In That Case, What Is the Question? Economics and the Demands of Contract Theory

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In his thoughtful essay, Eric Posner asks whether economic analysis has failed contract law and suggests that it has.[1] Not surprisingly, I hold a different opinion. That is, while I agree with much of what Posner says about particular economic findings, I disagree about what it would mean for economics to "fail" (or, for that matter, what it would mean to succeed).

More specifically, Posner argues that economic analysis has failed in two respects, both as a descriptive theory and as a normative one. Descriptively, Posner says, economics fails to predict existing doctrine: Either existing doctrine differs from the rules that economics identifies as efficient, or economics is too indeterminate to identify the most efficient rules. And normatively, Posner says that this same indeterminacy also prevents economics from making any suggestions for the reform of contract law.

On my view, though, the descriptive and normative issues (and what constitutes "failure" for each of these purposes) must be treated separately. The descriptive claims that might be made for economics are largely uninteresting, as most scholars have implicitly recognized. I will speak briefly about those claims in Part I of this Response, but the bulk of my comments—Part II—will concern the normative claims. To the extent that normative analysis is at issue, I am much less troubled by indeterminacy of the sort that Posner describes. I then address, in Part III, the very different demands of what might be called an "interpretive" theory of contract law.

In short, my differences with Posner are largely over the question of "what counts as a good theory" of contract.[2] Posner wisely declined to address that question—wisely, I say, because a full discussion could easily

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1. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

2. *Id*. at 831.

have tripled the length of his essay. My goal in this Response, though, is to put that issue back on the table, for this is where most of our differences can be found.

I. DESCRIPTIVE THEORIES

In the 1970s, in the early days of law and economics, much attention was given to Richard Posner's claim that the common law (including the law of contracts) was efficient.[3] The elder Posner's claim on this point was not so much that it was *good* for the common law to be efficient, but simply that, as a descriptive matter, it happened to be the case that the common law *was* efficient.

I should note here that it is not clear how many other scholars—other than Richard Posner, that is—actually used this view in their academic work. True, some authors tried to advance theories of the causal processes that might tend, over time, to produce efficient rules, so these authors presumably shared the belief that the common law was, in fact, efficient.[4] But the causal theories they advanced were not persuasive, and one of those authors (George Priest) soon revised his theory and abandoned any claim that it would support the evolution of efficient rules.[5] Meanwhile, most scholars who applied economic analysis confined their analysis to the effects of particular legal rules, so those scholars had no reason to express an opinion as to whether they thought an entire field of law (much less the entire common law) was efficient.[6]

Still, Richard Posner's more provocative claims attracted a good deal of attention, and his descriptive hypothesis was often attributed to law and economics as a field (or a "movement") rather than to a single author.[7] Since then, however, this descriptive hypothesis has fallen out of favor, in the sense that it is rarely discussed and even more rarely defended in the legal literature. Part of the reason for this decline—I suspect a big part—is the fact that Richard Posner himself eventually retreated from the strongest

3. *See generally* RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW (1st ed. 1973).

4. *E.g.*, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

5. George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 409-15 (1980).

6. A possible exception can be found in FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (arguing that the general structure of corporate law could best be understood as increasing wealth, but also taking normative stands based on that premise).

7. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 276-85, 444 n.1 (1986) (discussing Richard Posner's descriptive hypothesis as "the" economic theory of accident law).

form of the hypothesis.[8] As I have already noted, it is not clear how many other defenders the hypothesis ever had. But there were also substantive problems with this purely descriptive use of economics, which probably contributed to its decline.[9]

For one thing, as Eric Posner notes in his essay, the descriptive hypothesis (even if it were true) is not useful for predictive purposes.[10] True, the hypothesis can be cast as a claim that we can predict the content of any common-law doctrine by figuring out what rule would be most efficient. But there are plenty of other ways to figure out the content of any common-law doctrine—by reading the case law, for example—so it is not clear why we should want to predict something we can find out independently.

To be sure, the descriptive hypothesis, if it were true, might have served a legitimating or quasi-normative purpose, by showing that the common law really did care about efficiency. After all, if common-law rules really did track efficiency, it might be argued that this would justify the use of *normative* efficiency arguments, at least in any normative system that placed some value on internal consistency. Indeed, this potential use of the descriptive hypothesis might have seemed especially important—both to supporters and to opponents—during the early years of law and economics, when it was still being contested whether efficiency arguments had any legitimate place in the legal academy.[11] But this battle is now over, in the sense that it is (almost) universally permissible to discuss efficiency arguments in law schools. That might explain why this potential use of the descriptive hypothesis is much less salient today.

In any event, another problem with the descriptive hypothesis is that it was never very clear what null hypothesis was being rejected.[12] In standard hypothesis testing, of course, the researcher seeks not so much to confirm the hypothesis under consideration but rather to reject some rival (or "null") hypothesis. But what null hypothesis did Richard Posner's early research reject? He could surely reject the hypothesis that the common law tends to

8. For a statement of his current, more nuanced position, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 353-74 (1990) [hereinafter POSNER, PROBLEMS OF JURISPRUDENCE]. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227-65 (1999) is also relevant.

9. Richard Posner himself surveys some of the problems in POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 8, at 362-74.

10. Posner, *supra* note 1, at 852-53.

11. As Richard Posner later put it:

> One of the things judges ought to do is follow precedent, although not inflexibly; so if efficiency is the animating principle of much common law doctrine, judges have some obligation to make decisions that will be consistent with efficiency. This is one reason why the positive economic theory of the common law is so contentious.

POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 8, at 374-75.

12. As Richard Posner later noted, much of the work in empirical economics placed "far greater emphasis on confirmation than on falsification." *Id*. at 363.

minimize efficiency—but since nobody seriously endorsed that position, its rejection would not have created any stir. In addition, he might have been able to reject the hypothesis that the common law is essentially random with respect to efficiency. However, either of these conclusions would have established only that the common law places *some* value on efficiency without ruling out the possibility that it valued many other things as well. And while that view (that the common law places *some* value on efficiency) might have been controversial in the 1970s, it is not nearly so controversial today.

By contrast, in order to establish the hypothesis that the common law cares *only* for efficiency, we would have to reject null hypotheses for each of the possible rival theories. For example, to show that efficiency predicts contract doctrines better than do the autonomy-based theories of Charles Fried,[13] we would have to reject the hypothesis that individual autonomy had *any* predictive value where contract law was concerned—or, at least, we would have to reject the hypothesis that autonomy added any extra predictive value over and above what could be predicted on the basis of efficiency alone. But that hypothesis would be very difficult to reject, partly because efficiency and individual autonomy often coincide, and partly because Fried never operationalized his theory at a level that would permit predictive tests. As a result, Richard Posner's descriptive work could not address the comparative issues that many scholars cared most about such as the role of economics versus the role of autonomy, or economics versus corrective justice.

So what remains of the descriptive hypothesis today? It is still true that much work in law and economics proceeds without making full-blown normative arguments, as most economists (and most lawyers) continue to pay little attention to their normative underpinnings. Indeed, this absence of explicit normative argument might suggest that most economic work should be read as making merely descriptive claims.

In my view, though, this body of work is better read as (implicitly) advancing a limited and contingent normative argument. That is, I read most mainstream law-and-economics articles as saying: "To the extent that you care about efficiency as a value, you should pay attention to the following conclusions."[14] The normative claim in such an assertion is necessarily contingent because most scholars (in most articles, at least) make no attempt to convince the reader that he or she should care about

13. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

14. In a relatively early article, Jules Coleman described this use of efficiency analysis quite clearly, and noted that it best described the work of other early economic analysts such as A. Mitchell Polinsky and Steven Shavell. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 548-49 (1980).

efficiency as a value. But for any readers who already do care about efficiency—either as a sole criterion or just as one value among many—the article will indeed have normative force. It will say, in effect: "To the extent that you *do* care about efficiency, this is what you ought to do."

All of which is to explain why I am not interested in defending economics as a descriptive theory of contract law, the topic with which Eric Posner's essay is most concerned.[15] But his essay also criticizes the normative uses of economics, and not just on the grounds that I have already noted (i.e., that the normative argument is limited and contingent). Instead, he argues that, even to the extent that we *do* care about efficiency, economic analysis has still failed because it is too indeterminate to tell us which rules to adopt. Accordingly, I now turn to that aspect of his essay.

II. NORMATIVE THEORIES

Posner's claim here is that economic analysis has become so complex, and must consider so many offsetting factors, that it is incapable (in a large number of cases) of determining which rule would be most efficient. This implies that, even if we were to accept efficiency as a normatively desirable goal, economic analysis would fail to tell us how to achieve it. For this reason, he says, economics has failed contract law from a normative perspective as well.

A. *An Example of Posner's Criticism*

Rather than discussing Posner's arguments in the abstract, it will be more useful to consider a concrete example, which I take from his analysis of remedies for breach. The economic analysis of remedies tells us that one effect of a contract remedy is to give a party reason to pause before breaking her contract. Roughly speaking, the bigger the damages she will have to pay, the more reluctant she will be to breach. This observation led some early scholars to endorse the expectation measure of damages, on the grounds that it would deter breaches when (but only when) the breaching party's gains from the breach failed to exceed the nonbreaching party's losses.

As other analysts quickly pointed out, however, the full analysis was more complex.[16] If the parties could renegotiate—for example, if the potential breacher could buy her way out of the contract for less than the

15. Except where otherwise noted, all subsequent references to "Posner" refer to Eric Posner, not Richard Posner.

16. For a survey of the relevant literature, at least as it stood in the late 1980s, see Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988). More recent work is cited in Posner, *supra* note 1, at 834-39.

damages the law would make her pay—then the law's measure of damages might affect the nature (and the cost) of those negotiations. The measure of damages might also affect the extent to which the potential breacher took precautions to reduce the likelihood of events that might force a breach. It might also affect the extent to which each party *relied* on the contract (or, equivalently, the extent to which each party neglected precautions against the risk of the other party's nonperformance). It might also affect each party's willingness to enter into the contract in the first place, especially with trading partners who carried a high risk of breach. This latter effect might also change the parties' incentives as to just how closely they investigated their potential trading partners prior to signing a contract. The damage rule might also affect the price that each party would demand (and that price, in turn, might itself affect the mix of potential trading partners). And since contract damages have much in common with insurance, the law's measure of damages would also alter the levels of risk borne by each party (which, in turn, might affect the extent to which either party purchased private insurance).

Unfortunately, though, the remedy that would be most efficient in terms of its effect on one of these variables need not be the one that is most efficient in its effect on any of the other variables. For example, full expectation damages might be best in terms of their effect on the potential breaching party's incentive to take precautions against accidents, but expectation damages are not the best remedy in terms of their effect on the other party's incentive to rely. As a result, we cannot decide which remedy is "best" in any overall sense (in terms of its combined effect on all of the relevant variables) unless we have some way of measuring the relevant effects, both good and bad, and then summing them to come up with a combined score for each of the possible remedies. But if we lack empirical data to measure the magnitudes of the various effects, any such sum will be difficult—or even impossible—to construct, so we will never know which remedy is truly the most efficient.

This, at least, is the gist of Posner's indeterminacy argument. Before turning to my response, let me say that there is much in this argument with which I agree. Indeed, in some respects Posner may have *understated* the difficulties, by limiting his analysis to complexities discussed in the literature belonging to contract law. If we broaden our focus to include a larger set of economic analyses, the complexity and difficulty of the task only increases.

Just to name a few complications, picking an efficient remedy also involves choosing the specificity of the remedial doctrine, or where that doctrine should fall on the rules-versus-standards spectrum. The issues involved in that choice may or may not be different in contract law than they are in other fields, but they are still issues that have to be faced, thus

bringing into play another balance of competing considerations.[17] The choice of an efficient remedy may also be affected by the extent of any imperfections that might arise during the enforcement, including any uncertainty as to just when that remedy will be imposed.[18] The choice of remedy could also affect the number of lawsuits and other litigation costs.[19] Also, since many contract defendants are insolvent (or bordering on insolvency), the choice of remedy may also implicate any number of bankruptcy concerns involving the interests of other creditors.[20] And there is always the possibility of other, "second best" effects to be taken into account. For example, if we are ruling on supply contracts in an industry that emits too much pollution, society might on balance be better off if those contracts were made *less* attractive.[21] Obviously, if additional effects like these must be taken into account, it will then be even more difficult to identify the rule that is most efficient overall.

I should mention here that, to me, this last feature of economic analysis is a strength rather than a weakness. That is, if it is possible that some rule of contract law might produce bad effects on the environment, or on any other relevant factor, I prefer a method of analysis that will let me investigate those effects and take them into account. True, this will complicate the analysis considerably, especially since we will also have to consider related questions about whether the environmental effects are best handled through some change in contract law, in environmental law, or in some other body of law entirely. But I would be much more troubled by any method of analysis that, in its desire for certainty or closure, made it impossible even to consider effects like these.

Be that as it may, we can now see why Posner's criticisms seem to apply equally to both descriptive and normative uses of economics. If it is too hard to determine which rule is most efficient, then economics must fail at the descriptive task of deciding whether the common law is in fact efficient. And if it is too hard to decide which rule is efficient, it seems that economics must also fail at its normative task, at least if the normative task

17. For a good discussion of the economic considerations involved, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

18. For a recent survey of some of these issues, see Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185 (1999).

19. For a theoretical analysis of some of these factors, see A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. LEGAL STUD. 151 (1988).

20. For a discussion of a few of these issues as they relate to contract law in particular, see Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 DUKE L.J. 517, 524-39 (1996). For a more general discussion on judgments exceeding the defendant's assets, see Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986).

21. *Compare* Rock Island Improvement Co. v. Helmerich & Payne, Inc., 698 F.2d 1075, 1077-79 (10th Cir. 1983) (noting that normal contract-damage rules could be construed differently when public policy requires greater protection of the environment), *with* Schneberger v. Apache Corp., 890 P.2d 847, 849-55 (Okla. 1994) (refusing to follow *Rock Island*).

is to recommend the most efficient rule. This apparent similarity between the descriptive and normative tasks is what enables Posner to write most of his paper as a series of attacks on the descriptive uses of economics, with the attacks on the normative uses of economics following on as a sort of corollary.[22]

B. *The Uses of Partial Analysis*

This point, however, is where Posner and I part company. It is certainly true that *one* normative task is to recommend the most efficient rule. At that task, economics will indeed fail whenever an efficiency analysis is indeterminate. But even when it fails at that ultimate normative task, economics can still succeed in making useful contributions to the analysis of individual pieces of the normative puzzle.

Let me return to the example of remedies for breach. To give Posner the benefit of the doubt, let us stipulate (at least for the sake of argument) that we do not know for sure which remedy would be most efficient overall, once all of the various effects have been considered. Nevertheless, we can still know a number of things about the specific pros and cons of any particular remedy, which can help inform the ultimate decision about which rule to adopt.

For example, the effect of remedies on a breacher's precautions is, admittedly, only one of the relevant effects. But as long as it is *one* of the relevant effects, it is still useful to know what that effect is. It is useful to know, for example, that larger remedies will usually give the potential breacher more of an incentive to take precautions, while smaller remedies will usually give the breacher less of an incentive. It is also useful to know that the strength of this effect will vary with the strength of other factors that might already influence the breacher's incentives—for example, whether the breacher already has strong market incentives to keep her contract, or whether she instead sells in a market where reputations are weak or nonexistent.

Indeed, understanding these partial effects can be useful even to analysts whose normative premises do not rest on efficiency. For example, judges or legislators who believe that it is ethically wrong to break a contract might still want to know which legal rules will lead to a smaller number of breaches.[23] Similarly, judges or legislators who care about distribution will want to know the effect of damage rules on the price

22. *See, e.g.*, Posner, *supra* note 1, at 854 ("Rather than arguing that their models explain contract doctrine, most authors argue that their models can be used to criticize or defend contract doctrine. But the normative weaknesses of their models follow as a matter of course.").

23. *Cf.* FRIED, *supra* note 13. While Fried believes that breaches are ethically wrong, he (perhaps oddly) does *not* seem concerned with the effect of legal rules on the number of breaches.

buyers must pay, and those who care about product quality will want to know the law's effect on sellers' incentives not to produce defective products. Thus, the value of what I am calling "partial analysis" is not limited to those who take efficiency as their goal.[24]

In other words, the contribution made by partial analysis of a single incentive is conditioned on two levels: It applies only to the extent that its audience cares about efficiency, and—even then—it applies only to the extent that they are considering one particular aspect of efficiency (in this case, the effect of breacher's precautions). With those qualifications, the contribution can be expressed as follows:

> To the extent that you value efficiency (or, to the extent that you value fewer breaches; or to the extent that you value fewer defective products), and . . .
>
> (a) to the extent that precautions by the potential breacher are relevant to this goal . . .
>
> you should follow this analysis.

To be sure, a complete normative analysis would also include several other aspects of efficiency (factors (*b*) through (*z*)?), to reflect the possible effects on reliance by the promisee, on precontractual investigation, and so on. An even more complete analysis might also include other normative premises, depending on the particular analyst. But no matter how many additional factors the full list includes, I still believe it is a useful contribution if economics can clarify our understanding of any one of the factors on that list.

There is a similar value in the partial analysis of most of the other factors discussed in Section II.A (the factors whose number and complexity so discouraged Posner). For example, just as it is useful to understand the effect of damage rules on the performing party's precautions, it is also useful to understand their effect on the promisee's reliance. And here, too, greater understanding will be valuable not only to those judges and legislators who care about efficiency but also to those who care about reliance for other purposes.[25] Similar points could also be made about improving our partial understanding of the distributive effects of contract rules,[26] their effect on litigation costs,[27] or their effect on insolvency proceedings.[28]

24. Coleman also makes this point. Coleman, *supra* note 14, at 550.

25. *E.g.*, P.S. ATIYAH, PROMISES, MORALS, AND LAW 202–12 (1981).

26. *E.g.*, Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

27. *See* Polinsky & Rubinfeld, *supra* note 19.

28. *See* Fried, *supra* note 20.

To his credit, Posner does consider this sort of partial contribution, but only briefly, in two paragraphs at the end of the first section of his essay.[29] His response is as follows: "This defense has an air of plausibility but also distressingly open-ended and unambitious implications. The last decade has witnessed a piling on of relevant factors, but no increasing clarity about the function of contract law, and a wise judge might, in order to avoid paralysis, simply ignore them."[30] I will return below to the question of whether "a wise judge" would really be wise to ignore this sort of partial analysis.[31] For now, however, let me focus on the earlier portions of Posner's response.

One of his claims is that, while we have identified more and more potentially relevant factors, we have not seen any "increasing clarity about the function of contract law."[32] This seems simply wrong, at least if by "function" he means the *effects* of contract law. Indeed, greater clarity about the individual effects of contract law is a perfect way of describing what is contributed by the kind of partial analysis in which I am interested. That is, by understanding more and more about just how contract remedies can affect a potential breacher's incentives to take precautions (to continue with my earlier example), it seems to me that greater clarity in understanding those effects is precisely what we achieve.

I suspect, though, that Posner's main complaint about this sort of partial analysis comes in the first sentence of the passage quoted above, where he describes this analysis as "distressingly open-ended and unambitious."[33] If to be ambitious is to aspire to a full-blown analysis that incorporates every relevant factor and leads ineluctably to a definite conclusion, then this sort of partial analysis is indeed "unambitious." And while Posner never explicitly says that this is what he demands for a normative theory to be successful—recall that he has set aside any question of what counts as a good theory of contract[34]—it is only by comparison to such an ideal that partial analysis must be judged a failure.

Now, to the extent that he is concerned with *descriptive* uses of economics, Posner may be correct to demand that a descriptive theory emerge with a final, overall answer before it can be said to succeed. After all, if the descriptive claim is that common-law rules are efficient, that claim has no content—and certainly cannot be rigorously tested—unless and until the efficient rules have been identified. The inability to identify

29. *See* Posner, *supra* note 1, at 854-55.
30. *Id*.
31. *See infra* note 43 and accompanying text.
32. Posner, *supra* note 1, at 855; *see also infra* text accompanying note 41.
33. Posner, *supra* note 1, at 855; *see also infra* text accompanying note 41.
34. *See supra* text accompanying note 2.

efficient rules, therefore, could indeed be grounds for labeling a descriptive theory as a "failure."[35]

The demands of a normative theory, however, are different. While it may be that the ultimate goal of a normative theory is to be able to recommend a particular rule—and, of course, to justify that recommendation—normative analysis can still be useful even if it falls short of that ultimate goal. That is, if judges or other lawmakers have to choose a legal rule (and they do), I believe it is better for that choice to be informed by an understanding of the various effects that will follow, even if that understanding falls short of being a complete algorithm for producing a definitive answer. In short, while it may not be possible for a woman to be "a little bit pregnant," I do believe that a normative theory can be "a little bit useful."

Indeed, even to describe these partial analyses as "unambitious" seems to me to misunderstand the nature of the problem. The problem, in a nutshell, is that contracts (like most things the law regulates) are *complicated*. They can be used for many different purposes, and produce many different effects, and we are still a long way from completely understanding any of them. From my point of view, trying to advance our understanding in this regard—even if we proceed slowly and partially, one step at a time—is still an ambitious project.[36]

I should note, too, that the humility that comes from recognizing how hard these problems are is itself a useful contribution that economics can make to normative analysis. For example, if we would otherwise believe that it is easy to help poor consumers by striking objectionable contract clauses, it must then count as a real advance if we subsequently come to see that the problem is, in fact, much harder than it at first appeared.[37] To be sure, it is sometimes said (usually by critics of economics) that the early users of economics in law were attracted by the hope of finding certain,

35. Many critics of the descriptive theory pointed this out years ago. *E.g.*, Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 624-27 (1980); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 115-16 (1987).

36. Jon Hanson and Melissa Hart recognize the difficulties when they describe many law-and-economics scholars as "eyeballing the various efficiency considerations and offering their own view, together with a smattering of contestable empirical support, of how the countervailing efficiency considerations stack up." Jon D. Hanson & Melissa R. Hart, *Law and Economics*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 311, 328 (Dennis Patterson ed., 1996). Hanson and Hart observe that this makes the resulting analysis "less scientific," but they do not conclude that economics has therefore failed the demands of normative analysis (whatever those demands may be). *Id*.

37. Posner describes just such an example when he compares Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381 (1990) with Benjamin E. Hermalin & Michael L. Katz, *Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach*, 9 J.L. ECON. & ORG. 230 (1993). *See* Posner, *supra* note 1, at 859-61.

uncontroversial conclusions.[38] I have no way of knowing whether this is, in fact, an accurate description of the motives of the early adopters, but, in any case, it cannot be an accurate description today. To the contrary, the attraction of economics for me is simply that it attempts to come to grips with what are, in my view, the questions that really matter.[39] As I see it, shedding any light at all on those questions is a useful contribution, whether or not we are able to produce a complete and definitive answer.

For similar reasons, I cannot join Posner's complaint that efficiency analysis, as practiced today, is "distressingly open-ended."[40] By "open-ended," I take Posner to mean that the list of potentially relevant economic effects is never closed. As a result, even if the best current analysis did seem to yield a definite conclusion—say, about what remedy was most efficient overall—it would always be possible to overturn that conclusion, if economists were to identify some new effect that altered the previous analysis. To Posner, this open-endedness is troubling—as it should be, if the test of a theory's success is whether it yields complete and final answers.

On my view, though, this open-endedness is simply another consequence of the fact that the subject we are analyzing is extremely difficult, with lots of effects that we do not yet understand. Yes, this means that we can never be certain in the answers we reach and must instead regard every conclusion as merely provisional. As I have already said, though, such certainty or "close-endedness" forms no part of *my* test for the success or failure of a normative theory. As long as each factor that is added to the analysis brings additional insight into a normatively relevant factor, that makes the theory a successful one as far as I am concerned.

This difference between Posner's views and my own also bears on the other part of his essay that considers partial analysis. While discussing remedies for breach, Posner notes that "[a]rticles that discuss these various incentives typically bracket most of them for the purpose of analysis and focus on one or two. As a result, the optimal remedy derived from a model is optimal only under narrow conditions."[41]

As should now be apparent, in my view this bracketing of most incentives (in order to focus more clearly on one or two) is a strength of economics, for this is how we improve our understanding of any single incentive. But Posner sets this benefit aside and immediately looks to see whether the partial analyses can all be combined to reach what for him is

38. *See, e.g.*, Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905 (1980) (describing the "main attraction" of efficiency analysis as "the promise of a single 'scientific' right answer").

39. I will return to this point—the question of what issues really matter—in Section II.C.

40. Posner, *supra* note 1, at 855.

41. *Id*. at 838.

the ultimate goal: the goal of identifying the rule that is most efficient overall. Applying this test, he concludes that the models fail in this regard.[42]

C. *The Dangers of "All or Nothing"*

In short, I disagree with Posner about the appropriate test for whether a normative analysis has "succeeded" or "failed," and with his implicit assertion that the analysis fails unless it can proceed all the way to a final conclusion about which rule the law should adopt. As a result, I also disagree with the suggestion, made in passing, that a wise judge ought perhaps to disregard the economists' partial analyses entirely, if only to avoid paralysis.[43]

I should add at once that Posner does not himself make this suggestion. To the contrary, he states explicitly that he does not advocate that economic analysis be abandoned,[44] and in later portions of his essay he is even more critical of most of the alternatives to economics.[45] Nevertheless, Posner's views about the "failure" of economics, if combined with other premises, could yield exactly this conclusion (i.e., that economic analysis ought to be abandoned). Indeed, I have occasionally heard similar views expressed by students or colleagues, so the possibility is worth discussing even though it is not Posner's own position.

On my view, the problem with disregarding economics (even partial economic analyses) is that it throws away information *about factors that really matter*. That is, if we care at all about how many breaches occur, or about whether buyers overpay for products, or about any of the other factors that economics studies, then it behooves us to know as much as we can about those effects, rather than deliberately closing our eyes to them. As Louis Kaplow and Steven Shavell put it recently:

> The world is complex, and empirical research on the legal system is in its infancy, so this state of affairs [i.e., the need to make judgments on the basis of incomplete or partial information] is unavoidable. Implicit in the notion that this uncertainty (so-called indeterminacy) constitutes a criticism of welfare economics *is that easily answered questions—which necessarily ignore relevant, although complicated, features of reality—are somehow better to consider*.[46]

42. *Id*. at 838-39.
43. *Id*. at 854-55. I quote the relevant passage in full in the text accompanying note 30.
44. Posner, *supra* note 1, at 830.
45. *Id*. at 870-878.
46. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 457-58 (2002) (emphasis added).

Perhaps another example will clarify. The field of industrial design is also complicated, with many offsetting effects that must be balanced against one another. Even if we confine ourselves only to the safety aspects of product design, it is often hard to tell which design will best reduce overall risks. Sometimes reducing one risk will increase others: For example, making automobiles stronger and heavier may reduce the risk to people inside the automobile, but may increase the risk to anyone in another car that the automobile hits.[47] Product design may also interact with user behavior in unexpected ways, as when reductions in cigarette nicotine levels lead some users to "puff" more intensely,[48] or lead other users to increase their smoking because they believe cigarettes are now safer.[49] A complete theory of product design would therefore have to include: (a) a complete theory of engineering, capable of identifying all of the relevant costs of any possible design; (b) a complete theory of user behavior, capable of predicting the actual use that every design would receive (including the distribution of different user behaviors across different segments of the population); and (c) a full-blown moral theory, to tell us how to make trade-offs among various kinds of risks. Needless to say, our actual knowledge of product design has not yet reached this level.[50]

Does this mean, then, that our present knowledge of product design has "failed" us? Or, more to the point, does it mean that a wise designer should "simply ignore" all of these complexities, for fear of being reduced to paralysis? If so, what should the designer do instead? Should she, say, pick a design that expresses some aesthetic ideal, perhaps on the ground that aesthetics and self-expression don't seem nearly as complicated or as "distressingly open-ended"?

Most of us, I think, believe that a designer would *not* be justified in simply ignoring all considerations of product safety. Indeed, most would be shocked by such callous disregard of human safety, and many would be quick to award punitive damages if such an attitude were proved at trial. The reason, of course, is that we believe human safety matters, and that it matters a lot. As a result, even if we can never know *exactly* how best to

47. JOHN GRAHAM & JONATHAN WEINER, RISK VERSUS RISK 96-101 (1995). Some legal and policy aspects of these trade-offs are discussed in CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 271-94 (1997).

48. See the studies reviewed in John E. Calfee, *Cigarette Advertising Regulation Today: Unintended Consequences and Missed Opportunities?*, 14 ADVANCES CONSUMER RES. 264, 265-66 (1987).

49. Brett Silverstein et al., *The Availability of Low-Nicotine Cigarettes as a Cause of Cigarette Smoking Among Teenage Females*, 21 J. HEALTH & SOC. BEHAV. 383, 385-87 (1980).

50. Readers who find it hard to believe that "technical" fields like engineering could ever be indeterminate are invited to sample the relevant journals. *See, e.g.*, Giuliano Augusti et al., *Bounds to the Probability of Collapse of Monumental Buildings*, 24 STRUCTURAL SAFETY 89 (2002); Pasquale Erto & Massimiliano Giorgio, *Assessing High Reliability via Bayesian Approach and Accelerated Tests*, 76 RELIABILITY ENGINEERING & SYS. SAFETY 301 (2002); U. Neurader, *Investigation into Steering Wheel Nibble,* 216 J. AUTOMOTIVE ENGINEERING 267 (2002).

promote the goal of human safety, we normally believe that it is worth finding out as much as we reasonably can about the various costs and benefits. In my view, the design of a legal system deserves almost as great an effort.

To be sure, this argument will not persuade those who believe that we shouldn't care at all about the efficiency of (some) legal rules. While I don't agree with those arguments, those who believe them at least have an intelligible reason for urging that economic analysis of those rules should be ignored. In short, it is perfectly intelligible to argue that economic analysis should be ignored *if one believes that economic effects are not normatively relevant*.

It is much harder, though, to argue that economic analysis should be ignored if those effects *are* normatively relevant. In other words, it is hard to believe simultaneously that (a) economic effects are normatively relevant, but (b) we should not spend very much time on economic analysis, because it's just too complicated. If one believes point (a), that economic effects are normatively relevant, then the only justification for point (b) would have to be an additional belief that extra time and effort spent on economics would simply be unproductive because the complexities of economics mean that no useful insights would be realized.

This, unfortunately, is where the link to Posner's argument comes in. If "no useful insights" is defined in an all-or-nothing way, as Posner appears to define it—meaning that the only insights that count are those that yield complete and definitive normative answers—then further time and effort spent on economics always *will* be unproductive, at least as measured by that test. The same test, it should be noted, would also deem unproductive any further research into product safety. In this way, Posner's views about what counts as normative success or failure could indeed lend support to the conclusion that a wise judge should simply ignore economic analysis. On my view, that would be a loss.

III. INTERPRETIVE THEORIES

Let me turn now to a third class of theories, which are neither purely descriptive nor purely normative. For want of a better label, I will call these "interpretive theories," recognizing that I am crudely grouping together theories with as many differences as similarities.[51] While Posner refers to these theories only briefly,[52] a slightly longer discussion may shed light both on the proper uses of economics and on Posner's criticisms.

51. I have borrowed this term from Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW 206, 213-22 (Peter Benson ed., 2001).

52. Posner, *supra* note 1, at 877-78.

Interpretive theories attempt to clarify or reconstruct the concepts used in existing bodies of law, in order to "make sense" of, or give greater coherence to, those concepts. In tort law, these theories are exemplified (in very different ways) by the work of Jules Coleman[53] and Ernest Weinrib.[54] Interpretive theories are less common (or less well-developed) in contracts scholarship, but examples can be found in the work of Dennis Patterson,[55] Peter Benson,[56] and Stephen Smith.[57]

One common feature of interpretive theories is that their authors adopt a point of view that is *internal* to the body of law in question. That is, they seek to explain the law's concepts in terms that would be familiar to judges, practicing lawyers, and others who participate in actual legal practice and institutions.[58] These scholars thus do not attempt to evaluate a body of law from the standpoint of some *external* normative premise, such as autonomy or utility or anything else (what Coleman refers to as "top-down" theories).[59] Instead, these theories start by accepting, at least provisionally, the normative or quasi-normative concepts already employed in the cases being studied—for example, fault and corrective justice in tort law, or promise keeping and individual autonomy in contracts. Thus, the stated goal of these theorists is not to justify or criticize the body of law in question but merely to provide a better account of what that body of law *is*. As a result, these theories cannot be classified with the explicitly normative theories that Posner discusses.

53. *E.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001) [hereinafter COLEMAN, THE PRACTICE OF PRINCIPLE] (referring to his approach as a "middle-level" theory); JULES L. COLEMAN, RISKS AND WRONGS 7-12 (1992) [hereinafter COLEMAN, RISKS AND WRONGS] (same).

54. *E.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

55. *E.g.*, Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235 (1993).

56. *E.g.*, Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW, *supra* note 51, at 118.

57. Stephen A. Smith, *Towards a Theory of Contract*, *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 107, 111 (Jeremy Horder ed., 2000). Posner appears to place Melvin Eisenberg in this category. *See* Posner, *supra* note 1, at 878 n.128. Eisenberg's latest work, however, is explicitly critical of interpretive theories. *See* Eisenberg, *supra* note 51, at 213-22.

58. As Weinrib put it:

> The formalist treats the law's concepts as signposts of an internal intelligibility and tries to understand them as they are understood by the jurists who think and talk about them. The formalist, accordingly, regards law as understandable from within, not as an alien language that requires translation into the terminology of another discipline such as economics.

Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583, 592 (1993). Formalism, in this context, is the name that Weinrib gives to his version of what I am calling an interpretive theory.

59. COLEMAN, RISKS AND WRONGS, *supra* note 53, at 8. Interestingly, Coleman uses an interpretive theory (or what he calls a "middle-level" theory) to discuss tort law, but he uses a more explicitly normative ("top-down") theory to analyze contract law. *Id.* at 9-12, 430-36.

At the same time, though, these theorists aspire to more than merely describing what courts do, so their theories are not purely descriptive either. At a minimum, these theorists are describing the language and concepts that courts use, not the actual outcomes of cases. They therefore aim for a higher level of abstraction than would be achieved merely by reporting case outcomes, even though a list of outcomes might be perfectly accurate as a description. Instead, their concern is with "middle-level" concepts such as consideration or reliance, rather than with brute case outcomes.

Moreover, these theorists also seek to connect the various concepts into a coherent whole, thus revealing the underlying structure that is sometimes said to be "implicit" in or "presupposed" by the legal concepts. As a result, these theorists have some room to use normative theories in deciding which concepts to emphasize in their reconstruction, so that the underlying structure they reveal at least will be plausible in normative terms.[60] Interpretive theorists can also make limited suggestions for reforming existing law so as to give it even greater coherence—understanding, of course, that greater coherence with the law's existing framework is not *necessarily* a good thing. As a result, this case for reform will be at best a limited one, whose strength must ultimately depend on the moral attractiveness (according to some external normative theory) of the framework that the theorist has revealed.

The fact that any normative conclusions must ultimately draw their strength from some external normative theory leads Posner to conclude that interpretive theories are subject to criticisms that have been raised against other, more explicitly normative, theories.[61] Not all of these theorists, however, have as their goal the advancing of normative cases for reform. To some, a better understanding of the law's own concepts is a worthwhile goal in itself—or, at least, is a necessary precondition to any further normative work—and interpretive theories are seen as a way of gaining that better understanding. Stephen Smith nicely expresses this view:

> Legal scholarship is done with various purposes in mind, but the basic aim of legal scholarship is to understand the law better. Even if our ultimate goal is law reform, we need first to understand what it is we are trying to reform. . . . Understanding in law, like

60. I will skip over here the much-debated issues of just what kind of "coherence" is required, and how much room that leaves the theorist to adopt interpretations that match his or her own normative theories, or how much the theorist is instead constrained by the existing legal materials. For discussion of these issues, see the various contributions to the *Symposium on Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 579 (1993), and the much more extensive literature cited therein.

61. Posner, *supra* note 1, at 878 ("Ambitious doctrinal scholarship [Posner's term for these theories] thus converges to a kind of moral philosophy that is especially sensitive to judicial outcomes . . . ."). Posner surveys some of the criticisms of moral theories of contract law in Section V.A of his essay.

> understanding in other areas of life, is achieved through making sense of the object of our inquiry, through making that object intelligible to us in a way it was not intelligible before.[62]

Peter Benson puts it even more strongly:

> [H]owever much competing contract theories may differ among themselves, they all purport to be theories *of contract law*. They presuppose, therefore, the existence of the legal point of view. Indeed, if a theory were to ignore and not to take up, even provisionally, the standpoint of the law, the law would rightly dismiss it as extraneous and hence irrelevant to its own concerns and analysis—however internally coherent, sophisticated, or otherwise valid that theory might be.[63]

This use of theory represents something fundamentally different from either descriptive or normative theories (as Posner uses those terms). When Posner refers to a theory's ability or inability to "explain" contract law, he appears to use "explain" merely as a synonym for descriptive accuracy, meaning whether the theory's recommendations match existing case outcomes. But for interpretive theorists like Smith or Benson, a theory that "explained" contract law in terms of some entirely external factor (such as efficiency) would not count as an explanation at all, even if its predictions matched perfectly with actual outcomes. Instead, the goal of these interpretive theories is to explain the law's *internal* concepts and categories.[64]

I have described these interpretive theories not because I prefer them to economics—I do not, for reasons too complex to go into here—but because they raise even more starkly the question of what counts as a good theory of contract law. In particular, they show that what counts as a good theory depends on the uses to which the theory is going to be put, so it is best to be

62. Stephen A. Smith, *Taking Law Seriously*, 50 U. TORONTO L.J. 241, 249 (2000).

63. Benson, *supra* note 56, at 124. Smith is more pluralistic in his recognition that other sorts of theories can be useful for other legal purposes, including the purpose of law reform:

> [U]nderstanding the law is not all that we do or should care about. We also care about whether the law is just (valuable, good, desirable, etc.) and, if it is not just, how it should be reformed. . . . The value of such scholarship is clear. But we should not confuse such an exercise with the exercise of understanding the law we now have.

Smith, *supra* note 62, at 256.

64. Coleman expresses this goal as follows:

> Whereas there is much to be said for positive [i.e., descriptive] legal theory . . . , this book makes no predictions, derives no theorems, and is generally uninterested in this form of explanation. It is interested in providing an explanation of our practices, or important parts of them, but explanations that make sense of the practice in the light of norms it claims are inherent in it, norms, moreover, that could withstand the test of rational reflection.

COLEMAN, RISKS AND WRONGS, *supra* note 53, at 7.

explicit about those uses and the demands they make. In this case, some of the criticisms that Posner makes of economics are also criticisms that an interpretivist would make. And while Posner himself is not an interpretivist—in fact, he criticizes interpretive theories, if only briefly[65]—I suspect that some of the rhetorical force of his criticisms of economic analysis derives from the fact that those criticisms might well be valid if economics aspired to be an interpretive theory.

For example, the open-endedness of economic analysis might well count as a failure from an interpretive point of view. As I have already said, from a normative point of view there is nothing wrong with acknowledging that we understand some effects of contract law better than others, and that while we hope that our knowledge will progress, we will never be able to rule out the possibility of additional relevant effects that we have not yet considered.[66] From an interpretive standpoint, though, to admit that our interpretation is partial and limited *and that it probably always will be* comes close to admitting failure. After all, most interpretivists seek an interpretation that will bring coherence to a field of law in its entirety, so if there are aspects of that field that have not yet been accounted for, the coherence of the theory as a whole will be weakened. In other words, the coherentist aspect of interpretive theories may provide exactly that "all or nothing" quality that Posner seems to accept but which normative economics entirely lacks.

For the same reason, interpretive theorists would share Posner's doubts about any form of partial analysis, in which the economist holds constant most relevant variables and institutions in order to focus on just one or two. For example, an economist would see nothing strange in taking as given the structure of private litigation (one plaintiff and one defendant), and asking what substantive rule would be best *given* the costs and other consequences of the current enforcement structure. The economist would not thereby be endorsing the current enforcement structure, of course, but would merely be leaving to another day all questions about the optimal structure of enforcement. The economist would also concede willingly that, if the current structure were ever changed, that might alter his or her conclusion as to what substantive rule would then be most efficient. (This is another example of the inevitable open-endedness of economic analysis.)

For an interpretive theorist, though, the structure of litigation and the substantive rules are both part of the body of law that must be interpreted, so any theory that accounts for one but not the other would be lacking from an interpretive point of view. In tort law, for instance, Jules Coleman has argued that economic analysis cannot explain why we rely on private

65. *See* passage quoted *supra* note 61.
66. *See supra* text accompanying notes 40-41.

litigants to promote deterrence goals (rather than, say, relying on public enforcement),[67] and that this casts doubt on the validity of economics as an interpretive theory of tort law.[68] Once again, the aspiration to broad coherence pushes interpretive theorists strongly toward an "all-or-nothing" posture—a posture that is foreign to normative economics but which has been implicitly adopted by Posner.

Finally, an interpretive theorist would also approve of Posner's search for an economic theory "of contract law"[69]—rather than, say, a theory of economic welfare more generally, or a theory of overall utility. I mentioned earlier that Posner's indeterminacy arguments might be even stronger if he expanded them to take account of economic effects that are usually studied in literature other than that pertaining directly to contract law—for example, the literature on litigation costs, on the uncertain administration of rules and standards, or on the rights of claimants against insolvent debtors.[70] From the external vantage point of economics, all of these are relevant effects, and their significance is not affected by the fact that some of them are studied by scholars whose work is not primarily in contract law. (Similarly, the qualitative distinction between "public" and "private" law—a distinction that is absolutely essential to someone like Ernest Weinrib[71]—also has no significance in normative economic analysis.)

From the internal standpoint of an interpretive theory, however, the law's division of subjects between contract law and other topics is itself one feature of the subject being interpreted.[72] As a result, an interpretive theory of contract law would normally prefer a theory that accounted for contract law entirely on the basis of *contract* concepts and doctrines. Except to the extent that contract law itself referred to some other body of law, it would count as a failure (from an interpretive standpoint) if necessary parts of the theorist's explanation had to be imported from other fields.

In short, there are many reasons to think that economics would fail as an interpretive theory (were it to aspire to that status) and thus many reasons for interpretivists to reject economics as unsuited for their purposes.[73] But this merely underscores my basic point, which is that the suitability of a theory depends on what it is that the theory is expected to do. While there are reasons to reject economic analysis as an interpretive

67. COLEMAN, RISKS AND WRONGS, *supra* note 53, at 374-85.

68. COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* note 53, at 30-31.

69. Posner, *supra* note 1, at 830.

70. *See supra* notes 17-21 and accompanying text.

71. *See* WEINRIB, *supra* note 54.

72. Stephen Smith provides a useful discussion of this issue from an interpretive point of view. *See* Smith, *supra* note 62.

73. That is, interpretivists would be right to reject economics as an interpretive theory in its own right. Of course, to the extent that interpretivists draw on external normative theories in deciding which interpretation to adopt, *see supra* note 58, normative economics—like any other normative theory—could still be used for that purpose.

theory of law, those reasons do not thereby become grounds for rejecting economics in its proper use, as a contingent normative theory.

IV. CONCLUSION

There are, of course, many aspects of Posner's essay that I have not addressed in this Response. In particular, I have said almost nothing about those portions of his essay with which I agree (and there are many). I also have not addressed Posner's speculations about the future prospects for economic analysis—for example, about whether economics will have to abandon its assumption of perfect rationality in order to make any *additional* progress in analyzing contracts and contract law.[74] The question of whether economics has succeeded in the past is logically independent from the question of whether it will continue to succeed in the future, and nothing I have said even begins to address the latter question.

Instead, I have focused retrospectively on the past thirty years, partly because this is the primary focus of Posner's own essay, and partly because it is these claims that, I suspect, will prove most controversial. After all, assertions that it is time for law and economics to build on its successes by taking a new direction are not particularly new.[75] But assertions that law and economics has "failed"—in effect, that it has not succeeded at all in what ought to be its task—these assertions will attract much more attention.

To be sure, Posner does not claim that law and economics has failed entirely, for he is careful to note that there have been many successes.[76] According to Posner, economics has "clarified the policy questions at stake" and has "ushered in a set of scholarly virtues," so that the contracts literature now "proceeds at a higher level of sophistication."[77] But economics has nevertheless failed at what Posner takes to be its most important goal, because, as he says, it "fails to explain contract law."[78] By this, he means that it has developed neither a descriptive theory that predicts the actual shape of contract doctrine nor a normative theory capable of telling us conclusively which rules contract law should adopt.

As should by now be apparent, I believe that Posner has misidentified the most important goal of economic analysis. The descriptive or predictive goal is (to me) uninteresting and has already been abandoned by most

74. Posner, *supra* note 1, at 875-77.

75. *See, e.g.*, Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989). As Ellickson notes elsewhere, critics of law and economics have been predicting its imminent decline for at least twenty years. Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 524 (2000) (citing, e.g., Horwitz, *supra* note 38, at 905).

76. Posner, *supra* note 1, at 879-80.

77. *Id*. at 879.

78. *Id*. at 880.

current researchers. The interpretive goal might be worth pursuing, but it too is not the goal that economic researchers pursue. Instead, the normative goal is the one most often pursued by economists, and that goal does not demand a fully worked out theory with complete and close-ended answers. If we instead see the normative goal slightly differently—that is, if we see it as the goal of shedding as much light as we can on the morally relevant effects of contract rules, and on the costs and benefits of those effects—then, by this standard, the past thirty years should count as a success.