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# ESSAY

## Why is There *Taylor v. Caldwell*? Three Propositions About Impracticability

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### *Introduction*

THE ONTOLOGIST ASKS: 'Why is there something rather than nothing?' We ask at contract law: 'Why is there *Taylor v. Caldwell*<sup>1</sup> or *Krell v. Henry*?'<sup>2</sup> Law and economics cannot answer the question that *Taylor* presents at all. There is no sufficient reason for the result in *Taylor*. A French judge could, if the facts were clear, decide a question of law by drawing lots or casting a die.<sup>3</sup> We on the other hand, in cases like *Taylor*, disguise the law's arbitrariness; it is still there, though. Oppositely, there is a sound economic reason that supports the result in *Krell*.

In both *Taylor* and *Krell*, the parties failed to foresee and provide for an event that, said crudely, prevented completion of their respective contracts. The cases have been allied under the topic of

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\* I would like to thank Lee Morrissey and Sharon Jones for their assistance in writing and editing this article.

1. 3 B. & S. 826, 122 Eng. Rep. 309 (Q.B. 1863).

2. [1903] 2 K.B. 740 (C.A.), *aff'd in part* 18 T.L.R. 823 (K.B. 1902).

I use single quotation marks to name pieces of language.

3. M. SCREECH, *RABELAIS* 268-72 (1979).

impracticability, yet they differ in a decisive respect: in *Taylor* the parties jointly suffered a loss; in *Krell* they did not.

The *Krell* kind of impracticability is just now coming to separate itself out as distinct from the undecidable *Taylor* kind. *Krell* is decidable. Because in *Krell* the parties suffered no loss, the court served them best (most efficiently) by discharging the defendant, but should have also ordered the return of the deposit. The impracticability of *Krell* is like that of the innovative, generally rejected *Aluminum Co. of America v. Essex Group, Inc.*, in which the court *adjusted* a long term contract which had become onerous for one party.<sup>4</sup>

The *Taylor* court too discharged the defendant. Yet, the criterion by which one conventionally justifies *Taylor* and *Krell* today is efficiency. A criterion of efficiency generally presupposes that alternative ways to decide a case differently encourage or deter behavior. Inadvertent behavior, which both *Taylor* and *Krell* involve, is by definition beyond adjudicative influence.

The classic article responding to the convention, written by Posner and Rosenfield,<sup>5</sup> while always suggestive, now appears increasingly incorrect. Or, to preserve its insights, we must make it apply more narrowly than we first hoped. I have adopted their broad use of 'impracticability' to include also impossibility and frustration.<sup>6</sup> I agree with them that the separate terms do not mark a functional distinction.

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4. 499 F. Supp. 53 (W.D. Pa. 1980) [hereinafter *ALCOA*].

5. Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

6. This Essay uses 'impracticability' as a general term covering also impossibility and frustration. The American philosopher C.S. Peirce, distressed by others' misuse of 'pragmatism', replaced that term with 'pragmaticism'. He explained the latter "is ugly enough to be safe from kidnappers." 5 C. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 414, at 216 (1934). A reader encountering in the legal literature 'impracticability' might think that something similar is going on because it is ugly too. The term 'impracticable', however, has a more honorable provenance than does 'impractical'. Dr. Johnson defined it partly by 'impossible', so even outside law and in the eighteenth century it had breadth. 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1755 & photo. reprint 1983) (unpaginated). Moreover, Blackstone used it. 1 W. BLACKSTONE, COMMENTARIES \*244. On the other hand, the *Oxford English Dictionary* records the first use of 'impractical' as by J.S. Mill in 1865. 5 THE OXFORD ENGLISH DICTIONARY 106 (1931). And at this word the *Supplement* tells us: "Delete rare." 3 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 263 (1987).

## I. TAYLOR AND EFFICIENCY

### A. *Impracticability Rules*

In this Essay, I will defend several propositions, the first being that nothing about a rule's efficiency can explain *Taylor v. Caldwell*. That explanatory deficit is immense and disquieting. Farnsworth in *Contracts* labels the case "the fountainhead of the modern law of impossibility."<sup>7</sup> Farnsworth is not Corbin: there were giants in the earth in those days. He is, nevertheless, awfully authoritative, and often gets the conventions right. A theory treating *Taylor* as an exception is like a Toynbeeian or Spenglerian theory of history that makes the Roman Empire anomalous.

There are a few ground rules, which are only provisional because their presuppositions partly cause our troubles. The term 'explain' equivocates;<sup>8</sup> stating a rule explains. The rule we seek will decide every case of impracticability. Posner and Rosenfield state "In every discharge case the basic problem is the same: to decide who should bear the loss from an event that has rendered performance by one party uneconomical."<sup>9</sup>

Impracticability rules, then, are functions whose arguments are the facts of discharge cases, and whose values are performatives,<sup>10</sup> here only 'Discharge' and 'Do not discharge'. A judge applies a rule to the facts of a case and says the indicated judgment. In the kind of case we are talking about, the parties have sustained a loss which is joint in the first instance, and the judge's job is to distribute it. This she does by discharging the promisor (promisee loses) or not (promisor loses). The partition is all or nothing.

The program of law and economics is to select *the* efficient (Pareto optimal) rule from the set of admissible rules. The program cannot get off the ground if there are no efficient rules, or more than one. That is, there must be one and only one efficient rule. Otherwise, the criterion of efficiency cannot determine the law. If no rule is efficient or if more than one are, the program fails. I will use White's definition of 'efficiency': an efficient rule

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7. E. FARNSWORTH, *CONTRACTS* § 9.5, at 673 (1982).

8. Somebody has counted 93 kinds of explanation. W. MATSON, *THE EXISTENCE OF GOD* 62 (1965).

9. Posner & Rosenfield, *supra* note 5, at 86.

10. A performative is a piece of language used to do something. 'I now pronounce you man and wife', said with requisite authority, makes it so.

"causes goods or services to be produced that have higher value than those the parties would produce" otherwise.<sup>11</sup>

The but-for test articulates the type of cause relevant here. Judge Easterbrook, an ally of efficiency, cautions: "To determine whether a rule is beneficial," that is, efficient, "a court must examine how that rule influences future behavior."<sup>12</sup> Clearly, if an impracticability rule causes no behavior, we ought not call it 'efficient'. Indeed, to consider it either efficient or inefficient is to make a category mistake like insisting that the number three either is or is not blue.

Posner and Rosenfield's sentence generalizes a remark in *Taylor*. Taylor had hired Caldwell's hall to give concerts; then the hall burned down. Taylor sued for his wasted promotional expenses. His theory was that Caldwell had not performed because he had not delivered the hall. Taylor of course lost. Blackburn, J. remarked: "[T]he question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants."<sup>13</sup> *Taylor's* answer was 'No'.

## B. *Posner and Rosenfield*

Posner and Rosenfield advocate an impracticability rule ('the Orthodox Rule') that discharges a promisor if and only if the promisee is the "cheaper insurer."<sup>14</sup>

Posner and Rosenfield argue thus: (1) 'An impracticability rule is a default rule'.<sup>15</sup> The premise is obviously true: the parties can choose who bears a risk. (2) 'The sole efficient default rule allocates risk as would the parties, if they had negotiated about the event'.

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11. White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 J. LEGAL STUD. 353, 355 (1988).

12. *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358, 366 (7th Cir. 1987).

13. *Taylor v. Caldwell*, 3 B. & S. 826, 833, 122 Eng. Rep. 309, 312 (Q.B. 1863).

14. Posner & Rosenfield, *supra* note 5, at 91 (footnote omitted). The factors relevant to determining which party to the contract is the cheaper insurer are (1) the risk-appraisal costs and (2) transaction costs. The former comprise the costs of determining (a) the probability that the risk will materialize and (b) the magnitude of the loss if it does materialize. The amount of risk is the product of the probability of the loss and the magnitude of the loss if it occurs.

*Id.*

15. A default rule is just a rule the parties may override: 'An acceptance is effective on dispatch' states one but not 'Thou shalt not kill'.

In the interesting case, the parties will expend resources writing around a different default rule. (3) 'If the parties had negotiated about the event, they would have assigned the risk of its occurring to the cheaper insurer'. They would then save *together* the difference between their costs of insuring.

Imagine that the argument is sound (it is not). The parties only save by not having to negotiate because the default rule supplies the provision they want. The saving is small. It should not cost much to negotiate an efficient clause if the parties have focused on what the clause would address sufficiently to decide not to negotiate over it. Let discharging A save the world \$.01. Still that is a reason to discharge her. But it is a less compelling reason than would be saving \$1 million.

"In *Taylor*, the court put itself in place of the parties, which it assumed were sensible business people, and attempted to determine how they would have allocated the risk had they foreseen it."<sup>16</sup> Thus, *Taylor* helps Posner and Rosenfield here somewhat.

We must reflect on the relation between the contracting parties and the supervening event alleged to cause impracticability. The event (or condition) must occur or come to the attention of the parties after they contract. The parties must have a particular mental state relative to the event. Posner and Rosenfield characterize the state by calling the event "unexpected"<sup>17</sup> and "unforeseen, or at least unprovided for."<sup>18</sup>

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16. Stroh, *The Failure of the Doctrine of Impracticability*, 5 CORP. L. REV. 195, 216-17 (1982). Cf. *Newman-Green, Inc. v. Alfonzo-Larrain* R.R., 832 F.2d 417, 421 (7th Cir. 1987) (Easterbrook, J.) ("Courts try to understand and interpret loose language in contracts . . . so that it means what the parties would have provided if they had thought about the problem expressly and spelled out their conclusions fully.").

17. Posner & Rosenfield, *supra* note 5, at 88.

18. *Id.* at 90.

We will imagine one can coherently speak of foreseeing an event. The imprecision of the law of impracticability comes partly from the incoherence of speaking this way. The imprecision itself is evidence that the law of impracticability functions badly.

A party must think of an event that has not happened yet under a description that equally denotes uncountably many other possible events. Assume illustratively that events are only different if they occur at different times. Let Caldwell foresee a fire at the hall June 11 at 3:00 PM plus  $\pi$  seconds. The probability of *that* particular event occurring is zero. On the other hand, if Caldwell simultaneously thinks of all fires occurring between 3:00 and 3:01, he thinks of uncountably many fires even if they are alike in all other respects. Nontemporal characteristics of events work identically. A fire has an intensity, a spatial location, and so forth. The empiricists had the same problems when thinking about triangles.

Premise (3) presumes that Taylor and Caldwell save the difference between their costs of insuring. That presupposes one of them insures. Of course if they fail to foresee the *possibility* of the event that causes loss, and if one reads 'foresee' naturally,<sup>19</sup> neither insures. At least the parties do not *buy* insurance. Probably on this ground, White restricts Posner and Rosenfield's analysis to "situations in which no outside insurer is involved."<sup>20</sup> The reason to exclude cases of buying insurance holds for actively self-insuring too. Inadvertent self-insurance reduces to a relative preference for risk. Posner and Rosenfield's analysis applies in *that* circumstance. It discredits the analysis somewhat to show it applies to few cases.

'The Orthodox Rule is efficient' is the conclusion from premises (1) through (3). The argument fails because the Orthodox Rule must *cause* the contracting parties not to negotiate. All of Posner and Rosenfield's premises are true but there are not enough of them. Besides (3), the argument requires a second counterfactual premise, (4), 'If the rule were other than the Orthodox Rule, Taylor and Caldwell would have negotiated'.

Now (4) is false—we have Corbin's word for it. "[W]e have little ground for supposing," he said, "that the parties thought of the possibility of fire."<sup>21</sup> Blackburn, J. said that in *Taylor* the "parties when framing their agreement evidently had not present

Assuming one can think simultaneously of more than one event, did Caldwell think of the actual fire if he thought under these descriptions: 'all possible fires (that destroy the hall) June 11'; 'all possible events that would allow discharge'; 'all possible events of June 11'? At best Caldwell thought of the fire under the second description only if the court finds impracticability, hence whatever judgment a court delivers makes the facts fit that decision. So much for the metaphysics.

Thinking of the actual fire only under some descriptions amounts in law to thinking of it simpliciter. Caldwell in legal contemplation did not foresee the fire if he thought briefly about the course of the world until Armageddon.

The law lacks a principle for choosing among descriptions. This is not news. Schwartz, for instance, sometimes a student of contract law, here writing on products liability, remarks on "a well-known description problem" that he identifies as that "whether a risk is foreseeable depends on how it is described, and the choice among possible descriptions is arbitrary." Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 693 (1985).

19. To foresee is either to expect or to contemplate. The former does not give the requisite unconsciousness to 'unforeseen'. The latter comes down to recognizing the possibility of something. That is better but iterates modal operators if read back into the usual legal 'foresee the possibility': 'to recognize that it is possible that it is possible that . . .'. See 6 A. CORBIN, CORBIN ON CONTRACTS § 1331 (rev. ed. 1962).

20. White, *supra* note 11, at 360.

21. 6 A. CORBIN, *supra* note 19, § 1331, at 356.



to their minds the possibility of such a disaster."<sup>22</sup> It is not so much that Blackburn, J. got the facts right as that his understanding of them makes them what they are.

Taylor and Caldwell did not negotiate. The reason they did not, however, is not their appreciation of the excellence of the impracticability rule. The parties simply did not perceive anything to negotiate about. The result is independent of the particular impracticability rule. The Orthodox Rule does not cause the parties to do anything; it fails the but-for test.

Kronman speaks helpfully from a context of unilateral mistake.<sup>23</sup> He says that information is instrumentally good because it helps produce efficiency.<sup>24</sup> He endorses a rule that he finds already law although unrecognized. It forbids a contracting party to rescind for unilateral mistake.<sup>25</sup> The rule therefore lets one party exploit the other by using information only the first has. Kronman admires the rule because it encourages people to acquire information.<sup>26</sup> Kronman so far has been talking exclusively about deliberately acquiring information. He also says: "The casual acquisition of information, on the other hand, need not be protected, as a disclosure requirement for casually-acquired information would have little or no effect on the production of socially useful information."<sup>27</sup> A party cannot go around deliberately inadvertently acquiring information. Neither can an impracticability rule induce inadvertent behavior.<sup>28</sup>

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22. Taylor v. Caldwell, 3 B. & S. 825, 833, 122 Eng. Rep. 309, 312 (Q.B. 1863).

23. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

24. *Id.* at 4-5.

25. *Id.* at 5.

26. *Id.* at 9.

27. F. KESSLER, G. GILMORE & A. KRONMAN, *CONTRACTS* 92 (1986).

28. "For Wordsworth, in other words, the poet [who recollects emotion in tranquility] is a man who attempts to write in obedience to the classic example of the double bind: 'be spontaneous.'" B. Johnson, *Strange Fits: Poe and Wordsworth on the Nature of Poetic Language*, in *A WORLD OF DIFFERENCE* 89, 94 (1987).

On the level of polemic not scholarship Llewellyn helps marginally here.

I doubt whether in all of the quest for social science there has ever been such hastily considered, ill-planned, mal-prepared, large-scale, so-called research as was perpetrated by Cook and Oliphant at Hopkins. But it was at Yale that the nadir or idiocy was achieved when Underhill Moore "tested out" whether law has mystical operation by an elaborate observation, metering and statistiking of the noneffect on the parking practices of New Haveners of a change in the official traffic regulations which he had arranged to keep carefully from coming

### C. *Efficient Breach*

White says that Posner and Rosenfield "focus[] on cases in which the promisor's decision whether or not to perform the contract is not an important issue."<sup>29</sup> The basis of her claim is that "the event that makes discharge a consideration in their examples is beyond the control of the performing party."<sup>30</sup> The expectancy measure of damages efficiently prices breach. An impracticability rule that qualifies that measure is pro tanto inefficient.

There is no question in *Taylor* of the choice of an impracticability rule affecting Caldwell's decision to perform. Caldwell had promised to deliver a hall but there was no hall to deliver. Caldwell breaches no matter what. Like the constraint on foreseeing, that on the choice to perform forecloses the impracticability rule from affecting behavior.

### D. *Optimal Foreseeing*

The law often drifts from requiring that an event be unforeseen to requiring that it be unforeseeable. Two purposes might impel this drift, one interesting to us.<sup>31</sup> The uninteresting purpose is: to replace a subjective with an objective test, so that a case does not turn on a mentalistic, hence not publicly observable, fact. That just economizes adjudicatory resources: it is more expensive, through discovery and so forth, to prove what was foreseen than it is to prove what was foreseeable.

The interesting purpose, although likely it is not very conscious, is to build a norm into what began as a description. Syntactically, the law derives 'foreseeable' from 'foreseen' by adding a modal operator. If objectivity alone were at stake, that operator would be alethic, giving 'able to be foreseen' or 'possibly foreseen'. But to call an event 'foreseeable' is uninformative without specification of a threshold because in a sense, albeit the wrong sense,

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to the knowledge of any trafficker.

Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL ED. 399, 400-01 (1955).

29. White, *supra* note 11, at 360.

30. *Id.*

31. See, e.g., *Waldinger Corp. v. CRS Group Eng'rs*, 775 F.2d 781, 786 (7th Cir. 1985) ("The applicability of the defense of commercial impracticability, then, turns largely on *foreseeability*. The relevant inquiry is whether the risk of the occurrence of the contingency was so unusual or *unforeseen* . . .") (emphasis added).

any event is foreseeable. Plausibly, an event foreseeable in legal contemplation is one likely to be foreseen with reasonable effort. The 'reasonable' is like that in 'reasonable person', hence the requisite foresight is the efficient amount. The operator then is deontic: 'ought to be foreseen'.

The rule 'Shoot a contracting party who does not foresee a supervening event' elicits more investment in foreseeing than the Orthodox Rule elicits. But Posner and Rosenfield do not admit that rule, because its judgment is irregular: they allow a judge to say 'Discharge', but not 'Death by slicing'. The admissible rules have in common that they assign the loss already there. The inadmissible ones augment or diminish that loss.

All the inadmissible rules are inefficient. The goal is to get the optimal quantity of foreseeing. On balance, apparently, there are no externalities from foresight. Any loss from failure to foresee falls on the contracting parties who do the failing. Then having the parties bear exactly the cost of their lack of foresight optimizes socially. They will invest in foreseeing until its marginal expected gain to them falls to its marginal cost to them. Without external economies or diseconomies, they maximize the social product there.<sup>32</sup>

All admissible impracticability rules—those that do not change the loss to the parties—ought to elicit the same level of investment. At least nobody has argued they do not. The encouragement to foresee is the loss from not foreseeing. So long as that is held constant, the null hypothesis is that its distribution does not affect the level of investment. If Taylor will sustain the loss, he will expend the effort to foresee; oppositely if Caldwell will sustain it. If the loss is divided,<sup>33</sup> a diminution in foreseeing by one party

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32. For a discussion of search, which is really what is going on here, see Craswell, *Precontractual Investigation as an Optimal Precaution Problem* 17 J. LEGAL STUD. 401 (1988).

To describe a risk as remote is not to say that a firm had no idea at all that its product could cause great harm. A risk is remote when a firm either (i) was ignorant or (ii) believed great harm unlikely, and research to correct either impression was not cost justified.

Schwartz, *supra* note 23, at 718.

33. The *expected* loss can be divided even if, as we have been assuming, the judicial choice is only between 'Discharge' and 'Do not discharge'. A party can have any probability of sustaining a loss, depending on the impracticability rule. A 0.5 probability of sustaining it is (if a party is risk neutral) equal to a certainty of sustaining half of it.

offsets an increase in that by the other.

Posner and Rosenfield say: "[I]f one party is a superior risk bearer, the *entire* loss should be placed on him in order to encourage future parties similarly situated to insure or take other measures to minimize the economic consequences of nonperformance."<sup>34</sup> The cheaper insurer might also be the cheaper foreseer. But that must be argued for; so far, nothing correlates good insuring with good foreseeing. If there is a difference between the parties in foreseeing skills, a rule better than the Orthodox Rule is 'Discharge a contracting party unless she is the cheaper foreseer'.

In summary, impracticability rules do not affect parties' behavior after contracting, and do not affect it at contracting, other than to divide a constant quantity of foreseeing between the parties. Therefore, a criterion of efficiency gets no purchase. That much is clear without taking account of rules that change the parties' loss. Relative to them, the rules that do not change the loss all optimally encourage foreseeing. Still a judge has no basis in efficiency on which to choose among these rules.

## II. *TAYLOR* AS UNDECIDABLE

The second proposition I will defend is that just as efficiency cannot decide *Taylor* and like cases, neither can any other criterion.

### A. *Data*

A reader of the literature on impracticability is astonished that at this late date, 125 years after *Taylor*, it is so tentative and unsuccessful. There is of course nothing tentative about Posner and Rosenfield. But aspects of their article that are critical of traditional (noneconomic) investigation are especially convincing. The authors disparage theories of impracticability antecedent to their own (1977). They say *either* a theory advocates "a broad and undefined judicial discretion, the result of amorphous, ad hoc concepts such as fairness, equity, and justice," *or* it is "complex, arbitrary, at times almost incomprehensible" yet not "systematic."<sup>35</sup>

That critique, by authors intolerant of techniques besides

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34. Posner & Rosenfield, *supra* note 5, at 114.

35. *Id.* at 87.

their own, might be unrealistically negative. Still, more sympathetic scholars do not assess differently. Halpern describes, with some poetic license, a student of impracticability, *A*, having to "live with" *B*, who is "unsatisfying," although *A* "yearn[s] for" *C*.<sup>36</sup> His is one of the most erotic passages in contract law. In its conceit of unrequited love, *B* is "doctrinal compromises" at impracticability, *C* an elusive "comprehensive and consistent doctrinal solution."<sup>37</sup> That comes from the final paragraph of a careful article. Halpern is recapitulating the law. Yet he writes like Yeats contemplating Maude Gonne.

Let us concede that the law of impracticability is not as it should be and try to explain the trouble. I do not think that anything contingent is going on here. If it were, scholars of impracticability, who are likely to be no less able than other contracts scholars, have had an extraordinary run of bad luck. Something makes *necessary* our collective failure to construct a satisfactory rule.

## B. *Rationale*

Pretend for a moment that an unspecified criterion, call it '*X*', is the only true one—*X* might be efficiency, might be something else. *X* can fail to guide a judge two ways. The facts of the case might have no significance for *X*. That is how Part I made *Taylor* undecidable. There, *X* being efficiency, it could, Judge Easterbrook admonishes, only evaluate behavioral consequences, and there were none. Caldwell could not perform; the parties did not foresee the fire.

Or the facts of a case significant for *X* can offset each other. If there are no discontinuities, a kind of fixed point theorem assures that this even balance for *X* occurs at *some* case. If *X* is, for instance, virtue, circumstances can vary imperceptibly from litigant *A* being virtuous and litigant *B* lascivious<sup>38</sup> to the converse. At some case then *A* and *B* are at the same place on the virtue-lasciviousness scale.

We may generalize from a single criterion *X* to multiple crite-

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36. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon"*, 135 U. PA. L. REV. 1123, 1178 (1987).

37. *Id.*

38. The opposition is from Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988).

ria,  $X_0, X_1, \dots, X_n$ , applied successively or in weighted combination. Still there will be a case we cannot decide. The only change is that we assess cases in  $n$ -dimensional space,  $n > 1$ .

We just *call* that undecidable case a 'case of impracticability'. It is a hypothetical case, undecidability's Platonic form, imperfectly realized in the actual world. I think that is what is going on. We categorize as about impracticability those cases our regular rules cannot decide. Then 'impracticability rule' means a function having arguments only at that point in our space that is ruleless. We get multiple arguments for the function, different cases of impracticability, by adding functionally irrelevant dimensions to our space. If a case is undecidable, and lasciviousness not a criterion, changing a party's lasciviousness will give a factually different case, not less undecidable. If 'rule' imports something besides chaos, 'impracticability rule' becomes an oxymoron.

### C. *Will and Fault*

*Taylor* is a fine actualization of this undecidable case,  $X$  being efficiency. Also, we can see roughly already that its facts do not allow us to decide it by other criteria. The situation, crudely, is that Taylor and Caldwell, having sustained a joint loss, have *no* salient characteristics that let us designate either to bear it other than arbitrarily. We require more description to decide *Taylor* in a principled way. That implies there *are* other criteria. We should entertain the possibility that efficiency is the only criterion. Descriptions of ostensibly separate criteria may be the admonition 'be efficient' more restrictively stated for narrow circumstances. For example, the rule that gives expectancy damages instructs 'be efficient' by circumlocution.

We could make two kinds of changes. We could add a clause to the contract: 'Taylor (Caldwell) is to bear the lost promotional expenses in case of fire'. Or we could have Taylor or Caldwell intentionally or negligently set the fire. Immediately we can decide *Taylor*. Our criteria are that the parties can make the contract they choose (will) and that anyone who causes a loss bears it (fault). We may reduce either criterion to efficiency.<sup>39</sup>

Now we have a choice: we may speak of *Taylor* thus changed

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39. On will, consult Posner & Rosenfield, *supra* note 5, at 98; fault is routinely assessed by the Hand formula, itself an efficient rule.

as a case of impracticability although an easy one, or of it as now not a case of impracticability at all. The latter conceptualization is better. We must speak thus starting somewhere or proceed imperceptibly until *Marbury v. Madison*<sup>40</sup> becomes a *very* easy case of impracticability because its litigants did not contract. *Taylor* changed, then, is a case about the wills of the parties or about fault. Also if the contract does assign the risk, the contracting parties foresaw the event.

A curiosity of Farnsworth's great *Contracts* is instructive here. The book teaches: "The party who claims that a supervening event frustrated his performance must meet four requirements."<sup>41</sup> Then: "First the event must have 'substantially frustrated' his 'principal purpose' . . . ."<sup>42</sup> What is left? At least: "Third, the frustration must have resulted without the fault of the party seeking to be excused" and "Fourth, that party must not have assumed a greater obligation than the law imposes."<sup>43</sup> It is a bad mistake unusual for so careful a scholar to define a word using itself. The seeming redundancy of Farnsworth's requirements three and four points up they are out of place in impracticability.

#### D. Other Criteria

We think: maybe a single, efficient impracticability rule is maximally fair. We sometimes *prefer* fairness, that is, put a nonzero price on it.<sup>44</sup> Courts supply it. Fairness is less decidable than efficiency. Judge Easterbrook starts his analysis of a case: "We may dispose summarily of the argument from 'common sense and elemental justice.'"<sup>45</sup> His point is that justice or fairness is supervenient on the more tangible facts of a case. In *Taylor* unchanged, without a clause in the contract that assigns risk and without fault, we cannot distinguish the parties by the fairness of putting the loss on one of them. There must be something, fault or whatever, that makes putting the loss there fair.

It is arguably maximally fair to divide the loss. Generally, do-

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40. 5 U.S. (1 Cranch) 137 (1803).

41. E. FARNSWORTH, *supra* note 7, § 9.7, at 690.

42. *Id.* at 691 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981)).

43. *Id.*

44. Kahneman, Knetsch & Thaler, *Fairness and the Assumptions of Economics*, in RATIONAL CHOICE 101 (R. Hogarth & M. Reder eds. 1987).

45. *In re Iowa R.R.*, 840 F.2d 535, 536 (7th Cir. 1988).

ing that requires that Posner and Rosenfield's function have values beyond 'Discharge' and 'Do not discharge'. Dawson, disapprovingly, acknowledged the possibility of and cited authority for dividing the loss: "[S]ome have strongly urged, that reliance losses should be split—presumably divided by two or by whatever number of parties there may be."<sup>46</sup>

Dawson, however, continued: "This solution seems to me no more rational than appointing some neutral person to toss a coin."<sup>47</sup> For 'rational' read 'fair'. That is an insightful remark. We best interpret Dawson to say that to be unfair in a context where there is no good reason to assign the loss to either party is to assign it for a bad reason. We want to assign it for no reason at all. The intuition that supports dividing the loss only excludes bias. But we exclude bias by resorting to a random process. There is nothing to choose between distributions reached randomly. Or a preference for dividing the loss is at best a weak basis to decide cases like *Taylor*.

If all else fails, we think, we could adhere to precedent—just follow *Taylor*. But we have not done that. Following precedent is conventional behavior. To get a system of precedent off the ground, its participants must share or largely share a similarity relation between cases. Any case is a precedent for any other using *some* relation. Without a similarity relation a court is a tower of Babel. But 'Decide this case like *Taylor*' does not tell a court or the parties how to go on.<sup>48</sup>

### III. *KRELL* AND EFFICIENCY

The third proposition I will defend is that there is a class of cases including *Krell v. Henry*, subsumed under impracticability, yet unlike *Taylor* decidable.

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46. Dawson, *Judicial Revision of Frustrated Contracts*, 1982 JURID. REV. 86, 90 n.11 (citing Dobbs, REMEDIES pp. 268-69; comments in 69 YALE L.J. 1054 (1960) and 18 CHI. L. REV. 153 (1950)). To a Harvard professor, Yale and Chicago comments, the one experimental, the other dogmatic, are unlikely authoritative.

47. *Id.*

48. See generally S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); Goodman, *Seven Strictures on Similarity*, in EXPERIENCE & THEORY 19 (L. Foster & J. Swanson eds. 1970).



### A. *Lack of Loss in Krell*

Krell had for June 26 and 27 let Henry a flat from which to view processions connected to crowning Edward VII. The king became ill with appendicitis and the processions were postponed. So Queen Alexandra knew where he was for a while.<sup>49</sup> Krell sued Henry for the unpaid balance of the rent on the rooms: £50.52.<sup>50</sup> Williams, J. decided Edward's illness had frustrated the contract.

In a recent article,<sup>51</sup> Wladis discovers that postponing the processions "completely changed the complexion of the" case from what it would have been had they been cancelled.<sup>52</sup> What changed was that a "difficult loss allocation question had become simple."<sup>53</sup> Actually it just went away because there was no loss to allocate. Wladis reasons as follows. The postponement did not injure Krell. June 26 and 27 were days of great value for Krell's flat. The postponement just replaced them by August 3 and October 11, the days for which the procession was rescheduled. Nor did the postponement hurt Henry. He could rent a flat again, perhaps even Krell's, on August 9 and October 11. This absence of loss is an economic fact on which the law operates.

I think Wladis is right that Krell and Henry lost nothing. But next he makes a wrong inference: "The *Krell* case can be deleted or reduced to the status of a footnote case."<sup>54</sup> Not *Krell*. The canon has to count for something. Farnsworth in *Contracts* calls *Krell* "the fountainhead of the doctrine of frustration."<sup>55</sup> A fountainhead is not a puddle. So Wladis is speaking controversially. He adds: "If [*Krell*] is retained, it ought to be taught not as a case of general application but as a case reaching an equitable result on the unique set of circumstances surrounding Edward VII's postponed coronation."<sup>56</sup> Wladis is wrong because *Krell*-like cases are

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49. "In a sense it was Queen Alexandra that spoke Edward VII's epitaph. 'Now at least,' she told Lord Esher, 'I know where he is.'" *Other Comments*, FORBES, July 11, 1988, at 24 (quoting R. COLLIER, RAINBOW PEOPLE).

50. Henry dropped his claim to his deposit of £25. I pretend that the entire rent was the £50.

51. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575 (1987).

52. *Id.* at 1619.

53. *Id.*

54. *Id.* at 1630.

55. E. FARNSWORTH, *supra* note 7, § 9.7, at 689 (Farnsworth freely finds fountainheads).

56. Wladis, *supra* note 51, at 1631.

as plentiful as blackberries.

## B. *Creating Risk in Gaon*

A second *Krell*-like case is *Albert G. Gaon & Co. v. Société Interprofessionnelle des Oleagineux Fluides Alimentaires*,<sup>57</sup> a Suez Canal case. I assume the parties did not foresee that the Canal might close. The loss here is not zero but below the apparent loss. Gaon, by two contracts, agreed to sell 2500 tons of Sudanese groundnuts (peanuts) to Société. The contracts were c.i.f. Nice and Marseilles. So Gaon had to get them there. The contemplated route, Canal or not, was east to the Red Sea. Hence the groundnuts would have reached saltwater only slightly south of the Canal and their destination was near its other end. Closing the Canal lengthened the distance almost as much as it could: from 2300 to 10,500 miles.

Gaon defaulted and Société sued in London for the differences between the contract prices and the market price at Nice and Marseilles. It recovered these differences. The opinion by Lord Justice Seller in the Court of Appeal is a fair sample of all the opinions in *Gaon*.

[T]he changed circumstances gave rise to a change in the performance of the contracts by the sellers, but it is not so fundamental a change that it can be said to be commercially different or of such a character that the parties at the time of the making of the contract, if they had considered the position, would have said with one voice that in those circumstances their bargain would be at an end.<sup>58</sup>

If *Gaon* had the purity of *Krell* it would go like this. Closing the Canal caused an increase  $X$  in the cost of transportation. Gaon must incur it. Closing the Canal also caused the same increase  $X$  in the price of groundnuts at Nice and Marseilles. Société could realize it.<sup>59</sup> In the pure form of *Gaon*, closing the Canal causes no loss to Gaon and Société jointly. They just collect  $X$  from Société's buyer and remit  $X$  to Gaon's carrier. It does not matter that Société may have sold the groundnuts before the Canal closed. Say it

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57. [1960] 2 Q.B. 318 (C.A.).

58. *Id.* at 362.

59. The change in cost would equal the change in price if the Sudan were the only supplier of groundnuts, and if the demand for groundnuts were perfectly inelastic.

sold them to A. The analysis proceeds identically with 'A' substituted for 'Société'. The parties have shifted the increase in the cost of transporting the groundnuts forward. The analysis succeeds unless Société (or A) is the end user of the groundnuts. In that case there is not a nonparty further along the chain to shift the loss to.

The actual numbers in *Gaon* were these. The contract prices were £49 10s. and £54 per ton; the market price was £62 5s. Therefore Société recovered £12 15s. and £8 5s. The contract price probably reflected the market price when the parties contracted. Closing the Canal increased the cost/ton of transporting the groundnuts from approximately £6 to between £27 9s. and £29 5s. Hence the parties passed on about half their joint loss.

Assume the pure case again. The Court of Appeal in *Gaon* did contracting parties similarly situated a disservice by creating a risk. Compare three possible worlds: (1) the Canal stays open and the parties perform the contract as they anticipated; (2) the Canal closes and the court decides against Gaon; (3) the Canal closes and the court discharges Gaon. (3) is equivalent to (1) in terms of the parties' expectations. (2) is equivalent to (1) and (3) *plus* the risk—contingent on the Canal closing—that Société will gain and Gaon will lose about £22 per ton. Had it not discharged Henry, the court in *Krell* would have created an equivalent risk that Henry would lose and Krell gain £50.

Think of a risk as a kind of negative cow. The world comes with both cows and risks. "The air is not so full of flies in summer as it is at all times of invisible devils."<sup>60</sup> For 'devils' read 'risks' in the modern way. A cow is on balance a good thing so that if a court could inexpensively create a cow it should. A risk is a less concrete bad thing. But a court *can* create a risk. In *Gaon*, it is as though the court said: 'You have the contract you wrote plus a bet on the closing of the Canal'. If the parties in *Gaon* or *Krell* had wanted to wager on the Canal closing or the king getting sick they could have done that separately. Even then it might have been illegal. The closing of the Canal being unforeseen, the court could have given the parties the contract they wrote by discharging Gaon. The simplest rule efficient for these cases is 'Discharge a promisor if and only if there is no (or disproportionately little) loss'.

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60. A. HUXLEY, *THE DEVILS OF LOUDUN* 171 (1965) (quoting R. Burton).

### C. *The Remedy in ALCOA*

Most students of *ALCOA* reject the case. Dawson was a profound scholar who often stayed calm at doctrinal calamities. In the course of a single article, however, he called *ALCOA* "grotesque," "bizarre," "a lonely monument on a bleak landscape," and "the frustrated venture of a single trial judge whose fancy was unusually free."<sup>61</sup> Certainly courts have declined to invoke *ALCOA*.<sup>62</sup> Halpern excels at tropes as we have seen.<sup>63</sup> Discomfited, he displays two at *ALCOA* to convey its disuse: the "judicial sands have shifted more to cover over *ALCOA* than to expand on it"; *ALCOA* "has virtually faded into obscurity."<sup>64</sup>

The facts of *ALCOA* are these. In 1967, the parties entered into a contract that Essex could extend through 1988. *ALCOA* promised to process Essex's alumina into molten aluminum. Essex promised to pay *ALCOA* a price determined partly by the Wholesale Price Index — Industrial Commodities. *ALCOA* set a profit of about \$.04 per pound and foresaw that varying by up to \$.03. The parties did not set the price at *ALCOA*'s costs plus a profit because then *ALCOA* must reveal its costs and would have no incentive to produce cheaply.

In the 1970's, because of the oil crisis, the price of electricity, which smelting aluminum consumes in large quantities, rose much faster than the Index. The price of energy in general rose. And more directly, oil is used to generate electricity. Hence there was "a 500% variation of costs to Index," which of course *ALCOA* did not foresee.<sup>65</sup> Also: "[T]he court specifically finds that when the contract was made, even people of exceptional prudence and foresight would not have anticipated a need for this additional limitation . . . ."<sup>66</sup> The economist Alan Greenspan, whom *ALCOA* consulted and who did not foresee the failure of the Index, functions here as an ideal observer. Essex's cost of aluminum was \$.3635 in

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61. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1, 26, 28, 35 (1984).

62. See, e.g., *Groseth Int'l v. Tenneco, Inc.*, 410 N.W.2d 159, 166 (1987) ("We cannot accept the logic in *ALCOA* . . . .").

63. See *supra* text accompanying note 36.

64. Halpern, *supra* note 36, at 1127.

65. *ALCOA*, 499 F. Supp. 53, 65 (W.D. Pa. 1980).

66. *Id.* at 64 n.5.

1979; at that time the resale price of aluminum was \$.73313.<sup>67</sup> ALCOA was losing the difference.

In *ALCOA*, as in *Krell* and the pure *Gaon*, there was no loss to the parties jointly. ALCOA just made transfer payments to Essex. Judge Teitelbaum saw this. His language is exactly right. He said, "A significant fraction of Essex's advantage is directly attributable to the corresponding out of pocket losses ALCOA suffers";<sup>68</sup> "[O]ver the entire life of the contract it will lose, out of pocket, in excess of \$60 million, and the whole of this loss will be matched by an equal windfall profit to Essex;"<sup>69</sup> and finally "The equivalence of ALCOA's loss and Essex's gain may distinguish this case from the concededly more difficult 'Suez cases.'"<sup>70</sup>

The court reformed the contract to allow ALCOA the least profit it foresaw. But Alcoa and Essex settled before the remedy was put into effect. The rule White<sup>71</sup> prefers in *Gaon* is that a court measure damages to the promisee by the *net* loss caused by the event plus default. That protects a promisee without creating a risk. Judge Teitelbaum, in *ALCOA*, in effect followed White's rule. *ALCOA* being a pure form of *Gaon*, even purer than *Krell*, there were no damages.

## Conclusion

The two most significant cases of impracticability must be *Taylor* and *Krell*. They are Farnsworth's fountainheads and part of our heritage in contract law. They shape our thought as does *King Lear*. Yet functionally they are not related. *Taylor* is undecidable because a court might distribute their joint loss equally well to Taylor or Caldwell. Oppositely, because the parties sustained no loss, *Krell* is decidable by discharging Henry.

I have argued that no impracticability rule succeeds for two taxonomic reasons. First, necessarily there is not a rule to decide cases like *Taylor*. These are cases of impracticability *because* they are undecidable; the category of impracticability is a repository of them. Second, as things stand, an impracticability rule must ad-

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67. *Id.* at 59.

68. *Id.*

69. *Id.* at 66.

70. *Id.* at 66 n.8. Judge Teitelbaum did not cite *Gaon*.

71. White, *supra* note 11, at 370-73.

dress both *Taylor* and *Krell*, which are functionally unrelated. Then stating an impracticability rule is like making a claim that is simultaneously true and interesting about the class of prime numbers and Kirk's dik-diks. The predicates that commend themselves, for instance, 'furry, if not abstract' or 'all but one odd, if not ruminative', are awkward. Others, like 'existent', are uselessly vague.