

**The Productive Tension between Official and Unofficial Stories of Fault in Contract Law**

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*Draft*

It is hard to invoke the concepts of “contract,” and “fault” in the same sentence, unless you want to echo Justice Holmes’ assertion that “the wicked contract-breaker should pay no more in damages than the innocent and the pure in heart.”<sup>1</sup> But that separation of contract and fault is only the official story. An equally true, but quieter, and unofficial story complements the official one. The unofficial story traces the path of fault slipping into contract law through doctrines such as willful breach. Some contract theorists respond to the seeming tension between official and unofficial stories by seeking to impose discipline on their discipline, policing the message to convey a simple, loud, and clear story of strict liability. Others would publicize the richness that the unofficial story brings to contract law, despite, or perhaps because, it blurs boundaries between contract and tort, and between private and public realms.<sup>2</sup> This

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<sup>1</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 236 (Mark de Wolfe Howe ed., 1963) (1881).

<sup>2</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note (1981). *Compare* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 117-120 (4th ed. 1992), *with* George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994). Alternatively, fault might indirectly enter contract law through the law of

chapter, like much of this volume, tends toward the latter approach. But rather than defend fault in contractual terms,<sup>3</sup> it argues that the official and unofficial stories operate in tension to facilitate *ex ante* planning and, when necessary, look backward at reasons for breach to reach a just result.<sup>4</sup> The official story of contract law expresses a general rule of strict liability furthering that planning, tempered by considering fault in exceptional circumstances. Thus framed, fault's occasional appearances in contract law reflects a common pattern in which legal doctrine first articulates a general rule then enumerates one or more exceptions.

The argument here proceeds along doctrinal and theoretical lines. First, it identifies the common pattern where contract doctrine articulates a general rule then one or more exceptions in contract formation, enforceability, breach, and damages. Often, the general rule facilitates planning by providing certainty, while the exception allows courts to look backward at equitable considerations like fault and fairness. In each instance, the official and unofficial stories co-exist, continually in tension to prevent the exception from swallowing up the general rule. This tension allows courts to reach coherent and justified results most of the time. In other words, fault, properly constrained, facilitates rather than undermines contract law.

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restitution by providing remedy for restitutionary disgorgement when a party breaches deliberately, profits from the breach, and contract damages are inadequate. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (Tentative Draft No. 4, 2005).

<sup>3</sup> See, e.g., Steve Thiel & Peter Siegelman, this volume; and Oren Bar-Gill & Omri Ben-Shahar, this volume.

<sup>4</sup> Other productive tensions operate in Contract law as well as other doctrinal areas, such as law/equity, rules/standards, autonomy/fairness, and freedom/equality. While this chapter focuses on the fault/no-fault tension within contracts doctrine, but one could also view this tension as a subset of the larger dichotomies between law and equity or rules and standards.

Second, this chapter makes a normative argument defending the co-existence of the fault and no-fault stories. Contract theory itself tolerates co-existing, disparate views. One classical liberal approach tells a story about autonomy in which parties self-regulate through words on the page, which courts passively enforce to produce certainty and efficiency.<sup>5</sup> This approach might narrowly construe the duty of good faith, and enforce the terms of a pre-printed cruise-ship ticket.<sup>6</sup> A competing theory tells a realist story of much greater State involvement in contract law, as when courts fill gaps in contracts or refuse to enforce terms on unconscionability grounds.<sup>7</sup> Still other views seek to provide a general theory of contract, yet none, alone, explains the range of state and party interests in contract law.<sup>8</sup> One theory might apply best in large transactions between sophisticated parties, while another justifies a good result in consumer, employment or premarital contracts. The range of options helps courts target the pendulum between certainty and fairness as appropriate. Contract theory and doctrine are strengthened, rather than weakened, by the dualism.

This chapter mirrors that plurality. If contractual purists object to fault as an incursion of a tort-based principle into contract law, the discussion here offers a dual defense of that

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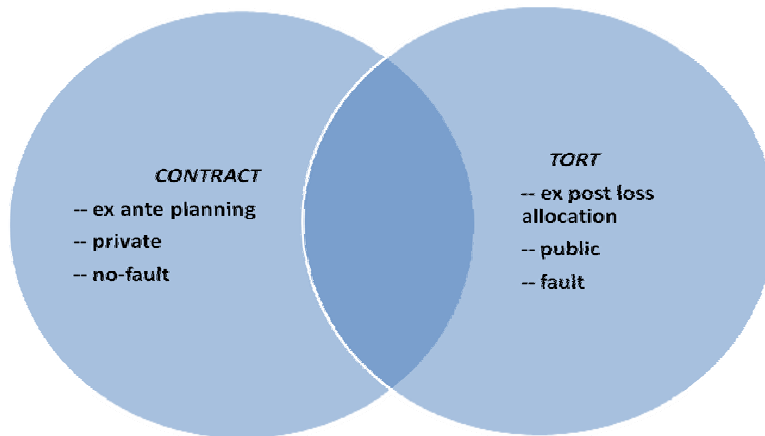
<sup>5</sup> See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).

<sup>6</sup> See, e.g., *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>7</sup> Morris R. Cohen, *The Basis of Contract*, 4 HARV. L. REV. 553 (1933); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008).

<sup>8</sup> Brian H. Bix, *Contract Rights and Remedies, and the Divergence between Law and Morality*, 21 *RATIO JURIS* 194 (2008).

incursion. First, it concedes the bifurcation of tort and contract, and then it defends the occasional leakage of tort into contract through fault. The diagram below illustrates the argument.



If tort and contract were two circles in a Venn diagram, we could conceive of the overlapping area as a semi-permeable membrane that allows a bit of *ex post* evaluations fault to leak out of tort and into contract, and also some *ex ante* strict liability rules to leak from contract into tort. While most of each circle remains separate, this small crossover reflects the complementarity of contract and tort through their tandem operation.

This chapter proceeds in three parts. First it describes how contract doctrine tells both the official and unofficial story of contract law through a system of general rules complemented by exceptions. Fault, in this view, no more undermines the integrity of contract theory or doctrine than other equitable exceptions. Second, it offers a theoretical justification for this doctrinal pattern by contending that the official and unofficial stories operate in productive tension. Third, and most provocatively, it explains its simultaneous defense of contract/tort bifurcation and overlap through a body-based metaphor. If private law can be viewed as a system that functions akin to a human body, we might view contract as analogous to the brain and tort like the heart.

Each performs specialized tasks with its particular mechanisms and needs cooperation from the other. In short, contract law without fault, in proper measure, would fail as quickly as a brain deprived of blood supply.

### **Official & Unofficial Stories Appear Throughout Contract Doctrine**

Before getting to the body, however, another metaphor helps explain the operation of general rules and exceptions in legal doctrine. Gore Vidal pointed out that “even a pancake has two sides.”<sup>9</sup> Similarly, many, and perhaps most, contract doctrines consist of a general rule, and upon close examination, one or more exceptions. Most relevant for present purposes, conventional wisdom indicates that contract law passively implements the intention of the parties,<sup>10</sup> yet it occasionally takes into account fault and other equitable considerations

Buy why force the unofficial story into the shadows? We may sacrifice accuracy for simplicity out of laziness, omitting part of the story to save time and effort. Alternatively, efficiency may caution against wasting breath by mentioning a seldom-utilized doctrinal exception. Or perhaps ignoring or downplaying the unofficial story masks the operation of power, as when the official story undermines consumers’ arguments that unequal bargaining power constrained their consent. Another explanation is functional, assigning the official story the task of channeling parties to clearly articulate contract terms. Instead of testing these explanations, this chapter contends that letting the general rule speak for the whole conveys a mostly-accurate picture (especially at a distance), while the exceptions facilitate parties trusting

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<sup>9</sup> Gore Vidal, *The Meaning of Tim McVeigh*, VANITY FAIR, Sept. 2001, at [] (quoting his grandfather).

<sup>10</sup> See, e.g., *Sun Printing & Pub. Ass’n v. Remington Paper & Power Co.*, 139 N.E. 470, 471 (N.Y. 1923) (Cardozo, J.) (refusing recovery where damages could be calculated in different ways, asserting “we are not at liberty to revise while professing to construe.”).

one another. At a more abstract level, the general rule and exceptions together support the ideological underpinning for the liberal state's foundational norms of freedom, equality, and plurality.

The doctrinal case starts with the very definition of contract. Common law defines contract as mutual assent paired with a consideration, but also recognizes limited circumstances in which detrimental reliance can create contractual liability.<sup>11</sup> At the formation stage, an offeree generally may accept orally or in writing, or a court might infer acceptance from conduct,<sup>12</sup> but not from silence. However, in exceptional circumstances, an offeree can assent by silence or inaction.<sup>13</sup> In *Register.com, Inc. v. Verio*,<sup>14</sup> for example, the Second Circuit bound a web site user to terms he never agreed to, reasoning that merely using the website subjected the user to its terms of use.<sup>15</sup> Similarly, at the level of enforceability, the common law generally enforces standard form contracts, but not where the drafter had reason to know that the other party would

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<sup>11</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 90 (1981).

<sup>12</sup> *Id.* at § 4.

<sup>13</sup> *Id.* at § 69 (allowing silence to constitute acceptance only where the offeree took the benefit of services with reason to know they were offered for compensation, where the offer or let offeree know that silence or inaction could constitute assent and the offeree intended to accept, where prior dealings justify requiring the offeree to notify the offeror of non-acceptance, and when offeree acts inconsistent with the offeror's ownership of the property, as long as the terms are not manifestly unreasonable).

<sup>14</sup> 356 F.3d 393 (2nd Cir. 2004). See also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).)

<sup>15</sup> *Id.* at 402 (distinguishing *Ticketmaster Corp. v. Ticket.com*, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000)), which required users to manifest assent by, for example, clicking an "I agree" icon on the webpage in order to be bound to its terms).

not have agreed if she knew the terms of the writing.<sup>16</sup> Along the same lines, contract law generally requires parties to perform the precise terms of their contract, but relaxes this rule for innocent breach of an inessential term.<sup>17</sup> Finally, contract doctrine generally awards expectation damages to compensate victims of breach for the value of their planned-for gains from the transaction, explicitly rejecting punitive damages as overcompensation.<sup>18</sup> Nevertheless, it also, in extraordinary cases, authorizes greater damages to punish willful breach.<sup>19</sup> This final example most explicitly imports fault into contract doctrine.

The following section defends fault in contract law by arguing that the official and unofficial stories produce an analytic framework allowing contract law to facilitate planning by providing relative certainty, and also, as necessary, to account for *ex post* consideration of fault. The tension between the official and unofficial stories, in this light, produces justifiable outcomes most of the time.

### **Official & Unofficial Stories Make Theoretical Sense**

Returning to pancakes, you might see contract law as a tall stack, alternating between big and little ones. The big pancakes represent a pile of general rules, with the little ones sandwiched between them as their exceptions. The very structure of default and immutable rules

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<sup>16</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211.

<sup>17</sup> *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921); *Edgewater Constr. Co. v. 81 & 3 of Watertown, Inc.*, 769 N.Y.S.2d 898 (N.Y. App. Div. 2003).

<sup>18</sup> RESTATEMENT (SECOND) OF CONTRACTS § 347; U.C.C. § 1-106 (2004).

<sup>19</sup> *Compare Tongish v. Thomas*, 840 P.2d 471 (Kan. 1992) (applying U.C.C. § 2-713 damages instead of lower UCC 1-106 damages where breach willful) *with Allied Cannery & Packers v. Victor Packing Co.*, 209 Cal. Rptr. 60 (Ct. App. 1984) (applying U.C.C. § 1-106 damages instead of § 2-713 damages where breach caused by heavy rains rather than willful breach).

follows this pattern. If contract law is a set of default rules, occasionally complemented by an immutable rule, then it mostly tells a story of freedom of contract, until you come across one of those immutable exceptions. The UCC codifies this approach by establishing a default rule in favor of default rules.<sup>20</sup> But at the very moment of codification to distinguish this doctrine from others, the UCC also built in overlap by allowing the UCC to be supplemented by principles of law and equity such as estoppel, fraud, misrepresentation, duress, coercion, and mistake.<sup>21</sup> Thus parties can alter most commercial law rules, but that right is constrained by immutable rules like the duty of good faith and non-enforceability of unconscionable terms.<sup>22</sup>

Despite these exceptions, intent defines the parameters of contract law, just as the big pancakes determine the shape of the stack. Contract doctrine guides contracting parties as they express that intent by drafting their agreements, telling them, for example, that the terms must be reasonably certain.<sup>23</sup> Certainty is required because contracts plan for future events (as when I agree to pay you \$50 if you deliver flowers to my mother next Saturday). Yet sometimes do not

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<sup>20</sup> U.C.C. § 1-302.

<sup>21</sup> *Id.* at § 1-103.

<sup>22</sup> Other immutable rules rest on functional grounds. U.C.C. Article 9's immutable choice of law provisions, for example, dictate the state in which a financing statement must be filed, precluding secured creditors from contracting with their debtors for perfection in some other state. If the Article 9 choice of law rule were a default rule, allowing creditors and debtors to pick their own state for filing financing statements, subsequent creditors would not know where to search to determine whether the collateral was encumbered. Thus the Article 9's immutable exception to the default rule that rules are mostly default rules protects the integrity of public record systems, and the structural integrity of the whole Article 9 scheme of balancing creditor, debtor, and third party interests U.C.C. §§ 9-301, 9-307.

<sup>23</sup> RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).



turn out as planned. Then cause of action for breach of contract comes into play, allocating losses in the wake of non-performance or botched performance.

Another aspect of contract law's focus on intent is its contrast to tort law. The productive tension between intent and fault echoes the larger tension between contract and tort. Fault's very association with tort generates contractual purists' objection (and surprise) at the "pockets of fault" in contract law.<sup>24</sup> Yet this very separation accompanies contract and tort's tandem operation.

Say you slip walking up the stairs to my house. To recover for your losses in tort, you must show a duty, breach of duty, causation, and damages.<sup>25</sup> At each stage public considerations take priority over private agreement, referencing consent, for the most part, only as a defense that would preclude tort liability. My duty to maintain my steps free of "unnatural accumulations,"<sup>26</sup> is publicly determined, as it must be, since if I had you sign an agreement establishing standards beforehand we would be in the realm of contract. My breach is likely accidental, but if I poured water on my already-icy steps in anticipation of your arrival, that action would reflect my will alone. If you were unsteady on your feet, having quaffed a pitcher of margaritas in anticipation of my company, tort law would decrease your damages to account for your contributions to the loss. Finally, your damages will be determined by a jury or judge, speaking for the public by awarding actual and perhaps even punitive damages to punish me and to deter other reprehensible hosts.. At no point is there a reciprocal exchange.

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<sup>24</sup> Eric A. Posner, this volume.

<sup>25</sup> RESTATEMENT (SECOND) OF TORTS § 281 (1965) ("The Elements of a Cause of Action for Negligence").

<sup>26</sup> See, e.g., *Budahl v. Gordon & David Assoc.*, 323 N.W.2d 853, 854, 855 (S.D. 1982)

At least not until settlement. Which is the most likely outcome once you send me the complaint. I'll check the terms of my homeowners' insurance contract and call my insurance company, happy that my bank (contractually) required the insurance before financing the home purchase. I'll hire a lawyer, who will meet with your lawyer. They will hammer out a settlement agreement based on my insurance coverage and other assets, and we will sign it. In other words, contracts play a crucial role in resolving a tort action.

Other stories can be told about your fall on my steps. A radical realist or critical legal studies scholar might reach a different conclusion, contending that publicly driven state determinations override any pretense of private agreements' primacy.<sup>27</sup> In this analysis, all law is public law because even purportedly private contracts require state enforcement and the state influences contractual terms through legislation and other mechanisms. Indeed, a rich body of scholarship attacks the analytical clarity of the public/private distinction.<sup>28</sup>

In spite of such scholarly handwringing, legal doctrine, and, accordingly, the first year curriculum, continue to distinguish between tort and contract. This bifurcation of tort and contract survived Grant Gilmore's 1974 assault,<sup>29</sup> though a handful of law schools briefly experimented by combining the two areas in a single course called "Contorts."<sup>30</sup> The remainder of this chapter uses metaphor to defend both the general bifurcation and occasional overlap tort and contract.

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<sup>27</sup> Morris R. Cohen, *The Basis of Contract*, 4 HARV. L. REV. 553 (1933); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

<sup>28</sup> Symposium, *The Public/Private Penumbra: Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982).

<sup>29</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

<sup>30</sup> Jay M. Feinman, *Change in Law Schools*, 16 N.M. L. REV. 505 (1986).

## Civil Obligation's Brain is Contract and Its Heart Could Be Tort

Cognitive linguist George Lakoff suggests that people often think in terms of body-based metaphors.<sup>31</sup> Under his theory of embodied cognition, common bodily experiences inform thought and language by providing metaphors to describe that experience. Anger, for example, creates physiological effects, including increased body heat and internal pressure (through increased blood pressure and muscular pressure).<sup>32</sup> Consequently, we think and talk about anger in ways that reflect this embodied experience. Idioms relating to anger (i.e., “he lost his cool,” “you make my blood boil,” and “she’s just letting off steam.”) refer back to the physiological experience of anger.<sup>33</sup> Building on Lakoff’s analysis, we can profitably understand the relationship of contract and tort in terms of a body-based metaphor.<sup>34</sup>

Imagine the first year curriculum or civil law generally, as a human body, so that each doctrine operates both separately and cooperatively with other doctrines, like systems of the body. The brain processes thought, imagination, and intellect. Contract law similarly specializes in rationality by accommodating parties’ thought-out plans for an imagined future. Tort, in turn, can be analogized to the heart. We often contrast the brain’s capacity to reason against the hearts’ association with emotion, especially love. The phrase “no-brainer” for example, denotes a problem requiring little thought to solve, while the adjective “heartless” describes an unfeeling

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<sup>31</sup> GEORGE LAKOFF & MARK JOHNSON, , METAPHORS WE LIVE BY (1980)

<sup>32</sup> *Id.* at 381.

<sup>33</sup> *Id.* at 380-81.

<sup>34</sup> Contract might map onto the body in different ways. In an earlier piece, I examined links between hands (and handshakes) and contractual thinking. Martha M. Ertman, *As Natural as Status*, in RECONCEIVING THE FAMILY 284 (Robin Fretwell Wilson ed., 2005). There, and here, I use the term metaphor loosely, while linguists distinguish among metaphor, analogy, and metonym. See LAKOFF & JOHNSON, *supra* note 31, at 19.

person. Thus contract, like the brain prize rationality, while tort recognizes the importance of emotion through doctrines like the intentional infliction of emotional distress and damages for pain and suffering. Contract law, in contrast, tends to ignore emotion. These doctrinal differences mirror structural differences between brains and hearts. Each is composed of tissues that are specially formed to perform different tasks, and requires cooperation with the other. Brains transmit electrochemical impulses through neurons, and hearts pump blood with striated muscle fibers. Yet the brain requires some blood to operate properly, and the heart gets its operating instructions from the lower brain.

The analogy is hardly an equation. We “cross our hearts” to designate the seriousness of a promise, and use our brains to memorize song lyrics “by heart.” A longer piece might explore whether tort might be more like the skin, perhaps, than the heart, since it is public and mediates sensation. This chapter’s modest aim is to make a contract/brain analogy, bringing forth the tort/heart analogy largely for contrast. Even here, the analogy may not bear much more pressure. The brain is marginally more private than other body parts, in that thought alone has no third party effect that would trigger public concerns, while hands can slap and feet can depress a gas pedal to cause a car accident. Still, hands and feet generally require direction from the brain. Nevertheless, the contract/brain metaphor, despite its limitations, supports the idea that contract law requires a little help on occasion to do its own job.

Metaphors operate by designating a source to make sense of a target, and work best when the two share deep structural commonalities. For example, the metaphor of sound-as-wave (evident in the phrase “sound waves”) works because both water waves and sound waves

evidence periodicity and amplitude, even though sound is neither blue, cold, nor wet.<sup>35</sup> The argument here identifies some structural similarities that the target (contract law) shares with the source (the brain). Stated most succinctly, they share a central concern with rational thought.

Rational thought produces intent. Agreement is one result of intent, and contracts are enforceable manifestations of intent to enter agreements. I am hardly the first to associate contract law with the brains. Classical contract theory rested on a brain-based metaphor when it defines contracts as a “meeting of the minds.” While this purely intentional and subjective understanding of contract evolved to a hybrid of subjective and objective standards, it still largely rests on intent. It requires an objective manifestation of assent, yet also requires that this manifestation lead a reasonable person, and the receiving party, to believe in the promisor’s intent.<sup>36</sup>

The bodily manifestation of assent mirrors this objective/subjective hybridity. Hands manifest intent by clicking “I agree” on a computer screen, but the decision to click, and the neural signals controlling the finger, emanate from the brain. Indeed, you could say that the brain operates as the nerve center for contract.<sup>37</sup> Just as the nerve center of a business

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<sup>35</sup> Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 783-85 (2002).

<sup>36</sup> RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”); *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

<sup>37</sup> In turn, contract law applies the “nerve center” test to determine parties’ location. See, e.g., U.C.C. 9-307 (2004).

organization directs and receives support from satellite operations, the brain requires a controlled flow of oxygenated blood from the heart.<sup>38</sup>

A second aspect of Lakoff's metaphorical analysis in turn mirrors the duality of a nerve center interacting with satellites. According to Lakoff, people think in terms of both basic examples and radial categories. For something to be a basic example, there have to be other, less central, instances of the same thing. For example, people across cultures asked by researchers to identify the best example of the category "furniture," tend to pick "chair," and designate "rocker" as a subordinate category.<sup>39</sup> Applying this analysis to legal regulation, we might see the basic level example of "mother" as a status held by a woman who gives birth and raises a child, and thus carries all maternal rights and responsibilities. Radial extensions are quasi-contractual variations, where women agree to a subset of rights and obligations as an adoptive mothers, birth mothers, foster mothers, or surrogate mothers.<sup>40</sup> Legal doctrine recognizes both the primacy of the basic category and the occasional relevance of radial extensions. For example, the women who fall within the basic category of "mother" (genetic mothers who give birth and raise children) carry greater rights and responsibilities than special cases like surrogate or birth mothers.

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<sup>38</sup> Strict products liability doctrine in tort law similarly indicates that tort operates well with a measure, but only a measure, of strict liability.

<sup>39</sup> LAKOFF & JOHNSON, *supra* note 31, at 46, 51.

<sup>40</sup> *Id.* at 91. Basic level categories include assumptions. For example, the basic level example of "bachelor" includes assumptions about marriagability. Thus, John Kennedy, Jr. was often described as a bachelor prior to his marriage, while Liberace and the Pope are not. *Id.* at 70.

Law's simultaneous, and differential, recognition of basic level and radial categories facilitates orderly and principled dispute resolution. One could go so far as to say that the productive tension between basic and radial categories at issue here – no-fault and fault in contract law – produce the legitimacy of the liberal state. The State enjoys a monopoly on force, which it sometimes delegates to private parties.<sup>41</sup> Under the official story, contract law constitutes such a delegation, in that the contract, rather than the courts, for the most part, dictates parties' rights and responsibilities. Even so, the State remains ever-present since it both created the doctrine and continually reshapes it. This unofficial story of continual and quiet State engagement in contract law is most obvious in doctrines that seek to ensure genuine consent and limit harm to third parties by refusing to enforce, for example, agreements to sell a kidney or a baby. A State that ordered specific performance of a baby-selling agreement would be a far cry from the individuality-honoring liberal democracy that classical contract law both presupposes and purports to support. Similarly, contracts would be fatally uncertain if a homeowner, for example, could evade his duty to pay the contractor who built his house by finding a tiny, peripheral instance of non-compliance.<sup>42</sup> In short, the very legitimacy of the State's assignment of authority to parties through contract law rests on a capacious understanding that includes continued, and shadow, State oversight of contractual relations through fault-based and other equitable doctrines.

Lakoff's rubric of basic level and radial categories show the functionality of contract law's official strict liability story working in conjunction with an unofficial fault-based story. If

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<sup>41</sup> For example, U.C.C. Article 9 authorizes secured creditors to use self-help repossession to satisfy debts, as long as they satisfy the requirements for attachment and do not breach the peace. U.C.C. §§ 9-203, 9-601, 9-609.

<sup>42</sup> See, e.g., *Jacob & Youngs v. Kent*, 129 N.E. 889 (N.Y. 1921).

strict liability is the basic category of contractual thinking, fault can exist alongside it as a radial category. To insist that fault be relegated to an entirely different category is akin to insisting that because genetic mothers who raise their children are the best example of “mother,” that we shouldn’t recognize variations like surrogate, adoptive, or foster mothers. In short, Lakoff’s rubric of basic and radial categories explains both why liability and fault can (and should) co-exist in contract doctrine, and also why some contract scholars vigorously resist any incursions of the radial fault category into contract doctrine, for fear it will taint the basic category of strict liability.

Like the human body, legal doctrine is a complex entity performing many jobs, some of which it does better than others. Most obviously, it provides an orderly system of allocating rights and duties, and assigning liability for losses. Each doctrine tailors itself to particular problems faced in one segment of human interactions. At the level of ideology, each doctrine also plays a role. The role of contract law is particularly grand, I think, undergirding western democracy and capitalism by providing an infrastructure for planning relationships and resolving disputes, and thus encouraging parties to enter agreements because they can, more or less, trust the State to intervene to enforce those agreements and protect parties who might not be able to protect themselves.<sup>43</sup> Contract law serves this function in the liberal state by implementing values of autonomy, equality, and plurality that ideally mirror democracy’s social contract in which citizens participate in government processes and the State respects citizens’ personal autonomy. Applying these lofty ideas to the twinned official and unofficial stories of fault in contract law, we might say that the official story buttresses the planning or certainty side of contract law, while the unofficial, fault-sensitive, story furthers *ex post* considerations of fault. If

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<sup>43</sup> JURGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996).



contract law served only certainty, refusing to temper it with occasional recognition of fault, that simplicity could both encourage opportunistic breach and defeat its own goals by creating uncertainty. Moreover, the ossification of contract law could cause damage far afield from particular contract disputes.

### **Conclusion**

It is hardly surprising that contract law generally follows a strict liability approach but also, occasionally, accounts for fault. Legal doctrine often articulates general rules then enumerates exceptions. This chapter dubs these two approaches the official and unofficial stories of contract law. Surprisingly, a number of contracts scholars seem to blanch at the unofficial story and either seek to excise fault out of contract law or resolve the tension by merging contract with tort. They fail to recognize that the official and unofficial stories comfortably and effectively operate in tandem at the level of both doctrine and theory. Doctrinally, fault and other equitable exceptions temper each element of the Cause of Action for breach of contract. Theoretically, official and unofficial stories operate in productive tension, as illustrated by metaphorical analysis of the highly abstract relationships among tort, contract, and fault. Drawing on the research of cognitive linguist George Lakoff, we can analogize the law governing civil obligations to the human body to reveal deep structural similarities between contract law and the brain, as well more attenuated similarities between tort law and the heart. Contract and tort, like the brain and heart, perform specialized work, but regularly rely on the other to get the job done. In this view, fault's occasional appearance in contract law is no more out of place than the blood circulating to the brain to facilitate neural activity. A bloodless approach to contract law that values only certainty, ignoring fault entirely, could not long survive.