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LEXICAL OPPORTUNISM AND THE LIMITS OF CONTRACT THEORY*

Jeffrey M. Lipshaw **

Abstract
This essay is a reflection on the gap between the real-life practice of contract law and some of the academic theory that tries to explain it. I describe "lexical opportunism," an aspect of contract practice having three elements. First, the parties must have reduced a complex business arrangement to contractual text, portions of which text are as devoid of thoughtful drafting or close negotiation as the boilerplate in a consumer contract. Second, an adversary cleverly develops a legal theory based upon a colorable interpretation of that text. Third, this interpretation creates a potential for staggering liability beyond all common sense. A multi-billion lawsuit, recently settled, serves as an example, and triggers my discussion of (a) what it means to engage in theoretical assessment in contract law; (b) how the justification of contract law by way of inhibiting economic opportunism is based on the simplest examples, rather than the kind of contract discourse found in any real-world contract worth spending millions to litigate; and (c) how normative theory based on upholding the moral sanctity of promise keeping evaporates when the parties disagree about the meaning of their promises. I argue that both economic and moral theories about contract law fail to account for issues in the use of language and depend on the naïve adoption of the correspondence theory of truth. The nature of language permits opportunism, and the only check on it is the desire,
from whatever motivation, not to be opportunistic. I conclude with what I hope are some constructive thoughts about the appropriate use of theory in lawyering, and thereby mitigate my skepticism whether any single theory or discipline is capable of meaningful explanation or prediction about lexical opportunism.

"We should be pragmatic about theory. It is a tool, rather than a glimpse of ultimate truth, and the criterion of a tool is its utility."

I. INTRODUCTION

This is a reflection on the gap between the real-life practice of contract law and the academic theory that tries to explain it. As someone who used to do mergers and acquisitions as a lawyer and corporate executive, I occasionally get a call to comment on pending litigation. I also happen to be an academic theorist who has written about contract theory, and a teacher who guides first-year law students through the standard fare of casebook law. These interludes in which I leave the ivory tower and revisit contract disputes in the real world cause me to shake my head sadly, as they generally confirm my intuition that trying to connect before-the-fact contracting intentions and behaviors with colorable after-the-fact interpretation disputes misses the point.

My skepticism about academic theories of contract law most recently flared up in connection with an eight-year-old dispute, the result of a contested public company takeover, between Johnson & Johnson, the frustrated suitor, and medical device maker Guidant Corporation, now a subsidiary of the winning bidder, Boston Scientific Corporation. The contract issues are straightforward despite having arisen out of the documentation of a deal worth more than $20 billion. I will tell the story of the case and explain the context of relatively standard M&A contract practice. Then I will reflect on the implications of the case for


the prevailing economic and moral theories justifying state intervention in the enforcement of private agreements, at least when we put aside the abstractions and get down to cases.

With the disclaimer that I had no stake in the outcome of the case and no particular sympathy for Boston Scientific’s uncomfortable situation, digging into J&J’s claim caused me to have flashbacks to my most frustrating experiences as a general counsel: contending with a phenomenon I am here calling “lexical opportunism,” an aspect of contract practice having three elements. First, the parties must have reduced a complex business arrangement to contractual text, portions of which text are as devoid of thoughtful drafting or close negotiation as the boilerplate in a consumer contract. Second, an adversary cleverly develops a legal theory based upon a colorable interpretation of that text. Third, this interpretation creates a potential for staggering liability beyond all common sense.³

I have long harbored two bugaboos about contract theory, at least when thinking about the complex deals I did versus the “Dick and Jane”⁴ contracts that are the necessary fodder for broad theory. The first is the fantasy that contract law actually does much to limit opportunism except in the arid laboratories where law professors conduct their thought-experiments. The second is the illusion of mutual consent against which to measure the putative opportunism or the moral force of the promise as a rational process in either contract formation or interpretation.⁵ Most business agreements worth litigating over were, at

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3. It is a fair question whether I ever authorized the very kind of lexically opportunistic lawsuits I am criticizing here. When I was representing a client as advocate in a contract claim, I did the best I could with the language I had, but I always thought that being credible was important. As the chief lawyer for several businesses, I heeded the teaching of one of my mentors to the effect that once you get around to litigating a contract case, it doesn’t matter who the plaintiff or defendant is; there’s only a “****er” and a “****ee” and your job as a lawyer is to make sure it’s clear your client is the latter and the other side is the former. In other words, I will simply say that I put the burden on anyone trying to make a lawyer’s case for us also to demonstrate that we would be able to show we were the “****ee.”

4. I am indebted to Victor Goldberg for the phrase “Dick and Jane” contracts.

5. My particular bête noire on this topic is the contract law professoriate’s fascination with *Raffles v. Wichelhaus* (1864) 159 Eng. Rep. 375. *Raffles* was the famous case in which the parties referred in the contract to a ship named *Peerless* traveling from India to Liverpool. Amazingly, there were two ships named *Peerless*, one departing Bombay in October and the other in December. The parties claimed to have been referring subjectively to the different ships. The court held no contract to have been formed. What I find astounding is that we have not been able to find another more modern case in 150 years. I do not teach it anymore, because it strikes me as the casebook equivalent of basing an entire unit of a medical school anatomy course on Joseph Merrick, also known as the “Elephant Man.” *Mirror Online* referred to Merrick as “the best known ‘human curiosity’ in history,” and that is how I feel about the good ships *Peerless*. *Bodyshocked: Elephant Man Joseph Merrick and other...*
the time of their creation, a complex synergy of individual intentions and motivations, more or less complete communications, drafting practices, pressures, and deadlines, many of which propelled the contract to its execution as a thing, a deed, or an event, and not necessarily as a logical and coherent text. In contrast, merely focusing after-the-fact on the logic and coherence of the text is, as often as not, an economist’s simplification, a moralist’s ideal, or a lawyer’s delusion.

My purpose here is to use the dispute between J&J and Boston Scientific as a case study in lexical opportunism. In Part II, I describe the interpretation issue that led to litigation with as much as $7 billion in damages and interest at stake. In Part III, I discuss (a) what it means to engage in theoretical assessments and justifications of social institutions like contract law; (b) how the justification of contract law by way of inhibiting economic opportunism is based on the simplest of “Dick and Jane” examples, rather than the kind of contract discourse found in any real-world contract worth spending millions to litigate; and (c) how normative theory based on upholding the moral sanctity of promise keeping evaporates when the parties disagree about the meaning of their promises. In Part IV, I take account of a recent study by Mitu Gulati and Robert Scott of a particular instance, like the contract provision at issue in Johnson & Johnson v. Guidant, of a surprising mismatch between the deal and the contract, and argue that both economic and moral theories about contract law (a) fail to take account of the nature of the very language in which any contract of any complexity is drafted, and (b) depend on the naïve adoption of the correspondence theory of truth. The nature of language permits opportunism, and the only check on it is the desire, from whatever motivation, not to be opportunistic. I conclude with what I hope are some constructive thoughts about the appropriate use of theory in lawyering, and thereby mitigate my skepticism whether any single theory or discipline is capable of meaningful explanation or prediction about lexical opportunism.

II. THE CASE AND ITS CONTEXT

Guidant Corporation (Guidant) manufactured and sold sophisticated medical devices. In 2005, it agreed to be merged into Johnson & Johnson (J&J) under a contract that would pay the shareholders of


Guidant $21.5 billion. To make a long story short, once Guidant and J&J announced their deal, Boston Scientific Corporation (BSC) entered the bidding and ultimately prevailed with a $27 billion offer. Shortly thereafter, J&J sued BSC and Guidant, alleging that Guidant breached its merger agreement with J&J, and seeking expectation damages and pre-judgment interest in an amount approaching $7 billion.

The most striking thing about the facts of the case is their typicality. The players were multi-billion dollar corporations. They had sophisticated in-house lawyers and were represented by the cream of Wall Street law firms: Skadden, Arps, Meagher & Flom LLP; Shearman & Sterling LLP; and Cravath, Swaine & Moore LLP. BSC’s entry into the fray was also typical. Indeed, in deference to the fiduciary obligations running from corporate management to the shareholders (as developed under Delaware case law), public company acquisition agreements almost always provide that the first bidder can get trumped, with consideration to the original bidder in the form of a substantial, but not deal-breaking, termination fee. And as is often the case, there were antitrust concerns arising out of a reduction in the number of players in a particular market—here, the market for a device known as a drug-eluting stent. To understand the litigated issue in context, it helps to understand the contract provisions commonly used to address these fiduciary and antitrust questions.

Deal protection devices. When lawyers negotiate contracts for the purchase and sale of public companies, they walk a line between, on one hand, the buyer’s desire to lock up the deal as against other bidders and, on the other, the fiduciary obligations incumbent on the target company’s board to obtain the best deal for the shareholders. The trick is to install as much protection as possible to make competing bids difficult, but to stop short of making a competing deal impossible. The typical “deal protection devices” are termination fees, stock and asset purchase options, voting agreements, “force-the-vote” provisions, and exclusivity measures like “no-shop” and “no-talk” provisions.

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7. There are at least two odd ironies about this tension. First, the buyer’s desire to lock out other bidders cuts against the usual buyer-side incentive to do as much as possible to create an option rather than a commitment to purchase. In a theoretical sense, these do not conflict as one could indeed write an agreement that gives multiple “outs” to the buyer yet restricts the seller from soliciting other bids. But it is generally in the seller’s interest to lock down the sale, and the end result is that the best a buyer gets is a “material adverse change” condition. As the courts narrowly construe them, and it is possible to draft them to exclude exogenous events, they are not really option creating. Second, the buyer really does have to believe in the deal because if the deal protection devices work to fend off other bidders and the buyer acquires the target, it is the buyer (directly or indirectly), that will be bearing the cost of any fiduciary breach not otherwise covered by insurance.

Typical public company acquisition "no-shop" agreements walk this fine line, and the provisions in the J&J/Guidant contract were no exception. Section 4.02(a) provided:

[Guidant] shall not, nor shall it authorize or permit any of its Subsidiaries or any of their respective directors, officers or employees or any investment banker, financial advisor, attorney, accountant or other advisor, agent or representative (collectively, "Representatives") retained by it or any of its Subsidiaries to, directly or indirectly through another person, (i) solicit, initiate or knowingly encourage, or take any other action designed to, or which could reasonably be expected to, facilitate, any Takeover Proposal or (ii) enter into, continue or otherwise participate in any discussions or negotiations regarding, or furnish to any person any information, or otherwise cooperate in any way with, any Takeover Proposal.9

That is an otherwise clear prohibition that would have locked up the deal for J&J, at least as far as other potential buyers of Guidant were concerned. But what the foregoing sentence gave, the next one took away in deference to fiduciary obligations under Delaware law:

[A]t any time prior to obtaining . . . Shareholder Approval [of J&J’s takeover proposal], in response to a bona fide written Takeover Proposal that the Board of Directors of the Company [Guidant] reasonably determines (after consultation with outside counsel and a financial advisor of nationally recognized reputation) constitutes or is reasonably likely to lead to a Superior Proposal, and which Takeover Proposal was not solicited after the date hereof and was made after the date hereof and did not otherwise result from a breach of this Section 4.02(a), the Company may . . . furnish information with respect to the Company and its Subsidiaries to the person making such Takeover Proposal (and its Representatives) . . . .10

In short, the buyer gets the target’s commitment to refrain from

9. Johnson & Johnson, 525 F. Supp. 2d at 342. The contract defined a Takeover Proposal as “the term "Takeover Proposal" means any inquiry, proposal or offer from any person relating to, or that could reasonably be expected to lead to, any direct or indirect acquisition or purchase of . . . assets (including equity securities of any Subsidiary of the Company) or businesses that constitute 15% or more of the revenues, net income or assets of the Company and its Subsidiaries, taken as a whole . . . .” Id. at 343 (emphasis in original).

10. Id.
looking for another deal, but acknowledges that, as long as the target
doesn’t solicit a competing bid, the deal “ain’t over till it’s over.”

*Antitrust review.* The Hart-Scott-Rodino Antitrust Improvements Act
of 1976, as amended,\(^\text{11}\) requires a preliminary filing and a waiting
period, based solely on the size of the parties and the size of the
transaction, for every deal of this magnitude, whether or not there are
any concerns that the combination will unduly reduce competition in
any particular relevant market.\(^\text{12}\) When there is no concern, the waiting
period lapses,\(^\text{13}\) or the Federal Trade Commission (FTC) terminates it
early.\(^\text{14}\) Where there is concern, the FTC or the Department of Justice
(DOJ) issues a “second request” for documents and extends the waiting
period.\(^\text{15}\) Where there is a concern about competition, the FTC or the
DOJ can sue to block the deal (a rare occurrence),\(^\text{16}\) or, more often,
cause the parties to negotiate a divestiture to a third party so as to
ameliorate the anti-competitive effect.\(^\text{17}\)

With regard to Guidant, everyone in the industry was aware that its
acquisition by either J&J or BSC would eliminate one potential
competitor in the market for a device known as a “drug-eluting stent.”
Hence, as it was negotiating the acquisition with Guidant, J&J also was
putting in place an agreement under which it would license the Guidant
technology to Abbott Labs on a non-exclusive basis.\(^\text{18}\) BSC had a
similar issue, but had a different contingency plan: it would divest
Guidant’s vascular intervention and endovascular businesses, while
retaining shared rights to Guidant’s drug-eluting stent program.\(^\text{19}\)

*The issues and the equities.* BSC acquired Guidant in early 2006.
Guidant, now owned by BSC, paid J&J a $705 million termination fee.
That fee would have been J&J’s exclusive remedy, but for another fairly
standard provision that left in place all applicable legal rights and
remedies if Guidant’s breach were “willful.”

Again, it is helpful to step back to understand why this provision was
standard in light of the common understanding that an agreement like
the one between J&J and Guidant (a) might well operate merely to put
Guidant in play (albeit without affirmative steps to that end on

\(^{12}\) Id. § 18a(a)(2).
\(^{13}\) Id. § 18a(b)(1)(B).
\(^{14}\) Id. § 18a(b)(2).
\(^{15}\) Id. § 18a(e).
\(^{16}\) Id. § 18(f).
\(^{19}\) Id. at 343.
Guidant’s part), and (b) the presence of the termination fee. The way these deals work, there can be any number of reasons why the deal does not close and the termination fee would be J&J’s, or any similar acquirer’s, compensation for the lost time and expense. The one thing that the acquirer cannot abide, however, is that the target simply walks away from the deal because, for example, incumbent management has second thoughts and wants to continue to run the company independently. On the other hand, the typical deal structure expressly acknowledges that the target indeed may undertake, contrary to the usual explanation in law and economics for contractual restrictions, a limited form of the very opportunism contracts are supposed to prevent.

So having collected its termination fee, J&J sued Guidant in September 2006, claiming that Guidant had breached the acquisition agreement by providing due diligence materials to Abbott—the party to whom BSC was going to divest assets. The heart of the alleged breach was that Abbott did not constitute a “Representative” of BSC under the contractual definition. Moreover, according to J&J, that the breach was willful and but for this breach, BSC would not have been able to involve Abbott and complete the deal. Thus, Guidant proximately caused J&J’s expectation damages under standard contract doctrine.

The case, which survived motions to dismiss and for summary judgment before proceeding to bench trial before Judge Richard J. Sullivan of the Southern District of New York, is something of a lawyer-technician’s dream. That is not a term of approbation. Why? There is barely a single equity running in favor of J&J other than a technical construction of the definition of the word “Representative” that gave J&J the opening to throw an argument for “well, you agreed to it” against the wall and see if it stuck. As Judge Gerald Lynch, who ruled on the motion to dismiss, observed:

In essence, events followed the sequence anticipated in the Agreement, and all parties benefited, if not to the extent they had hoped: the shareholders of Guidant got a higher price, BSC and Abbott got businesses they wanted, antitrust problems were avoided, and J&J got the $705 million it had negotiated as compensation. Defendants argue that J&J suffered no fundamental wrong—indeed, that it suffered no harm beyond that for which the Agreement provided an appropriate negotiated remedy.

If Abbott and BSC had made a joint bid or had each bid separately for complementary portions of Guidant, Guidant would clearly have been entitled to provide due diligence materials to Abbott. Thus, defendants argue
that J&J’s claim is based on no more than a technicality, and amounts to a bid to grab more compensation than the parties expressly provided was available. There is considerable force to that argument.\textsuperscript{20}

But the case survived because neither Judge Lynch nor Judge Sullivan was willing to dismiss out of hand the theory that Guidant might be liable for many billions of dollars because it indeed provided due diligence materials to a party that the boilerplate provisions of this complex agreement did not clearly specify as an intended recipient.

III. A SHORT CRITIQUE OF ECONOMIC AND MORAL CONTRACT THEORY

\textit{A. Making It Fit Together}

What law professors want to do in the usual economic or moral theorizing about contract law is to make it all fit together, as though there is an ideal descriptive or normative regularity to it all. It is what I have recently begun to refer to as “contract law in the ether.” The metaphor means to evoke that non-existent substance believed as recently as the early twentieth century to constitute space.\textsuperscript{21} If you were a physicist (or, more likely, an inquirer into “natural philosophy”) in 1875, you would be up to date if you believed space consisted of an immovable ether as the substance through which bodies moved. By 1905, when H.A. Lorentz had announced his transformation and Einstein published his theory of special relativity, you might well have considered theory of ether on the order of a theory of green cheese.\textsuperscript{22} What contract theorists want to do, like scientists making sense of the physical world by positing the existence of the ether, is to make sense of contract law by justifying how all the myriad rules of the doctrine fit together. To do so, they need to posit a world in which there is either no lexical opportunism (i.e., the subsequent use of language’s inherent imprecision for strategic purposes) or no moral fuzziness (i.e., that earlier promises were made in language clear enough to impart moral force upon their breach). But neither of those assumptions holds very often in the real world.

\textsuperscript{20} Id. at 344 (emphasis added).
\textsuperscript{21} “The element once believed to fill all space above the sphere of the moon and compose the stars and planets.” AM. HERITAGE COLL. DICT. 480 (4th ed., 2002); Albert Einstein, \textit{Ether and the Theory of Relativity, in Sidelights on Relativity} 3-24 (George Barker Jeffery & Wilfrid Parrett, trans.) (1922).
There is, however, nothing new under the sun. Lest it be said that I am being controversial for controversy’s sake, my skeptical review of contract theory as applied to mergers will be only slightly less scathing than one issued by a far more eminent scholar than I, Yale Law School Professor Clyde Summers, who did something similar in 1969 as applied to collective bargaining. Commenting on the inadequacy of “ordinary contract law” in dealing with all sorts of complex transactions, he observed that Arthur Corbin, the authors of the Restatements, and other treatise compilers simplified their task of making it all fit together by pushing difficult agreements out of the contract law mainstream and into other disciplinary pigeon-holes. Hence, Professor Summers asked, “What is this ‘law of contracts’ about which treatises and restatements are written? It almost seems to be the law of left-overs, of miscellaneous transactions, the rag-tag and bob-tail which do not get treated elsewhere.” Sitting here in 2015, I feel the same way about the theory as Professor Summers did about the doctrine in 1969.

As I tell my students, the real world is inordinately complex, and it is not easy to translate our subjective desires into words that even we the parties, much less an objective third party, understand. We subject ourselves to the judgment of the community of plain meaning the moment we open our mouths to order breakfast at a local diner, just as when we reduce the description of a transfer of a business worth $25 billion from its overwhelming complexity in real life to a mere 100-page document. No academic discipline, even one as mindful of others as the New Institutional Economics, fully captures the process. Translating my practice intuitions—wakened from their un-dogmatic slumbers when I encountered the J&J/Guidant case—into academese leaves me somewhere between economics and semiotics and at some distance from legal doctrine. Organizing the signs we make to each other—by way of language or otherwise—into the institution of

24. Id. at 565.
25. For an illustration involving the order of “two eggs over easy,” see Jeffrey M. Lipshaw, The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention, 78 TEMP. L. REV. 99 (2005) [hereinafter Lipshaw, Bewitchment].
26. The New Institutional Economics is school of economic thought intended to get beyond the neoclassical focus on market level variables of price and output (as to which firms were merely “production factors”). Its proponents sought to theorize about (not just describe) the actual “play of the game” within firms and institutions. It is central to this discussion, because private ordering through contracts is one of the key institutions on which their theory depends: economic actors “devise contract and governance structures that have the purpose and effect of economizing on bounded rationality while simultaneously safeguarding transactions against the hazards of opportunism.” OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM xiii (1985) [hereinafter WILLIAMSON, CAPITALISM].
LEXICAL OPPORTUNISM

contracts does something to facilitate exchange, but probably not as much as the theorists would argue.

So I am skeptical about most of the current threads of contract theory that presume the parties were thoughtful, or even rational, when they set down the words of the contract over which they actually end up litigating disputes.27 There is indeed, as legal scholar Nathan Oman rightly observes, something even in modern and sophisticated contract practice of the ancient ritual of slaughtering an animal to “cut a covenant.”28 Yes, we have solemnly committed ourselves to something in the way of a law-endorsed remedy, albeit less gruesome than being dismembered like the unfortunate beast. But to what did we commit ourselves? We have only committed that whatever we do in the future will not be physically violent, and it is not clear to me even that is the result of the contract. When it comes to connecting what we did when we made the contract to what we do when we use the contract as a weapon (i.e., turn to law to enforce it), I struggle to find jurisprudential or philosophical rather than semiotic, anthropological, or sociological significance. Does the institution of contract make cooperation more likely? Yes, but no more than any other ritual. Does the institution of contract limit opportunism? Yes, but not in a particularly meaningful way. The opportunism may be normal, it may be understandable, it may be venal, it may be silly, it may be vindictive, it may be counter-productive, but it will not be violent. Even that statement imports more cause-and-effect than I am willing to grant. In other words, contract law incorporated non-violent remedies when society as a whole was ready to put limits on violence. We may well sublimate and channel our violent inclinations into legal claims, but any changes in the law of contract remedies are an expression, rather than a cause, of some limited progress in civilizing ourselves.29

Beyond that there is little to say except that the institution of contract

27. I have taken a shot at this thesis a couple times already, but bear with me, because it’s a hard sell. See, e.g., Lipshaw, Bewitchment, supra note 25; Jeffrey M. Lipshaw, Metaphors, Models, and Meaning in Contract Law, 116 PENN. ST. L. REV. 987 (2012).


29. I am moderately upbeat about whether we, as humans, make progress, notwithstanding 2014’s contributions to barbarism like ISIS beheadings or Boku Haram rapes. My friend, the philosopher Susan Neiman, put it well in the context of a discussion about Hegel’s historicism: “The abolition of slavery, which he didn’t live to see, and the demand for gender equality, which he didn’t begin to imagine, can both be read as confirmation of Hegel’s claims about freedom . . . And the abolition of public torture represents progress not belied by all the horrors of twentieth-century history. Foucault claimed that modern substitutes for torture are subtler forms of domination. But the fact that we can barely stand to read descriptions of things we would have brought our children to watch a few centuries earlier marks an advance in human consciousness that seems hard to reverse.” SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY 99 (2002).
law checks opportunism or upholds promises only to the extent that ex post interpretation of those before-the-fact signs remain within the bounds of the “straight-face test” and the limits of judicial patience. Professor Summers captured forty-six years ago how little else there was to say about the internal structure of the institution: “It would seem a reasonable guess, in fact, that the principles common to the whole range of contractual transactions are relatively few and of such generality and competing character that they should not be stated as legal rules at all.”\(^{30}\)

If specifics of the doctrine itself, the armaments and ammunition law professors in particular purport to marshal for litigation warriors, have always seemed a tad tedious to me, perhaps it is because, as Professor Summers puts it, they are “nothing more than a set of common problems radiating from centers of tension such as that between subjective and objective tests of control, between arm’s-length and fiduciary relations of the parties, and between freedom of contract and social control.”\(^{31}\) In other words, I have reason to believe both conceptually and empirically that the system does nothing to check lexical or other doctrinal opportunism, because most of the issues being litigated have to do with what the words mean.\(^{32}\)

It ought to be obvious that I do not have the same issues with the sociology-based “law-in-action” school of Stewart Macaulay and others (and indeed am sympathetic to it), mainly because it eschews the theoretical justification of the institution or attempts to harmonize its doctrines.\(^{33}\) Macaulay and his co-authors are correct that “there are large gaps between the law school law of contract, what happens in courts, and what practicing lawyers do[,]” and “contract doctrine clearly is only one part of what lawyers need to understand to serve their clients.”\(^{34}\) They rightly warn students against the expectation “that your professors are going to hand you a beautifully worked out, consistent, and coherent system called ‘contract law.’”\(^{35}\) And yes, indeed, contract law is, instead, “a tool that you can use to try to solve your client’s problems, rather than a set of answers to all your questions.”\(^{36}\) What I am talking about here, however, is the dark side of that last point, in which the very doctrine Macaulay deflates is the hammer being used to vanquish the other side, and there are no non-contractual relations

\(^{30}\) Summers, supra note 23, at 568.

\(^{31}\) Id.


\(^{33}\) See generally 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (3d ed. 2010).

\(^{34}\) Id. at 15.

\(^{35}\) Id. at 18.

\(^{36}\) Id.
moderating the urge to use it.\footnote{37}

In short, the J&J/Guidant litigation that prompted this reflection seems to be beyond the usual theory that either justifies contract law (i.e., economics or morality) or minimizes its importance (i.e., non-legal relations). What checks the use of the linguistic or doctrinal hammer is the individual desire not to be opportunistic, whether or not there are long-term relationships, or the desire to be reasonable when nobody really knows what the terms of the promise were. In the remainder of this Part III, I offer critiques of economic and moral theories justifying contract law. In Part IV, I explain what I think is really going on.

\textbf{B. Checks on Opportunism?}

Let us talk about opportunism as a concept informing how we think about contract law. The thesis here is that as the contracting problem comes down to cases, as in J&J/Guidant, the only real check on opportunism is non-opportunistic behavior, whatever its source in culture, morality, or self-control. How many law professors treat contract law as a check on opportunism strikes me as a case study in a kind of theoretical syncretism—an idea with traction at an abstract or institution level seeps into theories of how real people make real decisions. Then it becomes part of the disciplinary paradigm and taken for granted. If, for example, your discipline (and your career within it) are based on factoring out trust in favor of calculativeness, but trust is a real phenomenon—originating in peoples’ minds and having an effect even in economic transactions—then somebody familiar with the real world may look askance at the theory. If your theory puts aside the possibility of linguistic fuzziness in all but the simplest transactions, and works its explanatory magic on exchange transactions in which nobody can argue after the fact (with a straight face at least) that the agreement was anything other than what everybody would think it was, those of us who have spent years finding loopholes and twists in the words may be skeptical about it. People operate culturally under a rule of law, which means they respect certain limits on being opportunistic outside of governance and dispute resolutions institutions. To use a sporting example, it was clearly beyond the pale for the Olympic figure skating hopeful Tonya Harding to arrange to have a thug take a swing with an iron bar at her competitor Nancy Kerrigan’s knee.\footnote{38} Within an


institution, however, it is a game with rules, and the check on opportunism there is only that with which the player can get away. Faking a reaction to draw a charging call in basketball may be opportunistically unsportsmanlike, but it is a generally accepted form of opportunism. The players regularly test the limits of the adjudicative system (i.e., the willingness of the referee to call a foul). 39

While both theory and common sense have long associated contracts with the limitation of opportunism in non-simultaneous exchange, 40 the importation of opportunism into law professors' theoretical discussions began in earnest with the New Institutional Economics (NIE). That movement's founders, Oliver Williamson and others, were dissatisfied with how little the classical focus on price and output decisions explained the origin and function of markets and structures within them—employment relationship, make or buy decisions, corporate horizontal and vertical integrations, and so on. 41 Specifically, "received microtheory, as useful and powerful as it is for many purposes, operates at too high a level of abstraction to permit many important microeconomic phenomena to be addressed in an uncontrived way." 42 To understand economic organization, one needed to understand why certain transactions were executed across markets and why others were executed within firms. Were all transactions frictionless, i.e., not involving costs of execution, neither form of execution would be more or less efficient than the other. Hence, the NIE focused on transaction costs as the critical determinant of the forms of economic organization. 43

In turn, every exchange relationship that could be characterized as one of a contract lent itself to analysis in terms of economizing on (i.e., the reduction of) transaction costs. 44 How that happens depends upon how human beings pursue their self-interest under four key assumptions: (1) they are boundedly rational; (2) they are opportunistic; (3) they do

39. Along the same lines, "[NASCAR racer] Dale Earnhardt, Jr. explained how drivers push the rules to the limits. "We have a rule book, and it's our job or the crew chief's job to bend that rule as far as it will go without breaking it." Dan Patrick, Guest Shots Say What? SPORTS ILLUSTRATED, Feb. 2015, at 22.

40. "Thus the fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures." Richard A. Posner, Economic Analysis of Law 94-95 (6th ed. 2003) (citing Thomas Hobbes, Leviathan 70-71 (1914) (1651)).

41. Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 1 (1975) [hereinafter Williamson, Markets].

42. Id.

43. Williamson, Capitalism, supra note 26, at 17 ("I submit that the full range of organizational innovations that mark the development of the economic institutions of capitalism over the past 150 years warrant reassessment in transaction cost terms.").

44. Id.
LEXICAL OPPORTUNISM

not always operate with the same access to information; (4) they operate in environments either of uncertainty or such complexity that outcomes cannot be calculated. Hence, Williamson defined opportunism as “self-interest seeking with guile,” involving “false or empty, that is, disbelieved, that is, self-disbelieved, threats and promises’ in the expectation that individual advantage will thereby be realized.” Opportunism can be active or passive, and ex ante or ex post. Armen Alchian and Susan Woodward parsed it in more detail. An opportunist is one who has a conflict between what she wants and what she has agreed with others, and so will tend to act in her own self-interest to the extent that it will be costly for the others to know the opportunist’s behavior. Opportunism, moreover, is not just about venality. “It includes honest disagreements. Even when both parties recognize the genuine goodwill of the other, different but honest perceptions can lead to disputes that are costly to resolve.” So people do not just contract to avoid being taken advantage of or hoodwinked; they do it as well so as to avoid costly disputes “between honest, ethical people who disagree about what event transpired and what adjustment would have been agreed to initially had the event been anticipated.” Because, in Williamson’s view, “[t]ransactions that are subject to ex post opportunism will benefit if appropriate safeguards can be devised ex ante,” it might be possible to realign incentives or devise “superior governance structures” in which to organize transactions. That is consistent with the general aim of the NIE—to refocus the analysis on the interplay between markets and firms, rather than merely the abstractions of price and output. That makes sense even to me, a non-economist.

My point here is that the NIE’s focus on transaction costs brought the level of economic analysis down from a high level of abstraction to one relatively more concrete (at least in terms of broad institutional structures), but the legal focus on the particular aspects of contract doctrine as actually inhibiting opportunism takes that a step farther. Professor Juliet Kostritsky contends clearly: “Opportunism is a threat ex ante to the bargainers’ ability (and the ability of other potential contracting parties) to maximize their gains from trade. Opportunism is

45. WILLIAMSON, MARKETS, supra note 41, at 26.
46. Id. (citing I. GOFFMAN, STRATEGIC INTERACTION 105 (1969)).
47. WILLIAMSON, CAPITALISM, supra note 26, at 47.
49. Id.
50. Id.
51. Id. at 48-49.
the enemy of bargains and of efforts to achieve the maximum benefit of bargains.\textsuperscript{52}

That is the move I question. The usual justification for contract law in NIE is that it curtails the "holdup" problem, but the thought experiments demonstrating that effect are generally so simple and so divorced from problems of interpretation as not to reflect the disputes of the real world.\textsuperscript{53} The contracting relationship between J&J and Guidant was typical, but it did very little to inhibit J&J’s willingness or ability to be opportunistic. In other words, when opportunism can be lexical, what limits being opportunistic is not the existence of a contract, but the inclination not to be opportunistic. Indeed, the mark of a good lawyer is the ability to make a case out of any real world textual glitch in the same way that an opportunistic baseball pitcher can use the slightest imperfection (like a scuff mark) in a ball to his advantage.\textsuperscript{54}

The leap from economic to legal theory of contract, however, is more problematic. Williamson observed an unhelpful division between economists “preoccupied with the economic benefits that accrue to specialization and exchange” and lawyers (I am assuming primarily academic ones) who “focus on the technicalities of contract law.”\textsuperscript{55} And he approved of the legion of law and economics scholars who sought to close the divide.\textsuperscript{56} In 1985, he identified, on one hand, “the problem of trying to theorize contract law as between the “fiction of pure legal centralism” (i.e., the idea that courts routinely resolve contract issues on the basis of the terms of the contract) and, on the other, the equally fictitious idea that parties cannot or do not turn to third parties to resolve their relational disputes.”\textsuperscript{57} Indeed, trying to theorize about contracts, like the contract between J&J and Guidant, that were neither simple and


\textsuperscript{53} Alchien and Woodward observed that Williamson had not distinguished between two different forms of opportunism, the holdup problem, on one hand, and moral hazard, on the other. “Holdup” is where the value of one party's assets or resources depends on their association with those of another, and the other could expropriate rents without some \textit{ex ante} protection. “Moral hazard,” on the other hand, arises when one party relies on the behavior of another, and it is costly to get information regarding that behavior. This is best understood in the context of agency costs. For example, shareholders want managers to act in the best interest of the company. But it is costly for shareholders to know what managers are doing. So a manager might well be tempted to act in his own interest. Alchien & Woodward, \textit{supra} note 48, at 67-69.

\textsuperscript{54} The following from another long-time practitioner comports precisely with my experience: “When the unanticipated event brings significant economic benefit or detriment to a party, it has an incentive to review the contract, find ambiguities, and develop self-serving interpretations.” Torbert, \textit{supra} note 32, at 5.

\textsuperscript{55} OLIVER E. WILLIAMSON, \textit{THE MECHANISMS OF GOVERNANCE121} (1996) [hereinafter WILLIAMSON, GOVERNANCE].

\textsuperscript{56} \textit{Id.} at 122-23; WILLIAMSON, CAPITALISM, \textit{supra} note 26, at 397-401.

\textsuperscript{57} WILLIAMSON, CAPITALISM, \textit{supra} note 26, at 399.
discrete or long-term and relational—"the middle range," as he put it—were "notoriously intractable." And Williamson adopted a binary approach to transaction cost contracting that excluded the middle: one mode is characterized by careful, detailed, and thoughtful planning; the other by a "very incomplete" document.

Thirty years later, the problem of the intractable agreement, both complex and, in the economic jargon, "incomplete," still exists. The problem is the intractability of language, something the economic theory recognizes but cannot reduce to a graph. Transaction cost economics take as fundamental that contracts are as boundedly rational as the humans who write them. What makes them incomplete is that almost no contract of any complexity can anticipate all of the "state contingencies" of the future. So it is the economically inclined law professors who have tried to bring the problem of opportunism down to cases by way of theoretical approaches to interpretation, prominently among them Juliet Kostritsky, Richard Posner, Eric Posner, and the co-authors Alan Schwartz and Robert Scott. For example, some have suggested that the appropriate way to resolve interpretation issues is to determine which view maximizes the joint surplus of the transaction; as Judge Posner puts it: "Each party, it is true, is interested in just his own profit, and not in the joint profit; but the larger the joint profit is, the bigger the "take" of each party is likely to be." My issue with these theorists is not necessarily the use of economic logic to guide courts in resolving disputes, even if I still do not fully understand how courts would determine such a hypothetical joint surplus. Rather, I question the connection to the ex post check on opportunism the contract was supposed to provide.

The problem is that the analysis assumes there was something in the use of language capable of algorithmic precision in the first instance. When it comes down to cases, there is still tenuous linkage between what humans are capable of writing down in language ex ante and how that language bears up in the ex post dispute. Hence, for the economist, contract language is largely irrelevant. Williamson's summary is instructive. Transaction cost economics take account of Karl Llewellyn's description of "contract as framework," that is, something

58. *Id.* at 399.
59. *Id.* at 20.
61. POSNER, *supra* note 40, at 96; see also Kostritsky, *supra* note 52, at 45 ("This paper presents an analytical framework for choosing an interpretive methodology that can curb opportunism and implement the parties' goals to maximize joint gains.").
that "almost never accurately describes real working relations, but . . . affords rough indication around which such relations vary, an occasional guide in case of doubt, and a norm of ultimate appeal when the relations cease in fact to work."\(^62\) In other words, the main action in contract is "ex post governance."\(^63\)

The metaphor of contract as framework or, as I prefer, model or map, is insightful. Economic theory attempts to reduce our attempts at linguistic reduction to something like scientific precision, and then finds itself disappointed when the theory provides no predictive power at all. Do refinements in contract language lead to a more accurate model of reality and thus fewer instances of litigation? I doubt there is a falsifiable design of experiment for the proposition.

C. Upholding the Sanctity of Promise?

And did we make promises we are morally bound to keep? Perhaps, but only if the promise is so lexically clear as to have us absolutely sure about what we promised. Indeed, I am not, and never have been, a skeptic about moral agency. I am a skeptic about the extent to which any justification or explanation of the institution of contract law, its constituent doctrines and rules, or its practice map in any way on the act of deciding what is the right thing to do when deciding whether to call someone on a promise or to fulfill one. Once again, the theoretical discussion loses its impact as we move from high-level abstractions to cases like J&J/Guidant.

I admire Charles Fried's *Contract as Promise* and his later reflection on it.\(^64\) He wrote the book in 1981 as reaction to schools of thought that saw contract law as merely another form of social organization, and which views minimized or eliminated the role of contract law as the state's affirmation of classically liberal values like respect for persons, trust, and living up to the autonomous individual's freely assumed word. On re-reading the original volume, I now see that even though he never dug into the problem of lexical opportunism, he recognized its reality. His treatment of interpretation evokes the bizarre *Raffles* circumstance, in which "interpretation may fail to locate a core of agreement, and so at some point we must admit that the contract gives out."\(^65\) But in cases like J&J/Guidant, the parties indisputably have a contract but also seem

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63. Id.


65. FRIED, supra note 64, at 89. See also the discussion of *Raffles*, supra note 5.
not to have a core of agreement on the very words to which they agreed. Professor Fried appears to have agreed with me: the only real check on opportunism is the willingness not to be opportunistic. When we look to resolve the dispute, we look not just to law but also to values like "sharing and altruism." Hence, Professor Fried observed:

If drastic consequences hang the balance for one or the other party and we are reaching the edges of the actual agreement (and who says the boundary must always be a sharp one – the formalists, whoever they may be), inevitably there will be pressure to avoid pushing language and one's contractual partner to the wall. This is the principle of civility, which permits the smooth functioning not only of private but of civil institutions: Dubious advantages are not pressed to their limit, lest the willingness to cooperate be undermined and the necessary limitations of language and goodwill be overreached.

What is the J&J/Guidant case if not one in which drastic circumstances hang in the balance for one of the parties, and indeed the other has pressed a dubious advantage to its limit?

The problem with the moral "promise-affirming" justification of contract law is the same as that encountered with the economic models: it depends on the assumption that the parties' *ex ante* agreement was clear enough to have moral force in the resolution of the case at hand. Fried's appeal to civility rather than law as the only real check on opportunism was ironical similar to one of the theories Fried himself sought to counter: Ian Macneil's relational contract theory. In 1974, Macneil had proposed a schema of polarities as between "transactional" and "relational" contracts, one of which was "Commencement and Termination." A transactional contract at the extreme, say a one-time agreement for the future purchase of wheat (and hence subject to the parties' opportunism if the market price were to vary from the contract price), would have the attribute of being "[s]harp in by clear agreement; sharp out by clear performance." A relational contract at the extreme, on the other hand, would have far more gradual beginnings and endings.

My experience in the business world is that Macneil was correct in identifying putatively contractual relationships in which the nature of the relationship often supersedes anything written in the contract. But there is nevertheless a universe of agreements, like the one in

66. FRIED, *supra* note 64, at 89.
67. *Id.* at 89-90.
68. *Id.* at 3, n.7.
J&J/Guidant, which are neither transactional nor relational at the extreme of Macneil’s model. In those, the agreement is neither sharp in by clear agreement, sharp out by clear performance, nor generally capable of having disputes resolved in the context of long-term relationships. As another long-term practitioner has observed, the primary problem in the performance of those putatively incomplete contracts is not “gap-filling,” but ambiguity of the very language of the agreement.\footnote{70. Torbert, supra note 32, at 5.}

We need therefore to come to terms with how lawyers manipulate words and sentences, not in “Dick and Jane” contracts, but in the mapping of complex one-time transactions.

IV. THOUGHTS IN A MORE CONSTRUCTIVE VEIN

A. What is Really Happening?

So far, the most thorough study of the language of these complex but non-relational agreements is the fascinating history, empirical work, and theoretical speculation of Mitu Gulati and Robert Scott regarding the persistence of a problematic clause in scores of sovereign debt agreements.\footnote{71. Mitu Gulati & Robert Scott, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013).} The great value of their work is that it helps dispel the theoretical myth that the language bears a calculated relationship to “the promise.” I suspect the history they recount of the automaton-like inclusion of contract language is spot on, particularly in complex yet relatively uniform deals like bond issuances, and it is close to my own experience in those kinds of deals.\footnote{72. For a short time, my law firm asked me to be the underwriter’s counsel in a number of “conduit” municipal or economic development bond financings. In these transactions, private businesses avail themselves of the proceeds of government-issued bonds. The municipality or state agency actually issues the bonds, but they are backed by a letter of credit issued by a commercial bank in favor of the trustee, and the bank, in turn, has a reimbursement agreement with the company that will receive the proceeds of the financing. As in typical firm underwritings, the underwriter agrees to buy up the bonds at closing, but, in the meantime, it has marketed the bonds to its customers. The documents, which include a loan agreement, a trust indenture, an underwriting agreement, and a prospectus, while customized to some extent from deal to deal, are very much boilerplate. The following lawyers attend “document meetings” in which they routinely flip through hundreds of pages of largely unchanged verbiage: the borrowing company’s counsel, bond counsel (who putatively represents the bond trustee and the bondholder), underwriter’s counsel, and bank counsel. One of the other partners in our firm—who by this point was an antitrust litigator—told me the story of how as a young associate he had been assigned to a bond deal, and traveled to New York for a document meeting with a trust indenture he had drafted from scratch, all to the great amusement of the experienced bond lawyers at the meeting.}

Additionally, their account of how the clause continues to appear in those agreements strikes me as typical
of the way clauses like the definition of “Representative” in the J&J/Guidant agreement also appear.\textsuperscript{73}

The inspiration for the Gulati-Scott work is the fact that two highly publicized court cases demonstrated a significant interpretation problem in sovereign debt contracts with something known as the \textit{pari passu} clause. Sovereign debt practitioners acknowledge that the insertion of the clause in their contracts does not make any sense. The two cases made it clear that creditors might use the nonsensical clause opportunistically to their advantage. Nevertheless, the clause continues to appear in sovereign debt agreements.\textsuperscript{74} What I find less puzzling than Professors Gulati and Scott is the apparent irrationality of a gap between practice and “the theoretical models of how sophisticated contract drafters behaved and with the dynamic model of case law serving as the basis for contract drafting and innovation.”\textsuperscript{75} I admit that the question of the \textit{pari passu} clause in sovereign debt agreement is puzzling, but I also suspect Gulati and Scott—who are inclined to theorize in economic models that begin, and in some cases, end in rational calculation—have not fully credited rigorous, but less quantifiable, theories that explain the practitioners’ own explanation of the phenomenon as the result of “rituals, talismans, alchemy, the search for the Holy Grail, and Zeus.”\textsuperscript{76}

I am less concerned here about how the language originally arises than what the parties do with it later. From my standpoint, the key observation from Professor Gulati and Scott is this: “Where some saw the \textit{pari passu} clause as a mere relic or mere surplusage resulting from earlier drafting errors, Elliott [the creditor suing to take advantage of the \textit{pari passu} provision] saw opportunity.”\textsuperscript{77} That strikes me as precisely what J&J did with the “Representative” language in the lawsuit against Guidant. Indeed, there may be norms within the sovereign debt

\textsuperscript{73} As John Coates testified at the J&J/Guidant trial, the “topping bid” provisions like those in the J&J/Guidant deal, including the definition of “Representative,” are considerably less standard, but my early and unsystematic review of subsequent deals suggests that the J&J/Guidant litigation has not significantly impacted drafting practices as to these provisions.

\textsuperscript{74} Gulati & Scott, \textit{supra} note 1, at 11-17. The documents they studied are loan agreements between creditors and sovereign governments. The \textit{pari passu} provision, providing equal distribution standing for creditors so designated, makes no sense when the debtor is a sovereign that can never be liquidated, and therefore the creditors will never be faced with an issue of relative preferences in distribution. Compare this to corporate financing, in which tranches of debt or equity may have preferences to each other, in which tranches the creditors are in \textit{pari passu}, and which status may be altered within or among the tranches by contract.

\textsuperscript{75} Gulati & Scott, \textit{supra} note 71, at 5.

\textsuperscript{76} \textit{Id.} By comparison, see Jeffrey M. Lipshaw, Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation, 46 \textit{Willamette L. Rev.} 139 (2009) (arguing that economic models of behavior do not deserve privileged theoretical status over other disciplines).

\textsuperscript{77} Gulati & Scott, \textit{supra} note 71, at 15.
community that tended to inhibit opportunism not otherwise present in one-off instances of lexical opportunism. Professors Gulati and Scott noted that it took the vulture funds, the "pariahs" of the sovereign debt industry, to press the expansive interpretation of *pari passu*. "Almost all of our respondents agreed that Elliott had acted opportunistically, pushing an interpretation of the clause that few believed to be plausible."\(^78\)

Though the particular canons of construction may have differed in J&J/Guidant, the aim was the same: use the contract language as it existed, regardless of its source, to press an opportunistic advantage. And the cases had similar results: both settled. In the *pari passu* case, "Elliott realized a very nice return on its long-shot litigation and walked away with more than $58 million on bonds that it had purchased on the secondary market for around $11 million."\(^79\) BSC/Guidant paid J&J $600 million, less than ten percent of the total value of the possible outcome.\(^80\) Whether the settlements were windfalls, I suspect, lies in the eye of the beholder. It strikes me as significant, however, that Elliott's windfall, the result of a "pariah's" opportunism, "outraged many (and caused envy in others)."\(^81\)

What is important to me is that the after-the-fact opportunism of seizing upon text for financial or strategic advantage, one instance of which Gulati and Scott ably describe, is the rule, not the exception. It happens because our very use of language is a kind of unthinking boilerplate that only snaps into focus when we have to analyze it rather than use it. That is the subject of the next section.

**B. A Language Theory Approach to Contract Language**

Consider a reflection from the physicist, biologist, and philosopher Jacob Bronowski about the relationship of theory and confirmation in the physical sciences:

> We are here face to face with the crucial paradox of knowledge. Year by year we devise more precise instruments with which to observe nature with more fineness. And when we look at the observations, we are discomfited to see that they are still fuzzy, and we feel that they are as uncertain as ever. We seem to be running after a goal which lurches away from us to

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78. *Id.* at 157.
79. *Id.* at 16.
infinity every time we come within sight of it. 82

Contract theory, whether economic or moral, depends on precisely the opposite conceit, namely that by closer crafting of language we can better achieve correspondence between the document and the reality. It takes criticism of the very semantics of those theories to understand why language is, and always will be, the gift that keeps giving, at least in terms of being an opportunistic tool.

Let’s return to the J&J/Guidant agreement. It defines “Representatives” as either party’s respective “directors, officers or employees or any investment banker, financial advisor, attorney, accountant or other advisor, agent or representative.” The issue was whether Abbott, as BSC’s candidate for purchase of the divested assets, constituted a “Representative” of BSC under this definition, and hence qualified to receive the due diligence material. We can stipulate that the language does not so provide expressly. Hence, the parties were obliged to argue that they did or did not actually intend the language to cover Abbott (the “implied in fact” argument) or that the conventional use of the language meant that Abbott was or was not covered (the “implied in law” argument”). We can further stipulate that there was no parol or interpretive evidence as to any objectively manifested agreement as to the meaning other than the contract language itself. So the dispute boils down to whether the contractual statement defining a representative was true when applied to Abbott.

Resolving theoretical perplexity about contract language means disabusing ourselves, as contract lawyers and law professors, that any expression in language, whether in conversation or in text (constitutional, statutory, regulatory, or contractual), is always a calculated correspondence to an individual intention, much less a shared one. Indeed, contract lawyers do engage in granular wordsmithing, but that is not how people normally communicate with each other. I want to make three points to help us understand why lexical opportunism abounds. The first is about the conventional objectivity of language, even when we, as speakers, think it is highly personal and subjective. The second has to do with the conversational or textual context in which language gets used. The third has to do with the extent to our sentences in language, including those in a contract, are true in the sense of corresponding to the reality they purport to represent.

Objectivity of language. The most famous discussion on this point is what has come to be known as Wittgenstein’s “private language” argument:

[A] language in principle unintelligible to anyone but its

originating user is impossible. The reason for this is that such a so-called language would, necessarily, be unintelligible to its supposed originator too, for he would be unable to establish meanings for its putative signs.\(^3\)

Although I do not refer to Wittgenstein in class (for fear of losing my students even more than I normally do), this is basis for my initial discussion of the plain meaning doctrine in contract law. That is, not just contract language, but any language is quasi-public commitment, regardless of the individual subjective sensation to which the speaker believes the language corresponds. The minute we use words, we take the risk of there being a gap between our subjective desires and the language we use to describe them. I use the following example with my contract law students. I go into a restaurant and say, “I want some guacamole.” My wanting guacamole is a subjective desire. But I did not make up the word guacamole. That word is a tool I pull off the linguistic shelf (as it were) because it suffices to map on what I think I want. But, I tell my students, it turns out that I do not just want guacamole. Putting guacamole in my mouth evokes a particular sensation that is my private and subjective experience of guacamole. Nothing quite tastes and feels like guacamole. I could describe it to them, but when I do, the language I use, as opposed to the sensation, is not private to me.

How do I describe what I want out of the guacamole other than by language? It is not to say that all private and subjective experience is shared and objective, but there is no way to describe the subjective experience except in a language that is objective. To put it differently, if we are using language to describe our most personal sensations, we are still “objectifying” those sensations. None of us invented the word “guacamole.” It has a public and objective meaning in the same way “500 railroad cars full of watermelons”\(^4\) has a public and objective meaning. If I just use the word “guacamole,” I take the risk that what I get is not really what I want. To me, the word that describes what I want is—and this always gets a big laugh—“guacamolity.” The problem, of course, is that nobody else in the world understands what that evokes—just the right texture, spice, color, etc. Moreover, even that invented word has a certain semantic objectivity to it, because when


\(^4\) TKO Equipment Co. v. C & G Coal Co., Inc., 863 F.2d 541, 545 (7th Cir. 1988) (“Under the prevailing will theory of contract, parties, like Humpty Dumpty, may use words as they please. If they wish the symbols ‘one Caterpillar D9G tractor’ to mean ‘500 railroad cars full of watermelons’, that’s fine – provided parties share this weird meaning.”).
I say guacamolity I actually have invoked objective community word usages that would let somebody else figure out the meaning. When we add “-ity” to a word in English we know without thinking that we are creating a noun that describes a property. Specificity is the property of being specific. Particularity is the property of being particular. Guacamolity is the property of being like guacamole.

But even though I have made some progress in conveying to them the property of being like guacamole, I still have not managed to come up with words to describe my completely subjective sensation. So what I need to do is find more objective words off the linguistic shelf that can get me closer to expressing what it is I really want. So I describe my experience when my wife and I used to take her grandmother out to dinner. She was no philosopher of language, but she did understand how to turn subjective desires into objective language. “Now the fish, it’s not too dry?” “And butter, I can’t digest butter.” “How much salt?” “Haddock. Is that fishy tasting?”

The reality is that the most of our words, phrases, and sentences have a conventional meaning most of the time, and so we do not take much of a risk that we will be misunderstood in our ordinary conversation or transactions. But my point for nascent contract lawyers is that the process of using the objective medium of language doesn’t just start when we begin translating our inter-subjective “let’s do something together” into a sales agreement, a lease, or plan of merger in a two-billion-dollar deal. It actually starts the instant we begin translating our subjective desires into an objective medium, because the world just does not understand the contractual equivalent of terms like “guacamolity.” The same is true when lawyers translate from thought to paper as they write customized sentences. Some of it gets parsed granularly, but the writing manages to flow at all because so much of it is still conventional.

Words and sentences acquire their objectivity by way of their conventionality. They are objective because people understand them in a conventional way. To return to Wittgenstein, words have no inherent meaning. They are symbols. They become useful symbols because they are so widely understood. A green light does not inherently mean, “go.” It is a convention, albeit an extremely powerful one. It permits us to say objectively that a green light at an intersection means, “go.” Even simple words take on meaning because we have a shared community understanding of them. Wittgenstein refers to this in his notes on the difference between use and reflection in the choice of words. To demonstrate this in class I make the following statement: “I am your

85. WITTGENSTEIN, supra note 83, at §§ 59-70.
teacher." I then ask the students if they understand the word "teacher" in the context of me? All do. But do any of them actually apply "teacher" to me in a calculated or reflective process? Certainly, the native English speakers do not. The reason, per Wittgenstein, is that we regularly use words in context that have the effect of applying them to things or circumstances because it just makes sense in a way that we may not be able to define.

I then utter another sentence. "I am your moreh." Only students who know Hebrew will know that I have merely used the word for a male teacher. Once I explain it, all the students understand it, but it is a matter of conscious reflection. They learn the word, translate the word, and apply the word. One final example of the power of convention is the process of crossing a street if you are an American in Great Britain. You no longer look for cars; if you want to survive, you have to interpret which way to look. If you are an American, and you step into the street, you expect a car to becoming from your left. It is almost impossible not to look left. And if you look left, a car coming up from the right, which is the way it works in Britain, will hit you. And, again to get a laugh, I project a picture of the technique the British use to address the problem: "Look Left" and "Look Right" painted in the crosswalk next to the curb.

To summarize the first point, the words and sentences of the contract are objective phenomena at the time of the litigation, and there is no reason not to be opportunistic in their interpretation.

Language in context. The second point in unpacking the inherent opportunism has to do with context. The seminal work here is that of philosopher of language Paul Grice who theorizes that there is considerably more to the exchange of meaning between speakers and listeners than a collection of conventional and objective meanings to sets of words and sentences. Here, Grice’s contribution is implicature in conversation, the idea that merely referring to the conventional meanings of words will not fully capture the meaning being communicated between speaker and listener. Grice asserts that there are certain conditions or protocols that exist in ordinary talk exchanges, which he calls the Cooperative Principle. The four categories and related maxims of the Cooperative Principle are:

- **Quantity**: Make one’s contribution to the conversation as informative as necessary, but no more informative than necessary.
- **Quality**: Do not say what one believes is false or for which one lacks adequate evidence.

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87. *Id.* at 24.
• *Relation*: Be relevant.
• *Manner*: Avoid obscurity and ambiguity and be brief and orderly. 88

Among the most notable applications of Grice’s theory of meaning to legal texts has been the work of Professors Lawrence Solum and John Mikhail in constitutional interpretation. 89 I have no desire to wade into debates about constitutional texts. Indeed, what I find most insightful about Grice and contract texts is the very distinction between a conversation and a document, a point made by Professor Deborah Hellman in her respectful critique of the Mikhail piece. 90 If we are constrained by the “meeting of the minds” metaphor in thinking about contracts, there might well be more traction in applying Gricean conversational maxims to contractual language. What Gricean analysis does here is underscore that a complex contract document being litigated long after its creation is not a conversation at all.

The key is that a conversation occurs in real time, and the interlocutors can react immediately to violations of the Cooperative Principle. Here are two transactional examples. In the first one, I walk into an ice cream shop and order an ice cream cone. The person behind the counter says “would you like waffle or cake?” I respond, “I don’t want a waffle or a cake. If I wanted a waffle, I’d go to IHOP. If I wanted a cake, I’d go to Rosie’s Bakery. I want an ice cream cone.” I have violated the Relation maxim in that I have applied otherwise conventionally understood meanings of “waffle” and “cake” inappropriately in the context of this conversation. The person behind the counter corrects the problem immediately: “Oh, you misunderstood. We serve ice cream in cones. They are either waffle cones or cake cones.” And in turn I immediately become aware of my conversational error, and the issue is resolved.

The second example is one of conversational error creating humor. In Fiddler on the Roof, 91 Tevye the dairyman is going to negotiate a contract with the old rich butcher Lazar Wolf. Tevye thinks he is negotiating a sale of his milk cow; Lazar thinks he is negotiating a contract of marriage to Tevye’s oldest daughter. Hence, it is funny

88. *Id.* at 26-27.
90. Deborah Hellman, *Unintended Implications*, 101 Va. L. Rev. 1105, 1106-07 (2015) (“First, a constitution is not a conversation between its drafters and some other people and, as a result, it is unclear whether the Gricean paradigm has anything useful to say about constitutional interpretation.”).
when Lazar says "you have a few more without her" and Tevye replies that today he wants one, but tomorrow he may want two, or that Lazar tells Tevye the deal is important because Lazar is lonely. The difference between a litigated case and this one is that Tevye and Lazar Wolf figured it out before the fact, and did not somehow manage to write a contract in which it was still possible that one was referring to a daughter and one to a milk cow.

In short, when we are disputing contract interpretation well after the fact, and particularly when there is no parol evidence to support one interpretation or the other, all we can do is construct narratives of hypothetical conversations within contexts that support our desired interpretations. Indeed, more often than not, the same problems exist in contractual interpretation that Professor Hellman identified with respect to the Constitution: the purposes of the drafters may not have been obvious, it may not be clear that they intended to cooperate with later readers, and they may have "deliberately adopted language that was ambiguous or obscure, which reflected compromise and that avoided decisions about controversial issues."92

The philosopher Max Black reflected on precisely this aspect of the conventionality and context of spoken versus written language.93 While we can choose our words carefully (as lawyers sometimes, but not always, do), words are capable of being conveyors of their own meaning.94 The key is the transition from speech as evanescent sound signals to written script.95 Textual interpretation becomes a matter of speculative theory about what the speaker was thinking or the speaker’s motives rather than “the articulated expression of thought.”96 Put otherwise, the dominant metaphor is of language as a map of the thought. Black’s criticism is that trying to reconstruct the thought rather than to focus on the conventional and contextual meaning of the map is an exercise in futility.97 My point is that argument from text is what contract litigation is all about; trying to theorize about contracts as though there is an underlying and discoverable shared thought apart from its articulated expression, especially in the absence of parol evidence, is equally futile.98

92. Hellman, supra note 90, at 1106-07.
94. Id. at 69.
95. Id. at 60.
96. Id. at 57.
97. Id.
98. Larry Solum has made a similar point in the context of constitutions, statutes, regulations, and ordinances, but the point applies equally to the text of a negotiated contract. When more than one individual creates a shared text, it has, in his coinage, artificial meaning, i.e., a meaning that is something other than the natural meaning we would impute to speech uttered by a natural person.
**Language and correspondent truth.** The third point about lexical opportunism comes from a particular aspect of philosophy of language known as correspondence theory. Since Aristotle and Plato, philosophers have been asking about the extent to which language, a uniquely human capability, maps on a reality that is independent of those using it to communicate. The issue is how to assess the truth of our thoughts, belief, propositions, and judgments. In the simplest terms, what makes these "truth-bearers"—"public language sentences, sentences of the language of thought (sentential mental representations), and propositions"—true (or truer) is that they match (or match better) some portion of reality (often called the "truth-makers"). My criticism of contract theory reflects philosopher J.L. Austin’s more general objection to the "isomorphism" brand of correspondence. That is, isomorphic correspondence theory looks for a one-to-one relationship between the truth-bearing statements and the truth-making facts, and the degree of naïveté of the isomorphism has to do with extent the theorist is committed to "assigning corresponding objects to each and every wrinkle of our verbal or mental utterings." The idea of a complete contract, particularly as the economists use it, strikes me as naïve isomorphism. In other words, we will always have an incomplete correspondence between contractual language and the reality of the transaction, but our goal as lawyers is to create contracts that are linguistic truth-bearers having an increasingly precise relationship to a certain state of affairs. Like Austin, I think this aspiration of correspondence, when taken to an extreme, goes too far. It "projects the structure of our language into the world." Contracts can indeed be coherent maps of a present or future state of the world, but I agree with Austin that a contract, like any statement, "as a whole is correlated to a state of affairs by arbitrary linguistic conventions without mirroring the inner structure of its correlate."
This is why trying to ground theoretical truths about contract law—whether economic or moral—is so hard. The difficulty arises because of the gap between theories of knowledge (i.e., what the contract is trying to reflect—in correspondence theory, the truth-makers) and theories of language and meaning (i.e., the limitations of the statements that constitute the contract—in correspondence theory, the truth-bearers). To formulate economic justifications (restraining opportunism) or moral justifications (affirming promises) of contract, the theorist is obliged to assume away any gap between the theories of knowledge and meaning. In other words, for the theorist, the propositions correspond precisely to the state of reality.

Contract statements are often elliptical in the sense that economy of expression is at a premium (one of Grice Cooperative Principles). Thus, a contract might say, for example:

(C) Seller to deliver 10,000 bushels of wheat, and
   Buyer to pay $5.00 per bushel in cash upon delivery.
   Delivery to be completed before 12/31/15.

Statement (C) is a slightly more austere way of saying “The parties agree that Seller is legally obliged to deliver 10,000 bushels of wheat, the Buyer is legally obliged to pay $5.00 per bushel in cash upon delivery, and the delivery must be completed before 12/31/15.” If so, then a correspondence theorist could say that (C) is true if and only if the parties agreed that Seller was legally obliged to deliver 10,000 bushels of wheat, the Buyer was legally obliged to pay $5.00 per bushel in cash upon delivery, and the delivery was to be completed before 12/31/15. Similarly, the claim of correspondence, call it (D), for the definition of “Representative” in the J&J/Guidant contract would be:

(D) “The contractual clause ‘Representative’ is any director, officer or employee or any investment banker, financial advisor, attorney, accountant or other advisor, agent or representative” is true if and only if the parties to the contract agreed that Representative is defined as director, officer or employee or any investment banker, financial advisor, attorney, accountant or other advisor, agent or representative.

The definition in the contract is true because it matches something that really happened, namely that the parties made an agreement in reality that matches the commonly understood meaning of the contractual statement.

Here then is my j'accuse to contract theorists of almost all stripes:

104. I am indebted to my colleague, Pat Shin, who came up with this way of formulating proposition.
you are correspondence theorists, and naïve ones at that, when you claim that the impact of (D) in a contract is to constrain economic opportunism or carry moral force. That the contract truth-bearer corresponds to the truth-maker (i.e., the underlying transaction) is only a valid assumption if the transactions and their corresponding language are so simple (i.e., "Dick and Jane") that nobody would disagree about the application of the language, something belied by the fact that there is a colorable dispute.

Indeed, the naïve correspondence in contract theory has real problems at both ends of the correspondence. At one end, what is the reality to which the contract language is supposed to correspond? This takes a bit of translation from otherwise confusing terminology that philosophers use. If you believe that propositions in language must correspond to an independent reality to be true, you are deemed a "realist." On the other hand, if you believe, for example, that propositions in language can have meaning and be "true" as a result of their coherence apart from correspondence to an independent reality, you are deemed an "anti-realist." Philosopher Gerald Vision observes, however, that assessing correspondence theory requires addressing another issue, namely, what is the nature of the independent reality to which the propositions correspond? As to that independent reality, can something beyond our empirical observations be "real?" If you believe it can, you are now deemed a metaphysical realist. What this all means is that if you believe there is a reality independent of your own mind, your theory of what makes a statement about it true ought to account for such a reality. Put otherwise, correspondence theory is only about the relationship of the proposition to the reality, and makes no claims about what the corresponding reality is. It does not account for a belief, for example, that the Easter Bunny, phlogiston, or God is real.

Consider this in the context of contract language when there is no parol evidence to be found. If the only evidence of the agreement is the contract language, but the language is a map of a transaction, what is the reality of the transaction to which the language corresponds? Alan Schwartz and Robert Scott are among the most sophisticated articulators of economic theory applied to contract interpretation. They have argued that most sophisticated business people would prefer a formal rather than a contextual approach to interpretation of the contract language; in other words, they are arguing that business people prefer the reality of the transaction to be nothing more than the language used to map it. As they note, "If the parties agree on the language in which their contract was written, the court's interpretive task is limited to finding what the

parties intended that language to say.\textsuperscript{106} Therein lies the circularity and paradox of formalism and "mutual intention." Even the most sophisticated of contract formalists, contending that the agreement is nothing more than the contractual language, want correspondence between the propositions embodied in the contract, on one hand, and "what the parties intended that language to say," on the other. To me, under the assumptions I have imposed (i.e., the only evidence of what the parties intended the language to say is the language itself), the reality is as elusive as phlogiston.\textsuperscript{107}

On one end of the correspondence between language and transaction, then, we have no idea what the transaction was, precisely because the language was the only evidence the transaction occurred. The problem with naive correspondence on the other end of the correspondence is the limitless ambiguity of the language itself, particularly in its application to circumstances arising long after the use of the language. Professor Bayless Manning captured this in his "law of the conservation of ambiguity":

Elaboration in drafting does not result in reduced ambiguity. Each elaboration introduced to meet one problem of interpretation imports with it new problems of interpretation. Replacing one bundle of legal words with another bundle of legal words does not extinguish debate; it only shifts the terms in which the debate is conducted.\textsuperscript{108}

I have conceded the possibility that a transaction is so simple that there is no credible argument over the conventional language used to map the transaction. To return to contract statement (C) regarding the delivery of wheat, assume there is no other parol or contextual interpretive evidence. In theory, this contract should protect against the seller's opportunism if the market price of wheat rises to $8.00 a bushel, and the buyer's opportunism if the market price falls to $2.00 a bushel. In fact, what happens is that the market price drops, Seller tenders the wheat, and Buyer says, "Oh, you have tendered hard winter red wheat, and our deal was for hard spring red wheat." Whatever the resolution of this particular dispute, the drafter of the next contract clarifies it, specifying that the wheat to be delivered is hard winter white wheat.

\textsuperscript{106} Schwartz & Scott, supra note 60, at 570.

\textsuperscript{107} Vision puts it nicely: "At best, such reality would acquire the status of a Kantian noumenon." Vision, supra note 99, at xi.

Indeed, that is the closest to a Gricean conversation we are likely to get with respect to the text itself.

This is naïve correspondence, because, as it turns out, both the reality to be mapped and the language of the mapping it are elusive even in the simplest of cases. There is another way to make sense of what is going on, and it is consistent with Dennis Patterson's persuasive thesis about what makes any legal proposition, not just one embodied in a contract, "true." In *Law & Truth*, Patterson characterized all but one of the prevailing "modernist" views of law and truth as "nam[ing] a relation between an asserted proposition and some state of affairs that makes the proposition true." Patterson adopts what he calls a post-modernist view. What makes a legal proposition true is not that it is true if it names a relation between a proposition and some state of affairs but that it is true if a competent legal actor could justify its assertion. Doing this requires the speaker to employ the forms of legal argument. In short, "true" is a term of commendation or endorsement.

I find myself surprised to be adopting any view that goes by the adjective "post-modern," but Patterson's articulation of the philosophy underpinning of his more general view of the truth of legal propositions resonates for this critique of contract theory. He observes, "Language—its powers, its secrets—is a central preoccupation of contemporary philosophy." Hence, the post-modern view disputes the notion that propositions in language correspond and are therefore true in relation to the state of the world. "[P]ost—modernist conceptions of the word-world relation see the modernist picture of propositional, relational truth as unintelligible; a project that never gets off the ground." The key is the very language of promises, the legal enforcement of which economic and moral theories seek to justify. The post-modern view (ironically now having been articulated for well over a half-century) "breaks down the distinction between explanation and the phenomenon to be explained."

The idea of language "corresponding" with something outside language can never be cashed out because all talk of language is still *use of language*: no part of
language can be torn apart from the whole and valorized as a "metalanguage," a superlanguage or "language about language."\footnote{Id. at 162.}

When we get beyond general theory and down to specific cases, the economic and moral justifications of the institution of contract law go out the window. The only thing that makes sense of what the lawyers are doing is a particular application of Patterson’s more general thesis about legal propositions. Put aside the notion of “truth.” The post-modern view of legal propositions focuses on “practice, warranted assertability, and pragmatism.”\footnote{Id. at 161.} What makes legal propositions meaningful is the way lawyers use them in practice. In particular, as Patterson points out, “[t]he essence of law is legal argument: the forms of legal argument are the culturally endorsed modes for showing the truth of propositions of law.”\footnote{Id. at 181.} In cases like J&J/Guidant, it consists of how lawyers use legal propositions in the interpretation of texts, such as contracts). Like all argumentation, the exercise is to “convince someone of something by appealing to beliefs he already holds and by combining these to induce further beliefs in him, step by step, until the belief we wanted finally to inculcate in him is inculcated.”\footnote{Id. at 172 (quoting W.V. QuINE & J.S. ULLIAN, THE WEB OF BELIEF 86 (1970)).} What makes the assertion of legal propositions “true” in contract cases is not their doctrinal coherence or their purported correspondence to a state of affairs, but that a lawyer successfully has shown how the text and the states of affairs, beginning before the parties ever communicated and culminating in the present dispute, “hang[] together’ with everything else we take to be true.”\footnote{Id. at 159. For a similar view, see Maribel Narváez Mora, Expressing Norms: On Norm-Formulations and Other Entities in Legal Theory, 25 REVUS J. CONST. THEORY & PHILOS. OF L. 43, 46 (2015) (“It makes no sense to assert the ontological character of norms. What is advocated can be seen as a metaphysical position – a grammatical or conceptual standpoint, depending on the philosophical map in which it is inserted. It is not a true thesis about a material world nor about a world of abstract objects, but a rule of representation, an expression of sense, or a philosophical statement.”).}

It is fair to say nobody litigating the J&J/Guidant case would ever be able to demonstrate that it was true or not true, in a correspondence sense, “Representative” did or did not include the candidate for divestiture of assets. What each party undertook was a narrative meant to persuade a third party that its view of the text, combined with all the other circumstances, hung together. Contract language, at least in any case in which there is a colorable dispute, is capable of meaning derived not from correspondence to objectively verifiable fact, but from mental, or social, or conventional constructs. Hence, we are all able to be
lexical opportunists, making arguments from the text that imperfectly maps on reality. We do so by constructing post hoc but conceivable narratives about hypothetical conversations (in the Gricean sense) that would put our self-promoting interpretations in context. And this largely eviscerates the economic and moral justifications of contract law. Contracts do not inhibit opportunism, and they do not affirm moral promises except when the language is so simple that nobody can contest its meaning.

A fortiori, in circumstances like J&J/Guidant, inhibition of economic opportunism and moral affirmation of promise keeping cannot account for what is going on. Lexical opportunism, the making of the interpretive argument, is the entire game.

V. CONCLUSION

I learned from a wise boss along the way, however, not to tolerate complaining about problems unless something constructive accompanied the complaint. So I will conclude in that vein. There is a tension here between (a) on one hand, our seemingly innate teleology—an adaptive inclination to believe there is order, and even human-like intention, in the chaos—that works its way into the “science” of contract law (as it does the science of everything else), and (b) on the other hand, our obligation as theoreticians of an applied social science, as educators of professional problem-solvers, and as practicing lawyers to be reflective about whether our particular theory helps those for whom we use our skills. Just recently, a participant on the Kauffman Foundation’s entrepreneurship list-serv asked whether anybody could recommend reading on the problem of “over-lawyering.”120 I responded that the issue is a significantly tough nut because effectively it means teaching students not to use precisely the tools we just spent all that time teaching them.121

Dealing with over-lawyering means teaching and learning self-reflection to the effect, “[t]here’s more to the world than my particular take on it, and I need in this moment to defer to that.” Yet we have to do so in the face of the predominant impact of behavioral economics on contract theory—suggesting all contracts are “incomplete” but holding out the ideal of one that is complete (i.e., anticipates all future state-contingencies). As the perplexity of Gulati and Scott demonstrates,

120. E-mail from Patience A. Crowder, Assistant Professor of Law & Director, Community Economic Development Clinic, University of Denver Sturm College of Law to Kauffman’s EshipLaw list, (Feb. 2, 2015 20:06 EST) (on file with author).

121. E-mail from Jeffrey M. Lipshaw, Professor of Law, Suffolk University Law School, to Kauffman’s EshipLaw list (Feb. 3, 2015, 10:01 EST) (on file with author).
there is a real hindsight bias at work in theory, because at the time of the dispute we know that the language was not precise enough to avoid the problem—that it failed to cut off all of the conceivable conversational implicatures and left enough for the lexical opportunist to use as ammunition.

But I also wonder about the practical aspect of the reduction of document to text. No, a contract is not a conversation, but at least in these complex transactions (as opposed to the boilerplate in my Best Buy receipt or the click-through on my order from L.L. Bean) there was some conversation that preceded the document. The lawyers work to eliminate (or cancel in Gricean jargon)\textsuperscript{122} as many inappropriate implicatures as possible, but indeed they recognize that eliminating them all would be an impossible if not endless task. The contract is a backup plan, created in anticipation of a later conversation about the deal. Litigation like Elliott or Johnson & Johnson v. Guidant over an outlying interpretation arises from the serendipitous availability of sufficiently arguable language and the willingness to let one’s opportunistic inclinations overcome what others would have taken to be the conversational context. And perhaps the concept of implicature is a theoretical response to the puzzlement of Gulati and Scott to what they perceive as “obvious failures to correct errors in the formulation of historic boilerplate.”\textsuperscript{123} If we think of the evolution of contract provisions as a kind of meta-conversation, perhaps the participants simply do not believe this particular error is worth the effort to cancel the erroneous implicature.

In any event, my purpose here has not been to resolve the perplexing question of sticky but odd contract provisions. Rather, it has been to consider the limits of particular disciplinary theories when applied to a complex and interdisciplinary world. Do these academic theories, here of contract law, matter? They certainly do if you are an academic theoretician. But translating theory to practice and employing theory in the real world requires reflection on the desire to impose our own theoretical constructs onto our clients and their problems and learning how to step back from that.\textsuperscript{124}

\textsuperscript{122} Mikhail, supra note 89, at 1074-75.
\textsuperscript{123} GULATI & SCOTT, supra note 71, at 6.