmore p. 833]

The law of conditions deals with the problem of interdependence within an established contractual relationship. The problem of autonomy vs. community also arises regularly when one party relies to his detriment on non-fraudulent and non-negligent representations that don't become contractual obligations, or become contractual and are then voided by mistake or the like. When the events promised or foretold do not come to pass, the relying party sues for damages. The judge must decide whether to set rules that will oblige the party responsible to share the loss, or to declare that although there may be a moral obligation, there has been no breach of legal duty.

The strategy of autonomy here consists in maintaining a vivid contrast between two states. Before a formal contract is signed, the parties are "at arms length," unless the relationship is fiduciary. Their only duties toward one another are those that apply even between strangers, though in fact they may be intimately involved. After the contract has been signed, this changes utterly, and each must perform his obligations even if ruined.

The doctrinal vehicles for the playing out of the conflict of autonomy and community are the consideration doctrine, with its counter rule of promissory estoppel, and the concept of "quantum meruit," a survival from the days before quasi-contract, through which the courts *sometimes* protect reliance outside of formal contracts. The story of the rise of counterrules in response to the theoretical dominance of the strategy of autonomy after the Civil War has been well told elsewhere. The outcome has been that we are now aware of the pervasive problem of protecting extra-contractual reliance, but have no coherent theory to explain either when during negotiations duties begin, or to what *extent* the parties accept responsibility for each other's welfare once that point is passed.



The Classical Theory of Torts

The Classical theory of torts has a clear cut internal structure much easier to describe than that of Classical contract law. It can be summed up as follows:

- (a) The emergence of will theory was reflected in the tripartite division of the field into:
 - (i) *intentional torts*, where liability was based on willful violation of a command of the sovereign, so that will figured both as the source of duty and as the criterion of its violation.
 - (ii) *negligence*, where liability was based on the will of

- the sovereign acting in response to a defect in the will of the defendant.
- (iii) *liability without fault*, based on the will of the sovereign concerning the equitable or otherwise socially desirable redistribution of losses that would otherwise lie where they fell.
 - (b) Autonomy was expressed in the slogan of no liability without fault, which reversed the earlier presumption of liability wherever there was damage (in the absence of "inevitable accident"), and represented a constriction of the legal bonds obligating actors to take account of the effects of their activities on the welfare of others.
 - (c) Objectivism was reflected in the development of the reasonable man standard of liability into a prominent instrument of analysis, with an ambiguity, as in contract objectivism, as to whether it was policy or the internal logic of legal science that required the random imposition of liability without moral fault in a system that claimed to embody moral notions.

Legal historians seem to be in virtually universal agreement that such was the self-conscious, formal organization of the theory of torts at the end of the nineteenth century. It is impossible to determine to what extent this description would apply meaningfully to the total pattern of actual results, but it was tolerably overt in treatises, articles and leading cases. The main problem for us is to determine more specifically than has been done in the past the sequence of events. My contention is that, as with contract law, the new synthesis emerged only between 1870 and 1880, rather than, as the conventional wisdom would have it, in the 1850's. My second point is unlikely to be controversial and I will do no more than state it. The modern dilemmas of tort law, which have to do with the tensions between fault and compulsory insurance and between expensive systems ensuring full compensation and cheap ones that allow leeways for the arbitrary imposition of uncompensated damage, are altogether absent from pre-Classical legal thought.

The event that has attracted the attention of modern historians of tort law is that between 1850 and 1855, beginning with the Massachusetts case of *Brown v. Kendall*, there appeared a spate of judicial opinions declaring that it was a *general* principle that a person acting with due care in a course of conduct not illegal in itself was not liable for damages accidentally caused to the persons or property of others. These opinions are supposed to mark the "triumph of negligence" over liability without fault. Prior to 1850, the argument goes, negligence (hence fault) was a requirement only in the action on the case. Liability in trespass was based on the fact of injury rather than any particular mental element, except for cases of "inevitable accident." These were cases in which the defendant was conceived as not having acted at all, since the injury could not have been prevented no matter what he did.

After 1850, the argument goes, any injury that happened in spite of the defendant's exercise of due care came to be defined as an inevitable accident. We began with a narrow exception to a general notion that, for the class of acts called trespasses to the person, damage led to liability. We ended with the idea that negligent acts were exceptions to the general proposition that damages from accidents should lie where they fall. Since negligence had all along been necessary in the action on the case, the events of 1850-1855 eliminated liability without fault from the law of injuries to the person.

Professor Horwitz has suggested two reservations with respect to this thesis. First, there were at least four opinions during the 1830's and 1840's, all from New York, that enunciated with perfect clarity the distinctions and the general principle for which *Brown v. Kendall* and the year 1850 are famous. Second, the action on the case had not developed a clear theory of liability based on negligence long before the corresponding change in trespass. Rather, there was a generalized emergence of negligence across the board, with 1850 an especially important year, but not a year of conceptual revolution. With these emendations, I have found nothing that contradicts the conventional theory, as far as it goes.

The difficulty arises when we attempt to pin down the meaning of the language in which the judges phrased their new general principle. Here is an example from New York in 1832:

In most of the cases referred to, the question chiefly discussed was whether the action should be trespass or trespass on the case. But the general principle which I have stated, in relation to the liability of a defendant, is to be fairly deduced from them. When we speak of an unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible in the nature of things for the defendant to have prevented; all that is meant is, that it was not occasioned, in any degree either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise. [*Dygert v. Bradley*, 8 Wend. 469, 472-73]

The famous language of *Brown v. Kendall* (1859) is as follows:

We think, as a result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. ...If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. [6 Cush. 292, 295-96]

The evidence as a whole suggests the following ill-assorted conclusions about the meaning of these words:

- (a) The judges in question saw themselves as stating a rule whose scope was
 - (i) wider than any particular form of action (their thinking was liberated from primitive proceduralism); and
 - (ii) wider than the injuries covered by the writs of case and trespass to the person.
- (b) But they did not conceive of themselves as generalizing about a field of "tort law" representing the total residuum of the law of wrongs after subtracting breach of contract, quasi-contractual obligation, and status.
- (c) Insomuch as they spoke of wrongs not included in tres-

pass to the person and case, they misstated the law, since liability without fault was then and remained the rule in at least the following areas:

- (i) trespass to real property
 - (ii) battery
 - (iii) nuisance
 - (iv) respondeat superior
 - (v) responsibility of bailees such as innkeepers and common carriers.
- (d) But while torts as we currently conceive it contained many areas of absolute liability, the slogan of no liability without fault was that of a powerful reforming elite with a real chance of substantially remodeling the law to correspond to its emerging vision of justice and policy.

What it is hard to imagine is the inchoacy of torts between 1850 and 1870. The initial assertion of the general principle of no liability without fault was made not *within* the context of a developed theory of the field, but as one of the incidents in its creation. The slogan helped bring into existence the context in which we now know exactly what it means. When it was first put forward, its meaning was relatively indeterminate.

In the Classical view, there were two kinds of liability: "with fault" meant there must be a showing of intent or of a degree of negligence; "without fault" meant you were liable even if you exercised due care. In the Classical view, a "general" principle was one that applied to all of torts, and torts included all of the cases of liability without fault listed above. It followed from this set of definitions, applied to the legal rules, that torts was a battleground. On one side were those favoring liability based on the sovereign's redistributive will carried out regardless of fault. On the other were those who would recognize the autonomy of legal actors within the sphere bounded by intentional wrongdoing and negligence.

The *pre*-Classical vision of the subject, *circa* 1850, already included the "no liability without fault" slogan. The evidence that the *pre*-Classical view was nonetheless indeterminate, rather than Classical, is as follows:

First. The treatises published between 1859 and 1880 did not put forward "no liability without fault" as an integrating generalization in the manner of the cases. They did not even organize the new field in these terms. Rather, they looked for categories that would fudge the distinction (e.g., *sic utere tuo ut alienum non loedas*) and preserve the all-inclusiveness of torts as a subject.

Second. In the early 1870's, Holmes wrote a series of reviews and articles that included liability without fault as an obviously important part of torts; during this period he, and Markby as well, tended to deny that negligence really involved fault at all, given the enormous discretion of juries to give it the meaning that seemed best to them.

Third. In the period 1872-75, several American Courts took up the question of whether to "receive" the doctrine of *Rylands v. Fletcher*, imposing liability without fault on landowners using their land in "unnatural" ways. *Rylands* rested on general principles, rather than on reference to existing pleading categories such as trespass or nuisance. The American courts treated the question of whether there could *ever* be liability without fault as open, and then decided it in the negative. In a case involving an accidental explosion, the Supreme Court, per Field, J., for the first time declared its allegiance to the slogan of *Brown v. Kendall*.

Fourth. In the 1850's, numerous legislatures passed statutes imposing liability without fault on railroads for fires caused by sparks from locomotives. When these were challenged as violations of due process, the state Supreme Courts affirmed them. In the 1870's, the same legislatures imposed liability without fault for cattle killed in various kinds of accidental encounters with trains. The state courts began to strike these down on the ground that liability without fault violated fundamental constitutional principles. Supreme Courts upholding the legislation argued that it did not in fact attempt to eliminate fault, rather than that the legislature could do so if it pleased.

Fifth. Beginning only with Bigelow's Treatise of 1878, there was a gradual movement toward the organization of the subject as Intentional Torts, Negligence and Liability Without Fault, but this organization was not clearly present in any book before

Pollock's of 1886. Cooley's famous treatise of 1879 reiterated the doctrine of *Brown v. Kendall*, but also contained a number of statements to the effect that there is "no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case, the reason is, because he that is damaged ought to be compensated." [99]

Sixth. In *The Common Law* (1880), Holmes revised his earlier position, and adopted the view that there should be no liability without fault, though "fault" meant conformity to an external standard rather than "actual" moral blameworthiness. He asserted the theoretical unity of tort law with criminal law, thereby accepting the essential features of Shaw's position of 1850. [See also II Howe, Ch.7]

Given this evidence, we should place the emergence of the Classical/modern framework of tort law in the decade 1870-80. The beginning of the transition is the debate about *Rylands v. Fletcher*, 1872-75. The transition was complete with Holmes' lectures in 1880. Pollock's treatise of 1886 collected and systematized the elements of the new ordering, as Holmes acknowledged ten years afterward in his "Path of the Law" lecture.

Objectivism

The emergence of objectivism is as easy to deal with in torts as it is difficult in contracts. The leading case was English, *Blyth v. Birmingham*, decided in 1847. Treatise and opinion writers quoted it endlessly to the effect that:

"Negligence," is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

In the statements before Holmes wrote *The Common Law*, there was not the slightest indication of awareness that the reasonable man standard conflicted with the idea that culpability was the foundation of liability. The choice of standard was founded on

policy, as in *Blyth*, but it was a policy not articulately opposed by morality. One might attribute to a dawning awareness of inconsistency Cooley's attempt to blur the issue in his 1879 treatise:

[N]egligence in a legal sense is no more nor less than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury....

But in a very large proportion of the cases in which negligence is counted upon, the facts are of that ambiguous quality, or the proper conclusion so doubtful, that different minds would be unable to agree concerning the existence of fault, or the responsibility for it. The question will often be, does the defendant appear to have exercised the degree of care which a reasonable man would be expected to exercise under like circumstances? [Cooley, Torts, 630; 668]

Cooley here exemplified that pre-Classical fuzziness the Classics most abhorred. Holmes gave the answer a year later:

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise. [Holmes, *The Common Law*, 88]

After *The Common Law*, the treatise writers made no effort to disguise the character of the standard; but they also felt no need to offer any explanation of its consistency with the slogan of no liability without fault. They seemed to suffer from the same uncon-

242 sciousness of the issue as characterized the contract theorists who treated as "true contracts" those that Costigan saw as merely "constructive." This is the puzzle of objectivism in a period that exalted private will and believed in the meaningfulness of the concept of individual culpability.



In the next chapter, I will argue that once we add the theory of the judicial role to will theory, autonomy and objectivism, we can see that Classical legal thought was an entity with an internal logic. It may be helpful, as a preliminary, to end this chapter with a sketch of the way the notion of "internal logic" can help in understanding anomalies like that of objectivism in a fault-oriented system.

Mark Howe has suggested that Holmes' position in favor of liability only for fault, but fault objectively determined, represented a "compromise" between an American trend in favor of, and an English trend against culpability as a determinant of responsibility. He also suggested that the explanation for Holmes' choice of the reasonable man standard was a reformer's urge to make the law more socially useful by making it more certain. On the other hand, it has been common to attack the late 19th Century tort rules as a covert subsidy to big business, and to defend them as the embodiment of a program of economically efficient judge-made law that left questions of distribution to the legislatures.

It seems to me very hard to argue that any particular pattern of outcomes is implicit in the reasonable man test. Too much depends on the choices made along the road about causation, about the definition of an act, and about the sources of "reasonable" behavior. The accomplishment of modernist analysis has been to show that the ambiguities in the treatment of these issues amounted to a veritable quicksand of counter rules and illusory distinctions lying across the straight path of principle. Judges so minded had no need to reject the Classical rhetoric even when they sought unclassical results.

Howe's suggestion may be more useful, especially if we keep

in mind that quasi-contract is to objective contract as liability without fault is to objective fault. In each area the Classics adopted the latter form of liability while restricting the former to special cases seen as vestigial. In each area, the moderns strengthened their argument against the logical necessity of the Classical conclusions by pointing this out. But in each case, there was a real though unarticulated difference.

The judge making rules of quasi-contractual liability or defining categories of tort liability without fault was obeying no will but his own. When there was no statute governing the matter and, *ex hypothesi*, no identifiable aspect of the will of the parties on which to hang the decision, the judge had to refer directly to morality and policy, the two ultimate sources of rules in all periods of common law history. In other words, the judge had to step into the role he usually at least pretended to reserve for the willing actors in the system.

This may be more obvious in the case of absolute liability than in that of quasi-contract. After all, we have seen the Classics insisting on the importance of a cause of action for restitution in the general scheme of private law, while the pre-Classics gave it only indirect recognition. Moreover, the emergence of quasi-contract as a distinct doctrinal category is often treated as of merely formal significance. It did away with conceptual confusion, in this view, but had no significance for outcomes. This view is incorrect. The distinction between a contractual cause of action for expectation or reliance damages and a restitutionary cause of action for restoral of benefits conferred did affect results. Specifically, it eliminated, in theory but not altogether in practice, the granting of reliance damages in situations where the parties had a relationship falling short of an enforceable contract. [Perillo, 73 Col. L. Rev.]

Before the creation of the sharp contrast between contract and restitution, courts had routinely granted reliance damages in implied contract actions on the "common counts." The characteristic pre-Classical imprecision as to whether the will in question was that of contracting parties or of a redistributively minded sovereign had camouflaged the issue. When it was brought to the fore by writers like Keener in the 1890's, Classical courts tended to

244 hold that there was no legal basis for shifting losses or gains between the parties where there was neither contract nor benefit conferred.

Boone v. Coe, decided in 1913, illustrates the point. The plaintiffs had moved with their household effects from Kentucky to Texas in reliance on an uncle's oral promise of a farm lease. When he went back on his promise, they returned to Kentucky and sued him. There was no claim on the contract, because oral leases are void under the statute of frauds. But twenty years before, the court had held that parties in the position of the plaintiffs could recover on an "implied contract," distinct from the invalid express contract, for their reliance expenditures. In *Boone*, they overruled that earlier decision, on the ground that the only recovery "off the contract" would be of restitution damages, and here there had been no benefit conferred on the defendant. [153 Ky. 233] Similar problems arose when the plaintiff had relied during negotiations, or when a contract turned out to be void because of mistake or impossibility.

Boone v. Coe was a typical instance of the Classical strategies of objectivism and autonomy. The courts constricted the number of situations in which the parties had to share gains and losses. They did so through the distinction between restitution, a *relatively* concrete doctrine about the disgorgement of ill gotten gains, and reliance. Reliance is hard to measure at best, and at worst poses horrid evidentiary problems.

More important, there are no obvious limits that can be set to the idea of compensation for such losses. By definition, the obligation of one party to the other cannot be defined through will (contract) or fault (tort). If there is a recovery, it must be based on a notion of community that is more fundamental than either. But if we recognize a duty to share based on relationship alone we will be drawn into questions like: How much involvement, beyond common membership in the human race, generates a legal obligation to share? Given an obligation, how is the judge to apportion gains and losses?

Quasi-contract, restricted to cases of benefits conferred, resembles liability without fault, restricted to the traditional

"exceptions" of respondeat superior and common carrier liability as an insurer. In each case, a doctrine whose implications are "revolutionary," in the sense of representing the ideals of community and informality, was accepted into the legal order, but cabined so as to pose no threat to a whole animated by ideals of autonomy and formality. [cf. Dawson, *Restitution*, Ch. 1]

We can also define a relationship between restitution and absolute liability, taken as a unit, and objectivism in tort and contract law. Contract objectivism *functioned* to protect reliance outside of relationships of real assent. The promisee who had taken action on the basis of action by his partner that *looked* contractual could recover in spite of the fact that the partner never intended to be bound. Likewise in tort law, objectivism functioned to redress injuries inflicted by blameless defendants.

Objectivism therefore involved an appeal to and accommodation of autonomy and community. But it crystalized the issue in an abstract principle, a general formula without overt social or political content, which could be followed out, once adopted, according to an impersonal judicial method. Objectivism was therefore consistent with the Classical theory of the separation of powers.

Objectivism was tied, on the one hand, to the will it was supposed, however clumsily, to mirror. On the other, it was constrained, in theory, to the pseudo-scientific determination of actual patterns of behavior. By contrast, quasi-contract and liability without fault brought the judge face to face with the problem of autonomy vs. community. They demanded an *ad hoc* judgment based on all the aspects of the case, about the extent to which the members of society should be obliged to look after each other's interests.

This explanation of why objectivism was more acceptable than quasi-contract and liability without fault also helps in understanding the function of objectivism within the system. It rendered the will theory plausible as a basis for the claim of judicial neutrality. It made it possible to claim for the legal order the moral legitimacy of rules based on consent or fault, without requiring the descent into an evidentiary morass that was implicit in genuine subjectivism. And objectivism once adopted, there appeared

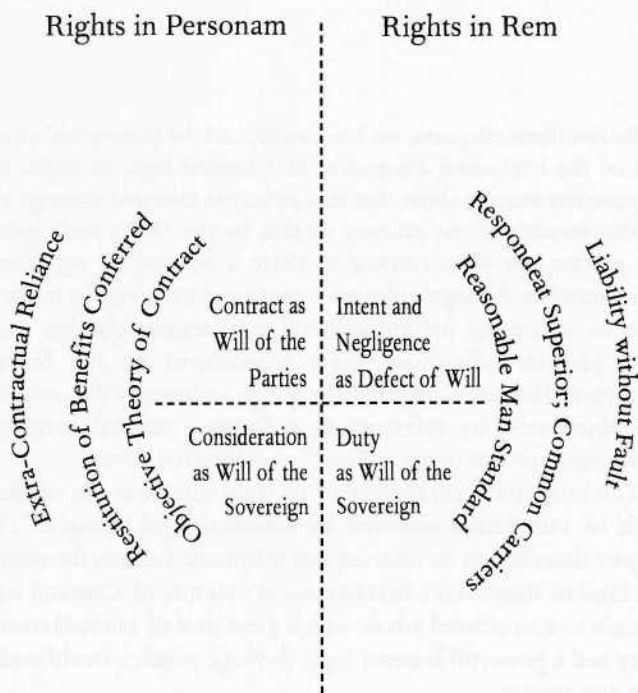
numerous leeways in the definition of the reasonable man that allowed the injection of the policies ostensibly banished at the moment of the judge's submission to the wills of others. In short, objectivism served, in Classical legal thought, as a mediator of the contradiction of morality and policy; its function was not unlike that of implied intent in the consciousness of the antebellum period.

There is a difference between mediation and compromise, and that is the shortcoming of Howe's approach. *Today*, objectivism, as a way to reduce the tension caused by the conflict of the ideal of individualized justice with that of social efficiency, is implausible. The Moderns have taught us from the first month of law school that there is little or no difference between an open textured reasonable man test and an open textured program of enterprise liability or of judicial regulation of consumer contracts. But, like implied intent for their predecessors, objectivism was much more to the Classics than a name for one approach to one branch of this general problem.

The passages from their writings that I have already quoted suggest strongly that, for them, objectivism actually made the problem go away. "No one arose" to argue that constructive contracts were not "real" contracts, until 1907. After Holmes' sharply etched portrayal of the fundamentally amoral character of external standards, the treatise writers continued for 30 years to repeat the reasonable man standard and the principle of no liability without fault practically in the same breath. There was a crucial distinction between the working out of the logical implications of an apparently neutral abstraction, and ad hoc enforcement of the moral bond that does or should exist among men independently of contract or in spite of it. Issues arising on different sides of that chasm simply did not come to mind as instances of the same thing; it followed that there was no requirement that they be treated consistently.

We are now in a position to give content to the notion that the structure of Classical private law thinking mediated the contradictions of private law theory. This it did, as I said in the last chapter, by organizing private law in terms of a core of self-determination, facilitation, autonomy and formality, surrounded by a

periphery of paternalism, regulation, community and informality. The diagram below uses the image of core and periphery in arranging the subject matters involved in the disintegration and reconstitution of the pre-Classical law of contracts.



CORE AND PERIPHERY
IN CLASSICAL LEGAL THOUGHT