

**TRACING TRAJECTORIES IN CONTRACT LAW THEORY:
FORM IN ANGLO-NEW ZEALAND LAW, SUBSTANCE IN JAPAN AND THE US**

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*Study of the history of opinion is the necessary preliminary to the emancipation of the mind.**

Some have recently proclaimed a thoroughgoing “Americanisation of Japanese Law”, as economic liberalisation, political fragmentation, and the growth of legal services markets accelerated in Japan from the mid-1990s. In product liability, corporate governance and other fields, Japan’s “law in books” has indeed been moving towards more of “the American Way”. Yet the changes are subject to the vagaries of all law reform, they often draw on European Union (EU) or other models, and they are certainly less pronounced when it comes to Japan’s “law in action”.^a Nonetheless, in a peculiar sense not appreciated by recent commentators, the Japan legal system has long shared much with its counterpart in the US. Both are much more open to what Atiyah and Summers famously outlined as “substantive reasoning” – “a moral, economic, political, institutional or other consideration” – and they have developed legal institutions to support that vision of law.^b American commentators have trouble appreciating this commonality, since of course not everything is the same in Japan. However, my separate study has demonstrated that the more important contrast lies between both these legal systems, on the one hand, and the still distinctly more “formal reasoning” oriented legal systems in the English law tradition, on the other.^c

Despite the demonstrated usefulness of the “form-substance” dichotomy for such broader comparative research, however, the initial work by Atiyah and Summers contrasting English with American law was queried by one reviewer in the following terms:¹

* J M Keynes “The End of Laissez Faire” in *Collected Works* Vol 9 (1973) 277, cited on the page before the preface in P S Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979).

^a Compare R D Kelemen & E C Sibbitt “The Americanization of Japanese Law” (2002) 23 *University of Pennsylvania Journal of International Economic Law* 269 with eg L Nottage *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (London, RoutledgeCurzon, 2004).

^b P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 2.

^c L Nottage “The Japanese of American Law? Substantive Similarities, Compared to Formal Anglo-New Zealand Law” (2007a) *Sydney Law School Research Papers* via www.ssrn.com.

¹ P J Cooke “Book Review” (1988) 8 *Leg Stud* 240, 240.

This was an enormously ambitious study which manfully struggled to establish its central thesis throughout. A more determined and unequivocal study of the form and substance dichotomy in the field of legal reasoning would perhaps have resulted in a generally more satisfying and normatively coherent book.

Accordingly, my research has further tested and applied their framework in the specific field of comparative contract law. Both Atiyah and Summers are well-known for their work on contract law in their respective jurisdictions.² In their co-authored study, however, they touch only briefly on some contract law rules and principles. One reason for this, no doubt, is that the study aimed to set out a general theory, requiring selectivity and inviting further research. Another reason may have been that their thinking differed somewhat on how to apply or develop their theory in the context of contract law.³ Nonetheless, the core distinctions set out in their original theory do help identify and explain major differences and similarities in the contract law of the four jurisdictions examined. In particular, in three significant and representative areas, both Japanese and US contract law prefer a more substantive approach compared to both English and New Zealand law.

One example comes from the law governing contract formation, namely the role of formal requirements. In particular, it focuses on the issue of whether reference in negotiations to recording or memorialising an informal agreement means that this must occur before it can have binding contractual effect. Rules to that effect, like formal requirements for making wills, risk being under-inclusive with respect to the objective of giving effect to the intentions of the parties, thereby heightening what Atiyah and Summers identified as one important dimension of more formal reasoning – “content formality”. By preferring to apply presumptions as to what the parties intended, New Zealand and (perhaps especially) English law are found to adopt stricter approaches, compared to US and (probably especially) Japanese law.^d

A second example comes from doctrines regulating unfairness in contracting. It develops Atiyah and Summers’ suggestion that many of the main doctrines in the US involve much more “content-oriented” standards of validity, thereby diminishing “authoritative formality”, in contrast to English law.⁴ Arguably, English law prefers the more “source-oriented” standard of the parties’ agreement. Japanese law is found to be closer to US law, although with perhaps more formal counter-tendencies. In dealing with a range of contractual unfairness problems, New Zealand law appears even more formal along this dimension than English law, particularly in light of the latter’s

² See for example Atiyah, opening footnote above; P S Atiyah *An Introduction to the Law of Contract* (5 ed, Clarendon Press, Oxford, 1995); R Summers “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 Va L Rev 195; J White and R Summers *Uniform Commercial Code* Vol 1, Chaps 1-12 [on Sales] (4 ed, West, St Paul (Minn), 1995).

³ Compare for example P S Atiyah “Form and Substance in Contract Law” in his *Essays on Contract* (Clarendon Press, Oxford, 1990) 329, with R Summers “The Formal Character of Law - Criteria of Validity for Contracts” (1995) 9 JCL 29.

^d L Nottage “Formal Requirements for Contract Formation: Anglo-New Zealand Law Versus Japanese, US and International Sales Law” (2007d) *Sydney Law School Research Papers*.

⁴ P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 51-52. See also L Nottage “Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts” (1996) 26 *Victoria University of Wellington Law Review* 247.

growing importance from European law in this field.

A third illustration comes from comparing doctrines relevant in the event of extreme supervening events affecting contractual performance, particularly the doctrines of frustration, impracticability, and changed circumstances. Atiyah and Summers mention that in US law “the entire subject of excuses for non-performance in contract ... is shaped by increasingly flexible or discretionary notions”, impliedly contrasting English law as adopting more “hard and fast rules”.⁵ Another way to conceptualise important distinctions in this area too is that English doctrine relies on the source-oriented standard of the parties’ agreement or intentions, while US law permits more content-oriented standards of validity. New Zealand law is shown to be at least as formal English law – and possibly even more so in light of some judgments, although the body of case law in New Zealand is much smaller than in England, making it risky to draw a firm conclusion on their relative positions. By contrast, Japanese law shares with US law a distinctly more substantive approach. The former is probably more substantive than the latter, but not by much.

The dichotomy between Anglo-New Zealand law versus US and Japanese law, particularly in this area, also suggests an important further refinement to the analytical framework devised by Atiyah and Summers. Drawing on empirical studies into attitudes and practices in regard to renegotiation and planning of long-term contracts, the notion of “didactic formality” can be added as a third “variety” of formality — additional to Atiyah’s and Summers’ “truth formality” and “enforcement formality”. I define didactic formality as the tendency among judges and commentators to develop or apply contract law (the law in books) to influence actual contracting behaviour and expectations (the law in action), as opposed to adapting the former in the light of the latter. Contrary to the assertions of some judges and scholars in both jurisdictions, New Zealand and England retain a high degree of such didactic formality, at least compared to the US and (perhaps especially) Japan.

From the outset, it is important to stress that the differences which emerge in these three areas of contract law compared are very much differences in degree. None of the four legal systems examined will readily enforce informal agreements for the sale of land, for instance. Nor do they readily strike down contracts for unfairness. All of them are perhaps most reluctant in allowing relief from performance obligations due to supervening changes in circumstances. Nonetheless, important points of contrast and similarity do emerge. In addition, as in the general comparison of the four legal systems overall, it is much more difficult to determine the positioning of US and Japanese law relative to each other, and that of English relative to New Zealand law, as opposed to establishing the significant gap between these two pairs of jurisdictions.

Bearing these caveats in mind, comparisons of contract law can be conceptualised diagrammatically as in the Figure overleaf. Because a more substantive tendency possibly emerging in New Zealand law regarding informal agreements still appears weak, it is positioned as only slightly less formal than English law on Line 2. In all other areas examined (Lines 3-5), New Zealand contract law appears somewhat more formal, so overall it is positioned as more formal than English contract law (Line 1).

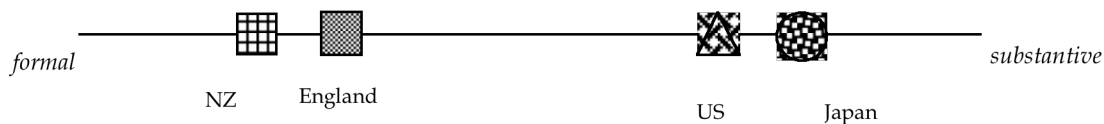
⁵ Above n 4, 84. See also L Nottage "Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law and Practice" (2007c) *Sydney Law School Research Papers*.

Japanese law is more difficult to position in relation to US law, since the former – until perhaps quite recently – has exhibited noticeable formal counter-tendencies in one area, regulation of contractual unfairness (line 3). Yet in all other respects examined, Japanese contract law appears even more substantive. Nonetheless, contrary to those who have stressed great differences between Japan and US,⁶ the analysis confirms strong similarities between the two countries. Much more significant differences lie between Japan and the US on the one hand, and English and especially New Zealand law on the other.

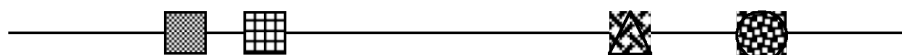
⁶ See for example H Wagatsuma and A Rosett “Cultural Attitudes towards Contract Law: Japan and the United States Compared” (1983) 2 UCLA Pacific Basin LJ 76.

Positioning New Zealand, English, US and Japanese Contract Law

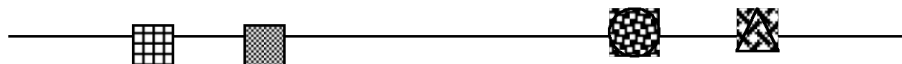
1. Contract Law Overall (including theory development)



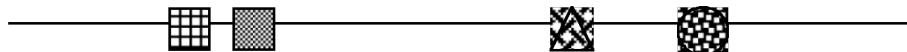
2. Content Formality in Contract Formation



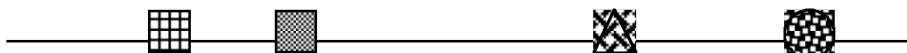
3. Authoritativeness Formality in Contractual Unfairness: The Contextual Dimension



4. Authoritativeness Formality in Frustration, Etc: The Time Dimension



5. "Didactic" Formality: Law in Books trying to lead Law in Action



Such studies therefore reinforce the need to reassess any lingering stereotypes about the uniqueness of Japan in regard to contract law, as well as law more generally. They also confirm that Japanese contract law is quite Americanised, but alternatively that American law is quite “Japanised” – both prefer more substantive reasoning, at least compared to Anglo-New Zealand law. Further, both differ even among themselves in being more or less formal in different areas of contract law. In addition, what Atiyah and Summers term “second-order reasoning” – the underlying values and other considerations that these systems draw on to feed through their more substantive reasoning frameworks – probably differ even further. The spread of market forces – in economics, politics and other social spheres – does seem to be transforming Japan’s value system, and this is highlighted by some Western commentators as driving the “Americanisation” of certain areas of Japanese law. Yet ideology dies hard and, probably more importantly, supporting socio-legal institutions (or communities) continually redefine and reassert themselves.^e

This paper develops these nuances by focusing on general developments in contract law theory. Of necessity, this comparative analysis must remain sketchy and tentative. Entire books could be written on the development of contract law theory in the US, for instance.⁷ Part I below begins by drawing out its main features, allowing a more succinct introduction to closely related Japanese developments, discussed in Part II. Part III draws parallels to show how contract law theory in England developed more substantive tendencies much later in the 20th century. This sets the stage for assessing New Zealand developments in Part IV. These are presented in considerable detail, since there appears to have been no substantial publication offering a reasonably comprehensive survey of the historical evolution of contract law theory in that jurisdiction.⁸

Part V concludes by conceding that contract law theorists in all four jurisdictions have developed more interest in substantive reasoning, notably by showing greater readiness to replace rules by broad standards, thus directly reducing interpretive formality, and inviting reductions in authoritative and content formality. However, these transformations are shown to have been most consistent and prominent in the US and Japan, despite some recent counter-tendencies. In part, this result follows from well-articulated theory advancing this transformation, dating back to the early decades of the 20th century. Other supporting factors are significant sensitivity to related developments in other jurisdictions, overtly political and ideological overtones in theory-building and contract law scholarship, and a willingness to engage in philosophical and empirical inquiry. These elements were largely lacking in England until the 1970s. However, their confluence has brought forth a recent flowering in contract law theory, incorporating or promising a more strongly substantive orientation.

^e L Nottage "Nothing New in the (North) East? The Rhetoric and Reality of Corporate Governance in Japan" (2006) 01-1 *CLPE Research Paper* <http://ssrn.com/abstract=885367>; L Nottage "Translating Tanase: Challenging Paradigms of Japanese Law and Society" (2006) *Sydney Law School Research Papers* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921932.

⁷ See for example R Hillman *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Kluwer, Dordrecht, 1997).

⁸ Compare for example J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (Butterworths, Wellington, 1997) 14-20, 28-29.

The comparative paucity of these elements in New Zealand explains the persistent attraction of avowedly formalist or doctrinal scholarship in that jurisdiction. It also appears to have undermined the potential for statutory interventions around the 1970s, conferring some broad discretions on the courts, to move New Zealand law scholarship strongly and consistently towards a more substantive approach.

One major implication is that contract law is not suddenly and straightforwardly converging world-wide.^f Japanese law is indeed quite like US law in some key structural characteristics, particularly its openness to more substantive reasoning. Yet this is nothing new. And, at a deeper level, Japanese need not be identical with US law – and it appears unlikely ever to be so. A major contrast also remains with the still more formal approach in England and New Zealand, where even the shared openness to substantive reasoning is lacking, although “second-order reasons” there may remain closer to those in the US.

I The Pervasive Legacy of Legal Realism in the US

A first striking feature of contract law theory development in the US is how early it got underway. Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895, drew heavily on then prevalent methodology in the natural sciences to establish law as a worthy discipline within the academy.⁹ He argued that contract law cases could be systematically reviewed to uncover a few key principles, from which legal results could then be deduced, a methodology later developed by Samuel Williston in promoting the promulgation of the *Restatement of Contract* in 1932.¹⁰ A central principle became the bargain theory of consideration: a promise would only be enforced if induced by consideration, in the form of a benefit to the promisor or detriment to the promisee. This theory, emphasised by Oliver Wendell Holmes, reflected his “individualist view that legal liability to others discourages socially useful activity and that promissory liability therefore should be as narrow as possible”.¹¹ It also tended to stress the intention or will of contracting parties, albeit in the abstract, instead of the facts of a benefit being conferred or detriment being suffered, in establishing contractual liability. Another principle involved rendering liability absolute, within the confines of

^f See also generally L Nottage "Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law" (2004) 1 *Annual of German and European Law* 166; and L Nottage "Legal Harmonization" in D Clarke (ed) *International Encyclopedia of Law and the Social Sciences* (New York, Sage, forthcoming).

⁹ C Tomlins “Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative” (2000) 34 *L & Soc’y Rev* 911.

¹⁰ Langdell’s preface to the first edition of *Cases on the Law of Contracts*, published in 1871, read as follows:

Law, considered as a science, consists of certain principles and doctrines ... [T]he number of fundamental legal doctrines is much less than is commonly supposed ... It seems to me, therefore, to be possible to take a branch of the law such as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.

Cited in G Gilmore *The Death of Contract* (Ohio State U Press, Columbus Ohio, 1974) 12.

¹¹ Hillman, above n 7, 20; citing Gilmore, above n 12, 14, and O W Holmes *The Common Law* (originally published in 1881).

the bargain theory of consideration, by narrowing grounds for excuse and promoting an objective approach to contract formation. This further reified the will or consent of the parties, by restricting factual inquiries into the parties' actual motives and other circumstances, thus reducing intervention by judges – and juries¹² – as well as the costs and uncertainties of litigation.¹³

Consistent with this emerging “classical” paradigm of contract law was *Lochner v New York*, where the Supreme Court ruled unconstitutional a New York statute limiting the working hours of bakers.¹⁴ In 1909, Roscoe Pound vigorously denounced such court rulings, at both federal and state levels over previous decades, which had upheld “freedom of contract” on the unrealistic assumption that actual litigants had voluntarily entered into a social contract removing claims to protective legislation.¹⁵ Pound’s “sociological jurisprudence” dovetailed with the “progressive” movement, culminating in the triumph of New Deal state interventionism in the 1930s, and established a perennial debate about the role of judges which was rooted in concerns about the institution of contract.¹⁶

The judicial role became a particular focus for the “legal realists” who engaged with this new thinking. The core was a group of senior professors at Columbia Law School in the 1920s who were radically sceptical about classical legal analysis, whereby concepts and rules were applied deductively to facts. In particular, they questioned judges’ willingness and ability to give the real reasons for their decisions, and believed that legal rules applied were merely *ex post* rationalisations. These iconoclastic professors developed scientific and empirical approaches on the assumption that judges “responded predictably to certain stimuli ... found in the facts surrounding the controversy and perhaps in the judges’ own experience, but not at all in the ‘paper rules’, in prior decisions or in acts of the legislature”.¹⁷ Another group of legal realists included Jerome Frank and Arthur Corbin, both of whom later became judges; and Karl Llewellyn, a younger member of the Columbia Law School who had studied under Corbin at Yale. Llewellyn did not go as far in totally rejecting black-letter law rules, to focus solely on the behaviour of legal actors, but:¹⁸

... he was in greater disagreement with the legal conceptualists. It is the central tenet of the realist movement, embraced by Llewellyn, that judges’ decisions arise not merely from the rules that they state in their opinion, but at least as much from the facts before them, from the expectation of the parties in the trade, or from their own judgment about fairness.

Accordingly sceptical about the role of precedent and techniques of case analysis,¹⁹ he

¹² See for example C McCormick “The Parol Evidence Rule as a Procedural Device for Control of the Jury” (1932) 41 Yale LJ 365.

¹³ Compare Hillman, above n 7, 21-22.

¹⁴ (1905) 198 US 45. See generally J Boyarin “Law, Literature and the Resurrection of Contract” (1999) 24 L & Soc Inq 195.

¹⁵ R Pound “Liberty of Contract” (1909) 18 Yale LJ 454.

¹⁶ Compare for example G Rowe “*Lochner* Revisionism Revisited” (1999) 24 L & Soc Inq 221, 222-223.

¹⁷ J White “Promise Fulfilled and Principle Betrayed” [1988] Ann Survey Am L 7, 10.

¹⁸ White, above n 18, 13. See generally K Llewellyn “Realistic Jurisprudence – The Next Step” (1930) Colum L Rev 431.

¹⁹ See for example K Llewellyn *The Bramble Bush* (Oceana, New York, 1951) 68-69, on how

devoted increasing attention to uncovering the actual practices and expectations of businesspeople. Llewellyn admired some contemporary English judges, like Lord Scrutton, for a professed willingness to decide cases based on personal experiences and insights into commercial practices.²⁰ But Llewellyn went much further in advocating inquiry through legal sociology and anthropology, showing that a major inspiration came from Eugen Ehrlich's theories of "living law" and "sociology of law" along with other contemporary developments in Germany.²¹ Although far from systematic and methodologically convincing by today's standards of social science,²² Llewellyn was able to draw on two years' experience as in-house counsel to a New York bank,²³ a revolutionary casebook published in 1931, breaking with the Langdellian black-letter law tradition by discussing "economic considerations, business practice, and other factors which affect the expectations and behaviour of commercial buyers";²⁴ pioneering research in legal anthropology;²⁵ and then (from 1942 until his death in 1962) a dominant role in the sometimes contentious tasks of developing and promoting a Uniform Commercial Code (UCC), turning on sensitivity to commercial practices and expectations.²⁶ Llewellyn was also able to build on the pragmatist philosophy applied to law by John Dewey in the 1920s. Dewey contended that classical jurisprudence had

easily precedents can be read narrowly to avoid its application and vice versa.

²⁰ J White "Good Faith and the Cooperative Antagonist" (2001) 54 SMU L Rev 679, 684-685 (discussing K Llewellyn "On Warranty of Quality, and Society" (1936) 36 Colum L Rev 677, 707, which had cited *Ronaasen & Son v Arcos Ltd* [1932] 43 Lloyds Rep 1 and Justice Scrutton "The Work of the Commercial Court" (1932) 1 CLJ 6).

²¹ See Note "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code" (1987) 97 Yale LJ 156; J Gedid "UCC Methodology" (1988) 29 Wm & Mary L Rev 341; M Ansaldi "The German Llewellyn" (1992) 58 Brooklyn L Rev 705; D Lind "Free Legal Decision and the Interpretive Turn in Modern Legal Theory" (1993) 38 Am J Juris 159. The impact of Ehrlich on Benjamin Cardozo, a judge whose writings in the 1920s exerted a powerful influence on Llewellyn and later generations of US jurists, is also apparent: N Insua "Dogma, Paradigm and the Uniform Commercial Code: *Sons of Thunder v Borden* Considered" (1999) 31 Rutgers LJ 249, 260-261. The consequentialist aspects of Holmes' work (above n 12), rather than the latter's individualist tendencies, would seem to explain his influence on Llewellyn as well: compare for example K Llewellyn "Holmes" (1935) 35 Colum L Rev 485; R Danzig "A Comment on the Jurisprudence of the Uniform Commercial Code" (1975) 27 Stan L Rev 621, 624.

²² C Williams "The Search for Bases of Decision in Commercial Law: Llewellyn Redux" (1984) 97 Harv L Rev 1495, 1508; L Bernstein "The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study" (1999) 66 Chi L Rev 710, 713.

²³ A Corbin "A Tribute to Karl Llewellyn" (1962) 71 Yale LJ 805; G Gilmore "In Memoriam: Karl Llewellyn" (1962) 71 Yale LJ 813, 814.

²⁴ W Twining "Two Works of Karl Llewellyn" (1967) 516, 520.

²⁵ D Papke "How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code" (1999) 47 Buff L Rev 1457.

²⁶ G Maggs "Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code" (2000) 71 U Colorado L Rev 541, 541-548; A Kamp "Uptown Act: A History of the Uniform Commercial Code: 1940-49" (1998) 51 SMU L Rev 275. Llewellyn was the Chief Reporter in drafting and re-drafting the UCC. His main collaborator was his wife, Soia Mentschikoff; other reporters, who readily acknowledged their deference to Llewellyn, included Grant Gilmore and Friedrich Kessler. Arthur Corbin, Llewellyn's teacher at Yale, was appointed an advisor. See I Hillinger "The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law" (1985) 73 Geo LJ 1141; S Mentschikoff "Highlights of the Uniform Commercial Code" (1964) 27 MLR 167.

outlived its usefulness in liberating bourgeois interests from restrictions on trade, degenerating into a new set of rigid rules impeding the evolving tendency towards welfare state interventions. Instead, he advocated legislation “conceived as tools to be adapted to the conditions in which they are employed rather than as absolute and intrinsic ‘principles’”, giving special attention “to the facts of social life”.²⁷ Echoing Dewey, and especially the German scholar Goldschmidt, Llewellyn stressed “situation-sense” in adjudication: “What judges need is ‘knowledge and experience and values’, and their job is to ‘see’ the ‘pressure’ of ‘type-facts’”.²⁸

These influences came together to result in the UCC largely breaking with earlier contract legislation, which had amended particular areas of law primarily under the guidance of Williston.²⁹ The Code comprehensively reformed all major areas of US commercial law, based on the following guiding principles:³⁰

- (a) a preference for open-ended standards over firm rules;
- (b) the purposive interpretation of legislative provisions;
- (c) the minimisation of formal requirements;
- (d) the avoidance of a definitive statement of all aspects of the law, in favour of directions to the courts to supplement UCC rules with general legal and equitable principles, and the incorporation of rules established by prior dealings and usages of trade;
- (e) a related focus on remedies as providing ex post compensation to make parties whole rather than as incentives affecting future behaviour, thus reinforcing the philosophy that commercial law should follow behaviour and expectations as much as possible rather than forcing them to change.

Principles (a) and (b) imply a lowering of interpretive and mandatory formality; principle (c), a reduction in content formality; and principles (d) and (e), a reduction in authoritative and rank formality.³¹ In other words, drawing on decades of legal theory

²⁷ J Dewey “Logical Method and Law” (1924) 10 Cornell LJ 17, 27.

²⁸ T Rakoff “Implied Terms: Of ‘Default Rules’ and ‘Situation Sense’” in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Clarendon, Oxford, 1995) 191, 202.

²⁹ But see R Flores “Risk of Loss in Sales: A Missing Chapter in the History of the UCC: Through Llewellyn to Williston and a Bit Beyond” (1996) 27 Pac LJ 161 (showing that Williston’s recrafting of risk of loss rules in the Uniform Vendor and Purchaser Risk Act over the 1930s, moving away from ownership concepts towards more practical contract law rules, was initially objected to by Llewellyn but then taken up in the UCC).

³⁰ Compare Maggs, above n 27, 543, n 11 (expressing some reservations regarding the originality of prior dealings and usages in (d); but see Rakoff, above n 29), and 579 (regarding (e), citing another UCC reporter, H Kripke “The Principles Underlying the Drafting of the Uniform Commercial Code” (1962) U Ill L Forum 321, 330).

³¹ See Nottage 2007a. Further lessening rank formality, Llewellyn argued that contract law interpretation need not proceed first by looking sequentially at express terms, then course of performance, course of dealing, and trade usages. Rather, he advocated a holistic approach, freely considering all four sources. However, he agreed that each source should trump the following ones in the event of inconsistency, and it was unclear how default rules and general reasonableness standards fitted into this scheme. Interestingly, it seems that contemporary contract interpretation principles maintain low levels of rank formality and considerably reduced interpretive formality, by giving primacy to reasonableness and good faith standards, default rules, and trade usages. See E Zamir “The Inverted Hierarchy of Contract Interpretation and Supplementation” (1997) 97 Colum L Rev 1710.

development within the US, in turn strongly influenced by contemporary trends in Germany, by the middle of the 20th century US commercial law had been pervasively refocused on substantive reasoning at multiple levels.

However, such attempts to reform US contract law, particularly by stressing commercial and social context, attracted criticism from Lon Fuller from the late 1930s. He accused legal realism of failing to appreciate law's prescriptive character, in establishing norms of conduct for society. Fuller remained sympathetic to the call for judges to be more honest so as to increase their predictability and accountability.³² Nonetheless, his influential work in contract law³³ was distinguished by attempts to reinstate "the principle of private autonomy" as central, "to be harmonised with, and occasionally balanced against, a small number of counter-principles", such as protection of reliance and prevention of unjust enrichment.³⁴ Fuller achieved this primacy of private autonomy by isolating areas not related to markets (such as the family) and those areas of "private heteronomy" (such as labour and insurance law) where terms were imposed by law. This left less scope for distributive justice to become problematic in the remaining field of general contract law, and put the private autonomy principle in a strong position relative to reliance and restitutionary principles premised on commutative justice (restoring the status quo ante), and the will of the state rather than of the parties. Duncan Kennedy therefore concludes that although Fuller's work helped move away from a "will theory of contract", derived completely or overwhelmingly from the principles of autonomy and consent, it involved an ideological response to more radical (even communist) proposals over the 1920s and 1930s for reformulating contract law to pursue distributive justice. Further, he suggests that:³⁵

The work which moves contract theory from Fuller's intermediate position to the fully developed modern conflicting considerations model has to do with deciding what else beside private autonomy is at stake, given that neither protecting reliance nor preventing unjust enrichment comes close to summarising the various considerations that in fact come into play against autonomy. This involved reintroducing the social, with its ideological baggage.

However, Kennedy argues that the ideological spectrum from World War II through to 1970 narrowed, to exclude communist or fascist extremes. This led to a new mainstream model of "conflicting considerations", involving:³⁶

an even more mildly ideologised debate between conservatives touting freedom of contract, on the one side, and liberals advocating policing bargains in the interests of weak parties, on the other. They carried on the debate using the full repertoire of formal arguments; substantive arguments, including rights, morality, and efficiency; and institutional competence arguments about the appropriate roles of judges, administrators, and legislatures.

The major links between Fuller and this post-War phase are considered to be Friedrich

³² White, above n 18, 14. See L Fuller "American Legal Realism" (1934) 82 U Pa L Rev 429.

³³ See especially L Fuller and W Perdue "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52; L Fuller "Consideration and Form" (1941) 41 Colum L Rev 799.

³⁴ D Kennedy "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'" (2000) 100 Colum L Rev 94, 97, 167-172. Compare also T Rakoff "Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship" [1991] Wisc L Rev 203.

³⁵ Above n 35, 172-173.

³⁶ Above n 35, 173.

Kessler, in his articles on contracts of adhesion and on pre-contractual liability; Stewart Macaulay, discussing the liberal approach of Californian courts in the 1950s and under Justice Traynor, and liability for lost credit cards as large institutions came to dominate the industry; and Ian Macneil, with the first edition of his “radically anti-formalist contracts casebook”.³⁷

To Kennedy’s sketch should be added Grant Gilmore’s (in)famous proclamation of *The Death of Contract*, in lectures first delivered in 1970 but published in 1974.³⁸ This work further undermined the 19th century “will theory” or classical model of contract, which had led to an extreme reluctance to: (i) find that binding relations had been entered into, (ii) add obligations not sourced in the parties’ express agreement, and (iii) allow contractual relations to be altered over time. Truer to the legal realist tradition,³⁹ by suggesting that contract law might be in the process of being reabsorbed into tort law, it followed through on Fuller’s insight into modern contract law’s role in protecting detrimental reliance.⁴⁰ Gilmore also stressed indications of more willingness by courts and commentators to allow enforcement of promises not supported by bargained-for consideration, when the promisor received a benefit and the other party had intended to make a gift or compel acceptance. Further undermining central tenets of classical contract law theory, he argued that the US law was increasingly willing to allow excuses for failure to perform due to unforeseen circumstances or mistakes of fact, bringing in broad principles of fairness.⁴¹ The first aspect of Gilmore’s provocative thesis may have been related to the dramatic decline in contract cases filed in US courts through to the 1960s, especially debt claims, at least

³⁷ Kennedy, above n 35. See respectively F Kessler “Contracts of Adhesion – Some Thoughts on Freedom of Contract” (1943) 43 Colum L Rev 629, F Kessler and E Fine “Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study” (1964) 77 Harv L Rev 401; S Macaulay “Justice Traynor and the Law of Contracts” (1961) 13 Stan L Rev 812, S Macaulay “Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts, and Credit Cards” (1966) 19 Vand L Rev 1051; I Macneil *Cases and Materials on Contracts: Exchange Transactions and Relationships* (West, St Paul, 1971). Kessler’s work also appears to have drawn on critical German contract law theory prior to World War II, while eschewing variants adopting national socialism, and coming under the influence of the school of US legal realism which acknowledged law’s normative force (epitomised by Fuller and, to a lesser extent, Llewellyn). Compare C Joerges “Friedrich Kessler” (1994) 42 AJCL 170, 180-184.

³⁸ Above n 12.

³⁹ Compare White, above n 18, with E Peters “Symposium: Foreword” (1995) 90 Nw U L Rev 1, 1-2:

Grant Gilmore’s intellectual outlook reflected the Yale Law School’s pervasive commitment to legal realism from the 1930s onward. Jerome Frank was a visible and audible presence at Yale. All the faculty were expert at demonstrating the fragility of legal doctrine and the ambiguity of legal language. In the absence of fixed constellations in the legal firmament, attention necessarily focused on alternatives, on the critical dissection of inherently imperfect solutions to particular policy disputes framed by factual contexts. Lacking confidence in jurisprudential outcomes, the faculty valued a wide angle of vision that took account of traditional as well as nontraditional learning about the law. In such a legal climate, any intriguing idea was worth exploring, whether or not its hypothesis proved ultimately to be persuasive. The *Death of Contract* was one such intriguing idea.

⁴⁰ Compare also S Henderson “Promissory Estoppel and Traditional Contract Doctrine” (1969) 78 Yale LJ 343.

⁴¹ Hillman, above n 7, 23-26, 32.

relative to tort filings.⁴² Further, even the latter aspect, suggesting the infusion of broad norms of fairness into US contract law by the 1970s, did not involve setting out a radical ideological commitment. Rather, Gilmore's work was driven by a conviction that freedom of contract could still help guide the law in adapting to changing needs and practices.⁴³

Nonetheless, Gilmore's work also encouraged others drawing on the well-established realist tradition, such as Arthur Corbin and Allan Farnsworth, who contested classical theory's focus on literal interpretation of contract wording and a strict parol evidence rule. These theorists were primarily responsible for the American Law Institute's promulgation of the *Restatement (Second) of Contracts* in 1981, which Farnsworth has since promoted as the core of an influential reformulation of contract law.⁴⁴ Both the *Restatement* and his textbooks reveal the influence of Llewellyn, and especially the UCC, in seeking to recognise contemporary business norms and practices. Also pervasive, however, is the legacy of Fuller. Bargained-for promise premised on the principle of private autonomy is "first among equals", along with restitutionary and reliance based rationales for enforcing contractual obligations. This widely-accepted paradigm therefore remains "neoclassical", taking promise or "voluntary assumption of obligation" as the central focus in contract law (and, indeed, in perceptions of contractual behaviour, and broader conceptualisations or theories of contract).⁴⁵

The same approach is taken further by Charles Fried's *Contract As Promise*, an influential book published in the same year as the *Restatement (Second)*. He argued that the central organising principle of contract law is and ought to be the moral precepts involving in promise-making. Fried contended that promisors create a moral obligation by invoking a "convention of promising", allowing promisees moral grounds to expect the promised performance; but the key reason for enforcing such promises is to enable promisors to "determine their own values", permitting them free choice (and then moral and legal responsibility) in binding themselves to others.⁴⁶ This reformulation allowed him to criticise the bargain theory of consideration, arguing that situations such as those imposing liability for promissory estoppel (in which courts enforce promises given without consideration) demonstrate this morality of promise-making. Fried also retrieved the legitimacy of objective interpretation of contracts, by asserting that promises are made against "an unexpressed background of shared purposes, experiences, and even a shared view of the world", ensuring that objective interpretations coincide

⁴² Compare M Galanter "Contract in Court" [2001] *Wisc L Rev* 577, 578-583.

⁴³ See for example J Braucher "The Afterlife of Contract" (1995) 90 *Nw U L Rev* 49; P Linzer "Law's Unity - An Essay for the Master Contortionist" (1995) 90 *Nw U L Rev* 183.

⁴⁴ Compare A von Mehren "Preface" (1982) 67 *Cornell L Rev* 631; and for example E A Farnsworth *Farnsworth on Contracts* (3 ed, Aspen Publishers Inc, New York, 1999).

⁴⁵ See for example I Macneil "Relational Contract: What We Do and Do Not Know" [1985] *Wisc L Rev* 483, 496-498 (going on to criticise, as another example of this genre, J Levin and B McDowell "The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations" (1983) 29 *McGill LJ* 24). See also J Feinman "The Significance of Contract Theory" (1990) 58 *U Cinn L Rev* 1283, 1285; J Esser "Institutionalising Industry: The Changing Forms of Contract" (1996) 21 *L & Soc Inq* 593. Compare Hillman, above n 7, 3 n 6 (arguing that his own attempted recognition of both promise and fairness concerns is not "neoclassical", because "it stresses both the importance of both freedom of contract and other principles, without finding that one set of principles dominates another).

⁴⁶ C Fried *Contract As Promise: A Theory of Contractual Obligation* (Harvard UP, Cambridge Mass, 1981) 7, 12-13, 20.

with promisors' actual intentions.⁴⁷ That could still leave problems of gaps in incomplete agreements, which courts had to fill with terms unrelated to the parties' promises. However, Fried argued that this role is supplementary, only applicable when "promise gives out", because parties have decided not to include their own terms.⁴⁸ In short, even more so than the post-realist neoclassical mainstream, Fried reasserted the primacy of private autonomy. Unlike the realists, however, he proceeded deductively from moral philosophy, an approach later preferred by Randy Barnett.⁴⁹ Further, although this may be confusing cause with effect, Fried's appointment as Solicitor-General in the Reagan administration points to the conservative ideological ramifications of his stance.⁵⁰

This supports Kennedy's point that ideological divides have re-emerged in US contract law theory since the 1970s, matching developments in legal scholarship and general political debate in the aftermath of the Vietnam War and other social upheaval in the US.⁵¹ Moreover, he suggests that the resultant proliferation of projects to reconstruct contract law, ostensibly to meet concerns that "conflicting considerations" models will simply reflect ideological choices, has ironically resulted in the projects revealing their ideological or political links. Promising further detail in a forthcoming publication, Kennedy provides already the following bird's eye view:⁵²

I would place Alan Farnsworth ... in the center-right position that Fuller himself occupied in 1941. To his right are the conservative projects based on morals, rights, or efficiency, including those of Richard Epstein, Charles Fried, Randy Barnett, Farber and Mathieson, Richard Posner, and Alan Schwartz. To his left, there are, first, the Fuller loyalists of the center, including Melvin Eisenberg, Robert Summers, Stanley Henderson, and Richard Hillman. Then come the more progressive modernists in the Fuller tradition, including Patrick Atiyah, Todd Rakoff, and Charles Knapp, and liberal law and economics types, such as Guido Calabresi, Michael Schill, Jon Hanson, and Christine Jolls. Further to the left are left reconstructionists, for example Roberto Unger and Margaret Radin. Also on the left are the critical legal studies contract scholars who pushed for bringing the ideological out of the shadows: myself, Karl Klare, Frances Olsen, Clare Dalton, Mary Joe Frug, Jay Feinman, Elizabeth Mensch, Peter Gabel, and James Mooney, among others.

The broadening of the ideological spectrum since the 1970s is most obvious in the development, on the one hand, of the Critical Legal Studies (CLS) movement, a still influential movement in which Kennedy remains a leading figure; and the early economic analysis of law, articulated notably by Richard Posner.⁵³ From the 1970s,

⁴⁷ Above n 47, 88.

⁴⁸ Above n 47, 69. See also Hillman, above n 7, 14.

⁴⁹ See for example R Barnett "A Consent Theory of Contract" (1986) 86 Colum L Rev 269.

⁵⁰ Compare for example K Norman-Major "The Solicitor-General: Executive Policy Agendas and the Court" (1994) 57 Albany L Rev 1081, 1100.

⁵¹ Kennedy claims, above n 35, 174:

After 1970, there emerged both a more radical left and a more radical right tendency in legal scholarship, patently tied to developments outside law. This is what creates the perennial sense of danger: that ad hoc, semioticized conflicting considerations analysis of legal problems will turn out to be no more than a vehicle for ideology - liberal or conservative, radical or hard right, not communist or fascist; and it is one of the things that motivates the reconstruction projects that characterize the period from 1970 to the present.

⁵² Above n 35, 174 n 282. Compare generally D Kennedy *A Critique of Adjudication* (Harvard UP, Cambridge Mass, 1997).

⁵³ See generally for example M Kelman *A Guide to Critical Legal Studies* (Harvard UP,

proponents of CLS drew on early realist insights as well as developments in European theory, such as post-structuralism and Marxism, to reiterate the considerable (but not necessarily total) indeterminacy of contract law, criticising mainstream theorists and judges who stressed instead its coherence. They argued that the latter masked an individualist, liberal agenda; and advocated instead a reopening of contract law primarily towards redistributivist and communitarian concerns.⁵⁴ At the other extreme, economic analysis claimed a new coherent basis for understanding and evaluating contract law, namely the criterion of efficiency (especially Pareto superiority), underpinned by methodological individualism and utilitarianism.⁵⁵ It is hardly surprising that proponents such as Posner and Frank Easterbrook were appointed to the judiciary during the conservative Reagan era.⁵⁶

Thus, Kennedy's claims of more polarised ideological and political position-taking in contract law theory development, in the US since the 1970s, appear plausible. If they can be more fully substantiated, it follows that US contract law theory – and probably black-letter law, given the appointments during the Reagan era just mentioned, as well as the extensive influence of academic theory on US law⁵⁷ – will have become even more open to substantive reasoning than in Llewellyn's heyday from the mid-1930s through to the early 1960s, and possibly even more so than in the earlier realist era.

This tendency also follows from other elements ignored or downplayed in Kennedy's history of developments after World War II. In particular, while correctly highlighting the important political implications of the work of Stewart Macaulay,⁵⁸ he

Cambridge Mass, 1987); J Paul "Introduction CLS 2001" (2001) 22 *Cardozo L Rev* 701; R Posner *The Economics of Justice* (Harvard UP, Cambridge Mass, 1981).

⁵⁴ See for example M Horwitz "The Historical Foundations of Modern Contract Law" (1974) 87 *Harv L Rev* 917; D Kennedy "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard L Rev* 1685; D Kennedy "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) *Maryland L Rev* 563; C Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 *Yale LJ* 997. Kennedy (above n 35) includes the late Mary Joe Frug as a CLS scholar, but her main ideological attack was on patriarchal tendencies in mainstream and neoclassical economic accounts of contract: see for example M Frug "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 *Am U L Rev* 1065; M Frug "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law" (1992) 140 *U Pa L Rev* 1029.

⁵⁵ See generally Hillman, above n 7, 213-220. Pareto superiority involves trying to make at least one actor better off without making any others worse off. Other notions of efficiency are also proposed: compare J Coleman "Efficiency, Utility and Wealth Maximisation" (1980) 8 *Hofstra L Rev* 509. Other critiques of Posner's starting point, based on liberal theory, were also promptly pointed out by R Dworkin "Is Wealth a Value?" (1980) 9 *J Leg Stud* 191, and "Why Efficiency? A Reply to Professors Calabresi and Posner" (1980) 8 *Hofstra L Rev* 563. Posner has since toned down his stance, subsuming economic analysis within a broader pragmatist philosophy, from which basis he advocates classical liberalism: see R Posner *Overcoming Law* (Harvard UP, Cambridge Mass, 1995) 1-29.

⁵⁶ Compare also Note "Judge Frank H Easterbrook: A Faithful Adherent of the Law & Economics Approach Advocated by Professor Frank H Easterbrook" (1987) 50 *L & Contemp Prob* 265.

⁵⁷ Above n 9.

⁵⁸ Above n 38. Macaulay's center-left "Democratic" stance also shines through in much of his other work. See for example S Macaulay "Changing a Continuing Relationship Between a Large Corporation and Those Who Deal with It: Automobile Manufacturers, Their Dealers, and the Legal System" [1965] *Wisc L Rev* 483; S Macaulay *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (Russell Sage, New York, 1966); S Macaulay "The Standardized

fails to mention the latter's renowned post-War empirical studies of "contract law in action". No doubt this reflects a strong tendency within the CLS movement to focus on "trashing" black-letter law, often related to a scepticism about social science, perceived as proclaiming objectivity while masking (mostly mainstream) ideology.⁵⁹ However, building on the insights and approach of Llewellyn and other realists, the empirical research pioneered by Macaulay appears to have had a much greater impact on the development of contract law theory in the US, compared to his other work.⁶⁰ His most famous study, published in 1963 in the *American Sociological Review* yet one of the most frequently cited articles in US law journals over recent decades, found from extensive interviews of manufacturers in Wisconsin that:⁶¹

- (1) many business exchanges reflect a high degree of planning about ... four categories – description [of performances], contingencies, defective performances and legal sanction – but
- (2) many, if not most, exchanges reflect no planning or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances.

Further, Macaulay found that "disputes are frequently settled without reference to the contract, or potential or actual legal sanctions".⁶² He suggested that these patterns were related to reliance on industry customs; minimising risk, through techniques such as dealing with reputable or multiple companies; sanctions related to broader norms, such as honouring deals and supplying good quality products; and the desire to maintain ongoing business relationships (reinforced often by personal ties) and general reputation. Careful planning and references to contractual documents in dispute resolution were found in complex and high value transactions, but also simply as a tool to promote communication and organisation within a firm.

Gilmore promptly dubbed Macaulay the "Lord High Executioner of the Contract is Dead School", yet went on to profess disinterest in those engaging in "sociological analysis rather than in historical or philosophical synthesis", a surprising stance from someone working within the tradition of legal realism.⁶³ Further, Macaulay's article

Contracts of United States Automobile Manufacturers" in A von Mehren (ed) *The Impact of Large Scale Business Enterprise upon Contract* (Mohr, Tuebingen, 1974); "Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises" in C Joerges (ed) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the US* (Nomos, Baden-Baden, 1991) 179; S Macaulay "Bambi Meets Godzilla" (1989) 26 *Houston L Rev* 575.

⁵⁹ Compare D Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stan L Rev* 575.

⁶⁰ Compare the works by Macaulay cited above n 38; with Hillman, above n 7, 241-255.

⁶¹ S Macaulay "Non-Contractual Relations In Business: A Preliminary Study" (1963) 28 *Am Socio Rev* 55, 60. I Shapiro "The Most Cited Law Review Articles Revisited" (1996) 71 *Chicago-Kent L Rev* 751, 767.

⁶² Macaulay, above n 62, 61.

⁶³ Gilmore, above n 12, 113 n 1; compare Peters, above n 40. See also R Speidel "The Characteristics and Challenges of Relational Contracts" (2000) 94 *Nw U L Rev* 823, 825-826:

[The modern UCC] model invites the parties, their lawyers, and the courts to become litigation empiricists as they confront issues of liability and remedy, and it suggests that norms immanent in trade usage and practice may become part of the bargain.

Other empiricists, such as Stewart Macaulay, accept the vital link between bargain and context. His research, however, tends to marginalize the importance of contract law by identifying other practices and norms that have a greater influence on behavior than either the bargain itself or

never proclaimed that contract was unimportant, only that practical realities meant that:⁶⁴

... situations where legal sanctions seem to make sense are a limited subset of all contract disputes. Writing about contracts that assumes that litigation is the major, usual or typical way to resolve disputes rests on a false assumption.

Building on this research in the 1960s, and contemporaneous studies by his then colleague Lawrence Friedman which highlighted the gutting of general contract law by specialised statutes and contract law regimes,⁶⁵ the “Wisconsin school” of contract law scholarship has attempted to systematically investigate the realities facing contracting parties – not just through reported case judgments – and to reintegrate these findings with post-classical contract law theory.⁶⁶

One aspect of their new synthesis has involved re-engaging the interplay among principles of private autonomy, reliance and restitution, following the lead of Lon Fuller, but adding a more sustained analysis of social context and norms.⁶⁷ This has also been the approach of Ian Macneil, who has drawn on the work of the Wisconsin school (but also much other sociological and anthropological material), and in turn influenced it.⁶⁸ The key insight of his “relational contract theory” has been that classical law takes a highly discrete, one-off exchange as its paradigm case, focusing overly on contract law’s role in enhancing “discreteness” (abstracting from context) and “presentation” (bringing the future into the present, primarily through an initial agreement), whereas the more important contemporary exchanges involve complex long-term relationships and evolving normative frameworks.⁶⁹ Macneil incorporates as a set of “linking norms” the restitution, reliance and expectation interests, originally highlighted by Fuller.⁷⁰ However, from a diverse range of sources not limited to

contract doctrine. In short, there is an independent life of bargaining, reputation, repeat exchange, and adjustment and settlement that occurs in the shadow of, but not directly influenced by, contract doctrine.

⁶⁴ S Macaulay “Almost Everything I Did Want to Know about Contract Litigation: A Comment on Galanter” [2001] *Wisc L Rev* 629, 633.

⁶⁵ See for example L Friedman *Contract Law in America: A Social and Economic Case Study* (U Chicago Press, Chicago, 1965).

⁶⁶ See for example L Friedman and S Macaulay “Contract Law and Contract Teaching: Past, Present and Future” [1967] *Wisc L Rev* 805; S Macaulay, J Kidwell, W Whitford and M Galanter *Contracts: Law in Action 2 Vols* (The Michie Company, Charlottesville, 1995). See generally W Woodward “Clearing the Underbrush for Real-Life Contracting” (1999) 24 *L & Soc Inq* 99.

⁶⁷ Macaulay and others, above n 67, Vol 1 Chapter 2.

⁶⁸ Macaulay and others, above n 67, Vol 1 Chapter 1. See also K Llewellyn “What Price Contract – An Essay in Perspective” (1931) 40 *Yale LJ* 704. Another probable, but rarely noted, influence on Macneil’s “bottom up” approach to contract law theory appears to have been a lengthy period spent teaching law in Tanzania in the 1960s. See I Macneil *Contracts, Instruments for Cooperation: East Africa* (F B Rothman, South Hackensack NJ, 1968). Compare generally Hillman, above n 7, 255-260.

⁶⁹ I Macneil “Contract: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law” (1978) 72 *Northwest Univ L Rev* 854, 856-864 (classical law), 865-886 (neoclassical law).

⁷⁰ I Macneil “Values in Contract: Internal and External” (1984) 78 *Northwest Univ L Rev* 340, 247. See also Note “Hegel and the Autonomy of Contract Law” (1999) 77 *Tex L Rev* 719 (arguing that Fuller and Macneil both attempt a mixed or soft reconstruction of contract law compatible with Hegel’s

reported case law, Macneil derives a much broader range of norms or values “internal” to the parties’ relationship.⁷¹ His colleague, Richard Speidel, has recently singled out “norms that are necessary to hold the relationship together, such as solidarity, reciprocity, and role integrity, and other norms that may be generated by the relationship over time, such as those supporting cooperation, risk sharing, and preserving the relationship”.⁷² Macneil further distinguishes “external” norms or values, notably those imposed by “sovereign positive law”, while recognising that his encompassing range of “internal” norms subsumes “external” norms so that their separation can never “be other than partially arbitrary”.⁷³ Several contract law scholars sympathetic to this approach have accordingly attempted to gauge the suitability of external norms developed by courts or legislative bodies.⁷⁴ However, Macneil himself has consistently shown more interest in the broader normative context, drawing on a wide range of empirical and theoretical material.⁷⁵

Macneil also takes further the realist insight that every transaction is embedded in complex relations, asserting that: “A surer and more rapid understanding of any transaction is achieved by contemporaneous examination of those relations than by focusing initial inquiry on the transaction itself”.⁷⁶ Thus, before assessing the events resulting in a judgment in which the Ohio Supreme Court remedied a failed pricing mechanism by insisting on negotiations between the parties and otherwise appointment of a mediator, Speidel checks for key relational features of the overall relationship: extended duration, open terms, expectations of future cooperative behaviour and risk sharing, transaction-specific investments, and close personal relations between the parties.⁷⁷

The importance of empirical research for both descriptive and normative theory-building has also been growing among those interested in the economic analysis of law. The neoclassical approach initially propounded by Posner and others focused on issues raised by case law and legislation, making strong assumptions to deduce optimal rules from the guiding principle of efficiency, such as the notion that the “superior risk

account).

⁷¹ I Macneil “Values in Contract: Internal and External” (1984) 78 Northwest Univ L Rev 340, 347-369.

⁷² Speidel, above n 64, 827.

⁷³ Macneil, above n 72, 367.

⁷⁴ See for example Speidel, above n 64; R Speidel “Article 2 and Relational Sales Contracts” (1993) 26 Loyola of Los Angeles L Rev 789; R Speidel “Court-Imposed Price Adjustments Under Long-Term Supply Contracts” (1981) 76 Nw U L Rev 369, 370-381; P Brown and J Feinman “Economic Loss, Commercial Practices and Legal Process: Spring Motors Distributors Inc v Ford Motor Co” (1991) 22 Rutgers LJ 301.

⁷⁵ See for example I Macneil *The New Social Contract* (Yale UP, Yale, 1980); I Macneil “Bureaucracy, Liberalism, and Community – American Style” (1984-1985) 79 Nw U L Rev 900; D Campbell “Ian Macneil and the Relational Theory of Contract” in I Macneil *The Relational Theory of Contract: Selected Papers of Ian Macneil* (Sweet & Maxwell, London, forthcoming). Thanks to David Campbell for making available the manuscript for the latter.

⁷⁶ I Macneil “Relational Contract Theory: Challenges and Queries” (2000) 94 Nw U L Rev 877, 877. Compare for example Llewellyn, above n 69.

⁷⁷ Speidel, above n 64, 827-833, 834-37 (discussing *Oglebay Norton Co v Armco Inc* (1990) 556 NE 2d 515). Compare the stricter approach in English and perhaps especially New Zealand law described in D McLauchlan “Rethinking Agreements to Agree” (1998) 18 NZULR 77.

bearer” should be determined when setting rules on remoteness of damage or excuse following changed circumstances. A “second generation” of economic analysis has accepted more realistic assumptions and taken a more dynamic approach to the interaction between legal rules and behaviour, often drawing on game theory, even at the expense of more qualified conclusions.⁷⁸ Intriguingly, what might be termed a “third generation” has engaged in detailed empirical studies of contract law rules in action.

Lisa Bernstein, for instance, begins with a hypothesis (derived from game theory in economics) that although contracting parties may behave flexibly in seeking to preserve a relationship, they would expect written “end-game norms” to be applied by an adjudicator if the relationship broke down. Rather than leaving the argument at that, as earlier economic analysts had tended to do, she examines the practices of arbitrators in the US grain and feed industry, arguing that they do indeed adopt a strict approach and that courts should also act accordingly.⁷⁹ In more recent research into this and other industries, Bernstein argues that debates and ultimate failures to codify customs and practices show that they do not exist in a manner which can be readily subsumed into legislation or court judgments.⁸⁰ Rather similarly, Eric Posner also has set out various reasons why commercial customs will tend to be inefficient, and then has drawn directly and indirectly on empirical research to support his conclusions.⁸¹ Other hypotheses about formal requirements under the Statute of Frauds, derived from game theory and more realistic assumptions about the costs and benefits of contract planning, have been confirmed by patterns in reported judgments. From an admittedly small sample, Jason Johnston shows that US courts recognise informality in established relationships, finding exceptions to the statutory requirements, but not in “stranger” relationships.⁸² Finally, although driven by more general – perhaps too unfocused – concerns, Daniel Keating’s recent interview research into practices and expectations regarding the “battle of forms” addresses a suggestion by two proponents of “second generation” economic analysis that the UCC should abandon its innovative compromise solution and return to a strict (Anglo-New Zealand) “mirror image” rule.⁸³ All these recent studies can be

⁷⁸ Compare Hillman, above n 7, 225-236; M Trebilcock *The Limits of Freedom of Contract* (Harvard UP, Cambridge Mass, 1993); G Hadfield and M Richardson (eds) *The Second Wave of Law and Economics* (Federation Press, Leichhardt NSW, 1999); R Korobkin and T Ulen “Law and the Behavioural Sciences: Removing the Rationality Assumption from Law and Economics” (2000) 88 Calif L Rev 1051. The “transaction cost economics” of Oliver Williamson is of earlier and arguably separate vintage, although Posner (above n 56, 433-440) is keen to draw this within his neoclassical paradigm.

⁷⁹ L Bernstein “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms” (1996) 144 U Pa L Rev 1765. Compare her earlier theoretical work in “Social Norms and Default Rules Analysis” (1993) 3 S Calif Interdisc LJ 59; and Speidel, above n 64.

⁸⁰ L Bernstein “The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study” (1999) 66 U Chi L Rev 710.

⁸¹ Compare E Posner “Law, Economics, and Inefficient Norms” (1996) 144 U Pa L Rev 1687; with E Posner *Law and Social Norms* (Harvard UP, Cambridge Mass, 2000). Eric Posner is the son of Richard Posner, an apt symbol of the changing generations within law and economics.

⁸² J Johnston “The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model” (1996) 144 U Pa L Rev 1859.

⁸³ Compare D Baird and R Weisberg “Rules, Standards, and the Battle of the Forms: A Reassessment of 2-207” (1982) 68 Va L Rev 1217 with D Keating “Exploring the Battle of Forms in Action” (2000) 98 Mich L Rev 2678, 2706:

criticised on grounds of methodology, interpretation of data, and normative implications.⁸⁴ However, these criticisms in turn raise new empirical issues, further reinforcing the importance of substantive reasoning in contract law theory development in the US over recent decades.

This longstanding and seemingly growing tradition of empiricism needs to be appreciated when considering the debate about whether there is a “new formalism in contract” in the US. David Charny points out that Bernstein’s studies challenge the “modernist” anti-formal approach of Llewellyn and other realists, who had rejected classical theorists’ aspirations “to deduce the vast edifice of contractual rules from an essentialist understanding of promise and consent”, in favour of scepticism about abstraction and “guidance from the concrete, everyday perceptions and understandings of the transactors”.⁸⁵

We are now in the midst of a third phase, a phase of “anti-antiformalism” that seeks to discredit and displace Llewellyn’s claim to found commercial law in immanent commercial practice.

While the implications of research in this phase, at least so far, tend to favour more formal legal rules and institutions, the *process* and considerations involved – a highly contextual approach incorporating empirical research and insights from socio-legal theory – remains consonant with the substantive approach which has pervaded US contract law theory since the days of the early realists.⁸⁶

A similar point can be made about the ongoing debate on reforming the UCC, notably article 2 on Sales. Gregory Maggs claims that the guiding principles in its original drafting and promulgation, which arguably promote more substantive reasoning

Professors Baird and Weisberg argue that because at least some parties will read the forms, the mirror-image rule encourages parties to draft provisions that advance the mutual interests of buyer and seller. If a party persists in writing one-sided terms on its form, it will risk losing business since the other side is more likely to read a form that it knows it might be bound by. The two authors stress that effectively it only takes a minority of parties reading their forms to encourage the form drafters not to be unfairly one-sided. The problem with a regime like section 2-207, in which UCC gap-fillers are more likely to control, is that parties have less of an incentive to read forms since the terms on those forms probably won’t bind them anyway. Drafting parties, in turn, will have less reason to draft forms with any thought of the other side’s interests in mind.

The Baird-Weisberg model is premised on two key factual assumptions about the behavior of parties in battle-of-the-forms scenarios: 1) That at least some parties will read the other side’s forms closely; and 2) That parties will change terms on their forms if less than a majority of those receiving the forms object to those terms. The interviews that I conducted suggest that the two authors are probably right on both counts; nevertheless, their general proposal was not especially popular with the subjects whom I asked.

⁸⁴ See for example D Snyder “Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct” (2001) 54 SMU L Rev 617; D Charny “The New Formalism in Contract” (1999) 66 U Chi L Rev 842; E Posner “Norms, Formalities, and the Statute of Frauds: A Comment” (1996) 144 U Pa L Rev 1971; A Katz “On the Use of Practitioner Surveys in Commercial Law Research: Comments on Daniel Keating’s ‘Exploring the Battle of Forms in Action’” (2000) 98 Mich L Rev 2760; Macaulay, above n 65, 634 n 30 (“Social science results, including law and economics, are always suggestive at best. The game cannot be to produce the equivalent of the formula for water”).

⁸⁵ Charny, above n 85, 842.

⁸⁶ See also for example W Woodward “Neoformalism in a Real World of Forms” [2001] Wisc L Rev 971.

in US commercial law overall, have been undermined by successive amendments to various other Articles over recent decades. He also suggests that debate on reforming article 2 points towards a reinjection of formal reasoning. However, he concedes that the outcome is not clear regarding whether or how to incorporate contract practices.⁸⁷ Arguably, this follows from the controversies engendered by new empirical and theoretical research. These should also impact on other issues such as the role of formal requirements (impacting on content formality in contract law reasoning), and whether to prefer rules over standards (affecting interpretive formality).⁸⁸ Further, at least until the suspension of reform discussions in 1999, the debate about appropriate rules for a revised article 2 had also drawn on evidence of contemporary trade practices reflected in new international instruments, often adopting broad standards and consequently favouring less formal reasoning.⁸⁹

Empirical research also plays a significant part in a related debate which also emerged over the 1990s. Focusing on reported judgments, Ralph Mooney contended in 1995 that since the early 1980s – consistently with the conservative turn in US politics – there has been a striking return to “conceptualist” or formal reasoning by US judges, related to a revival in “freedom of contract” ideology favouring economically stronger parties.⁹⁰ However, both views have been strongly contested by a prolific commentator and theorist, Richard Hillman.⁹¹

I am unconvinced that 1990s’ contract law has increasingly favored “economically privileged parties”. The claim appears to be based in part on a “trend” in recent decisions to favor “sellers, banks, insurers, and employers” over “buyers, borrowers, policyholders, and employees”. The problem is that, in the cases identified to support the claim or as an abstract matter, the former parties are not always “privileged” and the latter parties are not always “underdogs”. ... In addition, many contracts cases in the 1990s protect true underdogs, so it is difficult to establish any “trend”.

Similarly, recent contract cases do not appear to exemplify a genuine paradigm shift away from flexibility and egalitarianism toward “the abstract conceptualism of classical contract law”. It is true that some recent cases have, for example, applied the “indefiniteness” doctrine to dismiss claims and the parol evidence rule to bar the admissibility of evidence to interpret terms, while others balked at enforcing agreements-to-agree. This “trend” allegedly evidences a “resurrection” of formal rules that prevent enforcement of the true agreement between the parties. These rules have always existed in courts’ arsenals, however, and I doubt that their recent use constitutes a major change in the direction of contract law. Moreover, many recent cases appear to buck this “trend”. I am more comfortable with the proposition that recent reported decisions demonstrate an incremental enhancement of rules that favor the enforcement of written contracts over alleged oral, less formal representations or agreements. My own study of promissory estoppel cases in the mid-1990s illustrates the dramatic lack of success of the promissory estoppel theory which, in part, stems from a preference for the enforcement of written contracts.

The last-mentioned study – which demonstrated a still central role for detrimental reliance, rather than promise as alleged by traditional theorists such as Daniel Farber

⁸⁷ Maggs, above n 27.

⁸⁸ Above n 31. Compare for example Johnston, above n 83; Charny, above n 85.

⁸⁹ See for example L Rusch “The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent” (1998) 72 Tul L Rev 2043, 2062-2066.

⁹⁰ R Mooney “The New Conceptualism in Contract Law” (1995) 74 Or L Rev 1131, 1133-1134.

⁹¹ R Hillman “The ‘New Conservatism’ in Contract Law and the Process of Legal Change” (1999) 50 Boston College L Rev 879, 880-881 (citations omitted).

and John Matheson, despite the overall lack of success in promissory estoppel claims⁹² – is one example of the focused empirical and theoretical work which will need to be done to decide the issue raised by Mooney. As Hillman comments, moreover, the debate will need to be linked to theories of whether and why judges respond to shifts in public opinion. He argues that this is plausible, but suggests other possible theories: the power of the rhetoric of a particular judge (such as Richard Posner), or a “case-selection effect” resulting from plaintiffs (encouraged for instance by earlier tendencies for judges to find obligations outside of written contracts) to bring increasingly weak cases.⁹³ Responding to the latter point in particular, Keith Hylton argues that judicial attitudes are unimportant compared to whether plaintiffs in civil disputes tend to have more or less information about relevant legal standards than defendants.⁹⁴ To a greater or lesser degree, all these issues are amenable to empirical inquiry. That will no doubt be undertaken, advancing the vision of Llewellyn and other realists,⁹⁵ and thus further promoting substantive reasoning in US contract law theory generally.

Finally, another important political backdrop to these recent discussions should also be noted. Confidence in the judiciary was a factor linking Llewellyn’s variant of legal realism, reflected in the UCC, the “conflicting considerations” methodology through to the 1960s, and the neoclassical synthesis carried over to the *Restatement (Second) of Contracts*. Since the 1970s, this confidence has been shaken due to changes in the political arena and new schools of general legal theory, such as CLS. This, in turn, frames current debates about reformulating contract law. In particular, the process of promulgating new *Restatements* through the American Law Institute has become extremely contentious, and overtly political as the Institute has attempted to boost its legitimacy and transparency by encouraging interest group participation.⁹⁶ Similar tensions emerged in the attempts to reform article 2, contributing to the suspension of formal discussions in 1999. The tensions have also led to scholarly attempts to revisit the process leading to enactment of the original UCC, uncovering similar political controversy (not well-publicised at the time), with a view to deriving some guidance on how to ride out the present storm.⁹⁷

In sum, contract law theory development in the US has blossomed since the early 1970s, perhaps linked to a resurgence of contract litigation,⁹⁸ but drawing on

⁹² Compare R Hillman “Questioning the ‘New Consensus’ on Promissory Estoppel: An Empirical and Theoretical Study” (1998) 98 Colum L Rev 580 with D Farber and J Matheson “Beyond Promissory Estoppel: Contract Law and the ‘Invisible Handshake’” (1985) 52 U Chi L Rev 903.

⁹³ Hillman, above n 7, 885; 885 n 29, citing R Hillman “‘Instinct with an Obligation’ and the ‘Normative Ambiguity of Rhetorical Power’” (1995) 56 Ohio St J LJ 775.

⁹⁴ K Hylton “A Note on Trend-Spotting in the Case Law” (1999) 40 Boston College L Rev 891. If plaintiffs have less information, as in many product liability cases, they will tend to lose significantly less than half of cases. See also K Hylton “Asymmetric Information and the Selection of Disputes for Litigation” (1993) 22 J Leg Stud 187.

⁹⁵ Compare White, above n 88; E Warren “Comments on Professor White’s Paper” [1988] Ann Survey Am L 49, 52-54 (complaining about the lack of empirical research into contract, at that stage).

⁹⁶ R Hyland “Perspectives on Private Law Codification in America in the 21st Century” (Paper presented at the Civil Code Centennial Conference, “Legislation in the 21st Century and Private Law”, Tokyo, 12 November).

⁹⁷ See for example Kamp, above n 27.

⁹⁸ Galanter, above n 43. See also L Kenworthy, S Macaulay and J Rogers “‘The More Things Change ...’: Business Litigation and Governance in the American Automobile Industry” (1996) L & Soc

stimulating developments dating back almost a century. The impact of legal realism has been pervasive in advancing substantive over formal reasoning. Despite attempts by Fuller and others to avert extremes of substantive reasoning, such reasoning has also been promoted by the political and ideological debate which intensified from around 1970, and a tradition of empirical inquiry which has steadily gained momentum from around the same time. Further, at key junctures, important theorists have borrowed from developments in legal and contract theory overseas, including Germany. These features, along perhaps with the resurgence of contract law litigation after a lull through to around 1960, provide an essential backdrop to the comparison of particular contract law topics in my other published works developing Atiyah and Summers' framework.

II From the First to the Second “Legal Interpretation Debate” in Japan

The foregoing detailed overview of contract law theory development in the US, and its relationship to patterns of substantive reasoning, permits a more succinct analysis of largely convergent developments in Japan. These too have deep roots, with a substantive approach characterising private law methodology following a move away from doctrinal scholarship since the 1920s. The shift drew heavily on developments in Germany and the US, especially legal realism.⁹⁹ A regular refrain has been the need to undertake sociological analysis to interpret private law doctrine, and an awareness of broader philosophical issues. Perhaps even more than in the US, politics and ideology have also figured prominently, especially during the “first legal interpretation debate” in the early 1950s (as the US encouraged Japan to adopt right-wing policies) and over the 1960s (as Marxists fought back in the legal arena). However, these methodological debates were often not directed specifically at contract law, and indeed laid the foundation for doctrinal reconstruction focusing primarily on tort law (especially new problems in environmental pollution, product liability and the like) over the 1970s and 1980s. By contrast, intense discussions centering on contract law theory emerged around 1990. Drawing especially on newer developments in US and German legal theory, these have generated a new wave of empirical research. However, several scholars associated with this debate turned their attention to doctrinal and law reform issues over the 1990s, as did many other academics who support a strong doctrinal tradition in Japanese contract law scholarship. Such counter-tendencies have been reinforced by a “second legal interpretation debate”, which also emerged around 1990 following attempts to reassert the importance of formal reasoning in private law more generally. They may also explain and reinforce a strong tendency to reform legal education by adding post-graduate “law schools” to the current under-graduate programmes. Supposedly drawing on US models, yet contrary to the pattern at least in the top law schools in that country, these proposals have been driven by a narrow vision of “legal practice” and concomitant attention to improving approaches to black-letter law analysis.

Following enactment of the Civil Code at the end of the 19th century, Japanese

Inq 631, 642-643.

⁹⁹ See generally K Yoshida “*Riarizumu Hogaku to Rieki Koryoron ni kansuru ‘Kisoriron’ teki Kosatsu* [Observations from ‘Fundamental Theory’ on Legal Realism and Balancing of Interests Theory]” in N Segawa *Shihogaku no Saikochiku [Reconstructing Private Law Theory]* (Hokkaido Daigaku Toshokan, Sapporo, 1999) 81, 101-113.

jurists turned increasingly to German doctrinal scholarship to flesh out Code provisions.¹⁰⁰ Because the Code had drawn in places on French and other law (even some rules of English law), as well as the German Civil Code and its earlier drafts, this resulted in serious contradictions and a sense that such legal scholarship was increasingly irrelevant. New social problems were also increasingly brought before the courts, which started to accumulate precedents and to address social realities, such as the growing usage of standard form contracts. Over the 1920s and early 1930s, sharp criticisms were directed against “conceptual jurisprudence”. Eiichi Makino drew on the new “free law” movement in Germany to urge judges and commentators to decide private law issues based on “concrete appropriateness”, invoking broad standards such as abuse of rights, public order and good morals, and the principle of good faith (not yet incorporated in the Civil Code). Following the terrible destruction resulting from the Great Kanto Earthquake of 1923, for example, Makino argued that lessors had a duty to renegotiate with lessees who had erected new dwellings, without clear legal entitlements, based simply on their “survival rights”.¹⁰¹

Another professor at Tokyo University, Izutaro Suehiro, reacted against the potential “dictatorship by judges” afforded by Makino’s free law theory. Developing insights of US pragmatists and legal realists, including Jerome Frank, Suehiro saw part of the answer in the evolution of case law and the nature of judicial reasoning. He was deeply impressed by the “case method” approach he witnessed in action at the University of Chicago in 1917, and later founded in Japan a still vibrant tradition of study groups centred on case law analysis. Suehiro valued such analysis for moving away from the mainstream German methodology of deducing legal principles and applying them to specific situations. Instead, case law analysis’ focus on facts was acclaimed as leading into a consideration of substantive reasons (such as consequences of deciding one way or another), capable of generating the articulation of more principled general standards. In addition, Suehiro met Eugen Ehrlich in France and Switzerland over 1918 and 1919, and later showed great interest in exploring Japan’s “living law” with a view to reforming Japan’s judge-made and statutory law.¹⁰² This interest was shared by a younger Marxist colleague, Yoshitaro Hirano. He drew on studies of Japanese village practices to suggest parallels with “Germanic legal institutions”, opposing these communitarian tendencies to the “classical Roman law” allegedly reflected in the Civil Code.¹⁰³

A fourth professor active at Tokyo University over the 1920s, Hideo Hatoyama, largely renounced his work in a narrow German doctrinal style. Following a twenty-month leave of absence spent at the Japanese Legation in Berlin, in 1924 he published a comprehensive analysis of the various manifestations of the good faith principle in the law of obligations. Hatoyama perceived this principle as the leading social and ethical *leitmotiv* running through the law, but hemmed in by legislative provisions. He urged an analysis of its contents through the study of Japanese cultural

¹⁰⁰ See generally Z Kitagawa *Rezeption und Fortildung des Europäischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970).

¹⁰¹ G Rahn *Rechtsdenken und Rechtsauffassung in Japan [Legal Thought and Conceptions of Law in Japan]* (CH Beck, Munich, 1990) 142.

¹⁰² Rahn, above n 102, 143-147.

¹⁰³ Rahn, above n 102, 151.

norms, “living law”, and “social jurisprudence”.¹⁰⁴ Nonetheless, his monumental study itself focused on manifestations and tensions with the good faith principle found within legal doctrine and black letter law in Japan and Germany.

These influences, and the work of Roscoe Pound, led to a synthesis by Sakae Wagatsuma, successor to Hatoyama at Tokyo University from 1927 to 1957, and the undisputed doyen of civil law scholarship in Japan over most of the 20th century. As Rahn explains, Wagatsuma advocated the following approach, focusing especially on court judgments:¹⁰⁵

To determine a measure for concrete value judgments for grounding a decision, it must first be clarified in what form and with what ideals private law *should* lead the regulation in some form of the relationships of life. Secondly, the changes in regulated relationships need to be determined based on connections to multiple social factors. And thirdly, the judgements for regulating individual cases based on ideal measures must be construed in the light of applicable law.

Unsurprisingly, against this backdrop going back to the 1920s, an even greater move towards substantive reasoning occurred during and after the “legal interpretation debate” in the early 1950s. The debate began with an emotional appeal by Saburo Kurusu, for jurists (scholars as well as judges) to be honest about what they were doing. He urged jurists to abandon the pretence of deciding legal issues based on “objectivity” and “one right answer”. Appealing to Austrian legal philosopher Hans Kelsen, Kurusu argued that the law provided a broad “framework” of possible answers. Selecting one, followed by “rationalisation” in terms of black letter law and doctrine, involved a subjective judgment. For this, in political cases, the interpreter had to take political responsibility.¹⁰⁶

These views, which generated extensive debate beyond the field of private law, were made in response to the change in political and legal climate in the early 1950s, especially the shift towards right-wing conservatism, away from the legal and socio-economic regime founded on left-liberal principles by key members of the US-led Occupation forces. Of particular concern was the willingness of politicians and the courts to disregard the plain meaning of article 9 of the new Constitution, prohibiting Japan’s right to wage war, and thus allow Japan to rebuild its armed forces. In the view of Kurusu and an increasing number of legal commentators at this time, appeals to formal reasoning were patently inadequate. By openly recognising the ideological dimensions of legal interpretation, Kurusu also suggested that “certainty” would be advanced, compared to decision-making advancing formal reasoning but hiding substantive considerations. Further certainty, and guidance in reaching value judgments, could be promoted by deriving legal norms through a sociological analysis of real social relationships.

These views were restated in even more influential form by Takeyoshi Kawashima, Kurusu’s colleague at Tokyo University after World War II. He advocated “law as a science”, empirically investigating systems of values (including their contents, relationships to each other, and interests supporting them). These investigations were to be relating to sociological analysis of underlying social relationships, to provide more

¹⁰⁴ Rahn, above n 102, 149.

¹⁰⁵ Rahn, above n 102, 153.

¹⁰⁶ Rahn, above n 102, 203-215.

guidance in making value judgments, which then were to be rationalised through “written techniques” in terms of black letter law and doctrine.¹⁰⁷ Inspired by the work of Ehrlich, Kawashima later promoted “practical jurisprudence” centred on empirical research. He drew on his earlier detailed studies of Japanese family and village life, was actively involved in establishing the Japanese Association of Sociology of Law in 1947, and went on to demonstrate a keen interest in law (especially contract law) in action.¹⁰⁸ Compared to Kurusu, and even Suehiro (from whom he inherited a copy of Jerome Frank’s *Law of the Modern Mind*), Kawashima also appears to have been driven by more cynicism about judges and case law development.

Another colleague, Ichiro Kato, drew on US legal realism as well, to suggest beginning with a focus on value judgments, only then turning to justification in terms of black letter law. However, while agreeing that an inter-disciplinary approach was called for by his “balancing of interests theory” of interpretation, Kato (later a Supreme Court Justice) preferred a freer evaluation and reposed greater confidence in judges’ ability to reach “appropriate” value judgments and decisions.¹⁰⁹ This broad-brush “multi-factor balancing” method, combined with largely pragmatic attempts to group fact situations and reported cases, became a widely used methodology from the 1960s.¹¹⁰

By contrast, the Marxist “modern law” school, developed by Yozo Watanabe and Toshio Hironaka from the 1960s (an era giving primacy to rapid economic development), remained highly sceptical about judges. They advocated a highly normative vision of where civil and contract law should be heading, for instance in regulating standard form contracts, going much further than Kawashima in drawing (based primarily on Marxist theory) on universal rules of evolutionary progress.¹¹¹ Finally, from the mid-1960s at Tokyo University, Eiichi Hoshino also urged greater attention to normative structures in private law interpretation. However, his approach was more philosophical, reflecting interests in natural law and Catholic theology. Unlike the “modern law” school, moreover, Hoshino retained more interest in contract and tort law in action.¹¹²

These vigorous methodological debates, building on developments in private law theory dating back to the 1920s and maintaining a keen awareness in thinking overseas (especially the US and Germany), further entrenched substantive reasoning in Japan. The approach is reflected in articles on civil and contract law published from the 1950s, although textbooks have tended to remain more doctrinal.¹¹³ Although the methodological innovations revolved around figures at Tokyo University, the latter’s

¹⁰⁷ Rahn, above n 102, 216-239.

¹⁰⁸ See for example T Kawashima (C Stevens trans) “The Legal Consciousness of Contract in Japan” (1974) 7 L in Japan 1. The noted deviations in practice from the provisions and ideals of the formal legal system have often been taken by non-Japanese commentators as proof that contract law is largely irrelevant in Japan. This is particularly ironic on the part of commentators from the US, since the work of Kawashima and his predecessors draws heavily on the tradition of US legal realism, which has consistently made similar observations in the US. Compare above Part I.

¹⁰⁹ Rahn, above n 102, 248-264; I Kato (C Stevens trans) “Logic and the Balancing of Interests in Legal Interpretation” (1968) 2 L in Japan 80.

¹¹⁰ Kato, above n 110, 99; Yoshida, above n 100, 114-115.

¹¹¹ Rahn, above n 102, 265-277.

¹¹² Rahn, above n 102, 277-297.

¹¹³ Compare for example T Uchida *Minpo I: Sosoku – Bukken Soron [Civil Code I: General Part & General Part on Real Property]* (U Tokyo Press, Tokyo, 1994).

pre-eminent role in Japan's legal education structure (and, indeed, its political order) ensured the consolidation of more substantive reasoning among private law theorists throughout the country. By tying the debate closely to theories about how to decide cases brought before the courts, it probably had a significant influence on judicial thinking, although this is difficult to substantiate since methodological approaches are rarely set out by judges in judgments and even in law journal literature.

However, the tradition of doctrinal private law scholarship remained strong, partly driven by the need for professors (and practitioners) to retain a conceptual understanding of how the Civil Code fits together. Doctrinal scholarship remained particularly strong at Kyoto University, Tokyo University's main rival, except in the writings of Zentaro Kitagawa, who combined a deep knowledge of German civil law theory with early exposure to US contract law, and maintained a strong interest in the interrelationship between law and changing business or social practices.¹¹⁴ Further, perhaps reflecting the greater overall preponderance of tort litigation, and certainly as a result of environmental pollution and product liability becoming increasingly pressing social problems from the late 1960s, the focus was less on contract law theory development. The practical need to address such social problems also contributed to a slowdown in theoretical debate over the 1970s and 1980s.

Nonetheless, firm foundations had been erected for further developments.¹¹⁵ A pathbreaking event was the publication in 1990 of a book proclaiming the "Resurrection of Contract", written by Takeshi Uchida.¹¹⁶ Like his mentor, Hoshino, he was interested in uncovering a new normative structure to guide the law. Like Hoshino, and other Tokyo University theorists such as Kato, Uchida showed much faith in judge-made law. He suggested that "preserving relationships" and "flexibility" were the main principles underlying a burgeoning number of cases since the 1960s which had applied the doctrine of good faith (added to the Code in 1947). Openly advocating communitarianism in doing so, he drew on Macneil's "relational contract law theory", but initially – also inspired by Ronald Dworkin – eschewing broader sociological inquiry.¹¹⁷ Now secure in a Chair at Tokyo University, however, since the mid-1990s Uchida has embarked on thought-provoking collaborative empirical studies into contract law and practice in Japan and the US.¹¹⁸

¹¹⁴ Compare Rahn, above n 102, 242-243, 246, 290, 296, 302; with for example Z Kitagawa "Unfair Contract Terms and Administrative Guidance" (1985) 16 *Rechtstheorie* 181.

¹¹⁵ Compare generally A Wang "*Nihon Keiyakuho no Genjo to Kadai: Shiteki Jichi no Gensoku o Chushin ni* [Topics and the Current Circumstances in Japanese Contract Law: Focusing on the Private Autonomy Principle]" (1995) 42 *Osaka Ichidai* 191; S Tanaka "*Ho Shisutemu no Sogo Shutaiteki Dodoka o Mezashite* [Aiming at Rendering the Legal System More Flexible through Intersubjectivity]" (1997) 200 *Hogaku Kyoshitsu* 6, 9-11.

¹¹⁶ T Uchida *Keiyaku no Saisei [The Rebirth of Contract]* (Kobundo, Tokyo, 1990). See also T Uchida "Gendai Keiyaku Ho no Aratana Tenkai to Ippanjoko [General Clauses and New Developments in Contemporary Contract Law]" (1993) 514 *NBL* 6; T Uchida "The New Development of Contract Law and General Clauses - A Japanese Perspective -" in ICCLP (ed) *Japanese and Dutch Laws Compared* (ICCLP, Tokyo, 1993) 119; T Uchida "*Keiyaku Purosesu to Ho* [Contract Process and Law]" in IwanamiKoza (ed) *Shakaikagaku no Hoko VI - Shakai Hendo no Naka no Ho [Directions in Social Sciences (6): Law Amidst Social Change]* (Iwanami, Tokyo, 1993) 129.

¹¹⁷ See generally L Nottage "Contract Law, Theory and Practice in Japan" in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316.

¹¹⁸ See for example T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era:*

In parallel from around 1990, Kitagawa's student Kenji Yamamoto drew on a very different tradition – primarily the “new liberal” philosophy and social theory of Habermas in Germany – to advocate a reorientation of contract law away from a narrow focus on the parties' initial agreement, and indeed to propose a duty to renegotiate in certain circumstances.¹¹⁹ He too has since been involved in a collaborative research project directed from Kyoto University, which straddled philosophy, sociology, and legal doctrine.¹²⁰ A related project co-directed by Masanobu Kato has involved surveys of law and business students in Japan and over 20 other countries, gauging reactions to a hypothetical long-term contract renegotiation scenario, based on the “Japan-Australia Sugar Case” in the early 1970s.¹²¹ In addition, Hiroo Sono has recently introduced to a broad audience in Japan the US debate – based on new empirical research – on the proper relationship between commercial practices and expectations, and legislative or judge-made law.¹²²

Over the 1990s, moreover, civil law scholars such as Keizo Yamamoto (at Kyoto University) have sought to re-establish more mainstream liberal philosophical and constitutional foundations for contemporary contract law theory.¹²³ Such attempts have more ambivalent implications for the further expansion of substantive reasoning in Japanese law. Although they may encourage the elaboration of competing philosophical perspectives and proposals for broad new contract law principles, like those advanced by Uchida or Kenji Yamamoto, they may also result in a return to a more circumscribed neoclassical synthesis.¹²⁴ More supportive of the latter is a growing tendency to focus on connections between existing legal norms and concepts, rather than displacing these by focusing on value judgments as advocated over the 1960s and 1970s. These newer attempts have involved: (i) deriving new legal norms from existing ones, by extending the methodology of grouping new sets of cases together (following a suggestion advanced by Kato); (ii) creating horizontal links between different norms and concepts

Japanese Society and Law] (Iwanami Shoten, Tokyo, 2000) 280-304.

¹¹⁹ A pioneering work was K Yamamoto “*Keiyaku Kosho Kankei no Hoteki Kochiku ni tsuite no Ichi Kosatsu* [A Perspective on the Legal Structure of Contract Negotiation Relationships]” (1989) 100 *Minsho Zasshi*. Compare also K Yamamoto “*Saikosho Gimuron ni Tsuite* [On the Duty to Renegotiate] (Part One)” (1996) 63/1 *Hosei Kenkyu* 1. See also generally K Yamamoto Yamamoto “Aleatory View of Contract and Critical Contract Theory” (1995) 2 *Proceedings of the 1995 Annual Meeting of the RSCA* (International Sociological Association), Tokyo, 1-4 August 1995, *Meetings Supplement* 143; K Yamamoto “Globalisation, Contract and Community: Reflections on Contemporary Contract Law Discourses” (Paper presented at the conference on “Legal Crisis? Japan and Asia”, Melbourne, 12-14 August 1999).

¹²⁰ Compare T Tanase (ed) *Keiyaku Hori to Keiyaku Kanko* [Contract Law and Contract Practices] (Kobundo, Tokyo, 1999). Yamamoto, who was on research leave at Harvard for much of the time this project was underway, does not add his own contribution. However, he was involved in studying the franchise dispute discussed by his post-modernist colleague, Yoshitaka Wada, in the volume.

¹²¹ See L Nottage “Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study” (1997) 26 *VUWLR* 59; and Nottage 2007c.

¹²² H Sono “*Shokanshuho to Nin'i Hoki* [Commercial Customary Law and Default Rules]” (1999) 1155 *Juristo* 85.

¹²³ See for example K Yamamoto “*Gendai Shakai ni okeru Riberarizumu to Shiteki Jichi* [Private Autonomy and Liberalism in Contemporary Society]” (1993) 133/4 *Hogaku Ronso* 1.

¹²⁴ For example, that developed in the US by Fuller, Fried, Barnett, and (albeit with few distinctive philosophical underpinnings) Farnsworth (above Part I); and likely to result from Bigwood's recent theory in New Zealand (below Part IV.E).

(for instance, to reformulate legal obligations involving services); and (iii) attempts to develop new conceptual structures encompassing the whole of the civil law (notably by Kitagawa). In addition, more direct critiques of broader forms of “balancing of interests” methodology have been developed by Toshio Hirai (also at Tokyo University) from the late 1980s and early 1990s. The thrust of his arguments has been that too much scope had been opened to “macro-level justification” based on substantive reasoning, but centred on subjective assessments; and that good legal reasoning required following different tenets such as sound deductive reasoning (“micro-level justification”), falsifiability, consistency with the terminology of the legal community, and the eschewal of consequentialist (as opposed to normative) reasoning. Various responses to Hirai, and wider discussions about methodology primarily in private law, have engendered Japan’s “second legal interpretation debate”.¹²⁵

The outcome may be to move Japanese civil law theory significantly towards a more formal reasoning based approach. This would link up with a longstanding doctrinal tradition.¹²⁶ The move is also likely to be supported by the need for Japanese scholars and policy-makers to address a series of practical contract law issues related to deregulation and recession in Japan over the 1990s.¹²⁷ A related tendency may be the prominence given, in establishing post-graduate “law schools”, to promoting better understanding of black-letter law for a narrow band of “practitioners”.¹²⁸ Yet the law schools have yet to get underway, and the “second legal interpretation debate” is ongoing.¹²⁹ The latter must also be located firmly in the context of the consistent pressures towards more substantive reasoning generated and largely maintained since the 1920s, including strong political and ideological overtones, interests in sociological and empirical research, and sensitivity to overseas developments. Overall, therefore, Japanese law contract law theory still appears strongly substantive in orientation, although perhaps less so than in the US.

III Indigenous and Received Influences in England

A first startling contrast between contract law theory development in England, compared to the US and (to a lesser extent) Japan, is its anti-theoretical nature. This stems from a lack of concern about what constituted a “contract” in the first place, because the case law developed around forms of action. As Ewan McKendrick points out, however:¹³⁰

¹²⁵ See N Segawa in “*Minpo Kaishakuron no Konnichiteki Iso* [Contemporary Tendencies in Civil Law Interpretation Theory] in N Segawa *Shihogaku no Saikochiku* [Reconstructing Private Law Theory] (Hokkaido Daigaku Toshokan, Sapporo, 1999) 3, 13-25.

¹²⁶ Compare Sono, above n 9.

¹²⁷ See for example L Nottage “Top Ten Changes and Continuities in Japanese Law and Society - 1997” (1998) NZACL Yearbook 3: 1997 611.

¹²⁸ See generally N Kashiwagi “New Graduate Law Schools in Japan and Practical Legal Education” in T Ginsburg, L Nottage and H Sono (eds) *The Multiple Worlds of Japanese Law* (University of Victoria, Victoria 2001) 158.

¹²⁹ See for example T Hirai “*Uchida Takeshi Kyoju Cho ‘Keiyakuhogaku no Saikochiku o meguru Oboegaki’ o Yonde* [Reading Professor Takeshi Uchida’s ‘Thoughts on the Reconstruction of Contract Law’]” (2000) 689 NBL 23.

¹³⁰ E McKendrick “English Contract Law: A Rich Past, an Uncertain Future?” [1996] CLP 25, 27, citing A Simpson “Innovations in Nineteenth Century Contract Law” (1975) 91 LQR 247. The influence

With the abolition of the forms of action by the Common Law Procedure Act 1852, the grip of procedural considerations over substantive law began to decline. At about the same time the practice of writing treatises on the law of contract began to increase and the authors of these texts sought to rationalise the existing mass of case law in principled terms, and in doing so they relied heavily on the works of continental jurists.

Pollock's work drew heavily on 19th century thinking in Germany and France, and continental "will theory" provided a general framework for Anson's influential textbooks first published in 1879.¹³¹ The impact of these works was heightened by publication in 1886 of Finch's casebook, inspired by their reformulations as well as Langdell's case method developed in Harvard. Practitioner texts continued to disclaim interest in underlying theory, in favour of commentary on case law. The leading reference tool, first developed by Chitty, was only comprehensively reorganised by Morris in 1961.¹³² The tradition of expository writing based on late 19th century reformulations was reinforced by publication of the first edition of Cheshire and Fifoot in 1945, their casebook published the year after, another traditional casebook published by Smith and Thomas in 1957, an update of Anson's textbook by Guest, and publication in 1962 of the first edition of a textbook by Guenter Treitel, whose family had immigrated Nazi Germany.¹³³ The prestige involved in writing treatises, systematically and succinctly deriving principles from case law to provide definite solutions to problems, remains a sharply distinctive feature of the legal world in England compared to that in the US.¹³⁴

McKendrick omits to mention a significant event over this post-War period: publication by Wolfgang Friedmann, another émigré, of a sharp critique of classical contract law. In 1951, Friedmann argued that contract's social functions – insuring against risks, and securing freedom of movement, individual will, and equality – could no longer be plausibly obtained by adhering to freedom of contract, in a world in which *laissez faire* had been displaced by contracts of adhesion, collective bargaining, expanding welfare provision, and socio-economic upheavals.¹³⁵ This theory presented intriguing parallels with German and US developments in contract law theory; but as David Campbell observes:¹³⁶

from the continent was also felt by some English judges around this time: see for example *Hadley v Baxendale* (1854) 9 Ex 341 (on remoteness of damages) and *Taylor v Caldwell* (1863) 3 B&S 826 (on supervening impossibility of performance).

¹³¹ McKendrick, above n 131, 27, 47-48; Burrows and others, above n 8, 11-12.

¹³² McKendrick, above n 131, 48.

¹³³ McKendrick, above n 131, 49. Although carefully tailored to English jurists, Treitel's restatements appear to have been influenced by German legal theory, at least in certain areas. Compare for example G Treitel *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press, Oxford, 1988); G Treitel *Unmöglichkeit Impracticability und Frustration im Anglo-Amerikanischen Recht* (Nomos, Baden-Baden, 1991). Even more so than Kessler (above n 38), however, Treitel's work stresses the normative force of law and especially its role in promoting certainty. See for example G Treitel *Doctrine and Discretion in the Law of Contract* (Clarendon Press, Oxford, 1981).

¹³⁴ A W B Simpson "Contract: The Twitching Corpse" (1981) 1 OJLS 265, 268-270.

¹³⁵ W Friedmann *Law and Social Change in Contemporary Britain* (Stevens & Son, London, 1951).

¹³⁶ D Campbell "Reflexivity and Welfarism in the Modern Law of Contract" (2000) 20 OJLS 477, 479 (footnotes omitted).

Despite the endorsement of Lord Denning [in a preface], Friedmann's work, though a tremendous personal success and generally accepted in 'the sociology of law', made little impression on contract law scholarship [in England]. The only work it appears to have provoked there was Atiyah's welfarist review of developments in contract on 'The Future of the Law of Contract' in the first two editions of his textbook [in 1961 and 1971].

Atiyah went on to publish in 1979 a revisionist history of *The Rise and Fall of Freedom of Contract*, detailing 19th century classical law's displacement of reliance and benefit based ascriptions of responsibility in favour of the primacy of consent and private autonomy, and positing a reversal of this trend in England over the 20th century. This monumental work was intended to pave the way for a thorough reconstruction of contract law theory.¹³⁷ This did not ensue, although Atiyah's later work served to introduce the work of Fuller, and then Fried and the early Posner, to an English audience.¹³⁸

By contrast, the impact of CLS is readily apparent from the first edition of the textbook published in 1986 by Hugh Collins, following study at Harvard. Reviewing English, and indeed some US case law, he argued that contemporary contract law was thoroughly infused by welfarist values of paternalism, fairness and cooperation.¹³⁹ Also influential was his mentor in labour law, Sir Otto Kahn-Freund, another émigré who in 1949 translated from the German an influential study by Karl Renner on the socialisation of private law.¹⁴⁰ Friedmann's work was also not lost on Collins. Further, it influenced Roger Brownsword's exposition in 1987 of the ideological tension between formalism versus and realist-inspired "market-individualism" and "consumer-welfarism", which developed into another popular student textbook.¹⁴¹ Collins work over the 1980s advanced stronger distributivist and Marxist arguments, however, adding a note of outright ideological dissensus and creating a parallel with polarisation of political, jurisprudential and contract law theory discourse noted in the US since the 1970s.¹⁴²

In parallel, there emerged a steady trickle of empirical studies into aspects of contract law in action, beginning with an analysis of practices and expectations among manufacturers in Bristol, carried out by Hugh Beale and Tony Dugdale over 1973-1974. Inspired by Macaulay's research, they found remarkably similar patterns: strong reluctance to plan many transactions through detailed and enforceable contract documents, and to refer to any such documents or contract law rules in the event of a disruption to contract performance (such as a delay) or other disputes.¹⁴³ Over

¹³⁷ P Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979); Simpson, above n 135, 272-277.

¹³⁸ See for example P Atiyah *Promises, Morals, and Law* (Clarendon Press, Oxford, 1981); *Essays on Contract* (Clarendon Press, Oxford, 1990).

¹³⁹ H Collins *The Law of Contract* (1 ed, Weidenfeld and Nicholson, London, 1986).

¹⁴⁰ K Renner *The Institutions of Private Law and their Social Functions* (O Kahn-Freund trans, Routledge, London, 1949); Campbell, above n 137, 490 n 61.

¹⁴¹ R Brownsword "The Ideologies of Contract" (1987) 7 Leg Stud 207. See also the textbook by J Adams and R Brownsword *Understanding Contract Law* (1 ed, Fontana, London, 1987).

¹⁴² See for example H Collins *Marxism and the Law* (Clarendon Press, Oxford, 1982). Compare Kennedy, above n 35.

¹⁴³ H Beale and T Dugdale "Contracts between Businessmen: Planning and the Use of Contractual

1974-1976, David Yates examined the usage of exemption clauses in 31 engineering, 8 insurance and 12 finance companies in Bristol and Manchester. He established that limitation and “procedural” clauses (such as arbitration clauses) were much more common than outright exclusion clauses, which were used mainly to prevent liability arising from narrow causes beyond suppliers’ control, and were driven by a desire to avoid court proceedings, reduce liability for consequential loss, and to conform with common practice.¹⁴⁴ In 1982, Richard Lewis sharply criticised a Law Commission proposal to make “firm offers”, showing that its concern for withdrawal of tender offers by a sub-contractor (after the main contractor had acted on them) was not generally a problem in the construction industry, according to his empirical research.¹⁴⁵ Other studies in England have included examinations of how commercial arbitration grew in popularity as contract law theory and courts were reorganised from the 19th century;¹⁴⁶ how lawyers have struggled in vain to claim a more prominent position in construction contract disputes;¹⁴⁷ and patterns in contract litigation over 1975-1991.¹⁴⁸

More recently, a major empirical research bringing together lawyers and economists generated a rich collection of empirical data and conclusions.¹⁴⁹ One study suggests that (at least in comparison to German counterparts) English firms manufacturing mining equipment and kitchen furniture: (i) still not infrequently deal without written contracts, and perceive themselves not to have “binding contracts”; (ii) rely more on repeated individual contracts (but inchoate expectations of ongoing business) as opposed to detailed long-term contracts, not for instance including “hardship” clauses; and (c) are prepared to bring legal action for contract breach (correlated with more uncertain legal rules), but also demonstrate a significant attitude of “give-and-take”.¹⁵⁰ Another study based on twenty in-depth interviews of manufacturers concluded that while most firms dealt on the basis of written documentation *perceived* as legally enforceable (but not necessarily so).¹⁵¹

Remedies” (1975) 2 Brit J L & Soc 45.

¹⁴⁴ D Yates *Exclusion Clauses in Contracts* (Sweet & Maxwell, London, 1978).

¹⁴⁵ R Lewis “Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry” (1982) 9 J L & Soc’y 153.

¹⁴⁶ R Ferguson “The Adjudication of Commercial Disputes and the Legal System in Modern England” (1980) 7 Brit J L & Soc 141.

¹⁴⁷ J Flood and A Caiger “Lawyers and Arbitration: The Juridification of Construction Disputes” (1993) 56 MLR 412.

¹⁴⁸ P Vincent-Jones “Contract Litigation in England and Wales 1975-1991: Transformation in Business Disputing?” (1993) 12 CJQ 337.

¹⁴⁹ S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997). For more theoretical work, see also P Vincent-Jones “Contract and Business Transactions: A Socio-Legal Analysis” (1989) 16 J L & Soc’y 166; D Campbell and P Vincent-Jones *Contract and Economic Organisation: Socio-Legal Initiatives* (Dartmouth, Aldershot, 1996).

¹⁵⁰ Compare A Arrighetti, R Bachman and S Deakin “Contract Law, Social Norms, and Inter-firm Cooperation” (1997) 21 Cambridge J Econ 171, 181-189, 191; B Burchell and F Wilkinson “Trust, Business Relationships and the Contractual Environment” (1997) 21 Cambridge J Econ 217, 226-232. See also S Deakin, C Lane and F Wilkinson “Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study” in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105.

¹⁵¹ B Lyons and J Mehta “Private Sector Business Contracts: The Text Between the Lines” in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 43, 58-59. But see M Maher “Transaction Cost Economics and Contractual Relations” (1997) 21 Cambridge J Econ

Non-legal mechanisms exert a far more powerful discipline on the exchange arrangement than formal, legal mechanisms: “Fundamentally, it’s a partnership. We have mutual interests: us to get the business; they recognise they’ve got a quality supplier who gives them a good deal. Trust and reputation are fundamental; you don’t get to the starting block without them”. Firms do not like to plan for failure in a written contract. Failure to deliver on time rarely occurs, but when it does it is dealt with by “giving them a sore ear down the phone”, and many disputes are settled “over a beer at the pub”, if necessary with a senior colleague who acts as an informal arbitrator. Ultimately, the effectiveness of non-legal mechanisms depends on the extent to which the firms have invested in building up personal relationships: successful exchange is not conducted by the autonomous, socially dislocated agents of neoclassical economic theory.

Such findings are consistent with those of Beale and Dugdale, highlighting a continuing gap between commercial practices and expectations, and comparatively strict legal rules regarding contract formation, terms, and relief from contractual obligations due to changed circumstances.¹⁵² It seems likely that English law’s strict approach is related to the preponderance of reported cases in the House of Lords dealing especially with charterparties, and to lesser extent carriage, insurance, sales of goods, construction and employment. As a small-scale empirical investigation by one commentator in Australia showed a decade ago, that country’s contract law is based on a much higher preponderance of case law particularly regarding sales of land, possibly underpinning a more flexible approach at least in some areas of law.¹⁵³

The need for clear rules and certainty allegedly required in these transactional contexts may explain English law’s continued reluctance to move sharply and consistently away from a classical model of contract law, for example by openly espousing a general duty of good faith.¹⁵⁴ However, others have questioned the empirical foundation of the claimed need for certainty. In 1991, promoting the notion of a good faith principle protecting “the reasonable expectations of honest men”, Justice Steyn (now a Law Lord) pointed out that good faith was widely adopted in civil law jurisdictions; the law of the EEC (now the European Union or EU); and the United Nations Convention on Contracts for the International Sale of Goods (CISG), “for which the international market place is voting” by accession (unlike, still, England). He regarded “as unproven the assertion that the pragmatic approach of our law necessarily leads to greater certainty and predictability than the more general methods of the civil law”.¹⁵⁵ McKendrick also criticises opposition to CISG based on the mere fact that English law is apparently still often selected in contracts which end up in the

21 (suggesting that Oliver Williamson’s governance theory, based on assumptions of opportunism and bounded rationality which may not be inconsistent with neoclassical economics in contemporary incarnations, helps explain most patterns of contract planning and dispute resolution mechanisms in six industry sectors).

¹⁵² See eg Nottage 2007b, 2007c.

¹⁵³ M Ellinghaus “An Australian Contract Law?” (1989) 2 JCL 13, 20.

¹⁵⁴ See for example L Sealy “Ties that Bind: Security of Contract in England at the End of the 20th Century” (2000) 16 JCL 47. Compare Nottage 2007c Part III.D.

¹⁵⁵ J Steyn “The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?” (1991) Denning LJ 131, 135, 140. See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194, 196 per Steyn J; J Steyn “Does Legal Formalism Hold Sway in England?” [1996] CLP 43, 45.

Commercial Court, pointing out that:¹⁵⁶

there is no empirical evidence one way or the other. It is probably safe to assume that businesses wish to avoid unnecessary upheaval and uncertainty in the law of contract, but are they really interested in the finer points of English contract law? The experience of the recent Arbitration Act 1996 suggests that they might not be. The thrust of this legislation is to give greater autonomy to the parties to arbitration and to free English arbitration law from some of its self-imposed limitations. One of these limitations was that English law did not recognise the validity of a clause giving the arbitrator the power to decide *ex aequo et bono* or to act as an *amiable compositeur*. The function of the arbitrator was to decide the case in accordance with the law and not simply according to any notions of equity and fairness.

More generally, this legislative intervention appears to have been driven by a belated awareness that London was losing its pre-eminent status as a venue for international commercial arbitration, in favour of the International Chamber of Commerce in Paris and venues in Switzerland since the 1960s, and the American Arbitration Association since the 1980s.¹⁵⁷ The latter venues had also encouraged the evolution of a “new *lex mercatoria*”, applying broader standards of good faith and fair dealing, despite some indications of formalisation of arbitral procedures and perhaps substantive norms from the 1980s until at least the mid-1990s.¹⁵⁸ This implies that English arbitrators and judges failed to pick up, and react to, trends in the international arena. Indeed, a recent survey confirms that English arbitration specialists remain significantly more conscious of “risks” in invoking the *lex mercatoria* than their counterparts overseas (especially in continental Europe).¹⁵⁹ More generally, Collins points out that the English higher courts (including the Commercial Court) process only about 300 cases per year, a work load presumably dwarfed by arbitration and other means of resolving disputes out of court. He draws on studies suggesting that English arbitrators have remained consistently more sensitive to commercial context, rather than insisting on the formal application of strict contract law rules, to argue that English businesses wish for flexibility in adjudication as well as their everyday dealings.¹⁶⁰ Further, a recent article by a Commercial Court judge indicates an awareness that the Court has been too strict, and should learn from businesses’ experiences with – and preferences for – alternative dispute resolution (ADR) and concomitant flexibility.¹⁶¹

¹⁵⁶ McKendrick, above n 131, 59.

¹⁵⁷ See for example B Garth and Y Dezalay *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, U Chicago Press, 1996).

¹⁵⁸ L Nottage “The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery” (2000) 16 *Arb Int'l* 73.

¹⁵⁹ See K Berger and others “The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results” in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 91.

¹⁶⁰ H Collins “Formalism and Efficiency: Designing European Commercial Contract Law” (2000) 8 *European Rev Private Law* 211, 225-228. He cites for example Ferguson (above n 147) and Flood and Caiger (above n 148), suggesting that he is primarily interested in domestic arbitration. Note also that the posited sensitivity is only relative, to formal court adjudication, and that it could also manifest itself despite English law’s traditional reluctance to countenance “equity clauses” (below n 162). Collins also draws on Lyon and Mehta (above n 152), whose research accorded with that of Beale and Dugdale (above n 144) in showing that businesspeople did not place great importance on standard form contract terms.

¹⁶¹ J Thomas “The Courts of England and Wales, Commercial Education, and the Changing Business of the City of London” (2000) 16 *Arb Int'l* 321.

This attitude presents a sharp contrast with the views expressed by Justice Devlin (later a Law Lord) in 1951, at an early stage of his judicial career. Based on his experiences as a barrister until then, he noted that English businesspeople did not expect strict application of the law; but concluded that the courts should ultimately undertake the latter, primarily to promote liberal ideals of the rule of law.¹⁶²

These works indicate the growing importance of empirical research into contracting, and the ability of contract law theorists to draw on pathbreaking studies going back many decades. In his inaugural lecture at the London School of Economics, delivered in 1995 and published in 1997, Collins clearly signalled his intention to move away from the more abstract exploration of “a new set of moral principles as the foundation of the systematic exposition of the law”, the approach he (and others like Brownsword and Atiyah) had adopted in the 1980s to undermine classical contract law theory. Collins declared his preference for a methodology more amenable to empirical inquiry.¹⁶³

Recalling the insight that law’s objective is the governance of social, economic, and political relations, the research agenda commences with an examination of how particular relations are constructed and how they function. It then elucidates how the law both succeeds in helping to construct these relations, then regulates them, and yet at times stifles or obstructs them. The science of legal study aspires to the deeper understanding of the techniques and consequences of regulation of society for the purpose of serving more effective and targeted government through law. This method abandons the quest for foundations in moral principle as the framework for maps of the law. The task is rather to elucidate the channelling and constitution of social relations through law. The morality of law is assessed not in its principles, but in its consequences for human activity.

He went on to draw on work by Macaulay and others to argue that contract law does not contribute significantly to the creation of binding market commitments, by offering a credible threat against breach of contract. More important were self-help remedies (such as payment in advance, threat of future boycotts), transaction-specific investments, investments in reputation, “hostage-taking” (such as taking of security), provision for ADR, guarantees by third parties, and prevention of misleading advertising and the like. Contract law’s main purposes, therefore, were seen to be the construction of “the facility for ex ante price-setting”, essential for markets as institutions for enhancing wealth; and providing “one of several mechanisms for transfers of title to property”.¹⁶⁴ Secondly, Collins proposed that legal support for the largely social practice of entering exchanges:

comes at the price of distorting the complexity of the underlying norms, for the sanctity attached to contracts insists upon a narrowing or oversimplification of the obligations. The controls on freedom of contract then enter the picture to counteract this distortion, in order to restore the variety and complexity of the normative expectations arising in the practice of entering exchanges.

¹⁶² P Devlin “The Relation between Commercial Law and Commercial Practice” (1951) 14 MLR 249, 250, 260.

¹⁶³ H Collins “The Sanctimony of Contract” in R Rawlings (ed) *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science* (Clarendon Press, Oxford, 1997) 60, 68-69.

¹⁶⁴ Collins, above n 164, 72-73.

Thirdly, however, Collins indicated that such a “recontextualisation” of contract law to pursue ideals of a “social market” faces challenges arising from the autonomous tendencies of legal doctrine relative to social and economic action. Collins suggested that the broader generalised standards such as good faith, driven by developments in EU law, will become an increasingly important part of this process; but that third-party vetting of contractual terms would be essential, perhaps by courts but also by arbitrators in particular cases, and by regulatory bodies (such as the Office of Fair Trading) for standard terms prevalent within an entire trade or industry.¹⁶⁵

These three themes have been extensively developed in Collins’ richly theoretical and empirical work on *Regulating Contracts*, published in 1999 and hailed for providing hope that “British scholarship, so long laughably off the pace, might now give the lead to the development of the law of contract”.¹⁶⁶ His renewed debt to US scholarship is apparent from the first and second themes, notably the insights of Macaulay and Macneil. Taking seriously the dictum of Justice Steyn that the central theme of contract law is the protection of “reasonable expectations”, Collins broadens the scope of inquiry as follows:¹⁶⁷

As well as expectations based upon the express commitments contained in the contractual undertakings (the contractual framework), the parties also form expectations with respect to both the norms of the “business deal” and the “business relation”. These expectations of the business relation derive from two dimensions of the “embeddedness” of economic transactions, that is the context of particular market conventions acknowledged by the parties, and the personal relations between the parties.

Macneil also now finds an even keener adherent in David Campbell.¹⁶⁸ However, Collins remains more interested than Macneil in the contemporary roles for markets and the potential for regulation, arguably reflecting the political climate ushered in by the Blair administration.¹⁶⁹ His third theme, and his recent book, also draw heavily on the work of Guenter Teubner, a German contract law theorist and legal sociologist who joined him at the London School of Economics around the same time. The latter’s theory of the relatively autonomous (“autopoietic”) nature of social sub-systems – including law – was driven by debates in his native Germany the 1980s about the potential for regulation in a post-welfare state, characterised by problematic tendencies towards and expectations regarding the “juridification” of socio-economic relations.¹⁷⁰ Both influences – Macneil and Teubner – are also apparent in the recent studies by Peter

¹⁶⁵ Collins, above n 164, 81-87.

¹⁶⁶ Campbell, above n 137, 498, reviewing H Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999).

¹⁶⁷ Collins, above n 164, 217-219. Compare above Part I; Steyn, above n 156.

¹⁶⁸ Above n 76.

¹⁶⁹ The parallel is even more apparent in the work of his colleague, Anthony Giddens. See for example “Risk and Reponsibility” (1998) 62 MLR 1; A Giddens *The Third Way and Its Critics* (Polity Press, Malden Mass, 2000).

¹⁷⁰ See especially G Teubner “After Legal Instrumentalism? Strategic Models of Post-Regulatory Law” in G Teubner (ed) *Dilemmas of Law in the Welfare State* (De Gruyter, Berlin, 1988) 299; G Teubner *Law as an Autopoietic System* (London, Blackwell, 1993); G Teubner “Altera Pars Audiatur: Law in the Collision of Discourses” in R Rawlings (ed) *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science* (Clarendon Press, Oxford, 1997) 149.

Vincent-Jones, developing theory based on extensive empirical inquiries into contemporary contracting in England, especially the changing interface between public and private governance regimes.¹⁷¹

Collins's interest in autopoiesis appears to have cemented a move away from a strong version of the "transformation thesis", the view that underlying socio-economic changes (away from a commitment to *laissez-faire* economics and rugged individualism) have generated a new set of basic values infusing and respecifying the English law of contract. Already, in 1994, he had admitted that new values were difficult to determine and weigh, new contract law doctrines did not necessarily evolve while old ones could be applied in new ways, and competing theoretical frameworks (notably economic analysis, reliance-based theories still rooted in liberal theory, and communitarianism) could be invoked to explain perceived transformations.¹⁷² In another innovative textbook published in 1996, John Wightman also stressed the pluralism in values and rules in contemporary English law, adding that 19th century developments (especially in hiving off new regimes for specialised contractual dealings) had already undermined the dominance of *laissez faire* and classical contract law.¹⁷³ In the third edition of his textbook, published in 1997, Collins maintained that "the modern law of contract differs from the classical tradition in its motivating ideals, in its methods of reasoning, and in its sources of law", but there were already inklings of a change of tack derived from a growing interest in empirical inquiry.¹⁷⁴ Brownsword has also recently refined his posited dichotomy between consumer-welfarist and market-individualist ideologies, suggesting that "static market individualism" (imposing its view of contracting onto the regulated and "constituting" the market) is being displaced by "dynamic market-individualism" ("reflecting the practice and expectations especially of the business community").¹⁷⁵ However, he retains more interest in a philosophical approach and case law developments.¹⁷⁶

The increasingly sophisticated discussion about the transformation thesis is matched by an escalating debate about the impact on English contract law from developments in the EU, including recent proposals for a European Civil Code. Going beyond the obvious, namely that such developments provide a contemporary instance of "the world elsewhere" affecting the path of English law, commentators now address

¹⁷¹ See for example P Vincent-Jones "Contractual Governance: Institutional and Organisational Analysis" (2000) 20 OJLS 317.

¹⁷² H Collins "The Transformation Thesis and the Ascription of Contractual Responsibility" in T Wilhelmsson (ed) *Perspectives of Critical Contract Law* (Dartmouth, Aldershot, 1993) 293, 294-295.

¹⁷³ J Wightman *Contract: A Critical Commentary* (Pluto Press, London/Chicago, 1996) 81-94.

¹⁷⁴ H Collins *The Law of Contract* (3 ed, Butterworths, London, 1997) 21. See also for example H Collins and C Scott "United Kingdom" in G Brueggermeier (ed) *Rechtsprobleme von Qualitätsmanagementvereinbarungen und EG-Binnenmarkt [Legal Problems of Quality Assurance Agreements and the EU Internal Market]* (Nomos, Baden-Baden, 1998) 239.

¹⁷⁵ R Brownsword "Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism" in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 255, 259. Compare Adams and Brownsword, above n 142

¹⁷⁶ R Brownsword "General Considerations" in M Furmston (ed) *The Law of Contract* (Butterworths, London, 1999) 1. Compare generally his early jurisprudential work: D Beyleveld and R Brownsword *Law As A Moral Judgment* (Sweet & Maxwell, London, 1986) 159-163, 382-409. See also for example C Riley "Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency" (2000) 20 OJLS 367.

fundamental issues in philosophy, ideology, empirical research, and comparative law methodology.¹⁷⁷ Boosted by concerns about England's lethargic response to acceding to CISG, to provide a comprehensive set of modern rules on international sales reflecting sensible business practices,¹⁷⁸ this debate may revive more profound debate on the merits of codifying substantial areas of contract law in England.

Discussion about codifying commercial law in the Victorian era appears to have centred on a fairly crude calculus of costs and benefits, no doubt affected by the top-down utilitarian view of law-making advocated by Bentham in the 19th century. This led to some piecemeal local enactments, in contrast to the export of a full contract code to govern relationships in India.¹⁷⁹ Other issues in codification, such as the advancement of analogical reasoning and related substantive considerations,¹⁸⁰ appear to have played a minor role in that debate over a century ago.

Similar obstacles seem to have promoted the demise of a project to codify contract law, launched in 1965 by the English Law Commission.¹⁸¹ A Law Commissioner's response to a South African professor's critique of codification, both published in May 1967, argued with admirable foresight that codification should advance harmonisation with the laws of continental countries and related international conventions, as well as with the civil law of Scotland (perceived as fundamentally different, in being founded on good faith). It also contended that rendering English contract law into more accessible form would make it more "exportable", especially to colonies gaining independence. The positive experience of the UCC was noted in these respects, and to counter the suggestion that codification would result in a great uncertainty. However, while suggesting that England's common law of contract had not "continued to display its customary ability to adapt itself to changing conditions" and that "legislative intervention [had] not tackled any of the fundamental principles", the Law Commissioner's response did not venture any possible new principles of law or methodology to guide codification.¹⁸² Similarly, in a review published a year later, Aubrey Diamond noted that codification would need to be careful to encourage judges not to construe provisions narrowly, and should promote accessibility and improvement of contract law; but she did not venture any broad principles for such encouragement or

¹⁷⁷ Compare T Bingham "There is a World Elsewhere: The Changing Perspectives of English Law" (1992) 41 ICLQ 513 with P Legrand "Against a European Civil Code" (1997) 60 MLR 44; G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 MLR 11; Collins, above n 161; S Whittaker "Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract" (2000) 116 LQR 95; R Brownsword "Individualism, Cooperativism and an Ethic for European Contract Law" (2001) 64 MLR 628.

¹⁷⁸ Steyn, above n 156; McKendrick, above n 131; R Goode *Commercial Law in the Next Millennium* (Sweet & Maxwell, London, 1998) 32-38 (criticising English law's persistent reluctance to countenance agreements to negotiate, suspension of performance, assurance of performance following anticipatory breach, and excuses for frustration), 87-96 (further discussing CISG and related harmonisation efforts).

¹⁷⁹ Lord Irvine "The Law: An Engine for Trade" (2001) 64 MLR 333, 335-336.

¹⁸⁰ Compare Nottage 2007a Part II.A.

¹⁸¹ Compare F Reynolds "Contract: Codification, Legislation and Judicial Development" (1995) 9 JCL 11, 13-15; Mentschikoff, above n 27.

¹⁸² E Gower "A Comment" (1967) 30 MLR 259, 259. Compare H Hahlo "Here Lies the Common Law: Rest in Peace" (1967) 30 MLR 241.

improvement.¹⁸³ It seems not unreasonable to infer that even those sympathetic to codification around this time were wary of advocating Llewellyn's vision of a "Grand Style" of appellate judging (involving "overt recourse to situation-sense") and the "three most important general substantive concepts" of the UCC: "good faith, commercial reasonableness, including the current course of business and financing, and facilitation of continued expansion of commercial practices through custom, usage and agreement of the parties".¹⁸⁴ These had been specifically mentioned by Soia Mentschikoff, in an article also published in the *Modern Law Review* back in 1964. However, perhaps tailored to an English audience, the article had focused overwhelmingly on specific rules enacted in that Code; and Llewellyn's underlying philosophy and approach to commercial law had drawn almost no attention in England at that stage.¹⁸⁵

From this perspective, it is also disconcerting that one recent comparative work on good faith in European contract law, co-edited by Simon Whittaker, focuses overwhelmingly on rules applied in specific contexts and how these allegedly tend to generate convergent results.¹⁸⁶ Recently, however, Brownsword has revealed the philosophical and other broader considerations glossed over by that study.¹⁸⁷ More generally, the ideological ramifications of a proposed European Civil Code, issues in comparative law methodology arising from this initiative, and their relationship to contract law theory, have been raised periodically over recent years.¹⁸⁸

In sum, McKendrick was probably too harsh when he wrote in 1996 that English contract law scholarship has exhibited more negative features – not being interdisciplinary or empirical, nor "rich in its theoretical content", and unwilling to follow Pollock's lead to draw on developments in Europe – than positive features, namely affecting some doctrines in the law (such as economic duress), and focusing still on "exposition of the law" (a "particular strength").¹⁸⁹ In fact, the early studies by Friedmann and then Atiyah were given a stronger political flavour notably by Collins, who more recently has drawn on a growing number of empirical studies since the 1970s, to re-engage with European legal theory and EU law in a theoretically sophisticated manner. Although contract law theory in England appears to have been bypassed by US legal realism prior to World War II, impeding development of the more substantive reasoning long characteristic of US contract law theory,¹⁹⁰ it has been able to draw on some of that tradition to grow from seeds planted over the last few decades. Contract law theory in England is now flowering, providing a more solid basis for the expansion of substantive reasoning in its contract law more generally, particularly now that theory appears to be reclaiming the place it struggled to obtain in relation to legal practice in the late 19th century.¹⁹¹

¹⁸³ A Diamond "Codification of the Law of Contract" (1968) 31 *MLR* 861.

¹⁸⁴ Mentschikoff, above n 27, 168.

¹⁸⁵ Twining, above n 25.

¹⁸⁶ R Zimmermann and S Whittaker (eds) *Good Faith in European Contract Law* (Cambridge UP, Cambridge, 2000).

¹⁸⁷ Brownsword, above n 178.

¹⁸⁸ Legrand, above n 178; Teubner, above n 178; Collins, above n 161.

¹⁸⁹ McKendrick, above n 131, 51-52.

¹⁹⁰ Above Part I. See also above Chapter One Part II.C.

¹⁹¹ Campbell (above n 137) correctly emphasises the significance of the thought-provoking theoretical introduction to a new "practitioner text": Brownsword, above n 177. For another substantive

IV Legislative, Judicial & Scholarly Activism in New Zealand

Legal realism and contract law theory from the US – and new contemporary theory from England – has had an even more troubled and belated reception in New Zealand. This has undermined the potential to develop more substantive approaches in its contract law, although there have been some moves in that direction over the 1990s.

Oddly, there seems to have been little public debate about contract law theory over the 1960s and 1970s, when the part-time Contract and Commercial Law Reform Committee (CCLRC) reviewed particular problems of contract law doctrine, prompting enactment of various Contract Statutes.¹⁹² The first “New Zealand edition” of the Cheshire and Fifoot textbook was published only in 1961, largely reproducing introductory material focused on the historical evolution of contract from earlier causes of action.¹⁹³ Little writing on contract law theory, as opposed to doctrinal issues and detailed case law analysis,¹⁹⁴ appeared in monographs or law journals over the next two decades. Partly, this situation may have reflected a paucity of law journals until around 1980.¹⁹⁵ However, there were a number of venues potentially available, notably the Victoria University of Wellington Law Review and the New Zealand Law Journal, making it rather odd that very little writing on contract law theory was published over the 1970s, when debates were becoming more intense in the US and (to a lesser extent) England.¹⁹⁶ The lack of writing may have reflected low rates of contract compared to tort law litigation, as in the US from the 1930s through to the 1960s.¹⁹⁷ Unfortunately, the lack of a tradition of empirical inquiry into the New Zealand legal system means that no quantitative data is readily available.

The same problem afflicts the converse hypothesis, namely that the growing relative weight of contract litigation in New Zealand may have generated a gradual increase in writing on contract law from the mid-1970s. Even without quantitative data,

reasoning based approach, likely now to find a ready audience in England, see E Peden “Policy Concerns Behind Implication of Terms in Law” (2001) 117 LQR 459.

¹⁹² See for example G Barton “The Effect of the Contract Statutes in New Zealand” (2000) 16 JCL 233. Compare generally R Sutton “Lord Cooke and the Academy: A View from the Law Schools” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 16-18, discussed in Nottage 2007a Part II.C.

¹⁹³ See *Cheshire & Fifoot’s Law of Contract* (1st NZ ed, Butterworths, Wellington, 1961).

¹⁹⁴ See for example D McLauchlan *The Parol Evidence Rule* (Professional Publications, Wellington, 1976).

¹⁹⁵ The New Zealand Universities Law Review was inaugurated in 1967; the Auckland University Law Review, in 1968; the Canterbury Law Review, in 1980; the Otago Law Review, in 1965, although by 2001 only 10 volumes had been published; and the Waikato Law Review, in 1993. The New Zealand Recent Law Review was inaugurated in 1989, but focused on round-ups of case law in discrete areas of law. It changed its name to the New Zealand Law Review from 1995, and now publishes more general articles.

¹⁹⁶ The first issue of the Victoria University of Wellington Law Review was published in 1953, although it did not appear annually until 1979. The New Zealand Law Journal began as a bi-monthly periodical in 1928, albeit primarily for practitioners, and is now published monthly. For contemporaneous developments overseas, see above Part I (notably the UCC and *Restatement (Second)* discussions, Gilmore, early Posner, CLS, the Wisconsin school and early Macneil) and II (notably Friedmann, the early Atiyah, and the codification debate).

¹⁹⁷ Compare Galanter, above n 43.

however, a growing relative weight is virtually assured by the abolition of rights to sue for personal injury by accident inaugurated by a state-funded no-fault liability scheme, enacted in 1972 and brought into effect from 1974. As Colin Patterson, chairman of the CCLRC, remarked at the triannual New Zealand Law Conference held in 1972.¹⁹⁸

When [this scheme] comes into force I believe we will enter a golden age of development of all other branches of the law. This conference should help practitioners of the law of personal injury to survey the legal scene again and to choose the area of law to which their future attention can most usefully be applied. ... the law of contract, I suggest, will find a prominent place.

IV.A The Seeds of Contract Law Theory Development in the Early 1970s

Patterson's comments were directed at a paper at the 1972 Law Conference presented by Edward Somers (later a Court of Appeal judge). It had raised a fundamental issue of contract law theory: the nature and extent of "agreement" in the context of standard form contracts, especially those incorporating exemption clauses, and the possibility that giving priority to the latter might "defeat the reasonable expectations of the consumer and perhaps even negative the very consensus which is the basis of the consent".¹⁹⁹ In fronting up to such a key theoretical issue raised by contemporary practices, Somers' paper was quite unusual for this era, and certainly marked an important milestone in the evolution of contract law theory in New Zealand.²⁰⁰

However, Patterson correctly chided Somers for failing to mention an influential reconceptualisation of exemption clauses developed in the early 1960s for a doctoral dissertation by a New Zealander, namely Brian Coote, and it should be added that the fundamental issues had been highlighted as long ago as 1943 by Kessler in the US.²⁰¹ Further, other comments on Somers' paper were hardly revolutionary. Patterson proposed simply to refocus attention away from contractual wording and onto the "real agreement", viewed "according to all the relevant evidence" – a solution perfectly consistent with mainstream contract law thinking at the US by the 1960s (at least), although this was not referred to.²⁰² He also suggested that this development could be promoted by legislation, worded to encourage consideration of all the particular circumstances of the case at hand. Showing some appreciation of contemporary developments in England, he added that "possibly the Englishmen will beat us to it with their codification of the law of contract", although that project was already under fire by 1972 and some regulation of exemption clauses was only achieved through the Unfair Contract Terms Act 1977 (enacted, indeed, as a private member's bill).²⁰³ Don Dugdale, another member of the CCLRC (and later a Law Commissioner), agreed with the suggestion that problems raised by Somers, notably remedies for misrepresentation,

¹⁹⁸ [1972] NZLJ 492.

¹⁹⁹ E Somers "Consensus and the Written Contract" [1972] NZLJ 485, 485.

²⁰⁰ Indeed, as McKendrick observes (above n 131, 32 n 14), in England: "It was not until the publication of the 21st edition of Anson's *Law of Contract* in 1959 that there was distinct discussions of the subject of standard form contracts".

²⁰¹ C Patterson [1972] NZLJ 492, referring to B Coote *Exception Clauses* (Sweet & Maxwell, London, 1964); compare Kessler and Fine, above n 38.

²⁰² Patterson, above n 202, 492-493. Compare for example Zamir, above n 32.

²⁰³ Patterson, above n 202, 493. Compare Reynolds, above n 182; McKendrick, above n 131, 32.

should be achieved directly by legislative intervention focusing on “the balance of convenience” rather than historical precedent and judicial subterfuge – singling out Lord Denning as “one of the worst offenders”.²⁰⁴ Legislative intervention was also approved in the penultimate comment by a certain P J McKinlay from Lower Hutt. On the other hand, the latter highlighted that the discussions had not:²⁰⁵

faced square on ... the change in social attitudes towards legal obligations since the rules of contract were first promulgated; the present situation seems to be one where there is wide recognition that weakness in bargaining power on the part of the one party to the contract is something to which should be given due recognition.

He went on to first advocate a legislative approach, able to “look at the social questions involved and the values which now seem to be broadly accepted”, suggesting that this might make it appropriate to distinguish “consensual contracts” (freely negotiated) from “non-consensual contracts” in which the parties had not never agreed as to their exact nature; and that rules for the latter might “allow Courts, in effect, to create the bargain between the parties, the bargain which the parties themselves may never in fact actually have made”.²⁰⁶

In a separate paper presented to the conference, however, Dugdale argued that care should be taken in conferring broad discretions on judges through legislation. This was particularly in appropriate, in his view, when the matter raised political issues. Dugdale insisted that “policy is for the Legislature and not the Courts”, echoing Sir Alexander Turner (a Court of Appeal judge); and more generally criticised a tendency for governments to refer politically contentious issues to committees and the like.²⁰⁷ He also stressed that “discretion should not be conferred where it introduces an unnecessary uncertainty into commercial practice”. Presenting the enactment of New Zealand’s Illegal Contracts Act 1970 as an unusual situation, Dugdale concluded.²⁰⁸

It is best if legislation is precise, and the conferment of judicial discretion is only ever justified *faute de mieux*, where the formulation of precise rules is impossible. But plainly there are circumstances where reform is needed and where the draftsman simply cannot foresee all possible circumstances. Then and only then is it proper for him to solve his problems by the conferment of a judicial discretion, and even then the policy must be made as plain and as many guidelines must be laid down as possible.

Unsurprisingly in view of his key role in the CCLRC, Patterson also approved of the Act. But his suggested rationale might have been intended to have broader application for other proposed legislative intervention: rather than legislating rules in a piecemeal fashion, “the whole process was [to be] started again, but this time on a new basis where the Courts would be enjoined to do justice between the parties”.²⁰⁹ By contrast, Dugdale’s paper is pervaded by considerable cynicism about judges, suggesting that

²⁰⁴ D Dugdale [1972] NZLJ 495.

²⁰⁵ P McKinlay [1972] NZLJ 497.

²⁰⁶ McKinlay, above n 206, 498.

²⁰⁷ D Dugdale “The Statutory Conferment of Judicial Discretion” [1972] NZLJ 556, 557. He appears to be referring to Sir Alexander Turner “Changing the Law” (1969) 3 NZULR 404.

²⁰⁸ Dugdale, above n 208, 560.

²⁰⁹ C Patterson [1972] NZLJ 567.

their moral assumptions should be studied empirically (as in the US). However, Austin Forbes (later President of the New Zealand Law Society) was dismissive of “the so-called American realist school of jurisprudence” and such studies.²¹⁰ Similarly, George Barton (then a lecturer at Victoria University of Wellington) responded that “what we really need is a bench of Judges and Magistrates of broad sympathies, sensitive to community needs and aspirations – and I believe we have now, in larger measure than at any other time, [such] a bench ...”.²¹¹

In sum, contained in these 1972 papers and comments – recorded, thankfully and unusually for New Zealand, verbatim – were the germs of a more substantive approach to contract law. Nonetheless, they revealed the power of formal reasoning in many ways, including a widespread preference for initial legislative intervention; Dugdale’s concerns to constrain the exercise of any judicial discretions conferred thereby, as well as the effect on certainty in commercial dealings; and a general view that a primary goal should be simplification of complex case law. The development of more substantive reasoning was also impeded by a reluctance to engage in empirical and more philosophical inquiry; and a lack of engagement with developments in other major common law countries, such as England and (especially) the US.

IV.B More Seeds in the Early 1980s

The potential for developing a distinctly more substantive approach remained virtually unexploited until the early 1980s. The major expansion of this potential – particularly in raising philosophical and (implicitly) empirical issues, drawing on contract law theory emerging in England – came from another New Zealand Law Conference, held in 1981. This is somewhat ironic given that such conferences were (and still are) focused on issues considered immediately relevant to the legal profession – even in England, contract law theory developed primarily in purely academic milieus. The milestone event in 1981 was a provocative paper presented by George Barton, who had by then left Victoria University to practise in Wellington.²¹² He argued that there had been a shift away from the will theory of contract congenial to 19th century legal theorists, ranging from Benthamite utilitarians to Maine’s “historical school”. Barton argued that the decline of the jury trial and the merging of common law with equity led judges to articulate reasons applied to particular facts, resulting in more precedents to be discussed by counsel and practitioners in future cases, and hence more and more refined classifications and categories. On the other hand, he argued:²¹³

As you read the decisions, you become conscious that a new principle is at work. Agreement seems no longer to be the golden meteward, but reasonableness. Judges, some with greater perspicacity than others, can read terms into agreements that are not there; and can read down terms that are there, sometimes even ignoring them entirely. All in the interests of doing justice, of reaching a fair result as between the parties.

²¹⁰ A Forbes [1972] NZLJ 565.

²¹¹ G Barton [1972] NZLJ 562.

²¹² G Barton “Whither Contract?” [1981] NZLJ 369.

²¹³ Above n 213, 371. See also C Rickett “Lord Denning – Sincere Man and Problematic Judge” (1982) 10 NZULR 91, 91 (suggesting that Lord Denning had “occupied a position of immense importance in British and New Zealand law for the last thirty-five years”).

Barton identified Lord Denning as the “high priest of the modern approach”, beginning with his undercutting of the common law doctrine of consideration by developing principles of equitable estoppel, founding liability on reasonable reliance.²¹⁴ He stressed Lord Denning’s willingness to allow termination on reasonable notice of a long-term supply contract expressed to be for “all times hereafter”.²¹⁵ Barton also discussed Lord Denning’s view that exemption clauses should be enforced only if reliance thereon would be fair and reasonable, suggesting that the House of Lords’ insistence that this could not be a rule of law still meant that “under the guise of interpretation there is still room for the notion of reasonableness to work”.²¹⁶ This left “a kind of judicial review of all the circumstances”, formulations familiar to administrative law, and the law of contract becoming “less private law and more public law”.²¹⁷ Further, conceding that reasonableness and the related lodestar of “reasonable expectations” were vague concepts, Barton suggested that:²¹⁸

It is, no doubt, reasonable to expect that promises will be kept, that conduct continued for some time in the past will be repeated in the future. But reasonableness of that kind is scarcely enough as a basis for a legal right to enforce the expectation. It is necessary to go further and to determine that the expectation should be based upon whether it is reasonable to rely on the conduct (including the words) of the defendant. If it is reasonable to treat the defendant as having intended the other party to place reliance on what he may have said or done to the extent that he will answer for his not having coming up to expectations, then the law will enforce the expectation or give compensation for the disappointed reliance. This is a long way from the law of contract. In many respects it is coming very close to tort, to a generalised duty with respect to one’s words or conduct.

These suggestions of contract law drawing closer to public law and especially tort law, as well as the displacement of 19th century “principles” by “pragmatism”, suggest the inspiration of Patrick Atiyah’s attempts around this time to redraw and expand the conceptual bases for contractual liability in English law.²¹⁹

However, Barton expressed some concern about the broad discretion conferred on New Zealand judges by statutes like the Illegal Contracts Act 1970, the Contractual

²¹⁴ Above n 213, 373, citing *Cental London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

²¹⁵ Above n 213, 372, discussing *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387, and noting that Lord Denning, in *The Discipline of the Law* (Butterworths, London, 1979) 48-50, viewed this judgment as the “epitome of reasonableness”. Compare below Chapter Four Part II.B, especially *Gore District Council v The Power Co Ltd* [1997] 1 NZLR 537.

²¹⁶ Above n 213, 374, discussing *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (rejecting Lord Denning’s doctrine of fundamental breach); *Reardon Smith Line Ltd v Yngvar Hansen Tangen* [1976] 1 WLR 989 (where Lord Wilberforce approved an objective view of contract interpretation), *FL Schuller AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (where Lord Reid suggested that unreasonableness of result indicates less probability that an interpretation was intended), and *Prenn v Simmonds* [1971] 1 WLR 1381 (allowing consideration of the factual matrix as well as language used). Compare below Chapter Three Parts III.B.1 and III.C.1.

²¹⁷ Above n 213, 375.

²¹⁸ Above n 213, 375.

²¹⁹ Although not specifically on these points, Barton, above n 213, 374 n 9, cites Atiyah’s “From Principles to Pragmatism” (1976) 92 LQR 174. See also Atiyah’s inaugural lecture published under the same title in 1978 by Clarendon Press, Oxford. Compare above Part III.

Mistakes Act 1977, and the Contractual Remedies Act 1979. He saw these statutes as paralleling the modern judicial approach (at least in England), in promoting individualised justice, but concluded: "... whose fairness? Whose reasonableness?". Overall, Barton contended that:²²⁰

the law of contract is clearly in a state of ferment; or, to change the metaphor, in an 'extraordinary conceptual morass', to use Professor Atiyah's language. It is too early to assess with any confidence how the New Zealand law of contract will develop. We are given to legal experiment. We are at the stage of improvisation. The most recent bold ventures into reform of the law contract may throw up more difficulties than they solve.

Pragmatic reformism, proceeding without much explicit ex ante theorising other than the need to simplify the law to generate fair outcomes, is consistent with the mentality of New Zealand's early modern law-makers described recently by Bassett, and the philosophy developed by Lord Cooke from the early 1980s.²²¹ Similarly, in the summary of the discussion which followed Barton's conference presentation, Don Dugdale is recorded to have again defended the exercise of judicial discretion under the Illegal Contracts Act 1970, to validate sales in breach of the Land Settlement Promotion and Land Acquisition Act 1952. He contended that the exercise "now enabled Judges to reach a just solution honestly instead of by the circuitous approach for which Lord Denning is famous".²²² Moreover, as a Law Commissioner recently, Dugdale proposed abolition of the Contracts Enforcement Act 1956 partly to prevent circuitous attempts by judges to avoid formal requirements in that statutory context too.²²³ However, his comments on Barton's paper need to be seen in the context of his concerns about judicial discretion, raised a decade earlier. Over the 1990s, he also remained a sharp critic of allowing broad discretion to judges.²²⁴

Similarly, although a comment on Barton's presentation by John Burrows (another CCLRC member from the late 1970s) also perceived a trend to use contract "interpretation" to overcome doctrinal difficulties to do justice in individual cases, along with doctrines of unconscionability and economic duress, he observed that "the Courts still had somehow to fit all this into the traditional framework of contract law".²²⁵ Noting that wide discretionary powers were likely to result in uncertainty and

²²⁰ Above n 213, 378. This rhetorical question is posed at the end of discussion on the Contractual Remedies Act, but it is implicit in Barton's remarks on the other two statutes.

²²¹ Nottage 2007a Part II.C. Further, as Barton adds (above n 213, 372), this tendency may have been reinforced by:

... contemporary thinking in many spheres of human conduct. Rules of any kind cease to trouble many of our contemporaries: in religion, some Christians can speak of God as being dead – indeed the view is held in some sections of New Zealand society that "Christian" is synonymous with being a "good bloke"; in ethics, the rightness or wrongness of an act depends entirely on the circumstances, "situational ethics" it is called; in psychology, no one is really responsible for anything – we are all creatures of our environment.

²²² [1981] NZLJ 380.

²²³ New Zealand Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997). See also D Dugdale "Do We Need the Contracts Enforcement Act?" [1993] NZLJ 239; below Chapter Two Part III.

²²⁴ See for example D Dugdale "A Polite Response to Mr Justice Thomas" (1993) 23 VUWLR 125; D Dugdale "Framing Statutes in an Age of Judicial Supremacy" (2000) 9 Otago L Rev 600.

²²⁵ [1981] NZLJ 379.

possibly inconsistency,²²⁶ he remarked that New Zealand might be getting to the stage of needing a comprehensive contract code – suggesting an awareness of the English Law Commission’s project of 1965 (but abandoned by 1981).²²⁷ Finally, John Wallace QC (later a High Court Judge and Law Commissioner) is also reported to have responded that: “if particularisation means abandonment of principle we are indeed on difficult ground ... We should achieve a clear definition of our principles. Failure to do this has meant recourse to statute to remedy manifest injustices”.²²⁸ Again in 1981, therefore, the seeds were planted for a reaction by those attracted towards more formal reasoning (especially “hard and fast rules”) against the substantive tendencies inherent in the contract law trends highlighted by Barton. The comparatively short history and weakly articulated theoretical basis of the latter trends, especially in enacting the Contract Statutes (discussed below Part IV.C), probably made such a reaction significantly easier to sustain.

Another contributing factor appears to be the unwillingness to pursue empirical inquiries into “reasonable expectations” in contractual settings.²²⁹ Barton implicitly invited such inquiry when he suggested, following an acclamation of Lord Wilberforce’s concern about the schematic character of English contract doctrine (particularly privity doctrines) not matching commercial realities (multi-party transactions):

The commercial character of contracts rests in many cases on the assumption that each of the parties will play his part in the relationship in accordance with the reasonable expectations of the others. That is why parties to continuing supply contracts, where price and supply are the subjects of written agreement, expect and usually receive a sympathetic response from their counterparts when the cost of performing their obligations is affected by a sudden rise in prices of raw materials or by a dramatic change in exchange rates. To the lawyer the written contractual formula ends all argument; to the businessman it merely provides the base for a further round of negotiation in the sure faith that he will not be bound by the letter of the agreement.

The same expectation is shared by the ordinary citizen who enters into a contract. When he signs a contractual document with columns of fine print he rarely reads beyond the first line. He certainly does not consult his lawyer ... Everyday experience shows that a vast number of contracts are signed without a proper appreciation of the nature and extent of the obligations imposed. How then is it possible to fit the theory into the reality of almost universal practice? It cannot be done. The notion of reasonable expectations is more in accordance with the attitudes both of the ordinary citizen and of the commercial man.

This drew a sharp reaction from a leading practitioner, Richard Craddock QC: “if we believe that this development is what the commercial community wants then we ‘misread our market’ ... The businessman expects performance and certainty, and to lose the latter diminishes the likelihood of the former”.²³⁰ Perhaps he had experienced

²²⁶ See also the concern in his Committee report, published in 1982 and reproduced in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 275, 291, to delimit any court discretion to vary contractual obligations upon frustration. Compare also below Chapter Four Part II.A.

²²⁷ Above n 226.

²²⁸ [1981] NZLJ 380.

²²⁹ Compare for example the debates in the first half of the 20th century in the US, resulting in the firm establishment of more substantive tendencies in the UCC and general contract law after World War II: above Part I.

²³⁰ [1981] NZLJ 380.

different types of contractual relations and parties in his practice, compared to Barton. Such sharply different views in 1981 might have prompted some systematic empirical research in New Zealand – as in the US, Japan, and even England by the 1970s – but unfortunately it did not, until one project in the mid-1990s.²³¹ Further, a response to Barton’s paper by Robert Gallen QC (later a High Court judge) suggested that New Zealand parties might be better off seeking “individualised justice” from arbitrators, rather than judges learned in the law but lacking in specialist skills in the area of dispute; and that judicial inquiry into reasonableness would likely result in more cost, delay and risk of error, leading to increases in litigation.²³² Again, these are empirical questions which have been pursued in other jurisdictions, but virtually ignored in New Zealand.²³³

IV.C The Contract Statutes

Not surprisingly, in the light of the foregoing, subsequent development of contract law theory in New Zealand has focused on refining more concrete principles in relation to existing black-letter law, especially the case law. The trend since the mid-1980s has been growing concern about the scope for judicial discretion provided in the Contract Statutes, a concern consistent with the general re-emergence of formal reasoning tendencies and corresponding institutional developments described in other published work (Nottage 2007a). On the whole, the courts appear to have been slow to exercise vigorously a number of broadly worded statutory discretions. Arguably, this has stemmed from insufficient clarification of the underlying purposes of the various statutes, as well as their piecemeal nature, making it more difficult to link them to a broader methodological and jurisprudential vision such as that developed to promote the UCC from the 1940s through to the 1960s.²³⁴

The most comprehensive statement of the broader considerations supposedly lying behind the enactment of the Contract Statutes came from John Burrows, a member of the CCLRC only in its later stages, in an article published in England as late as 1983. He argued that the various areas were chosen for reform because: (i) much of the case law was complex and technical, opening up the possibility of a more direct route to resolving issues; (ii) the law did not always reach a just result; and (iii) despite casuistry and attention to detail, the law did not always promote certainty. Burrows noted that a key feature of the resultant legislation was the conferral of broad discretionary powers on judges; and that it was “extraordinary ... how easily all these Acts [had] been passed, ... attract[ing] very little criticism or comment from lawyers, and little opposition from the commercial community”.²³⁵ That becomes less surprising when one realises that the legislation – in contrast for instance with the UCC – seems to have emerged quite

²³¹ Above Parts I-III. Compare L Nottage “Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study” (1997) 26 VUWLR 59; L Nottage “Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project” (1997) NZ L Rev 482; and below Chapter Four Part III.

²³² [1981] NZLQ 380.

²³³ Above Parts I-III. Compare L Nottage and C Wollschlaeger “What Do Courts Do?” [1996] NZLJ 369.

²³⁴ Compare above Part I.

²³⁵ J Burrows “Contract Statutes: The New Zealand Experience” [1983] Stat L Rev 76, 83.

quickly from the activities of a circumscribed group, in a piecemeal fashion lacking a clear prior statement of underlying principles.²³⁶ Accordingly, enactment of each Act probably drew no reaction from businesspeople and their advisors simply because they did not appreciate what was involved, nor the cumulative effect of the enactments together with subsequent rationalisations of them. Burrows remarks that “by giving the courts powers to provide reasonable solutions, the New Zealand legislation may be no more than most contracting parties do for themselves in any event”, mentioning the “excellent” studies by Macaulay and Beale in suggesting that “more research is necessary on just how far certainty is really a necessity to commerce”.²³⁷ However, there is no indication that the CCLRC ever attempted systematically to ascertain real-life practices and expectations, and use these as a widely publicised basis for their reform efforts. The approach seems to have been to “give it go” in a number of discrete areas, laying confidence in the judiciary to start afresh and the legislature to make any necessary later adjustments, and avoiding (or at least not seeking out) broader public engagement. These attitudes are reflected in Burrows’ concluding assessment.²³⁸

The new statutes are much better than the law they replaced. Perhaps some will believe it would have been better to take more time and produce a complete code of the whole law of contract. Not only was that not feasible, given New Zealand’s law reform machinery; it simply would not have worked. It is much harder to have total codification accepted by Parliament and the profession; and if one is to engage in bold reform it is better to introduce it gradually and observe its operation. The New Zealand legislature has taken risks, and in due course some amendment may be necessary. But that is far better than the alternative, which was to do nothing.

Such views add up to a very different process and orientation than that which drove enactment of the UCC in the US, clearly designed to reduce formal reasoning at multiple levels. The New Zealand statutes did not boost substantive reasoning by openly reflecting and promoting business usages and expectations, by encouraging purposive interpretation based on underlying principles reflected in the new law, or by doing away with strict formal requirements. Most of New Zealand’s Contract Statutes did reduce interpretive formality by replacing rules with broader open-ended standards. But these were primarily directed at relief – upon breakdown of contractual relationships, where “certainty” may be arguably less significant²³⁹ – rather than in their formation or interpretation. Further, these standards were often surrounded by extensive “guideline” factors.²⁴⁰ Such factors provide the backdrop for the following analysis suggesting that the Contract Statutes have had a rather limited impact on advancing substantive reasoning in New Zealand contract law theory.

²³⁶ Sutton, above n 193.

²³⁷ Burrows, above n 236, 90, citing Macaulay (above n 68) and Beale and Dugdale (above n 144). These works get relegated to a footnote in Burrows and others (above n 8, 14 n 11), with Macaulay’s study paraphrased as showing that “the *practice* of contracting parties often does not match the *law* of contract” (original emphasis). Bizarrely, this is then used to support the flat assertion in that textbook that: “The twentieth century has witnessed a move to a position where the law of contract more closely approximates the expectations of reasonable business people”. Compare also J Burrows “Statutes and Judicial Discretion” (1976) 7 NZULR 1, 22 (echoing Dugdale, above n 208, by suggesting that “there are some parts of the law in which certainty is more important than others”).

²³⁸ Burrows, above n 236, 97.

²³⁹ Burrows, above n 236, 90; Burrows and others, above n 8, 16.

²⁴⁰ Compare Dugdale, above n 208.

A related consideration is that although prominent New Zealand jurists appear to have enjoyed the sense that they are world leaders in reforming the common law in distinctive ways,²⁴¹ it is important to note contemporaneous developments in other Anglo-Commonwealth jurisdictions. Thus, New Zealand's tendency to legislate for judicial discretion had antecedents in English statutes, such as the war-time Law Reform (Frustrated Contracts) Act 1943. Largely adopted in the Frustrated Contracts Act 1944, sections 2(3) and 2(6) allowed the court discretion to adjust benefits received under a contract which had been held frustrated under the common law doctrine of frustration. More adventurous was New Zealand's Minors' Contracts Act 1969, which allowed court discretion to diminish the effects of certain minors' contracts if found unconscionable or oppressive (section 5(2)), as well as discretion to expand the effects of other contracts if "fair and reasonable" (section 6(2)). On the other hand, this legislation was partly prompted by the Lately Report of the Committee on the Age of Majority, published in England in 1967; and the Act has hardly ever been applied by New Zealand courts, with one judge finding it difficult to uncover its rationale.²⁴² Legislation was also enacted in New South Wales soon after the Lately Report, adopting very similar discretions and broad standards.²⁴³ As one English commentator notes: "problems with minors' contracts are never going to be very common, and a discretionary power in the court is no surprise to anyone. It existed even in Roman law".²⁴⁴

More significant was the Illegal Contracts Act 1970, which did not attempt to clarify the complex common law on what constitutes an "illegal contract", but allowed for discretionary relief in section 7. A member of the CCLRC reports that the scheme initially intended was "restitution as the primary form of relief, compensation when restitution was impossible, and validation which presupposed a variation to make the contract conform to law, ... constructed on the assumption that the courts would continue to want to refuse enforcement to illegal contracts".²⁴⁵ However, this scheme was not well appreciated by the courts. Following a dictum of Cooke J, validation came to given primacy from the late 1970s, despite concerns about the courts usurping the pre-eminence of the legislature.²⁴⁶ A decade later, variation was granted in one case "not to correct procedural defects in illegal contracts, but for ulterior purposes"; Hammond J cured illegality under the Land Settlement Promotion legislation by validating the sale subject to a statutory consent being obtained, but then went on to increase the sale price.²⁴⁷ However, this approach has been sharply criticised;²⁴⁸ and it

²⁴¹ See generally J Bassett "The New Zealand Legal System: Early Historical Influences" in R. Bigwood (ed) *New Zealand Legal Method* (Butterworths, Wellington, forthcoming). Compare for example R Cooke "The New Zealand National Legal Identity" (1987) 3 Cant L Rev 171.

²⁴² S Todd "Minors' Contracts Act 1969" in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 229, 230; *Morrow & Benjamin Ltd v Whittington* [1989] 3 NZLR 122, 124 (although Thorp J concluded that the Act was "a uniquely New Zealand response [sic] to the age-old problem of preventing persons taking advantage of youthful inexperience without unduly interfering with the ordinary course of commerce and the rights of innocent adults").

²⁴³ Minors (Property and Contracts) Act 1970 (NSW). See generally J Carter and D Harland *Contract Law in Australia* (3 ed, Butterworths, Sydney, 1996) 294-295, 297-299.

²⁴⁴ Reynolds, above n 182, 19.

²⁴⁵ B Coote "Security of Contract and the New Zealand Contract Statutes" (2000) 16 JCL 37, 41.

²⁴⁶ *Harding v Coburn* [1976] 2 NZLR 577, 584-585; Coote, above n 246, 42; Barton, above n 213.

²⁴⁷ Coote, above n 246, 42; *Busst v Bouma* (20 June 1996) unreported, High Court, Hamilton

seems unlikely that it will prompt widespread interference with substantive terms when a breach of statutory requirements or other illegality occurs.

By contrast, the Contractual Mistakes Act 1977 appears to have been driven not only by a willingness to simplify complex case law; but also to expand the scope of operative mistake, at least in situations of “cross-purpose mistake” pursuant to section 6(1)(a)(iii), where parties “were each influenced in their respective decisions to enter the contract by a different mistake about the same matter of fact or law”.²⁴⁹ Despite noting the general warnings of Arthur Corbin in this area of contract law, the CCLRC was prepared to risk reformulations of what constitutes mistake, although the legislation ultimately did not take up all these views. The Committee also envisaged a broad guiding principle, “a balance between avoiding the unfairness of holding a party to an inappropriate transaction which was not fully assented to, and protecting other parties ... who have a legitimate interest in seeing the contract performed”, and the purposes of the Act were stated to include powers to “mitigate the arbitrary effects of mistakes on contracts” subject to not prejudicing “the general security of contractual relationships” (section 4).²⁵⁰ A decision of the Court of Appeal in 1984 appeared to develop the notion of cross-purpose mistake so as to seriously challenge the objective theory of contract; but resultant controversy helps explain the retrenchment apparent five years later, emphasising that section 6(2)(a) precluded relief for a “mistake in [a contract’s] interpretation”.²⁵¹ In 1993, reporters for the Law Commission’s review of the Act suggested that “section 6(2)(a) be made a discretionary factor within the ambit of section 7”, which again confers broad powers for courts to provide relief (provided an operative mistake is established).²⁵² However, the Commission noted that no majority agreement could be reached regarding reform in this area, and concluded that a stabilisation in decisions from the courts indicated that they should be able to continue striking an appropriate balance.

The most significant and consistent expansion of the judicial discretion has come instead from the Contractual Remedies Act 1979. It too aimed primarily at simplifying complex judge-made law by providing direct routes to resolving the main perceived problems.²⁵³ Reynolds succinctly observes that a major problem was:²⁵⁴

the weakness of remedies in respect of misrepresentations inducing the contract (including the difficulty of distinguishing such representations from contract terms) ... [This] was solved by the surprising method of equating pre-contractual misrepresentation and contractual promises for the purposes of damages, and amalgamating the remedies of rescission for

Registry, upheld in *Bouma v Busst* (1998) 6 NZBLC 102, 457 (CA).

²⁴⁸ B Coote “Variation Under the Contract Statutes” (1997) 3 NZBLQ 3; B Coote “More, or Perhaps Less, on Variation Under the Contract Statutes” (1998) 4 NZBLQ 181; Coote, above n 246, 42-43.

²⁴⁹ Reynolds, above n 182, 21; A Beck and R Sutton “Contractual Mistakes Act 1977” in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 127, 143-153.

²⁵⁰ Report on the Effect of Mistakes on Contracts, Wellington, May 1976, para 5; Barton, above n 193, 240-241.

²⁵¹ Compare *Conlon v Ozolins* [1984] 1 NZLR 489 with *Paulger v Butland* [1989] 3 NZLR 549; Barton, above n 193, 242-243.

²⁵² Beck and Sutton, above n 250, 157.

²⁵³ J Burrows “The Contractual Remedies Act 1979” (1980) 1 Cant L Rev 82, 83.

²⁵⁴ Reynolds, above n 182, 22. See also Coote, above n 246, 44.

misrepresentation and treating the contract as discharged for breach into one remedy of 'cancellation', the consequences of which (since the results of the two remedies were different, one operating *ex tunc* and the other *ex nunc*) had to be entrusted to the discretion of the court.

Some of this English commentator's surprise may have stemmed from the more limited statutory intervention in England, in the form of the Misrepresentations Act 1967. Be that as it may, since cancellation under the Contractual Remedies Act crystallised the position of the parties, section 9 broadly allowed courts to provide discretionary relief including transfers of property or payment of money for benefits already conferred. Yet it seems clear that the CCLRC did not intend these measures to affect rights to claim damages, and the Act reflects this in various provisions of sections 8-10. Nonetheless, judges began issuing a variety of orders under section 9. In 1992, Fisher J decided that the broad wording of section 9(2)(b), permitting the award of any sum "as the Court thinks just", allowed a holistic assessment overriding common law rules on damages.²⁵⁵ This approach was approved by the Court of Appeal in 1993, and seems likely to prevail, despite protests that it subverts the Act and risks unprincipled decision-making.²⁵⁶ But even these decisions indicated that common law doctrine would continue to be influential, and Reynolds indicates that the Act may not have been necessary to encourage these events: "The rules of damages are a legitimate subject for development by caselaw, and they have been and are being developed in many countries".²⁵⁷

A fourth important Contract Statute resulting from the deliberations of the CCLRC was the Contracts (Privity) Act 1982, providing a scheme for contracts for the benefit of third parties. Unlike earlier Statutes, and some earlier legislation in Australia covering this issue, it did not provide any discretionary powers to the Courts.²⁵⁸ This is understandable in view of the controversy engendered by a fifth statute promoted by the CCLRC, the Credit Contracts Act 1981. In particular, practitioners and interest groups (especially in the business sector) expressed concerns about section 10's discretion to reopen terms which are "oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice".²⁵⁹ Despite its ostensibly broad scope – criticised by Bob Dugan as "if anything, broader in scope than its United States counterpart", namely unconscionability doctrine under the UCC and the *Restatement (Second)*²⁶⁰ – Rod Asher remarked in 1988 that concerns were largely misplaced: "Courts have shown robust commercial common sense in considering whether there has been oppressiveness [sic]".²⁶¹

²⁵⁵ *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68.

²⁵⁶ *Coxhead v Newman Tours Ltd* (1993) 6 TCLR 1; *Thomson v Rankin* [1993] 2 NZLR 68; Burrows and others, above n 7, 759-762. But see D Dugdale and C Walker "Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979" in New Zealand Law Commission *Contracts Statutes Review* (Report No 25, Wellington, 1993) 111, 122; B Coote "Remedy and Relief under the Contractual Remedies Act 1979 (NZ)" (1993) 6 JCL 141; and Coote, above n 246.

²⁵⁷ Reynolds, above n 182, 23.

²⁵⁸ Compare the Property Law Act 1974 (Queensland) s 55(3)(a) and (c).

²⁵⁹ R Asher "The Statutory Reforms of the Contracts and Commercial Law Reform Committee from a 1988 Perspective" (1988) 13 NZULR 190, 193.

²⁶⁰ R Dugan "The New Zealand Credit Contracts Act: A United States Lawyer's Perspective" (1984) 11 NZULR 20, 32-33.

²⁶¹ Asher, above n 260, 193. See also D Webb "A Proposed Decision-Making Process for

In sum, Asher (another former member of the CCLRC) correctly concludes that although the Contract Statutes were “major pieces of reforming legislation”, none “could be fairly described as deliberately challenging the fundamentals of contractual doctrine”.²⁶² The main reason for this was arguably that the reforms proceeded from the mid-1960s through to the 1980s largely in the absence of a new comprehensive theory of contract, firmly grounded in general legal theory, reinforced by political debate and empirical inquiry – as in the US, Japan, and even England (albeit still faltering, over this period).²⁶³ Nonetheless, the Contract Statutes belatedly erected a somewhat precarious platform for attempts to reconstruct contract law theory in New Zealand.

IV.D The Birth of Contract Law Theory in the Late 1980s and Early 1990s

As Francis Dawson (yet another CCLRC member) remarked perceptively in 1985, echoing – but not citing – a key insight of the legal realists in the US, secondary contract rights (such as damages or relief) are “inextricably linked” to primary rights.²⁶⁴ He added that enactment of the Contract Statutes had “dramatically altered the nature of contractual obligations of New Zealand”, with recent case law at that time suggesting that “it will soon be a truism in New Zealand that a contractual obligation will only be enforced to the extent that the court thinks just”. To counter such rough justice, Dawson suggested that:²⁶⁵

New Zealand contract theorists will have to assemble (and fairly rapidly) a new theory of contract obligation which will not only explain what role should be accorded to contractual autonomy under the statutory regime, but which will also explain why it is appropriate for courts to interfere with the parties’ own arrangements. One suspects that this will require the development of a fairly sophisticated notion of contractual justice, reconciling concepts of contractual autonomy, good faith bargaining and substantial equivalence of exchange, and careful working out the relationship between contract and tort obligations. This is a daunting task ...

Contrasting the tendency of French contract law commentators to begin expositions with “different philosophical conceptions of contract law”, he also suggested that common lawyers’ traditional aversions to articulating principles would need to be overcome, especially as “the courts struggle to interpret the language of the various statut[...]es”.²⁶⁶ Unfortunately, Dawson left academia for private practice in the early 1990s. Perhaps from that vantage point he assisted in reining in tendencies by some judges to interfere too readily in parties’ agreements, but this move deprived New Zealand of an influential academic commentator interested in broader contract law theory building.²⁶⁷

In 1988, Brian Coote reviewed the cases emphasised by Dawson, suggesting

Oppressive Credit Contracts” (1997) NZ L Rev 394; below Chapter Three Part IV.C.

²⁶² Asher, above n 260, 197.

²⁶³ See above Parts I-III.

²⁶⁴ F Dawson “The New Zealand Contract Statutes” [1985] LMCLQ 42, 43. Compare for example Fuller, above n 34; Macaulay and others, above n 67.

²⁶⁵ Dawson, above n 265, 57.

²⁶⁶ Dawson, above n 265, 44.

²⁶⁷ For a rare contribution after his career move, see F Dawson “Reflections on Certain Aspects of the Law of Damages for Breach of Contract” (1995) 9 JCL 125.

that they did not undermine a more classical understanding of contract, or at least should not encourage the emergence of “a new law of contract” centred on “reasonableness” as suggested by Barton in 1981.²⁶⁸ In a lengthy separate publication around the same time, Coote rose to the challenge of developing a general theory of contractual obligation, one which came down firmly on the side of insisting on the need for courts to respect party autonomy. In particular, he argued that contract law’s function as an institution lay in allowing parties to credibly commit to the assumption of obligations, so that the focus should remain on the interests of the promisor rather than the promisee.²⁶⁹ This perspective attracted considerable attention in Australia,²⁷⁰ as well as New Zealand, and Coote maintains it to this day. One corollary is that contractual obligations, taken on voluntarily by parties, are distinguished sharply from duties “like those in tort, imposed *ab extra* by force of law”. A second is “the need for enforceability”, which not only differentiates contractual obligations from “merely moral, social and religious ones”, but also provides the “key to security of contract” by ensuring that “sanctions ... mirror the obligations assumed”.²⁷¹ Such views have been developed in remarkable disregard of – or at least, disinterest in – the jurisprudential, political and empirical work by legal realists and their followers in contract law theory development overseas.²⁷² Nonetheless, with a comprehensive conceptual framework in place, Coote has consistently criticised some judges for undermining the allegedly rather conservative original intentions of those responsible for New Zealand’s Contract Statutes. He has castigated judgments perceived as contrary to this theory, premised on the primacy of party autonomy and supporting rules capable of predictable enforcement.²⁷³ In a valedictory lecture delivered in 1995 to a standing ovation, Coote declared himself an unabashed “formalist”, and his writings in this vein have remained prolific.²⁷⁴

Coote’s nemesis nowadays, in important respects, is David McLauchlan. In the latter’s inaugural lecture at Victoria University of Wellington in 1983, he shared concerns about the Contracts Statutes promoted by the CCLRC, of which he had not been a member. McLauchlan criticised the Contractual Remedies Act 1979, in particular, for doing away with “a body of intricate case-law, developed by the courts over 200 years, ... replaced by a discretion for the exercise of which little meaningful guidance is given”. This area was seen to be one in which “certain well-defined problems constantly recur”, and McLauchlan argued that: “it would have been possible to enact *principles* to be applied by the courts. It simply required time and effort”.²⁷⁵ He has since continued to expend much effort in relating trends and concepts particularly in

²⁶⁸ B Coote “The Contracts and Commercial Law Reform Committee and the Contract Statutes” (1988) 13 NZULR 160, 170-171, citing Barton (above n 213).

²⁶⁹ B Coote “The Essence of Contract” Part One (1988) 1 JCL 91; Part Two (1989) 1 JCL 183.

²⁷⁰ See for example J Carter and D Harland (eds) *Cases and Materials on Contract Law in Australia* (3 ed Butterworths, Sydney, 1998) 6-12.

²⁷¹ Coote, above n 246, 38

²⁷² Compare above Parts I-III.

²⁷³ See for example Coote, above n 246; n 249.

²⁷⁴ B Coote “Contract - An Underview” in B Brown (ed) *Contract - An Underview: A Souvenir of a Valedictory Lecture* (Legal Research Foundation, Auckland, 1995) 13. See for example Coote, 246.

²⁷⁵ D McLauchlan “Contract and Commercial Law Reform in New Zealand” (1984) 11 NZULR 36, 44. See also D McLauchlan “Contract Law Reform in New Zealand: The Contractual Remedies Act 1979” (1981) 1 OJLS 284.

Anglo-New Zealand contract law to the areas dealt with by the Contract Statutes.²⁷⁶ Also driven by respect for the elaborate common law and equitable rules developed by the courts to regulate unfairness in contractual terms and negotiations, McLauchlan launched a scathing attack on a Preliminary Paper published in 1990 by the Law Commission, which had proposed a succinct set of general standards.²⁷⁷ However, a clear tension with Coote's endorsement of a formal approach to contract law emerged in 1992, when McLauchlan reviewed developments in the Contract Statutes – and especially judge-made contract law – to proclaim the advent of “the ‘New’ Law of Contract in New Zealand”:²⁷⁸

Those elements of the so-called classical law of contract that survived the judicial and legislative inroads of the first 70 years of this century are gradually being supplemented and overtaken by a body of law which, *inter alia*, enforces some previously unenforceable promises and grants relief from some previously enforceable promises, often in accordance with a variety of broad standards such as reasonable expectations, legitimate commercial expectations, unconscionability, good faith, and even “the confident assumptions of commercial parties”.

The last-mentioned phrase was taken from a judgment of Lord Justice Bingham (as he was then), in a case in 1990 finding a collateral contract in a tendering process.²⁷⁹ McLauchlan concluded by disagreeing with some critics and acclaiming this decision as an illustration of “the trend towards the imposition of just solutions which can be ascribed to reasonable persons in the position of the parties”.²⁸⁰ He added:²⁸¹

My judgment is that commercial men and women would welcome the imposition of the kind of limited legal obligation imposed by the court in the ... case. Such a result tends to enhance, not undermine, the utility of the tendering process. Of course, this disagreement goes to show once again that the reasonable outcome will often be a matter on which careful minds, weighing all relevant considerations, may differ. One's judgment as to what is reasonable is dependent on one's life experience, philosophical starting-points, and moral values.

Notably absent from this list of relevant determinants was an interest in a systematic investigation of the actual experiences, practices and norms of commercial parties – a problem already uncovered when Barton's hypothesis that agreement was being displaced by “reasonableness”, as the lodestone for contractual liability, drew such strong reactions a decade earlier.²⁸² The omission is also surprising in light of

²⁷⁶ See for example D McLauchlan “Merger and Acknowledgement Clauses under the Contractual Remedies Act” (1988) 18 VUWLR 311; D McLauchlan “The Demise of *Conlon v Ozolins*” (1991) 14 NZULR 229.

²⁷⁷ D McLauchlan “Unfair Contracts - The Law Commission's Draft Scheme” [1991] NZ Recent L Rev 311. Compare New Zealand Law Commission “*Unfair Contracts*” (Preliminary Paper No 11, Wellington, 1990); and below Chapter Three Part IV.C. See also A Angelo and E Ellinger “Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States” (1992) 14 Loyola of Los Angeles Int'l and Comp LJ 455.

²⁷⁸ D McLauchlan “The ‘New’ Law of Contract in New Zealand” (1992) NZ Recent L Rev 436, 436.

²⁷⁹ *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195, 1201, per Bingham LJ.

²⁸⁰ McLauchlan, above n 279, 460.

²⁸¹ McLauchlan, above n 279, 461.

²⁸² Barton, above n 213.

McLauchlan's appeal to a prominent US legal realist and the mentor to Llewellyn, Arthur Corbin, for the proposition that contract law revolves around "the realisation of reasonable expectations that have been induced by the making of a promise".²⁸³ Further, contesting the ascription by Adams and Brownsword of ideological schizophrenia to Lord Wilberforce, McLauchlan suggested that:²⁸⁴

the pursuit of fair and reasonable results, "just solutions which can be ascribed to reasonable men in the position of the parties", necessarily involves giving due weight, sometimes perhaps decisive weight, to commercial convenience. Justice in contractual disputes requires a balancing of the values which constitute the so-called "market-individualist" and "consumer-welfarist" philosophies, in so far as they point in different directions.

This represents basically the "conflicting considerations" model which emerged from the 1940s through to the 1960s in the US, only to be seriously challenged since 1970 by ideological tension and new contract law theory based notably on liberal rights-based philosophy, economic analysis, and a renewed commitment to empirical inquiry.²⁸⁵ McLauchlan also downplayed the profoundly historical and philosophical arguments developed by Atiyah, and more importantly Collins' communitarian studies in the 1980s, as well as pioneering empirical studies in England. Instead, he left the assertion that "there has been a perceptible change in judicial attitudes and, in partnership with the legislature, in the values which should determine the resolution of contract cases". This was supported by "some general remarks concerning the underlying attitudes and values of judges when resolving contract cases today": "a more liberated and adventurous judiciary" less bound to precedent, exhibiting "a greater recognition of the realities of the contracting process and willingness to adapt and change the law accordingly; more awareness of that people do not read standard-form contracts and often do not reduce the whole of their agreement to writing",²⁸⁶ more concern to achieve individualised justice, and a willingness to blur the distinctions between contractual and tortious liability.

IV.E The Slow Development of Contract Law Theory Since the Mid-1990s

McLauchlan's subsequent work has not attempted to develop these points, but rather to propound a new set of "principles" to guide the courts. To be fair, it has only been in very recent years – especially after the retirement of Lord Cooke from the Court of Appeal – that robust debate has emerged in New Zealand about the attitudes and roles of the judiciary.²⁸⁷ Further, as President of the Court in 1990, Lord Cooke had claimed that "fairness" and "reasonable expectations" were new lodestones in New Zealand

²⁸³ McLauchlan, above n 279, 440 n 33, citing *Corbin on Contracts* (1963) Vol 1, 3. Compare above Part I.

²⁸⁴ McLauchlan, above n 279, 446. The first citation, repeated from the opening paragraph of the article, is from Lord Wilberforce's speech in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 696. It should be added that the House of Lords in that case extended the doctrine of frustration to leases of land, but decided that it could not be applied in the case at hand. See below Chapter Four Part II.A. For the other phrases cited by McLauchlan, see Adams and Brownsword, above n 142.

²⁸⁵ See above Part I.

²⁸⁶ McLauchlan, above n 279, 447.

²⁸⁷ See above Chapter One, especially Part III.

law.²⁸⁸ Taking this lead, in 1993 Thomas J published his monograph outlining a jurisprudential framework for judge-made law reflective of community expectations and not hidebound by precedent.²⁸⁹ Yet two swallows never make a summer. Moreover, Lord Cooke's claims were not centred on developments in contract law,²⁹⁰ he generated relatively few lasting innovations in New Zealand contract law doctrine,²⁹¹ and his tendency to adopt a strict approach in commercial settings, as opposed to transactions involving consumers or individuals, has been noted by a leading practitioner.²⁹² Likewise, Justice Hammond's imposition of punitive damages in contract has not generated momentum.²⁹³ His writings as a law professor, carried over into a judgment in 1993, have recently encouraged Thomas J to follow suggestions by Lord Cooke and develop a "dualistic" or "substantive interest-based" model under which breach of a civil obligation allows the judge to choose any remedy deemed most appropriate, irrespective of its historical or conceptual baggage.²⁹⁴ However, reviewing developments mainly since the mid-1990s against the backdrop of a rising caseload pressures on New Zealand courts since 1977, John Smillie has argued recently that.²⁹⁵

There are signs that an increasing number of judges are coming to the view that an independent law of contract offering a minimum level of certainty and predictability is essential in order to provide a meaningful guide to conduct and permit efficient resolution of disputes. The Court of Appeal is now more likely to give literal effect to the plain words of a contractual document, and less inclined to read down exclusion clauses and imply protective terms. The court has made some attempt to halt the progressive intrusion of the tort of negligence into the contractual world of economic affairs, and to differentiate fiduciary duties of loyalty from ordinary contractual obligations. In what is perhaps the most significant recent development, a majority of a five-judge court held that expectation damages for loss of future benefits cannot be recovered in an action for breach of the Fair Trading Act 1986, reasoning that only a binding contractual contract can generate an expectation will be fulfilled.

²⁸⁸ R Cooke "Fairness" (1989) 19 VUWLR 421. See also Nottage 2007a Part II.C.

²⁸⁹ E W Thomas "A Return to Principle in Legal Reasoning and an Acclamation of Judicial Autonomy" (1993) VUWLR Monograph 5.

²⁹⁰ Above n 289. Contract law also did not figure prominently in his review of the constituents of "The New Zealand National Legal Identity" (1987) 3 Cant L Rev 171, 176-178. But see R Cooke "Introduction" (1995) 9 JCL 3, 6 (commenting that "reasonable expectations" should be a guiding principle concept "in contract as in other fields").

²⁹¹ Compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 with R Cooke "Remoteness of Damage and Judicial Discretion" (1978) 37 CLJ 289. Compare recently *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); *JB Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC). See also the presumption against enforceability of certain informal commercial agreements, arguably created by Cooke P in *Concorde v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385, discussed below Chapter Two Part II.B.1.

²⁹² J Farmer "Lord Cooke and Judicial Decision-making: A Perspective from the Commercial Bar" in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 53, 57-58. Compare also Lord Cooke "Party Autonomy" (1999) 30 VUWLR 257.

²⁹³ *Tak & Co Inc v AEL Corporation Ltd & Anor* (1995) 5 NZBLC 103,887. The Court of Appeal left the issue unresolved in *State Insurance Ltd v Cedenco Foods Ltd* (6 August 1997) unreported, Court of Appeal, CA 216/97.

²⁹⁴ E W Thomas "An Endorsement of a More Flexible Law of Civil Remedies" (1999) 7 Waikato L Rev 23, 25-26, 33, 44 (following *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623).

²⁹⁵ J Smillie "Is Security of Contract Worth Pursuing? – Reflections on the Function of Contract Law" (2000) 16 JCL 148, 152 (citations omitted). See also J Smillie "Certainty and Civil Obligation" (2000) 9 Otago L Rev 633.

Unsurprisingly, Thomas J has often dissented in these respects.²⁹⁶ Occasionally, he has achieved some success in turning other judges to his more substantive reasoning. The most prominent example in recent years is the attempt to recant from a literal interpretation of contracts, preferring consideration of a wide array of extrinsic evidence. In *Attorney-General v Dreux Holdings Ltd*, Thomas J advocated reference to subsequent conduct.²⁹⁷ The propriety of this was left open by the Court of Appeal in *Airwork (NZ) Ltd v Vertical Flight Management Ltd*, but later approved in *Valentines Properties Ltd v Huntco Corporation*.²⁹⁸ In *Yoshimoto v Canterbury Golf Int'l Ltd*, however, Thomas J himself accepted that stare decisis compelled him to the conclusion that:²⁹⁹

For the moment, therefore, this Court must accept that, until the rule is reviewed by the Privy Council (or, possibly, the House of Lords) the extrinsic evidence relating to the draft agreement must be disregarded as part of the negotiations. The cautious flexibility in the application of the rule [of contract interpretation] which would seem sensible to ensure effect is given to the reasonable expectations of commercial men and women is lacking.

The pre-eminent role of Privy Council precedent in this area had been emphasised in an article published by a partner in a nation-wide law firm, Don Holborow, a month or so prior to the *Yoshimoto* judgment. He went on to castigate the general move away from literal interpretation, as signalled by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and followed by the New Zealand Court of Appeal in *Boat Park Ltd v Huntco*,³⁰⁰ adding indications that some High Court judges in New Zealand were still attracted to a more literal analysis.³⁰¹ There is also evidence of a move back to more literal interpretation in England.³⁰² Such developments have been acclaimed by Jack Hodder, a partner in another large firm and editor of New Zealand's most widely read weekly law newsletter (as well as a former Law Commissioner), as part of regular entreaties to maintain bright-line rules. In a very recent editorial, he acclaimed the Court of Appeal's refusal to find an informal agreement to be a binding contract, but expressed disappointment that the Court did not specifically "disapprove of Professor David McLauchlan's more or less heretical

²⁹⁶ See also for example the decision by Henry and Keith JJ reiterating the primacy of the contractual matrix in tort claims brought among businesses: *R M Turton & Co Ltd (in liq) v Kerlake & Partners* (6 July 2000) CA 169/99 (Thomas J dissenting).

²⁹⁷ (1996) 7 TCLR 617.

²⁹⁸ Respectively, [1999] 1 NZLR 641; [2000] 3 NZLR 16. But see *Ingram & Anor v Patcroft Properties Ltd* (18 April 2000) unreported, High Court, Auckland Registry, CP 387/SW99, Smellie J (following an earlier Court of Appeal ruling).

²⁹⁹ [2001] 1 NZLR 523, 549. Thanks are due to Don Holborow for providing a copy of this judgment.

³⁰⁰ Respectively, [1998] 1 All ER 98 (HL); and [1999] 2 NZLR 74.

³⁰¹ D Holborow "Contract Interpretation" [2000] NZLJ 374, 375-376 (discussing judgments by McGechan J and by Fisher J). Compare also *Findlay & Anor v Carey & Anor* (5 May 2000) unreported, High Court, Hamilton Registry, A 146/99, where Hammond J felt obliged to apply *Boat Park* but held reservations about the approach outlined in that case.

³⁰² See for example Sir Christopher Staughton "How Do the Courts Interpret Commercial Contracts" [1999] CLJ 303; M Clarke "Interpreting Contracts – The Price of Perspective" [2000] CLJ 18; *Bank of Credit and Commerce International SA v Ali & Ors* [2001] 1 All ER 901; S Gee "Interpretation of Commercial Contracts" (2001) 117 LQR 358.

modern writings on contract”.³⁰³

McLauchlan therefore seems to have overstated the situation in proclaiming “the new law of contract interpretation” in 2000.³⁰⁴ Nonetheless, having found a ready ally in Thomas J, he appears committed to waging a crusade to encourage New Zealand courts to move away from a literal approach.³⁰⁵ Similarly, McLauchlan criticises judges who take an overly objective approach to contract formation.³⁰⁶ He also proposes a multi-factor balancing test, rather than a bright-line rule, to determine whether parties in contractual negotiations intended to be bound despite referring to a formal contract having to be later executed.³⁰⁷ an approach which could encourage more promises to be enforced. McLauchlan also chastises New Zealand courts for their reluctance to recognise agreements to agree, even compared to English and Scottish courts,³⁰⁸ thereby undercutting more flexibility in long-term relationships. These areas – formation, terms, and performance – touch on key aspects of the classical law of contract.³⁰⁹ Ray Mulholland has also joined in surveying some developments in areas in or related to contract law, albeit in much more broad-brush fashion and ending with the concession that: “Despite the massive pressure that has been exerted on contract, in recent years, in the name of fair dealing, the substance of classical contract remains intact”.³¹⁰

Further, a regular feature of McLauchlan’s writings over the 1990s are appeals to Fuller, Corbin, the UCC, the *Restatement (Second)*, or Farnsworth.³¹¹ Thus, the new body of “principle” being proposed for New Zealand contract law, especially judge-made law, appears to be the neoclassical synthesis which rose to dominance in the US over the 1960s and 1970s, despite that jurisdiction’s very different history and institutional backdrop in relation to contract law (including, for example, extensive use

³⁰³ J Hodder “Contracts: To Fill or Not to Fill Gaps” (2001) 24/41 TCL 1, discussing *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ. For further stout advocacy of more bright-line rules, see for example J Hodder “Contract Law: Construction Problems” (2001) 24/8 TCL 1; “Contract and Tort, Again ...” (2001) 23/25 TCL 1; “Certainty: The Law and the Southern Perspective” (2000) 23/19 TCL 1.

³⁰⁴ D McLauchlan “The New Law of Contract Interpretation” (2000) 19 NZULR 147. This was also the title of a seminar he presented at the University of Auckland’s Research Centre for Business Law on 28 November 2000, further billed as describing “a quiet revolution” in recent years.

³⁰⁵ In *Yoshimoto* (above n 300), Thomas J cites D McLauchlan “A Contract Contradiction” (1999) 30 VUWLR 175. See also for example D McLauchlan “Subsequent Conduct and Contract Interpretation: An Update” (1997) 3 NZBLQ 147; D McLauchlan “The Plain Meaning Rule of Contract Interpretation” (1996) 2 NZBLQ 60 [“Plain Meaning”].

³⁰⁶ See for example D McLauchlan “Actual Consensus Ad Idem: Unnecessary But Surely Sufficient?” [1995] NZLJ 45.

³⁰⁷ See D McLauchlan “Informal Agreements for the Sale or Lease of Land: When Are They Contracts?” (1993) NZ Recent L Rev 442; D McLauchlan ““We Have a Deal” - Mere Consensus or Concluded Bargain?” (1996) 2 NZBLQ 206.

³⁰⁸ See D McLauchlan “Rethinking Agreements to Agree” (1998) 18 NZULR 77.

³⁰⁹ Compare Mooney, above n 91.

³¹⁰ R Mulholland “Freedom From Contract?” [2000] NZLJ 195, 197.

³¹¹ See for example D McLauchlan “Damages for Misrepresentation under the Fair Trading Act: Expectation or Reliance” (1999) 5 NZBLQ 133, 148; McLauchlan, above n 306, 84 (Plain Meaning); McLauchlan, above n 309, 97 (Agreements); McLauchlan, above n 307 (Consensus).

of jury trials).³¹²

McLauchlan also faces formidable opponents in academia, in addition to Coote, as well as within the legal profession. Peter Watts, the successor to the Chair held by Coote at the University of Auckland, has argued recently that:³¹³

... like others, I doubt whether the evidence [McLauchlan] relies on, principally a series of discursions of Lord Hoffmann, really supports the degree of change he is hailing, nor do I think the world would be a happier place for a fresh start. ... I think the conventional view in New Zealand has been against the use of post-contract evidence, if only because of the fairly consistent stance of the House of Lords on this issue.

More generally, he argues that “there has been a very substantial degree of continuity at the core and in the detail of our private law, and in the reasoning used in settling it”.³¹⁴ Likewise, his younger colleague Rick Bigwood observes that:³¹⁵

Care must inevitably be taken to avoid any suggestions that the law of contracts has undergone a greater transformation than in reality it has, the more so when one’s historical conclusions about that subject are founded primarily on judicial opinions expressed at particular times. Still, even caricatures gesture in the direction of truth. It cannot be denied that modern contract law looms as a “mutation” of some earlier, “more pure” strain.

Bigwood notes that one manifestation of this is the appeal by judges to broad concepts such as “fairness” and “reasonableness”. However, he insists that the underlying “idea of ‘conscience’ is not wholly external to the liberal notion of contract but rather is a requirement of its own internal logic”.³¹⁶ Opening a new chapter in contract law theory development in New Zealand law faculties,³¹⁷ Bigwood draws primarily on philosophical arguments to develop this argument in four main steps. He first follows Aristotle in differentiating forms of justice, namely (multilateral) “corrective” justice and (bilateral) “distributive justice”. Bigwood next adopts John Rawls’ theory that distributive justice principles should be applied in determining “the basic structure of society”, but not to the rules governing “particular transactions” entered into by individuals. Thirdly, this allows him to draw the following distinction:³¹⁸

“Contract as Institution” (“Contract-1”) is the publicly announced system of rules that defines the

³¹² Compare above Part I; Nottage 2007a; Galanter, above n 43; and for example W Whitford “The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts” [2001] *Wisc L Rev* 931.

³¹³ P Watts “The Judge as Casual Law-Maker” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), under “3. The Impact of the Legislative Thesis”.

³¹⁴ Watts, above n 314, under “The Need for a New Zealand Methodology”.

³¹⁵ R Bigwood “Conscience and the Liberal Conception of Contract: Observing Basic Distinctions” Part One (2000) 16 *JCL* 1, 2.

³¹⁶ Bigwood, above n 316, 12.

³¹⁷ At least one theorist interested in contract law is presently active in a Philosophy department, at the University of Auckland: Tim Dare. However, he has not published in New Zealand law journals, and his work does not seem to be widely known among legal academics in New Zealand, let alone its legal profession. Compare for example T Dare “Kronman on Contract: A Study in the Relation Between Substance and Procedure in Normative and Legal Theory” (1994) 7 *Can J of Law and Jurisprudence* 331.

³¹⁸ Bigwood, above n 316, 33.

form of activity by which private individuals may take upon themselves legal contractual liability, thereby giving that activity its structure (a normative significance it would not otherwise have). As such, Contract-1 is synonymous with “the free market”....

“Contract as instrument”, in contrast, corresponds to the law of contract as the normative device employed to regulate *particular* actions falling under Contract-1, that is, the formation, performance and enforcement of *particular* transactions.

Bigwood then argues that while distributive justice concerns may mean that a society does not permit distribution of available resources solely on the basis of Contract-1, once the latter has been committed to, “Contract-2” must be allowed to operate in a largely unqualified and *non*-distributive manner, free from excessive governmental interference and collective conceptions of the good”.³¹⁹ The final step in the argument is to contend that.³²⁰

adherence to the values of individualism implies that the justice of private transactions between particular individuals must depend at least on the *actual* consent of the parties. Ultimately, however, our conclusions about the conditions of such consent must be able to accommodate our understanding of corrective justice (and not distributive justice) as the primary mode of legal ordering in this context. Absence of consent on the part of one contracting party (P) is not, *per se*, positive justification for disappointing the contractual expectations of the party on the other side of the transaction (D). All things being equal, D must somehow be responsible for P’s failure to bring a proper consent to the transaction; the absence of a true, full, and free consent must somehow be linked to a form of *wrongdoing* on the part of that other party (in procuring or receiving that consent). In the final analysis, Contract-2 is rendered just by implying into the interactional structure of particular transactions duties of good faith and fair dealing that monitor and control the conditions under which personal contractual consent is procured and received. The idea of “conscience” in connection with the formation of contracts simply contributes content to that implication.

This view generates implications such as a focus on wrongdoing by D (“the Defendant”) rather than the effect on P (the “Plaintiff”), in rethinking the doctrine of undue influence; and the primacy of procedural over substantive unfairness.³²¹ The former challenges a doctrine of classical contract law; but the relegation of distributivist concerns to the “Contract-1” stage, and the pre-eminence given to voluntary assumption of consent in “Contract-2”, place this theory within the neoclassical tradition in the US.³²²

Those sympathetic to that tradition but who have not explored philosophical underpinnings, like McLauchlan, might fill this lacuna by adopting Bigwood’s theory and arguing that his perception of “conscience” equates to the “reasonable expectations” principle allegedly guiding New Zealand judges. However, this would involve showing that Bigwood’s implications in the law of undue influence fit with the case law, and that the theory works in other areas of private law.³²³

³¹⁹ Bigwood, above n 316, 34.

³²⁰ R Bigwood “Conscience and the Liberal Conception of Contract: Observing Basic Distinctions” Part Two (2000) 16 JCL 191, 192.

³²¹ Bigwood, above n 321, 198-202, 209-210. See also R Bigwood “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation?’” (1996) 16 OJLS 503, 505-507.

³²² Above n 46.

³²³ Compare P Watts “The Role of Conscience – A Commentary on ‘Conscience and the Liberal Conscience of Contract’” (2000) 16 JCL 223, 227-232.

Such endeavours may also deflect from the exciting possibility of developing philosophical and sociological critiques of the first three steps of Bigwood's argument, as well as the primacy given to voluntary consent in the fourth, suggested by other strands of contract law theory since the 1970s in the US, as well as Japan and the US.³²⁴ A recent lecture by Thomas J is disappointing in this respect, but at least highlights an important area for future debate. On the one hand, he praises Bigwood's "outstanding contribution to legal theory in elaborating the law's antithesis [sic] to exploitation in contract law", recognising the need to focus on exploitation rather than coerced consent and on the autonomy of the individual rather than paternalistic intervention by judges.³²⁵ On the other hand, drawing on Fuller for the notion that values develop from a homogenous society, Thomas J concludes with indications that he wishes to retain a communitarianism infused by altruism, distinguished from liberalism.³²⁶

... the law ... developed so as to reflect the underlying precept that a person may not use his or her superior strength or power to take or obtain an unfair advantage at another's expense. Judges reflect this sense of fairness which is immanent in the community.

While liberal individualism may hold sway, our society is sufficiently homogenous to be underpinned by some common mores and enduring values, and the precept of non-exploitation is an integral part of those mores and values. ... It is for this reason that the notion of an altruistic premise underlying the law cannot be debunked. It stems from the community itself.

Nonetheless, by firmly placing philosophical debate on the agenda, Bigwood's recent forays may finally open New Zealand contract law theory and doctrine to more substantive reasoning processes. This potential was highlighted by the newly appointed Chief Justice at the opening of a Journal of Contract Law conference in 1999 at which Bigwood presented his latest thesis, when she remarked:

Thirty years ago there were doubts that contract would see out the 20th Century, without being subsumed into a general law of obligations. Such pessimism failed to anticipate the libertarian revival. It affirms, as did the cases which established contract law as we know it, the economic and social efficiency of freeing competent parties to strike their own bargains. There is social benefit in the enforcement of such bargains.

The debate has centred on whether contracts should be enforced by Courts according to their formal content or according to substantive fairness or good faith. The libertarian tradition is in tension with the natural law tradition which views law as a substantive principle which confers wider responsibilities upon the Judge. Fairness and good faith are important considerations in identifying the bargain the parties have made and in its enforcement. This view of contract is buttressed by modern legislation under which broad discretion is conferred upon Judges to go beyond the formal reasons for the transaction and look to the substance of what is achieved.

The tension between the two views is nothing new and is one found in all areas of law.

³²⁴ See for example Part I above (especially CLS, Macneil, and possibly even Posner's current neo-pragmatic liberalism), Part II (especially Collins), Part III (especially Yamamoto and Uchida). Compare also below Chapter Five Part II.B.2 (Habermas).

³²⁵ E Thomas "The Conscience of the Law" (2000) 8 Waikato L Rev 1, 15. See also his lengthy dissent in *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, in which he argues (at para 128) that contract law should "give effect to the reasonable expectations of commercial men and women", to respect "the autonomy of the will of the parties".

³²⁶ Thomas, above n 326, 22. Bigwood's philosophy is fundamentally at variance with these apparent remnants of "moral realism" (on which see J Allen "The Invisible Hand in Justice Thomas' Philosophy of Law" [1999] NZ L Rev 213; and above Chapter Three Part II.C).

Professor Tony Honore compared the contest between natural lawyers and legal positivists to an international soccer match: “Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup (the Sociologists have never learned the rules). Victory goes now to one side, now to the other, but the enthusiasm of the players and spectators alike ensures that the losing side will take its revenge.

Hopefully, such matches will now become regular fixtures in New Zealand, engaging not only positivists and natural lawyers but also sociologists (under new rules), with an awareness that taking any side may have political or ideological implications. Only such transformations seem likely to secure the overall expansion of more substantive reasoning in contract law in New Zealand, particularly in view of the comparatively late expansion in debates about contract law theory.

V Conclusions

The foregoing has outlined the development of contract law theory in all four jurisdictions, suggesting that that Japan and (perhaps especially) the US promote highly substantive reasoning. This is despite a strong doctrinal tradition particularly in Japan, and debates in both jurisdictions since the 1990s that may reinforce more formal approaches. By contrast, contract law theory development in England, and especially New Zealand, displays distinctly more formal tendencies, although seeds planted in the late 1970s have contributed to a flowering of theory and empirical research in England in recent years, thus expanding the scope for a more substantive approach.

Of necessity, the survey has been quite broad-brush and selective. No doubt one could spend much more time and energy examining the oeuvre of individual theorists discussed so far, and that of others not introduced here (at all, or in any detail). One might also question whether it makes sense, in an increasingly globalised academic environment, to derive even a broad overview of developments from geographical origins of writers. However, it still seems plausible to link the emergence of distinctive approaches in contract law theory to the jurisdictions in which individual theorists were most active for most of their careers. Even nowadays, practical limits to mobility mean that an academic’s perceptions of what it is important to research and write about, and in what style and for whom, are likely to be determined by his or her main work environment.³²⁷ This was probably even truer for the older generations of contract law theorists discussed above. The academic milieu they and their successors inhabited, and sustained, seems to have coloured important strands of contract law theory, in different jurisdictions in different ways. In turn, these seem to have affected – albeit no doubt to varying degrees – the development of judge-made law and statutory interventions, as well as doctrinal reformulations.

Bearing these caveats in mind, several implications can be drawn. First, the comparative analysis of theory development highlights the need to select for analysis more specific areas of contract law that traverse key aspects of the “classical” model.³²⁸ This developed strict rules focusing on “party agreement” that made it difficult to enter the world of binding contractual obligations, but then to get out of again on the basis of

³²⁷ See generally Ginsburg and others, above n 9, especially 2-8. Thanks to Rick Bigwood for raising this point.

³²⁸ Gilmore, above n 12; Mooney, above n 91.

contractual unfairness (what my other writing calls the “contextual dimension”) or extreme changes of circumstances (the “time dimension”).³²⁹

Secondly, those more specific analyses combined with this Paper’s overarching comparison of contract law theory development show that aspects of the classical model, associated with more formal reasoning and a range of supporting legal institutions, remain powerful in England and (perhaps especially) New Zealand. Despite some recent tendencies towards a more formal (“Anglicised”) approach, Japan and the US have a long and more substantive reasoning based tradition that has propelled key areas of contract law beyond the classical mould. In turn, for example, this persistent dichotomy helps explain the problems that England has in acceding to the more substantive, neo-classical, indeed “American” 1980 UN Convention on Contracts for the International Sale of Goods. Even for Commonwealth countries like New Zealand and Australia that do accede, traditionally more formal reasoning in contract law seems to make courts have relatively more difficulty interpreting the Convention consistently with its principles, and leads more legal advisors to encourage parties to contract out of the Convention pursuant to its Article 6.³³⁰ Thus, extending Atiyah and Summers’ framework challenges those who perceive or advocate strong convergence or harmonisation in contract law world-wide. Convergence on a more substantive approach may be *normatively* preferable, at least when it comes to applying the Convention; but *in fact* this is not happening as much in New Zealand, at least, as some have alleged.³³¹

Thirdly, however, this Paper’s analysis does reveal that recent commentators on Japanese law are partially right – it shares important similarities with US law. Yet this “Americanisation of Japanese Law” is longstanding, and could equally be described as the “Japanisation of American Law”. Further, the similarity lies in the (substantive) legal reasoning structures that impact on specific aspects of Japanese law, such as contract law doctrines in the three areas mentioned above and analysed specifically elsewhere, as well as general theories of contract law. Not all actual doctrines or applications need be identical in US contract law, and in fact there are still differences. In addition, such specific differences as well as the pervasiveness of substantive reasoning may still vary depending on the contract law field compared.

Finally, the “second-order reasons” or values underpinning the overall system and framing the content of the substantive considerations more readily flowing through into the law, in both Japan and the US, are not necessarily the same. For example, “good faith” is accepted as a general principle of contract law in both countries and their

³²⁹ See, respectively, L Nottage "Formal Requirements for Contract Formation: Anglo-New Zealand Law Versus Japanese, US and International Sales Law" (2007d) *Sydney Law School Research Papers*; L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts" (1996) 26 *Victoria University of Wellington Law Review* 247; L Nottage "Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law and Practice" (2007c) *Sydney Law School Research Papers*.

³³⁰ L Nottage "Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan" (2005) 36 *Victoria University of Wellington Law Review* 815 (discussing also some other factors behind these tendencies).

³³¹ Compare for example McLauchlan, above n 279, and Mulholland, above n 311, with (sharing my skepticism as to the extent of New Zealand’s transfiguration) Bigwood, above n 316; Watts, above n 324; Smillie, above n 296.

judicial systems find ways to support application of that principle – unlike England and New Zealand. Yet Japanese law may still provide more communitarian underpinnings and content to good faith than US law, which tends to favour “economistic” rationales based on methodological individualism.³³² Second-order reasons preferred in the US probably bear more similarities with those preferred in England in New Zealand, but those countries’ more formal legal structures make it harder for them to influence reasoning and doctrines.

Overall, therefore, extending the framework initially proposed by Atiyah and Summers to compare more jurisdictions, especially in multiple aspects of the field of contract law, contributes to broader debates among both contract law scholars and comparative lawyers. Strong “convergence” theory is challenged by differences in first-order reasoning and related institutions even among substantive reasoning based systems; by potentially even more varied second-order reasoning, and finally by systems which remain quite coherently and resolutely wedded to more formal legal reasoning. And from a global perspective, the legacy of classical contract law may be greater than some commentators, especially in Japan and the US, expect.³³³

³³² See generally Nottage 1996 above n c. Compare the work of Ramseyer, assuming – heroically – that *homo economicus* is identical in both the US and Japan: C Freedman & L Nottage "The Chicago School of Economics and (Japanese) Law: Resisting the Invasions of Stigler and Ramseyer" 2006-3 *Centre for Japanese Economic Studies: Research Papers* www.econ.mq.edu.au/cjes/research/research_papers#2006.

³³³ Compare for example Hillman, above n 7.