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A COMMENT ON DEAN CLARK

Anthony T. Kronman*

Dean Clark's wideranging article takes as its point of departure a problem in corporate law—or more precisely, in corporate law scholarship—but this problem is for him simply an occasion to discuss a broader set of questions concerning the nature and comparative advantages of three different sorts of norms, norms that in Dean Clark's view play a legitimate role in law, and in many other areas of social life as well. His article is thus not centrally about corporate law, or even the law in general. Its real subject is an even wider one: the normative ordering of human conduct in all its different facets. It is clear that Dean Clark's main interest is in this larger topic, and I shall treat his article as an invitation to offer some similarly broad comments of my own.

Dean Clark's target is the so-called "contractual" theory of law, a theory that has in recent years become particularly prominent in corporate law scholarship (though of course not only there). The strengths and weaknesses of the contractual theory have been spotlighted in the debate, to which the articles in this Symposium are devoted, over the role of mandatory rules in corporate law, and the wisdom of permitting parties to opt out of requirements that have traditionally been regarded as compulsory. Because Dean Clark's argument is directed against the contractual theory of law, it will help, I think, to begin by asking what it is that proponents of this theory hold.

Assume that two parties have made an agreement to exchange goods or services—any sort of agreement, not necessarily the kind with which corporate law is specifically concerned. At a minimum, both must believe they will be made better off by the agreement, for if either does not, he will refuse to accept its terms. If we assume, in addition, that each is also able to judge his own self-interest accurately (a controversial assumption, as I discuss below), then it follows that their agreement must in fact be mutually beneficial, as the parties themselves believe. And if no one else's welfare is decreased as a result, it further follows that the overall welfare of society must increase too. That being so, proponents of contractualism argue, the agreement should be enforced.

The word "enforced," however, immediately conjures up something beyond the agreement itself, namely, the background rules and

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institutions of the legal order that are implicitly assumed whenever we speak of enforceable agreements or contracts. In fact, if we think of the parties not merely as agreeing, but as contracting, it is obvious that their undertaking presupposes the existence of a wide range of background rules. Such rules include those that specify how contracts shall be formed and enforced, as well as those that indicate what performance the parties are obligated to render, in the absence, at least, of any agreement to the contrary. Every contract presupposes some legal background of this sort—the very idea of a contract implies as much—and what makes contractualism interesting is that it purports to offer a model for explaining, and for evaluating, this legal background. Indeed, if it did not claim to do that, contractualism, whatever its contributions to other areas of political thought, could hardly be called a theory of law at all.

But of course the rules that form the legal background for any particular agreement have not themselves been invented by the parties to it. These rules antedate the parties’ agreement, in contrast to those provisions which the parties have actually created on their own. It follows that the legal background to a contract cannot be described, or critically evaluated, by asking whether it is part of the structure which the parties have constructed for themselves, since by definition it is not. At this point, contractualists must resort to the device of a hypothetical agreement if they are to make any theoretical headway at all.

Hypothetical contract arguments are now a familiar feature of the academic legal literature. In general terms, such arguments assert that if (contrary to fact) the parties to a transaction had deliberated beforehand about a particular background rule, they would or would not, as the case may be, have agreed to adopt the rule and be governed by its requirements. All hypothetical contract arguments have this formal structure.\(^3\) Before any specific conclusion can be drawn from such an argument, however, it is obvious that one must make a number of additional assumptions about the information the parties bring with them to their imaginary deliberations and also about their preferences or tastes (are the parties, for example, to be presumed risk neutral or averse?). Unless one makes some such assumptions, no judgments of any kind can be reached concerning the parties’ agreement. Different assumptions about their information or tastes will yield different conclusions, which is why arguments from hypothetical agreement are so often controversial.

The point I want to stress now, however, is a different one. In the case of actual agreements, it is possible to infer the mutually beneficial character of an arrangement from the fact that the parties have agreed to it themselves (though this inference depends, as I emphasize below,

on contestible empirical assumptions). In the case of hypothetical agreements, however, no such inference is possible, for the obvious reason that it is entirely up to us, the framers of the hypothesis, to say what the imaginary parties to any such agreement will agree to in the first place. And the only way we can do that is to decide what arrangement best serves their mutual interests, given the information and preferences we have assigned them. Once that decision has been made, we simply infer their agreement to the arrangement in question, whatever its features may be, and since the parties themselves are figments of our imagination, it is impossible—conceptually impossible—for them ever to reach an actual agreement that conflicts with the one we attribute to them.

The inference in all hypothetical agreements must therefore be from mutual benefit to consent, rather than the other way around, as in the case of actual agreements. But this means that once we have decided that a particular legal rule will maximize the parties’ welfare, given the assumptions we have made about their knowledge and tastes, the assertion that they would themselves hypothetically agree to its adoption adds no independent justificatory force of its own, for this last claim follows automatically from—it is entailed by—the rule’s welfare-enhancing character. Put differently, once we have concluded, for whatever reasons, that a rule is welfare-enhancing, the assertion that the parties to a hypothetical contract would voluntarily choose it adds nothing but rhetorical force to our conclusion; it is, so to speak, pure window-dressing. Hypothetical contract arguments are thus not really contractualist at all. They explain and justify their conclusion by an appeal to considerations of welfare alone, the latter providing their necessary and sufficient conditions. In arguments of this sort, contractualism is therefore something of a misnomer. A better term would be welfarism, for in the case of hypothetical contracts it is to the welfare of the parties, and that alone, that one must look, in the absence of any other basis for imputing an agreement to them.

What about actual agreements? What is their status within the contractualist theory of law? For the theory to be consistent, the justification that it offers for the adoption of certain background rules must be the same as the one it offers for honoring actual agreements, to the extent it insists that such agreements be enforced. But actual agreements and hypothetical agreements (which must be relied upon to justify the background rules) do not in reality share the property of being agreements; they share it in name only. What they do share (potentially, at least) is the property of being welfare-enhancing, and so if actual agreements are to be justified on the same grounds as hypothetical ones it must be by appealing to considerations of welfare too.

So far as their welfare effects are concerned, however, there is an obvious difference between hypothetical and actual agreements. Hypothetical agreements are always welfare-enhancing: they are so by defi-
nition, for the reasons I have indicated. Actual agreements, by contrast, need not be and sometimes aren’t. Whether they are or are not welfare-enhancing is a contingent matter that depends on various factors including, importantly, the information possessed by the parties at the time they make their agreement. Put differently, there is always a logical possibility that agreement and welfare will not coincide in the case of actual agreements, but no such possibility in the case of their hypothetical counterparts. Contractualists who maintain that agreement and welfare always, or often, coincide in the first case too can do so, therefore, only on empirical grounds, by arguing, in effect, that the parties always, or generally, know best.

I am not interested here in debating the plausibility of this last claim, but only in pointing out what kind of claim it is: a claim based upon contestible factual premises. Of course, one might argue that actual agreements should be honored, period—not because they promote the parties’ welfare (which they may or may not), but because the parties are entitled for moral reasons to have their own, possibly mistaken, judgments upheld. This argument, to which I shall come back, is a familiar and in some ways an attractive one, but it is very different from all hypothetical contract arguments and contractualists cannot accept it without compromising the internal consistency of their own theory and creating an unresolved, and perhaps unresolvable, tension between two competing principles of justification. If it is to retain its theoretical consistency, contractualism must treat considerations of welfare as the single ultimate criterion of evaluation and apply this one criterion to actual agreements as well as hypothetical ones.

Which brings me back to Dean Clark’s article. Like his contractualist opponents, Dean Clark is also a committed welfarist (he actually calls himself a consequentialist, but that is an unhelpfully vague term, for even an egoist who insists that the right policy is always the one that benefits him, regardless of how it affects other people, is a kind of consequentialist too). That is to say, Dean Clark also takes the welfare of those who must live under a given normative regime to be the only basis for assessing its desirability—even when, as in the case of elite-made and traditional rules, the people subject to them are not the ones who established the rules in the first place.

The central thesis of Dean Clark’s article is that people are sometimes better off following rules laid down by elites or bequeathed to them by tradition than they would be if they made up the rules themselves; and that they are sometimes better off having to live by rules of the former two sorts without the freedom to modify them as they choose. The justification that Dean Clark offers for this claim is empirical. Rules laid down by elites or established by tradition have advan-

4. See Clark, supra note 1, at 1713 n.30.
5. Id. at 1725.
tages, he argues, that self-created rules sometimes do not; specifically, they are often based upon better information.\(^6\) They also, of course, have costs that self-created rules do not, costs due in both cases to the fact that those promulgating the rules don’t take the parties’ interests as seriously as the parties themselves do (so-called “agency” costs).\(^7\)

Balancing the costs and benefits of these two sorts of noncontractual rules, Dean Clark concludes that it is plausible to think they sometimes enhance the welfare of the parties to a greater degree than consensual or self-made rules would.

The first point I want to emphasize is that this argument does not represent, as Dean Clark seems sometimes to suggest, a fundamental challenge to the contractual model, for that model also treats the welfare of the parties subject to any given set of rules as the standard or criterion for evaluating those rules, in exactly the way Dean Clark does. With respect to their ultimate criterion of value, then, Dean Clark and the proponents of the contractual theory of law are in agreement. Where they differ, to the extent they differ at all, is in their empirical judgments as to which rules are most likely, in a given context, to enhance the welfare of those subject to them. This is an important difference, and I do not mean to minimize its significance, but it is a disagreement between welfarists who share a common view of what ought to be the ultimate standard of evaluation. It is therefore not a disagreement about the status of welfarism (and hence of contractualism) as a theory, but a disagreement within that theory itself.

Consider, for example, how Dean Clark might defend the claim that a particular rule of law—a traditional rule, let us say, from which opting out is not allowed—should be preserved in its present mandatory form. Presumably Dean Clark would argue that if those subject to the rule could see its benefits as clearly as he himself does, and could also see that they might be tempted for shortsighted and self-defeating reasons to want on occasion to waive it, they would themselves choose (from this better-informed hypothetical perspective) to make the rules nonwaivable. The conclusion that they would choose to forbid subsequent opting out follows directly from the fact that doing so would leave them better off, all things considered, and so has no more independent justificatory force here than it does in the hypothetical contract arguments of Dean Clark’s opponents. Of course, contractualists might question whether the parties’ reasons for wanting to waive the rule would in fact be self-defeating, and conclude that while the rule itself is good; it can be made even better—that is, more welfare-enhancing—if it is waivable at the parties’ discretion (and between these positions there are, of course, intermediate ones, for example, that the rule should be waivable, but only if the parties demonstrate to

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6. Id. at 1718–19, 1730–31.
7. Id. at 1719–20, 1731–32.
someone's satisfaction that they are sufficiently well-informed). Dean Clark's article usefully reminds us that which of these conclusions we endorse depends upon empirical considerations of an often complex sort. It does not, however, offer any grounds for thinking that the practitioners of contractualism are mistaken in anything but their factual judgments, and in particular it offers no grounds for thinking that their theory rests upon a mistaken view of the proper criterion for evaluating different rules, for it embraces and applies the same welfare criterion that they do.

There are, of course, views that do directly attack this criterion itself, and though Dean Clark's paper does not, it suggests what form these attacks might take. One that I have already mentioned in passing, and which Dean Clark himself notes, though only to dismiss, is the view associated with what he calls "the philosopher's argument." \(^8\) The highest good, defenders of this view maintain, is not welfare but freedom, the development and exercise of our human capacity for autonomy or self-rule. In considering whether actual agreements ought to be enforced, they argue, we should ask ourselves whether doing so would protect and amplify the parties' freedom. Making their freedom the touchstone of evaluation in this way does not lead automatically to the conclusion that all actual agreements should be enforced (for it is plausible to think that some agreements undermine rather than enhance autonomy), but it does make it possible to argue that some actual agreements should be enforced on the grounds that doing so respects the parties' freedom even though their welfare will, all things considered, be decreased as a result. This is an argument that no welfarist—Dean Clark included—can make, and it has considerable force in certain circumstances (in the general law of contracts, for example, though not, I think, in the law of corporations as it presently stands). \(^9\)

One who adopts this point of view will also evaluate background rules in a different way. He will not ask whether a particular rule, or set of rules, maximizes welfare, but rather whether it promotes autonomy, and while it is certainly reasonable to think that welfare is a condition of freedom, the two notions are not equivalent. Here, too, there is a possibility they may diverge, and when they do, a proponent of the philosopher's argument is committed to preferring freedom over welfare—which, again, neither Dean Clark nor his contractualist opponents can ever do.

But this is familiar territory, and I want to conclude by describing two other less fashionable lines of attack on welfarism which Dean

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8. See id. at 1715.

9. See C. Fried, Contract as Promise 16–17 (1981). While this type of argument has not carried much force in the law of corporations as an empirical matter, it cannot be discounted as a valid normative approach. Perhaps it is the sense that corporate law involves many society-wide concerns that accounts for the inability of arguments based on autonomy to make much headway.
Clark's article, with its provocative emphasis on elite-made and traditional rules, also suggests. Dean Clark defends the existence and use of these two sorts of rules, and his defense is likely to arouse in many readers a vague feeling of concern. Today, elitism and, to a lesser degree, traditionalism, are terms that have largely negative connotations. But Dean Clark's attempt to give these terms a new respectability is not as disturbing as it seems, for at bottom it is based on welfarist claims that many can accept, and not the more unsettling ideas to which genuine elitists and traditionalists sometimes appeal. In Dean Clark's domesticated version of them, these ideas have lost their power to offend or shock, and with that their capacity to challenge the conventions of contemporary moral life. The welfarist assumptions on which Dean Clark's own argument is based must be included among these conventions, indeed among the most widespread and deeply settled ones, and in evaluating these assumptions themselves it may be helpful to recall what real elitists and traditionalists say when they speak to us directly.

In some cases, at least, when pressed to justify a rule, real elitists, instead of appealing to the welfare of those who must live under it, say simply, "This rule, which we have made, is good because it is good for us, for the values and practices with which we are associated and from which we in particular derive special meaning and happiness, even though those subject to it are worse off than they would be if they were not." Now in certain circumstances I think this argument has force, though it runs against our democratic feeling that the interests of different groups should all be treated equally—a feeling which welfarists like Dean Clark respect by insisting that the legitimacy of any social rule be decided from the point of view of the welfare of the persons subject to it. The tenured faculty of the Yale Law School, for example, sets the rules and makes the decisions concerning the promotion of junior faculty. This practice is good, I believe, because it is good for the Law School and for those whose association with it is longest and most complete, namely, the tenured faculty. It could be argued, I suppose, that elite rule making in this context serves the interests of the junior faculty too, who must live under the rules their senior colleagues make, though this seems to me quite doubtful. The important point, however, is that this elitist practice serves the interests of the institution, and of its principal custodians, and that, I think, would be a sufficient justification for it even if one could demonstrate conclusively that the practice makes junior faculty worse off. This is real elitism, not the watered-down and democratically acceptable version that Dean Clark defends on welfarist grounds, and in certain circumstances there is, I think, much to recommend it.

Something similar may be said about traditionalism. In many traditions (religious traditions are the best example), the justification that participants offer for their practices is that the tradition these practices sustain is itself a source of value, quite apart from the benefits it yields.
to those involved. The point of the tradition, they say, is not to enhance the welfare of its followers (though this may be a byproduct of it) but to serve God, maintain a civilization, produce and protect works of beauty, and so on—all of which are understood to have a value independent of the interests of the human beings responsible for doing so. This view represents, if anything, a more radical assault upon contemporary moral sentiments than even the most unashamed elitism, for while the latter challenges our democratic prejudices, it is at least intelligible. Even if we disapprove of his attitude, we understand what someone means when he says that the interests and values of his group are more important than those of some other. Genuine traditionalism, which in certain of its guises seems to assume that there are goods which are not the goods of any human beings at all, is likely to appear, by contrast, wholly unintelligible, for it conflicts with what is perhaps the deepest and most widely shared orthodoxy of modern moral thought—the assumption that only the goods of human beings (or perhaps sentient beings) count in assessing different practices and institutions. Welfarism, of course, subscribes to this orthodoxy too, and so there can be no room in it for real traditionalism, as opposed to Dean Clark's pale consequentialist version.

To these last arguments Dean Clark might reply that even if this is what elitists and traditionalists say, we need not adopt their justifications in order to defend their practices. Thankfully, he will point out, we can do so on other less objectionable (or at least currently more acceptable) grounds. In fact, warming to the argument, he is likely to assert that there are good welfarist reasons for allowing elitists and traditionalists to continue to believe what they (mistakenly) do. That he would say this is suggested by the way he treats the philosopher's insistence on the preeminence of freedom as a value: it is a good thing that some people believe there is a higher value than welfare because, he argues, their believing this enhances welfare in a roundabout way, despite their own disinterest in doing so.  

This last line of argument has been familiar at least since Sidgwick, but I must confess that I find it unconvincing, for it fails to come to grips with the question of whether anything other than welfare ought to count in our moral thinking. Those who say that other things do count—whether they be elitists, or traditionalists, or champions of autonomy—are justified in feeling that their arguments have not really

10. See Clark, supra note 1, at 1716–17.
11. For even supposing that this ideal society [in which the principles of utilitarianism are perfectly applied] is ultimately to be realised, it must at any rate be separated from us by a considerable interval of evolution; hence it is not unlikely that the best way of progressing towards it will be some other than the apparently directest way, and that we shall reach it more easily if we begin by moving away from it.

been met when it is pointed out that what they want serves welfare too. This, they will reply, may or may not be true, but is in any case beside the point. They will demand, rightly in my view, that the question they raise not be brushed aside. Dean Clark’s article brings us back to this question and though the question itself has little significance for the law of corporations, and the specific issues of policy which the participants in this Symposium have debated, it continues to be of very great importance for moral and political theory generally.