The Efficient Breach Theory: The Transparency Objection

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The efficient breach theory seems to offer a convincing explanation of why damages and not specific performance is the default remedy for breach of contract, and why a deliberate breach does not attract the sort of penalties (criminal or punitive) that usually attend other purposeful wrongs. Nevertheless, the question that arises here is: How consistent are these observations about the nature of the efficient breach theory and its potential role in the law with what common law courts actually do? Notwithstanding that the explanation seems to sit comfortably with what courts are doing, it is in fact totally different from how the courts explain what they are doing. The theory's explanation of the law differs entirely from the law's account of itself. The link between efficiency and the common law appears to be less strong than is suggested by this explanation. The theory is external to contract law because it depends upon notions, language and reasoning that are incompatible with those used by common law judges. It does not satisfy the transparency requirement. But is it still possible to rebut the transparency objection to economic theories? This article argues that the answer is 'no'.

Introduction

It is argued by proponents of the efficient breach theory (EBT) that the law encourages contracting parties not to perform particular contracts. In their view, the law gives contracting parties the option either to specifically perform the contract or else to provide compensation so as to promote the performance of the contract in cases where performance would not cost more than it was worth — the cost of performance is lower than the value of the (contracted-for) performance. If, on the other hand, the cost of performance is higher than its value, then the law, lawyer-economists argue, encourages contracting parties not to specifically perform the contract but instead to provide compensation in lieu of performance.[1] The purpose of contract law, for proponents of the theory, is therefore to offer incentives and so to produce efficient behaviour, and that contracting parties will behave in the light of these incentives.[2] The theory therefore assumes that the parties to the contract will respond to such incentives by altering the way they behave.[3]

The EBT seeks to explain contract law and this explanation, lawyer-economists argue, helps in the understanding of various doctrinal contract rules. For example, lawyer-economists claim that the theory offers a convincing explanation of: (1) why damages and not specific performance is

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1 S A Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed, Clarendon Press, 2006, p 372.

2 S A Smith, *Contract Theory*, OUP, Oxford, 2004, p 119.

3 Above, n 2 p 126.

the default remedy for breach of contract and (2) why damages are calculated at the value of the promised performance (expectation damages).[4] As regards the former, the theory shows that if specific performance were the normal legal response to a breach of contract, contracting parties would be contractually obliged to perform even when this was inefficient.

With regard to the measure of damages, lawyer-economists argue that the law, by awarding only expectation damages to the injured buyer, internalises the costs of breach to the seller, thus providing contracting parties with an incentive (or a reason) to fulfil the contract when its fulfilment is efficient and not otherwise.[5] In this view, the seller will breach the contract only when the expected profits derived from such a breach are higher than the buyer's financial loss. More specifically, calculating compensatory damages at a level beneath the expectation measure might encourage parties to break the contract in situations where it was not efficient to do so because the value of the (contracted-for) performance was greater than the cost of performance. Conversely, calculating compensatory damages at more than the expectation measure (eg, as punitive) would tend to deter parties from breaking the contract in situations where it would have been efficient to do so, as the value of the (contracted-for) performance would be lower than its cost.[6]

Efficiency theories view contract law as a system for encouraging efficient behaviour. From the efficiency perspective, contract remedies are designed in such a way as to maximise the production of efficient consequences. Since efficiency theories adopt this viewpoint, they appear obviously consequentialist. By contrast, contract law is seen by deontological rights-based theories as giving legal force to the duty not to violate individual rights. In this view, contract law's concern appears focused on the idea that contracting parties owe duties to one another, as opposed to a wider social objective such as the promotion of efficiency or social wealth.

Both types of theory aspire to enhance our understanding of contract law by way of highlighting its meaning. Each, however, offers a different understanding of contract. Efficiency theories, for example, analyse consideration, mistake and remedies in a way that differs from that of deontological rights-based theories, yet the rules which constitute these doctrines are not the subject of any significant divergence of opinion. Rather,

4 Above, n 2 p 117; C S Warkol, 'Resolving the Paradox between Legal Theory and Legal Fact: the Judicial Rejection of the Theory of Efficient Breach' (1998) 20 *Cardozo L Rev* 321 at 325–7; H Collins, *The Law of Contract*, 4th ed, Butterworths, London, 2003, pp 402–3.

5 F Menetrez, 'Consequentialism, Promissory Obligation, and the Theory of Efficient Breach' (2000) 47 *UCLA L Rev* 859 at 861; S V Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708 at 730. E A Farnsworth, 'Legal Remedies for Breach of Contract' (1970) 70 *Colum L Rev* 1145 at 1216 (describing the system of contractual remedies as 'heavily influenced by the economic philosophy of free enterprise' and showing 'a marked solicitude for men who do not keep their promises'; L A Kornhauser, 'An Introduction to the Economic Analysis of Contract Remedies' (1986) 57 *U Colo L Rev* 683 at 686, 692 (stating that economic analyses view the purpose of contract law as the promotion of efficiency and that 'the purpose of contract remedies is to induce the parties to act efficiently').

6 Warkol, above, n 4 at 325–6. The absence of punitive damages as a remedy for breach of contract has been cited as evidence that contractual obligation involves a lawful option to perform or breach and pay damages. See P Linzer, 'On the Amorality of Contract Remedies — Efficiency, Equity, and the Second Restatement' (1981) 81 *Colum L Rev* 111 at 115–16.

both theories differ over presumptions about methodology.[7] Thus, proponents of rights-based theories argue that the rules on consideration, mistake and remedies are best explained by their approach, while proponents of efficiency theories argue that these rules are best explained by theirs. To uphold the claims of either side would be to recognise in the law a lucid structure which is illuminated and made more comprehensible by that theoretical stance.

The EBT appears to offer a neat explanation of why damages and not specific performance is the presumptive remedy in breach of contract cases, and why a deliberate breach does not attract the sort of penalties (criminal or punitive) that usually attend other purposeful wrongs. It seems therefore that certain features of contract law no longer have a baffling air of inconsistency when efficiency (rather than rights) is recognised as its foundation. But a question which should be carefully addressed is: How consistent are these observations about the nature of the EBT and its potential role in the law with what common law courts actually do? Notwithstanding that the explanation seems to sit comfortably with what courts are doing, it is in fact totally different from how the courts explain what they are doing. The EBT's explanation of the law differs entirely from the law's account of itself.[8] As shall be shown below, the link between efficiency and the common law appears to be less strong than is suggested by this explanation.

Judicial Decision-making in Contract Cases

Stephen Smith claims that efficiency theories fail what he has called 'the transparency requirement'. He begins by arguing that the law is a self-reflective social practice. In order to understand the social practice of law — to make it plain — it is essential to consider how legal actors themselves understand it.[9] Legal actors' understanding of the law are referred to as 'the law's self-understanding' or 'the legal system's self-understanding'.[10]

One of law's fundamental aspects is the claim that legal reasoning is transparent. More specifically, law is regarded as transparent if the reasons judges present for delivering their legal decisions are actual or real reasons, and as non-transparent if their real or actual reasons are concealed or hidden. According to Smith, it is clear that, from the inside, law is regarded as transparent: judges present what they say as their actual reasons for making their decisions.[11] The evidence of this transparency, says Smith, is found in judicial reports. He believes that in practice, the report of a legal decision is meant to explain why the claimant won or lost, not merely to dress-up that decision for public view.

Transparency, Smith believes, is an important criterion for assessing legal theories of contract law. The transparency criterion, he says, assesses legal theories of contract law in relation to how satisfactorily they account for the so-called 'legal' or 'internal' explanation of contract law. Smith claims that

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7 J Kraus, 'A Philosophical Approach to the Economic Analysis of Contract law' (2006) 9 *Virginia Journal* 1 at 13.
8 See M Chen-Wishart, *Contract Law*, 1st ed, OUP, Oxford, 2005, p 30.
9 Smith, above, n 2, p 14.
10 Above, n 2, p 14.
11 Above, n 2, p 25.

theory's explanation of contract law should uphold the express legal reasoning judges use by illustrating 'why the legal concepts employed by a judge are an appropriate way of expressing in practice the broader concepts that the theorist argues underlie the law',[12] or otherwise show 'how legal officials could sincerely, even if erroneously, believe the law is transparent'.[13] This is the transparency requirement.

Smith claims that efficiency theories do not satisfy the transparency requirement. This is because their explanation of legal reasoning is radically different from that employed by judges themselves in contract cases.[14] He believes that no legal theory offers an adequate explanation of contract law unless its account of express judicial reasoning, 'once translated into concrete concepts, could be accepted by a court, even if no court has yet done so'.[15]

Smith argues that judicial reasoning in contract cases is couched in the language of morality, fairness and justice (ie, deontic moral terms). Economic analysis, on the other hand, contends that this judicial reasoning should be evaluated according to the consequentialist notion of efficiency. Inasmuch as Smith considers that judges use deontic concepts — rather than efficiency ones — to explain their legal reasoning in contract cases, he comes to the conclusion that the EBT is 'external' to contract law. It does not provide a proper account of the law, in that it depends on notions, language and reasoning that are fundamentally incompatible with those used by judges.[16] Smith highlights the divergence thus:[17]

> From the legal perspective, remedies are viewed as just that — remedies, and they are presented as the means by which a wrong is remedied. From the efficiency perspective, by contrast, a remedial order is regarded as a signal to future contracting parties to behave appropriately . . . There is virtually no point of contact, then, between the legal explanation and the efficiency-based explanation . . . That there is a difference in kind between efficiency-based explanations and legal explanations of the law seems indisputable.

This last paragraph deserves further clarification. The legal explanation for the law requiring the defendant to pay damages in the event of contract breach is that he or she has caused harm to the claimant and as a matter of justice should make good. Properly understood, the defendant is required to give to the claimant what is fitting or appropriate to him or her. Consider some basic facts about our existing contract institutions: (1) The claimant files a suit against the defendant, who has caused him or her financial loss by wrongfully infringing his or her primary contractual right to performance, and not somebody else. (2) The claimant provides arguments and evidence that the defendant has behaved wrongfully (or unjustly) towards him or her and that therefore the claimant has suffered tangible (or material financial) harm. (3)

12 Above, n 2, p 27.
13 Above, n 2, p 25.
14 Above, n 2, pp 132–3.
15 Above, n 2, p 30.
16 Above, n 2, pp 132–3. See also E Weinrib, *The Idea of Private Law*, Harvard University Press, Cambridge, Massachusetts: 1995, pp 14–18; J S Kraus, 'Transparency and Determinacy in Common Law Adjudication: A Philosophical Defence of Explanatory Economic Analysis' (2007) 93 *Virginia Law Review* 287 at 291.
17 Smith, above, n 2, p 133.

The outcome of the suit is affected by the fact that the behaviour is wrong, that it has done harm, and that the two are causally related.[18] (4) It is for the judge to decide, according to the arguments and evidence, whether the claimant has made a good case. (5) If successful, the defendant is ordered to remedy the wrongful financial loss.[19] Remedial orders are understood, from the legal perspective, as remedies for past wrongs — 'remedies are backward-looking'.[20] They are, in other words, true remedies fashioned to rectify a wrong or loss.

But lawyer-economists have analysed the law of contract in a manner which explains remedies in the light of what will lead to an overall increase in efficiency, rather than of what is fitting or appropriate to a particular individual.[21] In his economic account of contract, Richard Posner argues that when a court orders a defendant who has breached her or his contract to pay the claimant a sum of money, the purpose of this remedy is not to remedy her or his wrongdoing. Rather, the purpose is to send a signal to future contracting parties about how to act efficiently. The basic function of law, says Posner, is to alter incentives.[22] The economic theory of law is 'a theory of law as deterrence'.[23] Posner's hypothesis is 'that the common law tends to stimulate market outcomes'.[24] Courts should focus solely on how to ensure market outcomes achieve efficiency.[25]

Posner's theory, however, runs into numerous difficulties, the first being that statutes and judicial decisions offer it only limited support. More precisely, in Posner's efficiency theory of contract, past events are of no particular present relevance. Remedial orders have little or nothing to do with justice, but are understood as forward-looking remedies fashioned to prevent undesirable future events (ie, the ex ante perspective). Posner's economic theory is committed to the ex ante perspective because it tends to treat (or view) the process of adjudication as serving to facilitate prospective regulation. The judge is merely concerned with the likelihood that certain consequences will take place; his or her focus is on estimating the probability of behavioural changes.

Yet in the ordinary understanding, the judge's concern is focused on the rights of the claimant and defendant, and whether any of those rights were

18 See J Coleman, *The Practice of Principle*, OUP, Oxford, 2001, p 20.
19 Above, n 18, pp 20–1.
20 Smith, above, n 2, p 397.
21 See, eg, R H Coase, 'The Problem of Social Cost' (1960) 3 *JL & ECON* 1 at 26; R Posner, *Economic Analysis of Law*, 1st ed, Little, Brown, Boston, 1973, p 320; R Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) *Hofstra L Rev* 487 at 491.
22 Posner, above, n 21, p 393.
23 Above, n 21, p 349.
24 V P Goldberg (Ed), 'Discussion by Seminar Participants' (1979) 8 *J Legal Studies* 323 at 368.
25 See W Block, 'Private Property Rights, Economic Freedom, and Professor Coase: A Critique of Friedman, McCloskey, Medema, and Zorn' (2003) 26 *Harv JL & Pub Pol'y* 923 at 924–5; G Hadfield, 'The Second Wave of Law and Economics: Learning to Surf' in M Richardson and G Hadfield (Eds), *The Second Wave of Law and Economics*, Federation Press, Sydney, NSW, 1999, p 51.

unjustly infringed.[26] Judicial decisions are couched in deontic moral terms with no reference to the concept of economic efficiency — the judicial reasoning in contract cases is couched in the language of morality, fairness and justice (ie, deontic moral terms). Deontic theories are committed to the ex post perspective because they tend to treat the process of adjudication vindicating pre-existing rights and duties.

Contract law currently serves many ends apart from economic efficiency.[27] Posner's economic theory of contract apparently disarms remedial orders of their main purpose: to remedy the claimant's harm suffered as a result of the defendant's wrongful breach of contract. To be fair, Smith and Michael Trebilcock do accept that judges may sometimes take into account the consequences that their legal decisions will have on social welfare and commercial activities. Nevertheless, they insist that judges do not on the whole reason in this way and that they do not make their decisions in contract cases using consequentialist economic or efficiency reasoning.[28] Rather, judges are concerned primarily with the fact that the defendant has wrongfully harmed the claimant; they see their job as doing justice between the two contracting parties.

Another example of Posner's failure to meet the transparency requirement lies in the fact that his economic theory of contract does not offer an adequate explanation of the bilateral structure of common law adjudication. The common law has a bilateral structure that recognises the rights of claimants only if they can be correlated to duties of defendants and it vindicates these rights by ordering unsuccessful defendants to satisfy their claims for compensation.[29] This means that (i) only claimants can sue; (ii) they can sue only defendants; (iii) only defendants can pay damages or remedy the wrong (not eg someone richer than the defendant); and (iv) the defendant has to pay the claimant, not someone else (to do something else). Thus described, defendant and claimant are brought together in a contract case because the former has wrongfully infringed the latter's primary right, thereby harming her or him: the defendant has harmed the claimant in a manner they had no right to do and the judge is there to do justice between them. Seen in this way, the common law's bilateral structure explains why courts are justified in awarding claimants judgments only against the defendants who have caused them harm and not against society, and why courts are justified in requiring defendants to pay damages solely to the claimants they have harmed and not to the state.[30]

But Posner's economic theory of contract explains remedies in light of what will lead to an overall increase in efficiency, rather than of what is fitting or appropriate to a particular individual. Remedial orders have little or nothing to do with justice. The function of a judicial remedy is to stimulate market outcomes. If this is so, one can understand why the defendant has a duty to pay money. However, the question which remains unanswered is why the claimant

26 Chen-Wishart, above, n 8, p 30.
27 Ibid.
28 M Trebilcock, 'The Value and Limits of Law and Economics' in Richardson and Hadfield, above, n 25, pp 25–7; Smith, above, n 2, p 133.
29 Kraus, above, n 16, at 294.
30 Above, n 16, at 294.

(or right-holder) should benefit from the monetary duty imposed upon the defendant. Smith describes the position of efficiency theories on the link between the defendant and claimant as follows:[31]

> In principle, the goal of ensuring that contracting parties face the correct mix of penalties and rewards (so that they act efficiently) could be achieved by ordering defendants to pay damages to the state, and by allowing plaintiffs to collect compensation from the same source. The efficiency theories' explanation for why the law requires defendants to pay plaintiffs is that this is administratively cheaper than the alternatives. In a system in which plaintiffs are compensated by defendants, plaintiffs have incentives to bring forth information that courts require to make remedial orders. In effect, the plaintiff is bribed to act as the equivalent of a public prosecutor.

Smith rejects the economic analysis of contract law in light of the fact that it considers bilateralism as an administratively convenient scheme for providing the penalties and rewards necessary to create optimal incentives for contracting parties.[32] According to Smith, economic analysis of contract law has no access to the most natural explanation that the bilateral structure is an essential building block of a moral theory underpinning a compensatory claim in that the defendant has wrongfully infringed a moral obligation which reflects the claimant's moral right.[33] He then objects to the economic explanation of bilateralism because it appears 'inconsistent with what judges say and understand themselves to be doing'.[34] Smith's rejection of the economic explanation of bilateralism thus rests on his transparency requirement.

Another objection to Posner's theory of economic efficiency lies in the fact that it is based on the assumption that individuals are rational and efficient economic actors.[35] This, however, is rarely true as a matter of fact. More specifically, one may ask whether remedial rules actually have a significant influence on how contracting parties behave. Economic analysis assumes that contract law is a system of incentives fashioned to promote efficient behaviour and that individuals are rational and efficient economic actors who will respond rationally to these incentives by considering all the possible courses of action that they might take, calculating the risks, benefits and costs associated with each and acting accordingly to maximise the net benefit to themselves.[36]

Yet rationality, as Stephen Bundy states, 'requires a combination of aptitude, training, and appropriate skepticism that many actors lack'.[37] In a similar vein, Smith and Trebilcock argue that individuals often act irrationally in the sense of not responding to incentives. In this view, non-legal norms

31 Smith, above, n 2, p 397.
32 Above, n 2, p 397.
33 See Kraus, above, n 16, at 294.
34 Smith, above, n 2, p 398.
35 Rational actors are individuals that optimally use all available information about current and future policies, law, and economic possibilities before making any choices. See Warkol, above, n 4, at 343; N G Mankiw, *Macroeconomics*, Cambridge University Press, 1997, p 428.
36 Trebilcock, above, n 28, p 12.
37 S McG. Bundy, 'The Policy in Favor of Settlement in an Adversary System' (1992) 44 *Hastings LJ* 1 at 15–16.

have considerable influence on them, as they do not know about or cannot afford to use legal sanctions. In short, individuals sometimes, perhaps even often, behave as if they had little or no regard for legal penalties or rewards.[38] People often consider many factors other than economic reasonableness in making their decisions.[39] As a matter of fact, empirical research in behavioural economics confirms that individuals are not often, perhaps always, rational and efficient economic actors who will respond to incentives by making rational choices based on a comparative assessment of risks, benefits and costs.[40]

It could be argued, however, that the obstacles just described can be overcome. More precisely, other economic theorists, including Jules Coleman himself, offer a version of economic analysis — ie, a mimicking the market account of contract law — which views adjudication as an occasion not only for facilitating prospective regulation. For adjudication can, in addition, provide an opportunity for retrospective protection of the parties' rights and duties as a result of their failed attempt to create an efficiency-increasing contract. In this view, it is not the harm of breach that is significant but the harm of a failed (prima facie inefficient) transaction which needs to be addressed and resolved. The court's aim of imposing a duty upon the defendant to pay money to the claimant is not to compensate him or her for the financial harm caused by the defendant's breach of the claimant's (primary) right to the performance of the contract, but rather to protect both parties against the harm of a failed (prima facie inefficient) transaction.[41] In other words, courts should correct the parties' failure to create an efficiency-increasing contract in an efficiency-increasing way.

Thus described, the court's concern is focused both on simulating market outcomes in order to achieve efficiency (ie, the ex ante perspective) and on resolving the dispute in an efficiency-increasing way (ie, the ex post perspective). Coleman's economic theory of contract thus seems able to explain the law's bilateral structure, specifically why and how the law links claimant and defendant. Their link arises from their effort to enter into an efficiency-increasing transaction; because they failed, the law should step in to mimic the market, resolving the dispute in an efficiency-increasing way (for the two parties concerned).

While Coleman's theory is committed to both the ex ante and ex post perspectives, and although one may assume that it is able to explain why the law links the claimant and defendant, his theory fails the transparency requirement. His theory lacks the support which statutes and judiciary offer to it. More specifically, in the ordinary understanding, the judge's concern is

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38 Smith, above, n 2, pp 396–7.

39 See D G Myers, *Social Psychology*, McGraw-Hill, New York, 1983, pp 35–59 (discussing various factors that people consider when making decisions, including time, money, reputation, and values).

40 Trebilcock, above, n 28, p 14. For empirical evidence that even sophisticated parties engaged in a legal dispute are not always economically rational, see J A C Hetherington and M P Dooley, 'Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem' (1977) 63 *Va L Rev* 1 at 46 n 146 (shareholders sometimes reject buy-out settlements viewed as reasonable by counsel after a rancorous dispute).

41 See J Coleman, *Risks and Wrongs*, Cambridge University Press, Cambridge, 1992, pp 164–5, 180.

focused on the rights which belong to the claimant, and whether those rights were unjustly or wrongfully infringed by the defendant. In their judgments, judges explain why they oblige the defendant to pay money to the claimant. This is because the claimant has suffered material financial harm as a result of the defendant's breach of the claimant's (primary) right to the performance of the contract. As a matter of justice, therefore, the defendant ought to reimburse the claimant for such harm. Judges do not, it seems, seek to protect both contracting parties against the harm of their failure to create an efficiency-increasing contract in an efficiency-increasing way. As Mance LJ said in *Experience Hendrix LLC v PPX Enterprises Inc*:[42]

> Since *Blak*[43] I see no reason why, if the beneficiary of a restrictive covenant is unaware of its infringement in time to obtain an injunction immediately, but is able to obtain an injunction for the future after the defendant by the infringement has obtained some benefit, the appellant should be precluded from obtaining an injunction and, if justice requires, a reasonable sum to compensate for the past infringement.

Coleman's theory, therefore, seems to be unable to satisfy the transparency requirement. Does this mean that economic theories in no way can rebut the transparency objection? This question will be answered with a detailed explanation shortly.

Is it Still Possible to Rebut the Transparency Objection to Economic Theories?

The answer to this question, as will be explained in detail below, is 'no'. To begin, the above discussion makes it obvious that efficiency theories, rather than making legal reasoning intelligible, dismiss it as rhetorical and vacuous. This leaves unexplained why judges 'explain the law as they do if the real explanation is entirely different'.[44] Smith argues that if economic analysts want to rebut the transparency objection, they must necessarily provide a reasonable explanation as to why judges use efficiency reasoning to decide cases, yet the express reasoning they give in judicial reports is couched in the language of morality, fairness and justice (ie, deontic moral terms); or, why, in Jeremy Bentham's words, 'law shews itself in a mask'.[45] It seems that for economic analysis of law there is an obvious divergence between 'the actual judicial reasoning and the plain meaning of express judicial reasoning'.[46] Two explanations have been offered by Smith and Coleman for this divergence. The first claims that judges are involved in a massive conspiracy to misrepresent their actual reasoning. However, due to the huge number of

42 [2003] EWCA Civ 323 at [34]. See also *Wrotham Park Estate Co Ltd v Parkside Homes* [1974] 1 WLR 798 at 815B.
43 *Attorney-General v Blake* [2001] 1 AC 268.
44 Smith, above, n 2, p 134.
45 J Bentham, *A Comment on the Commentaries and a Fragment on Government*, J H Burns and H L Hart (Eds), Athlone Press, London, 1977, Ch II, s1.
46 Kraus, above, n 16, at 299.

judges that would have to be presumed to be engaged in such a conspiracy, Smith and Coleman dismiss this claim as implausible.[47]

The second possibility is 'that legal rules and decisions are the product of hidden-handed evolutionary processes that lead inevitably, and without conscious design or even awareness, to efficient law'.[48] This possibility clearly relies on the efficient evolution theory originated by George Priest.[49] Priest begins by arguing that a body of inefficient legal rules will enjoy less stability than a body of efficient legal rules because the latter present less likely targets for any resulting litigation than the former.[50] As judges overturn and replace inefficient rules, the new efficient ones are less likely to be challenged through litigation and therefore more likely to endure or survive, with the consequence that the proportion of efficient legal rules will increase over time.[51] If this is so, then it follows that the common law rules will become more efficient on average as they develop, regardless of the methods of decision-making which judges employ.[52]

So far, the efficient evolution account has focused on explaining why legal rules are efficient. However, in order to rebut the transparency objection, it must also give an adequate reason why judges explain their legal reasoning using deontic concepts, rather than efficiency concepts; why, in common law cases, a divergence exists between the express and the actual reasoning of judges. Coleman believes that the efficient evolution theory might give such a reason by portraying the process of reasoning in which judges engage as a kind of ideological illusion.[53] Like Coleman, Smith believes that the efficient evolution theory claims that 'although judges think their decisions are motivated by concepts like consent, in reality judges are mere cogs in a socio-evolutionary process, whereby inefficient rules are inevitably eliminated over time'.[54]

The efficient evolution theory, on this view, presumes that judicial reasoning is the result of some unseen irresistible force that operates on judges' thought processes, creating ideological illusions that cause them to make their decisions according to reasons which they believe to be real, when they are in fact not.[55] However, Smith and Coleman again dismiss this claim as implausible given the huge number of judges that must be supposed to be under the influence of this unseen irresistible causal force. But this is not the

47 Smith, above, n 2, p 134; Coleman, above, n 18, pp 25–6.

48 Above, n 2, p 134.

49 The hypothesis of the efficient evolution of the common law was first advanced in 1977 by George Priest and Paul Rubin in separate papers. See also G L Priest, 'The Common Law Process and the Selection of Efficient Rules?' (1977) 6 *J Legal Stud* 65; P H Rubin, 'Why Is the Common Law Efficient?' (1977) 6 *J Legal Stud* 51. Since then, a large related literature has developed. See, eg C J Bruce, 'Testing the Hypothesis of Common Law Efficiency: The Doctrine of Informed Consent' (1984) 6 *Res L & Econ* 227; R Cooter and L Kornhauser, 'Can Litigation Improve the Law without Help of Judges' (1980) 9 *J Legal Stud* 139.

50 Priest, above, n 48, at 65; J C Goodman, 'An Economic Theory of the Evolution of Common Law' (1978) 7 *J Legal Stud* 393 at 394; Kraus, above, n 16, at 350.

51 Above, n 50, at 393; above, n 16, at 350.

52 Above, n 16, at 350.

53 Coleman, above, n 18, p 25.

54 Smith, above, n 2, p 28.

55 Above, n 2, p 134; Kraus, above, n 16, at 353.

only reason why evolutionary hidden-hand accounts are open to criticism. Another objection is that if we assume, counterfactually, that all judges are in the grip of this unseen causal force that operates on their thought processes, creating ideological illusions that cause them to make their decisions according to reasons which they believe to be real, when they are in fact making them using consequentialist efficiency reasoning, then we must necessarily assume that consequentialist efficiency reasoning has advantages that deontic moral concepts lack. After all, what is the basis for this (unseen) irresistible force to exist in the first place?

Unless consequentialist efficiency reasoning is recognised as having some advantage over deontic moral concepts, there would be no basis for the claim that judges are under the effect of an unseen irresistible force: why would they be? Such evolutionary hidden-hand accounts (akin to efficiency theories) would not be able to offer an adequate account of why it is reasonable to assume that, in common law cases, judges use the language of morality, fairness and justice (ie, deontic moral concepts) to mask consequentialist efficiency reasoning. It seems, however, that deontic moral concepts are superior to consequentialist economic reasoning because they are consistent with the language and basic structure of contract. If this is so, then it follows that evolutionary hidden-hand accounts cannot rebut the transparency objection.

Jody Kraus claims, nevertheless, that evolutionary accounts can rebut the transparency objection. First, he argues that the efficient evolution theory does not claim, as Smith's and Coleman's criticisms imply, that judges are subject to some unseen force that creates in them the ideological illusion referred to above. Rather, it simply claims that the common law rules will increase in their average efficiency, whether or not judges are in fact doing what they believe and say they are doing.[56] Kraus then tries to explain why common law will evolve efficiently.

Kraus concedes that the common law might have first evolved with the goal of applying deontic moral concepts to decide cases. Nevertheless, he also claims that because deontic moral concepts were insufficient to resolve hard cases,[57] judges instinctively, gradually and implicitly turned to consequentialist economic or efficiency reasoning.[58] This argument can be clarified by considering first that '[t]he demand for a justification of a judicial outcome is a demand to provide reasons that explain why that outcome was reached'.[59] Understood in this way, the only justification for a judicial outcome is a set of justifying reasons that determine it. According to Kraus, one objection which can be directed at deontic theories is that their explanations of judicial reasoning are insufficiently fine-grained to determine (or fall far short of determining) the outcome of any but the easiest cases. Judges cannot use deontic moral concepts to decide hard cases.[60] Kraus's

56 Above, n 16, at 353.
57 Hard cases are those 'in which reasonable lawyers disagree' and 'where no settled rule dictates a decision either way': R Dworkin, *Taking Rights Seriously*, Duckworth, London, 1978, pp xiv and 83 respectively.
58 Kraus, above, n 16, at 332.
59 Above, n 16, at 308.
60 Above, n 16, at 304.

criticism of deontic theories, thus understood, is that there is a gap between their explanations of judicial reasoning and the outcomes of adjudication.[61]

He claims that efficiency theories are capable of providing a fully fine-grained explanation of judicial reasoning, with the consequence that they are better at determining the outcomes of hard cases than are deontic moral theories.[62] Thus, the more determinate explanation of economic theories is to be favoured over the less determinate explanation of deontic theories in light of the fact that 'it leaves less of the grounds of a decision unexplained by the reasons that justify it'.[63] As Kraus says:[64]

> Indeterminate explanations fail to explain fully why one litigant prevailed and the other lost, yet the demand to justify the exercise of coercion requires that precisely this choice be justified by reasons that explain it.

In his argument, Kraus is careful about when to advance the claim that judges are deluded about the nature of their own reasoning so as to justify his presumption that a divergence exists between the express and the actual reasoning of judges. More specifically, Kraus realises that simply to claim that judges are deluded about their reasoning in cases will not by itself stand to rebut the transparency objection, unless it is supported by a plausible account of why judges would, in the first place, be instinctively, gradually and implicitly attracted to consequentialist economic reasoning to resolve the disputes before them, or why common law will evolve efficiently. He suggests that this claim of the judges being deluded requires the support which the indeterminacy criterion provides.

Kraus argues that while deontic theories are superior in that they are consistent with the language and basic structure of contract, economic theories have superiority because they provide more determinate explanations of adjudicative outcomes.[65] He concludes that the indeterminacy of deontic concepts is the reason why common law judges have instinctively, gradually, and implicitly turned to consequentialist economic or efficiency reasoning.[66]

In Kraus's view, there are several reasons why common law judges did not, and do not, understand themselves to be using efficiency reasoning when resolving the disputes before them. First, 'even most contemporary judges are not trained in economics, and, at least until relatively recently, economic theory was not sufficiently developed to provide a rigorous analysis'.[67] The way of thinking of judges and the ways in which they are formally trained are legal rather than economic.[68] Second, judges are trained to explain and justify their legal reasoning in common law cases using the language found in past

61 Above, n 16, at 304.
62 Above, n 16, at 304–5; Smith, above, n 2, p 150.
63 Above, n 16, at 308.
64 Above, n 16, at 306.
65 Kraus, above, n 16, at 304.
66 As Kraus says, 'it is the indeterminacy of deontic concepts that creates the need for judges to look elsewhere for principled and normatively significant guidance to fill the gaps in reasoning they confront when trying to interpret deontic language by using a deontic moral theory. [C]ommon law judges [therefore] instinctively, gradually, and implicitly turned to efficiency-based reasoning to fill those gaps.' above, n 16, at 332.
67 Above, n 16, at 333.
68 Trebilcock, above, n 28, p 23.

cases.[69] All of this reasoning is indeed couched in the language of morality, fairness and justice (ie, deontic moral terms).

Moreover, Kraus believes that even if, counterfactually, judges were to understand their reasoning as based on the consequentialist concept of efficiency, they would also understand that they are bound to explain and justify their opinions using deontic moral language so as to perform their duty to follow the common law doctrinal language found in prior cases. As Kraus says, 'The norms of common law adjudication require adherence to precedent under the principle of *stare decisis*'.[70] Therefore, judges are not allowed to replace the language of the common law with their own. Under these circumstances, common law judges use language with a deontic plain meaning to express essentially consequentialist economic or efficiency reasoning. As Kraus says:[71]

> Even if judges consciously understood that economic analysis provides the best theoretical account of the implications of their tutored intuitions, most would not feel free to recast their reasoning in terms of efficiency. They likely would take their roles as common law judges to require them to continue to reason in the fashion prescribed by the common law — that is, using terms with deontic plain meaning but informed by precedents whose joint effect is to take efficiency into account.

It follows from the above that Kraus's claim of the judges being deluded or misguided about their reasoning in cases rests upon the idea that the explanations of judicial decisions furnished by economic theories yield more determinate results than those arising from deontic theories. Surely, if this idea were knocked down, then Kraus's claim of the judges being deluded would no longer be persuasive, the consequence being that he would not be able to justify his presumption that a divergence exists between the express and the actual reasoning of judges, nor therefore to rebut the transparency objection to efficiency theories.

Smith and Deakin agree that there is some truth in claims of the indeterminacy of deontic theoretical accounts. Nevertheless, they argue that efficiency theories cannot also claim to be more determinate than deontic theories.[72] Smith and Deakin concede that efficiency theories initially seem able to provide a fully fine-grained explanation of judicial reasoning, but they argue that they do not in practice provide determinate answers to difficult legal questions. Take, for example, this legal question: does a regime of routine specific performance lead to inefficient results?

Economists argue that the explanation for damages and not specific performance being the presumptive rule in the common law is that a presumptive rule of specific performance would lead to less efficient results than a presumptive rule of damages. Nevertheless, there is no possibility of determining with certainty which is more efficient than the other. Each rule has advantages and disadvantages. It is true that weighing these against each other

69 Kraus, above, n 16, at 333.
70 Above, n 16, at 333.
71 Above, n 16, at 334.
72 Smith, above, n 2, pp 150–1; S Deakin, 'Law Versus Economics? Reflections on the Normative Foundations of Economic Activity' in Richardson and Hadfield, above, n 25, pp 34–41.

would be a way of determining some sort of optimum; yet, in reality, this would be impossible to do, given the difficulty of quantifying the relevant costs. The empirical data needed is unavailable. A quarter-century of economic literature on this matter bears this out: although there are very many erudite treatments of the particular virtues of damages and specific performance in existence, there is complete disagreement over their comparative efficiency.[73]

Therefore, in the absence of empirical evidence, no easy conclusion is available to the question of whether the current rules are in fact efficient or not. Ultimately, then, efficiency theories of contract cannot claim to be any more determinate than deontic theories. This simply means that the judicial decision in a particular case, to award damages instead of specific performance for example, ought not to be taken as indicative that the judge's reasoning was based on the consequentialist concept of efficiency.[74] Since consequentialist efficiency reasoning has no superiority over deontic moral concepts, there would be no basis for Kraus's claim that judges are deluded about their reasoning in cases. It follows that Kraus cannot explain why it is reasonable to assume that 'law shews itself in a mask',[75] and as such cannot rebut the transparency objection to efficiency theories. He himself admits that the superior determinacy of efficiency theories exists in principle only, not in the results. He writes:[76]

> Throughout my analysis, I presume that, on average, the principle of efficiency leads to more determinate results, on any plausible scale of determinacy, than deontic moral principles. I will often add the proviso that the efficiency principle has superior determinacy 'at least in principle'. I mean here to distinguish between what we know about what the principle of efficiency requires and what we know about how to satisfy that requirement given our limited empirical knowledge. If we know what a theory requires but do not know how to satisfy that requirement given our limited empirical knowledge, the theory is determinate in principle only — not in result. But if we do not know what state of the world would satisfy the theory's requirements even if we were omniscient as to empirical facts, that theory is indeterminate in principle . . . [The claimed superior determinacy of the principle of efficiency] is by no means an uncontroversial claim, and if it is to play the central role it has in the present defence of the economic analysis, much more needs to be done to clarify and defend it.

Still, Kraus insists that common law judges would be attracted to using consequentialist economic or efficiency reasoning and relying on it to decide their cases, even though it is determinate in principle only, not in results. In his words, '[judges] prize reasoning that uses concepts, that, at least in principle,

73 A Schwartz, 'The Case for Specific Performance' (1979) 89 *Yale LJ* 271; W Bishop, 'The Choice of Remedy for Breach of Contract' (1985) *J Legal Studies* 299; P G Mahoney 'Contract Remedies and Optimal Pricing' (1994) 24 *J Legal Studies* 139.

74 As Deakin says: 'Without empirical testing, it is simply not possible to get a better grasp of the positive question of how particular laws affect economic behaviour; nor, therefore, is permissible to draw broad normative conclusions concerning legal policy in the absence of evidence.' Deakin, above, n 72, p 39.

75 Bentham, above, n 45, Ch II, s1.

76 Kraus, above, n 16, at 304.

determine results'.[77] However, he does not explain how. More specifically, Kraus does not explain how judges could reasonably prize (efficiency-based) reasoning if, whenever they employed it to resolve their legal cases, they would always ask themselves these questions: Are we by requiring the defendant in this case (following and relying on efficiency-based reasoning that is determinate in principle only, not in results) to pay compensation to his or her victim, in actual fact satisfying the idea underlying this reasoning? Does this state of the world satisfy the requirements of efficiency-based reasoning? Unfortunately, Kraus provides no answer to these crucial questions; it seems that his exposition is accordingly incomplete.

So, the difficulty which troubles Kraus's argument is that judges (who are aware of and understand the consequentialist concept of efficiency) will always raise these questions in their minds, the consequence being that they will be reluctant to apply economic or efficiency concepts. If judges cannot obtain the necessary data on which to base concrete conclusions concerning the efficiency consequences of the rules in question, because the empirical research which proves that economic concepts yield determinate results in practice does not exist, they run the risk of a mistake. They will apply economic reasoning to a false state of the world, thereby possibly achieving inefficiency rather than efficiency. This being so, it follows that economic reasoning does no good for judges who want to employ it to resolve hard cases. It is therefore best avoided by judges deciding these cases.

Similarly, the consequentialist concept of efficiency would be unhelpful for judges who are ignorant of it and of the fact that this concept has determinate results only in principle. After all, as has already been noted, the empirical research which proves that economic concepts yield determinate results in practice does not exist, the consequence being that it would be illogical to say that judges, who are ignorant of efficiency-based reasoning, are instinctively, gradually and implicitly attracted to apply it to resolve hard cases. Kraus's argument is thus defective and cannot be used to rebut the transparency objection to efficiency theories.

MacCormick's Theory: The Solution

If neither deontic nor efficiency theories can determine the outcomes of hard cases, what is the solution? Neil MacCormick offers judges the kind of concrete guidance they need to determine the outcomes of hard cases. More precisely, MacCormick argues that UK judges should try to account for their doctrinal choices in such cases by three different kinds of argument, of which two are intra-systemic, ie, they are concerned with the legal system itself. One of these is the class of arguments from consistency, resting on 'a fundamental judicial commandment: Thou shalt not controvert established and binding rules of law.'[78] As described by MacCormick, consistency arguments include both textual and systemic considerations. For him, such arguments are concerned with legal propositions closely related to the dispute itself and hold that no argument will be acceptable in case it is (i) clearly incompatible with

77 Above, n 16, at 332.
78 N MacCormick, *Legal Reasoning and Legal Theory*, 2nd ed, Clarendon Press, Oxford, 1994, p 195.

a similar legal proposition and (ii) not supported by either of the other types of argument.[79] Thus, the argument from consistency is the first argument in the hierarchy.

The second argument in the hierarchy is the argument from coherence, which also focuses on the legal system per se. This, however, is broader in focus than the first type, because to consider the legal coherence of an argument is to assess a hard case in terms of whether or not it is resonant with the overarching principles and values of the legal system, beyond the narrow area of doctrine within which the case has arisen. According to MacCormick, such arguments are based on the presumption 'that the multitudinous rules of developed legal system should "make sense" when taken together' or pull in the same direction.[80] A set of rules is regarded as coherent should they promote a common value or values or be instances of one or more general principles, which explain and justify the rules.[81] Up to this point, it is clear that a given ruling satisfies the consistency requirement as long as it is not at odds with a closely contiguous proposition of law; and it satisfies the coherence requirement as long as it makes sense within the legal system.

The third argument in the hierarchy which judges use to justify their decisions in hard cases is consequentialist. It is extra-systemic, being concerned with the effects on the whole society, with 'what make sense in the world', not within the legal system.[82] Thus, the criterion of correctness consists of an evaluation of the broadest consequences of a judgment; 'choosing between rival possible rulings in a case involves choosing between what are to be conceived of as rival models for, rival patterns of, human conduct in society'.[83]

MacCormick takes 'consequences' to cover a variety of matters, for example, justice, morality, common sense, public policy, convenience, expedience, the needs of civilized society and many other factors.[84] Second, he insists that to evaluate consequences is to consider the consequences of the universalised ruling, rather than that of the actual decision.[85] Therefore, the consequences which must concern the judge are not those of deciding the outcome of the case before him or her this way or that, but of adopting the ratio decidendi of that decision.[86]

Interestingly, MacCormick maintains that consequentialist arguments are focused 'not so much on estimating the probability of behavioral changes, as on possible conduct and its certain normative status in the light of the ruling

79 See W Lucy 'What's Private About Private Law?' in A Robertson and Hang Wu Tang (Eds), *The Goals of Private Law*, Hart Publishing, Oxford, 2009, Ch 3.

80 MacCormick, above, n 78, p 152.

81 Above, n 78, p 107. See also N MacCormick, 'Coherence in Legal Justification' in W Krawietz et al (Eds), *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, Duncker & Humblot, Berlin, 1984, pp 37–53 .

82 Above, n 81, p 103.

83 Above, n 81, p 104.

84 MacCormick, above, n 78, p 105.

85 Above, n 78, pp 115–16.

86 See T Spaak, 'Guidance and Constraint: The Action-Guiding Capacity of Neil MacCormick's Theory of Legal Reasoning' (2007) 26 *Law and Philosophy* 343 at 354.

under scrutiny'.[87] The consequentialist nature of the EBT is clearly different from MacCormick's version of consequentialist arguments.[88] For MacCormick, the judge's concern does not focus on the likelihood that certain outcomes or consequences will take place. Instead, the judge must concern himself or herself with the normative status of those consequences when they take place.[89] What is important is the legal qualification of that which may or may not happen, not the likelihood of it happening.

MacCormick illustrates this by considering the famous case of *R v Dudley and Stephens*.[90] In 1884, the yacht Mignonette was sunk by a storm, forcing its four crew members, Thomas Dudley, Edward Stephens, Richard Parker and a sailor named Brooks, to abandon the yacht and take to a lifeboat. After 2 weeks at sea and 1 week of hunger, the ship's boy, Richard Parker, was close to death. Stephens and Dudley decided without the consent of Brooks that they would kill and eat Parker if help did not arrive the next day. Nobody came, so Dudley cut Parker's throat and survived on his meat for another 4 days, after which they were rescued by a German ship.

Upon returning to land, Dudley and Stephens were arrested and brought to trial, charged with murdering and eating Parker. The court rejected the claim of the defence that it was justifiable to kill another in order to save one's own life, since such a precedent 'once admitted might be made the legal cloak for unbridled passion and atrocious crime'.[91] For MacCormick, the court should be taken to have been addressing the morality of acquitting the killers, not the increase in such crimes which might result. Therefore, to acquit would have been to sanction immorality.

Indeed, it seems clear that the consequentialist argument is linked to the teleological approach to statutory interpretation in the same way as the general is linked to the particular.[92] On the one hand, the consequentialist argument requires that the universalised ruling yields the best consequences on the whole, while, on the other hand, the teleological approach requires that the universalised ruling yields the best consequences in view of the statutory purpose. 'The consequentialist argument is thus essentially a moral argument, which is less determinate than the teleological argument.'[93]

In light of the above discussion, it becomes obvious that MacCormick suggests that the judge should start with a consistency argument. However, if

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87 N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, 1st ed, OUP, Oxford, 2005, p 110.

88 See Spaak, above, n 86, at 354; M Slote, 'Utilitarianism' in T Honderich (Ed), *The Oxford Companion to Philosophy*, Oxford University Press, Oxford and New York, 2005, pp 938–9; R Brandt, *Morality, Utilitarianism, and Rights*, 1st ed, Cambridge University Press, Cambridge, 1995, pp 119–20; H Lafollette, 'Review of Morality, Utilitarianism, and Rights by Richard Brandt' (1994) 44 *The Philosophical Quarterly* 410 at 411; E Pybus, 'Review of Morality, Utilitarianism, and Rights by Richard Brandt' (1994) 103 *A Quarterly Review of Philosophy* 535 at 535.

89 N MacCormick, 'On Legal Decisions and their Consequences: From Dewey to Dworkin' (1983) 58 *New York University Law Review* 239 at 254.

90 (1884) 14 QBD 273.

91 (1884) 14 QBD 273 at 287–8.

92 MacCormick, above, n 87, p 134.

93 See T Spaak, 'Deduction, Legal Reasoning, and the Rule of Law' (2006) 23 *Constitutional Commentary* 101 at 113.

that consistency argument does not yield a determinate result, then the judge should move on to consider a coherence argument. If these two arguments or any mixture of them, however, fails to yield a determinate result, then the judge should turn to the consequentialist, including the teleological, arguments. To put this differently, MacCormick suggests that the judge should resolve the dispute before him in line with the most obvious literal meaning of the provision (ie, the relevant norm), or a less obvious literal meaning, provided that the less obvious literal meaning is supported by one of the remaining two kinds of argument, that is, coherence or consequentialist.[94] Consequentialist arguments therefore emerge should the arguments from both consistency and coherence be unable to yield an answer to the interpretive question.

It is suggested by MacCormick that there is a tendency in all legal systems that judges consider consistency, coherence, and teleological/consequentialist arguments in that sequence.[95] They move on to consider teleological/consequentialist arguments should a mixture of both consistency and coherence arguments not yield an answer to the interpretive question, or, alternatively, should that mixture yield an absurd upshot. Nevertheless, the question that arises here is: why not start, for example, with teleological/consequentialist arguments rather than the consistency argument? Why is it necessary to follow these three steps in proper sequence for the interpretive arguments? The answer, says MacCormick, is that a consideration of the morally and politically relevant values underlying each kind of interpretive argument upholds following these steps in proper sequence for the interpretive arguments.[96] In other words, he argues that teleological/consequentialist arguments must only be resorted to by judges if they have no other option but to do so, because humans frequently differ with regard to the ultimate moral and political values and principles that come into play in teleological/consequentialist arguments.[97]

MacCormick's theory offers judges a reasonably firm ranking of the interpretive arguments and is easy to understand as well as apply. Almost all non-sceptical jurists agree that the arguments, according to MacCormick's findings, which judges actually employ for resolving hard cases, are indeed appropriate considerations for judges to employ.[98] MacCormick's theory accomplishes what neither the deontic nor the efficiency theories could, namely, offering judges the kind of concrete guidance they need to determine the outcomes of hard cases.

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94 See Spaak, above, n 86, at 355.
95 See N MacCormick, 'Argumentation and Interpretation in Law' (1993) 6 *Ratio Juris* 16 at 26–9.
96 See Spaak, above, n 86, at 356.
97 MacCormick, above, n 95, at 28.
98 See Lucy, above, n 79; R Alexy, *A Theory of Legal Argumentation*, Clarendon Press, Oxford, 1989; S Burton, *Judging in Good Faith*, Cambridge University Press, 1992; K Gunther, *The Sense of Appropriateness*, State University of New York Press, Albany, 1993; J Levin, *How Judges Reason*, Peter Lang, New York, 1992.

Conclusion

Lawyer-economists do not provide a proper account of the law, because they depend on notions, language and reasoning that are fundamentally incompatible with those used by judges. Their explanation of the law lacks the support which statutes and judiciary decisions offer to it. Efficiency theories are therefore 'external' to contract law. If economic analysts want to rebut the transparency objection, they must explain why it is reasonable to assume that judges in common law cases use the language of morality, fairness and justice to mask consequentialist efficiency reasoning. Kraus claims that common law judges use consequentialist economic or efficiency reasoning to resolve hard cases, notwithstanding they do not understand their reasoning as being founded upon these terms.

Nevertheless, unless consequentialist efficiency reasoning is recognised as having some advantage over deontic moral concepts, there can be no basis for the claim that judges are deluded about their reasoning in cases and accordingly for the assumption that 'law shews itself in a mask'.[99] Kraus argues that economic theories have superiority over deontic ones, in that they provide more determinate explanations of adjudicative outcomes in hard cases. However, as shown above, they cannot claim to be any more determinate than deontic theories. Kraus cannot, therefore, offer an adequate explanation to justify his assumption that a divergence exists between the express and the actual reasoning of judges, and as such cannot rebut the transparency objection to efficiency theories. In conclusion, this study suggests that UK judges do and should use MacCormick's theory to determine the outcome of hard cases.

99 Bentham, above, n 45, Ch II, s1.